

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

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022)

**PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC., AND COPYRIGHT
OWNER AND ARTIST PARTICIPANTS**

SoundExchange, Inc., the Recording Industry Association of America (“RIAA”), Sony Music Entertainment (“Sony”), Universal Music Group (“UMG”), Warner Music Group (“WMG”), the American Association of Independent Music (“A2IM”), the American Federation of Musicians of the United States and Canada (“AFM”), and the Screen Actors Guild and American Federation of Television and Radio Artists (“SAG-AFTRA”) (collectively, “SoundExchange”) propose the rates and terms set forth herein for digital audio transmissions made by Preexisting Satellite Digital Audio Radio Services as defined in 17 U.S.C. § 114(j)(10) (“SDARS”) and Preexisting Subscription Services as defined in 17 U.S.C. § 114(j)(11) (“PSS”) under the statutory license provided by 17 U.S.C. § 114, together with the making of ephemeral recordings necessary to facilitate such transmissions under the statutory license provided by 17 U.S.C. § 112(e), during the period January 1, 2018 through December 31, 2022. Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves its right to change its requested rates and terms at any time during the proceeding up to and including the filing of proposed findings of fact and conclusions of law.

I. ROYALTY RATES

A. SDARS

For all licensed transmissions and related ephemeral recordings by an SDARS, SoundExchange requests a royalty fee that is the greater of the per-Subscriber rate and the percentage of revenue rate set forth below.

1. PER-SUBSCRIBER RATE

The per-Subscriber rates requested by SoundExchange are the following amounts per-Subscriber, per-month:

2018 – \$2.48

2019 – \$2.55

2020 – \$2.63

2021 – \$2.71

2022 – \$2.79

For purposes of this proposal, “Subscriber” means every subscriber to the SDARS who receives the SDARS in the United States for all or any part of a month, except –

(1) any such subscribers that receive only channels, programming, products and/or other services that use no sound recordings, or only incidental performances of sound recordings; and

(2) any such subscribers receiving the SDARS during a trial period of not more than 30 consecutive days per subscriber per two year period, if such trial period is offered free of any charge to the subscriber, and the Licensee receives no monetary or nonmonetary consideration from any third party for providing such trial period.

2. PERCENTAGE OF REVENUE RATE

The percentage of revenue rate requested by SoundExchange is 23% of “Gross Revenues.”

For purposes of this proposal, “Gross Revenues” should be defined in a manner based on the definition currently appearing in 37 C.F.R. § 382.11 with the clarifying adjustments marked below:

Gross Revenues. (1) Gross Revenues shall mean revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS, and shall be comprised of the following:

(i) Subscription revenue recognized by Licensee directly from U.S. subscribers for Licensee’s SDARS; and

(ii) Licensee’s advertising revenues, or other monies received from sponsors, if any, attributable to advertising on channels other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) and (ii) of the definition of “Gross Revenues” to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1) or (2), Gross Revenues shall exclude:

(i) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee’s SDARS and any ~~taxes~~, shipping and handling fees therefor;

(ii) Royalties paid to Licensee for intellectual property rights;

(iii) Monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(iv) Sales and use taxes;

(v) shipping and handling, eCredit card, invoice, and fulfillment service fees activation, swap and early termination fees charged to subscribers and reasonably related to the Licensee’s expenses to which they pertain;

(vi) Bad debt expense, and

(vii) Revenues recognized by Licensee for the provision of

(A) Current and future data services ~~offered~~ provided on a standalone basis for a separate charge (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

(B) Channels, programming, products and/or other services ~~offered~~ provided on a standalone basis for a separate charge where such channels use only incidental performances of sound recordings;

(C) Channels, programming, products and/or other services provided outside of the United States; and

(D) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is exempt from any license requirement or is separately licensed, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

3. DIRECT LICENSE AND PRE-1972 ADJUSTMENTS

Regardless whether the basic royalty pool is determined by the per-Subscriber rate or the percentage of revenue rate in any accounting period, SoundExchange proposes continuing essentially the current payment adjustments for use of recordings pursuant to a direct license (37 C.F.R. § 382.12(d)) and the use of pre-1972 recordings (37 C.F.R. § 382.12(e)), with the following changes in detail:

- If the provider of an SDARS is capable of obtaining reasonably reliable data concerning the Aggregate Tuning Hours (as defined in § 370.4(b)(1) of this chapter) of the channels on its SDARS, or other reasonably reliable data concerning the relative listenership of channels or sound recordings on its SDARS, through the use of the radios referred to as SXM17 or otherwise, then that data, rather than “Internet

Performances” on the “Reference Channels,” would be used to calculate the percentages used in these adjustments.

