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In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR
(2018-2022)

COPYRIGHT OWNERS' AMENDED PROPOSED RATES AND TERMS

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COPYRIGHT OWNERS’ AMENDED PROPOSED RATES AND TERMS

On November 1, 2016, the National Music Publishers’ Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI”) (together, “Copyright Owners”), pursuant to 37 C.F.R. § 351.4(b)(3), proposed rates and terms for making and distributing phonorecords under 17 U.S.C. § 115 during the period January 1, 2018 through December 31, 2022. Pursuant to 37 C.F.R. § 351.4(b)(3), the Copyright Owners reserved the right to revise their proposed rates and terms at any time during the Proceeding up to, and including, the filing of their proposed findings of fact and conclusions of law.

While the Copyright Owners are not amending their proposed rates, they are hereby proposing a handful of changes to their proposed terms and regulations. These changes are made primarily to the definitions (and to conform the proposal to the modified definitions) and for simplification. The Copyright Owners have redlined these changes below, as well as in the attached proposed regulations.¹ A redlined version of the Copyright Owners’ proposed Subpart B

¹ The Copyright Owners have deleted herein and in the proposed regulations the discussion of the Subpart A rates and terms in light of the Copyright Royalty Board’s adoption of the Subpart A settlement. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*); Subpart A Configurations of the Mechanical License, 82 Fed. Reg. 15297 (March 28, 2017).

regulations (showing changes from their original proposed Subpart B regulations) are attached as Appendix A. A clean version of the Copyright Owners' proposed Subpart B regulations is attached as Appendix B.

I. ROYALTY RATES AND TERMS FOR INTERACTIVE STREAMS AND LIMITED DOWNLOADS

A. Structure of Rate Proposal

The Copyright Owners continue to propose that the existing mechanical rates and rate structure for those music products and configurations currently described and defined in 37 C.F.R. § 385 Subparts B and C ("Subpart B & C Configurations") should be modified and simplified.

The Subpart B Configurations are merely different methods or business models for delivering or offering interactive streams and/or limited downloads (as each is defined below). The Subpart B Configurations, as currently defined, are: (a) "standalone non-portable [i.e., tethered to a computer] subscription – streaming only" services; (b) "standalone non-portable subscription – mixed" (i.e., both streaming and limited download) services; (c) "standalone portable" (i.e., accessible on mobile or other Internet-enabled devices) subscription streaming and limited download services; (d) "bundled subscription services" which are streaming and limited download services bundled with another product or service (such as a mobile phone); and (e) "free [to the end user] nonsubscription/ad-supported services." See 37 C.F.R. § 385.13.

All but one of the Subpart C Configurations similarly constitute different business models for delivering or offering interactive streams and/or limited downloads. These include: (a) "paid locker services," which permit users to stream from the Digital Service's server copy a sound recording embodying a musical work that the user has demonstrated is present on the user's hard drive; (b) "purchased content locker services," which permit users to stream from the Digital Service's server copy a sound recording embodying a musical work that the user has demonstrated

he or she has purchased as a Subpart A Configuration; (c) “limited offerings,” which are subscription interactive streaming or limited download services where the consumer has access to a limited number of sound recordings relative to the marketplace or cannot listen to individual sound recordings on demand; and (d) “mixed service bundles” to the extent they bundle locker services or limited offerings with other non-music products or services (such as a phone). *See* 37 C.F.R. § 385.21.²

The ten different Subpart B and C categories, each with a different rate and rate structure, resulted from the settlements of the prior *Phonorecords I* and *II* proceedings.³ These categories are no longer applicable given that the Copyright Owners propose that the same rates and rate structure should apply to all interactive streams and/or limited downloads, regardless of the business model employed.⁴ In other words, the Copyright Owners propose that the rates and terms described in Section I.D below (and in the accompanying revised proposed regulations) apply to all licensed activity (interactive streams and limited downloads) in lieu of the current Subpart B and C rates and terms.

While the participants in this Proceeding that engage in licensed activity (the “Digital Services”) purportedly seek to “roll over” the current rates and rate structures in the various Subpart B and C categories (but in reality with modifications that would result in the reduction of the rates paid to Copyright Owners) the regulations clearly provide that, “[i]n any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory

² The one other Subpart C Configuration – “music bundles” – are offerings of two or more Subpart A products to end users as part of one transaction, and do not involve interactive streams or limited downloads.

