

§ 380.22

37 CFR Ch. III (7–1–11 Edition)

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).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (*e.g.*, HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective.

(b) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

- (1) 2011: \$0.0017;
- (2) 2012: \$0.0020;
- (3) 2013: \$0.0022;
- (4) 2014: \$0.0023;
- (5) 2015: \$0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents,

entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster.

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of

account. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

(3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

(5) The printed or typewritten name of the person signing the statement of account;

(6) The date of signature;

(7) The title or official position held by the person signing the statement of account;

(8) A certification of the capacity of the person signing; and

(9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general—*

(1) *Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a non-refundable, annual Proxy Fee of \$100 in

lieu of providing reports of use for the calendar year pursuant to the regulations at §370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at §370.4 of this chapter, except that, notwithstanding §370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station

name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to this paragraph (g)(3) shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by §370.4 of this chapter), except that, notwithstanding §370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with this paragraph (g)(3). For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this paragraph (g)(3) for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under this paragraph (g)(3) shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in §370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be

§ 380.24

37 CFR Ch. III (7–1–11 Edition)

created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

§ 380.24 Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster’s statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(3) Copyright Owners and Performers, including their designated agents,

whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any 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 the Collective or person.

§ 380.25 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice