

MINNESOTA STATE BAR ASSOCIATION COMMUNICATIONS LAW SECTION

"Digital Public Performance Rights in Sound Recordings and Their Application to
Webcasts"

April 14, 2010

By Tony Mendoza, Esq.

I. INTRODUCTION.

There are two basic rights integrated into a recorded piece of music. First, there is a separate copyright in the underlying musical composition.¹ One element of the "bundle" of rights inherent in the copyright for a musical composition is an exclusive right of public performance.² Public performance rights in musical compositions are administered by "performance rights societies" such as ASCAP, BMI, and SESAC.³ License agreements with all three of these performance rights societies are required to webcast any musical compositions covered by their songwriter/publisher representation agreements. Performance rights for most popular musical compositions are administered by one of these three societies. To the extent any webcast music is not administered by one of these performance rights societies, you will either need to obtain a license from the person or entity with authority to license such rights, or refrain from webcasting such recordings.

The second basic right inherent in a sound recording is a copyright in the sound recording itself.⁴ For example, The Beatles song "Yesterday" has been recorded by other artists 3,000 times (the most any song has ever been covered). So, there are 3,000 distinct "sound recording" copyrights in each recorded version of this song. In contrast, there is only one copyright in the underlying musical composition of that song.

¹ 17 U.S.C. §102(a)(2).

² *Id.* §106(4).

³ See Appendix A for a basic depiction of how the licensing scheme for public performance of musical compositions works.

⁴ *Id.* §102(a)(7).

II. DIGITAL PERFORMANCE OF SOUND RECORDINGS.

Historically, unlike copyright owners of musical compositions, copyright owners of sound recordings have had not enjoyed a public performance right. However, with the development of the internet, and all of its applications, this has changed. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”) to create a limited digital performance right and a compulsory licensing scheme for “digital phonorecord delivery.”⁵ The DPRA created a right to perform a sound recording publicly by means of a digital audio transmission.⁶ “Digital audio transmission” is defined as “a digital transmission . . . that embodies the transmission of a sound recording.”⁷ A “digital transmission,” in turn, “is a transmission in whole or in part in a digital or other non-analog format.”⁸ Both original and simultaneous retransmissions are included.⁹

The DPRA exempted non-subscription digital audio transmissions from royalty obligations, but created a compulsory license for subscription digital audio transmission services. The Digital Millennium Copyright Act Of 1998 (“DMCA”) expanded the scope of the compulsory license and imposed a statutory royalty obligation on digital audio music providers.¹⁰ Nearly all music-based webcasting is subject to compulsory license under the DMCA. A 2009 Second Circuit Court of Appeals decision clarified the scope of the DMCA.¹¹ The Court held the degree of predictability that a consumer experiences when utilizing a digital audio transmission service dictates whether the service falls under the compulsory licensing scheme of the DCMA, or requires individual licensing of sound recording copyrights.¹² The compulsory licensing system is cheaper and far less cumbersome on digital music providers.

A compulsory licensing system means copyright owners cannot withhold a license for the performance of sound recordings. Compulsory license fees/royalties are regulated. Establishing the statutory royalty rate applicable to digital audio transmissions that are subject to the compulsory licensing scheme has been a controversial exercise. A federal administrative body called the Copyright Royalty Board (CRB), formerly called the Copyright Arbitration Review Panel (CARP), establishes default royalty rates for Internet transmissions of sound recordings. In 2002, Congress passed the Small Webcaster Settlement Act of 2002 (“WSA 2002”).¹³ While proceedings were pending before the then CARP regarding the default compulsory licensing rates for digital transmission of sound recordings, WSA 2002 permitted certain statutorily defined “receiving agents” to

⁵ Pub. L. No. 104-39, Section 3, 109 Stat. 336.

⁶ 17 U.S.C. §114(d)(2).

⁷ *Id.* at §114(j)(5).

⁸ *Id.* §101.

⁹ *Id.* §114(j)(12), (14).

¹⁰ *Id.* §114(d)(2).

¹¹ *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2009).

¹² See Appendix B for a visual description of the *Arista* court's holding regarding the scope of the DMCA.

¹³ 107 Pub. L. No. 321, Section 1, 116 Stat. 2780 (Dec. 4, 2003).

negotiate agreements for royalties.¹⁴ A non-profit corporation called "SoundExchange" governed by major record companies and recording artists was created and appointed by CARP to be the exclusive "receiving agent" or "clearinghouse" for digital sound recording licenses. Thus, with respect to digital licensure of sound recordings, SoundExchange plays nearly an identical role to that which ASCAP, BMI, and SESAC play with respect to musical compositions.¹⁵

Another important aspect of the WSA 2002 was to include an opt-in provision for webcasters who do not have the resources to negotiate their own individual license agreements with SoundExchange.¹⁶ Thus, a new webcaster can now review agreements previously negotiated between Sound Exchange and other webcasters. If the webcaster seeking to opt-in to an existing agreement meets the eligibility criteria set forth in such an agreement, such a webcaster, after completing a few procedural steps, can opt-in to that existing agreement. If a new webcaster does not opt-in to an agreement, then it must either negotiate or arbitrate its own agreement, or pay the default compulsory licensing rates set by the CRB.

Since 1998, the CARP, and now the CRB have been through two lengthy and contentious proceedings to establish the default rates for digital transmission of sound recordings. Both of the agency's decisions were appealed and largely upheld by the United States Court of Appeals District of Columbia Circuit.¹⁷

III. OBTAINING DIGITAL LICENSES FOR PUBLIC PERFORMANCE OF SOUND RECORDINGS.

The default rates most recently established by the CRB (and upheld earlier this year by the Court of Appeals) were severely criticized by webcaster trade associations as unduly oppressive on the webcasting industry. Many webcasters predicted the end of the webcasting industry. This does not appear to have been the result. However, it could be because there have been several agreements between SoundExchange and various webcasting entities into which webcasters can now opt-in.

Key terms and conditions of these two negotiated agreements are summarized below as examples.

A. PurePlay/Small Play Agreement (See Appendix D).

- To qualify as a "small pure play" webcaster under this agreement, a commercial webcaster must (a) have gross revenue of less than \$1,250,000 per year; and (b) have "average monthly aggregate tuning hours" ("ATH") below a certain threshold established on a table included in the agreement.

¹⁴ 17 U.S.C. §114(f)(5)(A).

¹⁵ See Appendix C for a basic depiction of how the Sound Exchange licensure system works.

¹⁶ *Id.* §114(f)(5)(B).

¹⁷ *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005); *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd.*, 571 F. 3d 69 (D.C. Cir. 2009); *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd. II*, 574 F.3d 748 (D.C. Cir. 2009).

See Page 34798 of Appendix D. There is a separate rate under the agreement for commercial webcasters who do not meet the "small pure play" definition.

- Minimum annual fee of \$25,000, applied against webcaster's annual royalty liability.
- Royalty rates for "small pure play" webcasters will be the greater of either (a) 10% of the first \$250,000 in gross revenue plus 12% of gross revenue in excess of \$250,000; or (b) 7% of expenses for the calendar year.
- Webcasters electing this agreement must provide SoundExchange with census reporting (actual recording played and total listenership).
- Agreement is effective until December 31, 2015.

B. Small Webcaster/Microcaster Agreement (See Appendix E).¹⁸

- To qualify as a "microcaster" under this agreement you must: (a) be an "eligible small webcaster"; (b) have annual gross revenue of not more than \$5,000; (c) have annual expenses of not more than \$10,000; and (d) not make eligible nonsubscription transmissions exceeding 18,067 ATH.
- An "eligible small webcaster" is one with gross revenue \$1,250,000.
- Minimum annual fee:
 - \$500 for microcasters which shall constitute the only royalty payable under the agreement, except that a microcaster must also pay a \$100 per year fee in exchange for a waiver from the census reporting requirements required of larger webcasters.
 - \$2,000 for eligible small webcasters with annual gross revenue less than or equal to \$50,000.
 - \$5,000 for eligible small webcasters with annual gross revenue greater than \$50,000.
- For eligible small webcasters other than microcasters, additional royalty rates are:
 - On any transmissions not exceeding 5 million ATH, the greater of (a) 10% of the first \$250,000 of annual gross revenue, plus 12% of annual gross revenue in excess of \$250,000; or (b) 7% of annual expenses.
- Small webcasters must provide census reporting to SoundExchange. Microcasters do not need to report.
- Agreement effective through December 31, 2015.

There are certain prerequisites to becoming eligible to obtain any digital transmission license.

¹⁸ The Small Webcaster/Microcaster Agreement begins on page 9302 of Appendix E to this Memorandum, under the heading in the actual document labeled Appendix C. The copy provided is from the Federal Register where all SoundExchange agreements are published in accordance with federal law. Several other agreements were included in that edition of the Federal Register. To avoid confusion, I only included the pages that contain the referenced agreement.

Step One - Register with the U.S. Copyright Office.

All firms seeking compulsory licenses for digital transmission of sound recordings must file a Notice of Use of Sound Recordings Under Statutory License. I have a copy of this form is attached as Appendix F. The filing fee for this form is \$25.

Step Two - Comply With Performance Restrictions.

