
LIBRARY OF CONGRESS
Copyright Office**Notification of Agreement Under the Small Webcaster Settlement Act of 2002**

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreement.

SUMMARY: The Copyright Office is publishing an agreement which sets rates and terms for the reproduction and performance of sound recordings made by a noncommercial webcaster under the section 112 and 114 statutory licenses. Noncommercial webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreement published herein rather than the rates and terms adopted by the Librarian of Congress in an earlier proceeding.

FOR FURTHER INFORMATION CONTACT:

Tanya Sandros, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423. See the final paragraph of the **SUPPLEMENTARY INFORMATION** for information on where to direct questions regarding the rates and terms set forth in the agreement.

SUPPLEMENTARY INFORMATION:**Background**

In 1998, Congress amended the Copyright Act, title 17 of the United States Code, to make clear that an eligible nonsubscription service may publicly perform copyrighted sound recordings by means of digital audio transmissions under a statutory license, [17 U.S.C. 114](#), provided that the service pays the appropriate royalty fee and complies with the terms of the license. At the same time, Congress created a second statutory license, [17 U.S.C. 112\(e\)](#), to allow for the making of ephemeral reproductions for the purpose of facilitating the digital audio transmissions made by the nonsubscription services under the section 114 license. Rates and terms for both licenses were set after a hearing

before a copyright arbitration royalty panel ("CARP"). See [67 FR 45239](#) (July 8, 2002). However, some small webcasters, including some noncommercial webcasters, did not participate in that proceeding and expressed reservations about the fee structure adopted through that process.

In response to those concerns, Congress passed the [Small Webcaster Settlement Act of 2002](#) ("SWSA"), Pub. L. 107-321, 116 Stat. 2780, amending the section 112 and section 114 statutory licenses as they relate to small commercial webcasters and noncommercial webcasters. Specifically, the SWSA authorizes SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc. and the Receiving Agent designated by the Librarian of Congress in the initial rate setting proceeding, to enter into agreements on behalf of all copyright owners and performers for the purpose of establishing an alternative payment structure for small commercial webcasters¹ and noncommercial webcasters² operating under the section 112 and section 114 statutory licenses.

The rates and terms set forth in such agreements apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings. To make this point clear, Congress included language expressly addressing the precedential value of such agreements. Specifically, section 114(f)(5)(C), as added by the SWSA, states that:

Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the

¹ SoundExchange and small commercial webcasters negotiated such an agreement and submitted it to the Copyright Office for publication in December, 2002. See [67 FR 78510](#) (December 24, 2002).

² For purposes of the SWSA, a "noncommercial webcaster" is defined as a webcaster that: (1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986, 26 U.S.C. 501; (2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes. 17 U.S.C. 114(f)(5)(E).

public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

17 U.S.C. 114(f)(5)(C) (2002).

Request for Publication of Negotiated Rates and Terms Available to Certain Noncommercial Webcasters

On June 2, 2003, SoundExchange, and a group of membership organizations, including American Council on Education, Collegiate Broadcasters, Inc., the Intercollegiate Broadcasting System, Inc., Harvard Radio Broadcasting Co., Inc., and the National Religious Broadcasters Music License Committee, on behalf of their members and/or stations that operate or plan to operate noncommercial webcasting services, notified the Copyright Office that they had negotiated such an agreement for the reproduction and performance of sound recordings by noncommercial webcasters under the section 112 and section 114 statutory licenses, and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under section 114(f)(5)(B) of the Copyright Act, as amended by the SWSA.

Thus, in accordance with the requirement set forth in amended section 114(f)(5)(B), the Copyright Office is publishing the submitted agreement, as Appendix A, thereby making the rates and terms in the agreement available to any noncommercial webcaster meeting the eligibility conditions of the agreement as an alternative to the rates and terms announced by the Librarian in his July 8, 2002 order. Moreover, publication of the agreement in the **Federal Register** makes the agreement binding on all copyright owners of sound recordings and other persons entitled to payment under section 114 in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress and fulfills the Copyright Office's responsibility with respect to this agreement.