- In the absence of such SDARS listenership data, SoundExchange proposes that the percentage used in the direct license adjustment be no greater than the percentage of plays of direct-licensed recordings on the SDARS.
- The regulations should clarify that a recording is not to be treated as a “Pre-1972 Recording” and used in calculating the pre-1972 royalty adjustment if the recording is a restored work as defined in 17 U.S.C. § 104A(h)(6) or otherwise subject to protection under the Copyright Act.
- In addition to the reporting of information identifying the excluded tracks (as is currently required by 37 C.F.R. § 382.13(h)), an SDARS taking these adjustments should be required to provide the number of “Internet Performances” on the “Reference Channels” for each of the excluded tracks, or information about actual SDARS usage of each of the excluded tracks (e.g., Aggregate Tuning Hours) as that becomes available.

4. MINIMUM FEE

SoundExchange does not propose any substantive change to the current ephemeral royalty minimum fee of \$100,000 per year, which is creditable to ephemeral royalty payments for the relevant year (37 C.F.R. § 382.12(c)).

5. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange does not propose any substantive change to the current 5%/95% allocation of the combined Section 112/114 royalty between Section 112 and Section 114 (37 C.F.R. § 382.12(b)).

B. PSS

1. ROYALTY RATE

For all licensed transmissions and related ephemeral recordings through a television-based service qualifying as a PSS, SoundExchange requests the following per-Subscriber, per-month royalties:

2018 – \$0.0190

2019 – \$0.0196

2020 – \$0.0202

2021 – \$0.0208

2022 – \$0.0214

For purposes of this proposal, “Subscriber” means every residential subscriber to the underlying MVPD service who receives the PSS in the United States for all or any part of a month.

For all licensed transmissions and related ephemeral recordings through an Internet streaming service qualifying as a PSS (or any similar service capable of tracking the individual sound recordings received by any particular consumer), SoundExchange requests that the performance royalty fee for a commercial webcaster providing a subscription service (as set forth in § 380.10) apply.

2. MINIMUM FEE

SoundExchange does not propose any substantive change to the current ephemeral royalty minimum fee of \$100,000 per year, which is creditable to ephemeral royalty payments for the relevant year (37 C.F.R. § 382.3(b)).

3. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange does not propose any substantive change to the current 5%/95% allocation of the combined Section 112/114 royalty between Section 112 and Section 114 (37 C.F.R. § 382.3(c)).

II. TERMS AND OTHER REGULATORY LANGUAGE

SoundExchange proposes that the regulations currently set forth in 37 C.F.R. Part 382 be restructured, and the PSS and SDARS regulations be harmonized, generally along the lines of the Copyright Royalty Judges' rewrite in *Web IV* of the regulations in Part 380, with certain conforming and editorial changes. SoundExchange has set forth its proposed regulations as Appendix A.

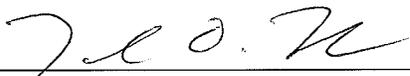
In connection therewith, and notwithstanding its desire generally to track the *Web IV* terms, SoundExchange proposes to address certain material terms issues as follows:

- Unclaimed Funds. SoundExchange proposes to address unclaimed funds in a manner consistent with current 37 C.F.R. § 382.8 and § 382.17, rather than the analogous provision of the webcasting regulations (37 C.F.R. § 380.4(b)).
- Resources for Locating Artists and Copyright Owners. In adopting the provision of the webcasting regulations requiring SoundExchange to use Copyright Office records and directories of copyright owners to locate artists and copyright owners (37 C.F.R. § 380.4(a)(2)), SoundExchange proposes to clarify that it is only required to consult such resources when that is likely to be helpful.
- Access to Confidential Information by Outside Counsel. In adopting the provision of the webcasting regulations requiring concerning confidentiality (37 C.F.R. § 380.5), SoundExchange proposes to add permission for disclosure of confidential information to

outside counsel without a written confidentiality agreement for purposes beyond royalty verification, if those purposes pertain to the collection and distribution of royalties.

- Audit Fee Shifting. In adopting the provision of the webcasting regulations concerning audits (37 C.F.R. § 380.6), SoundExchange proposes to apply the 5% threshold for fee-shifting presently provided in 37 C.F.R. § 382.6(f).
- Licensing of Auditors. In adopting the provision of the webcasting regulations defining the term Qualified Auditor (37 C.F.R. § 380.7), SoundExchange proposes to defer to state law governing CPA licensing as to whether the auditor must be licensed in the jurisdiction in which the audit is to take place.
- Distribution Methodology for SDARS Royalties. As described above in connection with the direct license and pre-1972 exclusions, SoundExchange proposes confirming that if an SDARS is capable of obtaining reasonably reliable data concerning the Aggregate Tuning Hours of the channels on its SDARS, or other reasonably reliable data concerning the relative listenership of channels or sound recordings on its SDARS, an SDARS is required to report that data pursuant to 37 C.F.R. § 370.4(d)(2)(vii), and SoundExchange is required to base its distributions on that data. In addition, if an SDARS does not provide complete usage data as required by the report of use regulations, SoundExchange proposes that it be permitted, but not required, to adopt a reasonable distribution methodology for SDARS royalties based on available usage data.