³ *See Matter of Mechanical & Digital Phonorecord Delivery Rate Adjustment Proceedings*, Docket No. 2006-3 CRB DPRA (“*Phonorecords I*”); *Matter of Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB (“*Phonorecords II*”).

⁴ For music bundles, the rates set forth in Subpart A should apply to the Subpart A Configurations contained in the bundle.

license shall be established de novo.” 37 C.F.R. §§ 385.17, 385.26.⁵ However, as discussed in Copyright Owners’ Proposed Conclusions of Law submitted herewith (at COL-338), the Digital Services have completely failed to present any evidence as to the basis or rationale for any of the rates or terms in the current regulations, and failed to even mention half of the categories.

B. Revisions To Definitions And Other Changes To Proposed Regulations

As noted above, and for the reasons discussed herein and in the Copyright Owners’ Proposed Conclusions of Law (at COL-115-COL-128), while the Copyright Owners are not amending their proposed rates, they are hereby proposing a handful of changes to their proposed terms and regulations for purposes of conformity and simplification. The Copyright Owners’ specific amendments to their proposed regulations and the rationale for such amendments are as follows:

The Copyright Owners have made some minor modifications from their original proposal to the definitions of “interactive stream” and “licensee” (as shown in the blackline below). These changes were made to conform these definitions to those in the current regulations and the Digital Services’ proposals.

The Copyright Owners have made an additional change from their original proposal to the definition of “stream” (as shown in the accompanying blackline). This change was also made to more closely track the definition in the current regulations and the Digital Services’ proposals.⁶

⁵ The Copyright Owners’ proposed, streamlined rate structure will be contained in Subpart B and there will no longer be a need for a Subpart C.

⁶ Note that both the Copyright Owners’ original and modified definition of “stream” varies from the definition contained in 37 C.F.R. § 385.11 in that it adds the language “any portion of” after the phrase “digital transmission” and before “a sound recording.” The Copyright Owners’ believe this change has proven to be necessary considering that, during the proceeding, it was revealed that one Service may have made the unilateral decision to account to rights owners for only streams of a duration of thirty seconds or greater. See COL-119-COL-125. This change is consistent with the definition of “performance” in the

The Copyright Owners have made some modifications from their original proposal to the definition of “end user” (as shown in the accompanying blackline). These changes are intended to clarify the Copyright Owners’ intended definition of “end user” rather than change it, in order to eliminate concerns expressed by certain participants as well as the Board during the Hearing. *See* Tr. 1441:23-1448:7. These changes are consistent with the definition of “active subscriber” contained in Section 385.13(a)(4) of the current regulations (which establish the minima for bundled subscription services).

The Copyright Owners have added to their original proposed rates and terms a definition of “accounting period” with reference to the monthly statutory accounting provisions embodied in the controlling statute for purposes of this Proceeding. *See* 17 U.S.C. § 115(c)(5). This term is used in the current regulations but is not specifically defined. The Copyright Owners have included this definition to provide certainty to licensees of their obligations under the compulsory license, especially in light of the modifications the Copyright Owners have proposed to the existing rates and terms. The proposed definition is consistent with the applicable accounting regulations embodied at 37 C.F.R. § 210 enacted pursuant to the statutory authority at 17 U.S.C. § 115.

The Copyright Owners have deleted the definitions of “offering,” “subscription service” and “service provider” from their original proposed regulations. The proposed “offering” definition was clarifying. It was intended to make clear the business-model agnostic nature of the Copyright Owners’ rate proposal. The Copyright Owners do not believe it needs to be included in the final regulations. The definition of “subscription service” is no longer necessary in light of the deletion of the definition of “offering,” where such definition had been used. The Copyright

implementing regulations for non-interactive streaming, which define a performance as “each instance in which *any portion of* a sound recording is publicly performed to a listener . . .” 37 C.F.R. § 380.7.