Beyond publication of this document, the Copyright Office has no

responsibility for administering the rates and terms of the agreement. For this reason, questions regarding the rates and terms set forth in this agreement should be directed to SoundExchange (for contact information, see <http://www.soundexchange.com>). Similarly, questions regarding the previously published agreement between SoundExchange and small commercial webcasters should also be directed to SoundExchange.

Dated: June 6, 2003.

Marybeth Peters,
Register of Copyrights.

Note: This appendix will not be codified in Title 37, part 261, of the Code of Federal Regulations.

Appendix A

Rates and Terms Available to Certain Noncommercial Webcasters

1. General

(a) *Availability of Rates and Terms.* The rates and terms set forth herein (the "Rates and Terms") cover the making of public performances of sound recordings by means of digital audio transmissions under the statutory license of 17 U.S.C. 114 by "Noncommercial Webcasters" (as defined in Section 9(e) hereof), and the reproduction of ephemeral recordings used solely to facilitate such transmissions under the statutory license of 17 U.S.C. 112(e), during the period beginning on October 28, 1998, and ending on December 31, 2004. A Noncommercial Webcaster may elect to be subject to these Rates and Terms, in their entirety, by complying with the procedure set forth in Section 2 hereof.

(b) *Relationship to Other Provisions.* Subject to Section 7, any Noncommercial Webcaster relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 under these Rates and Terms shall comply with the requirements of 17 U.S.C. 112 and 114, these Rates and Terms and other governing provisions established by the Copyright Office. Any terms determined in accordance with 17 U.S.C. 112 and 114 and applicable to the collection and distribution by SoundExchange of payments under 17 U.S.C. 112 and 114 from commercial eligible nonsubscription transmission services (e.g. terms relating to distribution of royalties by SoundExchange, deductions from distributions, unclaimed funds, possible designation of successors to SoundExchange in the event of its dissolution, retention of records, verification, and confidentiality of payment information) shall apply to payments under these Rates and Terms except to the extent inconsistent with these Rates and Terms.

(c) *Relationship to Other Agreements.* These Rates and Terms are without prejudice to, and subject to, any voluntary agreements that a Noncommercial Webcaster may have entered into with any sound recording copyright owner. Should there be any voluntarily negotiated rates and terms arrived

at between copyright owners and webcasters that are adopted by the Librarian of Congress during 2003 as rates and terms for eligible nonsubscription transmission services following publication of such rates and terms in the **Federal Register** pursuant to 37 CFR 251.63(b), any Noncommercial Webcaster that qualifies for such rates may, by written notice to SoundExchange, elect, for 2004, to pay royalties under the rates and terms adopted by the Librarian in lieu of the rates and terms applicable hereunder; provided that if a Noncommercial Webcaster does so, it shall at the time its first 2004 payment is due under the terms adopted by the Librarian, pay any additional amount that would have been due under the rates and terms adopted by the Librarian for the period beginning on October 28, 1998, and ending on December 31, 2003, in excess of the royalties previously paid by the Noncommercial Webcaster for that period under these Rates and Terms.

(d) *CARP Proceedings.* A Noncommercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected these terms in lieu of participating in a copyright arbitration royalty panel ("CARP") proceeding to set rates for the 2003–2004 period and in lieu of any different rates and terms that may be determined through such a CARP proceeding. Thus, once a Noncommercial Webcaster has elected these Rates and Terms, it shall refrain from participating in any such CARP proceeding and can opt out of these Rates and Terms only as provided in Section 1(c).

2. Election for Treatment as a Noncommercial Webcaster

(a) *Election Process.* A Noncommercial Webcaster that wishes to elect to be subject to these Rates and Terms in lieu of any other royalty rates and terms that otherwise might apply under 17 U.S.C. 112 and 114 for the period beginning on October 28, 1998, and ending on December 31, 2004, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than the date 30 days after publication of these Rates and Terms in the **Federal Register**. Notwithstanding the preceding sentence—

(1) if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election by no later than the first date on which it would be obligated under these Rates and Terms to make a royalty payment for the use of sound recordings under the section 112 or 114 statutory license; and

(2) an "NEE" (as defined in Section 9(d)) may make its election by no later than October 15, 2003.

