

.....APPENDIX B.....

**Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
LIBRARY OF CONGRESS
Washington, D.C.**

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| In the Matter of |) | |
| |) | |
| Digital Performance Right in Sound |) | Docket No. 2000-9 CARP DTRA 1 & 2 |
| Recordings and Ephemeral |) | |
| Recordings |) | |
| |) | |

**RATES AND TERMS FOR ELIGIBLE NONSUBSCRIPTION
TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS ***

1. General

(a) This part establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. § 114, and the making of ephemeral recordings by certain Licensees in accordance with the provisions of 17 U.S.C. § 112(e).

- *This provision is similar to 37 C.F.R. § 260.1(a).*

- * This provision is intended to make clear that these terms apply to webcasters, broadcasters, and Business Establishment Services.

(b) Licensees relying upon the statutory license set forth in 17 U.S.C. § 114 shall comply with the requirements of that section and the rates and terms of this part.

- *This provision is similar to 37 C.F.R. § 260.1(b). The parties did not believe the “upon” formulation contained therein was appropriate, as the statutory license was available to services before the adoption of these regulations.*

* Terms are in regular type. Party comments are in bulleted italics, and Panel comments are in asterisked italics.

- (c) Licensees relying upon the statutory license set forth in 17 U.S.C. § 112 shall comply with the requirements of that section and the rates and terms of this part.
- *This provision is similar to 37 C.F.R. § 260.1(b). The parties did not believe the “upon” formulation contained therein was appropriate, as the statutory license was available to services before the adoption of these regulations.*
- (d) Notwithstanding the schedule of rates and terms established here, the rates and terms of any license agreements entered into by copyright owners and services within the scope of 17 U.S.C. §§ 112 and 114 concerning eligible nonsubscription transmissions shall apply in lieu of the rates and terms of this section.
- (e) The term “Aggregate Tuning Hours” shall be used in this part to mean the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service’s Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service’s Aggregate Tuning Hours would equal 10.
- (f) The term “Business Establishment Service” shall be used in this part to mean a Licensee that is entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. § 114(d)(1)(C)(iv) and that obtains a compulsory license under 17 U.S.C. § 112(e) to make ephemeral recordings for the sole purpose of facilitating those exempt transmissions.
- (g) The term “Commercial Broadcaster” shall be used in this part to mean a Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission to make over-the-air broadcasts, other than a CPB-Affiliated or Non-CPB-Affiliated, Non-Commercial Broadcaster.
- (h) The term “Copyright Owner” shall be used in this part to mean a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. §§ 112(e) or 114.
- *This provision is similar to 37 C.F.R. § 260.6(g).*

- (i) The term “Designated Agent” shall be used in this part to mean an agent for the receipt of royalty payments made pursuant to this part from the Receiving Agent and the distribution of royalty payments to Copyright Owners and Performers that has been identified in _____[Section 3(b)] below.
- *This definition is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - * *The concept of a Designated Agent is intended to permit more than one entity to collect and distribute royalties to parties entitled to receive royalty fees pursuant to the Section 112 and 114 statutory licenses. Each Designated Agent would receive distributions from the one Receiving Agent.*
 - *The blank line followed by a bracketed reference is intended to assist the Copyright Office in making internal cross references when the terms are published in the Code of Federal Regulations (“CFR”). For example, in the case above, the CFR provision to be inserted where the blank line appears would be the CFR citation for the provision set forth herein as Section 3(b).*
- (j) The term “Licensee” shall be used in this part to mean a person or entity (i) that has obtained a compulsory license under 17 U.S.C. §§ 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings or (ii) a person or entity entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. § 114(d)(1)(C)(iv) and that has obtained a compulsory license under 17 U.S.C. § 112 to make ephemeral recordings.
- *This definition is intended to encompass each type of service for which statutory royalties are established in this CARP proceeding and make clear that these regulations apply to business establishment services making ephemeral recordings under statutory license as well as to broadcasters and webcasters making eligible nonsubscription transmissions or ephemeral recordings under statutory license.*
- (k) The term “Non-CPB, Non-Commercial Broadcaster” shall be used in this part to mean a Public Broadcasting Entity as defined in 17 U.S.C. § 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396.

- (l) The term “Performance” shall be used in this part to mean:

Each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (*e.g.* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the copyright owner of such sound recording; and

(3) An *incidental* performance that *both* (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events *and* (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

- (m) The term “Performer” shall be used in this part to mean the respective independent administrators identified in 17 U.S.C. § 114(g)(2)(A) and (B) and the parties identified in 17 U.S.C. § 114(g)(2)(C).

- *This provision refers to all of the non-Copyright Owner entities entitled to an allocation of fifty percent (50%) of the statutory royalties paid under Section 114 in accordance with Section 114(g)(2)(A)-(C).*

- (n) The term “Receiving Agent” shall be used in this part to mean an agent for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in _____ [Section 3(b)].