There are a number of restrictions on how a compulsory license holder can use licensed sound recordings. These restrictions are generally based on the purpose of the statute to allow webcasting while at the same time making it difficult for listeners to pirate the webcast recordings. The restrictions are:

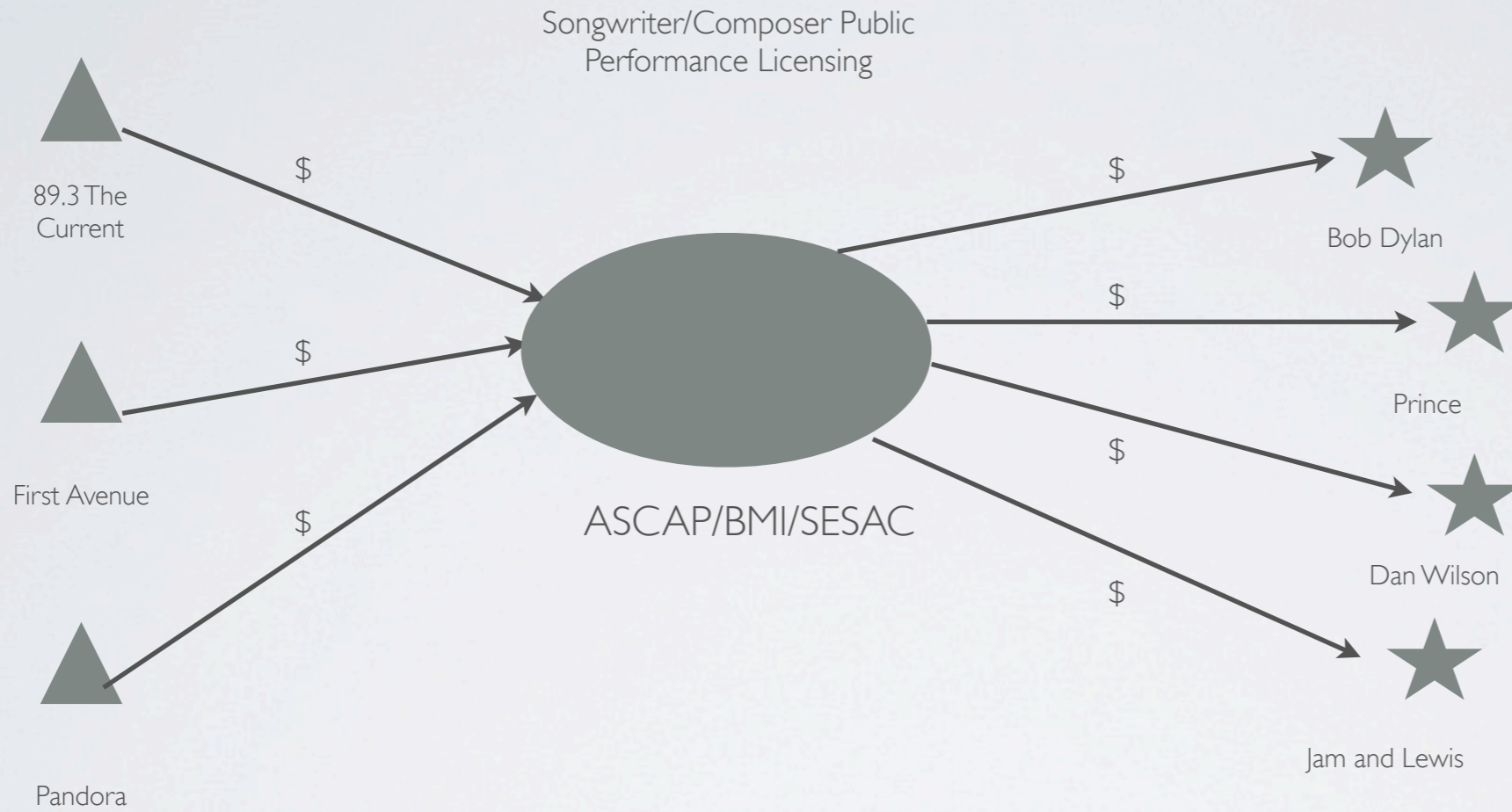
- **No interactive service.** Interactive services are those allowing listeners to dictate the songs to be played by the station. In other words, the transmission must be more like a typical broadcast radio station. Allowing listeners to dictate the songs being played would take the station out of the compulsory license, and result in liability for copyright infringement unless the non-conforming use were licensed under some other form of agreement.
- **Transmission of copyright information.** Internet stations must identify during the time any song is being played: (a) the song title; (b) the name of the album or CD from which the song came; (c) the name of the artist. If technically feasible, the sound recording must be accompanied by information that is encoded by the copyright owner that identifies the sound recording title, featured artist, and information regarding the underlying music composition.
- **Sound recording performance complement.**
 - One Album or CD Restriction. On a particular channel, within any three-hour time period, the programming can contain no more than three selections from any one album or CD, and no more than two such selections can be played consecutively;
 - Featured Artist Restriction. On any particular channel, within any three-hour period, no more than four different selections by the same featured artist or from any set or compilation, and no more than three such selections can be played consecutively.
- **Advance Program Schedules.** Webcasters cannot publish an advance program schedule that identifies when a specific recording, album or CD, or featured artist will be played.

- **Synchronous Visual Restrictions.** There are also restrictions on any pairing of recordings with visual product depictions that imply an association between the song and the product.

Step Four - Complete and Submit Notice of Election to Opt-In to Existing Sound Exchange Agreement. These forms are provided on the Sound Exchange web site. The election forms for the two agreements summarized above are attached as Appendices G and H.

Step Three - Calculate and Pay Royalties. There are fairly self-explanatory instructions for doing this on the SoundExchange web site. Also, payment terms are included in opt-in agreements negotiated between SoundExchange and other webcasters (See, e.g., Appendices D and E). There are penalties for late payment of royalties in all of the SoundExchange Agreements.

APPENDIX A



Mendoza Law Office, LLC

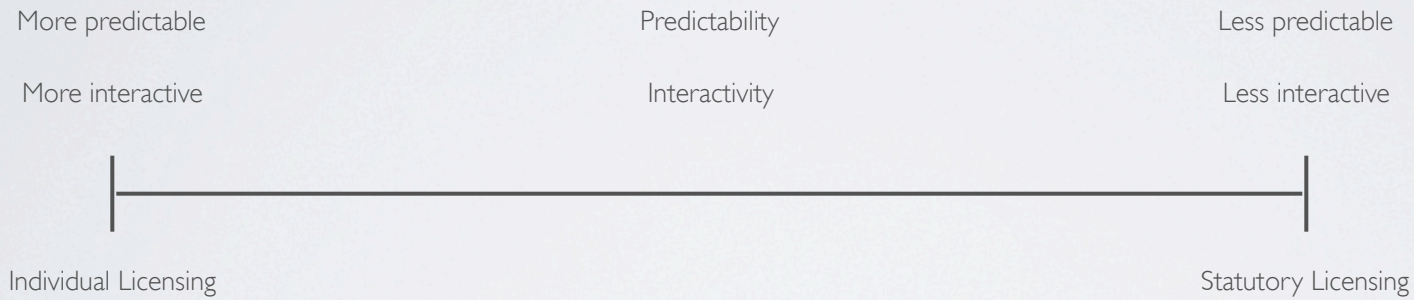
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Monday, April 12, 2010

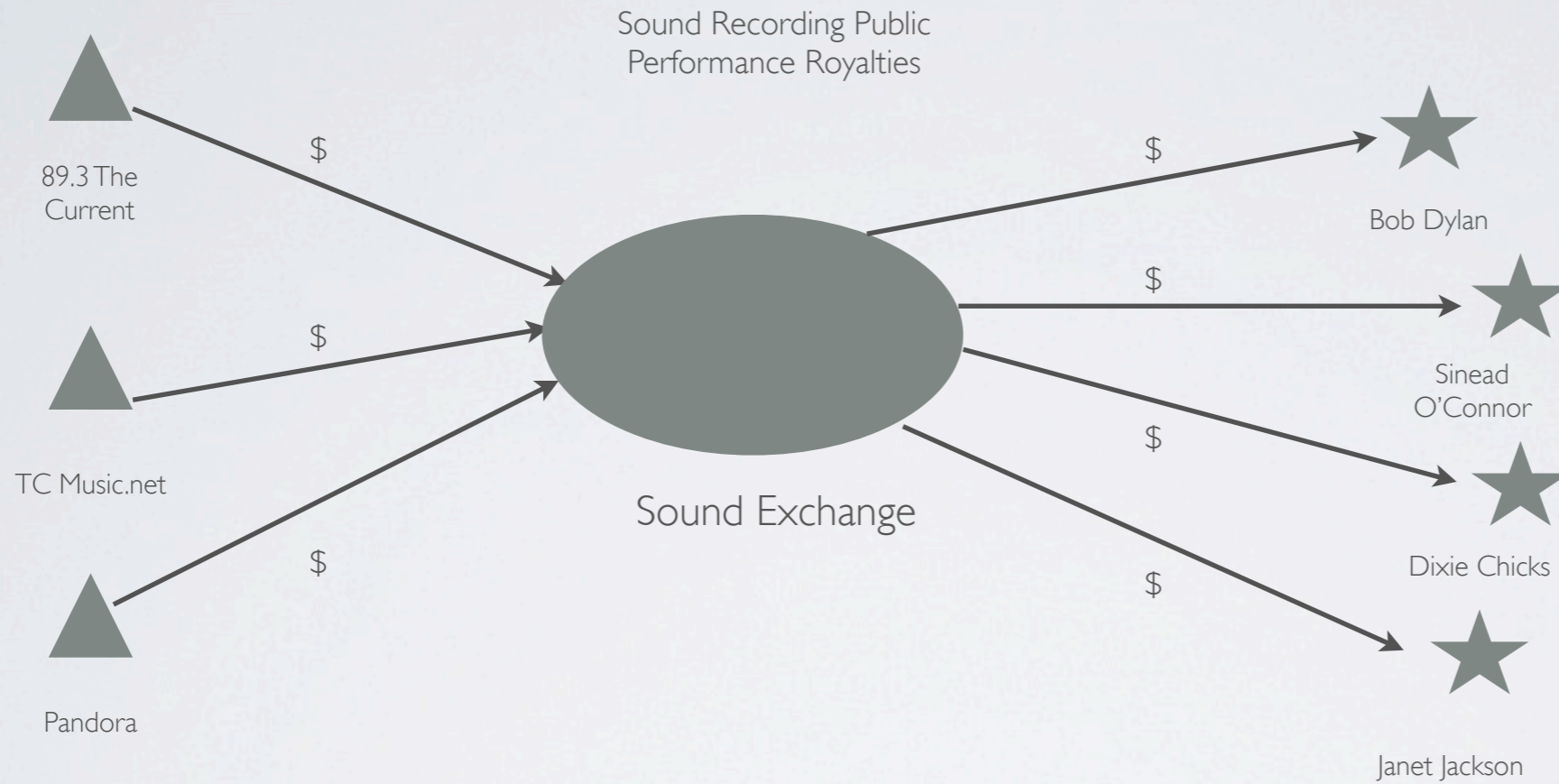
APPENDIX B

Arista Records v. Launch Media, 578 F. 3d 148 (2nd Cir. 2009)



Mendoza Law Office, LLC

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notice is to announce the Committee and workgroup meetings scheduled for September 1–2, 2009.

DATES: The Shipyard and Longshore workgroups will meet on Tuesday, September 1, 2009, 8 a.m. to 4:30 p.m., and the Committee will meet on Wednesday, September 2, 2009, from 8 a.m. to 4:30 p.m.

ADDRESSES: The Committee and workgroups will meet at the Newport News Marriott Hotel, 740 Town Center Drive, Newport News, VA 23606 ((757) 873-9299). Mail comments, views, or statements in response to this notice to Danielle Watson, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone (202) 693-1870; fax (202) 693-1663.

FOR FURTHER INFORMATION CONTACT: For general information about MACOSH and this meeting, contact: Amy Wangdahl, Acting Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693-2066. Individuals with disabilities wishing to attend the meeting should contact Danielle Watson at (202) 693-1870 no later than August 18, 2009, to obtain appropriate accommodations.