Respectfully submitted,

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Appendix A
SoundExchange's Proposed Regulations

PART 382--RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

SUBPART A--REGULATIONS OF GENERAL APPLICATION

§ 382.1 Scope and compliance.

(a) Scope. This part 382 codifies rates and terms of royalty payments for the public performance of sound recordings in certain Digital Audio Transmissions by certain Licensees in accordance with the applicable provisions of 17 U.S.C. 114 and for the making of Ephemeral Recordings by those Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2018, through December 31, 2022.

[Note: Used defined term Digital Audio Transmission. It is not necessary to include a provision analogous to 37 C.F.R. § 380.1(b) unless there is a freestanding settlement as there was in *Web IV*.]

(b) Legal compliance. Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 must comply with the requirements of 17 U.S.C. 112(e) and 114, this part 382 and any other applicable regulations.

[Note: Revised to reference compliance with the statutory provisions as well as the regulations, as does current 37 C.F.R. § 382.1(b) and (c) and § 382.10(b).]

(c) Voluntary agreements. Notwithstanding the royalty rates and terms established in any subparts of this part 382, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

§ 382.2 Making payment of royalty fees.

(a) Payment to the Collective. A Licensee must make the royalty payments due under subparts B and C of this part to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this part 382.

(b) Monthly payments. A Licensee must make royalty payments on a monthly basis. Payments are due on or before the 45th day after the end of the month in which the Licensee made Eligible Transmissions.

(c) Minimum payments. A Licensee must make any minimum annual payments due under subpart B or C of this part by January 31 of the applicable license year.

[Note: Omitted provision concerning a late entrant, because the PSS and SDARS are both closed sets of services, and current 37 C.F.R. § 382.3(b) and § 382.12(c) do not contemplate a late entrant.]

(d) Late fees. A Licensee must pay a late fee for each payment and each Statement of Account that the Collective receives after the due date. The late fee is 1.5% (or the highest lawful rate, whichever is lower) of the late payment amount per month. The late fee for a late Statement of Account is 1.5% of the payment amount associated with the Statement of Account. Late fees accrue from the due date until the date that the Collective receives the late payment or late Statement of Account.

(1) Waiver of late fees. The Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.

(2) Notice regarding noncompliant Statements of Account. If it is reasonably evident to the Collective that a timely-provided Statement of Account is materially noncompliant, the Collective must notify the Licensee within 90 days of discovery of the noncompliance.

§ 382.3 Delivering statements of account.

(a) Statements of Account. Any payment due under this part 382 must be accompanied by a corresponding Statement of Account that must contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the Statement of Account;

(3) The signature of the Licensee or a duly authorized agent of the Licensee, which shall be a partner or delegate if the Licensee is a partnership, or an officer of the corporation if the Licensee is a corporation;

[Note: In the analogous provisions of 37 C.F.R. § 380.3(a)(3), clauses (ii) and (iii) seem to address special cases of the general provision in clause (i). The foregoing has been revised for clarity.]

(4) The printed or typewritten name of the person signing the Statement of Account;

(5) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the Statement of Account;

(6) A certification of the capacity of the person signing;

(7) The date of signature; and

(8) An attestation to the following effect:

I, the undersigned owner/officer/partner/agent of the Licensee have examined this Statement of Account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence and that it fairly presents, in all material respects, the liabilities of the Licensee pursuant to 17 U.S.C. 112(e) and 114 and applicable regulations adopted under those sections.

(b) Certification. Licensee's Chief Financial Officer or, if Licensee does not have a Chief Financial Officer, a person authorized to sign Statements of Account for the Licensee, must submit a signed certification on an annual basis attesting that Licensee's royalty statements for the prior year represent a true and accurate determination of the royalties due and that any method of allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

§ 382.4 Distributing royalty fees.

(a) Distribution of royalties. (1) The Collective must promptly distribute royalties received from Licensees to Copyright Owners and Performers that are entitled thereto, or to their designated agents. The Collective shall only be responsible for making distributions to those who provide the Collective with information as is necessary to identify and pay the correct recipient. The Collective must distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the Reports of Use requirements for Licensees pursuant to § 370.3 or 370.4 of this chapter, as applicable, and pursuant to this part 382.

[Note: Added reference to PSS report of use regulations.]

(2) The Collective must use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under § 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but not be limited to, searches in Copyright Office public records and published directories of sound recording copyright owners when consulting such records and directories is likely to be helpful.

[Note: Revised to avoid the suggestion that SoundExchange always must search Copyright Office records and published directories of sound recording copyright owners, because other resources would generally be more current and useful, so registration records and directories would not naturally be the references of first resort.]

(b) Unclaimed funds. If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part 382, the Collective must retain the required payment in a segregated trust account for a period of three years from the date of the first distribution of royalties from the relevant payment by a Licensee. No claim to

distribution shall be valid after the expiration of the three-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

[Note: Revised to reflect predecessor provisions of 37 C.F.R. § 382.8 and § 382.17, to avoid ambiguity concerning the disposition of unclaimed funds.]

