

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

In re

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

Docket No. 21-CRB-0013-BER
(2024-2028)

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, 2024 through December 31, 2028. 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**”).¹ 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, 2024 through December 31, 2028.

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and Terms for business establishment services are the product of extensive negotiations among the Parties and are a non-precedential compromise motivated by

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 Judges.

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 14% of gross proceeds to 15% of gross proceeds over the rate period, increase the annual minimum fee from \$20,000 to \$25,000, and make certain other agreed-upon changes to the regulations in Part 384:

- Adjustment to Royalty for Direct License Share. Adding to 37 C.F.R. § 384.3 provisions for adjusting royalty payments based on use of directly-licensed recordings and recordings for which no license is required, in a manner similar to what is currently provided for SDARS in 37 C.F.R. § 382.23. With this addition, the second sentence of 37 C.F.R. § 384.3(a)(2) (providing an allocation formula for public domain recordings) is deleted.
- Account Numbers. Licensees will be required to use account numbers supplied by SoundExchange, Inc. (“SoundExchange”) in their reporting, as provided for webcasters in 37 C.F.R. §§ 380.2(e) and 380.3(a)(3).
- ISRC Reporting. Licensees will use International Standard Recording Codes (ISRCs) in their reports of use, where available and feasible, notwithstanding 37 C.F.R. § 370.4(d)(2)(v).
- Proxy Distribution. SoundExchange will be permitted to distribute royalties based on a proxy data set if a licensee has not provided a compliant Report of Use, and SoundExchange’s board determines that further effort to seek the missing Report of Use from the licensee is not warranted.

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 or SoundExchange on any disputed issues before the Copyright Royalty Judges in CRB Docket Nos. 16-CRB-0001-SR/PSSR (2018-2022) (*SDARS III*), 17-CRB-0001-BER (2019-2023) (*BES III*), 2012-1 CRB Business Establishments II or 2007-1 CRB DTRA-BE (*BES I*), or before the U.S. District Court for the District of Columbia in *SoundExchange, Inc. v. Music Choice*, Civil Action No. 1:2019cv00999; (2) any positions taken by SoundExchange, on the one hand, or any of Mood Media Corporation, Music Choice, Rockbot, Inc., Sirius XM Radio Inc., and Stingray Music USA Inc., on the other hand, in any audits conducted by SoundExchange of any of the foregoing entities pursuant to 37 C.F.R. Part 384; or (3) any positions taken by any of the Parties in any currently pending or future litigation, action, audit or proceeding.

The Parties specifically note that their agreement to continue the current definition of “Gross Proceeds” in 37 C.F.R. § 384.3(a)(2) is based on their desire to settle the Proceeding without having any effect on *SoundExchange, Inc. v. Music Choice* and related proceedings before the Judges. The precedent established in *SoundExchange, Inc. v. Music Choice* and related proceedings before the Judges is to be given whatever weight is appropriate under applicable law.

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 Parties’ Motion to Adopt Settlement

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 Parties are all of the current participants in the Proceeding. Accordingly, there is no participant who could object to the Settlement Rates and Terms, and the Copyright Royalty Judges should adopt the Settlement Rates and Terms in their entirety after publication in the *Federal Register* and the receipt of any comments. *See* 17 U.S.C. § 801(b)(7).

Dated: September 19, 2022

Respectfully submitted,

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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:

1. **License Period.** In 37 C.F.R. § 384.1(a), strike “January 1, 2019, through December 31, 2023” and insert “January 1, 2024, through December 31, 2028”.

2. **Royalty Rate.** In 37 C.F.R. § 384.3(a)(1), delete the current rate table and insert the following rate table:

Year	Rate
2024	14.0%
2025	14.5%
2026	14.75%
2027	15.0%
2028	15.0%

3. **Gross Proceeds.** Strike the second sentence of 37 C.F.R. § 384.3(a)(2) (including clauses (i) and (ii)).

4. **Adjustment to Royalty for Direct License Share.** Insert the following new 37 C.F.R. § 384.3(a)(3), (4) and (5):

(3) Subject to paragraph (a)(4) of this section, the royalty specified in paragraph (a)(1) of this section for a particular Business Establishment Service offering may be reduced by a percentage corresponding to the “Direct License Share” for such Business Establishment Service offering, as follows.

(i) If the transmissions of the Business Establishment Service offering are entirely made over the internet or the Licensee otherwise is able to count all of its Performances to business subscribers, the Direct License Share for such Business Establishment Service offering is its Performances of directly licensed sound recordings and sound recordings for which no license is required (e.g., sound recordings in which the copyrights are owned by the Licensee) (collectively, “Excluded Recordings”) divided by its total Performances.

(ii) If the transmissions of the Business Establishment Service offering are made to 10% or more of the bona fide subscriber locations of the Business

Establishment Service offering over the internet, or the Licensee otherwise is able to count its Performances to 10% or more of bona fide subscriber locations of the Business Establishment Service offering, and the Business Establishment Service offering provides transmissions of a substantially similar set of channels (fairly represented by the countable channels) to other subscriber locations by means that do not allow the Licensee to count Performances (e.g., by satellite with no usage feedback), the Direct License Share for such Business Establishment Service offering is its Performances of Excluded Recordings to the locations where the Licensee is able to count its Performances divided by its total Performances to the locations where the Licensee is able to count its Performances. When reporting under § 370.4(d)(2)(vii) of this chapter, such total countable Performances of sound recordings that are not Excluded Recordings shall be treated and reported as the “actual total performances” of the Business Establishment Service if the Direct License Share is calculated pursuant to this paragraph (a)(3)(ii).

(iii) If paragraphs (a)(3)(i) and (ii) of this section do not apply, but the Licensee transmits a set of webcast channels substantially similar to and representative of the Business Establishment Service offering to consumers over the internet or by other means that allow the Licensee to count Performances on those channels (“Reference Channels”), the Direct License Share for such Business Establishment Service offering is its Performances of Excluded Recordings on the Reference Channels divided by its total Performances on the Reference Channels.

(iv) Otherwise, the Direct License Share for such Business Establishment Service offering is a fraction calculated on a subscriber location-by-subscriber location basis, or if that is impracticable, on a uniform basis for all subscriber locations, where:

(A) the numerator is the play frequency (as defined in § 370.4(b) of this chapter) of Excluded Recordings for the Business Establishment Service offering during a period of time each day as follows:

(1) if the Direct License Share is calculated on a subscriber location-by-subscriber location basis, during a continuous 12-hour period to be selected by the Licensee for each location for the month for which the payment is made, provided that each such location’s hours of operation fall entirely within the selected 12-hour period, or if such location is in operation for more than 12 hours per day, the selected 12-hour period consists of hours the location is in operation, including its main hours of operation; or

(2) if the Direct License Share is calculated on a uniform basis for all locations, during the hours of 9:00 a.m. to 9:00 p.m. local time; and

(B) the denominator is the total play frequency (as defined in § 370.4(b) of this chapter) for the Business Establishment Service offering between the same hours as used in the numerator.

(4) The Direct License Share reduction in paragraph (a)(3) of this section is available to a Licensee only if the Licensee provides the Collective, by no later than the due date for the relevant payment under § 384.4(c), a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Excluded Recordings that is in effect for the month for which the payment is made and of each sound recording for which the Licensee takes the reduction, identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, if the ISRC is not available and feasible, album title and copyright owner name.

Notwithstanding § 384.5, the Collective may disclose such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

(5) For purposes of paragraph (a)(3) of this section, Performance means:

(i) Except as discussed in paragraph (a)(5)(ii) of this section, a Performance is an instance in which any portion of a sound recording is publicly performed to a Business Establishment Service subscriber location within the United States (e.g., the delivery of any portion of a single track from a compact disc to one subscriber location).

(ii) An instance in which a portion of a sound recording is publicly performed to a Business Establishment Service subscriber location within the United States is not a Performance if it both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief use during news, talk and sports programming, brief background use during disk jockey announcements, brief use during commercials of sixty seconds or less in duration, or brief use during sporting or other public events; and

(B) Does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song), except for ambient music that is background at a public event.

5. **Minimum Fee.** In 37 C.F.R. § 384.3(b), strike “\$20,000” and insert “\$25,000”.

6. **Account Numbers.**

- Redesignate 37 C.F.R. § 384.4(f), (g) and (h) as 37 C.F.R. § 384.4(g), (i) and (j), respectively.

- Insert the following new 37 C.F.R. § 384.4(f):

(f) *Use of account numbers.* If the Collective notifies a Licensee of an account number to be used to identify its royalty payments for a particular Business Establishment Service offering, the Licensee must include that account number on its check or check stub for any payment for that Business Establishment Service offering made by check, in the identifying information for any payment for that Business Establishment Service offering made by electronic transfer, in its statements of account for that Business Establishment Service offering under paragraph (g) of this section, and in the transmittal of its Reports of Use for that Business Establishment Service offering under § 370.4 of this chapter.

- In 37 C.F.R. § 384.4(g), as redesignated above, redesignate 37 C.F.R. § 384.4(g)(3) through (8) as 37 C.F.R. § 384.4(g)(4) through (9), respectively.

- Insert the following new 37 C.F.R. § 384.4(g)(3):

(3) The account number assigned to the Licensee by the Collective for the relevant Business Establishment Service offering (if the Licensee has been notified of such account number by the Collective);

7. **ISRC Reporting.** Insert the following new 37 C.F.R. § 384.4(h):

(h) Notwithstanding § 370.4(d)(2)(v) of this chapter, the Licensee must use International Standard Recording Codes (ISRCs) in its Reports of Use, where available and feasible.

8. **Proxy Distribution.** Add the following to the end of 37 C.F.R. § 384.4(i)(1), as

redesignated above:

However, in any case in which a Licensee has not provided a compliant Report of Use, whether for the License Period or otherwise, and the board of directors of the Collective determines that further efforts to seek the missing Report of Use from the Licensee would not be warranted, the Collective may determine that it will distribute the royalties associated with the Licensee's missing Report of Use on the basis of a proxy data set approved by the board of directors of the Collective.

Proof of Delivery

I hereby certify that on Monday, September 19, 2022, I provided a true and correct copy of the Motion to Adopt Settlement to the following:

Sirius XM Radio Inc. and it's Wholly-Owned Subsidiaries, represented by Todd Larson, served via E-Service at todd.larson@weil.com

Rockbot, Inc., represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Music Choice, represented by Paul Fakler, served via E-Service at pfakler@mayerbrown.com

Mood Media Corporation, represented by David P Mattern, served via E-Service at dmattern@kslaw.com

Stingray Music USA Inc., represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Signed: /s/ Steven R. Englund