

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In the Matter of:

Determination of Rates and Terms for
Making and Distributing Phonorecords
(Phonorecords III)

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

SERVICES' JOINT MOTION FOR REHEARING
TO CLARIFY THE REGULATIONS

INTRODUCTION

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, Amazon Digital Services, LLC (“Amazon”), Google Inc. (“Google”), Pandora Media, Inc. (“Pandora”), and Spotify USA Inc. (“Spotify”) (collectively, the “Services”) respectfully request clarification of the Regulatory Terms attached to the Court’s January 27, 2018 Initial Determination. This motion for rehearing to clarify the regulations is directed solely to fixing typographical and other clerical errors, and revising or eliminating certain ambiguities in the Regulatory Terms appended to the Initial Determination as Attachment A that are specifically identified herein. The Services have styled this motion principally as one for clarification, as the Services believe the existing record supports these clarifications. The Services do not concede the correctness of any part of the Initial Determination and reserve the right to challenge any and all aspects of the Initial Determination and Regulatory Terms on appeal.

STANDARD OF REVIEW

The Copyright Royalty Judges have the inherent power to clarify the regulations pursuant to 17 U.S.C. § 803(c)(4). The Copyright Royalty Judges “may grant rehearing upon a showing

that any aspect of the determination may be erroneous.” 37 C.F.R. § 353.1. Rehearing is appropriate where, *inter alia*, “there is a need to correct a clear error or prevent manifest injustice.” Order Denying Motions for Rehearing, *SDARS II*, Dkt. No. 2011-1 CRB PSS/SATELLITE II, Jan. 30, 2013 (quotations omitted).

ARGUMENT

I. Typographical and Clerical Errors

The attached Attachment A is a redline¹ that shows all the Services’ proposed typographical and clerical corrections to the regulations. The categories of apparent errors and illustrative examples are set forth below.

A. Table of Contents

The table of contents included with the regulations appeared to include a few outdated section headings (for example, 385.3 is listed in the table of contents as “Incidental Deliveries,” but the actual section is titled “Late Payments”). The attached redline conforms the table of contents to the section headings.

B. Paragraph Numbering

Certain subsection paragraphs appear to have been numbered incorrectly. For example, the definition of Free Trial Offering includes numbered paragraphs (1) and (3), but no paragraph (2). The attached redline renumbers paragraphs sequentially within each section.

C. Cross References

Certain cross references to other sections appear to be incomplete or incorrect. For example, Section 385.4(b) refers to “this section 385.5,” but section 385.5 does not exist, and the appropriate cross reference should be “this section 385.4.” In another example, the definition of

¹ The Services can also provide a clean version of the regulations, with all the Services’ proposed changes accepted, upon request.

Free Trial Offering makes a reference to “385.X.” The attached redline suggests corrections for these apparent errors.

D. Other Typographical Corrections

The other typographical corrections included in the attached redline consist of extra commas or inadvertent double negatives (for example, the definition of “Promotional Offering” uses both “nor” and “no consideration”—the latter “no” should be struck to avoid radically altering the meaning of that term in the current regulations) or extra articles (for example, the definition of “Interactive Stream” includes an extra “the” before the word “a”).

II. Definitional Issues

The Services also have identified extraneous, confusing, or incorrect definitions in Section 385.2. The errors associated with these definitions and their use in substantive provisions of the Regulatory Terms are described below, and the redline attached as Attachment A contains proposed corrections.

A. Certain Defined Terms Are Not Used

The defined terms “Performance Royalties” and “Offering Service” are never used. Accordingly, the Services propose that these definitions be struck. With regard to “Performance Royalties” in particular, the Services note that the term exists, undefined, in the current regulations, and there have been no disputes as to its meaning. Should the Judges determine that a definition of “Performance Royalties” is needed, the Services submit that the definition as currently drafted should be edited to track the language in Section 385.21(b)(2), for the reasons discussed below in Section III.C.3.

The defined terms “Service Revenue,” “Play,” “Offering,” “Bundle,” and “Subscription Service,” are not used as defined terms (*i.e.*, with the appropriate capitalization) in all of the

appropriate sections. Accordingly, the attached redline proposes using defined terms in a consistent manner.

