No.

In the
Supreme Court of the United States

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
Petitioner,
v.

COPYRIGHT ROYALTY BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1083

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
A RHODE ISLAND NON-PROFIT CORPORATION,

Appellant

v.

COPYRIGHT ROYALTY BOARD AND LIBRARY OF CONGRESS,

Appellees

COLLEGE BROADCASTERS, INC. AND SOUNDEXCHANGE, INC.,
Intervenors

BEFORE: Garland and Griffith, Circuit Judges, and Williams, Senior Circuit Judge

ORDER
August 28, 2012

Upon consideration of appellant's petition for panel rehearing filed on August 21, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1083

INTERCOLLEGIATE BROADCASTING SYSTEM, INC., A RHODE ISLAND NON-PROFIT CORPORATION,

Appellant

v.

COPYRIGHT ROYALTY BOARD AND LIBRARY OF CONGRESS,

Appellees

COLLEGE BROADCASTERS, INC. AND SOUNDEXCHANGE, INC.,
Intervenors

BEFORE: Sentelle, Chief Judge, and Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges; and Williams, Senior Circuit Judge

ORDER
August 28, 2012

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 2012 Decided July 6, 2012

No. 11-1083
684 F.3d 1332

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
A RHODE ISLAND NON-PROFIT CORPORATION,
Appellant

v.

COPYRIGHT ROYALTY BOARD
AND LIBRARY OF CONGRESS,
Appellees

COLLEGE BROADCASTERS, INC.
AND SOUNDEXCHANGE, INC.,
Intervenors

On Appeal from a Final Order of the Copyright Royalty Board

Before: GARLAND and GRIFFITH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Intercollegiate Broadcasting, Inc. appeals a final determination of the Copyright Royalty Judges ("CRJs" or "Judges") setting the default royalty rates and terms applicable to internet-based "webcasting" of digitally recorded music. We find we need not address Intercollegiate's argument that Congress's grant of power to the CRJs is void because the provision for judicial review gives us legislative or administrative powers that may not be vested in an Article III court. But we agree with Intercollegiate that the position of the CRJs, as currently constituted, violates the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. To remedy the violation, we follow the Supreme Court's approach in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs. With such removal power in the Librarian's hands, we are confident that the Judges are "inferior" rather than "principal" officers, and that no constitutional problem remains. Because of the Appointments Clause violation at the time of decision, we vacate and remand the determination challenged here; accordingly we need not reach Intercollegiate's arguments regarding the merits of the rates and terms set in that determination.

* * *

Intercollegiate is an association of "noncommercial" webcasters who transmit digitally recorded music over the internet in educational environments such as high school and college

campuses—a technologically updated version of "closed circuit" campus radio stations. As with traditional radio, such digital transmissions are "performances" under the Copyright Act and thus entitle the owner of a song's copyright to royalty payments. See 17 U.S.C. § 106(6). And since 1998, the act has provided a "statutory license" for webcasting—a set of provisions that encourage voluntary negotiations over licensing terms but provide, if the parties cannot agree, for proceedings before the CRJs to establish reasonable terms. See *id.* § 114(d)(2), (f)(2)-(3); see also *id.* § 112(e)(4) (similar licenses for "ephemeral recordings").

The administrative body responsible for setting these terms has changed in name and structure over time, but the Copyright Royalty Board (the regulatory name for the collective entity composed of the CRJs and their staff, see 37 C.F.R. § 301.1) was established in its current form in 2004 and is composed of three Copyright Royalty Judges who are appointed to staggered six-year terms by the Librarian of Congress. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified at 17 U.S.C. § 801 *et seq.*). When a ratemaking proceeding is initiated, the Judges are tasked with "mak[ing] determinations and adjustments of reasonable terms and rates of royalty payments," 17 U.S.C. § 801(b)(1), where "reasonable" means payments that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," *id.* § 114(f)(2)(B); see also *id.* § 112(e)(4).

SoundExchange, Inc. (an intervenor here) is a non-profit clearinghouse for musicians' webcast royalty payments. In 2008 it initiated ratemaking proceedings before the CRJs to set the default webcasting licensing rates for the years 2011-2015. The Judges initiated proceedings and received 40 petitions to participate, mainly from webcasters. Over the next two years, SoundExchange entered voluntary settlements with almost all of the participants, leaving only two webcasting participants, Intercollegiate and one other licensee, Live365 (a commercial webcaster). (Live365 originally appealed the CRJs' determination as to commercial webcaster rates but reached a settlement with SoundExchange before the filing of opening briefs.) Intervenor College Broadcasting, Inc., an association of educational webcasters similar to Intercollegiate, participated in cooperation with SoundExchange, providing the CRJs their settlement agreement as a reference for market rates.

After reviewing the evidence and testimony from the remaining participants, the CRJs issued a final determination in which they adopted as statutory rates the royalty structure agreed to in the settlement between SoundExchange and College Broadcasting. See 76 Fed. Reg. 13,026, 13,042/1 (Mar. 9, 2011). Those terms include a $500 flat annual fee per station for both "educational" and other noncommercial webcasters whose "Aggregate Tuning Hours" stay below a monthly threshold separating them from commercial webcasters. See *id.* at 13,039/1, 13,040/1. The CRJs rejected Intercollegiate's proposal to establish different fee structures for "small" and "very small"

noncommercial webcasters. See *id.* at 13,040/2-13,042/1. Intercollegiate appealed the CRJs' determination pursuant to 17 U.S.C. § 803(d)(1).

* * *

Intercollegiate first argues that all determinations made by the CRJs are void because the relevant appeal provision purports to ask Article III courts to take actions of a kind beyond their constitutional jurisdiction. Specifically, 17 U.S.C. § 803(d)(1) provides for appeals of the CRJs' determinations to the D.C. Circuit, and § 803(d)(3) states:

> Section 706 of title 5 shall apply with respect to review by the court of appeals under this subsection. If the court modifies or vacates a determination of the Copyright Royalty Judges, *the court may enter its own determination* with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).

17 U.S.C. § 803(d)(3) (emphasis added). Intercollegiate claims that this provision vests us with powers unsuitable for an Article III court, citing *Federal Radio Commission v. General Electric Co.*,

281 U.S. 464 (1930). There the Court addressed a provision vesting in the courts of the District of Columbia a power to substitute their own "determination" for that of an agency; it found the power to be legislative or administrative rather than judicial. Because the courts of the District were then legislative in character, their exercise of such a power presented no problem, but the Court regarded its review of such a legislative or administrative decision as beyond *its* authority under Article III. *Id.* at 469. As Congress clearly meant to provide an avenue for appeal, yet specified an invalid one, Intercollegiate argues, we must throw out the whole regime.

We conclude that we need not address this objection because it has no bearing on Intercollegiate's case. So far as the substance of the CRJs' decision is concerned, no party has asked us to enter our own determination, but rather to review the decision for compliance with 17 U.S.C. § 114(f)(2)(A). See Appellant's Br. 17-18 (seeking vacation and remand for lack of compliance with that provision); Appellees' Br. 43 (seeking affirmance). That challenge is evaluated under the familiar APA arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), which is incorporated by direct reference in § 803(d)(3). Intercollegiate insists that § 803(d)(3) is "facially unconstitutional" and therefore brings down the whole CRJ determination process even if the defective provision is not applicable in this case. Appellant's Reply Br. 29. But as the government points out, Intercollegiate has made no attempt to satisfy the common standard for a facial constitutional challenge, Appellees' Br. 16 (citing

United States v. Salerno, 481 U.S. 739, 745 (1987)), or justify the non-application of that standard, or explain why the allegedly offensive language wouldn't be severable, see *id.* at 19-20. Intercollegiate offers nothing in reply. See Appellant's Reply Br. 29-30. We note, incidentally, that power to make our "own determination" would appear to present no problem on an issue as to which the law permitted only one option.

* * *

Intercollegiate argues that the Copyright Royalty Board as currently structured violates the Constitution's Appointments Clause, art. II, § 2, cl. 2, on two grounds: (1) the Judges' exercise of significant ratemaking authority, without any effective means of control by a superior (such as unrestricted removability), qualifies them as "principal" officers who must be appointed by the President with Senate confirmation; and (2) even if the Judges are "inferior" officers, the Librarian of Congress is not a "Head of Department" in whom Congress may vest appointment power. We have discussed these issues in prior cases, but we never resolved them because they were not timely raised by the parties. See *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (per curiam). Now that they are properly presented, we agree with Intercollegiate on the first claim but not the second, and accordingly provide a remedy that cures the constitutional defect with as little disruption as possible.

The Appointments Clause provides that

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, § 2, cl. 2. To qualify as an "Officer of the United States" within the meaning of the clause, i.e., not simply an "employee," a person must "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976); see *Freytag v. Commissioner*, 501 U.S. 868, 880-82 (1991). Intercollegiate contends that the CRJs not only exercise significant authority, but are "principal" rather than "inferior" officers, so that Congress's decision to vest their appointment in the Librarian rather than the President (with Senate approval) violates the text of Article II.

The government concedes that the CRJs meet this initial threshold of significant authority. If significance plays no role *beyond* that threshold, i.e., has no bearing on whether an officer is principal or inferior, then we may pass on to the major differentiating feature, the extent to which the officers are "directed and supervised" by persons "appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). But there is in fact

some conflict over whether there are relevant degrees of significance in the authority of officers, so we first briefly examine the conflict and then consider the significance of the CRJs' authority.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court held that an independent counsel appointed by the Attorney General was an inferior rather than principal officer. *Id.* at 671-72. The counsel was removable "only for good cause," see *id.* at 663, but the Court also stressed that she was "empowered by the Act to perform only certain, limited duties," with no "authority to formulate policy for the Government or the Executive Branch," and that her office was not only "limited in jurisdiction," but also "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated," see *id.* at 671-72. The deprecatory language about the independent counsel's duties seems to rest on a premise that levels of significance may play some role in the divide between principal and inferior.

But in *Edmond* the Court, once satisfied that the persons in question exercised significant authority and were thus officers, 520 U.S. at 662, went on to discuss only direction and supervision. And it observed that the exercise of significant authority "marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer." *Id.*

In any event, assuming that significance of authority has any import beyond setting the threshold for officers, it is a metric on which the

CRJs score high. Their ratemaking decisions have considerable consequences—as our colleague put it, "billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions." *SoundExchange*, 571 F.3d at 1226 (Kavanaugh, J., concurring). The CRJs set the terms of exchange for musical works not only on traditional media such as CDs, cassettes and vinyl, but also on digital music downloaded through iTunes and Amazon.com, digital streaming via the web, rates paid by satellite carriers, non-commercial broadcasting, and certain cable transmissions. See 17 U.S.C. §§ 115(c)(3)(C)-(D) (phonorecords), 114(f)(1) & (f)(2)(A)-(B), (subscription and non-subscription digital transmissions and satellite radio services), 112(e)(3)-(4) (ephemeral recordings), 118(b)(4) (non-commercial broadcasting), 111(d)(4) (secondary transmissions by cable systems). Even though the CRJs affect Intercollegiate only in regard to webcasting, *Freytag* calls on us to consider all the powers of the officials in question in evaluating whether their authority is "significant," not just those applied to the litigant bringing the challenge. 501 U.S. at 882; *Tucker v. Commissioner*, 676 F.3d 1129, 1132 (D.C. Cir. 2012).

Of course one might see these authorities of the CRJs as primarily addressing "merely rates." But rates can obviously mean life or death for firms and even industries. Intercollegiate calls our attention, for example, to a firm for which royalty expenses constitute half its costs. See Appellant's Reply Br. 6-7; see generally *id*. 4-11.

As we noted, *Edmond* accepts officers' classification as "inferior" if their "work is directed

and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. In concluding that the judges of the Coast Guard Court of Criminal Appeals were inferior officers, the Court emphasized three factors: (1) the judges were subject to the substantial supervision and oversight of the Judge Advocate General (who in turn was subordinate to the Secretary of Transportation), see *id.* at 664; (2) the judges were removable by the Judge Advocate General without cause, see *id.* ("The power to remove officers, we have recognized, is a powerful tool for control." (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52 (1926))); and (3) another executive branch entity, the Court of Appeals for the Armed Forces, had the power to reverse the judges' decisions so that they had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Id.* at 664-65.

As to *Edmond*'s first concern, the CRJs are supervised in some respects by the Librarian and by the Register of Copyrights, but in ways that leave broad discretion. The Librarian (who is appointed by the President with advice and consent of the Senate, see 2 U.S.C. § 136) is entrusted with approving the CRJs' procedural regulations, 17 U.S.C. § 803(b)(6); with issuing ethical rules for the CRJs, *id.* § 802(h); and with overseeing various logistical aspects of their duties, e.g., *id.* §§ 801(d)-(e) (providing administrative resources), 803(c)(6) (publishing CRJs' decisions), 801(b)(8) (assigning CRJs additional duties). None of these seems to afford the

Librarian room to play an influential role in the CRJs' substantive decisions.

The Register (who is appointed by the Librarian and acts at his direction, see *id.* § 701(a)) has the authority to interpret the copyright laws and provide written opinions to the CRJs on "novel material question[s]" of law; the CRJs must abide by these opinions in their determinations. See *id.* § 802(f)(1)(B). The Register also reviews and corrects any legal errors in the CRJs' determinations. *Id.* § 802(f)(1)(D). Oversight by the Register at the direction of the Librarian on issues of law of course is not exactly direction by a principal officer, *Edmond*, 520 U.S. at 663, but it is a non-trivial limit on the CRJs' discretion, and the Librarian may well be able to influence the nature of the Register's interventions.

But the Register's power to control the CRJs' resolution of pure issues of law plainly leaves vast discretion over the rates and terms. If one looks to market conditions, as one statutory provision governing webcasting directs, see 17 U.S.C. § 114(f)(2), each copyright owner and would-be user are in something akin to a bilateral monopoly—a situation where the seller has no substitute purchaser (here, because each purchaser represents a distinct channel to end-users) and the buyer no exact substitute supplier (assuming each creative work is in some sense unique). (It is not a strict bilateral monopoly, as many songs, etc., may have fairly close substitutes.) In such a case, the range of possible market prices is likely to be very wide: the floor is likely to be very low (adding a user will

commonly cost the copyright holder nothing) and the ceiling relatively high, especially for creative material that has few close substitutes.

Moreover, the CRJs also apply ratemaking formulas that are even more open-ended. For example, § 801(b)(1) directs the CRJs to set "reasonable terms and rates of royalty payments" with reference to four factors: (1) to "maximize the availability of creative works"; (2) to provide a "fair" return to both the copyright owner and the copyright user; (3) to "reflect the relative roles" of the owner and user as to "creative contribution, technological contribution, capital investment," and the like; and (4) to "minimize any disruptive impact" on industry structure. 17 U.S.C. § 801(b)(1)(A)-(D). As we have previously stated, because these "factors pull in opposite directions," there is a "range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees." *RIAA v. Copyright Royalty Tribunal*, 622 F.3d 1, 9 (D.C. Cir. 1981). Thus the Register's control over the most significant aspect of the CRJs' determinations—the rates themselves—is likely to be quite faint. Even in the realm of rates required to be based on "cost," the ratemaker typically has broad discretion. See *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 278 (1976) ("[T]here is no single cost-recovering rate, but a zone of reasonableness: 'Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.'" (quoting *Montana-Dakota Utilities Co. v. Northwestern Public Service*

Co., 341 U.S. 246, 251 (1951))). And while we have recognized that an obligation to follow another's legal opinions creates a genuine supervisory limit, see *Tucker*, 676 F.3d at 1134, here the law does not provide much constraint on the rate, and it is the rate itself—not the answer to the pure questions of law that the Register can address—that is of the greatest importance.

We find that, given the CRJs' nonremovability and the finality of their decisions (discussed below), the Librarian's and Register's supervision functions still fall short of the kind that would render the CRJs inferior officers.

