

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

In the Matter of:

Determination of Rates and Terms for
Preexisting Subscription Services and
Satellite Digital Audio Radio Services

Docket No. 2011-1
CRB PSS/Satellite II

SECOND REVISED PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. (“SoundExchange”) proposes 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, 2013 through December 31, 2017.

I. ROYALTY RATES

A. SDARS

1. PERCENTAGE RATES

For all licensed transmissions and related ephemeral recordings by an SDARS, SoundExchange requests royalty rates that are a percentage of “Gross Revenues” as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	12%
2014	14%
2015	16%
2016	18%
2017	20%

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012.]

2. DEFINITION OF GROSS REVENUES

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the following definition of Gross Revenues:

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

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee’s SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee’s advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee’s SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

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

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

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of –

(A) Data services (*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, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee’s SDARS, and offered at the same price both to subscribers to Licensee’s SDARS and persons who are not subscribers to Licensee’s SDARS);

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

(C) Separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee’s SDARS, and offered at the same price both to subscribers to Licensee’s SDARS and persons who are not subscribers to Licensee’s SDARS).

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012.]

3. DIRECT LICENSE ADJUSTMENT

The record in this proceeding indicates that the magnitude of Sirius XM’s direct license usage is so small as to make it unnecessary to accommodate such usage in the rate structure.¹

The record also gives significant reason for doubt that the SDARS are capable of administering accurately an adjustment in statutory royalty payments for directly-licensed usage. To date, the magnitude of Sirius XM’s error in computing such usage has been greater than the usage itself.

If such an adjustment is permitted, copyright owners and performers have every reason to fear

¹ See SoundExchange PFOF at VI.B.1 (Sirius XM has asserted direct license usage is 4-6%, but it is at most about 2%, and there are indications it may be well less than 1%).

that they will be significantly and systematically underpaid.² Accordingly, SoundExchange proposes that there be no adjustment in statutory royalty payments for directly-licensed usage.

If the Judges determine that an adjustment in statutory royalty payments for directly-licensed usage should be provided notwithstanding the foregoing, SoundExchange proposes that the payable statutory royalty amount be determined by reducing the product of the percentage rate and Gross Revenues (as defined above) by a percentage approximating the value of the directly-licensed usage that is calculated with reference to the proportion of performances on corresponding channels of the SDARS' webcasting service for which an SDARS relies upon direct licenses rather than the statutory license (the "Direct License Share").³ Specifically, in such a case SoundExchange would propose to calculate the Direct License Share using Internet webcast data to approximate relative listenership to directly-licensed recordings and other recordings, as follows:

- For each month, identify the Internet webcast music channels offered by the Licensee that directly correspond to music channels offered on its SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both⁴ (the "Reference Channels").

² *Id.* At Judge Roberts' request, and after taking nearly a month to prepare it, Sirius XM submitted a "Play Share Analysis" that systematically inflated the play share of direct licensors. *See* SoundExchange's Motion to Strike the Play Share Analysis from the Rebuttal Testimony of Ronald H. Gertz, David Frear, and Roger Noll (filed August 9, 2012). Sirius XM eventually conceded that its Play Share Analysis was so unreliable that it withdrew the analysis and every reference to it from the testimony of its witnesses. Sirius XM's Response Mooting SoundExchange's Motion to Strike the Play Share Analysis from the Rebuttal Testimony of Ronald H. Gertz, David Frear and Roger Noll (filed August 9, 2012) ("the process is simply too complicated").

³ If the Judges determine that a direct license adjustment should be implemented in this manner, it would be improper also to include such an adjustment in the definition of Gross Revenues.

⁴ The references to legacy Sirius radios and XM radios are necessary because Sirius XM has recently introduced models of Sirius XM radios that are capable of receiving additional satellite

- For each month, divide the Internet performances of directly-licensed recordings on the Reference Channels by the total number of Internet performances of all recordings on the Reference Channels to determine the Direct License Share.

The foregoing assumes that the Reference Channels constitute a large majority of the music channels offered on the SDARS and are generally representative of the music channels offered on the SDARS. SoundExchange understands this to be true of the Internet webcast music channels offered by Sirius XM today. A Direct License Share adjustment would not be available if Sirius XM were to change its offerings so that this condition was no longer true.