B. Certain Capitalized Terms Are Used But Not Defined

Certain capitalized terms are used that are not defined terms in Section 385.2. For example, Section 385.4 uses the capitalized term “Free Trial” that is not defined. The attached redline replaces the undefined term “Free Trial” with the correct, defined term “Free Trial Offering.” In another example, “Service” appears in uppercase throughout the regulations, but is not a defined term. The attached redline proposes reverting to the lowercase “service” that is used in the current regulations.

C. Clarification of Certain Definitions

1. Definition of “Licensed Activity”

The definition of “Licensed Activity” as currently drafted uses the phrase “includes but is not limited to,” which is broad and could be misinterpreted to sweep in activity that does not require a mechanical license or is not licensed pursuant to 17 U.S.C. § 115. Accordingly, the Services’ redline proposes a revised definition of “Licensed Activity” that harmonizes the definition to its use in subparts C and D, to mean “Interactive Streams or Limited Downloads of musical works subject to Subparts C and D of this title, and licensed pursuant to 17 U.S.C. 115.”

2. Definition of “Offering”

The definition of “Offering” as “activity requiring a license under 17 USC 115” is vague given the acknowledged role of direct licensing in the regulations, *see* § 385.1(c), and the language in § 385.20(b) providing that “[n]either 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.” Furthermore, the Services do not believe the Judges intended to include revenue related to the sale of physical phonorecords in the calculation of royalties under Subpart C. However, as written, both the definitions of “Relevant Page” and “Service Revenue” reference the defined term “Offering,” which incorporates “physical and general” deliveries. This leaves open the possibility that ad revenue derived from webpages for physical phonorecord sales could be included in Subpart C revenue calculations. Because a separate royalty rate exists under Subpart B for physical phonorecords, and because the terms Service Revenue and Relevant Page are only used in the calculation of Subpart C royalties, the Services believe the inclusion of “physical” in the definition of Offering is an apparent error. For the foregoing reasons, the Services request amendment of the definition of Offering as shown in Attachment A.

3. *Definition of “Performance Royalty”*

“Performance Royalty” is defined in Section 385.2 as:

[T]he final and non-appealable royalty for the right to performance publicly [sic] musical works in any of the forms covered by this part 385, as those royalties are determined from time to time by the U.S. District Court for the Southern District of New [sic] sitting as the “Rate Court” acting in furtherance of the Consent Decrees beginning with *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶ 56,096 (W.D. Wis. 1941).

The Services respectfully submit that this definition is incorrect for at least three reasons. First, the Southern District of New York rate courts, established as part of the consent decrees governing only the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), determine royalties only when parties cannot reach a negotiated license and petition the courts to determine what reasonable royalties for the requested license are. *See, e.g., In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 320 (S.D.N.Y. 2014) (“The parties having been unable to reach agreement on an appropriate licensing fee, pursuant to Article IX of

the consent decree under which ASCAP operates...Pandora requested on November 5, 2012 that this Court set a rate for that licensing fee.”). Most performance royalties paid to ASCAP and BMI are *not* paid pursuant to a rate determined by a rate court proceeding, but rather, pursuant to private negotiations between licensees and each of ASCAP and BMI that result in agreed-upon rates without rate court review. Second, and as acknowledged by the Judges in their Initial Determination, there are two other performing rights organizations (“PROs”) in the United States, SESAC and Global Music Rights (“GMR”), that are not subject to *any* consent decrees or rate court proceedings—and new PROs could emerge in the future. *See* Initial Determination at 23 (discussing the “emergence of a fourth PRO, Global Music Rights (GMR), in addition to ASCAP and BMI, and in addition to SESAC which, like GMR, is not subject to a consent decree and rate court review”). Third, services frequently obtain some, and in some cases most, of the performance rights they need directly from rightsholders rather than via PROs. Absent revision, the vast majority of public performance royalties paid by the Services in connection with the same activities for which they also require mechanical licenses would be excluded from the definition of “Performance Royalty.” The Services do not believe the Judges intended to exclude the vast majority of performance royalties paid for the public performance of musical works from their definition of “Performance Royalty,” as the Judges’ revised section 385.21(b)(2) quite clearly provides for the subtraction of “the total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works.” This section does not limit the amount of deductible public performance royalties to just those determined by the ASCAP and BMI rate courts.