The second *Edmond* factor, removability, also supports a finding that the CRJs are principal officers. Unlike the judges in *Edmond*, the CRJs can be removed by the Librarian only for misconduct or neglect of duty. See 17 U.S.C. § 802(i). And while the presence of a "good cause" restriction in *Morrison* did not prevent a finding of inferior officer status, it clearly did not hold that such a restriction on removal was generally consistent with the status of inferior officer. Instead, as *Edmond* explains, *Morrison* relied heavily on the Court's view that the independent counsel also "performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited [to performance of a 'single task']." *Edmond*, 520 U.S. at 661.

Finally, the CRJs' rate determinations are not reversible or correctable by any other officer or entity within the executive branch. As we have mentioned, their procedural rules are reviewed by the Librarian,

and their legal determinations by the Register. But the Judges are afforded

> full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact.

17 U.S.C. § 802(f)(1)(A)(i); see also *id.* § 802(f)(1)(A)(ii) (Register's authority "under this clause shall not be construed to authorize the Register . . . to provide an interpretation of questions of procedure . . . [or] the ultimate adjustments and determinations of copyright royalty rates and terms"). Thus, unlike the judges in *Edmond*, 520 U.S. at 664-65, the CRJs issue decisions that are final for the executive branch, subject to reversal or change only when challenged in an Article III court.

Having considered all of these factors, we are in agreement with the view suggested by Judge Kavanaugh in *SoundExchange* that the CRJs as currently constituted are principal officers who must be appointed by the President and confirmed by the Senate, and that the structure of the Board therefore violates the Appointments Clause. 571 F.3d at 1226-

27 (concurring opinion). We therefore must decide the appropriate remedy to correct the violation.

In *Free Enterprise Fund*, the Supreme Court reviewed the structure of the Public Company Accounting Oversight Board, whose members were appointed and removable by the Commissioners of the Securities and Exchange Commission. The Court held that in the circumstances of that case the "for-cause" restriction on the Commissioners' removal power violated the Constitution's separation of powers by impeding the President's ability to execute the laws. See 130 S. Ct. at 3151-54. Rather than finding all authority exercised by the PCAOB to be unconstitutional, however, the Court held that invalidating and severing the problematic for-cause restriction was the solution best matching the problem and preserving the remainder intact. *Id.* at 3161 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006)).

We likewise conclude here that invalidating and severing the restrictions on the Librarian's ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage. Specifically, we find unconstitutional all of the language in 17 U.S.C. § 802(i) following "The Librarian of Congress may sanction or remove a Copyright Royalty Judge . . . ." Without this restriction, we are confident that (so long as the Librarian is a Head of Department, which we address below) the CRJs will be inferior rather than principal officers. With unfettered removal power, the Librarian will have the direct ability to "direct," "supervise," and exert some "control" over the

Judges' decisions. *Edmond*, 520 U.S. at 662-64. Although individual CRJ decisions will still not be directly reversible, the Librarian would be free to provide substantive input on non-factual issues via the Register, whom the Judges are free to consult, 17 U.S.C. § 802(f)(1)(A)(i). This, coupled with the threat of removal satisfies us that the CRJs' decisions will be constrained to a significant degree by a principal officer (the Librarian). We further conclude that free removability constrains their power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison*. Cf. *Free Enterprise Fund*, 130 S. Ct. at 3162 ("Given that the [SEC] is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the [PCAOB] members are inferior officers . . . .").

In sum, the inability of the Librarian to remove the CRJs, coupled with the absence of a principal officer's direction and supervision over their exercise of authority, renders them principal officers—but obviously ones not appointed in the manner constitutionally required for such officers. Once the limitations on the Librarian's removal authority are nullified, they would become validly appointed inferior officers—at least if the Librarian is a Head of Department, the issue to which we now turn.

* * *

Intercollegiate argues that even if the CRJs are inferior officers, the Board's structure is

unconstitutional because the Librarian is not a "Head of Department" within the meaning of the Appointments Clause. The Supreme Court addressed the same challenge as to the SEC Commissioners in *Free Enterprise Fund*; it ultimately held: "Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause." 130 S. Ct. at 3163. See also *Freytag*, 501 U.S. at 915-22 (Scalia, J., concurring in part and concurring in judgment); *Buckley*, 424 U.S. at 127 ("Departments" referred to in the Appointments Clause "are themselves in the Executive Branch or at least have some connection with that branch"). Intercollegiate notes that we have referred to the Library of Congress as a "congressional agency," see *Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985), and argues that it is not an executive department that can satisfy the "Head of Department" definition in *Free Enterprise Fund*.

Despite our language in *Keeffe*, the Library of Congress is a freestanding entity that clearly meets the definition of "Department." *Free Enterprise Fund*, 130 S. Ct. at 3162-63. To be sure, it performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes. But as we have mentioned, the Librarian is appointed by the President with advice and consent of the Senate, 2 U.S.C. § 136, and is subject to unrestricted removal by the President, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Kalaris v. Donovan*, 697 F.2d 376, 389 (D.C. Cir. 1983). Further, the powers in the

Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a "component of the Executive Branch." *Free Enterprise Fund*, 130 S. Ct. at 3163. It was on this basis that the Fourth Circuit rejected a similar charge that the Librarian was not a "Head of Department" for purposes of appointing the Register. *Eltra Corp. v. Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978). We too hold that the Librarian is a Head of Department who may permissibly appoint the Copyright Royalty Judges.

* * *

We hold that without the unrestricted ability to remove the Copyright Royalty Judges, Congress's vesting of their appointment in the Librarian rather than in the President violates the Appointments Clause. Accordingly we invalidate and sever the portion of the statute limiting the Librarian's ability to remove the Judges. Because the Board's structure was unconstitutional at the time it issued its determination, we vacate and remand the determination and do not address Intercollegiate's arguments regarding the merits of the rates set therein.

So ordered.

APPENDIX D

LIBRARY OF CONGRESS
RULES and REGULATIONS

COPYRIGHT ROYALTY BOARD

37 CFR PART 380

[Docket No. 2009-1 CRB Webcasting III]
76 FR 13026-01

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Final Rule and Order

March 9, 2011

I. Introduction

A. Subject of the Proceeding

This is a rate determination proceeding convened under 17 U.S.C. 803(b) et seq. and 37 CFR part 351 et seq., in accord with the Copyright Royalty Judges' Notice announcing commencement of proceeding, with a request for Petitions to Participate in a proceeding to determine the rates and terms for the digital public performance of sound recordings by means of an eligible nonsubscription transmission or a transmission made by a new subscription service under section 114 of the Copyright Act, as amended by the Digital Millennium Copyright Act ("DMCA"), and for the making of ephemeral copies in

furtherance of these digital public performances under section 112, as created by the DMCA, published at 74 FR 318 (January 5, 2009). The rates and terms set in this proceeding apply to the period of January 1, 2011 through December 31, 2015. 17 U.S.C. 804(b)(3)(A).

B. Statutory Background

A lengthy review of the history of the sound recordings compulsory license is contained in the Final Determination for Rates and Terms in Docket No. 2005-1 CRB DTRA, 72 FR 24084 (May 1, 2007) ("Webcaster II").[1] This history was summarized by the United States Court of Appeals for the District of Columbia Circuit in Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 574 F.3d 748, 753-54 (DC Cir. 2009), as follows:

[Since the nineteenth century, the Copyright Act protected the performance right of "musical works" (the notes and lyrics of a song), but not the "sound recording." Writers were protected but not performers.]

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act. Pub. L. No. 104-39, granting the owners of sound recordings an exclusive

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[1] The two prior webcasting proceedings often have been referred to informally as "Webcaster I" and "Webcaster II," respectively, as opposed to the formal caption "DTRA" (which stands for "Digital Transmissions Rate Adjustment"). In the current proceeding, we use the caption "Webcasting III" and intend to caption future webcasting proceedings using the term "Webcasting" followed by the appropriate Roman numeral.

right in performance "by means of a digital transmission." 17 U.S.C. § 106(6); see Beethoven.com LLC v. Librarian of Cong., 394 F.3d 939, 942 (D.C. Cir. 2005). The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, "created a statutory license in performances by webcast," to serve Internet broadcasters and to provide a means of paying copyright owners. Beethoven.com, 394 F.3d at 942; see 17 U.S.C. § 114(d)(2), (f)(2). To govern the broadcast of sound recordings, Congress also created a licensing scheme for so-called "ephemeral" recordings, "the temporary copies necessary to facilitate the transmission of sound recordings during internet broadcasting." Beethoven.com, 394 F.3d at 942-43; see 17 U.S.C. § 112(e)(4).

Congress has delegated authority to set rates for these rights and licenses under several statutory schemes. The most recent, passed in 2005 [sic], directed the Librarian of Congress to appoint three Copyright Royalty Judges who serve staggered, six-year terms. See 17 U.S.C. § 801, et seq. These Judges conduct complex, adversarial proceedings, described in 17 U.S.C. § 803 and 37 CFR § 351, et seq., and ultimately set "reasonable rates and terms" for royalty payments from digital performances. 17 U.S.C. § 114(f). * * * Rates should "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." Id. [17 U.S.C. § 114(f)(2)(B)] "In determining such rates and terms," the Judges must "base [their] decision on economic, competitive and programming information presented by the parties." Id. Specifically, they must consider whether "the service may substitute for or may

promote the sales of phonorecords" or otherwise affect the "copyright owner's other streams of revenue." Id. § 114(f)(2)(B)(i). The Judges must also consider "the relative roles of the copyright owner and the transmitting entity" with respect to "relative creative contribution, technological contribution, capital investment, cost, and risk." Id. § 114 (f)(2)(B)(ii). Finally, "[i]n establishing such rates and terms," the Judges "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." Id. § 114(f)(2)(B).

Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 574 F.3d 748, 753-54 (DC Cir. 2009). Forty petitions to participate were filed in response to the January 5, 2009, notice of commencement of the proceeding. The great majority of the petitioners were webcasters. During the subsequent period of voluntary negotiations, settlements were reached among many of the parties. In addition to the negotiation phase required in this proceeding, 17 U.S.C. 803(b)(3), Congress enacted the Webcaster Settlement Acts of 2008 and 2009, which expanded the opportunities to resolve the issues in this proceeding, as well as the issues in Webcaster II. This legislation further impacted Webcasting III by permitting the settling parties to determine if the settlements could be considered as evidence before the Copyright Royalty Judges ("Judges").[2] Eight

[2] In the pleadings filed and during the testimony, Live365 attempted to introduce evidence about agreements that contained provisions that they were not to be considered

settlements were resolved under the Webcaster Settlement Acts. 74 FR 9293 (March 3, 2009) (three agreements); 74 FR 34796 (July 17, 2009) (one agreement); 74 FR 40614 (August 12, 2009) (four agreements). The rates and terms under these settlements were the basis of approximately 95 percent of webcasting royalties paid to SoundExchange in 2008 and 2009. SX PFF at)) 50, 51.[3] Evidence was presented in this proceeding by SoundExchange, Inc. ("SX"), representing the owners, and three webcasters, College Broadcasters, Inc. ("CBI"), Live365, Inc. ("Live365"), and

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as precedential under the Webcaster Settlement Acts. Following the clear language of the statute that these agreements were not "admissible as evidence or otherwise taken into account," 17 U.S.C. 114(f)(5)(C), these attempts were rejected. See, e.g., 4/19/10 Tr. at 210:9-10 (sustaining objection to Live365's motion to enter into evidence the "Pure Play Agreement").

[3] References to the proposed findings of fact and conclusions of law shall be cited as "PFF" or "PCL," respectively, and reply findings and conclusions of law shall be cited as "RFF" or "RCL," respectively, preceded by the name of the party that submitted same and followed by the paragraph number. Similarly, references to the written direct testimony shall be cited as "WDT" preceded by the last name of the witness and followed by the page number. Likewise, references to the written rebuttal testimony shall be cited as "WRT" preceded by the last name of the witness followed by the page number. References to the transcript shall be cited as "Tr." preceded by the date and followed by the page number and the name of the witness.

Intercollegiate Broadcasting System, Inc. ("IBS").[4] CBI only presented evidence to support adoption of its settlement with SoundExchange for noncommercial educational webcasters. SoundExchange and Live365 presented evidence related to commercial webcasters. The webcasting royalties paid by Live365 to SoundExchange for 2008 and 2009 were less than 3 percent of total webcasting royalties paid to SoundExchange. SX PFF at) 53. SoundExchange presented evidence related to noncommercial webcasters, and IBS presented evidence for small noncommercial webcasters. Written statements, discovery and testimony for both direct case and rebuttal case were filed on these issues.

On December 14, 2010, the Judges issued their Initial Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2)(B) and 37 CFR 353.4, motions for rehearing were due to be filed no later than December 29, 2010. No motions were received.

II. Commercial Webcasters

A. Commercial Webcasters Encompassed by the National Association of Broadcasters-SoundExchange Agreement

On June 1, 2009, the National Association of Broadcasters ("NAB") and SoundExchange filed a settlement of all issues between them in the proceeding, including the proposed rates and terms. This was one of the Webcaster Settlement Act

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[4] After filing Written Direct Statements, RealNetworks, Inc. withdrew from the proceedings, and Royalty Logic, LLC, did not participate further.

agreements, published by the Copyright Office in the Federal Register, and was filed in this proceeding, pursuant to 17 U.S.C. 801(b)(7)(A), to be adopted as rates and terms for some services of commercial broadcasters for the period 2011 through 2015. It applies to statutory webcasting activities of commercial terrestrial broadcasters, including digital simulcasts of analog broadcasts and separate digital programming. The settlement includes per performance royalty rates, a minimum fee and reporting requirements that are more comprehensive than those in the current regulations. Section 801(b)(7)(A) allows for the adoption of rates and terms negotiated by "some or all of the participants in a proceeding at any time during the proceeding" provided they are submitted to the Copyright Royalty Judges for approval. This section provides that in such event:

(i) The Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and

(ii) The Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i)

objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

17 U.S.C. 801(b)(7)(A).

The Judges published the settlement (with minor modifications) in the Federal Register on April 1, 2010, and provided an opportunity to comment and object by April 22, 2010. 75 FR 16377 (April 1, 2010). No comments or objections were submitted, so the provisions of 17 U.S.C. 801(b)(7)(A)(ii) do not apply. Absent objection from a party that would be bound by the proposed rates and terms and that would be willing to participate in further proceedings, the Copyright Royalty Judges adopt the rates and terms in the settlement for certain digital transmissions of commercial broadcasters for the period of 2011-2015. 17 U.S.C.801(b)(7)(A). Cf. Review of the Copyright Royalty Judges Determination, Docket No. 2009-1, 74 FR 4537, 4540 (January 26, 2009) (review of settlement adoption).

B. All Other Commercial Webcasters

1. Stipulation Concerning the Section 112 Minimum Fee and Royalty Rate and Stipulation Concerning the Section 114 Minimum Fee

In between the direct and rebuttal phases, SoundExchange and Live365 presented two settlements of issues for all remaining commercial webcasters not encompassed by the NAB-SoundExchange agreement: (1) The minimum fee and royalty rates for the section 112 license and (2)

the minimum fee for the section 114 license. These two settlements were included in one stipulation. The terms of the settlement are the same as the agreement reached and included as a final rule in Webcaster II, following remand. See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule), 75 FR 6097 (February 8, 2010). The minimum fee for commercial webcasters is an annual, nonrefundable fee of $500 for each individual channel and each individual station (including any side channel), subject to an annual cap of $50,000. The royalty rate for the section 112 license is bundled with the fee for the section 114 license. There is one additional term in the stipulation that was not included in Webcaster II. The royalty rate for the section 112 license is attributed to be 5% of the bundled royalties. There was no objection to the stipulation. There was evidence presented to support the minimum fee for commercial webcasters and the bundled royalty rates. SX PFF at)) 459-468, 472. No evidence disputed it. These provisions are supported by the parties and the evidence. The Judges accept and adopt these two stipulations as settling these issues.

2. Rate Proposals for the Section 114 License for Commercial Webcasters

The contending parties propose vastly different rate amounts for the use of the section 114 license for commercial webcasters. In its second revised rate proposal, SoundExchange argues in favor of a performance rate beginning at $.0021 per performance in 2011 and increasing annually by .0002 to a level of $.0029 by 2015. SX PFF at) 118.

