

# Exhibit B

**PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS**

**Subpart A—Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones** Regulations of General Application<sup>1</sup>

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**Authority:** 17 U.S.C. 115, 801(b)(1), 804(b)(4). **Source:** 74 FR 4529, Jan. 26, 2009, unless otherwise noted.

**Subpart A—Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones**

**§385.1 General.**<sup>2</sup>

(a) *Scope.* This ~~subpart~~part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords, ~~including by means of digital phonorecord deliveries,~~ in accordance with the provisions of 17 U.S.C.

<sup>1</sup> Pursuant to the directive in the Corrected Order Regarding Regulatory Provisions Following Initial Ruling and Order (After Remand), eCRB Docket No. 27312 (November 10, 2022) (“Corrected Order”) the Participants herein provide footnotes under each section with citations indicating provisions to which the section conforms, including citations, where appropriate, to: the *Phonorecords II* regulations; the regulations instituted by the pre-remand Final Determination, as subsequently revised by the Judges to conform to the Music Modernization Act (“MMA”); *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020); the Initial Ruling and Order After Remand, eCRB Docket No. 27063 (Public); and other relevant authorities. Citations to the regulations instituted by the pre-remand Final Determination, as subsequently revised by the Judges to conform to the MMA, are provided, where appropriate, because the Parties believe that those regulations remain relevant, including because: (i) much of the pre-remand Final Determination was not appealed; (ii) *Johnson* affirmed certain aspects of the pre-remand Final Determination; (iii) the Judges have already incorporated numerous edits in these regulations to conform to the MMA; and (iv) the Judges expressed their agreement with the reorganization of Part 385 into new Subparts via these regulations (see Corrected Order at 32, fn. 37).

<sup>2</sup> 37 C.F.R. §§ 385.1, 385.10, 385.20 (2014); 37 C.F.R. § 385.1 (2020).

115. [This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.](#)

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

~~(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to use of musical works within the scope of such agreements.~~

#### **§ 385.2 Definitions.**

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

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

~~*Digital phonorecord delivery* means a digital phonorecord delivery as defined in 17 U.S.C. 115(d).~~

~~*Licensee* is a person or entity that has obtained a compulsory license under 17 U.S.C. 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work, including by means of a digital phonorecord delivery.~~

~~*Permanent digital download* means a digital phonorecord delivery that is distributed in the form of a download that may be retained and played on a permanent basis.~~

~~*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.~~

#### **§ 385.3 Royalty rates for making and distributing phonorecords.**

~~(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.~~

#### **§ 385.4 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 after the due date set forth in § 201.19(e)(7)(i) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.~~

### **Subpart B—Interactive Streaming and Limited Downloads**

#### **§ 385.10 General.**

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

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

(c) *Interpretation.* This [subpart](#) is intended only to set rates and terms for situations in which the exclusive rights of a ~~copyright owner~~[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 user must obtain](#) a compulsory license pursuant to 17 U.S.C. 115, ~~must be obtained.~~

(d) 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.

~~§ 385.11~~      385.2 Definitions.<sup>3</sup>

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

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.<sup>4</sup>

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.<sup>5</sup>

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a ~~record company~~ Sound Recording Company shall not include a ~~copyright owner of musical works~~ Copyright Owner to the extent it is engaging in business as to musical works.<sup>6</sup>

~~Applicable consideration means anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether such consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the licensed activity but nevertheless provide consideration for the identified rights to undertake the licensed activity, and including any such value given to an affiliate of a record company for such rights to undertake the licensed activity. For the avoidance of doubt, value given to a copyright owner of musical works that is controlling, controlled by, or under common control with a record company for rights to undertake the licensed activity shall not be considered value given to the record company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a record company.~~ Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to 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 providing 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 providing Licensed Activity for a single price).<sup>7</sup>

~~(or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where such in-kind promotional consideration is given in connection with a use that qualifies for licensing~~ Copyright Owner(s) are nondramatic musical works copyright owners who

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<sup>3</sup> See Corrected Order at 32 n.37; 37 C.F.R. § 385.2 (2020). Unless otherwise indicated, citations in this definitions section to C.F.R. definitions are to the definition of the same term.

<sup>4</sup> 37 C.F.R. § 385.2 (2020).

<sup>5</sup> 37 C.F.R. § 385.13(a)(4) (2014); 37 C.F.R. § 385.22(a)(4) (2020).

<sup>6</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.2 (2020).

<sup>7</sup> 37 C.F.R. § 385.13(a)(4) (2014); 37 C.F.R. § 385.2 (2020).

are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.<sup>8</sup>

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).<sup>9</sup>

~~GAAP means U.S. Generally Accepted Accounting Principles, 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, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.~~

~~Eligible Interactive stream means a stream of a sound recording of a musical work, where Stream means a Stream in which the performance of the sound recording by means of the stream is not exempt from the 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).~~<sup>10</sup>

~~Licensee means a person that has obtained a compulsory license under Eligible Limited Download means a Limited Download as defined in 17 U.S.C. 115 and its implementing regulations.~~(e)(16) that is only accessible for listening for—

~~Licensed activity means interactive streams or limited downloads of musical works, as applicable. Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—~~

- (1) An amount of time not to exceed ~~4~~one month from the time of the transmission (unless the ~~service provider~~Licensee, in lieu of retransmitting the same sound recording as another ~~limited download~~Eligible 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 ~~4~~one month), or in the case of a subscription ~~transmission plan~~, a period of time following the end of the applicable subscription no longer than a subscription renewal period or ~~3~~three months, whichever is shorter; or
- (2) A ~~specified~~ number of times not to exceed 12 (unless the ~~service provider~~Licensee, in lieu of retransmitting the same sound recording as another ~~limited download~~Eligible Limited Download, separately, and upon specific request of the ~~end user~~End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.<sup>11</sup>

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<sup>8</sup> 37 C.F.R. § 385.2 (2014); 37 C.F.R. § 385.2 (2020).

<sup>9</sup> 37 C.F.R. § 385.2 (2014); 37 C.F.R. § 385.2 (2020).

<sup>10</sup> 37 C.F.R. § 385.11 (2014) (at definition of “Interactive stream”); 37 C.F.R. § 385.2 (2020).

<sup>11</sup> 37 C.F.R. § 385.11 (2014) (at definition of “Limited download”); 37 C.F.R. § 385.2 (2020).

~~(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).  
Offering means a service provider's offering of licensed activity that is subject to a particular rate set forth in § 385.13(a) (e.g., a particular subscription plan available through the service provider).  
Promotional royalty rate means the statutory royalty rate of zero in the case of certain promotional interactive streams and certain promotional limited downloads, as provided in § 385.14.~~

~~Record company~~ End User means each unique person or entity that

~~(1) Is a copyright owner of a sound recording of 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 (including a Web page, screen or display) from which licensed activity offered by a service provider is directly available to end users, but only where the offering of licensed activity and content that directly relates to the offering of licensed activity (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for licensed activity from such page (in most cases this will be the page where the limited download or interactive stream takes place).~~

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

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

~~(2) Is able to report fully on service revenue from the provision of the licensed activity to the public, and to the extent applicable, verify service revenue through an audit; and~~

~~(3) 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.~~

~~Service revenue. (1) Subject to paragraphs (2) through (5) of the definition of "Service revenue," and subject to GAAP, service revenue shall mean the following:~~

~~(i) All revenue recognized by the service provider from end users from the provision of licensed activity;~~

~~(ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third party "in-stream" or "in-download" advertising as part of licensed activity (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of interactive streaming or limited downloads, as applicable, of a musical work); and~~

~~(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant page, any advertising revenue shall be allocated between such 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) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;~~

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

~~(iii) Not be reduced by credit card commissions or similar payment process charges; and~~

~~(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business.~~

~~(3) In each of the cases identified in paragraph (1) of the definition of "Service revenue," such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of "Service revenue." By way of example, the following kinds of revenue shall be excluded:~~

~~(i) Revenue derived from non-music voice, content and text services;~~

~~(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions); and~~

~~(iii) Revenue derived from music or music-related products and services that are not or do not include licensed activity.~~