As noted above, the Services do not believe that a definition of “performance royalties” is required. The term exists, undefined, in the current regulations, and there have been no disputes

as to its meaning. Nonetheless, if the Judges determine that a definition is required, the Services respectfully submit that the definition should be revised to provide for *all* performance royalties paid to *any* performing rights organization, copyright owner, publisher, or agent of a copyright owner for the right to publicly perform musical works, to conform to the Judges' revised regulations providing for the subtraction of performance royalties. *See* § 385.21(b)(2) (providing for the subtraction of the "total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such offering during the accounting period that constitute licensed activity"); *see also* Initial Determination at 5 (noting that the deduction should be for "the actual amount services pay for the phonorecord performance right") and 34-35 (finding that "the deduction of performance royalties accounts appropriately for the perfect complementarity of the performance and mechanical licenses").

4. *Definition of "Play"*

The current definition of "Play" includes a reference to a "limited download of 30 seconds or more." It is unclear what is meant by this phrase, and it could be misconstrued to only refer to limited downloads of sound recordings that are only 30 seconds or more in duration, rather than a *play* of a limited download of a sound recording that is 30 seconds or more. To avoid this ambiguity, the definition should be an "Interactive Stream or play of a Limited Download of 30 seconds or more." Further, the third and final reference to "30 second" should be struck. If a track is under 30 seconds, it cannot be played for 30 seconds or more.

5. *Definition of "Fraudulent Stream"*

The revised regulations define "Fraudulent Stream" as "a Stream that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed Fraudulent Streams." This definition

should be clarified to take into account both “Streams” *and* “Plays” (using the defined term rather than the undefined “play”), as the latter also includes streams of Limited Downloads, as provided in the attached redline.

6. *Definition of “Locker Service”*

The definition of “Locker Service” as currently drafted is missing one or more clauses, as it currently reads: “Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Interactive Streams, Permanent Digital Downloads, Restricted Downloads or Ringtones But [sic] does not mean any part of a Service’s products otherwise meeting this definition, but as to which the Service has not obtained a section 115 license.” The Services would propose revising the definition as provided in the attached redline.

7. *Definition of “Family Plan or Family Account”*

The regulations currently provide that a “Family Plan or Family Account means a discounted Offering to be shared by two or more family members for a single subscription price.” The use of the word “discounted” is both confusing and unnecessary, as family plans may be discounted *as compared against* multiple subscriptions for multiple family members but will be more expensive than a single subscription. The Services respectfully submit that striking “discounted” would eliminate this potential confusion without changing the intended meaning of this term.

8. *Use of “Family Plan End User”*

Section 385.22(4)(b) provides that a “Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family plan end user who subscribed for only part of a calendar month.” In addition to capitalizing “Plan” in accordance with its use as a defined term, the attached redline proposes replacing “end user” with “account,” since the defined term “End

User” is limited to “each unique person.” However, since Family Plans include more than one unique user, “account” is a more apt means of describing such plans.

9. *“Due Date” Not Defined in Section 385.3*

The revised regulations provide that “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. Late fees shall accrue from the due date until payment is received by the Copyright Owner.” The majority’s Initial Determination notes that this provision was added to be consistent with late fees payable under the current Subpart A regulations. *See* Initial Determination at 94 (“The Judges see no reason for Copyright Owners to receive late fees for “subpart A” activities, but forego [sic] late fees for other licensed activities.”). The new late-fee language mirrors the late-fee language in 37 C.F.R. § 385.4 of the current Subpart A regulations, except it deletes the provision, appearing in the current regulations, which provides that the “due date” is that “set forth in § 210.16(g)(1) of this title.”

Section 210.16(g)(1) sets forth procedures for royalties and statements of account under the compulsory license, and provides: (1) that service of a monthly statement of account on a copyright owner may be accomplished “by means of service on either the copyright owner or an agent of the copyright owner,” and (2) that the “royalty payment for a month also shall be served on” either the copyright owner or its agent “on or before the 20th day of the immediately succeeding month.” Without the proposed incorporation of section 210.16(g)(1), the regulation will be ambiguous and dangerously vague in two important respects. First, the “due date” for payments will not be clear. Second, it will not be clear—as it should be—that service on an agent is sufficient for purposes of making a timely payment. Accordingly, the Services respectfully submit that the reference to section 210.16(g)(1) should be added to the late fee provision, with

added language clarifying that the due date includes annual statements and that payment may also be made upon an agent for the copyright owner.