If the Judges adopt this Direct License Share adjustment or any other adjustment to royalty payments or Gross Revenues based on usage of particular sound recordings, the record in this proceeding demonstrates that, for accurate payment of copyright owners and performers, it will be important for SoundExchange to be able to understand on a current basis what sound recordings the Licensee believes to be excludable for purposes of calculating such an adjustment. Accordingly, in such a case, SoundExchange proposes that, as a condition to taking such an adjustment, the Licensee be required to notify SoundExchange monthly of each copyright owner from which the Licensee claims to have a direct license and each sound recording that the Licensee believes to be excludable. SoundExchange would be permitted to disclose such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

channels that most Sirius XM subscribers cannot receive, because most subscribers have legacy radios. Lys WRT at SX Ex. 224-RP, p. 3, SX Trial Ex. 240. Using as Reference Channels these channels that can be received by only relatively few subscribers would overweight their content in the proposed proxy.

4. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114.

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012 and the participants’ stipulation of May 24, 2012.]

5. EPHEMERAL ROYALTY MINIMUM FEE

Pursuant to 17 U.S.C. § 112(e)(3) and (4), SoundExchange proposes that an SDARS pay an annual, nonrefundable minimum fee of \$100,000 creditable to ephemeral royalty payments.

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012 and the participants’ stipulation of May 24, 2012.]

B. PSS

1. PERCENTAGE RATES

For all licensed transmissions and related ephemeral recordings by a PSS, SoundExchange requests royalty rates that are a percentage of “Gross Revenues” as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	15%
2014	20%
2015	25%
2016	35%
2017	45%

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012.]

2. TREATMENT OF NON-ARM’S LENGTH TRANSACTIONS

To ensure that a PSS pays a reasonable royalty when it derives Gross Revenues from transactions between the PSS and a customer that are not at arm’s length (i.e., the customer is an owner of equity or capital interests in the PSS or has any other relationship with the PSS such

that the PSS and customer do not do business with respect to the provision of music service as if they were independent, unrelated parties), SoundExchange proposes that, notwithstanding Section 1 above, the royalty payable by a PSS for transmissions through such a customer (a “Partner”) shall not be less than the product of multiplying such Partner’s total number of subscribers to the PSS’ programming by the PSS’ average per-subscriber royalty payment for transmissions through such PSS’ top five highest-paying customers that are not Partners (based on total payment).

3. DEFINITION OF GROSS REVENUES

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the definition of Gross Revenues presently set forth in 37 C.F.R. § 382.2(e) (although SoundExchange proposes relocating that definition within the applicable regulations and adjusting internal cross references accordingly).

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012.]

4. ALLOCATION BETWEEN SECTION 112 AND 114

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114.

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012 and the participants’ stipulation of May 24, 2012.]

5. MINIMUM FEE

SoundExchange proposes that a PSS pay an annual, nonrefundable minimum fee of \$100,000 creditable to all its statutory royalty payments, in the manner presently set forth in 37 C.F.R. § 382.2(c) (subject to technical and conforming changes in the regulation setting forth such arrangement).

[Note: This is consistent with SoundExchange’s proposal of July 2, 2012 and the participants’ stipulation of May 24, 2012.]

II. TERMS

Except as set forth above, SoundExchange proposes that the terms currently set forth in 37 C.F.R. Part 382 for the most part be continued, subject to generally technical and conforming changes. The majority of these changes consist of conforming the PSS terms to the SDARS terms. These changes are described in the testimony of Jonathan Bender.

SoundExchange has set forth its proposed terms (along with its proposed rates) in proposed regulations attached hereto. Exhibit A is a clean copy of the proposed regulations, and Exhibit B is marked to show changes from the regulations currently provided in 37 C.F.R. Part 382.

Respectfully submitted,

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September 26, 2012

Exhibit A
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—Preexisting Subscription Services

Sec.

- 382.1 General.
- 382.2 Definitions.
- 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.
- 382.4 Terms for making payment of royalty fees and statements of account.
- 382.5 Confidential information.
- 382.6 Verification of royalty payments.
- 382.7 Verification of royalty distributions.
- 382.8 Unclaimed funds.

Subpart B—Preexisting Satellite Digital Audio Radio Services

- 382.10 General.
- 382.11 Definitions.
- 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.
- 382.13 Terms for making payment of royalty fees and statements of account.
- 382.14 Confidential information.
- 382.15 Verification of royalty payments.
- 382.16 Verification of royalty distributions.
- 382.17 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

Subpart A—Preexisting Subscription Services

§ 382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

§ 382.2 Definitions.