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

~~(5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the 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 such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.~~

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

~~*Subscription service* means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.14(b).~~

### **§ 385.12 Calculation of royalty payments in general.**

~~(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the minimum royalties and subscriber-based royalty floors for specific types of services provided in § 385.13, except as provided for certain promotional uses in § 385.14.~~

~~(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided in paragraph (b) of this section. If a service includes different offerings, royalties must be separately calculated with respect to each such offering taking into consideration service revenue and expenses associated with such offering. Uses subject to the promotional royalty rate shall be excluded from the calculation of royalties due, as further described in this section and the following § 385.13.~~

~~(1) *Step 1:* Calculate the All-In Royalty for the Offering. For each accounting period, the all-in royalty for each offering of the service provider is the greater of [pays a subscription fee for an Offering](#)~~



during the relevant Accounting Period or (2) makes at least one Play during the relevant Accounting Period.<sup>12</sup>

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.<sup>13</sup>

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when

~~(i) The applicable percentage of service revenue associated with the relevant offering as set forth in paragraph (c) of this section (excluding any service revenue derived solely from licensed activity uses subject to the promotional royalty rate), and~~

~~(ii) The minimum specified in § 385.13 of the offering involved.~~

~~(2) Step 2: Subtract Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each 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 during the accounting period that constitute licensed activity (other than licensed activity subject to the promotional royalty rate). Although this amount may be the total of the service's payments for that 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. In the case where the service is also engaging in the public performance of musical works that does not constitute licensed activity, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed activity uses (other than promotional royalty rate uses) through the relevant 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 of musical works or, where per-play information is unavailable due to bona fide technical limitations as described in step 4 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 for a particular 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 resulting from the calculations described in § 385.13.~~

~~(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 through a particular 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. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for such offering by the total number of plays of all musical works through such offering during the accounting period (other than promotional royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than promotional royalty rate plays) through the 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 shall be counted as provided in paragraph (d) of this section. Notwithstanding the foregoing, if the service provider is not capable of tracking 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~~

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<sup>12</sup> [37 C.F.R. § 385.2 \(2020\)](#).

<sup>13</sup> [37 C.F.R. § 385.2 \(2020\)](#).

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) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%.~~

~~(d) *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 as follows:~~

~~(1) 5:01 to 6:00 minutes—Each play = 1.2 plays~~

~~(2) 6:01 to 7:00 minutes—Each play = 1.4 plays~~

~~(3) 7:01 to 8:00 minutes—Each play = 1.6 plays~~

~~(4) 8:01 to 9:00 minutes—Each play = 1.8 plays~~

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

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

~~(e) *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(e)(5) and § 201.19 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 allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to § 385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of 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.~~

### **§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.**

~~(a) *In general.* The following minimum royalty rates and subscriber-based royalty floors shall apply to the following types of 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 through which an end user can listen to sound recordings only in the form of interactive streams and only from a non-portable device to which such streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of § 385.12(b)(1)(ii) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3)(ii) 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 through which an end user can listen to sound recordings either in the form of interactive streams or limited downloads but only from a non-portable device to which such streams or downloads are originally transmitted, the minimum for use in step 1 of § 385.12(b)(1)(ii) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(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 through which an end user can listen to sound recordings in the form of interactive streams or limited downloads from a portable device, the minimum for use in step 1 of § 385.12(b)(1)(ii) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(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 providing licensed activity that is made available to 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 providing 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 providing licensed activity for a single price), the minimum for use in step 1 of § 385.12(b)(1)(ii) is subminimum I as~~

~~described in paragraph (b) of this section for the accounting period. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3)(ii) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an “active subscriber”).~~

~~(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of § 385.12(b)(1)(ii) is subminimum II described in paragraph (c) of this section for the accounting period. There is no subscriber-based royalty floor for use in step 3 of § 385.12(b)(3)(ii).~~

~~(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3), and (4) of this section, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—~~

~~(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—~~

~~(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams and limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(d) *Payments made by third parties.* If a record company providing sound recording rights to the service provider for a licensed activity—~~

~~(1) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed activity and its affiliates, and Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering;~~

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

~~(2) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights;~~

~~(3) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraphs (b)(1), (b)(2), (c)(1), or (c)(2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.~~

~~(e) Computation of subscriber-based royalty rates. For purposes of paragraph (a) of this section, to determine the minimum or subscriber-based royalty floor, as applicable to any particular offering, the total number of subscriber months for the accounting period, shall be calculated taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in § 385.14(b)(2), except that in the case of a bundled 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.~~

#### **§ 385.14 Promotional royalty rate.**

~~(a) General provisions. (1) This section establishes a royalty rate of zero in the case of certain promotional interactive streaming activities, and of certain promotional limited downloads offered in the context of a free trial period for a digital music subscription service under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the promotional royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission of interactive streams or limited downloads of a sound recording that embodies such musical work, only if—~~

~~(i) The primary purpose of the record company in making or authorizing the interactive streams or limited downloads is to promote the sale or other paid use of sound recordings by the relevant artists, including such sound recording, through established retail channels or the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service;~~

~~(ii) Either—~~

~~(A) The sound recording (or a different version of the sound recording embodying the same musical work) is being lawfully distributed and offered to consumers through the established retail channels or services described in paragraph (a)(1)(i) of this section; or~~

~~(B) In the case of a sound recording of a musical work being prepared for commercial release but not yet released, the record company has a good faith intention of lawfully distributing and offering to consumers the sound recording (or a different version of the sound recording embodying the same musical work) through the established retail channels or services described in paragraph (a)(1)(i) of this section within 90 days after the commencement of the first promotional use authorized under this section (and in fact does so, unless it can demonstrate that notwithstanding its bona fide intention, it unexpectedly did not meet the scheduled release date);~~

~~(iii) In connection with authorizing the promotional interactive streams or limited downloads, the record company has obtained from the service provider it authorizes a written representation that—[the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;](#)~~

~~(A) In the case of a promotional use other than interactive streaming subject to paragraph (d) of this section, the service provider agrees to maintain for a period of no less than 5 years from the conclusion of the promotional activity complete and accurate records of the relevant authorization and dates on which the promotion was conducted, and identifying each sound recording of a musical work made available through the promotion, the licensed activity involved, and the number of plays of such recording;~~  
~~(B) The service provider is in all material respects operating with appropriate license authority with respect to the musical works it is using for promotional and other purposes; and~~  
~~(C) The representation is signed by a person authorized to make the representation on behalf of the service provider;~~

- (iv4) Upon receipt by the ~~record company~~Service Provider of written notice from the ~~copyright owner of a musical work or agent of the copyright owner~~Copyright Owner or its agent stating in good faith that ~~a particular service~~the Service Provider is in a material manner operating without appropriate license authority from ~~such copyright owner, the record company~~the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days ~~withdraw by written notice its authorization of such uses of such copyright owner's musical works under the promotional royalty rate by that service;~~cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;
- (5) The Free Trial Offering is made available to the End User free of any charge; and
- (6) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-Free Trial Offering of the Service Provider.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

Licensed Activity, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary

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<sup>14</sup> 37 C.F.R. § 385.24(a) (2014); 37 C.F.R. § 385.2 (2020).

<sup>15</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.2 (2020).