- *This definition is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *The concept of a Receiving Agent is intended to: (1) permit those Licensees availing themselves of the Section 112 and 114 statutory*

licenses to make only one payment during each reporting period for the creation of ephemeral phonorecords and the public performance of sound recordings under those statutory provisions; (2) save the Licensee the expense of having to determine how much in monthly royalties should be paid to each Designated Agent and (3) have the Receiving Agent distribute receipts to the Designated Agent(s).

- (o) The term “side channel” as used in this part shall mean a channel on the Website of a Commercial Broadcaster or a Non-CPB, Non Commercial Broadcaster, which channel transmits eligible nonsubscription transmissions that are not simultaneously transmitted over-the-air by the Licensee.
- (p) The term “Webcaster” shall be used in this part to mean a Licensee, other than a Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible nonsubscription transmissions of digital audio programming over the internet through a Web Site.
- (q) The term “Web Site” shall be used in this part to mean a site located on the World Wide Web that can be located by an end user through a principal Uniform Resource Locator (a “URL), e.g., www.xxxxx.com.

2. Royalty Fees for Public Performances of Sound Recordings and for Ephemeral Recordings.

For the period October 28, 1998 through December 31, 2002, royalty rates and fees for eligible digital transmissions of sound recordings pursuant to 17 U.S.C. § 114(f)(2), and the making of ephemeral recordings pursuant to 17 U.S.C. § 112(e) shall be as follows:

- (a) Webcaster Performance Royalty
 - (i) For simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster shall pay a § 114(f) performance royalty of 0.07¢ per performance.
 - (ii) For all other internet transmissions, a Webcaster shall pay a § 114(f) performance royalty of 0.14¢ per performance.

(b) Commercial Broadcaster Performance Royalty

- (i) For simultaneous internet transmissions of over-the-air AM or FM radio broadcasts, a Commercial Broadcaster shall pay a § 114(f) performance royalty of 0.07¢ per performance.
- (ii) For all other internet transmissions, a Commercial Broadcaster shall pay a § 114(f) performance royalty of 0.14¢ per performance.

(c) Non-CPB, Non-Commercial Broadcaster Performance Royalty

- (i) For simultaneous internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a § 114(f) performance royalty of 0.02¢ per performance.
- (ii) For other internet transmissions, including up to two side channels of programming consistent with the mission of the station, a Non-CPB, Non-Commercial Broadcaster shall pay a § 114(f) performance royalty of 0.05¢ per performance.
- (iii) For internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a § 114(f) performance royalty of 0.14¢ per performance.

(d) Estimate of Performance.

For the period up to the effective date of this part, and for 30 days thereafter, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming).

(e) Webcaster, Broadcaster Ephemeral Recordings Royalty
For the making of all ephemeral recordings required to facilitate their internet transmissions, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a § 112(e) royalty equal to 9% of their total performance royalty.

(f) Business Establishment Ephemeral Recordings Royalty

For the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. § 114(d)(1)(C)(iv), a Business Establishment Service shall pay a § 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross proceeds derived from the use in such broadcast service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings shall be made on the basis of:

- (i) for classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and
- (ii) for all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(g) Minimum Fee

Each Webcaster, Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster, and Business Establishment Service licensed to make eligible digital transmissions and/or ephemeral recordings pursuant to licenses under 17 U.S.C. § 114(f) and/or 17 U.S.C. § 112(e) shall pay a minimum fee of \$500 for each calendar year, or part thereof, in which it makes such transmissions or recordings.

3. Terms for Making Payment of Royalty Fees and Statements of Account.

(a) A Licensee shall make the royalty payments due under _____ [Section 2] to the Receiving Agent. If necessary, the Receiving Agent shall apportion royalty payments among Designated Agent(s) on a reasonable basis to be agreed among Designated Agent(s) that values all performances equally. The Receiving Agent may also be a Designated Agent.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - * *This provision is intended to accommodate the authorization of more than one Designated Agent. A determination of how royalty payments should be apportioned between the Designated Agents cannot be made until the parties know the rate structure adopted by the CARP (in the first instance) and the Librarian of Congress (on review) and the outcome of the Notice and Recordkeeping Proceeding. The terms contemplate that there would need to be a distribution to the Designated Agent(s) from the Receiving Agent and that the methodology for such allocation, as described in Section 3(d), must value all performances equally between and among Designated Agents, while reserving the right of the members or principals of a Designated Agent to allocate royalties on some other basis if all such members or principals of such Designated Agent agree to such an alternative allocation in writing.*
 - * *The sentence permitting a Receiving Agent to also be a Designated Agent is intended to permit SoundExchange, presently an unincorporated division of the Recording Industry Association of America, Inc., to serve as both a Receiving Agent for all royalties paid by Licensees and a Designated Agent on behalf of all of its members and potentially unaffiliated and unidentified Copyright Owners and Performers.*
- (b) Until such time as a new designation is made, SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees. Until such time as a new designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to the Copyright Owners that designate them, respectively, and the Performers entitled to receive royalties under 17 U.S.C. § 114(g)(2) from the performance of sound recordings owned by such Copyright Owners. SoundExchange shall be designated as the Designated Agent to distribute royalty payments to all other Copyright Owners and the Performers entitled to receive royalties under 17 U.S.C. § 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