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

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

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

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

Gross Revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

- (i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;
- (ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;
- (iii) Monies received for the provision of time on the programming service to any third party;
- (iv) Monies received from the sale of time to providers of paid programming such as infomercials;
- (v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;
- (vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (1)(i) through (vii) of this definition.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "Gross Revenues" as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

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).

Qualified Auditor is a Certified Public Accountant.

§ 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.

(a)(1) Commencing January 1, 2013, and continuing through December 31, 2017, the monthly royalty fee to be paid by a Licensee 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) shall be a percentage of monthly Gross Revenues resulting from residential services in the United States as follows: for 2013, 15%; for 2014, 20%; for 2015, 25%; for 2016, 35%; and for 2017, 45%.

(2) Notwithstanding paragraph (a)(1) of this section, when the Licensee derives Gross Revenues from a Non-Arms' Length Transaction, the royalty payable by the Licensee for transmissions through the relevant carrier for the month shall not be less than the product of multiplying such carrier's total number of Subscribers for the month by the Licensee's Large Carrier Average Per-Subscriber Royalty Payment for the month. For purposes of this paragraph (a)(2):

(i) A "Non-Arms' Length Transaction" is a transaction between the Licensee and a carrier that is an owner of equity or capital interests in the Licensee or that has any other relationship with the Licensee such that the Licensee and carrier do not do business with respect to the Licensee's programming service as if they were independent, unrelated parties.

(ii) A carrier's "Subscribers" are persons authorized to receive the Licensee's programming service through the carrier.

(iii) A Licensee's "Large Carrier Average Per-Subscriber Royalty Payment" for a month is an amount determined as follows:

(I) Identify the five carriers making the largest payments to the Licensee that are included in Licensee's Gross Revenues for the month, other than pursuant to Non-Arms' Length Transactions.

(II) Determine the Licensee's Gross Revenues for the month reasonably allocable to such carriers in the aggregate, including all Gross Revenues payable directly by such carriers and any Gross Revenues payable by third parties (e.g., advertisers) reasonably allocable to provision of Licensee's programming service to such carrier's Subscribers.

(III) Determine the total number of Subscribers to such carriers in the aggregate for the month.

(IV) Divide the allocated portion of Gross Revenues determined in paragraph (a)(2)(iii)(II) of this section by the number of Subscribers determined in paragraph (a)(2)(iii)(III) of this section to yield the Licensee's average per-subscriber Gross Revenues from such carriers.

(V) Multiply the average per-subscriber Gross Revenues determined in paragraph (a)(2)(iii)(IV) of this section by the percentage applicable under paragraph (a)(1) of this section for the month to yield the Licensee's Large Carrier Average Per-Subscriber Royalty Payment for the month.

(b) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraph (a) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received.

§ 382.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.3 to the Collective.

(b) *Timing of payment.* A Licensee shall make any payments due under §382.3 on a monthly basis on or before the 45th day after the end of each month for that month.

(c) *Statements of Account.* Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address 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 a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative 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.

(d) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall 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 contained in §370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.8.

(e) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 382.5 Confidential information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include 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 Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

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

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been 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 confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall 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. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.8 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 subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-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.

Subpart B—Preexisting Satellite Digital Audio Radio Services

Authority: 17 U.S.C. 112(e), 114, 804(b)(3).

§ 382.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, 2013, through December 31, 2017.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

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

§ 382.11 Definitions.

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

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

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

[Note: The following definition of “Directly-Licensed Recording” is bracketed because it is proposed only if the Judges determine that an adjustment in statutory royalty payments for directly-licensed usage should be provided notwithstanding the significant reason for doubt that the SDARS are capable of administering any such adjustment accurately.]

[*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.]

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

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

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

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee's advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

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

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

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of –

(A) Data services (*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, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

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

(C) Separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

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).

Qualified Auditor is a Certified Public Accountant.

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

§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

[Note: The bracketed language at the end of Subsection (a) below is proposed for inclusion only if the Judges determine that inclusion of Subsection (d) is necessary.]

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues as follows: for 2013, 12%; for 2014, 14%; for 2015, 16%; for 2016, 18%; and for 2017, 20%[, except that the royalty fee so determined may be reduced by the Direct License Share as described in paragraph (d) of this section].