Live365 also proposes a per performance fee structure. By contrast, under the Live365 proposal, commercial webcasters would pay $.0009 per performance throughout the period 2011-2015. Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.3(a)(1).[5]

Notwithstanding the gulf between the SoundExchange and Live365 proposed royalty amounts, there is no difference between the parties with respect to the basic structure of their proposed compensation schemes. Both SoundExchange and Live365 propose that per performance rates (typically stated as a fraction of a penny) be applicable in the case of the section 114 license.

Furthermore, the per performance usage structure was adopted in Webcaster II. Webcaster II, 72 FR 24090 (May 1, 2007). It remains the best structure for the reasons stated therein. Id. at 24089-90. Therefore, the only issues we are left to decide are the applicable amount of the webcaster royalty rate and whether any discount to that rate should be made on those occasions when certain types of webcasters are aggregated.

The starting point for our determination is the applicable amount of the section 114 performance rate.

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[5] In addition, Live365 seeks a 20% discount applicable to this commercial webcasting per performance rate for certain "qualified webcast aggregation services." This proposal is discussed infra at Section II.B.5.

3. The Parties' Disparate Approaches To Rate Setting for the Section 114 License for Commercial Webcasters

Both Live365 and SoundExchange agree that the willing buyer/willing seller standard should be applied by the Copyright Royalty Judges in determining the rates for the section 114 license. Both recognize that those rates should reflect the rates that would prevail in a hypothetical marketplace that was not constrained by a compulsory license.

However, in contrast to the positions of the copyright owners and commercial services in Webcaster II, in the instant case SoundExchange and Live365 do not agree that the best approach to determining rates is to look to comparable marketplace agreements as "benchmarks" indicative of the prices to which willing buyers and willing sellers would agree in the hypothetical marketplace. On the one hand, Live365 primarily seeks to support its rate proposal by means of a modeling analysis that aims to determine the amount of any residue that may remain for compensating the sound recording input a commercial webcaster uses, after reducing webcaster revenues by an amount equal to the cost of all other inputs utilized by the webcaster in providing its service and also by an assumed amount of webcaster profits. By contrast, SoundExchange puts forward a benchmark approach in support of its rate proposal, similar to the primary argument it made in Webcaster II and an approach adopted by the Judges therein.

a. The Live365 Approach

Live365 relies primarily on a modeling analysis provided by Dr. Mark Fratrik that seeks to identify the rate that commercial webcasters "would have been willing to pay in a negotiated settlement between a willing buyer and a willing seller." Fratrik Corrected and Amended WDT at 5. We find that Dr. Fratrik presumes behavioral constraints not found in the statutory standard and, that even if we were to ignore the distortions created by such added constraints, his analysis suffers from so many other unwarranted explicit assumptions and data defects as to make his analysis untenable.

i. Dr. Fratrik's Model and the Hypothetical Market

The terms "willing buyer" and "willing seller" in the statutory standard simply refer to buyers and sellers who are unconstrained in their marketplace dealings. In other words, the buyers and sellers operate in a free market unconstrained by government regulation or interference. (See, for example, Noncommercial Educational Broadcasting Compulsory License (Final rule and order), 63 FR 49823, 49834 (September 18, 1998). ("[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice to license, could truly reflect 'fair market value.' "). Moreover, neither the buyers nor the sellers exercise such monopoly power as to establish them as price-makers and, thus, make negotiations between the parties superfluous. Webcaster II, 72 FR 24091 (May 1, 2007). ("In other words, neither sellers nor buyers can be said to be

'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.")

Dr. Fratrik and Live365 either misperceive the plain meaning of the terms of the statute or deliberately seek to expand the meaning of a "willing buyer" as articulated in the willing buyer-willing seller standard that governs this proceeding. For them, a "willing buyer" is viewed through the lens of an additional policy consideration nowhere articulated in the statute—i.e., that a buyer can only be considered "willing" if that buyer is able to obtain the sound recording input at a price that allows the buyer to earn at least a 20 percent operating profit margin from the use of that input. Thus, in Dr. Fratrik's analysis, a "representative" single buyer is deemed to be constrained in its behavior from participating in the input market for sound recordings unless its operating profit margin expectations in the output market for webcasting services are guaranteed at a level consistent with an industry-wide average profit margin for a purportedly comparable industry such as terrestrial radio. Fratrik Corrected and Amended WDT at 21-22.

Nothing in the statute supports reading such a behavioral constraint into the hypothetical marketplace to be derived by the Judges in this proceeding. Indeed, a similar argument that economic viability based on the sufficiency of revenue streams to cover costs determines any individual buyer's "willingness" to pay for an input raised by Live365 in Webcaster I, was rejected in that

proceeding. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (Final rule and order) ("Webcaster I"), 67 FR 45240, 45254 (July 8, 2002) ("Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates.").

Dr. Fratrik's notion of a representative entity adds an operating condition that distinguishes his conceptual formulation from that of a statistically average firm in an industry. His representative firm must reach one specified minimum profit margin and, therefore, can only be satisfied with a royalty rate sufficient to allow it to reach that profit margin. Any lower assumed profit margin would, ceterus paribus, necessarily result in a lower recommended royalty rate. Thus, Dr. Fratrik effectively assumes that his representative firm will never have a reason to operate at less than a particular operating profit margin (i.e., 20%).

But there is no a priori reason to believe that a representative webcaster would not accept a lesser profit margin, so long as it earns a profit and/or finds no risk-adjusted rate of return that could be earned by an alternative investment. Indeed, basic microeconomic analysis recognizes that, in the short-run, it is in the interest of a firm to continue to produce even at an operating loss, so long as its variable costs are covered and some contribution can be made toward fixed costs—otherwise, the loss incurred by the firm will be even greater (i.e., full

fixed costs if no production takes place).[6] In short, Dr. Fratrik's assumption of a 20% profit margin totally ignores the possibility of webcasters with a whole range of potential acceptable operating profit margins—whether lesser or greater—that would be dependent on such things as varying capital investment costs among webcasters, changing market conditions in output markets, and the applicable time horizon.[7]

Still another difficulty with Dr. Fratrik's conceptual framework is that his single "representative" buyer is treated as tantamount to an industry. But no single firm is typically the equivalent of an industry on the demand side of the market, although there is the obvious exception where a single monopsonistic buyer constitutes the entire demand side of the market for a particular input. While Dr. Fratrik does not make the claim that his representative commercial webcaster is a monopsonist, his analysis effectively produces that result.

For example, Dr. Fratrik explains that he chose to wed a 20% operating profit margin assumption to his cost and revenue estimates to "derive a resulting value for the copyrighted work." Fratrik Corrected and Amended WDT at 15, 23. In other words, Dr.

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[6] See, for example, Varian, Hal, Intermediate Microeconomics: A Modern Approach, (W.W. Norton & Company, 2009) at 350, 401. Mansfield, Edwin and Yohe, Gary Wynn, Microeconomics: Theory and Applications, (W.W. Norton & Company, 2004) at 296, 407; see also 7/28/10 Tr. at 54:2-14 (Salinger).

[7] In the long-run, all short-run fixed costs become variable.

Fratrik and Live365 effectively claim that no buyer would ever be a "willing buyer" unless the price of only the one input here analyzed (i.e., the royalty rate for sound recordings) is low enough to provide all buyers with sufficient revenue after the royalty payment to cover all other input costs and yield an operating profit margin of 20%. It is a claim that, rather than resulting from any careful analysis of the market demand and supply schedules, blithely ignores such analysis in favor of a single price point wholly determined by a single actor on the demand side of the market without any reference to the supply side of the market.[8]

In other words, Dr. Fratrik's single "representative" buyer's business model is to be treated as if it is the only webcasting production model in the whole webcasting industry. Instead of a market demand curve, Dr. Fratrik puts forward the implicit assumption that the amount of sound recording performances demanded must be whatever his representative firm deems best for its particular technological and organizational structure. But no one firm's demand curve is equivalent to the market's demand curve, unless that firm is a

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[8] Dr. Fratrik implies that because the record companies supplying the sound recordings will incur something near zero incremental costs, the supply side of the market may be largely ignored. 4/27/10 Tr. at 1131:12-1133:19 (Fratrik). But Dr. Fratrik offers no empirical support for his assertion as to actual incremental costs. We have clearly rejected a similar contention put forward in Webcaster II on both empirical and theoretical grounds. Webcaster II, 72 FR 24094 (May 1, 2007).

monopsonist. Rather, as we have noted in Webcaster II and the CARP noted in Webcaster I before us, in the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. Webcaster II, 72 FR 24087 (May 1, 2007); In the Matter of Rate Setting for the Digital Performance of Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Panel to the Librarian of Congress, Docket No. 2000-9 CARP DTRA 1&2 ("Webcaster I CARP Report") at 24.

Finally, even assuming the absence of the additional errors catalogued below, Dr. Fratrik's analysis, which focuses on past operating income statements to determine a royalty rate for all commercial webcasters in the future, fails to establish any behavioral information that would help to delineate the hypothetical marketplace we must replicate. Instead, Dr. Fratrik's analysis is largely mechanical and leads to an unsupported conclusion that past revenues and non-royalty costs, coupled with a webcaster operating profit margin not demonstrated to be related to past operating revenue and cost considerations (see infra at Section II.B.3.a.ii.), will repeatedly recur at the same levels in each year over the five-year period of the license going forward. Having tightly constrained the possibilities of market behavior in this manner, Dr. Fratrik's model then automatically produces an unchanging residue and, hence, an unchanging royalty rate for the whole

period.[9] This is a dubious result that flows from the unwarranted assumption of what amounts to a behavioral straitjacket.

Moreover, even if Dr. Fratrik's problematic behavioral constraints and implicit assumptions somehow could be ignored, his analysis suffers from so many other unwarranted explicit assumptions and data defects as to make it untenable.

ii. The Specific Elements of Dr. Fratrik's Model

Dr. Fratrik's assumptions regarding webcasting industry costs, revenues and profit margins are seriously flawed when viewed individually. Moreover, these flaws are compounded by merging revenue, costs and profit margin information gathered from disparate data sources into a single "economic model."[10]

Dr. Fratrik begins by assuming that "Live365's cost structure will serve as a good conservative proxy for the industry as it is a mature operator." Fratrik

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[9] In addition to the flat royalty rate growth recommended by Dr. Fratrik over the 2011-2015 term, his recommended royalty rate of $0.0009 per performance would return the statutory rate to near its 2006 statutory level.

[10] Dr. Fratrik uses the term "economic model" to broadly describe his analysis. It is more closely akin to a type of pro forma income statement that attempts to demonstrate the expected effect of varying royalty rates on a firm's financial viability. In other words, it is an accounting model that, relying on historical cost and revenue data for all but royalty costs, endeavors to demonstrate the anticipated results of alternative royalty rates on projected net revenues.

Corrected and Amended WDT at 16 (emphasis added). This assumption is not supported by the record of evidence in this proceeding which points to a wide variety of existing webcasting services and business models. SX PFF at) 323. It defies credulity to claim, as does Live365, that all these disparate business models may be experiencing essentially the same unit costs. Indeed, Dr. Fratrik makes this assertion while recognizing that, unlike for many other participants in the market, at least two separate lines of business can be distinguished for Live365 (broadcasting services and webcasting) and, further, that Live365 acts as an aggregator with respect to webcasting. Dr. Fratrik offers no example of a comparable analogous participant in the industry who is structured in this manner. Furthermore, when he attempts to adjust Live365's costs to reflect only webcasting operations, he fails to adequately do so and he ignores the synergistic nature of Live365's various lines of business. SX PFF at)) 355, 357, 358. Finally, even though he argues for an additional aggregator discount to be applied to Live365's webcasting royalty rates based on monitoring and reporting savings purportedly provided to the collective (i.e., SoundExchange), he nowhere appears to adjust Live365's webcasting cost estimates to account for any resulting differences in costs that Live365 may incur as compared to other webcasters who are not aggregators. He makes no such adjustment despite the fact that it is the typical webcaster's unit costs he is seeking to model rather than the typical aggregator's unit costs. While any

additional reporting and monitoring costs incurred by aggregators[11] may be offset by fees charged to the aggregated webcasters or by the reduced costs of programming that Live365 would otherwise have to undertake in order to make comparable channel offerings as a multi-channel broadcaster, such salient differences between the typical webcaster's unit costs and the typical aggregator's unit costs are not addressed by Dr. Fratrik's analysis. For all these reasons, the unit cost estimation for webcasting which Dr. Fratrik offers is seriously flawed.

On the revenue side of his analysis, Dr. Fratrik assumes that: (1) Webcaster revenue comes from advertising revenue and subscription revenue; (2) "publicly available industry reports from AccuStream and ZenithOptimedia serve as the lower and upper bounds, respectively, on advertising revenue measurements for the past period;" and (3) Live365's subscription revenue per listening hour can be utilized as a proxy for gauging subscription revenues in the webcasting industry. Fratrik Corrected and Amended WDT at 16-17, 24-25.

Live365's rate proposal in this proceeding (i.e., $.0009 per performance throughout the period 2011-2015), however, is apparently based only on Dr. Fratrik's analysis of revenues using the ZenithOptimedia data. Indeed, use of the

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[11] For example, Dr. Fratrik notes that, in connection with its aggregation services, "Live365 has spent a considerable amount of time and investment establishing its software systems to accurately measure and document listening for each copyrighted work that is streamed." Fratrik Corrected and Amended WDT at 38 n.62.

Accustream revenue data alternative produces the anomalous result that copyright owners would have to pay webcasters each time the owners' sound recordings were performed, no matter how low a profit margin Dr. Fratrik assumed for webcasters in his analysis. Fratrik Corrected and Amended WDT at 26, Table 4; 4/27/10 Tr. at 1157:1-1158:6 (Fratrik).

Undaunted by this anomalous result, Dr. Fratrik simply repeats his analysis, substituting, in part, the ZenithOptimedia advertising revenue data for the Accustream advertising revenue data and, in concert with a 20% assumed profit margin, obtains the $.0009 per performance royalty rate that has been proposed by Live365 to be applied without change throughout the period 2011-2015. Yet Dr. Fratrik's alternative ZenithOptimedia-based analysis does not completely divorce itself from the Accustream data; instead, because ZenithOptimedia did not provide the Aggregate Tuning Hours ("ATH") numbers associated with its total advertising revenue estimate, Dr. Fratrik fell back on the Accustream data for a total ATH number and calculated advertising revenue per ATH by dividing the ZenithOptimedia revenue data by the Accustream ATH data. In short, Dr. Fratrik combines advertising revenue data based on two separate data sources without making a determination that the data was capable of being combined in this manner.

Moreover, even Dr. Fratrik admitted that the ZenithOptimedia and Accustream advertising revenue estimates are "challenging" or difficult to produce because a vast number of webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220:1-

20 (Fratrik). Thus, these databases have clear limitations and the uncritical manner in which Dr. Fratrik mixes and matches data from these two separate advertising revenue databases and then further combines subscription revenue data from a third separate source (i.e., the Live365 subscription revenue data) plainly suggests a less than rigorous approach to his analysis.

Finally, with respect to revenues, Dr. Fratrik's analysis reports, but neither takes into account nor provides an adequate explanation for, the growth in the ZenithOptimedia advertising revenues forecast from his 2008 base through 2011 (i.e., growth from $200 million to $291 million). Fratrik Corrected and Amended WDT, Ex. 8 at 187. It may be argued that growth in the level of revenues does not necessarily translate into growth in unit revenues. However, we find that it is difficult to accept Dr. Fratrik's unsupported assertion that he expects little improvement in such revenues on a unit basis (see Fratrik Corrected and Amended WDT at 5). Dr. Fratrik fails to provide any adequate empirical support for the implied assumption necessary to reach this conclusion—an assumption that the growth in performances will take place at precisely the pace necessary to assure that the anticipated growth in revenues over the relevant period will not alter the unit revenue ratio. Moreover, without such an implied assumption, it is difficult to avoid the conclusion that Dr. Fratrik's constant royalty rate should have been adjusted each year based on the implications of growing revenues for his own model. Yet, he offers no such adjusted royalty rate. At the very least, these changing advertising revenue totals

call into question the reliability of the unchanging royalty rate derived by Dr. Fratrik from the lowest of the revenue totals available from the same data source (i.e., $200 million instead of $291 million).