(c) Retention of records. Licensees and the Collective shall keep books and records relating to payments and distributions of royalties for a period of not less than the prior three calendar years.

(d) Designation of the Collective. (1) The Judges designate SoundExchange, Inc., as the Collective to receive Statements of Account and royalty payments from Licensees and to distribute royalty payments to each Copyright Owner and Performer (or their respective designated agents) entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced for the applicable royalty term by a successor Collective according to the following procedure:

(i) The nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding SoundExchange's cessation or dissolution shall vote by a majority to recommend that the Copyright Royalty Judges designate a successor and must file a petition with the Copyright Royalty Judges requesting that the Judges designate the named successor and setting forth the reasons therefor.

(ii) Within 30 days of receiving the petition, the Copyright Royalty Judges must issue an order designating the recommended Collective, unless the Judges find good cause not to make and publish the designation in the *Federal Register*.

§ 382.5 Handling Confidential Information.

(a) Definition. For purposes of this part 382, "Confidential Information" means the Statements of Account and any information contained therein, including the amount of royalty payments and any information pertaining to the Statements of Account reasonably designated as confidential by the party submitting the statement. Confidential Information does not include documents or information that at the time of delivery to the Collective is public knowledge. The party seeking information from the Collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving to the Collective that the requested information is in the public domain.

[Note: Omitted reference to number of Performances, because Performances do not need to be reported on Statements of Account for PSS/SDARS (unless the Judges adopt a per-Performance rate structure).]

(b) Use of Confidential Information. The Collective may not use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(c) Disclosure of Confidential Information. The Collective shall limit access to Confidential Information to:

(1) Those employees, agents, consultants, and independent contractors of the Collective, subject to an appropriate written confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work;

(2) A Qualified Auditor or outside counsel who is authorized to act on behalf of:

(i) The Collective with respect to verification of a Licensee's statement of account pursuant to this part 382; or

(ii) A Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this part 382;

(3) Outside counsel who is authorized to act on behalf of the Collective with respect to other matters pertaining to the collection and distribution of royalty payments and who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work;

[Note: New provision added because the Judges in *Web IV* moved attorneys from paragraph (1) to paragraph (2) to avoid the need for written confidentiality agreements with outside counsel, but outside counsel may need access to confidential information for purposes other than verification.]

(4) Copyright Owners and Performers, including their designated agents, whose works a Licensee used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, consultants, and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, who require access to the Confidential Information to perform their duties during the ordinary course of their work;

(5) Attorneys and other authorized agents of parties to proceedings under 17 U.S.C. 112 or 114, acting under an appropriate protective order.

(d) Safeguarding Confidential Information. The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable

standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.

382.6 Auditing payments and distributions.

(a) General. This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify payments or distributions by auditing the payor or Collective. The Collective may audit a Licensee's payments of royalties to the Collective, and a Copyright Owner or Performer may audit the Collective's distributions of royalties to the owner or performer. Nothing in this section shall preclude a verifying entity and the payor or Collective under audit from agreeing to verification methods in addition to or different from those set forth in this section.

[Note: Substituted the defined term "Collective" for the undefined term "distributor" throughout this section, because it appeared that such references implicated what is otherwise referred to as the Collective.]

(b) Frequency of auditing. The Collective may conduct an audit of each Licensee only once a year, and such audit may cover any or all of the prior three calendar years. Copyright Owner and Performers may conduct an audit of the Collective only once a year, and such audit may cover any or all of the prior three calendar years. A verifying entity may not audit records for any calendar year more than once.

[Note: Revised for clarity, and specifically to use the defined term Licensee and address frequency of auditing of the Collective. This is intended to approximate the predecessor provisions of 37 C.F.R. § 382.6(b), 382.7(b), 382.15(b) and 382.16(b).]

(c) Notice of intent to audit. The verifying entity must file with the Copyright Royalty Judges a notice of intent to audit the payor or Collective, which notice the Judges must publish in the Federal Register within 30 days of the filing of the notice. Simultaneously with the filing of the notice, the verifying entity must send a copy to the payor or Collective.

[Note: Changed "deliver" to "send," because the timing of delivery is in the control of the courier, not the sender. This is intended to approximate the concept of "serve" in the predecessor provisions of 37 C.F.R. § 382.15(c) and 382.16(c).]

(d) The audit. The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(e) Access to third-party records for audit purposes. The payor or Collective under audit must use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit.

(f) Duty of auditor to consult. The auditor must produce a written report to the verifying entity. Before rendering the report, unless the auditor has a reasonable basis to suspect fraud on the part of the payor or Collective, the disclosure of which would, in the reasonable opinion of the auditor, prejudice any investigation of the suspected fraud, the auditor must review tentative written findings of the audit with the appropriate agent or employee of the payor or Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the payor or Collective reasonably cooperates with the auditor to remedy promptly any factual error[s] or clarify any issues raised by the audit. The auditor must include in the written report information concerning the cooperation or the lack thereof of the employee or agent.