(b) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the Ephemeral Recordings royalties due and payable for a given year or any month therein under subsections (a) and (b) shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

[Note: The following Subsection (d) is bracketed because it is proposed only if the Judges determine that an adjustment in statutory royalty payments for directly-licensed usage should be provided notwithstanding the significant reason for doubt that the SDARS are capable of administering any such adjustment accurately.]

[(d) *Direct license share.* The percentage of monthly Gross Revenues 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)(3) of this section, for each month, the Direct License Share is 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.

(2) For purposes of paragraph (d)(1) of this section:

(i) A “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 or retransmission (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).

(ii) The “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.

(3) A direct license share adjustment as described in paragraph (d) of this section is available to a Licensee only if –

(i) 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) the Licensee timely provides the relevant information required by § 382.13(h).]

§ 382.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under §382.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114.

(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 by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114 that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month. All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

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

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address 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 a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative 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.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall 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 contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

[Note: The need for the following subsection (h) will depend on the Judges' resolution of disputed issues in the proceeding, and the language may need to be tailored to the resolution of those issues. If the Judges adopt the Direct License Share adjustment in § 382.12(d) above or any other mechanism permitting the Licensee to adjust its royalty payments or Gross Revenues based on usage of particular sound recordings (including the current definition of Gross Revenues, which Sirius XM asserts permits such adjustments, although SoundExchange disagrees), it will be important to accurate administration of the statutory licenses to include a validation mechanism like this subsection (h). However, the bracketed reference below to "other adjustment" is not necessary within the context of SoundExchange's rate proposal, because no such adjustment is contemplated by SoundExchange's rate proposal.]

(h) *Notification of exclusions.* As a condition to a Licensee's taking a Direct License Share adjustment as described in § 382.12(d) [or any other adjustment to royalty payments or Gross Revenues based on usage of particular sound recordings], by no later than the due date for the relevant payment under § 382.13(c), the Licensee must provide 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). Notwithstanding § 382.14, 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.

§ 382.14 Confidential information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include 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 Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

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

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been 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 confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate

confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall 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. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.17 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 subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-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.

Exhibit B
Proposed Regulations Marked Against Current 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—Preexisting Subscription Services

Sec.

382.1 General.

382.2 Definitions.

~~382.3~~ 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral ~~phonorecords~~recordings by preexisting subscription services.

~~382.3~~382.4 Terms for making payment of royalty fees.~~382.4—Confidential information and statements of account.~~

382.5 ~~Verification of statements of account.~~Confidential information.

382.6 Verification of royalty payments.

382.7 ~~Unknown copyright owners.~~Verification of royalty distributions.

382.8 Unclaimed funds.

Subpart B—Preexisting Satellite Digital Audio Radio Services

382.10 General.

382.11 Definitions.

382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

382.13 Terms for making payment of royalty fees and statements of account.

382.14 Confidential information.

382.15 Verification of royalty payments.

382.16 Verification of royalty distributions.

382.17 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

Subpart A—Preexisting Subscription Services

§ 382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. ~~114(d)(2), 114,~~ and the making of ~~ephemeral phonorecords~~Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

~~(d) For the purposes of this subpart, *Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).~~

§ 382.2 Definitions.

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

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

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

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

Gross Revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee’s carriers and directly from residential U.S. subscribers for Licensee’s programming service;

(ii) Licensee’s advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(iii) Monies received for the provision of time on the programming service to any third party;

(iv) Monies received from the sale of time to providers of paid programming such as infomercials;

(v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee’s programming service, the fair market value thereof or Licensee’s prevailing published rate, whichever is less;

(vi) Monies or other consideration received by Licensee from Licensee’s carriers, but not including monies received by Licensee’s carriers from others and not accounted for by

Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (1)(i) through (vii) of this definition.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "Gross Revenues" as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

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).

Qualified Auditor is a Certified Public Accountant.

§ ~~382.2382.3~~ Royalty fees for the digital performance of sound recordings and the making of ephemeral ~~phonorecords~~ recordings by preexisting subscription services.

(a)(1) Commencing January 1, ~~2008, 2013,~~ and continuing through December 31, ~~2011,~~ a Licensee's ~~2017,~~ the monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral ~~phonorecords~~ Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be ~~7.25%~~ a percentage of such Licensee's monthly ~~gross revenues~~ Gross Revenues resulting from residential services in the United States as follows: for 2013, 15%; for 2014, 20%; for 2015, 25%; for 2016, 35%; and for 2017, 45%.