<sup>16</sup> 37 C.F.R. §§ 385.2, 385.11 (2014); 37 C.F.R. § 385.2 (2020).

or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.<sup>17</sup>

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

~~(v) The interactive streams or limited downloads are offered free of any charge to the end user and, except in the case of interactive streaming subject to paragraph (d) of this section in the case of a free trial period for a digital music subscription service, no more than 5 sound recordings at a time are streamed in response to any individual request of an end user;~~

~~(vi) The interactive streams and limited downloads are offered in a manner such that the user is at the same time (e.g., on the same Web page) presented with a purchase opportunity for the relevant sound recording or an opportunity to subscribe to a paid service offering the sound recording, or a link to such a purchase or subscription opportunity, except—~~

~~(A) In the case of interactive streaming of a sound recording being prepared for commercial release but not yet released, certain mobile applications or other circumstances in which the foregoing is impracticable in view of the current state of the relevant technology; and~~

~~(B) In the case of a free trial period for a digital music subscription service, if end users are periodically offered an opportunity to subscribe to the service during such free trial period; and~~

~~(vii) The interactive streams and limited downloads are not provided in a manner that is likely to cause mistake, to confuse or to deceive, reasonable end users as to the endorsement or association of the author of the musical work with any product, service or activity other than the sale or paid use of sound recordings or paid use of a music service through which sound recordings are available. Without limiting the foregoing, upon receipt of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular use of such work under this section violates the limitation set forth in this paragraph (a)(1)(vii), the record company shall promptly cease such use of that work, and within 5 business days withdraw by written notice its authorization of such use by all relevant third parties it has authorized under this section.~~

~~(2) To rely upon the promotional royalty rate, a record company making or authorizing interactive streams or limited downloads shall keep complete and accurate contemporaneous written records of such uses, 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 service or services where each promotion is authorized (including the Internet address if applicable), the beginning and end date of each period of promotional activity authorized, and the representation required by paragraph (a)(1)(iii) of this section; provided that, in the case of trial subscription uses, such records shall instead consist of the contractual terms that bear upon promotional uses by the particular digital music subscription services it authorizes; and further provided that, if the record company itself is conducting the promotion, it shall also maintain any additional records described in paragraph (a)(1)(iii)(A) of this section. The records required by this paragraph (a)(2) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed activity in the ordinary course of business, but in no event for less than 5 years from the conclusion of the promotional activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (a)(2) with respect to a specific promotion or relating to a particular sound recording of a musical work, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(1)(iii)(A) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the record company (but not any third-party service it has~~

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<sup>17</sup> [37 C.F.R. § 385.2 \(2020\)](#).

authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

~~(3) If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(1)(iii)(A) of this section by a service authorized by a record company with respect to a specific promotion, the service provider shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the service provider shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service provider does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the service provider (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.~~

~~(4) The promotional royalty rate is exclusively for audio-only interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the promotional royalty rate (including without limitation interactive streaming or limited downloads of a musical work beyond the time limitations applicable to the promotional royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 et seq.~~

~~(b) Interactive streaming and limited downloads of full-length musical works through third-party services. In addition to those of paragraph (a) of this section, the provisions of this paragraph (b) apply to interactive streaming, and limited downloads (in the context of a free trial period for a digital music subscription service), authorized by record companies under the promotional royalty rate through third-party services (including Web sites) that is not subject to paragraphs (c) or (d) of this section. Such interactive streams and limited downloads may be made or authorized by a record company under the promotional royalty rate only if—~~

~~(1) No applicable consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, any of its affiliates, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;~~

~~(2) In the case of interactive streaming and limited downloads offered in the context of a free trial period for a digital music subscription service, the free trial period does not exceed 30 consecutive days per subscriber per two-year period; and~~

~~(3) In contexts other than a free trial period for a digital music subscription service, interactive streaming subject to paragraph (b) of this section of a particular sound recording is authorized by the record company on no more than 60 days total for all services (i.e., interactive streaming under paragraph (b) of this section of a particular sound recording may be authorized on no more than a total of 60 days, which need not be consecutive, and on any one such day, interactive streams may be offered on one or more services); provided, however, that an additional 60 days shall be available each time the sound recording is re-released by the record company in a remastered form or as a part of a compilation with a different set of sound recordings than the original release or any prior compilation including such sound recording.~~

~~(4) In the event that a record company authorizes promotional uses in excess of the time limitations of paragraph (b) of this section, the record company, and not the third-party service it has authorized, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved. In the event that a third-party service exceeds the scope of any authorization by a record company, the service provider, and not the record company, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.~~

~~(c) Interactive streaming of full-length musical works through record company and artist services.~~ In addition to those of paragraph (a) of this section, the provisions of this paragraph (c) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate through a service (e.g., a Web site) directly owned or operated by the record company, or directly owned or operated by a recording artist under the authorization of the record company, and that is not subject to paragraph (d) of this section. For the avoidance of doubt and without limitation, an artist page or site on a third-party service (e.g., a social networking service) shall not be considered a service operated by the record company or artist. Such interactive streams may be made or authorized by a record company under the promotional royalty rate only if—

~~(1) The interactive streaming subject to this paragraph (c) of a particular sound recording is offered or authorized by the record company on no more than 90 days total for all services (i.e., interactive streaming under this paragraph (c) of a particular sound recording may be authorized on no more than a total of 90 days, which need not be consecutive, and on any such day, interactive streams may be offered on one or more services operated by the record company or artist, subject to the provisions of paragraph (b)(2) of this section); provided, however, that an additional 90 days shall be available each time the sound recording is re-released by the record company in a remastered form or as part of a compilation with a different set of sound recordings than prior compilations that include that sound recording;~~

~~(2) In the case of interactive streaming through a service devoted to one featured artist, the interactive streams subject to this paragraph (c) of this section of a particular sound recording are made or authorized by the record company on no more than one official artist site per artist and are recordings of that artist; and~~

~~(3) In the case of interactive streaming through a service that is not limited to a single featured artist, all interactive streaming on such service (whether eligible for the promotional royalty rate or not) is limited to sound recordings of a single record company and its affiliates and the service would not reasonably be considered to be a meaningful substitute for a paid music service.~~

~~(d) Interactive streaming of clips.~~ In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed 90 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

~~§ 385.15 [Reserved]~~

#### ~~§ 385.16 Reproduction and distribution rights covered.~~

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

#### ~~§ 385.17 Effect of rates.~~

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

### ~~Subpart C—Limited Offerings, Mixed Service Bundles, Music Bundles, Paid Locker Services and Purchased Content Locker Services~~

~~Source:78 FR 67944, Nov. 13, 2013, unless otherwise noted.~~

#### ~~§ 385.20 General.~~

~~(a) Scope.~~ This subpart establishes rates and terms of royalty payments for certain reproductions or distributions of musical works through limited offerings, mixed service bundles, music bundles, paid locker



~~services and purchased content locker services provided in accordance with the provisions of 17 U.S.C. 115. For the avoidance of doubt, to the extent that product configurations for which rates are specified in subpart A of this part are included within licensed subpart C activity, as defined in § 385.21, the rates specified in subpart A of this part shall not apply, except that in the case of a music bundle the compulsory licensee may elect to pay royalties for the music bundle pursuant to subpart C of this part or for the components of the bundle pursuant to subpart A of this part.~~

~~(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes reproduction or distribution of musical works in limited offerings, mixed service bundles, music bundles, paid locker services or purchased content locker services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.~~

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

### **§ 385.21 Definitions.**

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

~~*Affiliate* shall have the meaning given in § 385.11.~~

~~*Applicable consideration* shall have the meaning given in § 385.11, except that for purposes of this subpart C, references in the definition of “Applicable consideration” in § 385.11 to licensed activity shall mean licensed subpart C activity, as defined in this section.~~

~~*Free trial royalty rate* means the statutory royalty rate of zero in the case of certain free trial periods, as provided in § 385.24.~~

~~*GAAP* shall have the meaning given in § 385.11.~~

~~*Interactive stream* shall have the meaning given in § 385.11.~~

~~*Licensee* shall have the meaning given in § 385.11.~~

~~*Licensed subpart C activity* means, referring to subpart C of this part—~~

~~(1) In the case of a limited offering, the applicable interactive streams or limited downloads;~~

~~(2) In the case of a locker service, the applicable interactive streams, permanent digital downloads, restricted downloads or ringtones;~~

~~(3) In the case of a music bundle, the applicable reproduction or distribution of a physical phonorecord, permanent digital download or ringtone; and~~

~~(4) In the case of a mixed service bundle, the applicable—~~

~~(i) Permanent digital downloads;~~

~~(ii) Ringtones;~~

~~(iii) To the extent a limited offering is included in a mixed service bundle, interactive streams or limited downloads; or~~

~~(iv) To the extent a locker service is included in a mixed service bundle, interactive streams, permanent digital downloads, restricted downloads or ringtones.~~