(g) Audit results; underpayment or overpayment of royalties. If the auditor determines the payor or Collective underpaid royalties, the payor or Collective shall remit the amount of any underpayment determined by the auditor to the verifying entity, together with interest at the rate specified in § 382.2(d). In the absence of mutually-agreed payment terms, which may, but need not, include installment payments, the payor or Collective shall remit promptly to the verifying entity the entire amount of the underpayment determined by the auditor. If the auditor determines the payor or Collective overpaid royalties, however, the verifying entity shall not be required to remit the amount of any overpayment to the payor or distributor, and the payor or Collective shall not seek by any means to recoup, offset, or take a credit for the overpayment, unless the payor or distributor and the verifying entity have agreed otherwise.

(h) Paying the costs of the audit. The verifying entity must pay the cost of the verification procedure, unless the auditor determines that there was an underpayment of 5% or more, in which case the payor or distributor must bear the reasonable costs of the verification procedure, in addition to paying or distributing the amount of any underpayment.

[Note: Used 5% threshold from current 37 C.F.R. § 382.6(f), rather than the 10% threshold in current 37 C.F.R. § 382.15(g), because even a 5% underpayment by Sirius XM dwarfs the costs of an audit.]

(i) Retention of audit report. The verifying party must retain the report of the audit for a period of not less than three years from the date of issuance.

§ 382.7 Definitions.

[Note: Omitted webcasting definitions not relevant to PSS/SDARS.]

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges, and which, for the current rate period, is SoundExchange, Inc.

Copyright Owners means sound recording copyright owners who are entitled to royalty payments made under part 382 pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Digital Audio Transmission has the same meaning as in 17 U.S.C. 114(j)(5).

Eligible Transmission means a Digital Audio Transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under 37 C.F.R. part 382.

[Note: Used defined term Digital Audio Transmission. Omitted “subscription or nonsubscription,” because PSS and SDARS are subscription services.]

Ephemeral Recording has the same meaning as in 17 U.S.C. 112.

GAAP shall mean generally accepted accounting principles in effect from time to time in the United States.

[Note: Current definition from 37 C.F.R. § 382.2 and § 382.11.]

Licensee means the provider of an SDARS or Preexisting Subscription Service that has obtained a license under 17 U.S.C. 112(e) or 114 to transmit eligible sound recordings.

[Note: Definition revised to reflect types of services at issue in this proceeding.]

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Preexisting Subscription Service has the same meaning as in 17 U.S.C. 114(j)(11).

[Note: New definition based on definition of Licensee in current 37 C.F.R. § 382.2.]

Qualified Auditor means an independent Certified Public Accountant.

[Note: Based on current definition from 37 C.F.R. § 382.2 and § 382.11. Omitted reference to licensure requirements in 37 C.F.R. § 380.7, so as not to impose a higher standard on CPAs than required under state “CPA mobility” laws, which generally permit a CPA licensed in one state to practice accountancy in other states without obtaining separate licensure in the additional states.]

SDARS means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

[Note: Current definition from 37 C.F.R. § 382.11.]

Transmission has the same meaning as in 17 U.S.C. 114(j)(15).

SUBPART B—PREEXISTING SUBSCRIPTION SERVICES

§ 382.10 Additional definition for Preexisting Subscription Services.

Provider means a “multichannel video programming distributor” as that term is defined in 47 CFR 76.1000(e); notwithstanding such definition, for purposes of this subpart, a Provider shall include only a distributor of programming to televisions, such as a cable or satellite television provider.

[Note: New definition substantially the same as the definition of Provider in 37 C.F.R. § 383.2(e).]

Subscriber means every residential subscriber to the underlying service of the Provider who receives Licensee’s Service in the United States for all or any part of a month.

[Note: New definition based on the definition of Subscriber in 37 C.F.R. § 383.2(g). Omitted the proviso in that definition because it is not apparent that either PSS requires the accommodation made therein.]

A *Television Service* is a noninteractive (consistent with the definition of “interactive service” in 17 U.S.C. 114(j)(7)) audio-only subscription service (including accompanying information and graphics related to the audio) that is transmitted to residential subscribers of a television service through a Provider which is marketed as and is in fact primarily a video service where

(1) Subscribers do not pay a separate fee for audio channels.

(2) The audio channels are delivered by digital audio transmissions through a technology that is incapable of tracking the individual sound recordings received by any particular consumer.

(3) However, paragraph (2) above shall not apply to the Licensee’s current contracts with Providers that are in effect as of the effective date of this subpart if such Providers become capable in the future of tracking the individual sound recordings received by any particular consumer, provided that the audio channels continued to be delivered to Subscribers by digital audio transmissions and the Licensee remains incapable of tracking the individual sound recordings received by any particular consumer.

[Note: New definition substantially the same as the definition of Service in 37 C.F.R. § 383.2(h).]

§ 382.11 Royalty fees for the public performance of sound recordings and the making of Ephemeral Recordings by a Preexisting Subscription Service.

(a) Royalty fees.