SUPPLEMENTARY INFORMATION: All MACOSH meetings are open to the public. All interested persons are invited to attend the MACOSH meeting at the time and location listed above. The MACOSH agenda will include: An OSHA activities update; a review of the minutes from the previous meeting; and reports from each workgroup. MACOSH may also discuss the following topics based on the workgroup reports: Surface preparation (29 CFR 1915 subpart C, Painting and Coatings); Safety and Health Injury Prevention Sheets (SHIPS) rigging guidance document; arc flash guidance; commercial fishing industry quick cards; injury and fatality data initiative; activities related to shipyard employment; scaffolding and falls (29 CFR 1915 subpart E); welding guidance; break bulk cargo safety guidance; safety zone guidance; speed limits in marine terminals; and defective containers.

Public Participation: Written data, views, or comments for consideration by MACOSH on the various agenda items listed above should be submitted to Danielle Watson at the address listed above. Submissions received by August 18, 2009, will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits.

Authority: This notice was prepared under the direction of Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), Secretary of Labor's Order 5-2007 (72 FR 31160), and 29 CFR part 1912.

Signed at Washington, DC, this 14th day of July, 2009.

Jordan Barab,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E9-17022 Filed 7-16-09; 8:45 am]

BILLING CODE 4510-26-P

LIBRARY OF CONGRESS

Copyright Office

Notification of Agreements Under the Webcaster Settlement Act of 2009

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreement.

SUMMARY: The Copyright Office is publishing an agreement which sets rates and terms for the reproduction and performance of sound recordings made by certain specified webcasters, under two statutory licenses. Webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreement published herein rather than the rates and terms of any determination by the Copyright Royalty Judges.

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Attorney Advisor, or Tanya M. Sandros, Deputy General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366. See the final paragraph of the SUPPLEMENTARY INFORMATION for information on where to direct questions regarding the rates and terms set forth in the agreement.

SUPPLEMENTARY INFORMATION: On June 30, 2009, President Obama signed into law the Webcaster Settlement Act of 2009 ("WSA"), Pub. L. No. 111-36, which amends section 114 of the Copyright Act, title 17 of the United States Code, as it relates to webcasters. Section 114(f)(5) as amended by the WSA allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002, order for collecting royalty payments made by eligible

nonsubscription transmission services under the section 112 and section 114 statutory licenses, *see* 67 FR 45239 (July 8, 2002), to enter into agreements on behalf of all copyright owners and performers to set rates, terms and conditions for webcasters operating under the section 112 and section 114 statutory licenses for a period of not more than 11 years beginning on January 1, 2005. The authority to enter into such settlement agreements shall expire at 11:59 p.m. Eastern time on the 30th day after the enactment of the WSA.

Unless otherwise agreed to by the parties, the rates and terms set forth in the agreement apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords. To make this point clear, Congress included language expressly addressing the precedential value of agreements made under the WSA. Specifically, section 114(f)(5)(C), states that: "Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that are party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection." 17 U.S.C. 114(f)(5)(C) (2009).

On July 7, 2009, SoundExchange notified the Copyright Office that it had negotiated an agreement for the reproduction and performance of sound recordings by "Commercial Webcasters Including Small Pureplay Webcasters" under the section 112 and section 114 statutory licenses. Therefore, in accordance with the requirement set forth in amended section 114(f)(5)(B), the Copyright Office is publishing the submitted agreement as Appendix A, thereby making the rates and terms in the agreement available to any webcasters meeting the respective eligibility conditions of the agreement as an alternative to the rates and terms of any determination by the Copyright Royalty Judges.

The Copyright Office has no responsibility for administering the rates and terms of the agreement beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreement should be directed to SoundExchange (for contact information, see <http://www.soundexchange.com>).

Dated: July 13, 2009.

Marybeth Peters,

Register of Copyrights.

Note: The following Appendix Will Not Be Codified in the Code of Federal Regulations.

APPENDIX A – AGREED RATES AND TERMS FOR COMMERCIAL WEBCASTERS INCLUDING SMALL PUREPLAY WEBCASTERS ARTICLE 1 – DEFINITIONS

1.1 *General.* In general, words used in the rates and terms set forth herein (the "Rates and Terms") and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 *Additional Definitions*

(a) "Affiliate" of a transmitting entity is a person or entity that directly, or indirectly through one or more intermediaries –

(1) has securities or other ownership interests representing more than 50 percent of such person's or entity's voting interests beneficially owned by –

(A) such transmitting entity; or

(B) a person or entity beneficially owning securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity;

(2) beneficially owns securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity; or

(3) otherwise Controls, is Controlled by, or is under common Control with the transmitting entity.

(b) "Bundled Service" means any package of services or products provided to end users by a Commercial Webcaster, Affiliate, or any third party with which a Commercial Webcaster has a Third Party Business Arrangement that meets each of the following requirements:

(1) the package of products or services includes a digital music service through which Eligible Transmissions are made and at least one other product or service that does not consist only of the offering of Eligible Transmissions; and

(2) the package of products or services that constitute any particular package is only offered to end users for a fee (whether one-time, recurring or otherwise) that does not differentiate among the various components of the package. The fact that the package of products or services, or any component part(s) thereof, is offered to end users for a limited duration without a fee (i.e., on a promotional basis) shall not disqualify the package from treatment as a Bundled Service.

(c) "Commercial Webcaster" shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has obtained a compulsory license under 17 U.S.C. § 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(I).

(d) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract or otherwise.

(e) "Eligible Transmission" shall mean an eligible nonsubscription transmission, or a transmission through a new subscription service, made by a Commercial Webcaster over the internet that is subject to the payment of royalties under 37 C.F.R. Part 380.

(f) "Expenses" –

(1) means all costs incurred (whether actually paid or not) by a Small Pureplay Webcaster, except that capital costs shall be treated as Expenses allocable to a period only to the extent of charges for amortization or depreciation of such costs during such period as are properly allocated to such period in accordance with U.S. Generally Accepted Accounting Principles ("GAAP");

(2) includes the fair market value of all goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property) provided by a Small Pureplay Webcaster to any third party in lieu of a cash payment and the fair market value of any goods or services purchased for or provided to a Small Pureplay Webcaster by an Affiliate of such webcaster; and

(3) shall not include –

(A) the imputed value of personal services rendered by up to 5 natural persons who are, directly or indirectly, owners of the Small Pureplay Webcaster, and for which no compensation has been paid;

(B) the imputed value of occupancy of residential property for which no Federal income tax deduction is claimed as a business expense;

(C) costs of purchasing phonorecords of sound recordings used in the Small Pureplay Webcaster's service;

(D) royalties paid for the public performance of sound recordings; or

(E) the reasonable costs of collecting overdue accounts receivable, provided that the reasonable costs of collecting any single overdue account receivable may not exceed the actual account receivable.

(g) "Gross Revenues" means all revenue of any kind earned by the Commercial Webcaster or its Affiliates from all its operations, in accordance with U.S. Generally Accepted Accounting Principles, and includes –

(A) all cash or cash equivalents;

(B) the fair market value of goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property);

(C) in-kind and cash donations and other gifts (but not capital contributions made in exchange for an equity interest in the recipient); and

(D) amounts earned by such person or entity but paid to an Affiliate of such person or entity in lieu of payment to such person or entity.

For the avoidance of doubt, Gross Revenues includes revenue from activities other than making Eligible Transmissions, including revenue from transmissions of sound recordings licensed directly from the relevant copyright owners. Commercial Webcasters with substantial revenue from activities other than making Eligible Transmissions under the statutory licenses in Sections 112(e) and 114 may wish not to elect to be subject to these Rates and Terms.

(h) "Small Pureplay Webcaster" shall mean a Commercial Webcaster that (a) together with its Affiliates, has not had annual Gross Revenues of more than \$1,250,000 from its (or their) worldwide

activities, in any two previous calendar years, and (b) in any calendar year in which it is to be considered a Small Pureplay Webcaster reasonably expects to have, together with its Affiliates, (i) annual Gross Revenues of not more than \$1,250,000 from its (or their) worldwide activities; and (ii) average monthly aggregate tuning hours for all programming transmitted within the United States, less the actual running time of any sound recording licensed directly from the relevant copyright owners, that is less than the relevant threshold from the following table:

YEAR	MAXIMUM AGGREGATE TUNING HOURS
2006–2008	7 million ATH
2009	8 million ATH
2010	8.5 million ATH
2011	9 million ATH
2012–2014	10 million ATH

Small Pureplay Webcaster status is available in 2006–2014 only (not 2015).

(i) “*SoundExchange*” shall mean SoundExchange, Inc. and shall include its successors and assigns.

(j) “*Subscription Service*” means a service providing Eligible Transmissions that are subscription transmissions (as defined in 17 U.S.C. § 114(j)(14)).

(k) “*Syndicated Service*” means a service providing Eligible Transmissions selected or controlled, or made using ephemeral recordings controlled, by the relevant Commercial Webcaster but presented in such a manner that (i) the end user can receive Eligible Transmissions without visiting a page, interface, display, application, player, software or other electronic property predominantly associated with the service, or (ii) the end user can receive Eligible Transmissions through a website, application, player, software or other electronic property of any kind that is owned, controlled or branded by a third party, in whole or in part, directly or indirectly pursuant to a Third Party Business Arrangement.

(l) “*Third Party Business Arrangement*” means any arrangement with a third party where the third party (or another party on behalf of such third party) provides monies or other consideration recognizable as revenue under GAAP to a Commercial Webcaster or an Affiliate. For the avoidance of doubt, the provision of a “white label” service would constitute a Third Party Business Agreement.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

2.1 *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement

Act of 2009, and subject to the provisions set forth below, Commercial Webcasters may elect to be subject to the rates and terms set forth herein (the “Rates and Terms”) in their entirety, with respect to such Commercial Webcasters’ Eligible Transmissions and related ephemeral recordings, for any calendar year that it qualifies as a Commercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Commercial Webcaster and make a timely election pursuant to Section 2.2 must comply with otherwise applicable rates and terms.