~~Limited download shall have the meaning given in § 385.11.~~

~~Limited offering means a subscription service providing interactive streams or limited downloads where—~~

- (1) An ~~end user is not provided the opportunity~~End User cannot choose to listen to a particular sound recording ~~chosen by the end user at a time chosen by the end user~~ (i.e., the ~~service~~Service Provider does not provide ~~interactive streams~~Eligible Interactive Streams of individual recordings that are on-demand, and ~~any limited downloads~~Eligible 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~~End User over a period of time are substantially limited relative to ~~services~~Service Providers in the marketplace providing access to a comprehensive catalog of recordings (e.g., a ~~service~~product limited to a particular genre, or permitting ~~interactive streaming~~Eligible Interactive Streams only from a monthly playlist consisting of a limited set of recordings).<sup>18</sup>

~~Locker service~~Service means ~~a service~~an Offering providing digital access to sound recordings of musical works in the form of ~~interactive streams, permanent digital downloads, restricted downloads or ringtones, where the service~~Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that ~~the End User has purchased or is otherwise in possession of the subject~~the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound ~~recordings have been purchased by the end user or are otherwise in the possession of the end user~~recording prior to the ~~end user's~~End User's first request to ~~access such sound recordings by means of the service~~use the sound recording via the Locker Service. The term ~~locker service~~Locker Service does not ~~extend to mean~~ any part of a ~~service~~Service Provider's products otherwise meeting this definition, ~~but~~ as to which ~~a license is~~the Service Provider has not obtained ~~for the applicable reproductions and distributions of musical works~~a section 115 license.<sup>19</sup>

~~Mixed service bundle~~Service Bundle means ~~an offering of~~ one or more of ~~permanent digital downloads, ringtones, locker services or limited offerings,~~Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more ~~of~~ non-music services (e.g., ~~Internet~~internet access service, mobile phone service) or non-music products (e.g., a ~~telephone~~device ~~such as a phone~~) of more than token value, ~~that is~~ and provided to users as part of one transaction without pricing for the music services or music products separate from the whole ~~offering~~Offering.<sup>20</sup>

<sup>18</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

<sup>19</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

<sup>20</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

~~Music bundle~~Bundle means ~~an offering of~~ two or more of physical phonorecords, ~~permanent digital downloads or ringtones provided to users~~Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). ~~A music bundle must contain at least two different product configurations and cannot be combined with any other offering containing licensed activity under subpart B of this part or subpart C of this part.~~

(1) In the case of ~~music bundles~~Music Bundles containing one or more physical phonorecords, the ~~Service Provider must sell the~~ physical phonorecord component of the ~~music bundle must be sold~~Music Bundle under a single catalog number, and the musical works embodied in the ~~digital phonorecord delivery~~Digital Phonorecord Delivery configurations in the ~~music bundle~~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~~Music Bundle contains a set of ~~digital phonorecord deliveries~~Digital Phonorecord Deliveries sold by the same ~~record company~~Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), ~~the Service Provider may include in the same bundle~~ up to 5 sound recordings of musical works that are included in the stand-alone version of ~~such~~the set of digital phonorecord deliveries but ~~are~~ not included on the physical phonorecord ~~may be included among the digital phonorecord deliveries in the music bundle~~. In addition, the ~~seller~~Service Provider must permanently part with possession of the physical phonorecord or phonorecords ~~sold~~it sells as part of the ~~music bundle~~Music Bundle. (2) In the case of ~~music bundles~~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~~Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.<sup>21</sup>

~~Paid locker service means a locker service that is a subscription service.~~

~~Permanent digital download shall have the meaning given in § 385.2.~~

Offering means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.<sup>22</sup>

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.<sup>23</sup>

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.<sup>24</sup>

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<sup>21</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

<sup>22</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.21 (2014) (at definition of "Subpart C offering"); 37 C.F.R. § 385.2 (2020).

<sup>23</sup> 37 C.F.R. § 385.21 (2014) (at definitions of "Paid locker service" and "Subscription service"); 37 C.F.R. § 385.2 (2020).

<sup>24</sup> 37 C.F.R. § 385.12(b)(2) (2014); 37 C.F.R. § 385.2 (2020).

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).<sup>25</sup>

Play means an Eligible Interactive Stream, or a play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or a play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or a play of an Eligible Limited Download 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 not to have been initiated or requested by a human user.<sup>26</sup>

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;
- (2) For Eligible Interactive Streams or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;
- (3) For Eligible Interactive Streams of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);
- (4) The Promotional Offering is made available to an End User free of any charge; and
- (5) The Service Provider provides to the End User at the same time as the Promotional Offering Stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.<sup>27</sup>

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<sup>25</sup> 37 C.F.R. § 385.2 (2020).

<sup>26</sup> 37 C.F.R. § 385.2 (2020).

<sup>27</sup> 37 C.F.R. § 385.14(a) (2014); 37 C.F.R. § 385.2 (2020). *See also Amended Order Granting In Part And Denying In Part Motions For Rehearing*, eCRB Docket No. 3602 (January 4, 2019), at 15 (explaining that “the Judges did not

~~Purchased content locker service means a locker service~~ Content Locker Service means a Locker Service made available to ~~end-user~~ End User purchasers of ~~permanent digital downloads, ringtones~~ Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the ~~permanent digital downloads, ringtones~~ Permanent Downloads, Ringtones, or physical phonorecords; ~~with respect to the sound recordings embodied in permanent digital downloads or ringtones or physical phonorecords purchased~~ acquired from a qualifying seller ~~as described in paragraph (1) of this definition of "Purchased content locker service," whereby the locker service enables the purchaser to engage in one or both of the qualifying activities identified in paragraph (2) of this definition of "Purchased content locker service."~~ In addition, in the case of a locker service made available to end-user purchasers of physical phonorecords, ~~the seller must permanently part with possession of the physical phonorecords.~~ With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

- (1) A *qualifying seller* for purposes of this definition of ~~"purchased content locker service"~~ is the ~~same~~ entity operating ~~such locker service, one of its affiliates or the~~ Service Provider, including Affiliates, predecessors, or successors in interest, or—
- (i) ~~(i)~~ In the case of ~~permanent digital downloads or ringtones~~ Permanent Downloads or Ringtones, a seller having ~~another~~ a legitimate connection to the locker service provider ~~set forth in~~ pursuant to one or more written agreements (including that the ~~locker service and permanent digital downloads or ringtones~~ Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or
- (ii) ~~(ii)~~ In the case of physical phonorecords, ~~a seller having an agreement with—~~
- (A) ~~(A)~~ The ~~locker service provider whereby such parties establish~~ 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 Provider both sell the physical phonorecord and offer the integrated locker service; or
- (B) ~~(B)~~ A ~~service provider that also~~ The Service Provider has an agreement with the entity offering the ~~locker service, where pursuant to those agreements the service provider has established~~ Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same

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intend to change the substance of the regulations dealing with promotional streams and stated as much in the Initial Determination) (citing to the Initial Determination at 93).

~~service~~ Service Provider both sell the physical phonorecord and offer the integrated locker service.<sup>28</sup>

~~(2) Qualifying activity for purposes of this definition of “purchased content locker service” is enabling the purchaser to—~~

~~(i) Receive one or more additional phonorecords of such purchased sound recordings of musical works in the form of permanent digital downloads or ringtones at the time of purchase, or~~

~~(ii) Subsequently access such purchased sound recordings of musical works in the form of interactive streams, additional permanent digital downloads, restricted downloads or ringtones.~~

~~Record company shall have the meaning given in § 385.11.~~

~~Restricted download means a digital phonorecord delivery distributed in the form of a download that may not be retained and played on a permanent basis. The term restricted download includes a limited download.~~

~~Ringtone shall have the meaning given in § 385.2.~~

~~Service provider shall have the meaning given in § 385.11, except that for purposes of this subpart references in the definition of “Service provider” in § 385.11 to licensed activity and service revenue shall mean licensed subpart C activity, as defined in this section, and subpart C service revenue, as defined in this section, respectively.~~

~~Subpart C offering means, referring to subpart C of this part, a service provider's offering of licensed subpart C activity, as defined in this section, that is subject to a particular rate set forth in § 385.23(a) (e.g., a particular subscription plan available through the service provider).~~