CONCLUSION

For the foregoing reasons, the Court should grant the Services' motion for rehearing to clarify the regulations.

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Respectfully submitted,

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Regulatory Terms

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

Subpart A – Regulations of General Application

- §385.1 General
- §385.2 Definitions
- §385.3 ~~Incidental Deliveries~~§385.4 Late Payments
- §~~385.5 Audits~~385.4 Recordkeeping

Subpart B – Physical Phonorecord Deliveries, Permanent Digital Downloads, Ringtones, and Music Bundles

- §385.10 Scope
- ~~§385.11~~ Royalty Rates
- ~~§385.11 [Reserved]~~

Subpart C – Interactive Streaming, Limited Downloads, Limited Offerings, ~~Mixed Bundles, and Lockers~~Locker Services, and Other Delivery Configurations

- §385.20 General
- §385.21 ~~Calculation of~~ Royalty ~~Payments~~Rates and Calculations
- ~~§385.22~~ Subscriber-based Royalty Floors for Specific Types of Services

Subpart D – Promotional ~~and Free-to-the-User~~ Offerings, Free Trial Offerings, Certain Purchased Content Locker Services, and Incidental Deliveries

- §385.30 ~~Promotional Offerings~~Scope
- §385.31 ~~Free-to-the-User Offerings~~Royalty Rates

Subpart A—Regulations of General Application

§385.1 General.

(a) *Scope.* This part 385 establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart A contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) *Legal compliance.* Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part 385 describes rates and terms for the compulsory license only.

(c) *Relationship to voluntary agreements.* The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply *in lieu* of the rates and terms of this part.

§385.2 Definitions.

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(5) and any related regulations.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a record company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundle means any Offering that (1) A [Service](#)[service](#) delivers to End Users together with one or more non-music services (e.g., Internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole ~~offering~~[Offering](#); or

(2) Provides to End Users two or more of physical phonorecords, Permanent Digital Downloads or Ringtones as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of music bundles containing one or more physical phonorecords, the [Service](#)[service](#) must sell the physical phonorecord component of the music bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the music bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the music bundle contains a set of Digital Phonorecord Deliveries sold by the same Record Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the [Service](#)[service](#) may include in the same bundle up to 5 sound recordings of musical works that are included in the standalone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the [Service](#)[service](#) must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the music bundle. In the case of music bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the music bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part 385 pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(d).

End User means each unique person that (a) pays a subscription fee for an Offering during the relevant Accounting Period or (b) makes at least one Play during the relevant Accounting Period.

Family Plan or Family Account means ~~a discounted~~[an](#) Offering to be shared by two or more family members for a single subscription price.

Fraudulent Stream means a Stream ~~that~~ or a Play that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all ~~plays~~ Plays after ~~play~~ Play 50 shall be deemed Fraudulent Streams.

Free Trial Offering means a Record Company's transmission of or authorization to transmit a sound recording embodying a musical work when

(1) Neither the Service service nor the Record Company, nor any person or entity acting on behalf of or in lieu of either of them receives any consideration for the Offering, except for in-kind promotional consideration for the use of the sound recording and musical work by the Offering;

(~~3~~2) The free trial period does not exceed 30 consecutive days per subscriber per two-year period;

(~~4~~3) In connection with authorizing the transmissions, the Record Company has obtained from the Service service it authorizes a written representation that—

(i) The Service service agrees to recordkeeping described in § ~~385.X~~385.4;

(ii) The Service service is in all material respects operating with appropriate license authority with respect to the musical works it is using; and

(iii) The Service service's representation is signed by a person authorized to make the representation on behalf of the Service service;

(~~5~~4) Upon receipt by the Record Company of written notice from the Copyright Owner of a musical work or its agent stating in good faith that a particular Service service is in a material manner operating without appropriate license authority from the Copyright Owner, the Record Company shall within 5 business days withdraw by written notice its authorization of the Service service's uses of the Copyright Owner's musical works for a Free Trial Offering;

(~~6~~5) The Free Trial Offering is made available to the End User free of any charge; and

(~~7~~6) The Service service offers to End Users periodically during the free trial period an opportunity to subscribe to the Offering or another non-free Offering of the Service service.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.