(2) Notwithstanding paragraph (a)(1) of this section, when the Licensee derives Gross Revenues from a Non-Arms' Length Transaction, the royalty payable by the Licensee for transmissions through the relevant carrier for the month shall not be less than the product of multiplying such carrier's total number of Subscribers for the month by the Licensee's Large Carrier Average Per-Subscriber Royalty Payment for the month. For purposes of this paragraph (a)(2):

(i) A "Non-Arms' Length Transaction" is a transaction between the Licensee and a carrier that is an owner of equity or capital interests in the Licensee or that has any other relationship with the Licensee such that the Licensee and carrier do not do business with respect to the Licensee's programming service as if they were independent, unrelated parties.

(ii) A carrier's "Subscribers" are persons authorized to receive the Licensee's programming service through the carrier.

(iii) A Licensee's "Large Carrier Average Per-Subscriber Royalty Payment" for a month is an amount determined as follows:

(I) Identify the five carriers making the largest payments to the Licensee that are included in Licensee's Gross Revenues for the month, other than pursuant to Non-Arms' Length Transactions.

(II) Determine the Licensee's Gross Revenues for the month reasonably allocable to such carriers in the aggregate, including all Gross Revenues payable directly by such carriers and any Gross Revenues payable by third parties (e.g., advertisers) reasonably allocable to provision of Licensee's programming service to such carrier's Subscribers.

(III) Determine the total number of Subscribers to such carriers in the aggregate for the month.

(IV) Divide the allocated portion of Gross Revenues determined in paragraph (a)(2)(iii)(II) of this section by the number of Subscribers determined in paragraph (a)(2)(iii)(III) of this section to yield the Licensee's average per-subscriber Gross Revenues from such carriers.

(V) Multiply the average per-subscriber Gross Revenues determined in paragraph (a)(2)(iii)(IV) of this section by the percentage applicable under paragraph (a)(1) of this section for the month to yield the Licensee's Large Carrier Average Per-Subscriber Royalty Payment for the month.

~~(b) Commencing January 1, 2012, and continuing through December 31, 2012, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.5% of such Licensee's monthly gross revenues resulting from residential services in the United States.~~

~~(e)~~ Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ~~ephemeral phonorecords~~ Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under ~~paragraphs~~ paragraph (a) ~~and (b)~~ of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment is and the statement of account are received.

~~(e)(1) For purposes of this section, gross revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:~~

~~(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;~~

~~(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;~~

~~(iii) Monies received for the provision of time on the programming service to any third party;~~

~~(iv) Monies received from the sale of time to providers of paid programming such as infomercials;~~

~~(v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;~~

~~(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;~~

~~(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and~~

~~(viii) Bad debts recovered regarding paragraphs (e)(1)(i) through (vii) of this section.~~

~~(2) Gross revenues shall include such payments as set forth in paragraphs (e)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (e)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.~~

~~(f) During any given payment period, the value of each performance of each digital sound recording shall be the same.~~

§ ~~382.3382.4~~ Terms for making payment of royalty fees and statements of account.

~~(a) *Payment to the Collective.* All A Licensee shall make the royalty payments shall be made due under §382.3 to the Collective designated for the collection and distribution of royalties for the 2008–2012 time period, which shall be SoundExchange.~~

(b) Timing of payment. ~~Payment shall be made on the forty-fifth~~ A Licensee shall make any payments due under §382.3 on a monthly basis on or before the 45th day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.

(c) Statements of Account. Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

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

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address 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 a duly authorized officer or representative of the Licensee;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) The title or official position held in relation to the Licensee by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned officer or representative 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.

(d) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Licensees to ~~copyright owners and performers~~ Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those ~~copyright owners, performers~~ Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall 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 contained in §370.3 of this chapter.

(2) If the Collective is unable to locate a ~~copyright owner~~ Copyright Owner or ~~performer~~ Performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, such ~~distribution may first be applied to the costs directly attributable to the administration of that distribution.~~ The foregoing shall apply notwithstanding the common law or statutes of any State; royalties shall be handled in accordance with §382.8.

(e) Retention of records. Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ ~~382.4~~382.5 Confidential information and statements of account.