(b) *Effect of Election or Nonelection.* A Noncommercial Webcaster that fails to make a timely election shall pay royalties as otherwise provided under 17 U.S.C. 112 and 114 (the "Statutory Rate"). Subject to Section 1(c), if a Noncommercial Webcaster timely elects to be covered by these Rates and Terms, the Noncommercial Webcaster shall thereafter be obligated to pay royalties under

and comply with the provisions of these Rates and Terms through December 31, 2004, provided that such Noncommercial Webcaster continues to meet the conditions for eligibility as a Noncommercial Webcaster, as set forth in 17 U.S.C. 114(f)(5)(E)(i) (as added by the Small Webcaster Settlement Act of 2002).

(c) *Proof of Eligibility.* A Noncommercial Webcaster that makes an election pursuant to Section 2(a) shall make available to SoundExchange, within 30 days after SoundExchange's written request at any time during the 3 years following such election, sufficient evidence to support its eligibility as a Noncommercial Webcaster and, if applicable, as an NEE. Any proof of eligibility provided hereunder shall be provided with a certification signed by the chief executive officer of the Noncommercial Webcaster, or other person with similar management authority over the Noncommercial Webcaster, certifying that the information provided is accurate and the person signing is authorized to act on behalf of the Noncommercial Webcaster.

3. Minimum Annual Fees

(a) *NEEs Transmitting a Single Channel.* Except as provided in Section 3(c) and subject to Section 4, each NEE shall pay nonrefundable minimum annual fees as set forth below for all or any portion of a year in which it made or makes any digital audio transmissions of sound recordings under the section 114 statutory license (whether a "Broadcaster Simulcast" (as defined in Section 9(b)), an Internet-only transmission or otherwise):

(1) \$200 for the period beginning on October 28, 1998, and ending on December 31, 1999 (which shall be treated as one year for purposes of these Rates and Terms);

(2) \$250 for each of the years 2000 through 2003; and

(3) \$500 for 2004, except in the case of an NEE that is, or is affiliated with, an educational institution with fewer than 10,000 enrolled students, in which case the minimum fee shall be \$250.

(b) *Other Noncommercial Webcasters Transmitting a Single Channel.* Except as provided in Section 3(c) and subject to Section 4, each Noncommercial Webcaster that is not an NEE shall pay nonrefundable minimum annual fees as set forth below for all or any portion of a year in which it made or makes any digital audio transmissions of sound recordings under the section 114 statutory license (whether a Broadcaster Simulcast, an Internet-only transmission or otherwise):

(1) \$200 for the period beginning on October 28, 1998, and ending on December 31, 1999 (which shall be treated as one year for purposes of these Rates and Terms);

(2) \$250 for 2000;

(3) \$300 for 2001, except in the case of a Noncommercial Webcaster substantially all of the programming of which is reasonably classified as news, talk, sports or business programming, in which case the minimum fee shall be \$250;

(4) \$350 for 2002, except in the case of a Noncommercial Webcaster substantially all of the programming of which is reasonably

classified as news, talk, sports or business programming, in which case the minimum fee shall be \$250;

(5) \$400 for 2003, except in the case of a Noncommercial Webcaster substantially all of the programming of which is reasonably classified as news, talk, sports or business programming, in which case the minimum fee shall be \$250; and

(6) \$500 for 2004, except in the case of a Noncommercial Webcaster substantially all of the programming of which is reasonably classified as news, talk, sports or business programming, in which case the minimum fee shall be \$250.

(c) Noncommercial Webcasters Transmitting Multiple Channels.