Interactive Stream means a ~~stream~~ Stream of a sound recording embodying a musical work, where the performance of the sound recording by means of the ~~stream~~ Stream is not exempt from ~~the~~ a sound recording performance royalty 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).

Incidental Delivery means reproduction or delivery of a copy of a phonorecord to facilitate delivery by streaming, which copy an End User cannot, or chooses not, to retain or use for subsequent playback in any configuration.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity ~~includes but is not limited to delivery of physical phonorecords, Permanent Digital Downloads, Ringtones,~~ means Interactive Streams, or Limited Downloads of musical works, ~~as well as provision of Limited Offerings, Bundles, and Locker Services.~~ subject to Subparts C and D of this title, and licensed pursuant to 17 U.S.C. 115.

Limited Download means a delivery of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) 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~~ 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 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~~ Plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

Limited Offering means a subscription Offering providing ~~interactive streams or limited downloads~~ Interactive Streams or Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (i.e., the Service does not provide Interactive Streams of individual recordings that are on-demand, and Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to services in the marketplace providing access to a comprehensive catalog of recordings (e.g., a service limited to a particular genre, or permitting interactive streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Interactive Streams, Permanent Digital Downloads, Restricted Downloads or Ringtones ~~But, but~~ does not mean any part of a ~~Service~~ service's products otherwise meeting this definition, but as to which the ~~Service~~ service has not obtained a section 115 license.

~~Offering means a Service~~service's engagement in activity ~~requiring a license under 17 USC 115, including physical and general or incidental digital delivery~~licensed under 17 USC 115 and subject to Subparts C or D of this title, including Incidental Deliveries of embodiments of musical works.

~~Offering Service means that entity, which might or might not be the Licensee, that with respect to the section 115 license~~

~~(1) Sells directly or indirectly physical phonorecords, permanent digital downloads or ringtones;~~

~~(2) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;~~

~~(3) Is able to report fully on Service Revenue from the provision of the Offering to the public, and to the extent applicable, verify Service Revenue through an audit; and~~

~~(4) Is able to report fully on usage of musical works by the Service, or procure such reporting and, to the extent applicable, verify usage through an audit.~~

~~Paid Locker Service means a Locker Service for which the End User pays a fee to the Service.~~Performance Royalty means the final and non-appealable royalty for the right to perform publicly musical works in any of the forms covered by this part 385, as those royalties are determined from time to time by the U.S. District Court for the Southern District of New sitting as the "Rate Court" acting in furtherance of the Consent Decrees beginning with United States v. Broadcast Music, Inc., 1940-43 Trade Cas. ¶ 56,096 (W.D.Wis. 1941)service.

~~Permanent Digital Download or PDD means a digital phonorecord delivery that is distributed in the form of a download that the end user~~End User may retain on a permanent basis and play at any time.

~~Play means an interactive stream or limited download~~Interactive Stream or play of a Limited Download of 30 seconds or more, except a track that lasts in its entirety under 30 seconds and the End User streams the entire ~~30-second~~ duration of the track. A Play excludes Fraudulent Streams.

~~Promotional Offering means Licensed Activity the primary purpose of which is to promote the sale or other paid use of the sound recording containing the musical work and for which promotion neither the Record Company nor the Service~~service receives ~~no~~ consideration except for in-kind promotional consideration.

~~Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Digital Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the PDDs, Ringtones, or physical phonorecords, for which the Service~~service has reasonably determined that the End User has purchased from a qualifying seller, or is otherwise in possession of, phonorecords of

the applicable sound recordings prior to the End User's first request to have access to the sound recordings by means of the ~~Service~~[service](#).

(1) A qualifying seller for purposes of this definition is the entity operating the ~~Service~~[service](#), including affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Digital Downloads or Ringtones, a seller having a legitimate connection to the ~~locker service~~[Locker Service](#) provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Digital Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords,

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same ~~Service~~[service](#) both sell the physical phonorecord and offer the integrated ~~locker service~~[Locker Service](#); or

(B) The ~~Service~~[service](#) has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same ~~Service~~[service](#) both sell the physical phonorecord and offer the integrated ~~locker service~~[Locker Service](#).

