

REGISTER a revised schedule of the rates for §381.5(c)(3), the rate to be charged for compositions in the repertoire of SESAC, which shall adjust the royalty amounts established in a dollar amount according to the greater of

(1) The change in the cost of living determined as provided in paragraph (a) of this section, or

(2) Two percent (2%).

(3) Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule for the rates for §381.5(c)(3) shall become effective thirty (30) days after publication in the FEDERAL REGISTER.

[72 FR 67647, Nov. 30, 2007, as amended at 77 FR 71109, Nov. 29, 2012]

§381.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

Subpart A—Preexisting Subscription Services

Sec.

382.1 General.

382.2 Definitions.

382.3 Royalty fees for the digital performance of sound recordings and the making

of ephemeral recordings by preexisting subscription services.

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

382.5 Confidential information.

382.6 Verification of statements of account.

382.7 Verification of royalty payments.

382.8 Unclaimed funds.

Subpart B—Preexisting Satellite Digital Audio Radio Services

382.10 General.

382.11 Definitions.

382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

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

382.14 Confidential information.

382.15 Verification of royalty payments.

382.16 Verification of royalty distributions.

382.17 Unclaimed funds.

AUTHORITY: 17 U.S.C. 112(e), 114 and 801(b)(1).

SOURCE: 72 FR 71796, Dec. 19, 2007, unless otherwise noted.

Subpart A—Preexisting Subscription Services

§382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of Ephemeral Recordings made.

[72 FR 71796, Dec. 19, 2007, as amended at 78 FR 23096, Apr. 17, 2013]

§382.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

§ 382.3

37 CFR Ch. III (7-1-14 Edition)

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013-2017 license term, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

GAAP shall mean generally accepted accounting principles in effect from time to time in the United States.

Gross Revenues. (1) Gross Revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

- (i) Monies received by Licensee from Licensee’s carriers and directly from residential U.S. subscribers for Licensee’s programming service;
- (ii) Licensee’s advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;
- (iii) Monies received for the provision of time on the programming service to any third party;
- (iv) Monies received from the sale of time to providers of paid programming such as infomercials;
- (v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee’s programming service, the fair market value thereof or Licensee’s prevailing published rate, whichever is less;
- (vi) Monies or other consideration received by Licensee from Licensee’s carriers, but not including monies received by Licensee’s carriers from others and not accounted for by Licensee’s carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;
- (vii) Monies or other consideration received for any references to or inclu-

sion of any product or service on the programming service; and

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

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee’s carriers for the programming service. Licensee shall be allowed a deduction from “Gross Revenues” as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

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.

[78 FR 23096, Apr. 17, 2013]

§ 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.

(a) Commencing January 1, 2013, and continuing through December 31, 2017, the monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114 and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues resulting from residential services in the United States as follows: for 2013, 8%; and for 2014 through 2017, 8.5%.

(b) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment to the Collective of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but it may be counted as an advance of the section

112 royalties due and payable for a given year or any month therein under paragraph (a) of this section; Provided, however, that any unused portion of an annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for each payment or statement of account, or either of them, received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received.

[78 FR 23096, Apr. 17, 2013]

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

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 382.3 to the Collective.

(b) *Timing of payment.* A Licensee shall make any payments due under § 382.3 on a monthly basis on or before the 45th day after the end of each month for that month.

(c) *Statements of Account.* Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payments;

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

(3) The signature of a duly authorized officer or representative of the Licensee;

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

(5) The date of signature;

(6) The title or official position held in relation to the Licensee by the person signing the statement of account;

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

(8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(d) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall be responsible only for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (d)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 382.8.

(e) *Retention of records.* Both Licensees and the Collective shall maintain books and records relating to the payment of the license fees in accordance with generally accepted accounting principles for a period of three years after the end of the period for which the payment is made. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those

§ 382.5

interested parties entitled to receive such fees.

[78 FR 23097, Apr. 17, 2013]

§ 382.5 Confidential information.

(a) For purposes of this subpart, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt preexisting subscription service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement duly executed between a nonexempt preexisting subscription service and an interested party, or between one or more interested parties; Provided that all such information shall be made available, for the verification proceedings provided for in §§ 382.6 and 382.7.

(b) Access to the confidential information pertaining to the royalty payments shall be subject to an appropriate confidentiality agreement and limited to:

(1) Those employees, agents, consultants and independent contractors of the Collective who are engaged in the collection and distribution of royalty payments hereunder and activities directly related hereto, who are not also employees or officers of a sound recording Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

(2) An independent and Qualified Auditor who is not an employee or officer of a sound recording Copyright Owner or Performer, but is authorized to act on behalf of the interested Copyright Owners with respect to the verification of the royalty payments; and

(3) Copyright Owners and Performers whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, or agents thereof provided that the only confidential information that may be shared pursuant to this paragraph (b)(3) are the monthly statements of account that accompany royalty payments.

37 CFR Ch. III (7–1–14 Edition)

(c) The Collective or any person identified in paragraph (b) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the Collective or such person.

[72 FR 71796, Dec. 19, 2007. Redesignated at 78 FR 23096, Apr. 17, 2013 and amended at 78 FR 23097, Apr. 17, 2013]

§ 382.6 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by the Copyright Royalty Board.