Dr. Fratrik's assumption of a 20% operating margin for webcasters in his analysis is not solidly supported. That operating profit margin is not put forward as either a historical profit margin or a forecasted profit margin for webcasters, but rather as a profit margin derived from the over-the-air broadcasting industry. SX PFF at)) 328, 330. The record of evidence in this proceeding does not support the notion that profit margins for webcasters are likely to be similar to the more capital intensive terrestrial radio industry. SX PFF at)) 332-5. Furthermore, we find that Dr. Fratrik failed to establish a solid basis for concluding that the minimum operating profit margin for his representative webcaster was comparable to the average firm experience from firms that operate on a different platform (over-the-air radio).

Live365 argues in its proposed reply findings at) 327 that Dr. Fratrik's 20% profit margin assumption is further corroborated by the recording industry's own expert testimony in Webcaster I (offered by Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.) which purportedly "recommended that webcasters should be able to achieve margins between 13.2% and 21.8%." However, although the Nagle exhibit referred to by Live365 was appended to Dr. Salinger's written rebuttal testimony, the exhibit was only mentioned briefly in a footnote to the Salinger testimony and then only to make a

different argument. Dr. Salinger, in fact, made no specific reference to any of the varying operating profit-margin figures utilized in that 2001 Recording Industry Association of America ("RIAA") study. In other words, it can hardly be said that the figures in question were offered as "corroborative" evidence to support Dr. Fratrik's assumptions. Moreover, the point of this 2001 study appears to have been to recommend a royalty rate based on the operating profit margins necessary to generate an assumed range of rates of return on investment for webcasters. In fact, the Nagle study utilized an operating profit margin in the range of 8.43% to 17.05% in order to "arrive at the appropriate range for the statutory license royalty fee." See Salinger WRT, Exhibit 3 at 16 and Appendix 3 at 1. Dr. Fratrik's 20% assumption for webcaster operating profit margins lies substantially outside this range. Moreover, the CARP rejected Dr. Nagle's analysis as corroborating evidence in Webcaster I. ["Dr. Nagle's analysis necessarily relies upon a myriad of highly questionable assumptions that appear inconsistent with foreseeable market conditions."] Webcaster I CARP Report at 73; ["We conclude that Dr. Nagle's analysis does not support any particular rate level."] Id. at 74. We find it provides no corroborative support for Dr. Fratrik's assumed 20% webcaster operating profit margin in this proceeding.

Thus, we find that Dr. Fratrik's "model" is based upon a series of assumptions and analogies that, taken individually, add such a degree of uncertainty or inexactitude to the resulting model as to make it unsatisfactory for the purpose of portraying the likely outcome of negotiations between willing

buyers and willing sellers in the market for sound recording inputs that are used in webcasting services. Indeed, Dr. Fratrik's model does not even adequately address some of the modest considerations for a modeling approach laid out by Live365's rebuttal expert, Dr. Salinger. SX PFF at) 307. Questionable assumptions, reservations about the methodological appropriateness of mixing disparate data sources, and concerns over the resulting reliability of the data used in the Fratrik model lead us to find that this theoretical construct suffers serious deficiencies that do not lend themselves to remediation.

iii. Other Factors Put forward for Consideration

Live365 offers several other arguments to buttress its request for a royalty rate that would effectively return the statutory rates to near their 2006 statutory level.

First, Dr. Fratrik maintains that "[a]s industry projections for more robust growth in the Internet radio advertising market have clearly not materialized over the past few years," his valuation model must give rise to the conclusion that a "reduction in royalty rates from the prescribed rates covering 2006-2010" is warranted. Fratrik Corrected and Amended WDT at 31. In so doing, he incorrectly attributes the annual increase in rates established in Webcaster II to projections of growth primarily provided by Dr. Erik Brynjolffson and Mr. James Griffin in that proceeding. Fratrik Corrected and Amended WDT at 12-14. Similarly, Live365 argues that "[g]iven that the lofty expectations from the

Webcasting II proceeding have not been fulfilled, it follows that the rates for the next five years should be set lower than the rates determined by the CRB [Judges] in Webcasting II." See Live365 PFF at) 38. But, quite to the contrary, the Judges' determination in Webcaster II did not rely on those particular predictions in setting rates. Indeed, the Judges expressly rejected Dr. Brynjolfsson's modeling attempt and specifically cited the flaws in his effort "to project future growth rates" as a basis for not relying on them. Webcaster II, 72 FR 24093. Moreover, the evidence in the record on industry growth over the 2006-2010 period which shows increased advertising revenues, increased performances, and increased listening does not support a rate reduction. It more likely would support at least some modest rate increase. See SX PFF at)) 390-395, 398-401. While some Live365 data may show a flattening or decline for a particular pair of years, the overall trend of that same data does not show a decrease. For example, data presented by Live365 shows a year-to-year decline in listenership from 2006 to 2007, but this is followed by substantial increases in 2008 and 2009 and maintenance of 2009 levels in 2010. Overall, the trend in such listenership recorded since 2000 has been decidedly upward, even though the growth has occurred unevenly from year to year. See Smallens Corrected WRT at 7, Table 1.

Second, Live365 also contends that a downward adjustment of the current royalty rate is appropriate based on (1) The promotional value of statutory webcasting relative to its non-substitutional effect on other sales of music, including the promotional value to copyright owners stemming from the wide array of

music and artists played on statutory webcasting services; (2) the relative creative contributions, technical contributions, investments, costs and risks made or borne by commercial webcasters compared to copyright owners; and (3) the relative disparate impact of certain competitive factors on webcasters as compared to copyright owners. After careful consideration, we find that the evidence submitted by Live365 on each of these claims is weak at best and, most certainly, too weak to establish the basis for a decrease in webcaster royalty rates. SX PFF at)) 415, 419-21, 426, 431, 446-9; SX RFF at)) 176, 179-180. Then too, Live365 does not present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. Moreover, to the extent that Live365 claims that the Fratrik valuation model makes such a quantifiable translation, we need not further address these issues separate from our examination of that model which we have found seriously flawed and an inadequate representation of the market.

b. The SoundExchange Benchmark Approach

i. The Interactive Webcasting Market Benchmark

As in Webcaster II, SoundExchange maintains that one set of benchmark agreements with clear relevance for this proceeding as shown by an analysis prepared by its expert economist, Dr. Michael Pelcovits, consists of those agreements found in the market for interactive webcasting covering the digital performance of sound recordings.

That is because the interactive webcasting market has characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity.

Both markets have similar buyers and sellers and a similar set of rights to be licensed (a blanket license in sound recordings). Both markets are input markets and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use. In these ultimate consumer markets, music is delivered to consumers in a similar fashion, except that in the interactive case the choice of music that is delivered is usually influenced by the ultimate consumer, while in the non-interactive case the consumer usually plays a more passive role. This difference is accounted for in the Pelcovits analysis. In order to make the benchmark interactive market more comparable to the non-interactive market, Dr. Pelcovits adjusts the benchmark by the added value associated with the interactivity characteristic. Pelcovits Amended and Corrected WDT at 23. This results in a rate of $0.0036 per play for a statutory non-interactive webcaster as a possible outcome in the target market. Pelcovits Amended and Corrected WDT at 4, 33.

The Judges find the interactive webcasting benchmark to be of the comparable type that the Copyright Act invites us to consider. 17 U.S.C. 114(f)(2)(B). ("In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio

transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).") Nevertheless, as we indicated in Webcaster II, this particular Pelcovits benchmark analysis is not without warts. Webcaster II, 72 FR 24094 (May 1, 2007).

In Webcaster II we recognized the potential implications of a benchmark analysis that focuses on only subscription services as does the interactive benchmark presented by Dr. Pelcovits. That is, ad-supported non-interactive services might pay less than subscription-based interactive services to use the same music if their advertising revenues failed to evolve to the point where adsupported non-interactive services were just as lucrative as subscription-based interactive services on a per-listener hour basis. In that proceeding the Judges indicated that to the extent that ad-supported revenues did not come to match subscription revenues on a per-listener hour basis during the 2006-2010 term and, absent clear information on the substitutability of the subscription and non-subscription options among consumers, any resulting shortfall related to ad-supported webcasting revenues would likely be adequately mitigated by a phase-in of the per performance rates to the level indicated by the benchmark analysis, such that the benchmark recommended rate for 2006 would not become effective until the last year of the term. Webcaster II, 72 FR 24094 (May 1, 2007).

Here, unlike the absence of data supporting this critique which we noted in Webcaster II, Dr. Salinger provides some empirical data to support the position

that a benchmark which reflects a weighted average of revenues obtained from subscribers and non-subscribers may result in a lower estimated royalty rate than Dr. Pelcovits' benchmark which focuses on only subscription rates. Salinger WRT at 10-11. Therefore, we are not persuaded that Dr. Pelcovits' benchmark estimates are sufficiently reflective of the hypothetical target market as to support the immediate implementation of a royalty rate equivalent to the $0.0036 outcome estimated by Dr. Pelcovits. Some further downward adjustment to his recommendation to adequately address the subscription/non-subscription revenue level differences may well be in order, although the magnitude of such an adjustment is not clear.

While Dr. Salinger shows that there is likely some "upward bias" introduced into the Pelcovits analysis through its focus on only subscription-based services in the benchmark market, the amount of such upward bias is not persuasively determined. Non-interactive webcasters in the market like Live365 often provide both subscription and non-subscription offerings. 7/28/10 Tr. at 40:10-15 (Salinger). Therefore, subscription-based revenues clearly must be considered. Moreover, the data used by Dr. Salinger to support his criticism, as Dr. Salinger admits, is not without its shortcomings. 7/28/10 Tr. at 98:2-104:6 (Salinger). Similarly, Dr. Fratrik admitted that the ZenithOptimedia and Accustream advertising revenue estimates are "challenging" or difficult to produce because a vast number of webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220:1-20 (Fratrik). There is also the difficulty of segmenting intermingled revenues from

webcasting business models that may often directly and/or indirectly depend on both subscription and nonsubscription lines of business, as well as potentially on other sources of revenue. 7/28/10 Tr. at 40:10-15, 92:1-19 (Salinger); Ordover WRT at 10-11. Nevertheless, Dr. Salinger's critique is sufficiently supported to raise legitimate concerns about the potential for upward bias in the Pelcovits estimates. It is only the magnitude of the potential upward bias that is not clearly quantified. What is clear from the record of evidence in this proceeding is that $0.0036 can be no more than the upper bounds of the range of possible rates reasonably applicable to the target market and that the most likely prevailing rate in that market is currently lower than $0.0036.

Dr. Salinger also criticizes the Pelcovits interactive webcasting benchmark analysis for: (1) Relying only on contracts with the four major record companies to the exclusion of the independent record labels; (2) ignoring the downward trend in the effective play rates paid by interactive services by utilizing the average rate in his calculations; and (3) inappropriately constructing the hedonic regression model that is used as one alternative measure of interactivity in the analysis. Salinger WRT at 15-21.

The first of these criticisms fails for lack of persuasive evidence in the record that the use of independent record contracts would have made a material difference. SX RFF at)) 101-103.

Although the second and third criticisms have some merit, the Judges find that these criticisms indicate that the Pelcovits interactive webcasting benchmark may overstate the likely prevailing market rate in

the target market without necessarily rendering the Pelcovits analysis fatally flawed. With respect to the second criticism, Dr. Salinger acknowledged that this concern could be addressed by multiplying the recommended rate by 0.8737.[12] SX PFF at) 209. Such an adjustment, of course,would reduce the recommended rate. SoundExchange offers no evidence that such an adjustment is unwarranted and even appears to endorse such an approach by performing this exact calculation with respect to the $0.0036 rate and reducing it to $0.0031. See SX PFF at) 210. But SoundExchange's calculation was applied to the highest possible outcome Dr. Pelcovits lists for his benchmark analysis (i.e., $0.0036), when in fact, Dr. Pelcovits indicates that his rate after substitution adjustment would result in a "range of recommended rates" with a "simple average of $0.0033." Thus, it appears that this $0.0033 average also requires adjustment to meet Dr. Salinger's criticism (e.g., to approximately $0.0029). This is not a trivial consideration in light of the fact that in Webcaster II, it was Dr. Pelcovits' recommended rates after the substitution adjustment that formed the basis for SoundExchange's rate proposal and that formed the basis for the determination by the Judges of a royalty rate to be achieved by the end of the term in 2010 (i.e., a per play rate of $0.19). See Webcaster II, 72 FR 24096 (May 1, 2007). In any event, the

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[12] The 0.8737 multiplier represents the value of a ratio where the numerator consists of the effective per play rate for 2009 (i.e., 0.01917) and the denominator consists of the average effective play rate over the three years in question (i.e., 0.02194).

validity of this criticism of the Pelcovits approach regarding the effective per play rate clearly erodes the weight to be accorded to the $0.0036 figure.

Dr. Salinger also criticizes the Pelcovits hedonic regression analysis that formed the basis for one of the alternative measures of interactivity in the interactive webcasting benchmark approach. Dr. Salinger expressed concerns about the use of certain fixed effects variables (alternatively described as dummy variables) in the specification of the regression model and about the broad confidence interval surrounding the estimated interactivity coefficient in the hedonic regression. Salinger WRT at 20; 21 n.31 and Exhibit 6; 7/28/10 Tr. at 66:4-69:22 (Salinger). These criticisms have some merit, especially in light of Dr. Pelcovits' admitted lack of familiarity with some of the relevant economic literature, including recent literature cautioning against the indiscriminant use of dummy variables in certain hedonic estimations. 4/20/10 Tr. at 373:18-376:15 (Pelcovits). SoundExchange, in response to this criticism, claims that any problem associated with the hedonic regression is negated by Dr. Pelcovits' use of other methods that result in rates almost identical to the $0.0036 average. See, for example, SX RFF at) 107. However, this does not wholly obviate the impact of any resulting overstatement. The rate associated with the hedonic regression is the highest of the three values that are used to calculate the $0.0036 average. Removing the rate associated with the hedonic regression from the average would, in this case, reduce the average. Thus, this criticism of the Pelcovits approach

additionally erodes the weight that the Judges accord to the $0.0036 figure.

In short, the potential for upward bias or actual demonstrated upward bias in the Pelcovits estimates persuade us that $0.0036 can be no more than the upper bounds of the range of possible rates reasonably applicable to the target market and that the most likely prevailing rate at the present time in that market is significantly lower than $0.0036.

ii. The National Association of Broadcasters and SiriusXM Agreements

In addition to the interactive webcasting benchmark, Dr. Pelcovits offers a second benchmark based on the average of rates established for the 2011-2015 term in precedential Webcaster Settlement Act Agreements ("WSA agreements") between SoundExchange and the National Association of Broadcasters and between SoundExchange and SiriusXM ("SiriusXM agreement" or "Commercial Webcasters agreement"). Pelcovits Amended and Corrected WDT at 22.