(2) Use of a Purchased Content Locker Service will enable the End User to—

(i) Receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Digital Downloads or Ringtones at the time of purchase, or

(ii) Subsequently have digital access to the purchased sound recordings of musical works in the form of ~~interactive streams~~[Interactive Streams](#), additional Permanent Digital Downloads, Restricted Downloads, or Ringtones.

Record company means a person or entity that

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the copyright owner of the sound recording.

Relevant Page means a page (for example, a Web page, screen, or display) from which a ~~Service~~service's Offering is directly available to End Users, but only where the Offering and content directly relating to the Offering (e.g., an image of the artist or artwork closely associated with the particular Offering, including without limitation artist or album information, reviews, ~~;~~ credits, and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A ~~licensed activity~~Licensed Activity is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Limited Download or Interactive Stream takes place).

Restricted download means a Digital Phonorecord Delivery in the form that may not be retained and played on a permanent basis. The term restricted download includes a Limited Download.

Ringtone means a phonorecord of a partial musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, *Service Revenue* shall mean:

(i) All revenue from End Users recognized by a ~~Service~~service for the provision of any Offering;

(ii) All revenue recognized by ~~a Service~~the service by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of any Offering, *i.e.*, advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of ~~streaming~~Interactive Streaming or Limited Downloads; and

(iii) All revenue recognized by the ~~Service~~service, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the ~~Service~~service or on any page that directly follows a Relevant Page leading up to and including the Limited Download or Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the ~~Services~~services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of "Service Revenue," such revenue shall: for the avoidance of doubt,

~~(i)~~ (i) include revenue recognized by the ~~Service~~service, or by any associate, affiliate, agent, or representative of the ~~Service~~service in lieu of its being recognized by the ~~Service~~service; and

~~(ii)~~ (ii) include the value of any barter or other nonmonetary consideration; and

~~(iii)~~ (iii) except as expressly detailed in this part 385, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use

because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Revenue shall exclude revenue derived by the [Service](#) solely in connection with activities other than Offering(s), provided that advertising or sponsorship revenue [in connection with an Offering](#) shall be treated as provided in paragraphs (2) and (4) of this definition of Service Revenue.

(4) For purposes of paragraph (1) of this definition of Service Revenue, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a [Service](#) provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the [Service](#) for the Offering for the purpose of paragraph (1) of this definition of Service Revenue shall be the revenue recognized from End Users for the Bundle less the standalone published price for End Users for each of the other component(s) of the Bundle; provided that, if there is no standalone published price for a component of the Bundle, then the [Service](#) shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

Stream means the digital transmission 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 licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying 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 that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service, and the 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.

Student Plan or Student Account means a discounted subscription available on a limited basis by a [Service](#).

Subscription Service means a digital music Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle with one or more other products or services.

Total Cost of Content or *TCC* means the total amount expended by a ~~Service~~service or any of its affiliates in accordance with GAAP for rights to make ~~interactive streams or limited downloads~~Interactive Streams or Limited Downloads of a sound recording through the ~~Service~~service for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

§385.3 Late payments.

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 or its agent after the due ~~date~~dates set forth in § 210.16(g)(1) and § 210.17(g)(4) of this title. Late fees shall accrue from the applicable due date until payment is received by the Copyright Owner or its agent.

§385.4 Recordkeeping.

(a) *General.* A Licensee claiming a Promotional Offering or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Interactive Streams or Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero-rate is authorized (including the Internet address if applicable), and the beginning and end date of each zero rate, Offering.

(b) *Retention of Records.* The ~~Service~~service claiming zero rates shall maintain the records required by this section ~~385.5~~385.4 for no less time than the ~~Service~~service maintains records of usage of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than 5 years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of Records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

**Subpart B – Physical Phonorecord Deliveries,
Permanent Digital Downloads, Ringtones, and Music Bundles.**

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of digital phonorecord deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

(a) Physical phonorecord deliveries and permanent digital downloads. For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) Ringtones. For every ringtone made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) Music bundles. For a packaged music bundle, the royalty rate for each element of the [music](#) bundle shall be the rate required under paragraph (a) or paragraph (b), as appropriate.