Owners also believe the “service provider” definition is not necessary in light of the fact that it is undisputed that the interactive streaming services themselves are the compulsory licensees. In the event that a record label or other entity obtained the compulsory license and lawfully “passed through” the rights to an interactive streaming service, the label or entity, as the compulsory licensee, would be responsible for making the mechanical royalty payments to the copyright owner.⁷

As in their initial proposal, the Copyright Owners propose to retain without change 37 C.F.R. §§ 385.10 (the “General” section which addresses the “scope” of the subpart, and the issues of “legal compliance” and “interpretation”), 385.16 (“Reproduction and distribution rights covered”) and 385.17 (“Effect of rates”). None of the Digital Services proposed the deletion of these Sections.⁸

The Copyright Owners have made some modifications to Section 385.12(b) from their original proposal (as shown in the accompanying blackline). These revisions are made as a result of the elimination of the definitions of “offering” and “service provider,” as well as to eliminate redundant portions of that provision.

⁷ Copyright Owners have retained from their original proposal the inclusion of a definition of “play.” The Copyright Owners believe it is useful to include this definition to make clear that a royalty is payable for each play of a limited download, a fact that also is not in dispute, as the Digital Services have been accounting in such manner. *See* COF-420; *see also* Apple’s rate proposal at 2 (stating that licensees shall pay a mechanical royalty for each stream or play of a limited download”). Copyright Owners have also retained the inclusion of a definition of “copyright owner,” for clarity, which definition conforms with the definition in in Subpart A at 37 C.F.R. § 385.2, which the Copyright Royalty Board has already adopted for the forthcoming rate period. *See Phonorecords III*, Subpart A Configurations of the Mechanical License, 82 Fed. Reg. 15297 (March 28, 2017).

⁸ Google, Spotify and Pandora have proposed additional language to Section 385.10 relating to the relationship to voluntary agreements, but they have not proposed to alter any of the existing language in that section.

C. Late Fee Term

The Copyright Owners continue to propose a clarification that an existing term in Subpart A – the late fee provision contained at 37 C.F.R. § 385.4 – applies to late payments made by all licensees of any configurations under Section 115. Because of the persistently late payment of mechanical royalties, the CRJs in *Phonorecords I* adopted the Copyright Owners’ proposal that royalty payments that are not timely made be subject to a late fee of 1.5% per month (or the highest lawful rate), calculated from the date on which payment was due until the date it is received by the Copyright Owner. *See* 37 C.F.R. § 385.4. Copyright Owners proposed that the late fee apply to all licensees. However, because the participants reached a settlement with respect to Subpart B rates and terms, the CRJs placed the late fee provision in Subpart A (at 37 C.F.R. § 385.4). The Copyright Owners do not believe that it was the intent of the CRJs to limit the provision to only licensees of Subpart A Configurations, but rather, intended it to apply to all Section 115 licensees.

Regardless of the CRJs’ intent at the time, there is no reason why one group of licensees (those reproducing and distributing physical phonorecords, permanent digital downloads or ringtones) should be subject to a late fee provision while another group of licensees (those reproducing and distributing interactive streams and limited downloads) should not be subject to such a provision. Most importantly, late payments remain a significant problem with respect to interactive streams and limited downloads. *See* COL-101-COL-114. As the CRJs determined in *Phonorecords I*, a late fee is appropriate to ““provid[e] an effective incentive to the licensee to make payments timely,”” and that a fee of 1.5% per month is not ““so high that it is punitive”” and achieves the correct balance.⁹ The Copyright Owners therefore propose that the regulations be

⁹ Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding (“*Phonorecords I* Final Rule”), Docket No. 2005-3 CRB DPRA, 74 Fed. Reg. 4510, 4510 (Jan. 28, 2009) (quoting Final Rule, Determination of Rates and Terms for Preexisting Subscription Services and Satellite

amended to clarify that the late fee contained in 37 C.F.R. § 385.4, which the Copyright Royalty Board has already adopted for the coming rate period, applies with equal force to Digital Services making interactive streams or limited downloads.¹⁰

D. Proposed Amended Royalty Rates and Terms

The Copyright Owners propose the following rates and terms for interactive streaming and limited downloads:

Rates

A rate equal to the greater of:

- a. \$0.0015 per-play for licensed activity (for mechanical rights only) during the accounting period; and
- b. \$1.06 per-end user of licensed activity the offering during the accounting period per month (for mechanical rights only).