While these precedential WSA agreements certainly pertain to rates to be paid by non-interactive webcasters in the commercial webcasting market at issue in this proceeding, the buyers' and sellers' circumstances are not comparable to those that would prevail in the absence of the Webcaster Settlement Act. Rather than a single seller, the sellers in the hypothetical market we are to consider consist of multiple record companies. Webcaster II, 72 FR 24087, 24091 (May 1, 2007); Webcaster I, 67 FR 45244 (July 8, 2002). Thus, in Webcaster II we

found that the fact that there were multiple buyers and multiple sellers in the benchmark market as well as in the target market supported a benchmark analysis. Webcaster II, 72 FR 24093 (May 1, 2007). While the applicable law does not require a perfectly competitive benchmark market, the market must be at least "competitive" in the sense that buyers and sellers have comparable resources and market power. Webcaster II, 72 FR 24093 (May 1, 2007); Webcaster I, 67 FR 45245 (July 8, 2002). This would be generally consistent with free market principles. Yet, the buyers' and sellers' circumstances underlying the WSA agreements were not comparable to market conditions that would prevail in the absence of the WSA. That legislation permitted a single seller representative to enter into negotiations with buyers in the market with respect to rates that would be permitted to supplant the statutory rates previously established in the 2006-2010 period, as well as with respect to rates applicable to the 2011-2015 period. Even Dr. Pelcovits admits that "[e]ach of these contracts, of course, was negotiated in the shadow of the regulatory scheme and against the background of statutory rates previously set by this Court. To that extent, they may or may not represent the same outcome that would result in a pure market negotiation with no regulatory overtones." Pelcovits Amended and Corrected WDT at 15. Therefore, we find that these precedential WSA agreements, which may be fairly characterized as single-seller agreements reached under atypical marketplace conditions, cannot satisfy the comparability requirements for an appropriate benchmark.

However, we further find that, because the NAB-SoundExchange and SiriusXM-SoundExchange agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011-2015 period (Pelcovits Amended and Corrected WDT at 15) and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder of the non-interactive webcasting services (Salinger WRT at 24; Smallens Corrected WRT at 21), these agreements are a useful gauge of the weight to be assigned to the rates suggested by the interactive webcasting benchmark discussed supra at Section II.B.3.b.i. Moreover, nothing in the Webcaster Settlement Act constrains us from using these agreements for that purpose. See 17 U.S.C. 114(f)(5)(C).

The NAB-SoundExchange and SiriusXM agreements provide for royalty rates on a per performance basis. For the five-year period beginning 2011, the NAB-SoundExchange agreement sets the following rates: $0.0017 for 2011, $0.0020 for 2012, $0.0022 for 2013, $0.0023 for 2014 and $0.0025 for 2015. For the same period, the SiriusXM agreement sets the following rates: $0.0018 for 2011, $0.0020 for 2012, $0.0021 for 2013, $0.0022 for 2014 and $0.0024 for 2015. Pelcovits Amended and Corrected WDT at 15. Two characteristics of these rates are noteworthy. First, the 2011 rate is slightly less than the current 2010 statutory rate of $0.0019 and the rates in the precedential WSA agreements covering the years 2009 and 2010 were somewhat lower than the corresponding statutory rate for those years. Pelcovits Amended and Corrected WDT at 15.

Second, the rates in the NAB-SoundExchange and SiriusXM agreements over their entire term are substantially lower than the range of annual rate possibilities suggested for implementation pursuant to the proposed interactive benchmark ($0.0036) or the interactive benchmark after Dr. Pelcovits' substitution adjustment ($0.0033) or the interactive benchmark adjusted to give a more likely reading of the impact of downward trend in the effective play rates paid by interactive services ($0.0031).

Thus, we find that these negotiated rates indicate that the interactive benchmark may likely overstate the prevailing market rate in the target market even when subjected to Dr. Pelcovits' substitution adjustment or Dr. Salinger's adjustment to mitigate the impact of downward trend in the effective play rates paid by interactive services. As a consequence, we further find that the interactive benchmark, even when subjected to these alternative adjustments, provides for rates near the upper bounds of the range of possible rates reasonably applicable to the target market, when the most likely prevailing rate in that market appears to be lower than the interactive benchmark rates. In other words, the NAB-SoundExchange and SiriusXM agreements lend weight to the need for a further downward adjustment in the benchmark rate to reflect a prevailing rate in the target market closer to the current statutory rate.

Dr. Fratrik contends that the royalty rates in the NAB-SoundExchange agreement must overvalue the input in question, because the NAB received a particularly valuable concession with respect to the

waiver of performance complement rules as part of the rate agreement. See Fratrik Corrected and Amended WDT at 43-44. ["Consequently, these terrestrial broadcasters, already with the programming established to webcast, should be willing to pay more than other webcasters in order to relieve themselves of these provisions." (emphasis added)]. This claim of a one-sided benefit to broadcasters is not adequately supported in the record. The testimony of Dr. Pelcovits, Dr. Ordover and Mr. McCrady indicates that the waivers had value to both the NAB and to the record companies. Pelcovits Amended and Corrected WDT at 20 n.21; Ordover WRT at 5, 18; McCrady WDT at 5-6. There is no clear evidence in the record to support either the notion that the limited performance complement waiver in the NAB-SoundExchange agreement was a largely one-sided benefit accruing only to the broadcasters or that broadcasters did, in fact, pay more than other webcasters to obtain these provisions.

Dr. Fratrik also contends that terrestrial broadcasters were willing to pay more because they have fewer other costs to cover than pure webcasters. But Dr. Fratrik offers less than persuasive evidence of major cost differences between pure webcasters and broadcasters who engage in webcasting generally or between pure webcasters and the more limiting case of those broadcasters who exclusively simulcast. Dr. Fratrik appears to center his analysis on the latter case. Of course, focusing on this latter comparison simplifies from the reality of the market by assuming that all the webcasting performed by broadcasters consists of simulcasting when, in fact,

the NAB-SoundExchange agreement provides for other types of webcasting (e.g., through side channels). See SX Ex. 102-DP at Article 1.1(d), 4.2. In addition to that analytical shortcoming, Dr. Fratrik's analysis suffers from other unsupported conclusions. Dr. Fratrik's cost-based contention appears to largely rest on the notion that simulcasters, unlike other commercial webcasters, have no additional programming costs as those costs have already been paid in connection with their over-the-air operations. See Fratrik Corrected and Amended WDT at 41. But no specific empirical data in the record unambiguously supports this asserted relative difference. For example, Dr. Fratrik's conclusion ignores the wide range of business models utilized by commercial webcasters, including that of Live365, a webcaster that is apparently paid to put on programming designed by its clients as opposed to incurring a cost for originating such programming itself. FloaterCorrected WDT at 4-8; 4/27/10 Tr. at 1274:5-16; 1301:1-4 (Fratrik).

Several other theories are offered by the contending parties to suggest that the precedential WSA agreements are either higher or lower than the likely prevailing rate in the target market.

For example, the possibility is raised that since the rates in the NAB-SoundExchange agreement were negotiated collectively on behalf of the record companies by SoundExchange, the rates might reflect some additional bargaining power exercised by SoundExchange as a single seller, relative to the bargaining power that would have otherwise been exercised by the individual record companies, leading

to higher than free market-determined royalty rates. See Ordover WRT at 22, Salinger WRT at 27. While, at first blush, this contention appears to be consistent with economic theory, the facts surrounding the SoundExchange-NAB negotiation and the rates resulting from the negotiation cast serious doubt on the operation of normal economic theory in this case.

These negotiations took place in the context of the WSA legislation specifically providing for SoundExchange to engage in such negotiations as a collective in order to reach agreements that would exempt webcasters from the 2006-2010 statutory rates, as well as allow for 2011-2015 negotiated rates in lieu of any statutory rates that might be determined by the Judges for that term of the applicable license pursuant to a statutory proceeding. 17 U.S.C. 114(f)(5)(A). That is, the rates were to be negotiated in response to a specifically legislated, post-determination, second-chance opportunity afforded the parties to voluntarily reshape applicable webcasting rates. Thus, the rates could be said to have been negotiated both in the shadow of a specific regulatory scheme, as well as against the background of previously set statutory rates, which influenced the outcomes available to the parties and, in particular, constrained the exercise of monopoly power. Failing to reach an agreement for the 2011-2015 period, the buyers could still avail themselves of the statutory rate-setting procedure. That is, the buyers retained their rights to reject a settlement with SoundExchange and resort to the statutory rate-setting procedure for the 2011-2015 term of the license. Pelcovits Amended and Corrected

WDT at 17; Ordover WRT at 23; Salinger WRT at 27. In other words, the buyers in this case maintained some leverage that otherwise would be absent if they faced a monopolist seller without any such recourse.

Additionally, here, the NAB, which negotiated on behalf of broadcasters, effectively served as a single buyer and, thus, may be said to have exercised countervailing market power relative to SoundExchange. Ordover WRT at 23. At the same time, the SoundExchange-SiriusXM agreement certainly offers the example of a non-NAB webcasting buyer for whom negotiationsproduced rates very similar to the NAB-SoundExchange agreement, indicating that the NAB-SoundExchange agreement, on its face, did not result in the price discrimination sometimes associated with monopoly power.

In short, the NAB-SoundExchange negotiated royalty rates do not appear to have been pushed above what might prevail in a multi-seller market as a result of SoundExchange's legislatively permitted role as a single seller in these negotiations because, under the circumstances, it was unlikely to have the ability to exercise the equivalent of the unchecked bargaining power ofan unregulated monopolist.

On the other hand, Dr. Ordover's attempt to cast the NAB-SoundExchange agreement as producing royalty rates below what might prevail in a free market is also not supported by the record of evidence in this proceeding. Dr. Ordover suggests that, if certain circumstances can be assumed to be present, the NAB-SoundExchange agreement may represent a situation where SoundExchange, acting

as a single seller, nevertheless would agree to lower royalty rates as compared to those that would occur in a free market in which individual record companies function as sellers. But Dr. Ordover's analysis is predicated on, among other assumptions, the key notion that the repertoire of all four major labels is necessary for simulcasters to operate a viable streaming service. That is, the sound recordings of record companies must be perceived as complementary inputs rather than as substitutes. Here, there is no evidence in the record which establishes that to be the case for any of the particular broadcasters who have opted into the NAB-SoundExchange agreement, let alone that it is the case generally for all broadcasters.[13] For example, Dr. Ordover offers no evidence that these sound recording inputs are complements based on standard measures such as the cross-elasticity of demand. Moreover, the proffered notion that the NAB-SoundExchange agreement for broadcasters represents lower than average webcasting royalty rates based on some assumed unique requirement associated with simulcasting, is not borne out by the agreement itself which provides for no distinction between the royalty rate applicable to simulcasting and the royalty rate applicable to broadcasters who engage in other types of webcasting (e.g., side channels). See SX Ex. 102-DP at Article 1.1(d), 4.2. Nor is there a substantial difference between the

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[13] In Webcaster II, a similar assumption that a viable streaming service requires the repertoire of all four major labels was rejected by the Judges. See Webcaster II, 72 FR 24091 (May 1, 2007).

royalty rates applicable to simulcasting in the NAB-SoundExchange agreement and the royalty rates applicable to commercial webcasting in the SiriusXM-SoundExchange agreement. In short, while Dr. Ordover's proposed explanation may be a plausible theory under certain circumstances, here it suffers from a lack of sufficient empirical support to demonstrate the presence of those circumstances.

Finally, Dr. Salinger claims that the rates in both the NAB-SoundExchange and SiriusXM agreements are higher than average webcasting royalty rates in the period 2011-2015 based on a theory that the NAB and SiriusXM structured their agreements with SoundExchange to provide for lower-than-statutory-rates for the years 2009-2010, but above-market rates for the 2011-2015 period, in anticipation that such a restructuring would adversely affect their rivals' costs in the latter period.

Yet, this is also a theory without sufficient facts to support it in the instant case. There is no evidence in the record to suggest any coordination between the NAB and SiriusXM to reach their separate agreements with SoundExchange. Indeed, as NAB broadcasters and SiriusXM are competitors not only with respect to webcasting but also for listeners more generally, it would appear such coordination is unlikely. In addition, for the strategy of raising rivals' costs to work, SoundExchange would have to agree to go along with the NAB and SiriusXM. 7/28/10 Tr. at 132:1-10 (Salinger). There is no evidence in the record to support this additional coordination. A further condition necessary to the success of the strategy is that the NAB and SiriusXM

would have to feel assured that a rate setting proceeding would not result in a lower rate than those in their agreements with SoundExchange. There is no evidence in the record to suggest that any protection against a lower statutory rate was embodied in their agreements with SoundExchange. SX PFF at) 270.

Dr. Salinger suggests that one of the possible benefits to SoundExchange from cooperating with a NAB-SiriusXM raising rivals' costs strategy is that copyright owners may "get a rate that's so high but then they get to practice price discrimination by negotiating lower." 7/28/10 Tr. at 133:18-22 (Salinger). However, as Dr. Fratrik acknowledged, in order to price discriminate the seller must "be able to segment out customers." 4/27/10 Tr. at 1249:8-13 (Fratrik). No such market segmentation is supported by the record of evidence in this proceeding. On the contrary, simulcasting and other commercial webcasting compete for the same ultimate consumers who may easily substitute one service for the other as their listening choice. SX PFF at)) 277, 278. In Webcaster II, similarly noting that the balance of the evidence in the record did not persuade us that these simulcasters operate in a submarket separate from and noncompetitive with other commercial webcasters, we declined to set a differentiated rate for commercial broadcasters. By contrast, where we did find sufficient evidence in the record that supported a finding that certain noncommercial webcasters constituted a distinct segment of the market, we did set a differentiated rate. Webcaster II, 72 FR 24095, 24097 (May 1, 2007). In Webcaster II we noted that "[a] segmented marketplace may

have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve" and further, that "[t]he multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand." Webcaster II, 72 FR 24097. Price discrimination is a feature of such markets. Id. Dr. Salinger offers no persuasive empirical evidence of price discrimination related to different price elasticities of demand associated with distinct classes of buyers in the market.

Dr. Salinger's analysis also fails to address other important features of the "raising rivals' costs" construct. For example, he does not empirically examine whether it would make economic sense for NAB and SiriusXM in terms of profitability, to effectively shift up their respective average cost curves at the original output's average cost. In other words, by agreeing to a higher price for the sound recording input, NAB and SiriusXM may sacrifice some of their profitability, depending on the demand for their output. Dr. Salinger does not empirically address the extent to which that may or may not occur. Nor does he examine how the results of such a profitability analysis might support or undermine the incentives behind the "raising rivals' costs" strategy that he opines was operative in motivating NAB and SiriusXM negotiating behavior. For all these reasons, we do not find Dr. Salinger's "raising rivals' costs" theory persuasive.

However, it cannot be disputed that the 2009 and 2010 rates negotiated in these settlements were lower than the statutory rates otherwise applicable

to commercial webcasters. Dr. Pelcovits offers another possible adjustment to mitigate the effects of the lower 2009-2010 rates enjoyed by the NAB and SiriusXM as compared to those commercial webcasters that remained subject to the statutory rate. The rates resulting from Dr. Pelcovits' calculation "would give webcasters that are not part of the WSA settlements the same effective rate over the eight-year period [2009-2015] as the NAB and SiriusXM, assuming they all experience the same level of growth in performances." Pelcovits Amended and Corrected WDT at Appendix II. This calculation results in rates equal to the current statutory rate for the first year of the 2011-2015 term and only somewhat higher thereafter. For the five-year period beginning 2011, these adjusted NAB/SiriusXM agreement rates are as follows: $0.0019 for 2011, $0.0020 for 2012, $0.0020 for 2013, $0.0020 for 2014 and $0.0021 for 2015. Pelcovits Amended and Corrected WDT at Appendix II.

After a careful consideration of the evidence presented on the various suggested sources of potential overvaluation and undervaluation of the market rates by the NAB-SoundExchange and SiriusXM agreements, we find that the rates in these agreements do not appear to seriously overvalue or undervalue input prices likely to prevail in the market. Therefore, because the NAB-SoundExchange and SiriusXM agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011-2015 period and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder

of the non-interactive webcasting services, we find these agreements are a useful gauge of the weight to be assigned to the rates suggested by the interactive webcasting benchmark. See supra at Section II.B.3.b.ii.