Subpart C—Interactive Streaming, Limited Downloads, Limited Offerings, Bundles, Locker Services, and Other Delivery Configurations

§385.20 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for ~~interactive streams and limited downloads~~ Interactive Streams and Limited Downloads of musical works through, and other reproductions or distributions of musical works through ~~limited offerings, music bundles, paid locker services and purchased content locker services~~ Limited Offerings, Bundles, Paid Locker Services and Purchased Content Locker Services provided by, subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115, exclusive of offerings subject to Subpart D.

(b) *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.

§385.21 Royalty Rates and Calculations

(a) *Applicable royalty.* Licensees that make or authorize ~~licensed activity~~ Licensed Activity covered by this Subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the subscriber-based royalty floors for specific types of services provided in §385.22.

(b) *Rate calculation methodology.* Royalty payments for ~~licensed activity~~ Licensed Activity in this Subpart shall be calculated as provided in paragraph (b) of this section. If a service includes different ~~offerings~~ Offerings, royalties must be calculated separately with respect to each such ~~offering~~ Offering taking into consideration ~~service revenue~~ Service Revenue and expenses associated with such ~~offering~~ Offering.

(1) *Step 1:* Calculate the All-In Royalty for the Offering. For each accounting period, the all-in royalty shall be the greater of the applicable percent of ~~revenue~~ Service Revenue and the applicable percent of TCC set forth in the following table.

2018-2022 All-In Royalty Rates

Royalty Year:	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of TCC	22.0%	23.1%	24.1%	25.2%	26.2%

(2) *Step 2:* Subtract Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each ~~offering~~ Offering of the service ~~provider~~, subtract the total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such ~~offering~~ Offering during the accounting period that constitute ~~licensed activity~~ Licensed Activity. Although this amount may be the total of the service's payments for that ~~offering~~ Offering for the accounting period, it will be less than the total of such public performance

payments if the service is also engaging in public performance of musical works that does not constitute ~~licensed activity~~ Licensed Activity. In the case where the service is also engaging in the public performance of musical works that does not constitute ~~licensed activity~~ Licensed Activity, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to ~~licensed activity~~ Licensed Activity uses through the relevant ~~offering~~ Offering as determined in relation to all uses of musical works for which the public performance payments are made for the accounting period. Such allocation shall be made on the basis of ~~plays~~ Plays of musical works or, where per-~~play~~ Play information is unavailable due to bona fide technical limitations as described in step ~~34~~ in paragraph (b)(4) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3: Determine the Payable Royalty Pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the service provider by virtue of its ~~licensed activity~~ Licensed Activity for a particular ~~offering~~ Offering during the accounting period. This amount is the greater of

- (i) The result determined in step 2 in paragraph (b)(2) of this section, and
- (ii) The subscriber-based royalty floor (if any) resulting from the calculations described in §385.22.

(4) *Step 4: Calculate the Per-Work Royalty Allocation for Each Relevant Work.* This is the amount payable for the reproduction and distribution of each musical work used by the service provider by virtue of its ~~licensed activity~~ Licensed Activity through a particular ~~offering~~ Offering during the accounting period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the ~~offering~~ Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for such ~~offering~~ Offering by the total number of ~~plays~~ Plays of all musical works through such ~~offering~~ Offering during the accounting period (other than promotional royalty rate ~~plays~~ Plays) to yield a per-~~play~~ Play allocation, and multiplying that result by the number of ~~plays~~ Plays of each musical work (other than promotional royalty rate ~~plays~~ Plays) through the ~~offering~~ Offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each ~~play~~ Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the service provider is not capable of tracking ~~play~~ Play information due to bona fide limitations of the available technology for services of that nature or of devices useable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service provider for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment.* For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of ~~plays~~ Plays as follows:

- (1) 5:01 to 6:00 minutes—Each ~~play~~ Play = 1.2 ~~plays~~ Plays
- (2) 6:01 to 7:00 minutes—Each ~~play~~ Play = 1.4 ~~plays~~ Plays
- (3) 7:01 to 8:00 minutes—Each ~~play~~ Play = 1.6 ~~plays~~ Plays
- (4) 8:01 to 9:00 minutes—Each ~~play~~ Play = 1.8 ~~plays~~ Plays

(5) 9:01 to 10:00 minutes—Each ~~play~~Play = 2.0 ~~plays~~Plays

(6) For playing times of greater than 10 minutes, continue to add .2 for each additional minute or fraction thereof.