(1) Television. Commencing January 1, 2018, and continuing through December 31, 2022, a Licensee that provides a Preexisting Subscription Service must pay the following monthly payment per Subscriber for the public performance of sound recordings pursuant to 17 U.S.C. 114 through its Television Service and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e):

- (i) 2018: \$0.0190;
- (ii) 2019: \$0.0196;
- (iii) 2020: \$0.0202;
- (iv) 2021: \$0.0208; and
- (v) 2022: \$0.0214.

[Note: Based on combination of 37 C.F.R. § 380.10(a) and § 383.3(a), with a reference to a Television Service to limit the activity covered by this payment to the same scope of activity as covered by the Part 383 rates. Rates for 2021 and 2022 continue the same approximately 3% annual increases as the earlier years.]

(2) Internet. Commencing January 1, 2018, and continuing through December 31, 2022, if a Licensee that provides a Preexisting Subscription Service makes digital audio transmissions as part of a noninteractive Internet streaming service or otherwise uses a technology that is capable of tracking the individual sound recordings received by any particular consumer, such Licensee must pay the per-Performance royalty fee for a Commercial Webcaster providing a subscription service, as set forth in § 380.10 of this chapter, for the public performance of sound recordings pursuant to 17 U.S.C. 114 and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e).

[Note: Based on combination of proposed 37 C.F.R. § 382.11(a) above, the reference to Internet streaming services in the definition of Licensee in § 380.7, and the reference to technology for counting performances in the definition of Service in 37 C.F.R. § 383.2(h) (which is also included in the definition of Television Service in proposed § 382.10 above).]

(b) Minimum fee. Each Licensee must pay the Collective a minimum fee of \$100,000 each year. The Collective must apply the fee to the Licensee's account as credit towards any royalties under 17 U.S.C. § 112(e) that the Licensee may incur in the same year. The minimum fee is nonrefundable, and any unused portion of an annual minimum fee payment for a given year shall not carry over into a subsequent year.

[Note: Combination of 37 C.F.R. § 382.3(b) and § 380.10(b).]

(c) Ephemeral recordings royalty fees. The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive Digital Audio Transmission as a Preexisting Subscription Service are included in the 5%.

[Note: Based on § 380.10(d). Used defined term Digital Audio Transmission. Inserted reference to Preexisting Subscription Service.]

SUBPART C—PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

§ 382.20 Additional definitions for SDARS.

Directly-Licensed Recording is a sound recording for which the Licensee has previously obtained a license of all relevant rights from the Copyright Owner of such sound recording.

[Note: Current definition from 37 C.F.R. § 382.11.]

Gross Revenues. (1) Gross Revenues shall mean revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS, and shall be comprised of the following:

(i) Subscription revenue recognized by Licensee directly from U.S. subscribers for Licensee's SDARS; and

(ii) Licensee's advertising revenues, or other monies received from sponsors, if any, attributable to advertising on channels other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) and (ii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1) or (2), Gross Revenues shall exclude:

[Note: Added introductory clause to clarify that exclusions can be taken only to the extent that what is being excluded would otherwise be included.]

(i) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee's SDARS and any shipping and handling fees therefor;

[Note: Omitted reference to taxes because they are excluded in clause (iv) below.]

(ii) Royalties paid to Licensee for intellectual property rights;

(iii) Monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(iv) Sales and use taxes;

[Note: Broke taxes out into a separate clause, because taxes are distinct from the various fees in clause (v) below.]

(v) Credit card, invoice, activation, swap and early termination fees charged to subscribers and reasonably related to the Licensee's expenses to which they pertain;

[Note: Omitted reference to shipping and handling fees because they are excluded in clause (i) above. Replaced reference to fulfillment service fees with list based on the SDARS II determination (78 Fed. Reg. at 23,072). Clarified that the fees that may be excluded under this clause are fees charged to subscribers as recovery of costs.]

(vi) Bad debt expense; and

(vii) Revenues recognized by Licensee for the provision of:

(A) Current and future data services provided on a standalone basis for a separate charge (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

[Note: In paragraphs (A) and (B), clarified that the excluded offerings must be provided on a standalone basis.]

(B) Channels, programming, products and/or other services provided on a standalone basis for a separate charge where such channels use only incidental performances of sound recordings;

(C) Channels, programming, products and/or other services provided outside of the United States; and

(D) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is exempt from any license requirement or is separately licensed, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

[Note: Except as noted above, the foregoing definition of Gross Revenues is the current definition from 37 C.F.R. § 382.11.]

Performance is each instance in which any portion of a sound recording is publicly performed to a listener within the United States by means of a Digital Audio Transmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one listener) but excluding an incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances

during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

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

[Note: Current definition for SDARS royalty deductions from 37 C.F.R. § 382.12(d)(2)(i) and (e)(2)(i), using defined term Digital Audio Transmission.]

Pre-1972 Recording is a sound recording fixed before February 15, 1972 that is not a restored work as defined in 17 U.S.C. 104A(h)(6) or otherwise subject to protection under title 17, United States Code.