2.2 *Election Process in General.* To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for any one or more calendar years that it qualifies as a Commercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, a Commercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than 30 days after publication of these Rates and Terms in the **Federal Register**. On any such election form, the Commercial Webcaster must, among other things, certify that it qualifies as a Commercial Webcaster for the relevant year. Even if an entity has once elected to be treated as a Commercial Webcaster, it must make a separate, timely election in each subsequent year in which it wishes (and is eligible) to be treated as such. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Section 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 Fed. Reg. 24084 (May 1, 2007) (the “Final Determination”) or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Section 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015

(including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the **Federal Register** at 74 Fed. Reg. 318–20 (Jan. 5, 2009)) shall not be treated as a Commercial Webcaster or have the right to claim the benefit of these Rates and Terms, unless it withdraws from such proceeding no later than five business days after submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 *Election of Small Pureplay Webcaster Status.* A Commercial Webcaster that elects to be subject to these Rates and Terms and qualifies as a Small Pureplay Webcaster may elect to be treated as a Small Pureplay Webcaster for any one or more calendar years that it so qualifies during the period 2006–2014. To do so, the Commercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than 30 days after publication of these Rates and Terms in the **Federal Register**. On any such election form, the Commercial Webcaster must, among other things, certify that it qualifies as a Small Pureplay Webcaster for the relevant year and provide Gross Revenues and aggregate tuning hours information relevant to determining eligibility. Even if an Eligible Small Webcaster has once elected to be treated as a Small Pureplay Webcaster, it must make a separate, timely election in each subsequent year in which it wishes (and is eligible) to be treated as such. For the avoidance of doubt, if a Commercial Webcaster that has once made an election to be subject to these Rates and Terms as a Small Pureplay Webcaster wishes to not make such an election in subsequent years, and is eligible to be treated as an Eligible Small Webcaster under the agreement entered into by SoundExchange under the Webcaster Settlement Act and published in the **Federal Register** at 74 Fed. Reg. 9302 (March 3, 2009), the Commercial Webcaster may elect to be treated as an Eligible Small Webcaster under such agreement for such subsequent years. ≤

2.4 *Representation of Compliance and Non-waiver.* By electing to operate pursuant to these Rates and Terms, an entity represents and warrants that it qualifies as a Commercial Webcaster, and if applicable, as a Small Pureplay Webcaster. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates

and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Commercial Webcaster, Small Pureplay Webcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Commercial Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.

ARTICLE 3 – SCOPE

3.1 *In General.* In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Commercial Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as

otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for each calendar year during the period beginning on January 1, 2006, and ending on December 31, 2015, during which they have made such an election.

3.2 *Applicability to All Eligible Services Operated by or for a Commercial Webcaster.* If a Commercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Commercial Webcaster that qualify as a Performance under 37 C.F.R. § 380.2(i), and related ephemeral recordings.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Commercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. § 112(e) and 114.

ARTICLE 4 – ROYALTIES

4.1 *Minimum Fee.* Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$25,000. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee paid against any royalties payable by it under these Rates and Terms for the same calendar year.

4.2 *Royalty Rates in General.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall be payable as provided in this Section 4.2, except as provided in Section 4.3.

(a) A Commercial Webcaster that makes Eligible Transmissions through a Bundled Service, Syndicated Service or

Subscription Service, shall pay royalties for such Eligible Transmissions on a per performance basis, as follows:

YEAR	RATE PER PERFORMANCE
2006	\$0.0008
2007	\$0.0011
2008	\$0.0014
2009	\$0.0015
2010	\$0.0016
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

(b) To the extent a Commercial Webcaster is not required to pay royalties under Section 4.2(a), it shall pay royalties equal to the greater of the following (on an annual basis, as provided in Section 4.5):

(i) A usage-based royalty computed on a per-performance basis, or in the years where specified on an aggregate tuning hour basis, as follows:

YEAR	PER PERFORMANCE	PER AGGREGATE TUNING HOUR
2006	\$0.00080	1.2¢
2007	\$0.00084	1.26¢
2008	\$0.00088	1.32¢
2009	\$0.00093	
2010	\$0.00097	
2011	\$0.00102	
2012	\$0.00110	
2013	\$0.00120	
2014	\$0.00130	
2015	\$0.00140	

(ii) 25% of Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101).

4.3 *Royalty Rates for Small Pureplay Webcasters Through 2014.* For Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), during the period 2006–2014, electing Small Pureplay Webcasters shall pay royalties equal to the greater of the following (on an annual basis, as provided in Section 4.5):

(i) A percentage of Gross Revenues, as follows:

YEAR	PERCENTAGE
2006–2008	10% of the first \$250,000 in Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101), and 12% of any Gross Revenues in excess of \$250,000 from activities in the United States, during the applicable year

YEAR	PERCENTAGE	
2009–2014	12% of the first \$250,000 in Gross Revenues from activities in the United States, and 14% of any Gross Revenues in excess of \$250,000 from activities in the United States, during the applicable year	
<p>(ii) 7% of Expenses during the applicable year</p> <p>Provided, however, that Eligible Transmissions shall be subject to the royalty rates provided in Section 4.2(a) if they are (a) above the aggregate tuning hour thresholds in Section 1.2(h) or (b) made through a Bundled Service, Syndicated Service or Subscription Service;</p>	<p>month, less any amounts previously paid for such year.</p> <p>4.6 <i>True-Up for Certain Corporate Transactions.</i> If a transmitting entity that has at any time elected to be treated as a Small Pureplay Webcaster under these Rates and Terms, and has not ceased to qualify as such through growth in its business and thereafter paid full royalties under Section 4.2 for a period of at least twelve (12) full months, becomes a party to or subject of any merger, sale of stock or all or substantially all of its assets, or other corporate restructuring, such that, upon the consummation of such transaction, the transmitting entity or its successor (including a purchaser of all or substantially all of its assets) does not qualify, or reasonably expect to qualify, as a Small Pureplay Webcaster for the then-current year, then the transmitting entity or its successor shall, within thirty (30) days after the consummation of such transaction, pay to</p>	<p>purposes of determining the payment it would have been required to make under such commercial webcasting rates for each such year.</p>
<p>And Further Provided, however, that if a Commercial Webcaster has made payments for a calendar year based on the expectation that it will qualify as a Small Pureplay Webcaster, but it exceeds the \$1.25 Million Gross Revenues cap for the year, it shall pay for that entire year and the following year (if it again exceeds \$1.25 Million Gross Revenues cap for that following year) at a rate that is the greater of (x) a royalty determined as provided above in this Section 4.3 and (y) 25% of Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101), except that if the year in which the Commercial Webcaster exceeds the \$1.25 Million Gross Revenues cap is 2014, it shall in 2015 pay pursuant to Section 4.2. For the avoidance of doubt, the rate set forth in this paragraph shall be available to a Commercial Webcaster for no more than two years in total (whether those years are consecutive or not), and if a Commercial Webcaster has exceeded the \$1.25 Million Gross Revenues cap for two previous years, it shall thereafter be ineligible for Small Pureplay Webcaster status and must make payments pursuant to Section 4.2.</p>	<p>SoundExchange either –</p> <p>(i) the difference between (a) the payment the transmitting entity would have been required to make under Section 4.2 for each year in which it elected to be treated as a Small Pureplay Webcaster under these Rates and Terms, from January 1, 2006 through the date of such transaction, or if it elected to be treated as a Small Pureplay Webcaster under these Rates and Terms for more than four years between January 1, 2006 and the date of such transaction, for the most recent four such years, and (b) the royalty payments it made under these Rates and Terms for such years; or</p>	<p>4.7 <i>Payment.</i> Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees shall be paid by January 31 of each year, except that Small Pureplay Webcasters may elect to make their minimum payments in four equal quarterly installments, which shall be due on January 31, April 14, July 15 and October 15.</p>
<p>4.4 <i>Ephemeral Royalty.</i> The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Commercial Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015.</p>	<p>(ii) 30% of all value inuring in connection with such transaction to the transmitting entity and its Affiliates, shareholders, management personnel and other persons and entities associated with the transmitting entity receiving value in consideration for such transaction, including money, and the fair market value of securities and other consideration, provided for stock in the transmitting entity or assets of the transmitting entity, the value of consideration provided in connection with any merger, and compensation that becomes payable to management personnel of the transmitting entity and their family members in connection with such transaction.</p>	<p>4.8 <i>Monthly Obligations.</i> Commercial Webcasters must make monthly payments once its royalty obligation exceeds the minimum fee it has paid, and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.</p>
<p>4.5 <i>True-Up for Greater of Royalties.</i> In making monthly payments, a Commercial Webcaster subject to Section 4.2(a) or 4.3 shall, at the time a payment is due, calculate its liability for the year through the end of the applicable month under all relevant subparts of the royalty calculation, and pay the applicable royalty for the year through the end of the applicable</p>	<p>The burden of proof shall be on the transmitting entity or its successor to demonstrate its actual usage for</p>	<p>4.9 <i>Past Periods.</i> Notwithstanding anything else in this Agreement, to the extent that a Commercial Webcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on the last day of the month in which these Rates and Terms are published in the Federal Register, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than 60 days after publication of these Rates and Terms in the Federal Register, including late fees as provided in Section 4.10 from the original due date.</p>
		<p>4.10 <i>Late Fees.</i> A Commercial Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange.</p>

ARTICLE 5 – REPORTING

5.1 *Census Reporting.* Commercial Webcasters shall submit reports of use on a per-performance basis in full compliance with the regulations set forth in 37 CFR Part 370 and any subsequent amendments or modifications thereto or replacement regulations, except that the following provisions shall apply notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Commercial Webcasters shall submit reports of use to SoundExchange on a monthly basis.

(b) As provided in Section 4.8, Commercial Webcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(c) Commercial Webcasters shall submit reports of use to SoundExchange on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(d) Commercial Webcasters shall transmit each report of use in a file the name of which includes the name of the Commercial Webcaster, exactly as it appears on its notice of use.

(e) Commercial Webcasters shall submit reports of use with headers, as presently described in 37 C.F.R. § 370.3(d)(7) or as may be provided by successor regulations.

(f) Commercial Webcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes the name of the Commercial Webcaster, exactly as it appears on its notice of use.

5.2 *Server Logs.* To the extent not already required by the current regulations set forth in 37 C.F.R. Part 380, Commercial Webcasters shall retain for a period of at least four years server logs reasonably sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for a Commercial Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Commercial Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least four years and/or that such server logs be provided to, and maintained by, the Commercial Webcaster. SoundExchange shall have access to all such server logs pursuant to applicable regulations for the verification of statutory royalty payments (presently 37 C.F.R. § 380.6).

ARTICLE 6 – ADDITIONAL PROVISIONS

6.1 *Applicable Regulations.* To the extent not inconsistent with the terms herein, use of sound recordings by Commercial Webcasters shall be governed by, and Commercial Webcasters shall comply with, applicable regulations, including 37 C.F.R. Parts 370 and 380. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. Commercial Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 *Participation in Proceedings.* A Commercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006–2015 period. Thus, once a Commercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time directly or indirectly participate as a party, intervenor, amicus curiae or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the Final Determination, any proceedings on remand from such an appeal, any proceeding before the Copyright Royalty Judges to determine royalty rates and terms applicable to the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2011–2015, any appeal of such proceeding, or any other related proceedings, unless subpoenaed on petition of a third party (without any action by a Commercial Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 *Use of Agreement in Future Proceedings.* Consistent with 17 U.S.C. § 114(f)(5)(C), Commercial Webcasters and SoundExchange agree that neither the Webcaster Settlement Act nor any provisions of these Rates and Terms shall be admissible as evidence or otherwise taken into account in any

administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges. These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of Commercial Webcasters, copyright owners and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller. No person or entity may, in any way, seek to use in any way these Rates and Terms in any such proceeding.