(a) Definition. For purposes of this subpart, ~~confidential information~~ “Confidential Information” shall include 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 nonexempt preexisting subscription service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt preexisting subscription service and an interested party, or between one or more interested parties; Provided that all such information shall be made available, for the verification proceedings provided for in §§382.5 and 382.6. Licensee submitting the statement.

~~(b) Nonexempt preexisting subscription services shall submit monthly statements of account on a form provided by the Collective and the monthly royalty payments.~~

~~(c) A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.~~

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Access to the confidential information pertaining to the royalty payments*Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities ~~directly related hereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who related thereto,~~ for the purpose of performing such duties during the ordinary course of ~~employment, their work and who~~ require access to the ~~records;~~ and Confidential Information;

(2) An independent and ~~qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but~~ Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the ~~interested copyright owners~~ Collective with respect to the ~~verification of the royalty payments.~~ verification of a

Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

~~(3) Copyright owners and performers~~Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, ~~or agents thereof,~~ subject to an appropriate confidentiality agreement, ~~provided that the sole confidential information that may be shared pursuant to this paragraph (d)(3) are the monthly statements of account that accompany royalty payments and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents,~~ subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

~~(e) Safeguarding of Confidential Information.~~ The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect ~~confidential financial and business information~~Confidential Information or similarly sensitive information belonging to the Collective or ~~such~~ person.

~~(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.~~

§ 382.5382.6 Verification of statements of accountroyalty payments.

~~(a) General.~~ This section prescribes ~~general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by the Copyright Royalty Board~~procedures by which the Collective may verify the royalty payments made by a Licensee.

~~(b) Frequency of verification. Interested parties~~The Collective may conduct a single audit of a ~~nonexempt preexisting subscription service~~Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

~~(c) Notice of intent to audit. Interested parties must submit~~The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular ~~service with the Copyright Royalty Board~~Licensee, which shall, within 30 days of the filing of the notice, publish in the

Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. ~~Such~~such filing. The notification of intent to audit shall also be served at the same time on the ~~party to be audited.~~Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) ~~Retention of records.~~ The party requesting the verification procedure~~Acquisition and retention of report.~~ The Licensee shall 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. The Collective shall retain the report of the verification for a period of three not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent ~~auditor~~and 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.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The interested parties requesting the verification procedure ~~Collective~~ shall pay for the cost of the verification procedure, unless an independent auditor concludes it is finally determined that there was an underpayment of five (5) percent or more; in which case, the service which made the the Licensee shall, in addition to paying the amount of any underpayment shall, bear the reasonable costs of the verification procedure.

(g) Interested parties. For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the Collective.

§ ~~382.6~~382.7 Verification of royalty paymentsdistributions.

(a) General. This section prescribes ~~general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by the Copyright Royalty Board~~procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. ~~Interested parties~~A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours,

during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* Interested parties must submit A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the entity making the royalty payment with the Copyright Royalty Board Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such such filing. The notification of interest intent to audit shall also be served at the same time on the party to be audited Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Retention of records.* The interested party Acquisition and retention of report. The Collective shall 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of ~~three~~ not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor and Qualified Auditor, shall serve as an acceptable verification procedure for all interested parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The interested parties Copyright Owner or Performer requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes it is finally determined that there was an underpayment of five (5) percent or more, in which case, the entity which made the the Collective shall, in addition to paying the amount of any underpayment shall, bear the reasonable costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those who are entitled to receive royalty payments pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

§ 382.7 Unknown copyright owners. § 382.8 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 subpart, the Collective shall retain the required payment

in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-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.

Subpart B—Preexisting Satellite Digital Audio Radio Services

Authority: 17 U.S.C. 112(e), ~~114(f), 114~~, 804(b)(3).

§ 382.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, ~~2007, 2013~~, through December 31, ~~2012, 2017~~.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

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

§ 382.11 Definitions.

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

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the ~~2007–2012~~2013–2017 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and ~~114(f), 114~~.

[Note: The following definition of “Directly-Licensed Recording” is bracketed because it is proposed only if the Judges determine that an adjustment in statutory royalty payments for directly-licensed usage should be provided notwithstanding the significant reason for doubt that the SDARS are capable of administering any such adjustment accurately.]

[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.]

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f) and subject to the limitations specified in 17 U.S.C. 112(e).