Notwithstanding Section 3(a) or (b) as applicable, the nonrefundable minimum annual fee shall be \$500 for each year (as identified in Section 3(a)(1) through (3) or 3(b)(1) through (6)) for any Noncommercial Webcaster that made or makes digital audio transmissions of sound recordings on more than one channel or station of programming; provided that—

(1) if the digital audio transmissions of sound recordings over any channels or stations in excess of one consist only of "Incidental Performances" (as defined in Section 9(f)), the nonrefundable minimum annual fee shall be as provided in Section 3(a) or (b) as applicable;

(2) if substantially all of the programming of all of a Noncommercial Webcaster's channels and stations is reasonably classified as news, talk, sports or business programming, the minimum fee shall be \$250;

(3) if a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts, then—

(A) a nonrefundable minimum annual fee otherwise determined in accordance with this Section 3(c) shall extend to only three such Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to Section 5);

(B) additional nonrefundable minimum annual fees shall be payable under this Section 3(c) for additional groups of up to three Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to Section 5);

(C) each such group of up to three such Internet channels or stations, as well as associated Internet-only channels (subject to Section 5), shall be treated as a separate Noncommercial Webcaster for purposes of Sections 3(c)(2), 4 and 5;

(D) all such channels or stations offering Broadcaster Simulcasts in a group shall be treated as a single channel or station for purposes of Section 5;

(E) any additional channels or stations considered with the group for purposes of Section 5 shall also be considered with the group for purposes of Section 4; and

(F) accordingly, the Noncommercial Webcaster may offer two additional Internet-only channels or stations with each group of up to three channels or stations offering Broadcaster Simulcasts without triggering

payments under Section 5(b), but all of such channels or stations (up to a total of five) shall be considered together for purposes of determining whether the Noncommercial Webcaster exceeds the 146,000 Aggregate Tuning Hour threshold in Section 4; and

(4) for purposes of determining the number of channels or stations of programming offered by a Noncommercial Webcaster, an "archived program" (as defined in 17 U.S.C. 114(j)(2)) that complies with the conditions in 17 U.S.C. 114(d)(2)(C)(iii)(I) and (II) shall not be considered a separate channel or station of programming except in the case of a Noncommercial Webcaster that exclusively makes digital audio transmissions of archived programming.

(d) *Payment in Lieu of Providing Reports of Use.* All Noncommercial Webcasters' payments of nonrefundable minimum annual fees for each of 2003 and 2004 shall be accompanied by an additional payment of \$50 in 2003 and \$25 in 2004 in lieu of the provision of reports of use of sound recordings, as described in Section 7.

4. Usage Fees for 2004

(a) *In General.* Subject to Section 5, the nonrefundable minimum annual fee payable under Section 3 for 2004 shall constitute full payment for digital audio transmissions totaling not more than 146,000 "Aggregate Tuning Hours" (as defined in Section 9(a)) per month. If, in any month during 2004, a Noncommercial Webcaster makes digital audio transmissions of sound recordings under the section 114 statutory license in excess of 146,000 Aggregate Tuning Hours, the Noncommercial Webcaster shall pay additional royalties for those digital audio transmissions in excess of 146,000 Aggregate Tuning Hours at the following rates, subject to an election as provided in Section 4(b):

(1) \$0.0002176 (.02176¢) per "Performance" (as defined in Section 9(f)); or

(2) \$.00251 (.251¢) per "Aggregate Tuning Hour," except in the case of channels or stations where substantially all of the programming is reasonably classified as news, talk, sports or business programming, in which case the royalty rate shall be \$.0002 (.02¢) per Aggregate Tuning Hour.

For the avoidance of doubt, a Noncommercial Webcaster shall calculate its Aggregate Tuning Hours of digital audio transmissions each month and shall pay any additional royalties owed for such month as provided above in this Section 4(a), but the Noncommercial Webcaster shall not owe any additional royalties for any subsequent months until such time as the Noncommercial Webcaster again exceeds the 146,000 Aggregate Tuning Hour threshold during a given month.