6.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Commercial Webcaster setting alternative rates and terms governing the Commercial Webcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 *Default.* A Commercial Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Commercial Webcaster that, unless the breach is remedied within 30 days from the date of notice, the Commercial Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms is terminated by SoundExchange. No such cure period shall apply before termination in case of material noncompliance on a recurring basis. Any transmission made by a Commercial Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501–506.

ARTICLE 7 – MISCELLANEOUS

7.1 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia

(without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.2 Rights Cumulative. The remedies provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.3 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Commercial Webcaster with respect to the subject matter hereof and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Commercial Webcaster with respect to the subject matter hereof.

[FR Doc. E9-17092 Filed 7-16-09; 8:45 am]

BILLING CODE 1410-30-S

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS:

Mississippi River Commission

TIME AND DATE: 9 a.m., August 14, 2009.

PLACE: On board MISSISSIPPI V at City Front, St. Louis, MO.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 17, 2009.

PLACE: On board MISSISSIPPI V at River Park, Tiptonville, TN.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 18, 2009.

PLACE: On board MISSISSIPPI V at Mud Island, Memphis, TN.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 19, 2009.

PLACE: On board MISSISSIPPI V at City Front, Greenville, MS.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9 a.m., August 21, 2009.

PLACE: On board MISSISSIPPI V at Port Commission Dock, Morgan City, LA.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the New Orleans District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Stephen Gambrell, telephone 601-634-5766.

George T. Shepard,

Colonel, EN, Secretary, Mississippi River Commission.

[FR Doc. E9-17157 Filed 7-15-09; 11:15 am]

BILLING CODE 3720-58-P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at Cornell University by NSF Division of Materials Research (DMR) #1203.

Dates and Times: Sunday, August 23, 2009; 6 p.m.-9 p.m., Monday, August 24, 2009; 7:45 a.m.-9 p.m., Tuesday, Aug 25, 2009; 8 a.m.-4:30 p.m.

Place: Ithaca, NY.

Type of Meeting: Part-Open.

Contact Person: Dr. Thomas Rieker, Program Director, Materials Research Science and Engineering Centers Program, Division of

112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Broadcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 *Use of Agreement in Future Proceedings.*

(a) Consistent with 17 U.S.C. 114(f)(5)(C), and except as specifically provided in Section 6.3(b), neither the Webcaster Settlement Act nor any provisions of these Rates and Terms shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of musical works or sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges.

(b) Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) is expressly authorized. For the avoidance of doubt, this Section 6.3(b) does not authorize participation in a proceeding by an entity that has agreed not to participate in the proceeding (pursuant to Section 6.2 or otherwise).

6.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Broadcaster setting alternative Rates and Terms governing the Broadcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 *Default.* A Broadcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Broadcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Broadcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Broadcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106 and the remedies in 17 U.S.C. 501–506, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 *Acknowledgement.*

(a) The parties acknowledge this agreement was entered into knowingly and willingly.

(b) This agreement is limited solely to webcasting royalties, and the parties acknowledge that it shall not be cited in connection with any efforts to obtain, and sets no precedent related to, over-the-air performance royalties.

(c) The parties further agree that the preceding acknowledgement in Section 7.1(a) does not in any way imply Broadcasters' agreement that the royalty rate standard set forth in 17 U.S.C. 114(f)(2)(B) is an appropriate rate standard to apply to Broadcasters. Broadcasters shall never be precluded by virtue of such acknowledgement from arguing in the context of future legislation or otherwise that a different royalty rate standard should apply to them, and SoundExchange shall never rely upon by such acknowledgement as a basis for arguing that the royalty rate standard set forth in 17 U.S.C. 114(f)(2)(B) should apply to Broadcasters.

7.2 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and Broadcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 *Entire Agreement.* These Rates and Terms represent the entire and complete

agreement between SoundExchange and a Broadcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Broadcaster with respect to the subject matter hereof.

Appendix C

Agreed Rates and Terms

1. *General*

(a) *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of 2008, and subject to the provisions of Section 2, Eligible Small Webcasters may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, with respect to their eligible nonsubscription transmissions and related ephemeral recordings, in lieu of other rates and terms applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2 hereof. Any person or entity that does not satisfy the eligibility criteria to be an Eligible Small Webcaster during any calendar year during the period 2006–2015 must comply with otherwise applicable rates and terms for that year.

(b) *Compliance.* Any Eligible Small Webcaster relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those Sections, these Rates and Terms and other applicable regulations.

(c) *Effect of Direct Licenses.* These Rates and Terms are without prejudice to, and subject to, any voluntary agreements that an Eligible Small Webcaster may have entered into with any sound recording copyright owner.

(d) *Precedential Effect of Rates and Terms.* Eligible Small Webcasters agree that these Rates and Terms (including any royalty rates, rate structure, fees, definitions, terms, conditions, or notice and recordkeeping requirements set forth herein), shall not be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding, except as specifically provided in this Section 1(d). This prohibition applies to, but is not limited to, those proceedings involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements. These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller. Eligible Small Webcasters shall not, in any way, seek to use in any way these Rates and Terms in any such proceeding and further agree to take whatever steps are appropriate to prevent use of such rates and terms in those proceedings. SoundExchange may disclose, describe or explain any provision of these Rates and Terms in any proceeding without giving it precedential effect.

2. Election for Treatment as an Eligible Small Webcaster

(a) *Election Process in General.* An Eligible Small Webcaster that wishes to elect to be subject to these Rates and Terms with respect to its eligible nonsubscription transmissions and related ephemeral recordings, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for any calendar year that it qualifies as an Eligible Small Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than the first date on which the webcaster would be obligated under these Rates and Terms to make a royalty payment for such year. An Eligible Small Webcaster that fails to make a timely election shall pay royalties for the relevant year as otherwise provided under 17 U.S.C. 112 and 114.

(b) *Election of Microcaster Status.* An Eligible Small Webcaster that elects to be subject to these Rates and Terms and qualifies as a Microcaster may elect to be treated as a Microcaster for any one or more calendar years that it qualifies as a Microcaster. To do so, the Microcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than the first date on which the Eligible Small Webcaster would be obligated under these Rates and Terms to make a royalty payment for each year it elects to be treated as a Microcaster. On any such election form, the Eligible Small Webcaster must, among other things, certify that it qualifies as a Microcaster; provide its prior year Gross Revenues, Third Party Participation Revenues and Aggregate Tuning Hours; and provide other information requested by SoundExchange for use in creating a royalty distribution proxy. Even if an Eligible Small Webcaster has once elected to be treated as a Microcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Microcaster.

(c) *Participation in Proceedings.* Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as an Eligible Small Webcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination") or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009-1 CRB Webcasting III and Docket No. 2009-2 CRB New Subscription II, as noticed in the **Federal Register** at 74 FR 318-20 (Jan. 5, 2009)) shall not have the right to elect to be treated as an Eligible Small Webcaster or claim the benefit of these Rates and Terms,

unless it withdraws from such proceeding and submits to SoundExchange a completed and signed election form within thirty (30) days after publication of these Rates and Terms in the **Federal Register**. An Eligible Small Webcaster that elects to be subject to these Rates and Terms for any one or more years agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during that year and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006-2015 period. Thus, once an Eligible Small Webcaster has elected to be subject to these Rates and Terms it shall not at any time (even if it is no longer eligible, or has no longer elected to be treated, as an Eligible Small Webcaster) directly or indirectly participate as a party, *amicus curiae* or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006-2015, including any appeal of the Final Determination, any proceedings on remand from such an appeal, any proceeding before the Copyright Royalty Judges to determine royalty rates and terms applicable to the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2011-2015, any appeal of such proceeding, or any other related proceedings.

(d) *Compliance.* By electing Eligible Small Webcaster and/or Microcaster status, a transmitting entity represents that it is eligible therefor and in compliance with all requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as an Eligible Small Webcaster or Microcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, an Eligible Small Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with those requirements.

3. Royalty Rates for Eligible Small Webcasters

For eligible nonsubscription transmissions made by an Eligible Small Webcaster during the period 2006-2015, except an electing Microcaster, the royalty rate shall be—

(1) On any transmissions not exceeding 5,000,000 Aggregate Tuning Hours per month (equivalent to approximately 6,945 average simultaneous listeners, listening for thirty consecutive days, 24 hours a day), the greater of (i) ten percent (10%) of the Eligible Small Webcaster's first \$250,000 in Gross Revenues and twelve percent (12%) of any Gross Revenues in excess of \$250,000 during the applicable year; or (ii) seven percent (7%) of the Eligible Small Webcaster's Expenses during the applicable year; and

(2) On any transmissions in excess of 5,000,000 Aggregate Tuning Hours per month, the commercial webcasting rates provided in the Final Determination (for the period 2006-2010) or the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for the period 2011-2015).

4. Minimum Annual Fees

(a) *In General.* For each year from 2006-2015, an Eligible Small Webcaster shall pay annual minimum fees as follows:

(1) \$500 for electing Microcasters, which shall constitute the only royalty payable hereunder by an electing Microcaster, except that an electing Microcaster also shall pay a \$100 annual fee (the "Proxy Fee") to SoundExchange for the reporting waiver discussed in Section 6(a), and the provisions of Section 5(d) shall apply;

(2) \$2,000, for Eligible Small Webcasters other than electing Microcasters that had Gross Revenues during the prior year of not more than \$50,000 and reasonably expect Gross Revenues of not more than \$50,000 during the applicable year; or

(3) \$5,000, for Eligible Small Webcasters that had Gross Revenues during the prior year of more than \$50,000 or reasonably expect Gross Revenues to exceed \$50,000 during the applicable year.

(b) The amounts specified in Section 4(a) shall be paid by January 31 of each year.

(c) All minimum fees (but not the Proxy Fee for the reporting waiver for Microcasters) shall be fully creditable toward royalties due for the year for which such amounts are paid, but not any other year.

5. Payments

(a) *Qualification to Make Current Payments as Eligible Small Webcaster.* If the Gross Revenues, plus the Third Party Participation Revenues and revenues from the operation of New Subscription Services, of a transmitting entity and its Affiliates have not exceeded \$1,250,000 in any year, and the transmitting entity reasonably expects to be an Eligible Small Webcaster in a given year, the transmitting entity may make payments for that year on the assumption that it will be an Eligible Small Webcaster for that year for so long as that assumption is reasonable.