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

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

(i) ~~Subscription revenue~~All subscription, activation, subscription-related and other revenues recognized by Licensee ~~directly from residential~~from fees paid or payable by or for U.S. subscribers for to Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below; and

(ii) Licensee's advertising revenues, or other ~~monies received~~revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions; attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) ~~and through (iii)~~ 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). 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 by persons other than subscribers, advertisers and sponsors for intellectual property rights;

~~(iii) Monies or other consideration received by Licensee~~ (ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

~~(iv) Sales and use taxes, shipping and handling, credit card, invoice, and fulfillment service fees;~~

~~(v) Bad debt expense, and~~

~~(vi) Revenues recognized by Licensee for the provision of~~ —

(A) ~~Current and future data~~ Data services offered 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, but not transmission of sound recording data), when such services

are provided on a standalone basis (i.e., priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

~~(B) Channels, programming, products and/or other services offered 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~~(C) Separately licensed services, including webcasting, interactive services, and transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (i.e., priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

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).

Qualified Auditor is a Certified Public Accountant.

~~*Residential* means, with respect to a service, a service that may be licensed under the provisions of 17 U.S.C. 114(d)(2)(B); and, with respect to subscribers, subscribers to such a service.~~

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

~~*Term* means the period commencing January 1, 2007, and continuing through December 31, 2012.~~

§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

[Note: The bracketed language at the end of Subsection (a) below is proposed for inclusion only if the Judges determine that inclusion of Subsection (d) is necessary.]

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be thea percentage of monthly Gross Revenues resulting from Residential services in the United States as follows: for 2007 and 2008, 6.0%; for 2009, 6.5%; for 2010, 7.0%; for 2011, 7.5%; and for 2012, 8.0%as follows: for 2013, 12%; for 2014, 14%; for 2015, 16%; for 2016, 18%; and for 2017, 20%], except that the royalty fee so determined may be reduced by the Direct License Share as described in paragraph (d) of this section].

(b) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions ~~during the Term~~ for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, such royalty payments; the total royalties payable under 17 U.S.C. 112(e) and 114.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the Ephemeral Recordings royalties due and payable for a given year or any month therein under subsections (a) and (b) shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

[Note: The following Subsection (d) is bracketed because it is proposed only if the Judges determine that an adjustment in statutory royalty payments for directly-licensed usage should be provided notwithstanding the significant reason for doubt that the SDARS are capable of administering any such adjustment accurately.]

[(d) *Direct license share.* The percentage of monthly Gross Revenues 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)(3) of this section, for each month, the Direct License Share is 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.

(2) For purposes of paragraph (d)(1) of this section:

(i) A “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 or retransmission (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).

(ii) The “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.

(3) A direct license share adjustment as described in paragraph (d) of this section is available to a Licensee only if –

(i) 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) the Licensee timely provides the relevant information required by § 382.13(h).]

§ 382.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under §382.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114.

(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 by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114 that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month, ~~except that payments due under §382.12 for the period beginning January 1, 2007, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period.~~ All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until ~~payment is~~ and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) ~~The handwritten~~ signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative 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.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those

Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall 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 contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

[Note: The need for the following subsection (h) will depend on the Judges' resolution of disputed issues in the proceeding, and the language may need to be tailored to the resolution of those issues. If the Judges adopt the Direct License Share adjustment in § 382.12(d) above or any other mechanism permitting the Licensee to adjust its royalty payments or Gross Revenues based on usage of particular sound recordings (including the current definition of Gross Revenues, which Sirius XM asserts permits such adjustments, although SoundExchange disagrees), it will be important to accurate administration of the statutory licenses to include a validation mechanism like this subsection (h). However, the bracketed reference below to "other adjustment" is not necessary within the context of SoundExchange's rate proposal, because no such adjustment is contemplated by SoundExchange's rate proposal.]

(h) *Notification of exclusions.* As a condition to a Licensee's taking a Direct License Share adjustment as described in § 382.12(d) [or any other adjustment to royalty payments or Gross Revenues based on usage of particular sound recordings], by no later than the due date for the relevant payment under § 382.13(c), the Licensee must provide 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). Notwithstanding § 382.14, 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.

§ 382.14 Confidential information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include 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 Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

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

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

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

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(~~f~~) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 382.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall 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. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and 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.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 382.17 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 subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-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.

CERTIFICATE OF SERVICE

I, David Moskowitz, do hereby certify that copies of the foregoing were sent via electronic mail and First Class mail on the 26th day of September 2012, to the following:

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David Moskowitz