~~Subpart C relevant page means, referring to subpart C of this part, a page (including a Web page, screen or display) from which licensed subpart C activity, as defined in this section, offered by a service provider.~~ Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider’s Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to end users End Users, but only ~~where the offering of licensed subpart C activity, as defined in this section,~~ when the Offering and content that directly relates to the offering of licensed subpart C activity, as defined in this section, relating to the Offering (e.g., an image of the artist or artwork closely associated with such offering, information about the artist or album information, reviews of such offering, credits, and music player controls) comprises 75% or more of the space on that page display, excluding any space occupied by advertising. ~~A licensed subpart C activity, as defined in this section,~~ An Offering is directly available to end users End Users from a page if End Users can receive sound recordings of musical works ~~can be accessed by end users for licensed subpart C activity, as defined in this section, from such page~~ (in most cases this will be the page ~~where the transmission~~ on which the Eligible Limited Download or Eligible Interactive Stream takes place).<sup>29</sup>

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<sup>28</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

<sup>29</sup> 37 C.F.R. §§ 385.11, 385.21 (2014) (at definition of “Subpart C relevant page”); 37 C.F.R. § 385.2 (2020).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.<sup>30</sup>

Ringtone means a phonorecord of a part of a 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.<sup>31</sup>

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.<sup>32</sup>

Service Provider Revenue.<sup>33</sup>

~~Subpart C service revenue.~~ (1) Subject to paragraphs (2) through (65) of ~~the~~this definition of ~~“Subpart C service revenue,” as defined in this section,~~ and subject to GAAP, ~~subpart C service revenue~~Service Provider Revenue shall mean, ~~referring to subpart C of this part, the following:~~

- ~~(i) All revenue from End Users recognized by the service provider from end users from a Service Provider for the provision of licensed subpart C activity, as defined in this section~~any Offering;
- ~~(ii) All revenue recognized by the service provider~~a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party

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<sup>30</sup> 37 C.F.R. § 385.21 (2014); 37 C.F.R. § 385.2 (2020).

<sup>31</sup> 37 C.F.R. § 385.2 (2014); 37 C.F.R. § 385.2 (2020).

<sup>32</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.2 (2020).

<sup>33</sup> For proposed subparagraphs (1) to (4), *see generally* 37 C.F.R. §§ 385.11 (2014) (at subparagraphs (1) to (4) of the definition of “Service revenue”), 385.21 (2014) (at subparagraphs (1) to (4) of the definition of “Subpart C service revenue”); 37 C.F.R. § 385.2 (2020) (at subparagraphs (1) to (4) of the definition of “Service Provider Revenue”). For proposed subparagraph (5), *see* 37 C.F.R. § 385.11 (2014) (at subparagraph (5) of the definition of “Service revenue”); Initial Ruling and Order After Remand, eCRB Docket No. 27063 (Public) (“Initial Ruling”) at 113. For proposed subparagraph (6), *see* 37 C.F.R. § 385.21 (2014) (at subparagraph (5) of the definition of Subpart C service revenue”); Initial Ruling at 111; Corrected Order at 27-31.

“in-stream” or “in-download” advertising as part of ~~licensed subpart C activity, as defined in this section, (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 ~~transmissions of a musical work that constitute licensed subpart C activity, as defined in this section)~~ Eligible Interactive Streaming or Eligible Limited Downloads; and

- (iii) All revenue recognized by the ~~service provider~~ Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a ~~subpart C relevant page, as defined in this section, of the service~~ Relevant Page of the Service Provider or on any page that directly follows ~~such subpart C relevant page, as defined in this section, a~~ Relevant Page leading up to and including the ~~transmission~~ Eligible Limited Download or Eligible Interactive Stream of a musical work ~~that constitutes licensed subpart C activity, as defined in this section;~~ provided that, in the case ~~where more than one service is actually~~ Offering is available to ~~end users from a subpart C relevant page, as defined in this section~~ End Users from a Relevant Page, any advertising revenue shall be allocated between ~~such services~~ or among the Service Providers 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 “Subpart C service revenue,” of this section such revenue shall, for the avoidance of doubt,~~ Service Provider Revenue shall:

- (i) Include ~~any such~~ revenue recognized by the ~~service provider, or if not recognized by the service provider,~~ Service Provider, or by any associate, ~~affiliate~~ Affiliate, agent, or representative of ~~such service provider~~ the Service Provider *in lieu* of its being recognized by the ~~service provider~~ Service Provider; and
- (ii) Include the value of any barter or other nonmonetary consideration; and

~~(iii) Not be reduced by credit card commissions or similar payment process charges; and~~

- ~~(iv)~~ (iii) Except as expressly ~~set forth~~ detailed in this ~~subpart~~ part, not be subject to any other deduction or set-off other than refunds to ~~end users for licensed subpart C activity, as defined in this section, that they~~ End Users for Offerings that the End Users were unable to use ~~due to~~ because of technical faults in the ~~licensed subpart C activity, as defined in this section,~~ Offering or other bona fide refunds or credits issued to ~~end users~~ End Users in the ordinary course of business.

- ~~(3) In each of the cases identified in paragraph (1) of the definition of “Subpart C service revenue” of this section, such revenue shall, for the avoidance of doubt,~~ Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with ~~services and activities other than licensed subpart C activity, as defined in this section, provided that~~ Offering(s), whereas advertising or sponsorship



revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of ~~the~~this definition of “Subpart C service revenue” of ~~this section. By way of example, the following kinds of revenue shall be excluded:~~

~~(i) Revenue derived from non-music voice, content and text services;~~

~~(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions);~~

~~(iii) Revenue generated from the sale of actual locker service storage space to the extent that such storage space is sold at a separate retail price;~~

~~(iv) In the case of a locker service, revenue derived from the sale of permanent digital downloads or ringtones; and~~

~~(v) Revenue derived from other music or music-related products and services that are not or do not include licensed subpart C activity, as defined in this section.~~

(4) For purposes of paragraph (1) of ~~the~~this definition of “Subpart C service revenue” of ~~this section~~, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining ~~such~~that revenue, not to exceed 15%.

(5) In instances in which a Service Provider 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 Provider for the Offering for the purpose of paragraph (1) of this definition 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 Provider 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.

~~(5)~~ In the case of a ~~mixed-service bundle~~Mixed Service Bundle, the revenue deemed to be recognized from ~~end-users~~End Users for the ~~service~~Offering for the purpose of ~~the definition in~~ paragraph (1) of ~~the~~this definition of “Subpart C service revenue” of ~~this section~~ shall be the greater of—

(i) The revenue deemed to be recognized ~~from end-users for the mixed-service bundle less the standalone published price for end-users for each of the non-music product or non-music service components of the bundle; provided that, if there is no such standalone published price for a non-music component of the bundle, then the average standalone published price for end-users for the most closely comparable non-music product or non-music service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and~~pursuant to paragraph (5) of this definition; and

(ii) Either—

- (A) In the case of a ~~mixed-service bundle~~Mixed Service Bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the ~~mixed service bundle~~Mixed Service Bundle, 40% of the standalone published price of the licensed music component of the bundle (i.e., the ~~permanent digital downloads, ringtones, locker service or limited offering~~Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for ~~end-users~~End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the ~~mixed-service bundle~~Mixed Service Bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (56)(ii)(B) of ~~the~~this definition of “Subpart C service revenue” of this section applied; or
- (B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (i.e., the ~~permanent digital downloads, ringtones, locker service or limited offering~~Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for ~~end-users~~End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

~~(6) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee—~~

~~(i) Service revenue shall be 150% of the record company's wholesale revenue from the music bundle; and~~

~~(ii) The times at which distribution and revenue recognition are deemed to occur shall be in accordance with § 201.19 of this title.~~

Sound Recording 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 chapter 14 of title 17, United States Code, 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.<sup>34</sup>

*Standalone Non-Portable Subscription Offering—Streaming Only* means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.<sup>35</sup>

*Standalone Non-Portable Subscription Offering—Mixed* means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.<sup>36</sup>

*Standalone Portable Subscription Offering* means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.<sup>37</sup>

*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

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<sup>34</sup> 37 C.F.R. § 385.11 (2014) (at definition of “Record company”); 37 C.F.R. § 385.2 (2020).