Inasmuch as there are only small differences between the 2011, 2012 and 2013 rates in the NAB and SiriusXM agreements and the 2010 statutory rate, we decline to assign a weight to the interactive webcasting benchmark that results in a rate at great variance with the current statutory rate. In other words, the rates in these negotiated agreements serve as a caution to us not to depart radically from past rates where we cannot be confident, based on the quality of the benchmark evidence in the record, that the magnitude of such a departure is fully supported in the target market. Here, the NAB and SirusXM agreements serve as a means of roughly correcting the interactive benchmark for any overvaluation not captured by the variables directly considered in the analysis. As a consequence, we find that the current statutory rate ($0.0019) sets the lower bounds for a range of rates reasonably applicable to the target market and that the most likely prevailing rate in that market is closer to this lower boundary than to the upper boundary identified hereinabove.

4. The Section 114 Commercial Webcaster Rates Determined by the Judges

As previously indicated, supra at Section II.B.3.b.i., the Judges find the interactive webcasting benchmark to be of the comparable type that the Copyright Act invites us to consider. It is a

benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after some adjustment to account for the differences attributable to interactivity. Id. However, we cannot find sufficient evidence in the record to support an increase that fully implements the rates proposed on the basis of the interactive benchmark. Rather, we find that a rate of $0.0036, derived from the interactive market and adjusted for interactivity differences, can be no more than the upper bounds of a range of possible rates reasonably applicable to the target market. That is because: (1) There is likely some "upward bias" introduced into the interactive benchmark analysis through its focus on only subscription-based services in the benchmark market (see supra at Section II.B.3.b.i.) and (2) there is some merit to Dr. Salinger's identification of some additional sources of upward bias in the Pelcovits interactive benchmark analysis. Id.

Two measures available to test the magnitude of such upward bias are the NAB-SoundExchange and SiriusXM-SoundExchange agreements. That is, we find that these agreements are a useful gauge of the weights to be assigned to the rates suggested by the interactive webcasting benchmark, because the NAB-SoundExchange and SiriusXM-SoundExchange agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011-2015 period and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder of the non-interactive webcasting services (see supra at Section II.B.3.b.ii.). These negotiated rates indicate that the interactive benchmark may

likely overstate the prevailing market rate in the target market even when subjected to Dr. Pelcovits' substitution adjustment or Dr. Salinger's adjustment to mitigate the impact of downward trend in the effective play rates paid by interactive services. Id. Indeed, the NAB-SoundExchange and SiriusXM agreements lend weight to the need for a further downward adjustment in the benchmark rate to reflect a prevailing rate in the target market closer to the current statutory rate. Id. In this way, the NAB- SoundExchange and SirusXM agreements serve as a means of roughly correcting the interactive benchmark for any overvaluation not captured by the variables directly considered in the analysis. Therefore, inasmuch as there appears to be only a small difference between the 2011 rate in the NAB-SoundExchange and SiriusXM agreements and the 2010 statutory rate, we find that the current statutory rate ($0.0019) sets the lower bounds for a range of rates reasonably applicable to the target market and that the most likely prevailing rate in that market is closer to this lower boundary than to the interactive benchmark rates recommended by Dr. Pelcovits.

In other words, while we accept the interactive benchmark as suggesting an increase in royalty rates for non-interactive webcasting over or by the end of the period 2011-2015, we find that the weight of the evidence does not allow us to accept the full amount of the increases suggested by either the unadjusted or the various adjusted versions of the interactive benchmark. Rather having identified the $0.0036 rate as the upper boundary for a zone of reasonableness for potential marketplace

benchmarks and the $0.0019 rate as the lower boundary for a zone of reasonableness for potential marketplace benchmarks, we find that the most likely prevailing rate in the target market is closer to the lower boundary than to the upper boundary of this zone of reasonableness (see supra at Section II.B.3.b.ii.).

However, the most likely prevailing rate at the present time is also likely to shift upward over the 2011-2015 term. We recognize that the interactive benchmark derived in this proceeding after adjusting for interactivity and accounting for substitution (i.e., $0.0033) itself indicates an increase when compared to a similarly adjusted interactive benchmark derived in Webcaster II (i.e., $0.0019). See supra at Section II.B.3.b.i.; Webcaster II, 72 FR 24094, 24096. Similarly, the NAB-SoundExchange and SiriusXM-SoundExchange agreements exhibit an increase in rates over the 2011-2015 term for competing webcasters. See supra at Section II.B.3.b.ii. Moreover, we also find that the evidence in the record on industry growth in increased advertising revenues, increased performances, and increased listening likely support at least a modest increase over the 2011-2015 term. See supra at Section II.B.3.a.iii. However, we recognize that while the trend in industry growth, as captured by some measures such as listenership, has been decidedly upward, that growth has occurred unevenly from year to year, with two-year plateaus succeeded by large jumps in growth. Id.

Our findings suggest three criteria for an appropriate rate based on the marketplace evidence

we have been presented. These criteria are: (1) A rate structure that reflects our finding that the most likely prevailing rate in the target market is closer to the lower boundary than to the upper boundary of the zone of reasonableness for potential marketplace benchmarks; (2) a rate structure that accommodates some modest growth in rates over the term of the license period; and (3) a rate structure that provides for longer periods of stable rates during the term of the license period. We find that the following rate structure for commercial webcasters, based on our downward adjustment of the interactive benchmark, meets these three criteria: For the five-year period beginning 2011, the per play rate applicable to each year of the license for Commercial Webcasters is: $0.0019 for 2011, $0.0021 for 2012, $0.0021 for 2013, $0.0023 for 2014 and $0.0023 for 2015.

The willing buyer/willing seller standard in the Copyright Act encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt an adjusted benchmark approach to determining the rates, we agree with Webcaster II and Webcaster I that such

considerations would have already been factored into the negotiated price in the benchmark agreements. 72 FR 24095 (May 1, 2007); 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. Similar considerations would have been factored into the negotiated price of the NAB-SoundExchange and SiriusXM-SoundExchange agreements which we utilized to roughly gauge the further downward adjustment necessary to assure that the interactive benchmark rates reasonably reflected likely rates in the target market.

Nevertheless, we have also further separately reviewed the evidence bearing on these considerations. We find that no further upward or downward adjustment is indicated. We have previously noted that the evidence submitted by Live365 on each of these considerations is too weak to establish a basis for a decrease in webcaster royalty rates from the current statutory rate (see supra at Section II.B.3.a.iii.). Nor does Live365 present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. Id. Similarly, to the extent that SoundExchange treats each of these factors separate from its proffered benchmark analysis, it also does not present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. Moreover, SoundExchange explicitly relies on Dr. Pelcovits'

interactive services benchmark analysis to encompass these considerations. SX RCL at) 20. Therefore, our further consideration of these factors leads us to find no need for any further adjustment to the rates determined hereinabove.

5. The Proposed Aggregator Discount to the Section 114 Commercial Webcaster Rates

Live365 seeks a further 20% discount applicable to the commercial webcasting per performance rate for certain "qualified webcast aggregation services" who operate a network of at least 100 independently operated "aggregated webcasters" that individually "stream less than 100,000 ATH per month of royalty-bearing performances." Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2 and § 380.3(a)(2). This "discount" proposal may be more properly understood as a proposed term rather than an additional rate proposal. It is conditional; that is, it is applicable only to the extent that certain defined conditions are met (e.g., minimum number of 100 aggregated webcasters and each individual aggregated webcaster streaming less than 100,000 ATH per month). It proposes to establish a mechanism whereby a group of commercial webcasters under certain qualifying conditions may utilize a "webcast aggregation service" to aggregate their monitoring and reporting functions. Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2(m). Monitoring and reporting are compliance-related functions that are currently required of all individual webcaster licensees.

We find no persuasive evidence in the record to support the imposition of an aggregator discount

that would apply to the statutory rate for commercial webcasters. Live365 submitted testimony from Dr. Fratrik and Mr. Floater to support this request. The testimony of the latter witness does not, in any meaningful way, address the purported rationale behind this request—namely, that an administrative benefit accrues to the collective which, by implication, reduces transactions costs. Rather Mr. Floater's testimony speaks largely about the asserted benefits of using an aggregation service that flow to "individual webcasters" who make use of the service and to copyright owners of having multiple webcaster stations assembled on a single platform. ["* * * a streaming architecture that can aggregate tens of thousands of individual webcasters * * * Live365's broadcast tools and services enable broadcasters to economically and efficiently stream their programming * * * Live365's aggregation helps broadcasters contain their costs * * * Live365 allows small webcasters to broadcast content * * * while generating increased performances, sales, royalties and promotional benefits for a wide range of artists and copyright holders."] Floater Corrected WDT at 11-14. These asserted benefits to individual webcasters and copyright owners, which are not quantified sufficiently to ascertain their value, are benefits that are largely indistinguishable from those that might be asserted by any multi-channel webcaster. Nor do these benefits address the issues at heart of the proposal; that is, whether an aggregator like Live365 provides any administrative benefit that could be shown to reduce transactions costs, whether any administrative benefit provided by the aggregator can be measured and translated

into a discount applicable to the commercial webcasting royalty rate, and whether the full amount of the purported administrative benefit should properly flow to the aggregator, to the individual webcasters so aggregated, to the copyright owners or to some combination thereof.[14] We do not find Mr. Floater's testimony helpful in resolving any of these issues.

Live365 also submitted testimony from Dr. Fratrik to support its request for an aggregator discount that attempts, in part, to address the administrative savings issue. Dr. Fratrik opines that aggregators are entitled to this discount because they "collect and compile all of the necessary documentation of the actual copyrighted works that are streamed and the number of total listening levels for each of these copyrighted works" and because "aggregators make royalty payments to the appropriate parties." Fratrik Corrected and Amended WDT at 38. But again these functions are part of the same sort of compliance activities for which any multi-channel webcaster would necessarily be responsible on behalf of the multiplicity of channels it offered. They do not appear to be unique to an "aggregator." Indeed, when questioned about his description of the aggregator

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[14] For example, it is obvious that if the full amount of any purported administrative savings were to flow to the aggregator, then no benefit accrues to anyone else. In such a formulation, the aggregator proposal would seem to reduce to a mere stalking horse for obtaining a less than competitive market rate that advantages Live365 as compared to other commercial webcasters and simulcasters.

discount, Dr. Fratrik offered no practical distinction between an "aggregator" and any commercial webcaster or simulcaster who offered 100 or more channels. 4/27/10 Tr. at 1265:9-1266:22; 1267:7-1270:15 (Fratrik). We find that Dr. Fratrik's claim of administrative cost savings provided by aggregators describes a benefit that is largely indistinguishable from those that might be asserted by any multi-channel webcaster. Therefore, inasmuch as multi-channel webcasters already receive a benefit under current regulations[15] (37 CFR 380.3(b)(1)) by way of a $50,000 cap on the minimum fee for services with 100 or more stations or channels, the proposed additional discount for indistinguishable administrative services provided by an "aggregator" is unwarrantedly cumulative. SX PFF at) 597.

Furthermore, Dr. Fratrik admitted that the choice of 100 channels or stations as the threshold for triggering the proposed aggregator discount was not supported by any examination of administrative costs to see what relative administrative cost savings specifically demarcated the boundaries of the discount's applicability. 4/27/10 Tr. at 1270:12-1271:3 (Fratrik). In other words, Dr. Fratrik establishes no cost savings basis in the record for a distinction between the administrative cost savings that might accrue from aggregating 100 stations as compared to 50 or 300 stations where each such station meets the

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[15] Under the May 14, 2010 Stipulation executed by SoundExchange and Live365, the $50,000 cap on minimum fees was also agreed to by the parties for the 2011-2015 term. See supra at Section II.B.1.

additional condition of accounting for streaming of less than 100,000 ATH per month.

At the same time, Dr. Fratrik reaches his estimated 20% discount rate through the offer of a kind of benchmark analysis that uses purported aggregator discounts provided to Live365 in its agreements with the Performance Rights Organizations ("PROs") pertaining to musical works royalties. But Dr. Fratrik indicated in his testimony that the Live365-BMI agreement he utilized to support this benchmark does not provide a discount to Live365 for aggregating webcasters. Instead, the agreement apparently provides a discount more directly to very small webcasters that utilize Live365 for certain administrative functions related to compliance. 4/27/10 Tr. 1261:18-1262:19 (Fratrik). That is not comparable to the proposal before us which calls for the aggregator to receive the full benefits of any discount.

In any case, even if Live365 were to receive the full benefits of any aggregator discount in the BMI agreement, such PRO agreements do not constitute a benchmark that inspires sufficient confidence to be useful. Dr. Fratrik asserts that Live365 provides centralized administration for the benefit of the PROs, including centralized collection, reporting and compliance. But he offers no evidence to suggest that the types and level of centralized administrative services provided to the PROs are comparable to the administrative services to be provided by the aggregator to SoundExchange. In Webcaster II, we found that another benchmark offered in that proceeding based on the musical works market was

flawed because the sellers in that market are different and they are selling different rights. 72 FR 24094 (May 1, 2007). Yet, in the instant proceeding, Dr. Fratrik fails to show that these different sellers and different rights give rise to comparably valued "centralized" administrative services provided by a third party in the target sound recordings market. Nor does Dr. Fratrik address the issue of whether any adjustments to the data from the benchmark musical works market are required that could make it more comparable to the target sound recordings market.

In short, we find that Live365 makes no sufficient showing that an aggregator discount can be justified in general, or adequately measured in particular, on the basis of the evidence in the record.

To the extent that Live365's proposed aggregator discount is viewed strictly as a rate proposal rather than a term, Live365 also fails to delineate a basis for a different royalty rate applicable to a distinct submarket of the larger commercial webcasting market. Webcasting II determined that a key factor in differentiating between classes of webcasters for rate purposes is whether the webcasters operate in a distinct market segment or submarket that does not directly compete with the remainder of all webcasters. Webcaster II, 72 FR 24095, 24097 (May 1, 2007); see also supra at Section II.B.3.b.ii. Live365 as the aggregator does not appear to meet this standard. The record clearly establishes that Live365 competes directly with other commercial webcasters. SX PFF at) 280. And, of course, whether considered as a proposed rate for a new category of commercial

webcasters or, as noted hereinabove as a proposed term, we are not persuaded by the record of evidence in this proceeding of a particular market value provided by an aggregator in terms of reduced transactions costs that can, or should, be translated into a discount applicable to the commercial webcasting royalty rate.

In addition, some aspects of the Live365 proposal appear likely to engender confusion. For example, Live365 proposes definitions for a "webcast aggregation service," "aggregated webcasters," "commercial webcaster," and "licensee." Taken together, these definitions fail to explicitly delineate that Live365 intends the webcast aggregation service to serve as the licensee in its proposed arrangement and that the webcasters whose programming is transmitted are not the licensees. The proposed regulations, by contrast, identify webcasters specifically as licensees and, therefore, suggest that any commercial webcaster, whether aggregated or unaggregated, remains responsible for payment of the applicable statutory license fee. See Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2(b), § 380.2(e), § 380.2(h), § 380.2(o); 9/30/10 Tr. at 622:14-22, 669:18-677:12 (Closing Arguments, Oxenford). Such confusion has practical consequences. Given that the aggregator, as the licensee, is not obligated to provide a list of webcasters for whom it purports to pay SoundExchange and the aggregator, as licensee, may not voluntarily provide such a list to SoundExchange, it may result in more time-consuming administrative effort for SoundExchange to determine whether a particular webcaster is

subject to or properly complying with the statutory licenses. This burden was pointed out by Mr. Funn in the context of SoundExchange's specific experience with Live365. Funn WRT at 2; 8/2/10 Tr. at 445:13-446:2 (Funn).

For all the above reasons, we decline to adopt Live365's proposal for a 20% aggregator discount, applicable under certain conditions to the commercial webcasting royalty rate.

III. Noncommercial Webcasters

Having determined the rates for commercial webcasters, the Judges now turn to the noncommercial category. As previously mentioned, certain services argued in Webcaster II that they were distinguishable from commercial webcasters and, as a result, deserved a lower royalty rate. We observed:

Based on the available evidence, we find that, up to a point, certain "noncommercial" webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. An example of a segmented market is a market for electricity with different prices for commercial users and residential users. In other words, price differentiation or price discrimination is a feature of such markets. The multiple demand

curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.