(b) *True-Up Between Gross Revenues and Expenses.* In making monthly payments, an Eligible Small Webcaster shall, at the time a payment is due, calculate its Gross Revenues and Expenses for the year through the end of the applicable month and pay the applicable

percentage of Gross Revenues or Expenses, as the case may be, for the year through the end of the applicable month, less any amounts previously paid for such year. For the purposes of illustration only, if an Eligible Small Webcaster has \$100,000 in Gross Revenues and \$2,000 in Expenses in Month 1, the monthly payment shall be \$10,000 (10% of aggregate gross yearly revenue up to \$250,000). In Month 2, if the Eligible Small Webcaster has \$100,000 in Gross Revenue and \$2,000 in Expenses, then the Eligible Small Webcaster shall pay \$10,000 in monthly payments (10% of aggregate gross yearly revenue for the year up to \$250,000 less the \$10,000 paid in Month 1). In Month 3, if the Eligible Small Webcaster has \$100,000 in Gross Revenue and \$2,000 in Expenses, then the Eligible Small Webcaster shall pay \$11,000 in monthly payments (10% of aggregate gross yearly revenue for the year up to \$250,000 plus 12% of aggregate gross yearly revenue for the amount above \$250,000, less prior payments).

(c) *Effect if Eligibility Condition is Exceeded.* Except as provided in Section 5(e), if a transmitting entity has made payments for any year based on the assumption that it will qualify as an Eligible Small Webcaster, but the actual Gross Revenues plus Third Party Participation Revenues and revenues from the operation of New Subscription Services in that year of the transmitting entity and its Affiliates exceed the Gross Revenue threshold provided in Section 8(e), then the transmitting entity shall receive a six (6) month grace period measured from the first month following the month in which such revenues exceed \$1,250,000 (the "Grace Period"). During the Grace Period, the transmitting entity shall pay the rates as specified in Section 3(a). From and after the date the Grace Period has expired, the transmitting entity will pay the commercial webcasting rates provided in the Final Determination (for 2006–2010) or the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015), only for periods after the expiration of the Grace Period.

(d) *Effect if Microcaster Eligibility Condition is Exceeded.* Except as provided in Section 5(e), if a transmitting entity has made payments and not reported usage for any year based on the assumption that it will qualify as a Microcaster, but the actual Gross Revenues plus Third Party Participation Revenues, Expenses, or Aggregate Tuning Hours in that year of the transmitting entity and its Affiliates exceed a threshold provided in Section 8(h), then the transmitting entity's payments for that entire year shall retroactively be adjusted as provided in this Section 5(d). By no later than January 31 of the following year, the transmitting entity shall notify SoundExchange whether it elects to be treated for the entire year in which such threshold was exceeded as either an Eligible Small Webcaster but not a Microcaster, or as a transmitting entity fully subject to the Final Determination (for 2006–2010) or to the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015) (whichever of the foregoing it elects, the "Elected Status"). At the same time, the transmitting entity must pay all amounts that

would have been due for that year if it had originally elected the Elected Status, less any royalties previously paid hereunder as a Microcaster for that year (but not less the Proxy Fee). The transmitting entity need not provide reports of use for that year, and SoundExchange may distribute the royalties paid by the transmitting entity for that year based on the proxy usage data applicable to Microcasters. For the year following the year in which such threshold was exceeded, the transmitting entity must comply with applicable requirements as either an Eligible Small Webcaster but not a Microcaster, or as a transmitting entity fully subject to the Final Determination (for 2006–2010) or to the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015).

(e) *True-Up for Certain Corporate Transactions.* If a transmitting entity that has at any time elected to be treated as an Eligible Small Webcaster under these Rates and Terms, and has not ceased to qualify as an Eligible Small Webcaster through growth in its business and thereafter paid full commercial webcasting rates for a period of at least twelve (12) full months (after any Grace Period applicable under Section 5(c)), becomes a party to or subject of any merger, sale of stock or all or substantially all of its assets, or other corporate restructuring, such that, upon the consummation of such transaction, the transmitting entity or its successor (including a purchaser of all or substantially all of its assets) does not qualify, or reasonably expect to qualify, as an Eligible Small Webcaster for the then-current year, then the transmitting entity or its successor shall, within thirty (30) days after the consummation of such transaction, pay to SoundExchange the difference between (1) the payment the transmitting entity would have been required to make under the commercial webcasting rates provided in the Final Determination (for 2006–2010) or under the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015) for each year in which it elected to be treated as an Eligible Small Webcaster under these Rates and Terms, from January 1, 2006 through the date of such transaction, and (2) the royalty payments it made under these Rates and Terms for each such year. The burden of proof shall be on the transmitting entity or its successor to demonstrate its actual usage for purposes of determining the payment it would have been required to make under such commercial webcasting rates for each such year. If the transmitting entity has insufficient records to determine the payment it would have been required to make under such commercial webcasting rates for each such year, then such calculation shall be made on the basis of the assumption that it made transmissions of 5,000,000 Aggregate Tuning Hours per month, and 15.375 performances per each such Aggregate Tuning Hour, during the relevant period.

(f) *Remittance.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange as provided in Section 7(a). Eligible Small Webcasters shall not be entitled to a refund of any amounts paid to SoundExchange, but if an Eligible

Small Webcaster makes an overpayment of royalties (other than payments of minimums) during a year, SoundExchange shall, at its discretion, either refund the overpayment or give the Eligible Small Webcaster a credit in the amount of its overpayment, which credit shall be available to be applied to its payments for the immediately following year only.

(g) *Ephemeral Recordings Royalty.* SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as the majority of other webcasting royalties.

(h) *Past Periods.* Notwithstanding anything else in this Agreement, to the extent that an Eligible Small Webcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on February 28, 2009, any amounts payable under these Rates and Terms for eligible nonsubscription transmissions during such period for which payment has not previously been made shall be paid by no later than April 30, 2009, including late fees as provided in Section 5(i) from the original due date.

(i) *Late Fee.* An Eligible Small Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in full compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange.

6. Notice and Recordkeeping

(a) *Microcasters.* SoundExchange believes that accurate census reporting by services is the best way for it to obtain data for making fair royalty distributions to copyright owners and performers, and for that reason, Section 6(b) generally requires census reporting by Eligible Small Webcasters. However, SoundExchange has observed a low level of compliance by the smallest webcasters with the payment and notice and recordkeeping requirements imposed by applicable regulations. Moreover, where SoundExchange has received reports of use from the smallest webcasters, it has had to devote levels of resources to processing those reports that are high relative to the usage and payment involved. While SoundExchange's ultimate goal is for all webcasters to provide census reporting, requiring census reporting by the smallest webcasters at this time may further reduce compliance and significantly increase distribution costs.

Accordingly, on a transitional basis for a limited time and for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these services, electing Microcasters shall not be required to provide reports of their use of

sound recordings for eligible nonsubscription transmissions and related ephemeral recordings. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Microcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Microcasters will pay to SoundExchange a \$100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that offering this option to electing Microcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers. SoundExchange further hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of the smallest webcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. Microcasters should assume that, effective January 1, 2016, they will be required to report their actual usage in full compliance with then-applicable regulations. Microcasters are encouraged to begin to prepare to report their actual usage by that date, and if it is practicable for them to do so earlier, they may wish not to elect Microcaster status.

(b) *Reports to Be Provided by other Eligible Small Webcasters.* As a condition of these Rates and Terms, except as provided in Section 6(a), an Eligible Small Webcaster shall submit reports of use of sound recordings to SoundExchange covering the following for all of its eligible nonsubscription transmissions, on a channel by channel basis:

- (1) The featured recording artist, group or orchestra;
- (2) The sound recording title;
- (3) The title of the retail album or other product (or, in the case of compilation albums created for commercial purposes, the name of the retail album upon which the track was originally released);
- (4) The marketing label of the commercially available album or other product on which the sound recording is found;
- (5) The International Standard Recording Code ("ISRC") embedded in the sound recording, if available;
- (6) The copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P) (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track);
- (7) The Aggregate Tuning Hours, on a monthly basis, for each channel provided by the Eligible Small Webcaster as computed by a recognized industry ratings service or as computed by the Eligible Small Webcaster from its server logs;
- (8) The channel for each transmission of each sound recording; and
- (9) The start date and time of each transmission of each sound recording.

If at any time during the period through December 31, 2015, Eligible Small

Webcasters would be required under regulations applicable to the Section 112(e) or 114 statutory license to provide reports of use more extensive than provided in this Section 6(b), then any incremental information required by such regulations shall be provided under these Rates and Terms in addition to the information identified above.

(c) *Provision of Reports.* Reports of use described in Section 6(b) shall be provided at the same time royalty payments are due under Section 7(a).

(d) *Server Logs.* To the extent not already required by the current regulations set forth in 37 CFR Part 380, all Eligible Small Webcasters shall retain for a period of at least four (4) years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for an Eligible Small Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Eligible Small Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least four years and/or that such server logs be provided to, and maintained by, the Eligible Small Webcaster. SoundExchange shall have access to the same pursuant to applicable regulations for the verification of statutory royalty payments (presently 37 CFR 380.6).

7. Additional Provisions

(a) *Monthly Obligations.* All Eligible Small Webcasters except electing Microcasters must make monthly payments, provide statements of account, and submit reports of use as described in Section 6 for each month on the forty-fifth (45th) day following the month in which the transmissions subject to the payments, statements of account, and reports of use were made.

(b) *Proof of Eligibility.* At all times, the burden of proof shall be on the Eligible Small Webcaster to demonstrate eligibility for the Rates and Terms set forth herein and for Microcaster status, and at all times the obligation shall be on the Eligible Small Webcaster to maintain records sufficient to determine eligibility. Failure to retain sufficient records to determine eligibility shall constitute a violation of these Rates and Terms and shall render a transmitting entity ineligible for the rates and terms set forth herein. An Eligible Small Webcaster that elects to be governed by the rates and terms set forth herein shall make available to SoundExchange, within thirty (30) days after SoundExchange's written request at any time during the three (3) years following a period during which it is to be treated as an Eligible Small Webcaster for purposes of these Rates and Terms, sufficient evidence to support its eligibility as an Eligible Small Webcaster and/or Microcaster during that period, including but not limited to an accounting of all Affiliate and Third Party Participation Revenue, and Aggregate Tuning Hours on a monthly basis. Any proof of eligibility provided hereunder shall be provided with a certification signed by the Eligible Small Webcaster if a natural person, or by an officer

or partner of the Eligible Small Webcaster if the Eligible Small Webcaster is a corporation or partnership, stating, under penalty of perjury, that the information provided is accurate and the person signing is authorized to act on behalf of the Eligible Small Webcaster.

