

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

In re

Determination of Royalty Rates and
Terms for Ephemeral Recordings and
Digital Performance of Sound Recordings
(*Web IV*)

Docket No. 2014-CRB-0001-WR
(2016-2020)

JOINT MOTION TO ADOPT PARTIAL SETTLEMENT

SoundExchange, Inc. (“SoundExchange”) and College Broadcasters, Inc. (“CBI”) (collectively the “Parties”) have reached a partial settlement of the above-captioned proceeding (the “Proceeding”) for certain internet transmissions by college radio stations and other noncommercial educational webcasters. The Parties are pleased to submit the attached proposed regulatory language (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 promptly adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, and related ephemeral recordings, as more specifically set forth in the Settlement. The Parties further request that the Judges determine by approximately December 1, 2014 whether or not they will adopt the Settlement.

I. The Parties

SoundExchange and CBI are both participants in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both sound recording copyright owners and performers. The Copyright Royalty Judges have designated SoundExchange as the collective to receive and distribute royalties under Sections 112(e) and 114 on behalf of all copyright owners and performers, and SoundExchange has about 18,000 rights owner members and more than 40,000 artist members.

CBI is a national nonprofit association, the members of which include college, university and high school radio and television stations and other electronic media organizations. Many of CBI's radio station and other members make internet transmissions subject to licensing under Sections 112(e) and 114.

II. Nature of the Settlement

The Parties have concluded an agreement concerning royalty rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet during the period 2016-2020. That agreement generally continues in effect the present provisions of 37 C.F.R. Part 380 Subpart C, which was itself adopted pursuant to 17 U.S.C. § 801(b)(7)(A) as part of the *Webcasting III* proceeding, with certain adjustments in detail. These adjustments are primarily directed toward: (1) more strictly limiting eligibility for the rates set forth herein to services that remain below 159,140 aggregate tuning hours per channel or station per month; and (2) somewhat increasing the listenership cap for services electing the proxy reporting option.

III. Prompt Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), 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.” Such an agreement may serve as the basis of proposed regulations 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,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Congress desired that royalty rates and terms be established by settlement, rather than litigation, whenever possible, to “reduce[] the need to conduct full-fledged ratesetting . . . proceedings” and thus “generate savings while expediting the disposition of proceedings.” H. Rep. No. 108-408, at 24. It bears emphasis that even a partial settlement like this one not only allows the parties to the settlement to conserve their resources, but also streamlines further proceedings to the benefit of the Judges and the other participants. Prompt action on settlements by the Judges also would allow the parties to a settlement know at an early date whether the rates and terms in the settlement will become the statutory rates and terms, and thus prevent prejudice to their position as participants in a proceeding if those rates and terms are not ultimately adopted.

However, achieving these advantages depends upon prompt action by the Judges to address Settlements when they are reached, so the parties to a settlement do not have to participate in litigation to set rates and terms for which there is already consensus. As a result,

Congress contemplated that the Judges would not wait until the end of a proceeding to act on settlements reached much earlier. The Judges are specifically authorized to adopt settlements reached “at any time during the proceeding.” 17 U.S.C. § 801(b)(7)(A). In describing this provision, Congress explained that the Judges may need to act on settlements before they have a fully-developed record before them:

Because settlement agreements can be offered at any time before final disposition of a proceeding, the extent of the record before the CRJs may vary widely depending on the timing of the settlement agreement. Bearing in mind the objective of encouraging settlement, the CRJs are to use their best judgment as to whether the record before them indicates the proposed agreement is not likely to meet the relevant statutory standard.

H. Rep. No. 108-408, at 24. Here, prompt action on the Settlement is important to both of the Parties. CBI is a member-funded organization consisting of stations with limited budgets, and which is dependent on pro bono counsel in order to participate in these proceedings. *See* 17 C.F.R. § 350.2. For its part, SoundExchange does not wish to spend the money of artists and record companies litigating issues that have been settled.

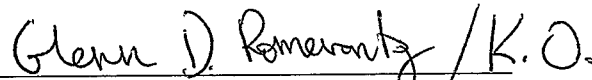
Accordingly, the Parties respectfully request that the Judges publish the Settlement for comment, and promptly adopt the Settlement in its entirety as the statutory rates and terms for Eligible Transmissions by Noncommercial Educational Webcasters for the period 2016-2020. The Parties specifically request that the Judges endeavor to decide by approximately December 1, 2014 whether or not they will adopt the Settlement.¹ The schedule for this Proceeding requires filing of Amended Written Direct Statements by December 22, 2014, and assumes that

¹ If the Judges were to publish the Settlement in the *Federal Register* in October, with comments due a few weeks thereafter, the Judges could potentially adopt the Settlement by approximately December 1. In the *Webcasting III* proceeding, the Judges provided a three-week comment period for the settlements submitted pursuant to 17 U.S.C. § 801(b)(7)(A). *See Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 75 Fed. Reg. 16,377 (Apr. 1, 2010).