Webcaster II, 72 FR 24097 (footnote omitted). We found that the evidence supported a submarket for noncommercial webcasting, but included safeguards to assure that the submarket did not converge or overlap with the submarket for commercial webcasting. A cap of 159,140 ATH per month marked the boundary between noncommercial and commercial webcasting, and we adopted a $500 per station or channel rate which included the annual, non-refundable, but recoupable, $500 minimum fee payable in advance.[16]

In this proceeding, certain participants have once again asked us for adoption of lower rates for noncommercial webcasting. Greater refinements to the category are also sought; namely, separate rates for distinct "types" of services (all still under the general rubric of noncommercial). SoundExchange

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[16] The United States Court of Appeals for the District of Columbia Circuit remanded the $500 minimum fee for lack of evidence. Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, 574 F.3d 748, 767 (DC Cir. 2009). After taking evidence, we adopted a $500 minimum fee. Digital Performance Right in Sound Recordings and Ephemeral Recordings (Remand order), 75 FR 56873, 56784 (September 17, 2010).

and CBI have submitted an agreement, pursuant to 17 U.S.C. 801(b)(7)(A), for rates and terms for a type of service that they identify as "noncommercial educational webcasters." SX PFF at 65; CBI PFF at 5. IBS urges us to recognize and set rates for two types of services: small noncommercial webcasters, defined as those whose ATH does not exceed 15,914 per month, and very small noncommercial webcasters, defined as those whose ATH does not exceed 6,365 per month. IBS PFF (Reformatted) at) 26. We address these requests beginning with the SoundExchange- CBI agreement.

A. Noncommercial Educational Webcasters

On August 13, 2009, slightly more than eight months into the cycle of this proceeding, SoundExchange and CBI submitted a joint motion to adopt a partial settlement "for certain internet transmissions by college radio stations and other noncommercial educational webcasters." Joint Motion to Adopt Partial Settlement at 1. The settlement was achieved under authorization granted by the Webcaster Settlement Act of 2009, Public Law 111-36, discussed supra at Section I.B., and was published by the Copyright Office in the Federal Register. See 74 FR 40616 (August 12, 2009). By virtue of that publication, the SoundExchange-CBI agreement is now "available, as an option, to any * * * noncommercial webcaster meeting the eligibility conditions of such agreement." 17 U.S.C. 114(f)(5)(B). In submitting the agreement to the Judges, SoundExchange and CBI urged us to likewise publish it in the Federal Register and adopt it, under 17 U.S.C. 801(b)(7)(A), as the rates and terms

applicable to noncommercial educational webcasters for the period 2011 through 2015.[17]

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[17] At the hearing to consider the SoundExchange/CBI motion, there was significant discussion as to whether SoundExchange and CBI were asking the Judges to adopt the agreement as an option for noncommercial educational webcasters or whether the agreement would be binding on all noncommercial educational webcasters. See 5/5/10 Tr. at 5:8-51:11 (Hearing on Joint Motion To Adopt Partial Settlement). The confusion was created by the last two sentences of proposed § 380.20(b) to the Judges' rules, 37 CFR, which provided:

> However, if a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this subpart.

Digital Performance Right in Sound Recordings and Ephemeral Recordings (Proposed rule), 75 FR 16377, 16383 (April 1, 2010). After deliberations, counsel for SoundExchange conceded that such language was confusing and unnecessary, since the purpose of the motion was to set the rates and terms for all services that met the definition of a noncommercial educational webcaster, and could be removed. 5/5/10 Tr. at 46:14-47:16, 50:12-51:11 (Hearing on Joint Motion To Adopt Partial Settlement). In adopting The SoundExchange/CBI agreement today, we are accepting SoundExchange's offer and are not adopting this language.

On April 1, 2010, the Judges did publish the SoundExchange/CBI agreement under the authority of section 801(b)(7)(A). 75 FR 16377. With respect to rates, the agreement proposes an annual, nonrefundable minimum fee of $500 for each station or individual channel, including each of its individual side channels. Id. at 16384 (April 1, 2010). For those noncommercial educational webcasters whose monthly ATH exceed 159,140, additional fees are paid on a per-performance basis. There is also an optional $100 proxy fee that may be paid by noncommercial educational webcasters in lieu of submitting reports of use of sound recordings. The agreement also contains a number of terms of payment.

Our consideration of the SoundExchange-CBI agreement, as is the case with the NAB-SoundExchange agreement is governed by 17 U.S.C. 801(b)(7)(A). The Judges received 24 comments, from managers and representatives of terrestrial radio stations, favoring adoption of the SoundExchange-CBI agreement. Many of these comments asserted that the rate structure was compatible with their budget restraints, see, e.g., Comment of Bill Keith for WSDP Radio, Plymouth-Canton Community Schools ("The monetary amount was reasonable and most college or high school stations can live with the amounts charged for webcasting"), and several expressed satisfaction with the $100 proxy fee in lieu of reports of use. See, e.g., Comments of Christopher Thuringer for WRFL, University of Kentucky; Comments of David Black, General Manager, WSUM-FM. We received one comment objecting to

the settlement from IBS.[18] We held a hearing on the motion on May 5, 2010.

During the course of the hearing, it became clear that IBS' arguments centered upon the proposed annual $500 minimum fee for stations with less than 159,140 ATH. Most significantly, IBS contended that if the Judges adopted the proposed minimum fee for noncommercial educational webcasters, it would be precluded from presenting its own minimum fee proposal and, effectively, its participation in this proceeding would be ended. 5/5/10 Tr. at 51:22-52:2 ("I think Mr. DeSanctis' [counsel for SoundExchange] last remarks indicate that this is an attempt to freeze IBS out of statutory rights to a decision from the Board on the record.") (Hearing on Joint Motion to Adopt Partial Settlement). After conclusion of the hearing, the Judges did not render a decision on the adoption of the settlement, preferring instead to let IBS present its case in the main and consider the matter after all testimony had been presented.

It is now evident that IBS' contention of a "freeze out" was erroneous from the start, for IBS never proposed any rates and terms for noncommercial educational webcasters. Rather, as noted above, IBS requested rates and terms only for certain

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[18] IBS has asserted several times throughout the course of this proceeding that it represents more college and high school radio stations than CBI. See, e.g. 5/5/10 Tr. at 80:16-81:3 (Hearing on Joint Motion to Adopt Partial Settlement). However, it has never provided any evidence to demonstrate this is true. In fact, IBS has never revealed to the Judges how many members it has, let alone their identities.

noncommercial webcasters (defined by it as "small" and "very small"). The Judges pressed counsel for IBS at closing argument as to whether he still objected to adoption of the SoundExchange-CBI agreement as the basis for establishing rates and terms for noncommercial educational webcasters. After some dissembling, he concluded that he did to the extent that adoption of the agreement might influence or prejudice his rate proposal.[19] We find

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[19] [THE JUDGES]: You're not proposing a rate for noncommercial educational webcasters. Only CBI and SoundExchange are.

MR. MALONE: Right.

[THE JUDGES]: So why are you objecting to the adoption of that if you have a—two separate categories that you want adopted?

MR. MALONE: Well, the judges can certainly say that—I mean, there's nothing incompatible with them. The—

[THE JUDGES]: But I'm asking you why are you still objecting to the adoption of a $500 minimum fee for noncommercial educational webcasters when you have proposed new fees for two new types of services and have not proposed a fee for something called a noncommercial educational webcaster?

MR. MALONE: Well, our—

[THE JUDGES]: Where is your dog in that fight? I don't see it.

MR. MALONE: All right. The dog in that fight is—and, again, excluding indirect effects that I understand to be the context of your question.

We have no objection to the terms that are there as long as they don't apply to our small stations.

that his response does not support a proper objection raised under section 801(b)(7)(A)(ii) which would require us to consider the reasonableness of the SoundExchange/ CBI agreement. Cf. 37 CFR 351.10 (admissible evidence must be relevant); FRE 401. Even if we were to conclude otherwise, IBS has not presented any credible testimony that the agreement is unreasonable. Twenty-four noncommercial broadcasters that purportedly will operate their webcasting services under the agreement find it to be reasonable and affordable. IBS has not provided documented testimony to the contrary, despite an invitation to do so. 5/5/10 Tr. at 81:7-82:10 (Hearing on Joint Motion to Adopt Partial Settlement). Instead, it has relied upon the bald assertions of its counsel and its witnesses, arguing that some unidentified and unspecified number of its members cannot afford the fees contained in the agreement and will be driven from the webcasting business. Without proper evidence, we could not find the agreement unreasonable, were we inclined to do so.

Finding neither a proper nor a credible objection to the SoundExchange-CBI agreement, nor other grounds requiring rejection, we adopt the agreement (see supra n.17) as the basis for rates and terms for noncommercial educational webcasters for the period 2011-2015. See supra Section II.A.

[THE JUDGES]: So you're just objecting to it on the theory that you just hope that what's ever in there doesn't somehow get applied to your case, even though you're asking for two completely different services?

MR. MALONE: That's essentially correct, Your Honor.

9/30/10 Tr. at 660:13—661:22 (IBS Closing Argument).

B. All Other Noncommercial Webcasters

1. Rate Proposals for the Section 114 License for Noncommercial Webcasters

The Judges' adoption of the SoundExchange-CBI agreement under section 801(b)(7)(A) does not resolve the matter of rates for the broader category of noncommercial webcasters that we recognized in Webcaster II. SoundExchange urges adoption of the same rates for noncommercial webcasters as noncommercial educational webcasters. IBS agrees, but proposes that we recognize two new types of services: small and very small noncommercial webcasters. We address these proposals separately.

For noncommercial webcasters operating under the sections 112 and 114 licenses, SoundExchange proposes a royalty of $500 per station or channel per year, subject to the 159,140 ATH limit. The base royalty would be paid in the form of a $500 per station or channel annual minimum fee, with no cap. If a station or channel exceeds the ATH limit, then the noncommercial webcaster would pay at the commercial usage rates for any overage. SX PFF at)) 489, 471. In support of its proposal, SoundExchange points to the fact that 363 noncommercial webcasters paid royalties in 2009 similar to its current proposal, with 305 of those webcasters paying only the $500 minimum fee. Id. at) 493. This, in its view, demonstrates noncommercial webcasters' ability and willingness to pay the requested fees.

SoundExchange also submits that the reasonableness of the $500 minimum fee is confirmed by the testimony of Barrie Kessler, its

chief operating officer. While SoundExchange does not track its administrative costs on a service-by-service basis, Ms. Kessler presented a "reasonableness check" by estimating its administrative cost per service and per channel. First, she divided SoundExchange's total expenses for 2008 by the number of licensees, and then divided that number by the average number of stations or channels per licensee (seven). The result was an approximate average administrative cost of $825 per station or channel. Kessler Corrected WDT at 25.

Finally, SoundExchange offers its agreement with CBI, discussed above, as support for its rate proposal. The fees are the same, along with the 159,140 ATH limitation and no cap on the minimum fee. The agreement, along with the 24 comments received in favor of it, "is strong evidence of the rates and terms that noncommercial webcasters are willing to pay." SX PFF at) 501.

IBS agrees with SoundExchange's proposal for noncommercial webcasters, but asks the Judges to recognize two additional types of noncommercial services that it identifies as "small" and "very small." Its arrival at this request has followed a decidedly convoluted path throughout this proceeding, metamorphosing from the written direct statements through the closing argument. Section 351.4(a)(3) of the Judges' rules, which governs the content of written direct statements, provides that in a rate proceeding, "each party must state its requested rate." IBS did not do this in plain fashion, instead including its request within the body of testimony of one of its three witnesses. Frederick J. Kass, Jr., the

"treasurer, director of operation (chief operating officer), and a director of" IBS stated that: "IBS Members should only pay for their direct use of the statutory license by the IBS Member. There should be no minimum fee greater than that which would reasonably approximate the annual direct use of the statutory license, not to exceed $25.00 annually." Kass WDT at 1, 9. However, Mr. Kass attached as an exhibit to his statement a joint petition to adopt an agreement negotiated between the RIAA, IBS, and the Harvard Radio Broadcasting, Co. that was submitted to the Copyright Office on August 26, 2004.[20] That agreement provided for a minimum annual fee of $500 for noncommercial educational webcasters, except that the fee was $250 for any noncommercial educational webcaster that affiliated with an educational institution with fewer than 10,000 enrolled students or where substantially all of the programming transmitted was classified as news, talk, sports or business programming. Kass WDT, Exhibit A at 5. Despite the inclusion of this exhibit, Mr. Kass expressly disavowed endorsement of its rates in the hearing on his written direct statement. Instead, he asserted that "the appropriate rates are what most people were paying in the marketplace for the direct use of the statutory license," without stating what that fee or amount should be. 4/22/10 Tr. at 779:22-780:2 (Kass). When the Judges questioned Mr. Kass as to exactly what was his rate

[20] The joint petition was submitted to the Copyright Office as a settlement of rates and terms for the sections 112 and 114 licenses for the period 2005 and 2006. It was not acted upon by the Office.

proposal, he responded that IBS members should pay only for their actual use of sound recordings and that the fee should be 50 cents per continuous listener per year to a station or channel,[21] not to exceed $25 per year. Id. at 781:3-792:12 (Kass). He then later characterized the $25 as a "flat fee" and concluded his testimony on this point that each IBS station should pay an annual $25 flat fee. Id. at 791:17-792:12 (Kass).

After the close of the direct case hearings and before the submission of written rebuttal cases, IBS filed a "Restatement of IBS' Rate Proposal." This proposal identified two new types of services: a "small noncommercial webcaster," described as a service with total performances of digitally recorded music less than 15,914 ATH per month or the equivalent; and a "very small noncommercial webcaster," described as a service with total performances of less than 6,365 ATH per month or the equivalent. For small noncommercial webcasters, IBS proposed a flat annual fee of $50, and for very small noncommercial webcasters a flat annual fee of $20. No mention was made of the broader category of noncommercial webcaster. On July 29, 2010, after the submission of written rebuttal cases, IBS filed an "Amplification of IBS' Restated Rate Proposal." This filing was far more than an amplification, because for the first time it proposed an annual minimum fee of $500 for

[21]This fee is very roughly derived from an agreement negotiated between the RIAA and the Corporation for Public Broadcasting under the Small Webcaster Settlement Act of 2002, which was submitted by IBS in the Webcaster II proceeding.

noncommercial webcasters per station or channel, along with annual minimum fees of $50 and $20 for small noncommercial webcasters and very small noncommercial webcasters, respectively. IBS also expressly endorsed SoundExchange's per performance rate proposal for the sections 114 and 112 licenses.[22] And, as an alternative to this rate structure, IBS proposed paying an annual lump sum of $10,000 to SoundExchange to cover all performances by IBS members that are not covered by a negotiated agreement. IBS added that "[i]f the amount of IBS members participating exceeds $10,000.00 there will be a true up within 15 days of the end of the year." Amplification of IBS' Restated Rate Proposal at 3 (July 29, 2010).[23]

During the hearings on the written rebuttal cases, SoundExchange objected to the testimony of Mr. Kass, IBS' only rebuttal witness, on the grounds that

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[22] IBS does not define "noncommercial webcaster," but the proposal suggests that it is a webcaster with no more than 159,140 ATH per month per station or channel, but no less than 15,915 ATH. The endorsement of the SoundExchange per performance proposal would then apply to the overage of 159,140 ATH. 9/30/10 Tr. at 651:11-652:21 (IBS Closing Argument).

[23] IBS does not explain what is meant by IBS members exceeding $10,000 in participation. However, the pleading does offer a number of annual statutory performances covered by the $50 annual minimum fees for small noncommercial webcasters (2,291,616) and very small noncommercial webcasters (916,646). Presumably, IBS is offering to pay additional unspecified amounts for those members that exceed that number of performances in a given year.

he did not verify his testimony as required by § 350.4(d) of the Judges' rules, and did not appear to know what was in his testimony.[24] The Judges granted the motion and his testimony was not admitted.[25] IBS sought reconsideration of the decision, which was denied. Order Denying IBS' Motion For Reconsideration of the Rulings Excluding Its Rebuttal Case, Docket No. 2009-1 CRB Webcasting III (August 18, 2010). Even if his testimony had been admitted, it did not contain support for IBS' new rate proposals, nor could it given that such testimony would be outside the scope of the rebuttal proceedings.

