

Before the  
**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
Washington, D.C.

*In re*

Determination of Rates and Terms for  
Digital Performance of Sound Recordings  
by New Subscription Services and Making  
of Ephemeral Copies to Facilitate those  
Performances (*NSS IV*)

Docket No. 19-CRB-0006-NSR  
(2021-2025)

**JOINT MOTION TO ADOPT SETTLEMENT**

SoundExchange, Inc. (“SoundExchange”) and Sirius XM Radio Inc. (“Sirius XM”) (collectively, the “Parties”) have reached a settlement of the above-captioned proceeding (the “Proceeding”). The Parties are pleased to submit the proposed regulatory language attached as Exhibit A (the “Settlement”) for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for new subscription services of the type at issue in the Proceeding (*i.e.*, music services provided to residential subscribers as part of a cable or satellite television bundle subject to the royalty rates and terms in 37 C.F.R. Part 383).<sup>1</sup>

**I. Background**

This Proceeding was instituted on February 25, 2019, for the purpose of determining royalty rates and terms under the Section 112(e) and 114 statutory licenses for the period 2021-2025 for the type of new subscription service defined in 37 C.F.R. § 383.2(f). 84 Fed. Reg. 6021

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<sup>1</sup> David Powell d/b/a Circle God Network Inc. has also requested to join in this motion.

(Feb. 25, 2019). Three entities filed petitions to participate: SoundExchange, Sirius XM, and David Powell d/b/a Circle God Network Inc.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of sound recording copyright owners and performers. It has approximately 150,000 artist members and approximately 110,000 rights owner members (including both record companies and artists who own the copyrights in their own recordings). The Copyright Royalty Judges have repeatedly designated SoundExchange as the collective to receive and distribute royalties under Sections 112(e) and 114 on behalf of all recording artists and copyright owners.

Sirius XM creates music and non-music programming and transmits it through its satellite digital audio radio service and other outlets. Sirius XM relies on the royalty rates and terms in 37 C.F.R. Part 383 for music programming it provides through the DiSH satellite television service. The Parties believe that Sirius XM is the only provider of a Part 383 service participating in this Proceeding.

## **II. Nature of the Settlement**

The Settlement incorporates the same royalty rate structure presently set forth in 37 C.F.R. Part 383, with annual 3% increases in the per-subscriber fee during the coming rate period. The Parties have also agreed that the applicable terms incorporated by reference in Part 383 should be those finally determined in the *Web V* proceeding (Docket No. 19-CRB-0005-WR (2021-2025)), rather than those determined in an SDARS proceeding, because the Parties will have an opportunity to litigate terms issues in *Web V*, and the *Web V* terms will be in effect for the same period as covered by this proceeding. In other respects, the Settlement preserves the existing provisions of Part 383 with only minor updating.

### **III. Adoption of the Settlement by the Copyright Royalty Judges**

The Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates ... an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding” if other interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement.” 17 U.S.C. § 801(b)(7)(A)(i). The Judges generally are required to adopt the rates and terms provided in such an agreement, unless a “participant [to the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 78 Fed. Reg. 67,938, 67,939 (Nov. 13, 2013) (*Phonorecords II*) (quoting 17 U.S.C. § 801(b)(7)(A)(ii); alterations in original).

The Settlement is an agreement as described in 17 U.S.C. § 801(b)(7)(A) reached between two participants in the Proceeding. The third participant has requested to join in this motion. As a result, there is no basis for the Judges not to adopt the Settlement as the statutory terms and rates under Section 112(e) and 114 for services relying on the royalty rates and terms in 37 C.F.R. Part 383. Accordingly, the Parties respectfully request that the Judges publish the Settlement for notice and comment, and in due course adopt the Settlement in its entirety as the statutory rates and terms for such services.