Definitions¹¹

1. Accounting period means the monthly period specified at 17 U.S.C. 115(c)(5) for which payment and a statement of account is due on the 20th day of the immediately succeeding month consistent with the regulations embodied at 37 C.F.R. 210 or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. § 115.
- ~~1.2.~~ Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license at 17 U.S.C. § 115.
- ~~2.3.~~ End user means each unique individual ~~or entity that~~ (a) pays a fee for has access to a standalone music service offering licensed activity during the relevant accounting period, or (b) makes at least one play of licensed activity during the relevant accounting period ~~an offering whether by virtue of the purchase of a~~

Digital Audio Radio Services (“SDARS I Final Rule”), Docket No. 2006-1 CRB DSTRA, 73 Fed. Reg. 4080, 4099 (Jan. 24, 2008)).

¹⁰ Note that the late payment fee is not intended to be in lieu of, but rather a supplement to, the Copyright Owners’ statutory right to terminate a compulsory license for failure to account or pay royalties on time.

¹¹ Definitions currently contained in 37 C.F.R. Part 385 Subparts B and C that are not expressly included herein shall no longer apply.

~~subscription to access the offering or otherwise. Licensees or service providers shall be required to obtain from each individual or entity that wishes to access licensed activity an offering a unique user name and valid e-mail address, and to provide each such individual or entity with a unique password or identifier, prior to granting such access.~~

~~3.4. *Interactive stream* means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. § 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. § 114(d)(2). An interactive stream is a digital phonorecord delivery under 17 U.S.C. § 115(d).~~

~~4.5. *Licensee* means a person that has obtained a compulsory license to engage in licensed activity under 17 U.S.C. § 115 and its implementing regulations.~~

~~5.6. *Licensed activity* means interactive streams or limited downloads of musical works, as applicable.~~

~~6.7. *Limited download* means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—~~

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the ~~service provider~~licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the ~~licensee~~service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. §-115(c)(3)(C) and (D~~d~~).

~~7. *Offering* means a licensee's or service provider's offering of licensed activity under Subpart B. An offering shall include, without limitation, any licensed activity accessible by an end user via a subscription service; on a per play basis; via an advertiser supported or other free to the user or "promotional" basis; on a portable, non-portable or mixed use basis; via a "cloud" or "locker" service; whether bundled~~

~~with any other offering or other music or non music product or service; or otherwise.~~

8. *Play* means, for purposes of this subpart, the digital transmission of any portion of a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download.

~~9. *Service provider* means that entity (which may or may not be the licensee) that, with respect to the licensed activity,~~

~~(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users; and~~

~~(2) Is able to report fully on licensed activity on or via the offering and the number of end users of the offering during each accounting period, or to procure such reporting, and to the extent applicable, verify such reporting through an audit.~~

~~10.9. *Stream* means the digital transmission of any portion of a sound recording of a musical work to an end user—~~

~~(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and~~

~~(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and~~

~~(3) That is also subject to listening as a public performance of the musical work.~~

~~11.10. *Streaming cache reproduction* means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service,~~

and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

~~12. — *Subscription service* means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less, whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services.~~

Term

Late Fee: Without affecting any right to terminate a license for failure to report or pay royalties as provided in 17 U.S.C. § 115 (c)(6), a licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title, or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. 115(c)(5). Late fees shall accrue from the due date until payment is received by the Copyright Owner.¹²

¹² The Copyright Owners continue to propose to retain without change 37 C.F.R. §§ 385.10 (the “General” section which addresses the “scope” of the subpart, and the issues of “legal compliance” and “interpretation”), 385.16 (“Reproduction and distribution rights covered”) and 385.17 (“Effect of rates”). None of the Digital Services proposed the deletion of these Sections.

Appendix A

PROPOSED SUBPART B REGULATIONS [REDLINED]¹³

Subpart B – Interactive Streaming and Limited Downloads

37 C.F.R.

§ 385.10 General.

Effective: January 1, 2018

(a) *Scope.* This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. §-115.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. §-115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. §-115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. §-115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. §-115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. §-115, must be obtained.

§ 385.11 Definitions.

Effective: January 1, 2018

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

Accounting period means the monthly period specified at 17 U.S.C. 115(c)(5) for which payment and a statement of account is due on the 20th day of the immediately succeeding month consistent with the regulations embodied at 37 C.F.R. 210 or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. 115.

Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license at 17 U.S.C. § 115.