(b) *Frequency of verification.* Interested parties may conduct a single audit of a nonexempt preexisting subscription service during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit a particular service to the Copyright Royalty Board, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested party's notice. Such notification of intent to audit shall also be delivered at the same time to the party to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three years from the date of completion of the verification process.

(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.

(f) *Costs of the verification procedure.* The interested party or parties requesting the verification procedure shall pay all costs of the verification

procedure, unless an independent and Qualified Auditor concludes that during the period audited, the Licensee underpaid royalties by an amount of five (5) percent or more; in which case, the service that made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those Copyright Owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the Collective.

[72 FR 71796, Dec. 19, 2007. Redesignated at 78 FR 23096, Apr. 17, 2013 and amended at 78 FR 23097, Apr. 17, 2013]

§ 382.7 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by the Copyright Royalty Board.

(b) *Frequency of verification.* Interested parties may conduct a single audit of the Collective during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit the entity making the royalty payment to the Copyright Royalty Board, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested party's notice. Such notification of intent shall also be delivered at the same time to the party to be audited.

(d) *Retention of records.* The interested party requesting the verification procedure shall retain the report of the verification for a period of three years after completion of the verification process.

(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 interested parties.

(f) *Costs of the verification procedure.* The interested party or parties requesting the verification procedure

shall pay for all costs associated with the verification procedure, unless an independent and Qualified Auditor concludes that, during the period audited, the Licensee underpaid royalties in the amount of five (5) percent or more, in which case, the entity that made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those who are entitled to receive royalty payments pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

[72 FR 71796, Dec. 19, 2007. Redesignated at 78 FR 23096, Apr. 17, 2013 and amended at 78 FR 23098, Apr. 17, 2013]

§ 382.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of the last distribution from the royalty fund at issue. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of the three-year claim period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

[72 FR 71796, Dec. 19, 2007. Redesignated at 78 FR 23096, Apr. 17, 2013 and amended at 78 FR 23098, Apr. 17, 2013]

Subpart B—Preexisting Satellite Digital Audio Radio Services

AUTHORITY: 17 U.S.C. 112(e), 114(f), 804(b)(3).

SOURCE: 73 FR 4102, Jan. 24, 2008, unless otherwise noted.

§ 382.10 General.

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

§ 382.11

37 CFR Ch. III (7–1–14 Edition)

the period from January 1, 2013, through December 31, 2017.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any voluntary license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

[73 FR 4102, Jan. 24, 2008, as amended at 78 FR 23098, Apr. 17, 2013]

§ 382.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license term, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Directly-Licensed Recording is a sound recording for which the Licensee has previously obtained a license of all relevant rights from the Copyright Owner of such sound recording.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

GAAP shall mean generally accepted accounting principles in effect from time to time in the United States.

Gross Revenues. (1) Gross Revenues shall mean revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS, and shall be comprised of the following:

(i) Subscription revenue recognized by Licensee directly from U.S. subscribers for Licensee's SDARS; and

(ii) Licensee's advertising revenues, or other monies received from spon-

sors, if any, attributable to advertising on channels other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) and (ii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary or division of Licensee.

(3) Gross Revenues shall exclude:

(i) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee's SDARS and any taxes, shipping and handling fees therefor;

(ii) Royalties paid to Licensee for intellectual property rights;

(iii) Monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(iv) Sales and use taxes, shipping and handling, credit card, invoice, and fulfillment service fees;

(v) Bad debt expense, and

(vi) Revenues recognized by Licensee for the provision of

(A) Current and future data services offered for a separate charge (e.g., weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

(B) Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings;

(C) Channels, programming, products and/or other services provided outside of the United States; and

(D) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is exempt from any license requirement or is separately licensed, including by a

statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

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).

Pre-1972 Recording is a sound recording fixed before February 15, 1972.

Qualified Auditor is a Certified Public Accountant.

SDARS means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

Term means the period commencing January 1, 2013, and continuing through December 31, 2017.

[73 FR 4102, Jan. 24, 2008, as amended at 78 FR 23098, Apr. 17, 2013]

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

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues as follows: for 2013, 9.0%; for 2014, 9.5%; for 2015, 10.0%; for 2016, 10.5%; and for 2017, 11.0%, except that the royalty fee so determined may be reduced by the Direct License Share or the Pre-1972 Recording Share as described in paragraphs (d) and (e), respectively, of this section.

(b) *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 for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5%

of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment to the Collective of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but it shall be considered as an advance of the Ephemeral Recordings royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) *Direct license share.* The percentage of monthly Gross Revenues royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the “Direct License Share”).

(1) Subject to paragraph (d)(3) of this section, for each month, the Direct License Share is the result of dividing the Internet Performances of Directly-Licensed Recordings on the Reference Channels by the total number of Internet Performances of all sound recordings on the Reference Channels.

(2) For purposes of paragraph (d)(1) of this section:

(i) A “Performance” is each instance in which any portion of a sound recording is publicly performed to a listener within the United States 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 an incidental performance that both:

(A) 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

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and

§ 382.13

37 CFR Ch. III (7-1-14 Edition)

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).