Dated: October 21, 2019

Respectfully submitted,

/s/ Steven R. Englund

Steven R. Englund (D.C. Bar No. 425613)  
JENNER & BLOCK LLP  
1099 New York Avenue, N.W., Suite 900  
Washington, DC 20001  
Tel.: 202-639-6000  
Fax: 202-639-6066  
senglund@jenner.com

*Counsel for SoundExchange, Inc.*

/s/ Todd D. Larson

Todd D. Larson (N.Y. Bar No. 4358438)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212.310.8238  
Fax: 212.310.8007  
todd.larson@weil.com

*Counsel for Sirius XM Radio Inc.*

## EXHIBIT A

### PROPOSED REGULATIONS

The Parties propose that 37 C.F.R. Part 383 be revised to read as follows. (~~Bold strikethrough~~ indicates language to be deleted and **bold underline** indicates language to be added.)

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

Sec.

§383.1 General.

§383.2 Definitions.

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

§383.4 Terms for making payment of royalty fees.

##### **§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 January 1, ~~2016~~ **2021**, and continuing through December 31, ~~2020~~ **2025**.

(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 voluntary license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmissions with the scope of such agreements.

##### **§383.2 Definitions.**

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

(a) *Bundled Contracts* means contracts between the Licensee and a Provider in which the Service is not the only content licensed by the Licensee to the Provider.

(b) *Copyright Owner* means a sound recording copyright owner, or a rights owner under 17 U.S.C. 1401(1)(2), who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

(c) *License Period* means the period commencing January 1, ~~2016~~ 2021, and continuing through December 31, ~~2020~~ 2025.

(d) *Licensee* is a person that has obtained statutory licenses under 17 U.S.C. 112(e) and 114, and the implementing regulations, to make digital audio transmissions as part of a Service (as defined in paragraph (f) of this section), and ephemeral recordings for use in facilitating such transmissions.

(e) *Provider* means a “multichannel video programming distributor” as that term is defined in 47 CFR 76.1000(e); notwithstanding such definition, for purposes of this part, a Provider shall include only a distributor of programming to televisions, such as a cable or satellite television provider.

(f) 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 (f)(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 become 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.

(g) *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.

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

### **§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 **statutory licenses License** Period, are as follows. Each Licensee will pay, with respect to content covered by the statutory licenses that is provided via the Service of each such Licensee:

(1) For Stand-Alone Contracts, the following monthly payment per Subscriber to the Service of such Licensee:

~~(i) 2016: \$0.0179;~~

~~(ii) 2017: \$0.0185;~~

~~(iii) 2018: \$0.0190;~~

~~(iv) 2019: \$0.0196;~~

~~(v) 2020: \$0.0202;~~

(i) 2021: \$0.0208;

(ii) 2022: \$0.0214;

(iii) 2023: \$0.0221;

(iv) 2024: \$0.0227;

(v) 2025: \$0.0234;

(2) For Bundled Contracts, the following monthly payment per Subscriber to the Service of such Licensee:

~~(i) 2016: \$0.0299;~~

~~(ii) 2017: \$0.0308;~~

~~(iii) 2018: \$0.0317;~~

~~(iv) 2019: \$0.0326;~~

~~(v) 2020: \$0.0336;~~

(i) 2021: \$0.0346;

(ii) 2022: \$0.0356;

(iii) 2023: \$0.0367;

**(iv) 2024: \$0.0378;**

**(v) 2025: \$0.0390;**

(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. 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. Allocation between ephemeral recordings and performance royalty fees. The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions through a Service are included in the 5%.**

#### **§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 requirements, 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~~ **digital audio** transmissions and the reproduction of ephemeral recordings by ~~preexisting satellite digital audio radio services~~ **Commercial Webcasters** in 37 CFR part ~~382~~ **380**, subpart ~~B~~ **A** of this chapter, for the license period ~~2013-2017~~ **2021-2025**. 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 2025, 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.



## Proof of Delivery

I hereby certify that on Monday, October 21, 2019, I provided a true and correct copy of the Joint Motion to Adopt Settlement to the following:

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Signed: /s/ Steven R. Englund