

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

In the Matter of

Determination of Royalty Rates and Terms
for Making Ephemeral Copies of Sound
Recordings for Transmission to Business
Establishments (Business Establishments III)

Docket No. 17-CRB-0001-BER
(2019-2023)

MOTION TO ADOPT SETTLEMENT

The undersigned parties (collectively, the “**Parties**”) hereby notify the Copyright Royalty Judges that a settlement has been reached concerning royalty rates and terms under Section 112(e) of the Copyright Act in the above-referenced proceeding (the “**Proceeding**”) for the royalty period January 1, 2019 through December 31, 2023. The proposed, modified rates and terms for business establishment services as agreed to among the Parties are attached hereto as Exhibit A (the “**Settlement Rates and Terms**”). The Parties respectfully submit the Settlement Rates and Terms 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) and request that the Judges adopt the same as the statutory royalty rates and terms for business establishment services for January 1, 2019 through December 31, 2023.

I. Nature of the Settlement Rates and Terms

The Settlement Rates and Terms for business establishment services are the product of extensive negotiations among the Parties and are a non-precedential compromise motivated by the unique business and economic circumstances of the Parties. The Parties also agreed to the Settlement Rates and Terms to avoid the costs, risk, and uncertainties of participating in a litigated rate proceeding. The Settlement Rates and Terms increase the statutory royalty rate

incrementally from 12.5% of gross proceeds to 13.5% of gross proceeds over the rate period, increase the minimum fee from \$10,000 to \$20,000, and continue the existing terms unchanged.

Nothing in the Settlement Rates and Terms should be understood as making any admissions or concessions with respect to (1) any positions taken by Music Choice, Sirius XM Radio Inc., or SoundExchange, Inc. on any disputed issues before the Copyright Royalty Judges in CRB Docket No. 16-CRB-0001-SR/PSSR (2018-2022) (SDARS III) or Docket No. 2006-1 CRB DSTRA (SDARS I), or (2) any positions taken by SoundExchange, on the one hand, or any of Music Choice, Sirius XM Radio Inc., or Mood Media (on behalf of itself and all of its operating entities), on the other hand, in any audits being conducted by SoundExchange of any of the foregoing entities pursuant to 37 C.F.R. Part 384.

II. 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 for statutory terms and rates 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 no participant objects. *Id.* § 801(b)(7)(A)(ii).

The Parties¹ are all of the participants in the Proceeding except for Mr. David Powell, who has not participated in the Proceeding other than by filing a Petition to Participate. On May

¹ The Parties do not intend to file Written Direct Statements in this Proceeding in light of the submission of the Settlement Rates and Terms to the Copyright Royalty Judges.

3, 2018, counsel for Mood Media twice attempted to make contact with Mr. Powell to discuss the filing of this Motion, and left voice mail messages for him that were not returned as of the date hereof. To the knowledge of the Parties, Mr. Powell is not involved in the creation or licensing of sound recordings as an artist or record company, does not operate a business establishment service, and otherwise lacks the required “significant interest” in the Proceeding to be a proper participant. *See* Order Granting SoundExchange’s Motion to Dismiss Music Reports, Inc. and David Powell in Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (June 24, 2016). Accordingly, there is no proper participant who could object to the Settlement Rates and Terms, and the Copyright Royalty Judges should adopt the Settlement in its entirety after its publication in the *Federal Register* and the receipt of any comments. 17 U.S.C. § 801(b)(7).

Dated: May 4, 2018

Respectfully submitted,

/s/ Gary R. Greenstein (by permission)

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EXHIBIT A
PROPOSED REGULATIONS

The Parties have agreed to settle the Proceeding by continuing the existing regulations at 37 C.F.R. Part 384, with the following modifications:²

1. License Period. In 37 C.F.R. § 384.1(a), strike “January 1, 2014, through December 31, 2018” and insert “January 1, 2019, through December 31, 2023”.

2. Royalty Rate. In 37 C.F.R. § 384.3(a):

A. Strike “12.5%” and insert “a royalty equal to the following percentages”; and

B. At the end of the first sentence, strike the period and insert a colon and the following table:

Year	Rate
2019	12.5%
2020	12.75%
2021	13.0%
2022	13.25%
2023	13.5%

As so revised, 37 C.F.R. § 384.3(a) would read as follows:

(a) *Basic royalty rate*. For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay a royalty equal to the following percentages of such Licensee’s “Gross Proceeds” derived from the use in such service of musical programs that are attributable to copyrighted recordings:

Year	Rate
2019	12.5%
2020	12.75%
2021	13.0%
2022	13.25%
2023	13.5%

² The Parties also note that in § 384.5(d)(4), there are two commas after the word “supplied.” Removal of the redundant comma is not integral to the Parties’ settlement, but the Judges may wish to remove the redundant comma in their amendment of the regulations.

“Gross Proceeds” as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

3. Minimum Fee. In 37 C.F.R. § 384.3(b), strike “\$10,000” and insert “\$20,000”.

Certificate of Service

I hereby certify that on Friday, May 04, 2018 I provided a true and correct copy of the Motion - Other to the following:

Rahn, David, represented by David Rahn served via Electronic Service at dave@customchannels.net

Music Choice, represented by Jackson D Toof served via Electronic Service at jackson.toof@arentfox.com

Mood Media Corporation, represented by Brian J Levy served via Electronic Service at blevy@wsgr.com

Sirius XM Radio Inc, represented by Todd Larson served via Electronic Service at todd.larson@weil.com

Powell, David, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

Signed: /s/ Steven R. Englund