- * *The terms provide that SoundExchange would serve as the sole Receiving Agent and that SoundExchange and Royalty Logic, Inc., and any other agents eventually authorized by the Copyright Office, should be permitted to receive and distribute royalties on behalf of their members or principals that designate them as an agent.*
 - * *The frequency with which Copyright Owners can change Designated Agents should be addressed in bilateral negotiations between a Copyright Owner and a Designated Agent, provided that any changes are consistent with regulations adopted in the Notice and Recordkeeping Proceeding.*
- (c) A Licensee shall make any payments due under Section 2 of this part to the Receiving Agent by the forty-fifth (45th) day after the end of each month for that month, commencing with the month succeeding the month in which the Librarian's order becomes effective. Concurrently with the delivery of payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Receiving Agent after the due date. Late fees shall accrue from the due date until payment is received by the Receiving Agent.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *The terms require royalty payments forty-five (45) days after the end of each month in order to give Licensees sufficient time to calculate and verify royalty payments. The terms state that Licensees should provide each Designated Agent with a copy of the statement of account used to calculate royalty payments, so that the Receiving Agent does not have to bear the cost and burden of providing each Designated Agent with such statement of account.*
 - *The payment schedule is intended to be similar to 37 C.F.R. § 260.3(b). The provision for late fees and accrual of late fees is intended to be similar to 37 C.F.R. § 260.2(b). The specific interest rate for late fees is the product of extensive negotiations.*
- (d) The Receiving Agent shall make payments of the allocable share of any royalty payments received under _____ [Section 3(a)] to the Designated Agent(s) within twenty (20) days following the forty-five (45)-day period set forth in _____ [Section 3(c)], with such allocation to be made on a reasonable basis to be agreed among the Receiving Agent and

the Designated Agent(s), together with an agreement on the sharing on a pro-ration basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *The intent is that a Receiving Agent should be obligated to distribute the royalties received from Licensees to each Designated Agent within a specified period, which period is the product of extensive negotiations. The parties wanted to ensure that the Receiving Agent and the Designated Agent(s) had enough flexibility to devise an efficient and fair methodology for allocating royalties where each Designated Agent may, from time to time, represent a different percentage of sound recording performances entitled to receive statutory royalties. The parties believed it was unlikely that the Receiving Agent and the Designated Agents would be able to allocate royalty payments each month on a final basis, but would likely need to develop a method of allocation followed by a final adjustment after all relevant data were available.*
- * *The parties did not believe it was possible, at the present time, for the Receiving Agent and the Designated Agent(s) to agree on a reasonable allocation method. The parties do not know either the payment methodology that will be used to calculate royalties or the types of information that will be reported by Licensees. Such determinations cannot be made before the conclusion of this proceeding and the Notice and Recordkeeping Proceeding. In permitting the use of a reasonable allocation method, the Receiving Agent and the Designated Agent(s), for example, could use data published in a recognized industry publication (e.g., using SoundScan data or BDS data as a proxy for making temporary, interim distributions of royalties) to facilitate estimated, interim distributions.*
- *The parties believe that any incremental costs incurred by the Receiving Agent in calculating the amount of royalties to be paid to Designated Agent(s) should be allocated among the Designated Agent(s) so that Copyright Owners and Performers represented by the respective Designated Agents bear these costs on a fair basis.*
- *The parties believe that if the Agents made estimated payments*

during a year, some adjustment and reconciliation would need to be made at the end of each year. The terms provide that a Receiving Agent should have no later than one hundred eighty (180) days after December 31st of each year (or one hundred thirty-five (135) days from receipt of the December statement of account for such year) to perform final reconciliations and make final payment adjustments.

- (e) A Licensee shall submit a monthly statement of account for accompanying royalty payments on a form reasonably agreed among the Designated Agents and the Receiving Agent that is made available to the Licensee by the Receiving Agent. A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty payments to be paid shall not be included on the statement of account.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *The parties agreed that it would be best to permit the Receiving Agent and the Designated Agent(s) to design the statements of account to be utilized by Licensees after the current proceeding is concluded, particularly as it is impossible to design a statement of account without knowing the payment method and calculation methodology to be adopted by the CARP (in the first instance) and by the Librarian of Congress (on review). In addition, it is possible that some of the information to be reported on a statement of account may not be resolved until the conclusion of the Notice and Record-keeping Proceeding.*
- *The language limiting what is to be reported on the statement of account and excluding additional information beyond that which is sufficient to calculate royalty payments to be paid is taken from 37 C.F.R. § 260.4(c).*
- * *The Panel does not intend for this provision to have any precedential effect as to issues that are to be resolved in the Notice and Recordkeeping Proceeding for the usage reports required from eligible nonsubscription services availing themselves of the Section 112 and 114 statutory licenses.*

- (f) Designated Agent(s) shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally; *Provided*, however, that members of a Designated Agent may agree to allocate such

royalty payments among themselves on an alternative basis. Designated Agent(s) shall distribute such royalty payments directly to the Copyright Owners and Performers, or their agents, according to the percentages set forth in 17 U.S.C. § 114(g)(2), if such Copyright Owners and Performers, or their agents, provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. A Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients. Notwithstanding the above, Performer and Copyright Owner representatives may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. § 114(g)(2).