[Note: Based on current definition in 37 C.F.R. § 382.11. Added reference to restored works and other federally-protected works, because they are subject to the statutory license.]

Reference Channels are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both, and on which the programming consists primarily of music.

[Note: Current definition for SDARS royalty deductions from 37 C.F.R. § 382.12(d)(2)(ii) and (e)(2)(ii).]

Subscriber means every subscriber to the SDARS who receives the SDARS in the United States for all or any part of a month, except –

(1) any such subscribers that receive only channels, programming, products and/or other services that use no sound recordings, or only incidental performances of sound recordings; and

(2) any such subscribers receiving the SDARS during a trial period of not more than 30 consecutive days per subscriber per two year period, if such trial period is offered free of any charge to the subscriber, and the Licensee receives no monetary or nonmonetary consideration from any third party for providing such trial period.

[Note: New definition based on 37 C.F.R. § 383.2(g). Paragraph (1) is based on language in the current definition of Gross Revenues in 37 C.F.R. § 382.11 and intended to exclude data-only and talk-only subscribers. Paragraph (2) is based on language in 37 C.F.R. § 385.14(a)(1)(v) and (b)(1) and intended to permit free trials on a royalty-free basis, within limits consistent with those applicable to interactive services.]

§ 382.21 Royalty fees for the public performance of sound recordings and the making of Ephemeral Recordings by an SDARS.

(a) Royalty fees. (1) Commencing January 1, 2018, and continuing through December 31, 2022, a Licensee that provides an SDARS must pay royalties for the public performance of sound recordings pursuant to 17 U.S.C. 114 and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) that are the greater of the following, on a calendar year basis, except that the royalty fee so determined may be reduced by the Direct License Share or the Pre-1972 Recording Share as described in paragraphs (d) and (e), respectively, of this section:

(i) the following monthly payment per Subscriber:

- (A) 2018: \$2.48;
- (B) 2019: \$2.55;
- (C) 2020: \$2.63;
- (D) 2021: \$2.71; and
- (E) 2022: \$2.79.

(ii) 23% of Gross Revenues.

[Note: Based on combination of 37 C.F.R. § 380.10(a), § 382.12(a) and § 383.3(a). Rates based on SoundExchange economic case.]

(2) In making monthly payments pursuant to § 382.2(b), a Licensee shall, for each monthly payment, calculate its liability for the calendar year through the end of the applicable month and pay the resulting royalty for the year through the end of the applicable month, less any amounts previously paid for such year.

[Note: New provision clarifying monthly calculations within the context of the annual greater-of structure.]

(b) Minimum fee. Each Licensee must pay the Collective a minimum fee of \$100,000 each year. The Collective must apply the fee to the Licensee's account as credit towards any royalties under 17 U.S.C. § 112(e) that the Licensee may incur in the same year. The minimum fee is nonrefundable, and any unused portion of an annual minimum fee payment for a given year shall not carry over into a subsequent year.

[Note: Combination of 37 C.F.R. § 382.12(c) and § 380.10(b).]

(c) Ephemeral recordings royalty fees. The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive Digital Audio Transmission as an SDARS are included in the 5%.

[Note: Based on § 380.10(d). Used defined term Digital Audio Transmission. Inserted reference to SDARS.]

(d) Direct license share. The royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the “Direct License Share”).

(1) Subject to paragraph (d)(2) of this section, for each month, the Direct License Share is—

(i) If the Licensee collects and provides to the Collective data as described in § 382.22(a) concerning the Aggregate Tuning Hours (as defined in § 370.4(b)(1) of this chapter) of the channels on its SDARS or other information concerning the relative listenership of channels on its SDARS, the result of dividing the plays of Directly-Licensed Recordings on its SDARS by the total number of plays of all sound recordings on its SDARS, after weighting all plays on each channel in proportion to the relative listenership of the channel as reflected in such data;

(ii) If the Licensee collects and provides to the Collective data as described in § 382.22(a) concerning the Performances of individual sound recordings on its SDARS or other information concerning the relative listenership of individual sound recordings on its SDARS, the result of dividing the plays of Directly-Licensed Recordings on its SDARS by the total number of plays of all sound recordings on its SDARS, after weighting all such plays in proportion to the corresponding Performances or their other relative listenership as reflected in such data; and

(iii) In the absence of such data, the result of dividing the Internet Performances of Directly-Licensed Recordings on the Reference Channels by the total number of Internet Performances of all sound recordings on the Reference Channels, but in no event an amount greater than the result of dividing the number of plays of Directly-Licensed Recordings on the SDARS by the total number of plays of all sound recordings on the SDARS.