¹³ Upon adoption of these proposed rates and terms, corresponding payment and accounting regulations will be implemented to conform the provisions currently embodied at 37 C.F.R. § 210. *See* 17 U.S.C. § 115(c)(5).

End user means each unique individual or entity that (a) ~~pays a fee for~~ has access to a standalone music service ~~an offering~~ offering licensed activity during the relevant accounting period, or (b) makes at least one play of licensed activity during the relevant accounting period ~~whether by virtue of the purchase of a subscription to access the offering or otherwise~~. Licensees or service providers shall be required to obtain from each individual or entity that wishes to access an offering licensed activity a unique user name and valid e-mail address, and to provide each such individual or entity with a unique password or identifier, prior to granting such access.

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. § 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. § 114(d)(2). ~~An interactive stream is a digital phonorecord delivery under 17 U.S.C. § 115(d).~~

Licensee means a person that has obtained a compulsory license ~~to engage in licensed activity~~ under 17 U.S.C. § 115 and its implementing regulations.

Licensed activity means interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the ~~service provider~~ licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the ~~service provider~~ licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. § 115(c)(3)(C) and (D).

Offering ~~means a licensee's or service provider's offering of licensed activity under Subpart B. An offering shall include, without limitation, any licensed activity accessible by an end user via a subscription service; on a per-play basis; via an advertiser supported or other free-to-the-user or "promotional" basis; on a portable, non-portable or mixed use basis; via a "cloud" or "locker" service; whether bundled with any other offering or other music or non-music product or service; or otherwise.~~

Play means, for purposes of this subpart, the digital transmission of any portion of a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download.

~~*Service provider* means that entity (which may or may not be the licensee) that, with respect to the licensed activity,~~

~~(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users; and~~

~~(2) Is able to report fully on licensed activity on or via the offering or procure such reporting, and the number of end users of the offering during each accounting period or procure such reporting, and to the extent applicable, verify such reporting through an audit.~~

Stream means the digital transmission of any portion of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; ~~and,~~

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and -

(3) That is also subject to listening as a public performance of the musical work.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

~~*Subscription service* means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less, whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services.~~

§ 385.12 Royalty rates for making and distributing interactive streams and limited downloads.

Effective: January 1, 2018

(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. § 115 shall pay royalties therefor that are calculated as provided in this section.

(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided ~~below, in paragraph (b) of this section. If a service provider makes different offerings, royalties must be separately calculated with respect to each such offering.~~

(1) *Step 1:* Calculate the Per-Play Mechanical Royalty ~~for the offering.~~ For each accounting period, calculate the mechanical royalty ~~for each of the service provider's offerings~~ at \$0.0015 per-play.

(2) *Step 2:* Calculate the Per-End User Mechanical Royalty ~~for the offering.~~ For each accounting period, calculate the mechanical royalty ~~for each of the service provider's offerings~~ at \$1.06 per-end user ~~of the offering.~~

(3) *Step 3:* Determine the greater of Step 1 and Step 2. The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the ~~licensee service provider~~ by virtue of its licensed activity ~~for a particular offering during the accounting period.~~ This amount is the greater of the result determined in Step 1 at paragraph (b)(1) of this section, and the result determined in Step 2 at paragraph (b)(2).

(4) *Step 4:* Calculate the Per-Work Royalty Allocation ~~for Each Relevant Work.~~

(a) In the event that the amount calculated in Step 1 at paragraph (b)(1) is greater than the amount calculated in Step (2) at paragraph (b)(2), then the royalty payable for each relevant work shall be the number of times each relevant work was played during the accounting period, multiplied by \$0.0015.

(b) In the event that the amount calculated in Step 2 ~~at~~ of paragraph (b)(2) is greater than the amount calculated in Step (1) ~~at~~ of paragraph (b)(1), then a per-work royalty allocation for each relevant work must be made. ~~This amount is the amount payable for the reproduction and distribution of each musical work played through a particular offering during the accounting period. To determine this amount, the result determined in Step 2 at paragraph (b)(2) of this section must be allocated to each musical work played through the offering.~~ The allocation shall be accomplished by dividing the payable royalty pool determined in Step 2 ~~for such offering~~ by the total number of plays of all musical works ~~through such offering~~ during the accounting period to yield a per-play allocation, and multiplying that result by the number of plays of each musical work ~~through the offering~~ during the accounting period.