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- * *The terms do not specifically provide how a Designated Agent should allocate royalties among parties entitled to receive such royalties because such allocation will depend upon the rate structure adopted by the CARP (in the first instance) and by the Librarian of Congress (on review) and may be affected by the types of reporting requirements that are adopted by the Copyright Office in the Notice and Record-keeping Proceeding for eligible nonsubscription transmissions and business establishment services. For example, the Panel understands that Licensees may want to reserve the right to use sampling methods for reporting performances, whereas Copyright Owners and Performers may want Licensees to report actual performance logs for each sound recording transmitted to a listener. The types of reports required by the Copyright Office will affect how royalties can be allocated.*
- *The provision stating that a “Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients” makes clear that so long as a Designated Agent complies with the requirements adopted by the Copyright Office for distributing royalties, then a beneficiary of statutory royalties cannot sue such Designated Agent for payments made in accordance with Copyright Office regulations. Any dispute among recipients should be resolved among themselves.*
- *The terms provide that it is appropriate to grant Designated Agents, and their members or principals, the flexibility to permit the allocation of royalties according to any methodology if all such*

members or principals of such Designated Agent agreed to such an alternative allocation. Such agreement would not be permitted to affect the allocation of royalties to unaffiliated Copyright Owners or Performers.

(g) Designated Agent(s) may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the licensing, collection and distribution of the royalties paid by Licensees under _____ [Section 3(a)] and a reasonable charge for administration.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

- * *This provision is based in part on 37 C.F.R. § 260.3(d). The ability to deduct “reasonable costs incurred in licensing” is added to permit a Designated Agent that engages in licensing activities authorized by 17 U.S.C. §§ 114(e) and (f) to deduct reasonable costs incurred in such activities.*

- *The ability to deduct a “reasonable charge for administration” is added to permit a for-profit Designated Agent to make a reasonable profit on royalty collection and distribution on top of the direct expenses that may be incurred in licensing, collection and distribution.*

4. Confidential Information.

(a) For purposes of this part, “Confidential Information” shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

- *This provision is intended to be similar to 37 C.F.R. § 260.4(a). A reasonableness standard has been inserted so that information such as a contact name, mailing address, and phone number are not designated as confidential.*

(b) Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are

public knowledge or which become public knowledge thereafter as a result of publication or disclosure except where such publication or disclosure is prohibited, restricted or contrary to the terms of this ____ [Section 4]. The Receiving Agent or a Designated Agent that claims the benefit of this ____ [Section 4(b)] has the burden of proving that the disclosed information was public knowledge.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- * *This provision is intended to incorporate exclusions commonly found in commercial agreements and protective orders, including the protective order governing the parties in this proceeding (see Protective Order in Docket No. 2000-9 CARP DTRA 1 & 2 at 3), as to categories of information that may not be deemed confidential.*

(c) In no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; *Provided*, however, that the Designated Agent(s) may report Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated. All reported, aggregated Confidential Information from Licensees within a class of Licensees shall concurrently be made available to all Licensees then in such class. As used herein, the phrase “class of Licensees” means all Licensees paying fees pursuant to the same subsection of Section 2 of this part.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision prohibits Designated Agents and the Receiving Agent from using Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto. The reference to activities “directly related” to royalty collection and distribution is intended to refer to activities such as, by way of example and not limitation, analyzing such information to facilitate the development of more efficient and less costly systems.*
- *The provision permitting a Designated Agent to report*

Confidential Information in aggregated form is intended to permit a Designated Agent to issue meaningful reports to members or principals on the amount of royalties that are being paid, the types of Licensees that are paying royalties (e.g., broadcasters or Internet-only webcasters), the geographic location of Licensees paying royalties, etc. Such disclosure is only permitted if the identity of the Licensees or group of Licensees whose data are included in such report cannot reasonably be determined. For example, there is a fear that one could infer the underlying Licensee if there were few Licensees in the entire marketplace that could satisfy the parameters used to create any report.

* *The provision requiring a Designated Agent to make available to all Licensees within the class the report derived from members then in such class is intended to permit Licensees to have access to the same data that are made available to Copyright Owners and Performers, in order, among other things, for such Licensees to confirm compliance with the confidentiality requirements set forth herein with respect to their confidential information. The “made available” language permits a Designated Agent to post such information on a secure Web site without having to incur the cost or burden of mailing such reports to Licensees. The provision limiting the disclosure obligation to a “class of Licensees” is intended, for example, to require disclosure of reports based upon broadcaster statements of account only to broadcasters and not to Internet-only webcasters, and vice versa. The provision limiting the disclosure obligation to “all Licensees then in such class” is intended to limit the scope of disclosure so that a Designated Agent would not be obligated to make available aggregated Confidential Information to Licensees that are no longer making ephemeral reproductions under Section 112 or eligible nonsubscription transmissions under Section 114.*

• *The use of “subsection” at the end of this provision refers to the first small letter subdivision under Section 2 (e.g., Section 2(a), 2(b), etc.).*

(d) Except as provided in ____ [Section 4(c)] and as required by law, access to Confidential Information shall be limited to, and in the case of paragraphs (3) and (4) below shall be provided upon request, subject to resolution of any relevance or burdensomeness concerns and reimbursement of reasonable costs directly incurred in responding to such request, to:

• *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms*

contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.