(b) *Election of Per Performance or Aggregate Tuning Hour Rate.* The first time a Noncommercial Webcaster is required to pay additional royalties under Section 4(a), the Noncommercial Webcaster shall elect to pay based on the per performance royalty set forth in Section 4(a)(1) or the aggregate tuning hour royalty set forth in Section 4(a)(2) for all additional royalties under Section 4(a) incurred during the remainder of 2004, if any. Thus, for example, a Noncommercial Webcaster may not in one

month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its additional royalties based on the per performance royalty and in another month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its additional royalties based on the aggregate tuning hour royalty.

(c) *Reporting.* For 2004, each Noncommercial Webcaster making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall report its Aggregate Tuning Hours of digital audio transmissions to SoundExchange in its monthly statement of account under Section 6(d). Each Noncommercial Webcaster having a statutory license in 2004 and not making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall so certify in the statement of account accompanying its first payment in 2005, if any.

5. Fees for More Than Three Channels of Programming

Subject to Section 3(c)(3), if in any year (as identified in Section 3(a)(1) through (3) or 3(b)(1) through (6)), a Noncommercial Webcaster made or makes digital audio transmissions of sound recordings on more than three channels or stations of programming, then—

(a) the Noncommercial Webcaster shall by written notice to SoundExchange at the time of its first payment for the year or its inception of its first channel or station in excess of three, whichever is later, designate three channels or stations for which the nonrefundable minimum annual fee payable under Section 3, and in 2004, any additional royalty payment under Section 4, shall constitute full payment; and

(b) the Noncommercial Webcaster shall pay royalties for all its digital audio transmissions of sound recordings under the section 114 statutory license over its other channels and stations at the Statutory Rate for digital audio transmissions made by commercial eligible nonsubscription transmission services at such time, provided that—

(1) the Noncommercial Webcaster shall not be required to make any minimum payment that otherwise applies to commercial eligible nonsubscription transmission services;

(2) the nonrefundable minimum annual fee payable under Section 3 shall not be creditable toward such payments for its other channels and stations;

(3) such payments for its other channels and stations shall be due at the times provided in Section 6 (rather than any different times otherwise applicable to commercial eligible nonsubscription transmission services), except that if the Statutory Rate for digital audio transmissions made by commercial eligible nonsubscription transmission services has not then been determined, such payments for its other channels and stations shall be due 45 days following the month in which the Statutory Rate is determined; and

(4) the Noncommercial Webcaster shall comply with other terms relating to royalty payments that otherwise apply to commercial eligible nonsubscription transmission

services (e.g. terms concerning any election among payment options).

For the avoidance of doubt, by operation of Section 3(c)(3), when a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts: (i) such Broadcaster Simulcasts shall in no event be subject to the Statutory Rate for digital audio transmissions made by commercial eligible nonsubscription transmission services, and (ii) only programming offered on Internet-only channels or stations in excess of two that may be associated with a group of up to three channels or stations offering Broadcaster Simulcasts may be subject to that Statutory Rate as provided in this Section.

6. Payment of Royalties in General

(a) Timing of Minimum Payments.

Payments of nonrefundable minimum annual fees under Section 3 for the period beginning on October 28, 1998, and ending on December 31, 2003, shall be due by October 15, 2003. Nonrefundable minimum annual fees for 2004 shall be due by January 31, 2004. Notwithstanding the foregoing provisions of this Section 6(a), when a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its first payment of nonrefundable minimum annual fees within 45 days following the month in which the Noncommercial Webcaster commences digital audio transmissions of sound recordings under the section 114 statutory license.

(b) *Timing of Other Payments.* Any payments due under Section 4 or 5 shall be due 45 days following the month in which the liability accrues.

(c) *Credit.* Any payments of section 112 or 114 statutory license royalties made by a Noncommercial Webcaster to SoundExchange prior to its election under Section 2 shall be creditable to the payments due under Sections 3 through 5 of these Rates and Terms.