§ 385.13 Late payments.

Effective: January 1, 2018

Without affecting any right to terminate a license for failure to report or pay royalties as provided in 17 U.S.C. § 115 (c)(6), a Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title, or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. 115(c)(5). Late fees shall accrue from the due date until payment is received by the Copyright Owner.

§ 385.14 [Reserved]

Effective: _____

§ 385.15 [Reserved by 74 FR 6834]

§ 385.16 Reproduction and distribution rights covered.

Effective: January 1, 2018

A compulsory license under 17 U.S.C. §-115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

§ 385.17 Effect of rates.

Effective: January 1, 2018

In any future proceedings under 17 U.S.C.-§ 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Appendix B

PROPOSED SUBPART B REGULATIONS [CLEAN]¹⁴

Subpart B – Interactive Streaming and Limited Downloads

37 C.F.R.

§ 385.10 General.

Effective: January 1, 2018

(a) *Scope.* This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

§ 385.11 Definitions.

Effective: January 1, 2018

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

Accounting period means the monthly period specified at 17 U.S.C. 115(c)(5) for which payment and a statement of account is due on the 20th day of the immediately succeeding month consistent with the regulations embodied at 37 C.F.R. 210 or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. § 115.

Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license at 17 U.S.C. 115.

¹⁴ Upon adoption of these proposed rates and terms, corresponding payment and accounting regulations will be implemented to conform the provisions currently embodied at 37 C.F.R. § 210. See 17 U.S.C. 115(c)(5).

End user means each unique individual that (a) pays a fee for access to a standalone music service offering licensed activity during the relevant accounting period, or (b) makes at least one play of licensed activity during the relevant accounting period. Licensees shall be required to obtain from each individual that wishes to access licensed activity a unique user name and valid e-mail address, and to provide each such individual with a unique password or identifier, prior to granting such access.

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Licensee means a person that has obtained a compulsory license under 17 U.S.C. 115 and its implementing regulations.

Licensed activity means interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

Play means, for purposes of this subpart, the digital transmission of any portion of a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download.

Stream means the digital transmission of any portion of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and

(3) That is also subject to listening as a public performance of the musical work.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

§ 385.12 Royalty rates for making and distributing interactive streams and limited downloads.

Effective: January 1, 2018

(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section.

(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided below.

(1) *Step 1:* Calculate the Per-Play Mechanical Royalty. For each accounting period, calculate the mechanical royalty at \$0.0015 per-play.

(2) *Step 2:* Calculate the Per-End User Mechanical Royalty. For each accounting period, calculate the mechanical royalty at \$1.06 per-end user.

(3) *Step 3:* Determine the greater of Step 1 and Step 2. The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the licensee by virtue of its licensed activity during the accounting period. This amount is the greater of the result determined in Step 1 at paragraph (b)(1) of this section, and the result determined in Step 2 at paragraph (b)(2).

(4) *Step 4:* Calculate the Per-Work Royalty Allocation.

(a) In the event that the amount calculated in Step 1 at paragraph (b)(1) is greater than the amount calculated in Step (2) at paragraph (b)(2), then the royalty payable for each relevant

work shall be the number of times each relevant work was played during the accounting period, multiplied by \$0.0015.

(b) In the event that the amount calculated in Step 2 at paragraph (b)(2) is greater than the amount calculated in Step (1) at paragraph (b)(1), then a per-work royalty allocation for each relevant work must be made. The allocation shall be accomplished by dividing the payable royalty pool determined in Step 2 by the total number of plays of all musical works during the accounting period to yield a per-play allocation, and multiplying that result by the number of plays of each musical work during the accounting period.

§ 385.13 Late payments.

Effective: January 1, 2018

Without affecting any right to terminate a license for failure to report or pay royalties as provided in 17 U.S.C. 115 (c)(6), a Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title, or any applicable corresponding successor regulations enacted pursuant to 17 U.S.C. 115(c)(5). Late fees shall accrue from the due date until payment is received by the Copyright Owner.

§ 385.14 [Reserved]

Effective: _____

§ 385.15 [Reserved by 74 FR 6834]

§ 385.16 Reproduction and distribution rights covered.

Effective: January 1, 2018

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

§ 385.17 Effect of rates.

Effective: January 1, 2018

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.