(ii) The "Reference Channels" are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio, or either or both, and on which the programming consists primarily of music.

(3) A Direct License Share adjustment as described in paragraph (d) of this section is available to a Licensee only if—

(i) The Reference Channels constitute a large majority of the music channels offered on the Licensee's SDARS and are generally representative of the music channels offered on the Licensee's SDARS; and

(ii) The Licensee timely provides the relevant information required by § 382.13(h).

(4) No performance shall be credited as an Internet Performance of a Directly-Licensed Sound Recording under this section if that performance is separately credited as an Internet Performance of a Pre-1972 sound recording under paragraph (e)(1) of this section.

(e) *Pre-1972 Recording Share.* The percentage of monthly Gross Revenues royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the "Pre-1972 Recording Share").

(1) Subject to paragraph (e)(3) of this section, for each month, the Pre-1972 Recording Share is the result of dividing the Internet Performances of Pre-1972 Sound Recordings on the Reference Channels by the total number of Internet Performances of all sound recordings on the Reference Channels.

(2) For purposes of paragraph (e)(1) of this section:

(i) A "Performance" is each instance in which any portion of a sound recording is publicly performed to a listener within the United States 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 an incidental performance that both:

(A) 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

(B) 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).

(ii) The "Reference Channels" are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both, and on which the programming consists primarily of music.

(3) A Pre-1972 Recording Share adjustment as described in paragraph (e) of this section is available to a Licensee only if—

(i) The Reference Channels constitute a large majority of the music channels offered on the Licensee's SDARS and are generally representative of the music channels offered on the Licensee's SDARS; and

(ii) The Licensee timely provides the relevant information required by § 382.13(h).

[78 FR 23098, Apr. 17, 2013]

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

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 382.12 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 Licensees due under § 382.12 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.

(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 paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges 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 that have themselves authorized the 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) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month. All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, each for any payment or statement of account, or either of them received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payments;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be

contacted for information or questions concerning the content of the statement of account;

(3) The signature of a duly authorized officer or representative of the Licensee;

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

(5) The date of signature;

(6) The title or official position held in relation to the Licensee by the person signing the statement of account;

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

(8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees 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 the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

(h) *Notification of exclusions.* (1) As a condition to a Licensee's taking a Direct License Share adjustment as described in §382.12(d), by no later than the due date for the relevant payment

§ 382.14

37 CFR Ch. III (7–1–14 Edition)

under paragraph (c) of this section, the Licensee must provide the Collective a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Directly-Licensed Recordings that is in effect for the month for which the payment is made, and of each sound recording as to which the Licensee takes such an adjustment (identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name). Notwithstanding §382.14, the Collective may disclose such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

(2) As a condition to a Licensee's taking a Pre-1972 Recording Share adjustment as described in §382.12(e), by no later than the due date for the relevant payment under paragraph (c) of this section, the Licensee must provide the Collective a list of each Pre-1972 Recording as to which the Licensee takes such an adjustment (identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name).

[73 FR 4102, Jan. 24, 2008, as amended at 76 FR 45696, Aug. 1, 2011; 78 FR 23099, Apr. 17, 2013]

§ 382.14 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 royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee 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 pur-

pose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited, subject to an appropriate confidentiality agreement, to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, 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 the Confidential Information;

(2) An independent and Qualified Auditor, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(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 by the Licensee whose Confidential Information is being supplied, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, 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 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.

[73 FR 4102, Jan. 24, 2008, as amended at 78 FR 23099, Apr. 17, 2013]

§382.15 Verification of royalty payments.

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

(b) *Frequency of verification.* The Collective 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 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 Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. 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 parties.

(d) *Acquisition and retention of report.* 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. The Collective shall retain the report of the verification for a period of not less than 3 years.

(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.

(f) *Consultation.* Before rendering a written report to the Collective, 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 an 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.

(g) *Costs of the verification procedure.* The Collective shall pay all costs associated with the verification procedure, unless it determines that the Licensee underpaid royalties in an amount of 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.

[73 FR 4102, Jan. 24, 2008, as amended at 78 FR 23099, Apr. 17, 2013]

§382.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective 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.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and

§ 382.17

shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(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.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, 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 Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay all costs associated with the procedure, unless it is finally determined that the Licensee underpaid royalties in an amount of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

[73 FR 4102, Jan. 24, 2008, as amended at 78 FR 23100, Apr. 17, 2013]

§ 382.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart,

37 CFR Ch. III (7–1–14 Edition)

the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

PART 383—RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY NEW SUBSCRIPTION SERVICES

Sec.

383.1 General.

383.2 Definitions.

383.3 Royalty fees for public performance of sound recordings and the making of ephemeral recordings.

383.4 Terms for making payment of royalty fees.

AUTHORITY: 17 U.S.C. 112(e), 114, and 801(b)(1).

SOURCE: 72 FR 72254, Dec. 20, 2007, unless otherwise noted.

§ 383.1 General.

(a) *Scope.* This part 383 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period commencing from the inception of the Licensees' Services and continuing through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections and the rates and terms of this part.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part