- *This provision contains limitations commonly found in commercial agreements and is intended to be similar to 37 C.F.R. § 260.4(d).*
- *The provision permitting disclosure “as required by law” permits a Designated Agent to disclose Confidential Information under subpoena or other compulsory process. The provision limiting disclosure “subject to resolution of reasonable costs directly incurred in responding to such request” is intended to limit the burden on a Designated Agent required to respond to requests under Sections 4(d)(3) and (4). For example, there is no discovery right for a party to a copyright arbitration royalty proceeding to obtain information that may be necessary for the preparation of a direct case prior to the filing of direct cases by all parties to a proceeding. The intent of this provision is to permit counsel for parties preparing direct cases for a CARP proceeding to obtain Confidential Information, under an appropriate protective order, prior to the filing of direct cases. As the time and expense involved in responding to such requests is and will be unknown, the parties believe that Designated Agents should not be subject to burdensome obligations that would reduce the royalties that are to be paid to Copyright Owners and Performers without reimbursement. The provision limiting reimbursement to “reasonable costs directly incurred in responding to such request” is intended to limit the scope of what a Designated Agent could claim as a cost of responding to a request for information.*

(1) Those employees, agents, consultants and independent contractors of the Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records;

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

* *This provision contains limitations commonly found in protective orders (cf. Protective Order in Docket No. 2000-9 CARP DTRA 1 & 2 at 3, § 2(a)) and in commercial*

agreements, and is intended to be similar to 37 C.F.R. § 260.4(d)(1).

- * *The provision permits those employees, agents and independent contractors (e.g., outside computer consultants, system consultants, accountants, etc.) who are engaged in the collection and distribution of royalties to have access to such information. The provision permitting disclosure to those whose activities are “directly related” to royalty collection and distribution would encompass persons involved in, among other things, budgeting for collection and distribution, enforcement of royalty payments due under the Section 112 and 114 statutory licenses, evaluations of system operations and efforts to improve systems.*
 - *The provision limiting disclosure to persons “who are not also employees of a Copyright Owner or Performer” is intended to ensure that a Licensee’s Confidential Information is not disclosed to individual Copyright Owners or Performers. Persons receiving Confidential Information under this section must be performing duties during the ordinary course of business and not for another purpose unrelated to royalty collection and distribution.*
- (2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Receiving Agent or a Designated Agent with respect to the verification of a Licensee’s statement of account pursuant to ____ [Section 5] or on behalf of a Copyright Owner with respect to the verification of royalty payments pursuant to ____ [Section 6];
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision contains limitations commonly found in commercial agreements, and is intended to be similar to 37 C.F.R. § 260.4(d)(2).*
 - *The provision limiting disclosure “subject to an appropriate confidentiality agreement” is intended to ensure that auditors are not free to disclose to third parties information obtained during an audit.*

- (3) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. §§ 114(f)(2) and 112(e), under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision implements the access discussed in the third comment under the introductory paragraph of subsection 4(d).*
- (4) In connection with *bona fide* royalty disputes or claims by or among Licensees, the Receiving Agent, Copyright Owners, Performers or Designated Agent(s), under an appropriate confidentiality agreement or protective order, attorneys, consultants and other authorized agents of the parties to the dispute, arbitration panels or the courts.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision is intended to permit counsel and other authorized agents for parties involved in a royalty dispute (e.g., members of a band) to obtain (under an appropriate protective order) Confidential Information that may be in the hands of a third party (i.e., the Designated Agent) not involved in such royalty dispute.*
- (e) The Receiving Agent, Designated Agent(s) and any person identified in _____ [Section 4(d)] shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Receiving Agent, Designated Agent(s) or person.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

- *This provision is similar to 37 C.F.R. § 260.4(e), but it substitutes a general commercial standard for the more technology specific requirement of “locked files,” which has questionable relevance in the electronic age. This provision contains limitations commonly found in protective orders (see e.g., Protective Order in Docket No. 2000-9 CARP DTRA 1 & 2 at 6, § 6) and commercial agreements.*
- (f) Books and records of a Licensee, the Receiving Agent and of a Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.
- *This provision is similar to 37 C.F.R. § 260.4(f) and contains limitations commonly found in commercial agreements.*
 - *The parties believe that the further, more detailed listing of types of records subject to retention contained in 37 C.F.R. § 260.4(f) would be confusing, as the exemplary list focuses on records of the Designated Agent.*

5. Verification of Statements of Account.

- (a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by Designated Agents.
- *This provision is similar to 37 C.F.R. § 260.5(a), while taking into account the structure of having Designated Agents verify statements of account filed by Licensees.*
- (b) *Frequency of verification.* A Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision contains limitations commonly found in commercial agreements and is similar to 37 C.F.R. § 260.5(b).*
 - *The parties believed that it was sufficient to give an audit right to a Designated Agent rather than the entire universe of individual Copyright Owners, which could number in the tens of thousands. The parties were concerned that it may be impractical for a*

Licensee to be subject to audit triggered by individual Copyright Owners. Moreover, the Designated Agent will have a fiduciary duty to the Copyright Owners and Performers it is designated to represent.