(d) *Accounting*. The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and part 210 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-~~play~~Play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to §385.22 does or does not apply) and, for each ~~offering~~Offering reported, also indicate the type of ~~licensed activity~~Licensed Activity involved and the number of ~~plays~~Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

§ 385.22 Subscriber-based royalty floors for specific types of services.

(a) *In general*. The following subscriber-based royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the following types of ~~licensed activity~~Licensed Activity:

(1) *Standalone non-portable subscription—streaming only*. Except as provided in paragraph (a)(4) of this section, in the case of a ~~subscription service~~Subscription Service through which an ~~end user~~End User can listen to sound recordings only in the form of ~~interactive streams~~Interactive Streams and only from a non-portable device to which such ~~streams~~Streams are originally transmitted while the device has a live network connection, the subscriber-based royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable subscription—mixed*. Except as provided in paragraph (a)(4) of this section, in the case of a ~~subscription service~~Subscription Service through which an ~~end user~~End User can listen to sound recordings either in the form of ~~interactive streams or limited downloads~~Interactive Streams or Limited Downloads but only from a non-portable device to which such ~~streams~~Streams or downloads are originally transmitted, the subscriber-based royalty floor for use in step 3 of §385.21(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable subscription service*. Except as provided in paragraph (a)(4) of this section, in the case of a ~~subscription service~~Subscription Service through which an ~~end user~~End User can listen to sound recordings in the form of ~~interactive streams or limited downloads~~Interactive Streams or Limited Downloads from a portable device, the subscriber-based royalty floor for use in step 3 of ~~§385.12~~§385.21(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled subscription services*. In the case of a ~~subscription service~~Subscription Service providing ~~licensed activity~~Licensed Activity that is made available to ~~end users~~End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the ~~subscription service~~Subscription Service providing ~~licensed activity~~Licensed Activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to

a ~~subscription service~~Subscription Service providing ~~licensed activity~~Licensed Activity for a single price), the subscriber-based royalty floor for use in step 3 of §385.21(b)(3)(ii) is the aggregate amount of 25 cents per month for each ~~end-user~~End User who has made at least one ~~play~~Play of a licensed work during such month (each such ~~end-user~~End User to be considered an “active subscriber”).

(b) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the subscriber-based royalty floor, as applicable to any particular ~~offering~~Offering, the total number of subscriber-months for the accounting period, shall be calculated taking into account all ~~end-users~~End Users who were subscribers for complete calendar months, prorating in the case of ~~end-users~~End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for ~~end-users~~End Users covered by a free trial period subject to Subpart D, except that in the case of a bundled ~~subscription service~~Subscription Service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period. A Family ~~plan~~Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family ~~plan-end user who~~Plan account that subscribed for only part of a calendar month. A Student ~~account~~Account shall be treated as 0.50 subscribers per month, prorated in the case of a Student ~~account end-user~~Account End User who subscribed for only part of a calendar month.

Subpart D – Promotional Offerings, Free Trial Offerings, Certain Purchased Content Locker Services, and Incidental ~~Downloads~~Deliveries

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, ~~Certain~~certain Purchased Content Locker Services and Incidental Deliveries provided by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty Rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Interactive Streaming and Limited Downloads of musical works that the Licensee offers to the End User ~~in the context of a Free Trial or other Promotional Offering,~~ for which the ~~Service~~service receives no monetary consideration, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the ~~Service~~service receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the ~~Service~~service receives no monetary consideration, the royalty rate is zero.

(d) *Incidental Deliveries.* The royalty rate for Incidental Deliveries is zero.

(e) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering differs in a material manner from the terms governing a Promotional Offering or Free Trial Offering, the Licensee must within 5 business days withdraw that Copyright Owner's musical works from the identified Promotional Offering or Free Trial Offering.

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Services' Joint Motion For Rehearing To Clarify The Regulations to the following:

National Music Publishers Association (NMPA) et al, represented by Frank Scibilia served via Electronic Service at fscibilia@pryorcashman.com

Johnson, George, represented by George D Johnson served via Electronic Service at george@georgejohnson.com

Apple Inc., represented by Mary C Mazzello served via Electronic Service at mary.mazzello@kirkland.com

Signed: /s/ Richard M Assmus