(2) A Direct License Share adjustment as described in paragraph (d)(1) of this section is available to a Licensee only if—

(i) In any case in which paragraph (d)(1)(iii) of this section applies, the Reference Channels constitute a large majority of the music channels offered on the Licensee’s SDARS and are generally representative of the music channels offered on the Licensee’s SDARS; and

(ii) By no later than the due date for the relevant payment under § 382.2(b), the Licensee provides the Collective a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Directly-Licensed Recordings that is in effect for the month for which the payment is made, and of each sound recording as to which the Licensee takes such an adjustment (identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name), and the usage data for the excluded Directly-Licensed Recordings that the Licensee uses in its calculations under paragraph (d)(1). Notwithstanding § 382.5, the Collective may disclose

such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

(3) No use of a Directly-Licensed Recording shall be credited as such under this paragraph (d) if that use is separately credited as a use of a Pre-1972 Sound Recording under paragraph (e)(1) of this section.

[Note: Based on current deduction provision in 37 C.F.R. § 382.12(d), with changes including use of satellite usage date (if available), capping the direct license deduction at the percentage of plays of Directly-Licensed Recordings on the SDARS in the absence of actual satellite usage data, and moving definitions to the definitions section. Current 37 C.F.R. § 382.13(h)(1) is incorporated herein, with the addition of reporting of track-level usage information. Paragraph (3) revised to reflect the different forms of usage data that may be used in making this calculation.]

(e) Pre-1972 Recording share. The royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the “Pre-1972 Recording Share”).

(1) Subject to paragraph (e)(2) of this section, for each month, the Pre-1972 Recording Share is—

(i) If the Licensee collects and provides to the Collective data as described in § 382.22(a) concerning the Aggregate Tuning Hours (as defined in § 370.4(b)(1) of this chapter) of the channels on its SDARS or other information concerning the relative listenership of channels on its SDARS, the result of dividing the plays of Pre-1972 Sound Recordings on its SDARS by the total number of plays of all sound recordings on its SDARS, after weighting all plays on each channel in proportion to the relative listenership of the channel as reflected in such data;

(ii) If the Licensee collects and provides to the Collective data as described in § 382.22(a) concerning the Performances of individual sound recordings on its SDARS or other information concerning the relative listenership of individual sound recordings on its SDARS, the result of dividing the plays of Pre-1972 Sound Recordings on its SDARS by the total number of plays of all sound recordings on its SDARS, after weighting all such plays in proportion to the corresponding Performances or their other relative listenership as reflected in such data; and

(iii) In the absence of such data, the result of dividing the Internet Performances of Pre-1972 Sound Recordings on the Reference Channels by the total number of Internet Performances of all sound recordings on the Reference Channels.

(2) A Pre-1972 Recording Share adjustment as described in paragraph (e)(1) of this section is available to a Licensee only if—

(i) In any case in which paragraph (e)(1)(iii) of this section applies, the Reference Channels constitute a large majority of the music channels offered on the Licensee’s SDARS and are generally representative of the music channels offered on the Licensee’s SDARS; and

(ii) By no later than the due date for the relevant payment under § 382.2(b), the Licensee provides the Collective a list of each Pre-1972 Recording as to which the Licensee takes such an adjustment (identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, alternatively to the ISRC, album title and copyright owner name), and the usage data for the excluded Pre-1972 Recordings that the Licensee uses in its calculations under paragraph (e)(1).

[Note: Based on current deduction provision in 37 C.F.R. § 382.12(e), with changes including use of satellite usage date (if available) and definitions moved to the definitions section. Current 37 C.F.R. § 382.13(h)(2) is incorporated herein, with the addition of reporting of track-level usage information for excluded tracks.]

§ 382.22 Distribution of SDARS royalties.

(a) With SDARS usage data. If a Licensee that provides an SDARS is capable of obtaining reasonably reliable data concerning the Aggregate Tuning Hours (as defined in § 370.4(b)(1) of this chapter) of the channels on its SDARS, the Performances on its SDARS, or other reasonably reliable data concerning the relative listenership of channels or sound recordings on its SDARS, through the use of the radios referred to as SXM17 or otherwise, such Licensee shall collect such data, and provide such data to the Collective, at the most granular level practicable, in accordance with § 370.4(d)(2)(vii) of this chapter or by such other means as the Licensee and Collective shall agree. To the extent that such data is provided to the Collective, the Collective shall use such data in making distributions pursuant to § 382.4 to allocate SDARS royalties proportionally among SDARS channels or recordings performed on SDARS channels based on listenership.

[Note: New provision contemplating that Sirius XM is likely to become able to report relative usage data as required by § 370.4(d)(2)(vii) during the coming rate period, and confirming that in such an event, Sirius XM is required to report that data to SoundExchange, and SoundExchange is required to use that data to weight distributions as provided by the report of use regulations.]

(b) Otherwise. In the absence of data as described in § 382.22(a), the Collective may make distributions pursuant to § 382.4 using a reasonable distribution methodology that takes into account usage data in addition to the reports of use for the SDARS provided pursuant to § 370.4 of this chapter.

[Note: New provision permitting SoundExchange, in the absence of actual SDARS usage data as required by § 370.4(d)(2)(vii), to incorporate other usage data into its SDARS royalty distribution methodology.]