<sup>35</sup> 37 C.F.R. § 385.13(a)(1) (2014); 37 C.F.R. § 385.22(a)(1) (2020).

<sup>36</sup> 37 C.F.R. § 385.13(a)(2) (2014); 37 C.F.R. § 385.22(a)(2) (2020).

<sup>37</sup> 37 C.F.R. § 385.13(a)(3) (2014); 37 C.F.R. § 385.22(a)(3) (2020).

(3) That is subject to licensing as a public performance of the musical work.<sup>38</sup>

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 Provider 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 Provider, 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.<sup>39</sup>

Student Plan means a discounted Subscription Offering available on a limited basis to students.<sup>40</sup>

Subscription service Offering means a digital music service an Offering for which end users End Users are required to pay a fee to have access to the service 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 such the End User makes payment is made for access to the service Offering on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.24.<sup>41</sup>

TCC means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. As used in this definition, “Applicable Consideration” means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording

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<sup>38</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.2 (2020).

<sup>39</sup> 37 C.F.R. § 385.11 (2014); 37 C.F.R. § 385.2 (2020).

<sup>40</sup> 37 C.F.R. § 385.2 (2020).

<sup>41</sup> 37 C.F.R. §§ 385.11, 385.21 (2014) (at definition of “Subscription service”); 37 C.F.R. § 385.2 (2020) (at definition of “Subscription”).

Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.<sup>42</sup>

**§ 385.22**      **Calculation of royalty**385.3 Late payments in general.<sup>43</sup>

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 17 U.S.C. 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.

**§385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.**<sup>44</sup>

(a) General. A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional Offering or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible 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. A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five 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.

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<sup>42</sup> 37 C.F.R. §§ 385.11 (2014) (at definition of “Applicable consideration”), 385.13(b)-(c) (2014), 385.21 (2014) (at definition of “Applicable consideration”), 385.23(b) (2014); 37 C.F.R. § 385.2 (2020) (at definition of “Total Cost of Content or TCC”).

<sup>43</sup> 37 C.F.R. § 385.4 (2014); 37 C.F.R. § 385.3 (2020).

<sup>44</sup> 37 C.F.R. § 385.4 (2020). See also 37 C.F.R. §§ 385.14(a)(1)(iii)(A), (a)(2)-(3) (2014), 385.24(a)(4)(i), (b)-(c) (2014).

**Subpart B – Physical Phonorecord Deliveries,  
Permanent Downloads, Ringtones, and Music Bundles<sup>45</sup>**

**§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 Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download 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 the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

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<sup>45</sup> These Subpart B regulations were adopted based on a settlement covering physical phonorecord deliveries, permanent downloads, ringtones, and music bundles, which was entered into during the *Phonorecords III* proceeding (pre-remand). They were not appealed nor a part of the remand proceeding. The regulatory language set forth herein is identical to that in the *Phonorecords III* (pre-remand) regulation, at 37 C.F.R. §§ 385.10-385.11 (2020).

**Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations**

**§385.20 Scope.**<sup>46</sup>

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

**§385.21 Royalty rates and calculations**<sup>47</sup>

(a) *Applicable royalty.* Licensees that ~~make or authorize licensed~~ engage in Licensed Activity covered by this subpart ~~C activity, as defined in § 385.21,~~ pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty ~~rates and subscriber-based royalty~~ floors for specific types of services ~~provided in § 385.23, except as provided for certain free trial periods in § 385.24.~~ described in § 385.22, provided, however, that Promotional Offerings, Free Trial Offerings, and certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part.

(b) *Rate calculation* ~~methodology.~~ Royalty payments for ~~licensed~~ Licensed Activity in this subpart ~~C activity, as defined in § 385.21,~~ shall be calculated as provided in this paragraph (b). If a ~~service provides~~ Service Provider includes different ~~subpart C offerings, as defined in § 385.21~~ Offerings, royalties must be ~~separately~~ separately calculated with respect to each ~~such subpart C offering, as defined in § 385.21,~~ Offering taking into consideration ~~service revenue~~ Service Provider Revenue and expenses associated with ~~such offering. Uses subject to the free trial royalty rate shall be excluded from the calculation of royalties due, as further described in this section and § 385.23.~~ each Offering.

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<sup>46</sup> 37 C.F.R. §§ 385.10(a), 385.20(a) (2014); 37 C.F.R. § 385.20 (2020).

<sup>47</sup> This section is generally structured in the same manner as in the *Phonorecords III* regulations (pre-remand), see 37 C.F.R. § 385.21 (2020), which had consolidated separate sections from the *Phonorecords II* regulations, see 37 C.F.R. §§ 385.12-385.13, 385.22-385.23 (2014). For the revenue rates set forth in Table 1, see 37 C.F.R. § 385.21(b)(1) (2020), *Johnson v. Copyright Royalty Board*, 969 F.3d 363, 384-86 (D.C. Cir. 2020), and Initial Ruling at e.g., 2-3, 11-17, 73, 78 n.117, 94 & n.132, 113-14. For the per-subscriber “caps” set forth in Table 2, see 37 C.F.R. §§ 385.13 (2014), Initial Ruling at e.g., 19-20, 78-79, 88, 94, 113-14; see also 84 Fed. Reg. 1,918, 1,961 (Feb. 5, 2019) (eliminating separate pass-through TCC rate). Updated information has been added to the table that was included in the *Phonorecords III* (pre-remand) regulations for the TCC rates, see 37 C.F.R. § 385.21(b)(1) (2020), in order to include the per-subscriber minima for limited offerings and paid locker services, see Corrected Order at 21-24. The brackets in Table 2 for TCC rates pertain to the dispute addressed in Section II of the joint submission to which this is attached, which sets out the participants’ respective positions. Proposed paragraph (d) is modeled after the language set forth in 37 C.F.R. § 385.21 (2019). Proposed paragraph (e) is modeled after the language set forth in §§ 385.13(e) and 385.23(c) (2014).

(1) *Step 1:* Calculate the All-In Royalty for the ~~Subpart C Offering, as Defined in § 385.21.~~ For each ~~accounting period~~ Accounting Period, the all-in royalty for each ~~subpart C offering, as defined in § 385.21, of the service provider is the greater of:~~ Offering under this subpart shall be the greater of (a) the applicable percent of Service Provider Revenue, as set forth in Table 1 below, and (b) the result of the TCC Prong Calculation for the respective type of Offering as set forth in Table 2 below:

(i) ~~The applicable percentage of subpart C service revenue, as defined in § 385.21, associated with the relevant offering as set forth in § 385.23(a) (excluding any subpart C service revenue, as defined in § 385.21, derived solely from licensed subpart C activity, as defined in § 385.21, uses subject to the free trial~~

royalty and

<u>Table 1</u>					
<u>Royalty Year</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>
<u>Percent of Service Provider Revenue</u>	<u>11.4</u>	<u>12.3</u>	<u>13.3</u>	<u>14.2</u>	<u>15.1</u>

rate);

(ii) ~~The minimum specified in § 385.23(a) for the subpart C offering, as defined in § 385.21, involved.~~

<u>Table 2</u>	
<u>Type of Offering</u>	<u>TCC Prong Calculation</u>
<u>Standalone Non-Portable Subscription Offering— Streaming Only</u>	<u>The lesser of (i) [SEE SECTION II OF THE JOINT SUBMISSION] for the Accounting Period or (ii) the aggregate amount of 50 cents per subscriber for the Accounting Period.</u>
<u>Standalone Non-Portable Subscription Offering— Mixed</u>	<u>The lesser of (i) [SEE SECTION II OF THE JOINT SUBMISSION] for the Accounting Period or (ii) the aggregate amount of 50 cents per subscriber for the Accounting Period.</u>
<u>Standalone Portable Subscription Offering</u>	<u>The lesser of (i) [SEE SECTION II OF THE JOINT SUBMISSION] for the Accounting Period or (ii) the aggregate amount of 80 cents per subscriber for the Accounting Period.</u>
<u>Bundled Subscription Offering</u>	<u>[SEE SECTION II OF THE JOINT SUBMISSION] for the Accounting Period</u>
<u>Free nonsubscription/ad-supported services free of any charge to the End User</u>	<u>[SEE SECTION II OF THE JOINT SUBMISSION] for the Accounting Period</u>



<u>Table 2</u>	
<u>Mixed Service Bundle</u>	<u>[SEE SECTION II OF THE JOINT SUBMISSION]</u> for the Accounting Period
<u>Purchased Content Locker Service</u>	<u>[SEE SECTION II OF THE JOINT SUBMISSION]</u> for the Accounting Period
<u>Limited Offering</u>	The greater of (i) <u>[SEE SECTION II OF THE JOINT SUBMISSION]</u> for the Accounting Period and (ii) the aggregate amount of 18 cents per subscriber for the Accounting Period.
<u>Paid Locker Service</u>	The greater of (i) <u>[SEE SECTION II OF THE JOINT SUBMISSION]</u> for the Accounting Period and (ii) the aggregate amount of 17 cents per subscriber for the Accounting Period.