(c) *Default.* An Eligible Small Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Eligible Small Webcaster that, unless the breach is remedied within thirty days from the date of notice and not repeated, the Eligible Small Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. 501 and fully subject to the remedies provided by 17 U.S.C. 502-506.

(d) *Applicable Regulations.* To the extent not inconsistent with the terms herein, use of sound recordings by Eligible Small Webcasters shall be governed by, and Eligible Small Webcasters shall comply with, applicable regulations, including 37 CFR Part 380. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. Eligible Small Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

(e) *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and Eligible Small Webcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

(f) *Rights Cumulative.* The remedies provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent

with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. Neither these Rates and Terms nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

(g) *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and an Eligible Small Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and an Eligible Small Webcaster with respect to the subject matter hereof.

8. Definitions

As used in these Rates and Terms, the following terms shall have the following meanings:

(a) An “*Affiliate*” of a transmitting entity is a person or entity that directly, or indirectly through one or more intermediaries—

(1) Has securities or other ownership interests representing more than 50 percent of such person’s or entity’s voting interests beneficially owned by—

(A) Such transmitting entity; or

(B) A person or entity beneficially owning securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity;

(2) Beneficially owns securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity; or

(3) Otherwise Controls, is Controlled by, or is under common Control with the transmitting entity.

(b) The term “*Aggregate Tuning Hours*” has the meaning given that term in 37 CFR § 380.2(a), as published in the Final Determination.

(c) A “*Beneficial Owner*” of a security or other ownership interest is any person or entity who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, has or shares voting power with respect to such security or other ownership interest.

(d) The term “*Control*” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract or otherwise.

(e) An “*Eligible Small Webcaster*” is a person or entity that (i) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make eligible nonsubscription transmissions over the Internet and related ephemeral recordings; (ii) complies with all

provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i); and (iv) in any calendar year in which it is to be considered an Eligible Small Webcaster has, together with its Affiliates, annual Gross Revenues plus Third Party Participation Revenues and revenues from the operation of New Subscription Services of not more than \$1,250,000. In determining qualification under this Section 8(e), a transmitting entity shall exclude—

(1) Income of an Affiliate that is a natural person, other than income such natural person derives from another Affiliate of such natural person that is either a media or entertainment related business that provides audio or other entertainment programming, or a business that primarily operates an Internet or wireless service; and

(2) Gross Revenues of any Affiliate that is not engaged in a media or entertainment related business that provides audio or other entertainment programming, and is not engaged in a business that primarily operates an Internet or wireless service, if the only reason such Affiliate is Affiliated with the transmitting entity is that (i) it is under common Control of the same natural person or (ii) both are beneficially owned by the same natural person.

In the case of a person or entity that offers both eligible nonsubscription transmissions (as defined in 17 U.S.C. 114(j)(6)) and a New Subscription Service, these Rates and Terms apply only to the Eligible Small Webcaster’s eligible nonsubscription transmissions and not the New Subscription Service.

(f) The term “*Expenses*”—

(1) Means all costs incurred (whether actually paid or not) by an Eligible Small Webcaster, except that capital costs shall be treated as Expenses allocable to a period only to the extent of charges for amortization or depreciation of such costs during such period as are properly allocated to such period in accordance with United States generally accepted accounting principles (“GAAP”);

(2) Includes the fair market value of all goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property) provided by an Eligible Small Webcaster to any third party in lieu of a cash payment and the fair market value of any goods or services purchased for or provided to an Eligible Small Webcaster by an Affiliate of such webcaster; and

(3) Shall not include—

(A) The imputed value of personal services rendered by up to 5 natural persons who are, directly or indirectly, owners of the Eligible Small Webcaster, and for which no compensation has been paid;

(B) The imputed value of occupancy of residential property for which no Federal income tax deduction is claimed as a business expense;

(C) Costs of purchasing phonorecords of sound recordings used in the Eligible Small Webcaster’s service;

(D) Royalties paid for the public performance of sound recordings; or

(E) The reasonable costs of collecting overdue accounts receivable, provided that

the reasonable costs of collecting any single overdue account receivable may not exceed the actual account receivable.

(g) The term “*Gross Revenues*”—(1) Means all revenue of any kind earned by a person or entity, less—

(A) Revenue from sales of phonorecords and digital phonorecord deliveries of sound recordings;

(B) The person or entity’s actual costs of other products and services actually sold through a service that makes eligible nonsubscription transmissions, and related sales and use taxes imposed on such transactions, costs of shipping such products, allowance for bad debts, and credit card and similar fees paid to unrelated third parties;

(C) Revenue from the operation of a New Subscription Service for which royalties are paid in accordance with provisions of 17 U.S.C. 112 and 114; and

(D) Revenue from the sale of assets in connection with the sale of all or substantially all of the assets of such person’s or entity’s business, or from the sale of capital assets; and

(2) Includes—

(A) All cash or cash equivalents;

(B) The fair market value of goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property);

(C) In-kind and cash donations and other gifts (but not capital contributions made in exchange for an equity interest in the recipient); and

(D) Amounts earned by such person or entity but paid to an Affiliate of such person or entity in lieu of payment to such person or entity.

Gross revenues shall be calculated in accordance with U.S. Generally Accepted Accounting Principles (GAAP), except that a transmitting entity that computes Federal taxable income on the basis of the cash receipts and disbursements method of accounting for any taxable year may compute its gross receipts for any period included in such taxable year on the same basis.

(h) A “*Microcaster*” is an Eligible Small Webcaster that, together with its Affiliates, in any calendar year in which it is to be considered a Microcaster, meets the following additional eligibility criteria: (i) Transmits sound recordings only by means of eligible nonsubscription transmissions (as defined in 17 U.S.C. 114(j)(6)); (ii) had annual Gross Revenues plus Third Party Participation Revenues during the prior year of not more than \$5,000 and reasonably expects Gross Revenues plus Third Party Participation Revenues during the applicable year of not more than \$5,000; (iii) has Expenses during the prior year of not more than \$10,000 and reasonably expects Expenses during the applicable year of not more than \$10,000; and (iv) during the prior year did not make eligible nonsubscription transmissions exceeding 18,067 Aggregate Tuning Hours, and during the applicable year reasonably does not expect to make eligible nonsubscription transmissions exceeding 18,067 Aggregate Tuning Hours.

(i) The term “*New Subscription Service*” has the meaning given that term in 17 U.S.C. 114(j)(8).

(j) The “Third Party Participation Revenues” of a transmitting entity are revenues of any kind earned by a person or entity, other than the transmitting entity, including those:

(1) That relate to the public performance of sound recordings and are subject to an economic arrangement in which the transmitting entity receives anything of value; or

(2) That are earned by such person or entity from the sale of advertising of any kind in connection with the transmitting entity’s eligible nonsubscription transmissions.

By way of example only, a transmitting entity’s Third Party Participation Revenues would include revenues earned by the transmitting entity’s proprietor, a marketing partner of the transmitting entity, or an aggregator through which the transmitting entity’s transmissions are available, by virtue of the transmitting entity’s transmissions.

[FR Doc. E9-4439 Filed 3-2-09; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection, Financial Disclosure Report, Standard Form 714, which is required as a condition of access to specifically designated classified information along with a favorably adjudicated personnel security background investigation or reinvestigation that results in the granting or updating of a security clearance. Additionally, NARA proposes to make changes to the Standard Form 714 and the instructions to the form. Specific proposed changes will be provided upon request to NARA at the addresses provided below. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before May 4, 2009 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd., College Park, MD 20740-6001; or faxed to 301-713-7409; or electronically mailed to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301-837-1694, or fax number 301-713-7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA’s estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways, including the use of information technology, to minimize the burden of the collection of information on all respondents; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Financial Disclosure Report.

OMB number: 3095-0058.

Agency form number: Standard Form 714.

Type of review: Regular.

Affected public: Business or other for-profit.

Estimated number of respondents: 25,897.

Estimated time per response: 2 hours.

Frequency of response: On occasion.

Estimated total annual burden hours: 51,794 hours.

Abstract: Executive Order 12958, as amended, “Classified National Security Information” authorizes the Information Security Oversight Office to develop standard forms that promote the implementation of the Government’s security classification program. These forms promote consistency and uniformity in the protection of classified information.

The Financial Disclosure Report contains information that is used to assist in making eligibility determinations for access to specifically designated classified information pursuant to Executive Order 12968, “Access to Classified Information,” by appropriately trained adjudicative

personnel. The data may later be used as part of a review process to evaluate continued eligibility for access to such specifically designated classified information or as evidence in legal proceedings.

The Financial Disclosure Report helps law enforcement entities obtain pertinent information in the preliminary stages of potential espionage and counter terrorism cases.

Dated: February 26, 2009.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E9-4502 Filed 3-2-09; 8:45 am]

BILLING CODE 7515-01-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extensions of two currently approved information collections. The first is a survey of Customer Satisfaction at the National Personnel Records Center (Military Personnel Records [MPR] facility) of the National Archives and Records Administration. The second is voluntary survey of museum visitors at each Presidential library. The information provides feedback about our visitors’ experiences at the libraries. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before May 4, 2009 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740-6001; faxed to 301-713-7409; or electronically mailed to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301-837-1694; fax number 301-713-7409; or tamee.fechhelm@nara.gov.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13), NARA invites the

APPENDIX F



Notice of Use of Sound Recordings under Statutory License

United States Copyright Office

In accordance with 37 *CFR* 270.1, the transmission service named below hereby files with the Library of Congress, Copyright Office, a notice stating the service's intention to use the statutory license under sections 112(e) or 114(d)(2), or both, of title 17 of the *United States Code*, as amended by Public Law 104-39, 109 Stat. 336, and Public Law 105-304, 112 Stat. 2860.

Please enclose a check or money order for the nonrefundable filing fee, payable to *Register of Copyrights*. Mail to:

Check, if applicable:

- Amended filing

Copyright Royalty Board
ATTN: Licensing Division
PO Box 70977
Washington, DC 20024-0400

Please type or print the requested information for each item. If this is an amended filing, please indicate which item contains new information by checking the new information box to the left of that item.

New Information

- 1 Name of service _____
- 2 Mailing address _____
- NOTE: A post office box is acceptable if it is the only address that can be used in that geographic location.
- 3 Telephone no. _____
- 4 Fax no. _____
- 5 Website address of service http:// _____

NOTE: Information must be provided on how to gain access to the online website or home page of the service, or where information may be posted under the regulations concerning the use of sound recordings.