- *The terms provide that a Designated Agent will provide a Licensee with “reasonable notice” of an intent to audit and that such audit may be conducted only during “reasonable business hours.” The parties agreed that a Designated Agent should be permitted to audit any given calendar year during any subsequent three (3)-year period but not thereafter so that a Licensee may purge files or records after a reasonable period of time. The parties agreed that any given calendar year should not be subject to audit more than once.*
- (c) *Notice of intent to audit.* A Designated Agent must submit a notice of intent to audit a particular Licensee with the Copyright Office, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Designated Agent’s notice. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Designated Agents, Copyright Owners and Performers.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *The first two sentences of this provision are substantially similar to the language contained in 37 C.F.R. § 260.5(c). Publication of a notice of intent to audit in the Federal Register is a standard Copyright Office notice procedure and also appears on the Copyright Office web site.*
 - *The provision that an audit be “conducted by an independent and qualified auditor” is intended to give all parties some degree of comfort that the audit will be conducted fairly and in accordance with high professional standards. It also serves to limit access to sensitive business information. The provision that an audit “shall be binding on all Designated Agents, Copyrights Owners and Performers” is intended to protect Licensees from duplicative audits from parties entitled to receive royalties under Sections 112 and 114 or their agents.*

(d) *Acquisition and retention of records.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Designated Agent requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) years.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision is intended to encompass the situation where, for example, a Licensee utilizes the services of a third-party vendor to facilitate the making of ephemeral phonorecords under Section 112 or eligible nonsubscription transmissions under Section 114, and where such third party, rather than the Licensee, maintains the records for such activities. This provision is commonly found in commercial agreements.*
- *The retention of records for three (3) years is consistent with 37 C.F.R. § 260.5(d).*

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all Designated Agents with respect to the information that is within the scope of the audit.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision is substantially similar to 37 C.F.R. § 260.5(e). The provision referencing an audit by “an independent and qualified auditor” picks up the language from Section 5(c) of this submission. The provision providing that an “audit shall serve as an acceptable verification procedure for all Designated Agents with respect to the information that is within the scope of the audit” is intended to ensure that if, for example, a Licensee is subject to an audit for the purpose of reporting quarterly financial results but not for the calculation and payment of Section 112 and/or 114 royalties, then such audit shall not be binding upon a Designated Agent with respect to the audit rights such agent may*

have for the purpose of verifying the Licensee's calculation of its liability for the payment of statutory royalties.

(f) *Consultation.* Before rendering a written report to a Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; *Provided* that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*

- *This provision is intended to enable Licensees and Designated Agents to avoid expending unnecessary time and resources if an audit uncovers a discrepancy between the tentative findings of the auditor and the actual payments by the Licensee that is the product of a simple mistake by the Licensee or misunderstanding of the auditor. The parties agreed that requiring an auditor to review its "tentative written findings" with an "agent or employee of the Licensee of the audit" may enable the auditor and the Licensee to expeditiously resolve errors. The parties agreed, however, that requiring an auditor to review tentative written findings with a Licensee reasonably suspected of fraud might harm the parties on whose behalf the audit is conducted where such review would "prejudice the investigation of such suspected fraud."*

- * *The Panel believes that an auditor's obligation to review tentative written findings with a Licensee should be extinguished if the "agent or employee of the Licensee" fails to "reasonably cooperate[] with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit." The review process is intended to protect the parties, but such protections should not be imposed if a Licensee fails to cooperate with an auditor.*

(g) *Costs of the verification procedure.* The Designated Agent requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; *Provided*, however, that a Licensee shall not have to pay any

costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Licensee and more than \$5,000.00.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision is intended to be similar to 37 C.F.R. § 260.5(f), with some significant modifications for the protection of Licensees and Designated Agents. In all cases where it is finally determined that there is an underpayment, the Licensee is required to pay the full amount of the underpayment, but the Licensee's liability for reimbursing a Designated Agent for the reasonable costs of an audit beyond paying the underpayment is subject to certain thresholds and limitations.*
- *The terms provide that, as a threshold matter, a Designated Agent would not recover the costs incurred in conducting an audit unless the Licensee makes an underpayment of ten percent (10%) or more. The terms provide that in the event a Licensee underpays royalties in an amount in excess of ten percent (10%) of its statutory liability, then the Licensee should pay for the reasonable expenses incurred by the Designated Agent in conducting the audit up to a ceiling of the amount of the underpayment, but with that ceiling being eliminated (in accordance with the proviso) if the underpayment is both more than twenty percent (20%) of the amount finally determined to be due and more than \$5,000.*
- *For example, if a Licensee's statutory liability for a given year is finally determined to be \$100,000 and the Licensee paid only \$92,000 in statutory royalties and the audit to determine such underpayment cost \$5,000, then the Licensee would pay the \$8,000 underpayment but no portion of the \$5,000 cost for the audit as the underpayment of \$8,000 did not exceed 10% of the statutory liability. Taking a second example, if the Licensee's statutory liability was \$100,000 and the Licensee paid only \$85,000 in statutory royalties (a 15% underpayment), then the Licensee would have underpaid its royalty obligation by more than the 10% threshold and it would therefore be liable for the the \$15,000 underpayment plus the reasonable cost of the audit up to the amount of its underpayment (a ceiling of \$15,000). Taking a third example, if the Licensee's statutory liability was finally determined to be \$100,000 and the Licensee paid only \$75,000, then the underpayment would have exceeded both the twenty*

percent (20%) and \$5,000 levels, and the Licensee would therefore be liable for the \$25,000 underpayment and the reasonable cost of the audit even if that reasonable cost exceeded \$25,000.

6. Verification of Royalty Payments.

(a) *General.* This section prescribes general rules pertaining to the verification by Copyright Owners of royalty payments made by Designated Agents; *Provided*, however, that nothing contained in this Section shall apply to situations where Copyright Owners and their Designated Agent(s) have agreed as to proper verification methods.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision is intended to be similar to 37 C.F.R. § 260.6(a), but limits the audit rights of Designated Agents to Copyright Owners, rather than the entire universe of Copyright Owners and Performers, which could number in the tens of thousands. The parties were concerned that it may be impracticable for a Designated Agent to be subject to audit from individual Performers. The parties further believed that Copyright Owners, in ensuring a Designated Agent's proper distribution of royalties among Copyright Owners, would also act in the best interests of Performers as royalties are to be allocated 50% to Copyright Owners and 50% to Performers.*
- *The proviso permits private agreements between a Designated Agent and Copyright Owners it represents to be given effect in lieu of the verification procedures in this section. Cf. 17 U.S.C. § 114(f)(3).*

(b) *Frequency of verification.* A Copyright Owner may conduct a single audit of its Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision contains limitations commonly found in commercial agreements and is similar to 37 C.F.R. § 260.6(b). The parties*

agree that it is appropriate for a Copyright Owner to provide a Designated Agent with “reasonable notice” of an intent to audit and that such audit may be conducted only during “reasonable business hours.” The parties further agree that a Copyright Owner should be permitted to audit any given calendar year during any subsequent three (3)-year period but not thereafter so that a Designated Agent may purge files or records after a reasonable period of time. The parties believe that any given calendar year should not be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner must submit a notice of intent to audit a particular Designated Agent with the Copyright Office, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Copyright Owner’s notice. The notification of intent to audit shall be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *The first two sentences of this provision are substantially similar to the language contained in 37 C.F.R. § 260.6(c). Publication of a notice of intent to audit in the Federal Register is a standard Copyright Office notice procedure and also appears on the Copyright Office web site.*
- *The provision that an audit be “conducted by an independent and qualified auditor” is intended to give all parties some degree of comfort that the audit will be conducted fairly and in accordance with high professional standards. It also serves to limit access to sensitive business information. The provision that an audit “shall be binding on all Copyrights Owners and Performers” is intended to protect Designated Agents from duplicative audits from parties entitled to receive royalties under Sections 112 and 114.*

(d) *Acquisition and retention of records.* The Designated Agent making the royalty payment shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Copyright Owner requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) years.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision is intended to encompass the situation where, for example, a Designated Agent utilizes the services of a third-party vendor to facilitate the collection or distribution of royalty payments, and where such third party, rather than the Designated Agent, maintains the records for such activities. This provision is commonly found in commercial agreements. The retention of records for three (3) years is consistent with 37 C.F.R. § 260.6(d).*
- (e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision is substantially similar to 37 C.F.R. § 260.6(e). The provision referencing an audit by “an independent and qualified auditor” picks up the language from Section 6(c). The provision providing that an “audit shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit” is intended to ensure that if a Designated Agent is subject to an audit for the purpose of reporting quarterly financial results but not for the distribution of Section 112 and/or 114 royalties, then such audit shall not be binding upon a Copyright Owner with respect to the audit rights such Copyright Owner may have for the purpose of verifying the Designated Agent’s distribution of statutory royalties to such Copyright Owner.*
- (f) *Consultation.* Before rendering a written report to a Copyright Owner, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent being audited in order to remedy any factual errors and clarify any issues relating to the audit; *Provided* that the appropriate agent or employee of the Designated Agent reasonably cooperates with the

auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
 - *This provision is intended to enable Designated Agents and Copyright Owners to avoid expending unnecessary time and resources if an audit uncovers a discrepancy between the findings of the auditor and the actual payments distributed by the Designated Agent that is the product of a simple mistake by the Designated Agent or a misunderstanding of the auditor. The parties believe that requiring an auditor to review its “tentative written findings” with an “agent or employee of the Designated Agent of the audit” may enable the auditor and the Designated Agent to expeditiously resolve errors. The parties agreed, however, that requiring an auditor to review tentative written findings with a Designated Agent reasonably suspected of fraud might harm the parties on whose behalf the audit is conducted where such review would “prejudice the investigation of such suspected fraud.”*
 - * *The terms provide that an auditor’s obligation to review tentative written findings with a Designated Agent should be extinguished if the “agent or employee of the Designated Agent” fails to “reasonably cooperate with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.” The review process is intended to protect the parties, but such protections should not be imposed if a Designated Agent fails to cooperate with an auditor.*
- (g) *Costs of the verification procedure.* The Copyright Owner requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; *Provided*, however, that a Designated Agent shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Designated Agent and more than \$5,000.00.
- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is*

acceptable to all parties in the current arbitration proceeding.

- *This provision is intended to be similar to 37 C.F.R. § 260.6(f), with some significant modifications for the protection of Designated Agents and Copyright Owners. In all cases where it is finally determined that there is an underpayment in the distribution made by the Designated Agent, the Designated Agent is required to pay the full amount of the underpayment, but the Designated Agent's liability for reimbursing a Copyright Owner for the reasonable costs of an audit is subject to certain thresholds and limitations.*
- *The terms provide that, as a threshold matter, a Copyright Owner would not recover the costs incurred in conducting an audit unless the Designated Agent makes an underpayment of ten percent (10%) or more. The terms provide that in the event a Designated Agent fails to distribute royalties in an amount in excess of ten percent (10%) of the payment due a Copyright Owner, then the Designated Agent should pay for the reasonable expenses incurred by the Copyright Owner in conducting the audit up to a ceiling of the amount of the underpayment, but with that ceiling being eliminated (in accordance with the proviso) if the underpayment is both more than twenty percent (20%) of the amount finally determined to be due and more than \$5,000.*
- *For example, if the statutory amount due a Copyright Owner for a given year is finally determined to be \$100,000 and the Designated Agent paid only \$92,000 in statutory royalties and the audit to determine such underpayment cost \$5,000, then the Designated Agent would pay the \$8,000 underpayment but no portion of the \$5,000 cost for the audit as the underpayment of \$8,000 did not exceed 10% of the statutory royalties due to the Copyright Owner. Taking a second example, if the statutory amount due a Copyright Owner for a given year is finally determined to be \$100,000 and the Designated Agent paid only \$85,000 in statutory royalties (a 15% underpayment), then the Designated Agent would have underpaid its royalty obligation by more than the 10% threshold and it would therefore be liable for the \$15,000 underpayment plus the reasonable cost of the audit up to the amount of its underpayment (a ceiling of \$15,000). Taking a third example, if the amount due a Copyright Owner for a given year is finally determined to be \$100,000 and the Designated Agent paid only \$75,000, then the underpayment would have exceeded both the twenty percent (20%) and \$5,000 levels, and the Designated Agent would therefore be liable for the \$25,000 underpayment and the reasonable cost of the audit even if that reasonable cost exceeded \$25,000.*

7. Unclaimed Funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim to such payment shall be valid after the expiration of the three (3)-year period. After the expiration of this period, the unclaimed funds of the Designated Agent(s) may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro ration basis among the Designated Agent(s) to be used to offset such Designated Agent(s) other costs of the collection and distribution of the royalty fees.

- *This provision is the product of extensive negotiations among the parties, was negotiated as part of a settlement of all of the terms contained in the joint submission made by the parties, and is acceptable to all parties in the current arbitration proceeding.*
- *This provision is intended to be similar to 37 C.F.R. § 260.7, with some significant modifications for the protection of Designated Agents and Copyright Owners and Performers. The first two sentences of this provision are substantially similar to the first two sentences of 37 C.F.R. § 260.7.*
- *The provision permitting Designated Agent(s) to apply unclaimed funds “to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers” enables a Designated Agent to deduct from the royalties that would have been payable to such Copyright Owners and Performers the cost of attempting to locate such persons without penalizing identified Copyright Owners and Performers who might otherwise have to bear the cost of locating such unidentified parties.*
- *The provision requiring Designated Agent(s) to thereafter allocate unclaimed funds “on a pro ration basis among the Designated Agent(s) to be used to offset such Designated Agent(s) other costs of the collection and distribution of the royalty fees” is similar to 37 C.F.R. § 260.7, which also provides for the use of such funds to offset costs of collection and distribution. The allocation between Designated Agents “on a pro ration basis” provides a fair means of allocating the balance of unclaimed funds, if any, among all identified Copyright Owners and Performers, regardless of whether or not they are represented by the same Designated Agent that is responsible for the unidentified parties.*