(2) *Step 2:* Subtract ~~applicable performance royalties to determine the payable royalty pool, which is the amount payable for the reproduction and distribution of all musical works used by the service provider by virtue of its licensed subpart C activity, as defined in § 385.21, for a particular subpart C offering, as defined in § 385.21, during the accounting period~~ Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each ~~subpart C offering, as defined in § 385.21, of the service provider~~ Offering of the Service Provider, subtract the total amount of ~~royalties for public performance of musical works that has been or will be expensed~~ Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through ~~such subpart C offering, as defined in § 385.21, that Offering during the accounting period~~ Accounting Period that constitute ~~licensed subpart C activity, as defined in § 385.21, (other than licensed subpart C activity, as defined in § 385.21, subject to the free trial royalty rate), or in connection with previewing of such subpart C offering, as defined in § 385.21, during the accounting period~~ Licensed Activity. Although this amount may be the total of the ~~payments with respect to the service for that subpart C offering, as defined in § 385.21, for the accounting period~~ Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of ~~such public performance payments if the service~~ the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute ~~licensed subpart C activity, as defined in § 385.21, or previewing of such licensed subpart C activity, as defined in § 385.21~~ Licensed Activity. In the case ~~where~~ in which the ~~service~~ Service Provider is also engaging in the public performance of musical works that does not constitute ~~licensed subpart C activity, as defined in § 385.21~~ Licensed Activity, the amount to be subtracted for ~~public performance payments~~ Performance Royalties shall be the amount ~~of such payments allocable to licensed subpart C activity, as defined in § 385.21, uses (other than free trial royalty rate uses), and previewing of such uses, in connection with~~ Licensed Activity uses through the relevant ~~subpart C offering, as defined in § 385.21,~~ Offering as determined in relation to all uses of musical works for which the ~~public performance payments are made for the accounting period. Such~~ Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation ~~shall be made~~ on the basis of ~~plays~~ Plays of musical works or, where per-play information is unavailable ~~due to~~ because of *bona fide* technical limitations as

described in step ~~34~~ in paragraph (b)(~~34~~) of this section, using the same alternative methodology as provided in step ~~3~~ in paragraph (b)(~~3~~) of this section ~~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 for a particular 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 royalty floor (if any) resulting from the calculations described in § 385.22.

~~(34) Step 34:~~ 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~~ Service Provider by virtue of its ~~licensed subpart C activity, as defined in § 385.21, Licensed Activity~~ through a particular ~~subpart C offering, as defined in § 385.21, Offering~~ during the ~~accounting period~~ Accounting Period. To determine this amount, the result determined in step ~~23~~ in paragraph (b)(~~23~~) of this section must be allocated to each musical work used through the ~~subpart C offering, as defined in § 385.21 Offering~~. The allocation shall be accomplished as follows:

~~(i) In the case of limited offerings (but not limited offerings that are part of mixed service bundles),~~ by dividing the payable royalty pool determined in step ~~2~~ in paragraph (b)(2) of this section ~~for such offering 3 for the Offering~~ by the total number of ~~plays~~ Plays of all musical works through ~~such offering~~ the Offering during the ~~accounting period~~ Accounting Period (other than ~~free trial royalty rate plays~~ Plays subject to subpart D of this part) to yield a ~~per-playper-Play~~ allocation, and multiplying that result by the number of ~~plays~~ Plays of each musical work (other than ~~free trial royalty rate plays~~ Plays subject to subpart D of this part) through the ~~offering~~ Offering during the ~~accounting period~~ Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this step ~~34~~ 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~~ Service Provider is not capable of tracking ~~play~~ Play information ~~due to~~ because of *bona fide* limitations of the available technology for ~~services~~ Offerings of that nature or of devices ~~usable~~ useable with the ~~service~~ Offering, 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.

~~(ii) In the case of mixed service bundles and locker services, by—~~

~~(A) Determining a constructive number of plays of all licensed musical works that is the sum of the total number of interactive streams of all licensed musical works made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed musical works made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through such~~

~~offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads);~~

~~(B) Determining a constructive per-play allocation that is the payable royalty pool determined in step 2 of paragraph (b)(2) of this section for such offering divided by the constructive number of plays of all licensed musical works determined in paragraph (b)(3)(ii)(A) of this section;~~

~~(C) For each licensed musical work, determining a constructive number of plays of that musical work that is the sum of the total number of interactive streams of such licensed musical work made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of such licensed musical work made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of such licensed musical work made through such offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads); and~~

~~(D) For each licensed musical work, determining the per-work royalty allocation by multiplying the constructive per-play allocation determined in paragraph (b)(3)(ii)(B) of this section by the constructive number of plays of that musical work determined in paragraph (b)(3)(ii)(C) of this section.~~

~~(E) Notwithstanding the foregoing, if a service provider offers both a paid locker service and a purchased content locker service, and with respect to the purchased content locker service there is no subpart C service revenue, as defined in § 385.21, and the applicable subminimum is zero dollars, then the service provider shall be permitted to include within the calculation of constructive plays under paragraphs (b)(3)(ii)(A) and (C) of this section for the paid locker service, the licensed subpart C activity, as defined in § 385.21, made through the purchased content locker service (i.e., the total number of interactive streams of all licensed musical works made through the purchased content locker service during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads)); provided that the relevant licensed subpart C activity, as defined in § 385.21, made through the purchased content locker service is similarly included within the play calculation for the paid locker service for the corresponding sound recording rights.~~

~~(iii) In the case of music bundles, by—~~

~~(A) Allocating the payable royalty pool determined in step 2 of paragraph (b)(2) of this section to separate pools for each type of product configuration included in the music bundle (e.g., CD, permanent digital download, ringtone) in accordance with the ratios that the standalone published prices of the products that are included in the music bundle bear to each other; provided that, if there is no such standalone published price for such a product, then the average standalone published price for end users for the most closely comparable product in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and~~

~~(B) Allocating the product configuration pools determined in paragraph (b)(3)(iii)(A) of this section to individual musical works by dividing each such pool by the total number of sound recordings of musical works included in products of that configuration in the music bundle.~~

(c) *Overtime adjustment.* For purposes of the calculations in step ~~3~~4 in paragraph (b)(3)(~~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-plays~~0.2 Plays 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 at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A)(i), and part 210 of this title. Without limitation, statements of account (where applicable) shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply) were determined and, for each Offering reported, also indicate the type of Licensed Activity involved and the number of 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.

(e) Computation of subscriber months in TCC Prong Calculation. In connection with the TCC Prong Calculation in step 1 of this section for an Accounting Period, to the extent applicable, the total number of subscriber-months for the Accounting Period shall be calculated, taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber shall be used as the subscriber-based component (if any) in step 1 for the Accounting Period.

**§ 385.23** 385.22 **Royalty rates and subscriber-based royalty floors for specific types of services offerings.**<sup>48</sup>

(a) *In general.* The following royalty ~~rates and subscriber-based royalty floors~~ floors for use in step 3 of § 385.21(b)(3)(ii) shall apply to the ~~following~~ respective types of ~~licensed subpart C activity, as defined in § 385.21:~~ Offerings.