- 6 Nature of license and category of service: (Check all that apply)
- a *Statutory license for digital transmissions, 17 USC §114(d)(2)*
- Preexisting subscription service Eligible nonsubscription transmission service
- Preexisting satellite digital audio radio service New subscription service
- b *Statutory license for making ephemeral phonorecords, 17 USC §112(e)*
- Preexisting subscription service Eligible nonsubscription transmission service
- Preexisting satellite digital audio radio service New subscription service
- A business establishment making ephemeral phonorecords in furtherance of an exempt digital transmission pursuant to 17 USC §114(d)(1)(C)(iv)
- 7 Date or expected date of
- a *Initial digital transmission of a sound recording* _____
- b *Initial use of the §112(e) license for the purpose of making ephemeral recordings of sound recordings* _____
- 8 Officer or authorized representative of service
- a Name _____
- b Title _____
- c Date _____
- d Signature _____
- e Email address _____

NOTE: The date of filing will be the date when the notice and fee are both received in the Copyright Office.

APPENDIX G



NOTICE OF ELECTION FOR RATES AND TERMS FOR MICROCASTERS 2010 LICENSE PERIOD

I. ELECTION

The Licensee identified below hereby elects, and declares that it is eligible for, the rates and terms for the statutory licenses for the making of ephemeral phonorecords and digital audio transmissions of sound recordings¹ by Microcasters² set forth in the Federal Register at 74 Fed. Reg. 9,293 at 9,302 (Mar. 3, 2009) (the “Eligible Small Webcaster Rates and Terms”) and authorized pursuant to the Webcaster Settlement Act of 2008 (Pub. L. No. 110-435; to be codified at 17 U.S.C. § 114(f)(5)). This election is for the period commencing on January 1, 2010, or the date of the Licensee’s first digital audio transmission of a sound recording under statutory license after such date, and ending on December 31, 2010.

This election is for any eligible digital transmissions and ephemeral recordings made by a qualified Microcaster on all stations and channels owned and/or operated by the Licensee.

By submitting this Notice of Election, the Licensee further declares and certifies that during the period January 1, 2009 through December 31, 2009, the Licensee had the following Gross Revenues, Third Party Participation Revenues and Aggregate Tuning Hours³:

1. **2009 Gross Revenues:** _____
2. **2009 Third Party Participation Revenues:** _____
3. **2009 Total Aggregate Tuning Hours:** _____

II. PROXY FEE

Microcasters must pay a \$100 Proxy Fee in lieu of submitting a Report of Use for 2010⁴.

The Proxy Fee **must** be submitted with the Notice of Election, in the form of a (1) check or money order (made out to “SoundExchange, Inc.”) or (2) bank wire.

¹ 17 U.S.C. § 112(e), 114.

² See 74 Fed. Reg. 9,306 (Mar. 3, 2009) for a definition of the term “Microcaster.”

³ The eligibility requirements for Microcasters include (1) a combined annual Gross Revenues and annual Third Party Participation Revenues of under \$5,000, (2) annual Expenses of under \$10,000, and (3) a total amount of annual aggregate tuning hours less than 18,067. See 74 Fed. Reg. 9,293 at 9,306 (Mar. 3, 2009).

⁴ Microcasters who do *not* pay the Proxy Fee must comply with the reporting procedures as described in 74 Fed. Reg. 9,293 at 9,304 (Mar. 3, 2009).

APPENDIX G
NOTICE OF ELECTION – RATES AND TERMS FOR MICROCASTERS
2010 LICENSE PERIOD

III. LICENSEE INFORMATION

1. Name of Licensee⁵: _____
2. Name of Corporate Parent⁶: _____
3. Mailing address⁷: _____

4. City/State/Zip: _____
5. Telephone number: _____
6. Fax number: _____
7. Contact person for questions: _____
8. Telephone number for contact person: _____
9. E-mail address for contact person: _____

IMPORTANT NOTE: Licensees should also identify all of their channels and stations on Schedule A or prepare a document identifying their channels and stations that is in substantially the same format as Schedule A.

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⁵ The "Licensee" should be the entity identified on the Notice of Use filed pursuant to 37 C.F.R. § 370.1.

⁶ Name of corporate parent only needs to be listed if different from Licensee..

⁷ A post office box is acceptable only if it is the only address that can be used in that geographic location.

⁹ SoundExchange does not acknowledge receipt of documents. If you wish to receive notice of delivery, please mail this form by Certified Mail, return receipt requested.

APPENDIX G
NOTICE OF ELECTION – RATES AND TERMS FOR MICROCASTERS
2010 LICENSE PERIOD

CERTIFICATION

The undersigned hereby certifies that (1) he or she is authorized to make the election set forth above, (2) that the Licensee is eligible for the Eligible Small Webcaster Rates and Terms, and (3) that the Licensee is eligible to operate as a Microcaster as defined in the Eligible Small Webcaster Rates and Terms.

Signature: _____

Name: _____

Title: _____

Date: _____

Licensees must comply with all requirements of the statutory licenses set forth in Sections 112(e) and 114 of the Copyright Act, including all requirements set forth in the applicable rates and terms adopted in accordance with those statutory licenses. SoundExchange is not in a position to determine whether each of the many services that rely on these statutory licenses is eligible for statutory licensing and does not in fact make any such determination. Nor does SoundExchange verify that such Licensees are in full compliance with all applicable requirements of the two statutory licenses. Accordingly, SoundExchange's acceptance of a Notice of Election, Statement of Account, Report of Use, payment, or anything else provided by a Licensee does not express or imply any acknowledgment that a Licensee is in compliance with the requirements of the statutory licenses or otherwise eligible to rely on the statutory licenses. SoundExchange, its members and other copyright owners reserve all their rights to take enforcement action against a Licensee that is not in compliance with those requirements or otherwise ineligible for the statutory license.

DELIVERY⁹

A completed Notice of Election must be delivered to:

SoundExchange
ATTN: Royalty Administration
1121 Fourteenth Street, N.W., Suite 700
Washington, DC 20005

APPENDIX H



NOTICE OF ELECTION FOR RATES AND TERMS FOR SMALL WEBCASTERS 2010 LICENSE PERIOD

I. ELECTION

The Licensee identified below hereby elects, and declares that it is eligible for, the rates and terms for the statutory licenses for the making of ephemeral phonorecords and digital audio transmissions of sound recordings¹ by small commercial² webcasters set forth in the Federal Register at 74 Fed. Reg. 9,293 at 9,302 (Mar. 3, 2009) (the “Eligible Small Webcaster Rates and Terms”) and authorized pursuant to the Webcaster Settlement Act of 2008 (Pub. L. No. 110-435; to be codified at 17 U.S.C. § 114(f)(5)). This election is for the period commencing on January 1, 2010, or the date of the Licensee’s first digital audio transmission of a sound recording under the statutory licenses after such date, and ending on December 31, 2010.

This election is for any eligible digital transmissions and ephemeral recordings on stations and channels owned and/or operated by the Licensee. (In order to elect the rates and terms applicable to “Microcasters” (as defined in 74 Fed. Reg. 9,293 at 9,306 (Mar. 3, 2009)), the Licensee must complete and submit the separate Notice of Election for Microcasters instead of the Notice of Election for Small Webcasters.)

The Licensee acknowledges that this election to pay royalties in accordance with the Eligible Small Commercial Webcaster Rates and Terms is in lieu of any different rates and terms that may be available to such Licensee. Upon filing of this notice of election, and for so long as the service qualifies for the Eligible Small Commercial Webcaster Rates and Terms, the Licensee acknowledges and agrees that it cannot opt out of these Rates and Terms or otherwise elect different rates and terms during the period for which this election is made.

The Licensee hereby states that it and its Affiliates’ Gross Revenues, plus Third Party Participation Revenues and revenues from the operation of a new subscription service, have not exceeded \$1,250,000 in 2009, and that the service expects to be an Eligible Small Webcaster during the applicable period covered by this election. “Affiliate”, “Gross Revenues”, “Third Party Participation Revenues” and “Eligible Small Webcaster” shall have the meanings set forth in Section 8 of the Eligible Small Webcaster Rates and Terms. The Licensee further acknowledges that the filing of this notice of election does not guarantee the Licensee the right to pay statutory royalties under the Eligible Small Webcaster Rates and Terms if and when the service no longer qualifies as an eligible small webcaster.

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¹ 17 U.S.C. §§ 112(e) & 114.

² Noncommercial webcasters are not eligible for these rates and terms. See 74 Fed. Reg. 9,293 at 9,306 (Mar. 3, 2009).

**APPENDIX H
NOTICE OF ELECTION
RATES AND TERMS FOR SMALL WEBCASTERS
2010 LICENSE PERIOD**

II. LICENSEE INFORMATION

1. Name of Licensee³: _____
2. Name of Corporate Parent⁴: _____
3. Mailing address⁵: _____

4. City/State/Zip: _____
5. Telephone number: _____
6. Fax number: _____
7. Contact person for questions: _____
8. Telephone number for contact person: _____
9. E-mail address for contact person: _____

IMPORTANT NOTE: Licensees should identify all of their channels and stations on Schedule A or prepare a document identifying their channels and stations that is in substantially the same format as Schedule A.

³ The "Licensee" should be the entity identified on the Notice of Use filed pursuant to 37 C.F.R. § 370.1.

⁴ Name of corporate parent only needs to be listed if different from the Licensee.

⁵ A post office box is acceptable only if it is the only address that can be used in that geographic location.

**APPENDIX H
NOTICE OF ELECTION
RATES AND TERMS FOR SMALL WEBCASTERS
2010 LICENSE PERIOD**

CERTIFICATION

The undersigned hereby states that he or she is authorized to make the election set forth above.

Signature: _____

Name: _____

Title: _____

Date: _____

Licensees must comply with all requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act, including all requirements set forth in the applicable rates and terms adopted pursuant to those statutory licenses. SoundExchange is not in a position to determine whether each of the many services that rely on these statutory licenses is eligible for statutory licensing and does not in fact make any such determination. Nor does SoundExchange verify that such Licensees are in full compliance with all applicable requirements of the two statutory licenses. Accordingly, SoundExchange's acceptance of a Notice of Election, Statement of Account, Report of Use, payment, or anything else provided by a Licensee does not express or imply any acknowledgment that a Licensee is in compliance with the requirements of the statutory licenses or otherwise eligible to rely on the statutory licenses. SoundExchange, its members and other copyright owners reserve all their rights to take enforcement action against a Licensee that is not in compliance with those requirements or otherwise ineligible for the statutory license.

DELIVERY⁶

A completed Notice of Election must be delivered to:

**SoundExchange
ATTN: Royalty Administration
1121 Fourteenth Street, N.W., Suite 700
Washington, DC 20005**

⁶ SoundExchange does not acknowledge receipt of documents. If you wish to receive notice of delivery, please mail this form by Certified Mail, return receipt requested.

