

(v) Where merchandise, service, or anything of value is receivable by Licensee in lieu of cash consideration for the use of Licensee's Service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration recognizable as revenue by Licensee from Licensee's Providers, but not including revenues recognizable by Licensee's Providers from others and not accounted for by Licensee's Providers to Licensee, for the provision of hardware for the Service by anyone and used in connection with the Service;

(vii) Monies or other consideration recognizable as revenue for any references to or inclusion of any product or service on the Service; and

(viii) Bad debts recovered regarding paragraphs (g)(1)(i) through (vii) of this section.

(2) "Revenue" shall include such payments as set forth in paragraphs (g)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid or payable to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's Providers for the Service. Licensee shall be allowed a deduction from "Revenue" as defined in paragraph (g)(1) of this section for bad debts actually written off during the reporting period.

(h) A *Service* is a non-interactive (consistent with the definition of "interactive service" in 17 U.S.C. 114(j)(7)) audio-only subscription service (including accompanying information and graphics related to the audio) that is transmitted to residential subscribers of a television service through a Provider which is marketed as and is in fact primarily a video service where

(1) Subscribers do not pay a separate fee for audio channels.

(2) The audio channels are delivered by digital audio transmissions through a technology that is incapable of tracking the individual sound recordings received by any particular consumer.

(3) However, paragraph (h)(2) of this section shall not apply to the Licensee's current contracts with Providers that are in effect as of the effective date of this part if such Providers be-

come capable in the future of tracking the individual sound recordings received by any particular consumer, provided that the audio channels continued to be delivered to Subscribers by digital audio transmissions and the Licensee remains incapable of tracking the individual sound recordings received by any particular consumer.

(i) *Subscriber* means every residential subscriber to the underlying service of the Provider who receives Licensee's Service in the United States for all or any part of a month; provided, however, that for any Licensee that is not able to track the number of subscribers on a per-day basis, "Subscribers" shall be calculated based on the average of the number of subscribers on the last day of the preceding month and the last day of the applicable month, unless the Service is paid by the Provider based on end-of-month numbers, in which event "Subscribers" shall be counted based on end-of-month data.

(j) *Stand-Alone Contracts* means contracts between the Licensee and a Provider in which the only content licensed to the Provider is the Service.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010]

### § 383.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

(a) *Royalty rates.* Royalty rates for the public performance of sound recordings by eligible digital transmissions made over a Service pursuant to 17 U.S.C. 114, and for ephemeral recordings of sound recordings made pursuant to 17 U.S.C. 112(e) to facilitate such transmissions during the License Period, are as follows. Each Licensee will pay, with respect to content covered by the License that is provided via the Service of each such Licensee:

(1) For Stand-Alone Contracts, the greater of:

(i) 15% of Revenue, or

(ii) The following monthly minimum payment per Subscriber to the Service of such Licensee—

(A) From inception through 2006: \$0.0075

(B) 2007: \$0.0075

(C) 2008: \$0.0075

(D) 2009: \$0.0125

(E) 2010: \$0.0150

#### § 383.4

(F) 2011: \$0.0155  
(G) 2012: \$0.0159  
(H) 2013: \$0.0164  
(I) 2014: \$0.0169  
(J) 2015: \$0.0174 and

(2) For Bundled Contracts, the greater of:

(i) 15% of Revenue allocated to reflect the objective value of the Licensee's Service, or

(ii) The following monthly minimum payment per Subscriber to the Service of such Licensee:

(A) From inception through 2006: \$0.0220  
(B) 2007: \$0.0220  
(C) 2008: \$0.0220  
(D) 2009: \$0.0220  
(E) 2010: \$0.0250  
(F) 2011: \$0.0258  
(G) 2012: \$0.0265  
(H) 2013: \$0.0273  
(I) 2014: \$0.0281  
(J) 2015: \$0.0290

(b) *Minimum fee.* Each Licensee will pay an annual, non-refundable minimum fee of one hundred thousand dollars (\$100,000), payable on January 31 of each calendar year in which the Service is provided pursuant to the section 112(e) and 114 statutory licenses, but payable pursuant to the applicable regulations for all years 2007 and earlier. Such fee shall be recoupable and credited against royalties due in the calendar year in which it is paid.

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions during the License Period for which it pays royalties as and when provided in this part shall be included within, and constitute 5% of, such royalty payments.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010]

#### § 383.4 Terms for making payment of royalty fees.

(a) *Terms in general.* Subject to the provisions of this section, terms governing timing and due dates of royalty payments to the Collective, late fees, statements of account, audit and verification of royalty payments and distributions, cost of audit and verification, record retention require-

#### 37 CFR Ch. III (7–1–12 Edition)

ments, treatment of Licensees' confidential information, distribution of royalties by the Collective, unclaimed funds, designation of the Collective, and any definitions for applicable terms not defined herein and not otherwise inapplicable shall be those adopted by the Copyright Royalty Judges for subscription transmissions and the reproduction of ephemeral recordings by preexisting satellite digital audio radio services in 37 CFR part 382, subpart B of this chapter, for the license period 2007–2012. For purposes of this section, the term "Collective" refers to the collection and distribution organization that is designated by the Copyright Royalty Judges. For the License Period through 2015, the sole Collective is SoundExchange, Inc.

(b) *Reporting of performances.* Without prejudice to any applicable notice and recordkeeping provisions, statements of account shall not require reports of performances.

(c) *Applicable regulations.* To the extent not inconsistent with this part, all applicable regulations, including part 370 of this chapter, shall apply to activities subject to this part.

[75 FR 14075, Mar. 24, 2010]

#### PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

Sec.

384.1 General.

384.2 Definitions.

384.3 Royalty fees for Ephemeral Recordings.

384.4 Terms for making payment of royalty fees and statements of account.

384.5 Confidential information.

384.6 Verification of royalty payments.

384.7 Verification of royalty distributions.

384.8 Unclaimed funds.

AUTHORITY: 17 U.S.C. 112(e), 801(b)(1).

SOURCE: 73 FR 16199, Mar. 27, 2008, unless otherwise noted.

#### § 384.1 General.

(a) *Scope.* This part 384 establishes rates and terms of royalty payments for the making of Ephemeral Recordings by a Business Establishment Service, as defined in § 384.2(a), in accordance with the provisions of 17 U.S.C.