~~(1) *Mixed service bundle.* In the case of a mixed service bundle, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.~~

~~(2) *Music bundle.* In the case of a music bundle, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) and (3) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.~~

~~(3) *Limited offering.* In the case of a limited offering, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 10.5%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—~~

~~(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%; and~~

~~(ii) The aggregate amount of 18 cents per subscriber per month.~~

~~(4) *Paid locker service.* In the case of a paid locker service, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 12%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—~~

~~(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.11%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 20.65%; and~~

1) *Standalone non-portable Subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the ~~(ii) The~~ aggregate amount of ~~17~~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 Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible

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<sup>48</sup> 37 C.F.R. § 385.13(a), (e) (2014); 37 C.F.R. § 385.22 (2020). While the *Phonorecords II* definitions also discussed the TCC “cap” levels in this section, those are now addressed in Table 2 for clarity and organization. For the language in proposed paragraph (b), see 37 C.F.R. § 385.13(e) (2014), 37 C.F.R. § 385.22(b) (2020). For treatment of Family Plans and Student Plans, see 37 C.F.R. § 385.22(b) (2020), Corrected Order at 6-7.

Limited Downloads but only from a non-portable device to which those Streams or Eligible Limited Downloads are originally transmitted, the royalty floor is the aggregate amount of 30 cents per subscriber per month.

~~(5) *Purchased content locker service.* In the case of a purchased content locker service, the percentage of subpart C service revenue, as defined in § 385.21, applicable in step 1 of § 385.22(b)(1)(i) is 12%. For the avoidance of doubt, paragraph (1)(i) of the definition of “Subpart C service revenue,” as defined in § 385.21, shall not apply. The minimum for use in step 1 in § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 18%, and the sound recording only percentage applicable to § 385.23(b)(2) is 22%, except that for purposes of paragraph (b) of this section the applicable consideration expensed by the service for the relevant rights shall consist only of applicable consideration expensed by the service, if any, that is incremental to the applicable consideration expensed for the rights to make the relevant permanent digital downloads and ringtones.~~

~~(b) *Computation of subminima.* For purposes of paragraph (a) of this section, the subminimum for an accounting period is the aggregate of the following with respect to all sound recordings of musical works used in the relevant subpart C offering, as defined in § 385.21, of the service provider during the accounting period—~~

~~(1) Except as provided in paragraph (b)(3) of this section, in cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C activity, as defined in § 385.21, with respect to a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, the appropriate all-in percentage from paragraph (a) of this section of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C activity, as defined in § 385.21, with respect to a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, the appropriate sound recording only percentage from paragraph (a) of this section of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights 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.~~

~~(3) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee, the appropriate all-in percentage from paragraph (a) of this section of the record company's total wholesale revenue from the music bundle in accordance with GAAP for the accounting period, which amount shall equal the applicable consideration for such music bundle at the time such applicable consideration is properly recognized as revenue under GAAP, subject to the provisions of § 201.19 of this title concerning the times at which distribution and revenue recognition are deemed to occur.~~ *Standalone portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor is the aggregate amount of 50 cents per subscriber per month.

(4) Bundled Subscription Offerings. In the case of a Bundled Subscription Offering, the royalty floor is the aggregate amount of 25 cents per month for each Active Subscriber.

~~(4) If a record company providing sound recording rights to the service provider for a licensed subpart C activity, as defined in § 385.21—~~

~~(i) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed subpart C activity, as defined in § 385.21, and its affiliates, and~~

~~(ii) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,~~

~~(iii) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraph (b)(1) or (2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.~~

(e) Computation of subscriber-based royalty rates/floors. For purposes of paragraphs (a)(3) and (4) paragraph (a) of this section, to determine the subscriber-based minimum royalty floor, as applicable to any particular subpart C offering, as defined in § 385.21 Offering, the total number of subscriber-months for the accounting period Accounting Period, shall be calculated, by 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 covered by a free trial period subject to the free trial royalty rate as described in § 385.24 End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the accounting period 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 for the accounting period royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.

**§ 385.24 Free trial periods.**

**Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services**

**§385.30 Scope.**<sup>49</sup>

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

~~(a) *General provisions.* This section establishes a royalty rate of zero in the case of certain free trial periods for mixed service bundles, paid locker services and limited offerings under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the free trial royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission, as part of a mixed service bundle, paid locker service or limited offering, of a sound recording that embodies such musical work, only if—~~

~~(1) The primary purpose of the record company in providing or authorizing the free trial period is to promote the applicable subpart C offering, as defined in § 385.21;~~

~~(2) No applicable consideration for making or authorizing the transmissions is received by the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or audiovisual works embodying musical works or the paid use of music services through which sound recordings or audiovisual works embodying musical works are available;~~

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

~~(4) In connection with authorizing the transmissions, the record company has obtained from the service provider it authorizes a written representation that—~~

~~(i) The service provider agrees to maintain for a period of no less than 5 years from the end of each relevant accounting period complete and accurate records of the relevant authorization, and identifying each sound recording of a musical work made available through the free trial period, the licensed subpart C activity, as defined in § 385.21, involved, and the number of plays or downloads, as applicable, of such recording;~~

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

~~(iii) The representation is signed by a person authorized to make the representation on behalf of the service provider;~~

~~(5) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the free trial royalty rate by that service;~~

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<sup>49</sup> [37 C.F.R. § 385.30 \(2020\)](#).



~~(6) The free trial period is offered free of any charge to the end user; and~~

~~(7) End users are periodically offered an opportunity to subscribe to the service during such free trial period.~~

~~(b) *Recordkeeping by record companies.* To rely upon the free trial royalty rate for a free trial period, a record company making or authorizing the free trial period shall keep complete and accurate contemporaneous written records of the contractual terms that bear upon the free trial period; and further provided that, if the record company itself is conducting the free trial period, it shall also maintain any additional records described in paragraph (a)(4)(i) of this section. The records required by this paragraph (b) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed subpart C activity, as defined in § 385.21, in the ordinary course of business, but in no event for less than 5 years from the conclusion of the licensed subpart C activity, as defined in § 385.21, to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (b) with respect to a specific free trial period, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(4)(i) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.~~

~~(c) *Recordkeeping by services.* If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(4)(i) of this section by a service authorized by a record company with respect to a specific promotion, the service provider shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the service provider shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service provider does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the service provider (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.~~

~~(d) *Interpretation.* The free trial royalty rate is exclusively for audio-only licensed subpart C activity, as defined in § 385.21, involving musical works subject to licensing under 17 U.S.C. 115. The free trial royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the free trial royalty rate (including without limitation licensed subpart C activity, as defined in § 385.21, beyond the time limitations applicable to the free trial royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101, et seq.~~

**§ 385.25      ~~Reproduction and distribution rights covered.~~**

~~A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed subpart C activity, as defined in § 385.21, solely for the purpose of providing such licensed subpart C activity, as defined in § 385.21 (and no other purpose).~~

**§ 385.26      ~~Effect of~~385.31 Royalty rates.<sup>50</sup>**

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

(a)      *Promotional Offerings.* For Promotional Offerings of audio-only Eligible Interactive Streams and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

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

(d)      *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 subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

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<sup>50</sup> 37 C.F.R. § 385.31 (2020). See also 37 C.F.R. §§ 385.14(a)(1), 385.24(a) (2014).

# Proof of Delivery

I hereby certify that on Wednesday, November 30, 2022, I provided a true and correct copy of the Exhibit B to Joint Submission Pursuant to November 10 Corrected Order Regarding Regulatory Provisions Following Initial Ruling and Order (After Remand) to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Amazon.com Services LLC, represented by Scott Angstreich, served via E-Service at sangstreich@kellogghansen.com

Google LLC, represented by David P Mattern, served via E-Service at dmattern@kslaw.com

National Music Publishers' Association (NMPA) et al, represented by Benjamin Semel, served via E-Service at Bsemel@pryorcashman.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

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

Signed: /s/ Richard M Assmus