(d) *Remittance.* Payments of all amounts due under these Rates and Terms shall be made to SoundExchange and shall under no circumstances be refundable. Payments shall be accompanied by a statement of account in the form made available on the SoundExchange Web site located at <http://www.soundexchange.com>.

(e) *Ephemeral Recordings.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made during the period beginning on October 28, 1998, and ending on December 31, 2004, and used solely by a Noncommercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in these Rates and Terms shall be deemed to be included within, and to comprise 8.8% percent of, the Noncommercial Webcaster's royalty payments under these Rates and Terms.

(f) *Continuing Obligation to Pay.* If Statutory Rates and terms for Noncommercial

Webcasters for the period beginning January 1, 2005, have not been established by December 31, 2004, then Noncommercial Webcasters shall continue to make payments at the 2004 rates under these Rates and Terms until such successor rates and terms are established. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within 30 days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms.

(g) *Late Payments.* A Noncommercial Webcaster shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by SoundExchange after the due date. Late fees shall accrue from the due date until payment is received by SoundExchange.

7. Notice and Recordkeeping

(a) *Data for Distributions.* Noncommercial Webcasters electing these Rates and Terms shall not be required to provide reports of use of sound recordings for 2003 and 2004, even if the Librarian of Congress issues regulations otherwise requiring such reports by Noncommercial Webcasters. The payments required by Section 3(d) are intended to facilitate SoundExchange's ability to collect or otherwise acquire substitute data on which to base distributions to copyright owners and performers of payments made by Noncommercial Webcasters, although SoundExchange shall be under no obligation to spend such payments in any particular way or to collect or otherwise acquire any particular data by any particular means. SoundExchange may base its distributions to copyright owners and performers of payments made by Noncommercial Webcasters on any data or methodology determined by its board.

(b) *Future Reporting.* The Noncommercial Webcasters shall designate a task force of not less than five members that shall be obligated to use reasonable efforts to work with SoundExchange to determine data fields and report formats and recommend policies, procedures and systems for the delivery of electronic reports of use of sound recordings to SoundExchange sufficient to permit SoundExchange, beginning in 2005, to distribute the royalties paid by Noncommercial Webcasters to those copyright owners and performers whose sound recordings are used by Noncommercial Webcasters based on data reported by or on behalf of Noncommercial Webcasters. In the absence of agreement among the Noncommercial Webcasters concerning the membership of such task force, each Noncommercial Webcaster shall be obligated to use reasonable efforts to do the foregoing.

8. Default

A Noncommercial Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Noncommercial Webcaster that, unless the breach is remedied within 30 days from the date of notice and not repeated, the

Noncommercial Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. 501 and fully subject to the remedies provided by 17 U.S.C. 502-506 and 509.

9. Definitions

As used in these Rates and Terms, the following terms shall have the following meanings:

(a) The term "*Aggregate Tuning Hours*" means the total hours of programming that a Noncommercial Webcaster has transmitted during the relevant period to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions, less the actual running time of any sound recordings for which the Noncommercial Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Webcaster transmitted 1 hour of programming to 10 simultaneous listeners, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10.

(b) A "*Broadcaster Simulcast*" is a simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, where such Internet transmission or retransmission is made by a Noncommercial Webcaster that owns or operates the over-the-air radio station making the AM or FM broadcast.

(c) An "*Incidental Performance*" is a Performance that both:

(1) 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, sports and business programming, brief background performances during disk jockey announcements, brief performances during commercials of 60 seconds or less in duration, or brief performances during sporting or other public events; and

(2) 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 30 seconds (as a sound recording used as a theme song is featured).

(d) An "*NEE*" or "*Noncommercial Educational Entity*" is a Noncommercial Webcaster that is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

(e) The term "*Noncommercial Webcaster*" shall have the meaning given in 17 U.S.C. 114(f)(5)(E)(i) (as added by the Small Webcaster Settlement Act of 2002).

(f) A "*Performance*" is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio 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 Noncommercial Webcaster has previously obtained a license from the copyright owner of such sound recording; and

(3) an Incidental Performance.

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