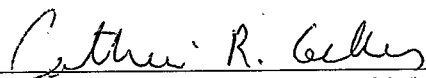
preparation for the Initial Hearing will take place during the winter. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Exhibit A (Feb. 19, 2014). Knowing by approximately December 1 whether it will be necessary to litigate the issues addressed by the Settlement would allow the Parties to address those issues in Amended Written Direct Statements if necessary, or avoid trial preparation that would not be necessary if those issues will not need to be litigated.

Dated: October 7, 2014

Respectfully submitted,



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ATTACHMENT
PROPOSED REGULATIONS

The provisions of 37 C.F.R. Part 380 Subpart C continue in effect except as modified below. (~~Bold strikethrough~~ indicates language to be deleted and **bold underline** indicates language to be added.)

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, ~~2011~~ **2016**, through December 31, ~~2015~~ **2020**.

* * *

§ 380.21 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 ~~2011-2015~~ **2016-2020** license period, the Collective is SoundExchange, Inc.

* * *

Noncommercial Educational Webcaster means **a** Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; ~~and~~

(4) Is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396; and

(5) Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month.

* * *

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

(a) *Minimum fee for eligible Noncommercial Educational Webcasters.* Each Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and does not expect to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year shall pay an annual, nonrefundable minimum fee of \$500 (the "Minimum Fee") for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. The Minimum Fee shall constitute the annual per channel or per station royalty for all Eligible Transmissions totaling not more than 159,140 Aggregate Tuning Hours in a month on any individual channel or station, and for Ephemeral Recordings to enable such Eligible Transmissions. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a \$100 annual fee (the "Proxy Fee") to the Collective.

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

~~(1) 2011: \$0.0017;~~

~~(2) 2012: \$0.0020;~~

~~(3) 2013: \$0.0022;~~

~~(4) 2014: \$0.0023;~~

~~(5) 2015: \$0.0025.~~

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

(b) Consequences of unexpectedly exceeding ATH cap. In the case of a Noncommercial Educational Webcaster eligible to pay royalties under paragraph (a) that unexpectedly makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year:

(1) The Noncommercial Educational Webcaster shall, for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters;

[Note: It is assumed that general noncommercial webcasting rates determined in the Webcasting IV proceeding will be set forth in Part 380 Subpart A. If such rates are codified elsewhere, an appropriate reference should be substituted here and in other places where these proposed regulations refer to Part 380 Subpart A.]

(2) The Minimum Fee paid by the Noncommercial Educational Webcaster for such calendar year will be credited to the amounts payable under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of such month, notify the Collective that it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on a channel or station in a month; pay the Collective any amounts for such month due under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and provide the Collective a statement of account pursuant to Part 380 Subpart A.

(c) Royalties for other Noncommercial Educational Webcasters. A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) shall pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters.

(d) Estimation of performances. In the case of a Noncommercial Educational Webcaster that is required to pay royalties under paragraph (b) or (c) on a per-performance basis,

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

~~(ee) Ephemeral royalty.~~ The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster ~~and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) through (c) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.35% of the total royalties payable under such paragraphs.~~

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

* * *

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

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

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

~~(d) Usage fees.~~ ~~In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments,~~

~~for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent. [Reserved]~~

* * *

(f) *Statements of account.* Any payment due under § 380.22(a) shall be accompanied by a corresponding statement of account on a form provided by the Collective. A statement of account shall contain the following information:

* * *

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

* * *

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

* * *

(9) A statement to the following effect:

I, the undersigned ~~officer or other~~ duly authorized ~~faculty member or administrator~~ representative of the applicable educational institution, have examined this statement of account; ~~and~~ hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence; ~~and further certify that the licensee entity named herein qualifies as a Noncommercial Educational Webcaster for the relevant year, and did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required additional royalties.~~

(g) Reporting by Noncommercial Educational Webcasters in general—

(1) *Reporting waiver.* In light of the unique business and operational circumstances ~~currently existing~~ with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,00080,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,00080,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,00080,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver

described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding ~~55,000~~**80,000** total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by ~~an officer or another~~ a duly authorized ~~faculty member or administrator~~ representative of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

* * *

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

- (i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;
- (ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or
- (iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section.

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

[Note: It is assumed that the reporting requirements for webcasters will remain in § 370.4, and that § 370.4(d)(2) will continue to specify the content of reports of use. If such provisions end up elsewhere as a result of the notice and recordkeeping rulemaking, appropriate references should be substituted. The Settlement is intended to be without prejudice to the positions expressed by the Parties in the notice and recordkeeping rulemaking.]



* * *



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on October 7, 2014, I caused a copy of parties' **JOINT MOTION TO ADOPT PARTIAL SETTLEMENT** to be served by **OVERNIGHT MAIL** and **EMAIL** to the Participants as indicated below:

Participants

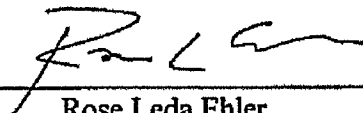
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