IBS changed its proposed rates one final time with the filing of its proposed findings of fact and conclusions of law. It withdrew its proposal of a $10,000 annual lump sum payment, and proposed regulatory language that permitted SoundExchange to accept unspecified collective payments on behalf of small and very small noncommercial webcasters.[26]

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[24] Section 350.4(d) provides that "[t]he testimony of each witness shall be accompanied by an affidavit or a declaration made pursuant to 28 U.S.C. 1746 supporting the testimony."

[25] It was apparent after voir dire of the witness that not only did he not comply with the verification rule in filing his written rebuttal statement, but that he was not familiar with substantial portions of his testimony, which had been drafted by IBS' counsel. 7/29/10 Tr. at 292:1-296:15 (Kass).

[26] To further roil the waters, IBS attached to its proposed findings its Amplification of IBS' Restated Rate Proposal

2. The Section 114 Noncommercial Webcaster Rates Determined by the Judges

The statutory standards that apply to the Judges' determination of section 114 rates for commercial webcasters apply with equal force to our consideration of rates for noncommercial webcasters. IBS requests that we distinguish between two different types of noncommercial webcasters—small and very small—within the broader category, thereby invoking the provision of section 114(f)(2)(B) that requires that rates (and terms) shall distinguish among different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

17 U.S.C. 114(f)(2)(B). IBS asks that we make such a distinction for small and very small noncommercial webcasters despite the fact that it has not presented one iota of evidence regarding the relative quantities of music used by these services,[27] nor the nature of their use of sound recordings covered by the

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which does contain the $10,000 lump sum payment language.

[27] IBS distinguishes between the services based upon the number of ATH, but ATH is not a measurement of the quantity of use of sound recordings covered by the section 114 license. It is only a time measurement of reception of a transmission.

license.[28] Likewise, it has completely failed to present any evidence that would enable the Judges to determine the degree to which these proposed services promoted or substituted for the purchase of phonorecords by consumers. IBS has done nothing more than create two arbitrary subcategories of noncommercial webcaster, separated by unsupported amounts of monthly aggregated tuning hours, in an effort to obtain lower royalty rates for its members. IBS has failed to satisfy the statutory burden of presenting evidence to enable the Judges to determine if distinctions within the noncommercial webcaster category are required or warranted, and there is nothing in the record of this proceeding that requires the Judges under section 114(f)(2)(B) to establish separate terms and rates for types of services other than noncommercial webcasters.

IBS' failure on this point is endemic to its failure to the even greater task at hand: The rates that would be negotiated in the marketplace between a willing buyer and willing seller. IBS' constantly changing rate proposals were not fashioned with this standard in mind (let alone the evidence to support it), but rather appeared to spring from some undefined meaning of "fairness," or more likely the impressions of Mr. Kass as to what his members would like to pay for statutory royalties. Indeed, even with respect to Mr. Kass' somewhat consistent mantra, that IBS members should not pay for any more than the music

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[28] Counsel for IBS conceded at closing argument that the record was devoid of evidence on this statutory requirement. 9/30/10 Tr. at 647:12-651:5 (IBS Closing Argument).

that they used, there was no proffer of evidence to demonstrate the nature or volume of that use, by what stations, or under what circumstances. The aridity of the record necessitates the rejection of IBS' proposal.

There is no dispute between SoundExchange and IBS that noncommercial webcasting is a distinct segment of the noninteractive webcasting market for which a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for commercial webcasters. SX PFF at)) 489-90; IBS PFF at)) 4, 26. There is also no dispute that the boundary of that submarket is marked by 159,140 ATH per month per station or channel and that any noncommercial webcaster exceeding this limitation should pay the commercial rates adopted in this proceeding for the overage. SX PFF at) 489; IBS PFF at) 26. There is a dispute as to the annual $500 minimum, recoupable fee (i.e., the flat fee rate) proposed by SoundExchange and adopted by the Judges in the Webcaster II proceeding. See 75 FR 56873 (September 17, 2010) (Remand order). IBS contends that many of its members cannot afford the fee and will cease webcasting activities, but it did not provide any financial records, data or other information, beyond bare allegations of its counsel and Mr. Kass, to support its claim. To the contrary, financial data obtained from IBS' witness John E. Murphy, General Manager of WHUS, licensed to the University of Connecticut, revealed that in 2009 WHUS generated total revenues of $527,364.21 and had a profit of $87,041.55. 4/21/10 Tr. at 583:1-

586:12 (Murphy).[29] Mr. Murphy was the only witness to present radio station financial data. Even Mr. Kass' statement that the average operating budget of IBS members is $9,000, though wholly unsupported by documentation, does not demonstrate a lack of ability to pay.[30] Three hundred and five noncommercial webcasters paid SoundExchange the $500 minimum fee in 2009 pursuant to the decision in Webcaster II, with an additional 58 services paying more for exceeding the ATH cap or streaming more than one station or channel. 75 FR 56874 (September 17, 2010) (Remand order). Twenty-four noncommercial educational stations endorsed the SoundExchange-CBI agreement which contains the same flat $500 fee. See supra at Section III.A. In sum, we reject IBS' contention that the $500 fee is not affordable and cannot represent what a willing buyer would pay in the hypothetical marketplace.

Having rejected in toto the contentions and claims of IBS,[31] we are persuaded that the presentation of

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[29] It was revealed that WHUS did not pay any statutory license fees in 2009 nor did it file required reports of use. 4/21/10 Tr. at 579:21-582:3, 594:5-600:2 (Murphy).

[30] Interestingly, IBS members pay an annual $125 membership fee to IBS, and pay $85 per person, or $480 per station, to attend IBS' annual conference in New York City, plus the cost of hotel rooms. 4/21/10 Tr. at 593:12-594:3 (Murphy).

[31] In its proposed findings, and for the first time in this proceeding, IBS contends that "Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses," and that as a consequence the Judges are required under the Regulatory Flexibility Act,

SoundExchange best represents the rates that would be paid in the willing buyer/willing seller hypothetical marketplace for noncommercial webcasting. The annual minimum fee of $500 per station or channel functions as the royalty payable for usage of sound recordings up to 159,140 ATH per month. This flat fee is the same that we adopted in

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5 U.S.C. 601(6), to determine whether the $500 fee unnecessarily burdens IBS' members. IBS PFF (Reformatted) at)) 10-13. There is no support in the text or legislative history of the Copyright Act for the proposition that section 114(f)(2) favors small businesses, and, indeed, IBS does not supply any. To the contrary, section 114(f)(2)(B) is very clear as to our task in this proceeding: To fashion rates (and terms) that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." IBS has also failed to support its contention that the Judges must conduct a Regulatory Flexibility Act assessment of impact of the $500 fee on IBS' members in particular. IBS has not supplied the Judges with any evidence to adduce whether its members are "small entities" within the meaning of 5 U.S.C. 601— IBS has not supplied us with any documentary evidence of its membership, even their names —nor has it demonstrated that the Regulatory Flexibility Act applies to rate proceedings before the Judges. See 5 U.S.C. 601(2) (exempting from the definition of a rule of a government agency "a rule of particular applicability relating to rates"); c.f. American Moving and Storage Assoc. v. DOD, 91 F.Supp.2d 132, 136 (D.D.C. 2000) (exception for "a rule of particular applicability relating to rates" is explicit and broad). In any event, the Judges did consider the circumstances of noncommercial webcasters, discussed above, in establishing the $500 fee.

Webcaster II and, as discussed above, is demonstrably affordable to noncommercial webcasters. We find that the SoundExchange-CBI agreement, which contains the very same fee and rate structure, and the 24 comments supporting it are corroborative evidence that our determination satisfies the statutory standard. As a minimum fee, and mindful of the Court of Appeals' admonition regarding evidence of administrative costs administering the licenses, Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd., 574 F.3d at 761 (DC Cir. 2009), we are persuaded that the testimony of Ms. Kessler as to estimates of average administrative costs per licensee shows that a $500 minimum fee for noncommercial webcasters is more than reasonable. SX PFF at) 484; see also 75 FR 56874 (September 17, 2010) (Remand order).

3. The Section 112 Noncommercial Webcaster Rates Determined by the Judges

Although there is not a stipulation as to the rates for the section 112 license for noncommercial webcasters as there is for commercial webcasters, supra at Section II.B.1, there is no disagreement between SoundExchange and IBS. SoundExchange proposes the same bundled rate approach for both the section 112 and 114 rights, five percent of which is allocated as the section 112 royalty for making ephemeral copies, and IBS endorses the proposal. SX PFF at)) 671; IBS PFF at) 24. The testimony offered by SoundExchange supports this proposal and we adopt it. SX PFF at)) 672-688.

IV. Terms

The standard for setting terms of payment is what the record reflects would have been agreed to by willing buyers and willing sellers in the marketplace. Webcaster II, 72 FR 24102 (May 1, 2007); see also Webcaster I, 67 FR 45266 (July 8, 2002). In Webcaster II, we further established that we are obligated to "adopt royalty payment and distribution terms that are practical and efficient." Webcaster II, 72 FR 24102 (May 1, 2007). The parties each submitted proposals of the terms that they believe satisfy both of these requirements.[32] SoundExchange based its proposal generally on the current terms as adopted in Webcaster II and the proceeding setting the sections 112 and 114 rates and terms for preexisting satellite digital audio radio services, with certain revisions, and proposed conforming editorial changes to the webcasting terms in light of changes made in that proceeding. SX PFF at) 549. Live365 proposed changes to the definitions of two terms in § 380.2 of the current webcasting regulations.[33] Live365 PFF at)) 382-87; Live365 PCL at)) 77-79. IBS proposed terms for noncommercial webcasters. IBS PFF at) 26.

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[32] CBI's proposal consisted of the terms contained in the agreement with SoundExchange submitted for adoption by the Judges. Since we are adopting that agreement, see supra at Section III.A., CBI's proposal will not be discussed here.

[33] Live365's request for an aggregator discount initially was proposed as a term. However, as discussed supra at Section II.B.5., the aggregator discount was handled in the section on proposed rates and thus will not be

SoundExchange and Live365 also stipulated to certain terms. See Stipulation of SoundExchange, Inc. and Live365, Inc. Regarding Certain Proposed Terms, Docket No. 2009-1 CRB Webcasting III (September 10, 2010) ("Joint Stipulation").

When adopting royalty terms, we also strive, where possible, to maintain consistency across the licenses set forth in sections 112 and 114 in order to maximize efficiency in and minimize the overall costs associated with the administration of the license. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services (Final rule and order), 73 FR 4080, 4098 (January 28, 2008) ("SDARS"). However, this goal is not overriding. We will vary terms across the licenses where a party can demonstrate the need for and the benefits of such variance. Id.

A. Collective

SoundExchange requests to be named the sole collective for the collection and distribution of royalties paid by commercial and noncommercial webcasters under the sections 112 and 114 licenses for the period 2011-2015. SX PFF at) 602; Second Revised Rates and Terms of SoundExchange, Inc., Docket No. 2009-1 CRB Webcasting III, at Proposed Regulations § 380.4(b) (July 23, 2010). Live365 takes no position regarding SoundExchange's request, Live365 RFF at) 602, and IBS does not appear to object, given its rate proposal refers to SoundExchange as the collective. See Amplification

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discussed here. See also, 9/30/10 Tr. at 615:5-22 (Live365 Closing Argument).

of IBS' Restated Rate Proposal, Docket No. 2009-1 CRB Webcasting III, at 2 (July 29, 2010).

We have determined previously that designation of a single Collective "presents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses." Webcaster II, 72 FR 24104 (May 1, 2007); see also SDARS, 73 FR 4099 (January 24, 2008). No party has submitted evidence that would compel us to alter that determination here. Indeed, no party requested the designation of multiple collectives, and SoundExchange was the only party requesting to be selected as a collective.[34]

SoundExchange (and its predecessor) has served as the Collective for the collection, processing and distribution of royalty payments made under the sections 112 and 114 statutory licenses since their inception thereby accumulating a wealth of knowledge and expertise in administering these licenses. See Kessler Corrected WDT at 4. Moreover, SoundExchange's designation as the sole Collective is supported by artists and copyright owners. See Roberts Hedgpeth WDT at 1-2; McCrady WDT at 19. This coupled with the absence of any opposition or record evidence to suggest that SoundExchange should not serve in that capacity here leads us to

[34] As noted supra at n.4, RLI filed a written direct statement but did not present oral testimony; therefore, their written direct statement was not considered. In any event, RLI did not seek designation as a Collective.

designate SoundExchange as the Collective for the 2011-2015 license period.

B. Stipulated Terms and Technical and Conforming Changes

On September 10, 2010, SoundExchange and Live365 submitted a stipulation regarding certain proposed terms in the Proposed Regulations appearing as an attachment to Second Revised Proposed Rates and Terms of SoundExchange, Inc. filed July 23, 2010. In several instances, they have stipulated that current provisions of the webcasting terms will remain unchanged. For example, SoundExchange and Live365 agree that the current definitions of the following terms in § 380.2 shall remain unchanged: "Commercial Webcaster," "Copyright Owners," "Ephemeral Recording," "Noncommercial Webcaster," "Performers," and "Qualified Auditor." Joint Stipulation, Exhibit A at 2-4 (September 10, 2010). Similarly, the current provisions of § 380.5 will remain unchanged. Id. at 9-11.

In other instances, stipulated terms consist of eliminating provisions which were solely applicable to the 2006-2010 license period (see, e.g., § 380.4(d)) and reflecting changes necessitated by the adoption of the NAB-SoundExchange and SoundExchange-CBI agreements (see, e.g., § 380.2 definition of "Licensee"). Id. at 3, 8.

We find that the stipulated terms constitute for the most part technical and non-controversial changes that will add to the clarity of the regulations adopted

today. Therefore, we are adopting the terms stipulated to by SoundExchange and Live365.

For these same reasons, we are adopting the technical and conforming changes proposed by SoundExchange, and not opposed by any party, in Section IV of their Second Revised Rates and Terms, filed July 23, 2010.

We now turn to those contested terms proposed for Commercial Webcasters.

C. Contested Terms for Commercial Webcasters

1. Terms Proposed by Live365

Live365 proposes changes to the definitions of two terms in § 380.2, namely, "performance" and "aggregate tuning hours."[35] Live365 PFF at) 387 and PCL at) 79. Specifically, Live365 proposes to modify the definition of "performance" to "exclude any performances of sound recording that are not more than thirty (30) consecutive seconds." Live365 PFF at) 387. According to Live365, this proposed modification conforms the definition of "performance" in § 380.2 to that of a "performance" or "play" as defined in the four interactive service agreements reviewed by Dr. Pelcovits. Id. Live365 also contends

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[35] In the proposed regulations attached to its proposed findings of fact, Live365 included an additional term: A proposed deadline for the completion and issuance of a report regarding an audit to verify royalty payments. See Attachment to Live365's Proposed Findings of Fact and Conclusions of Law, § 380.6(g). Since this proposal was not discussed in its proposed findings of fact and Live365 presented no evidence to support the need for such a term, we decline to adopt it.

that past precedent has excluded partial performances from "royalty-bearing" performances, citing to the Librarian's adoption of a settlement agreement among SoundExchange, AFTRA, the American Federation of Musicians of the United States and Canada, and Digital Media Association which excluded from payment performances that suffered technical interruptions or the closing down of a media player or channel switching. Live365 PCL at) 78, citing Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket Nos. 2002-1 CARP DTRA3 & 2001-2 CARP DTNSRA, 74 FR 27506, 27509 (May 20, 2003).

Similarly, Live365 seeks to revise the current definition of "aggregate tuning hours" to exclude programming that does not contain sound recordings such as talk, sports, and advertising not containing sound recordings. Live365 PCL at) 79. Live365 justifies its request by asserting that "programming without sound recordings should not be subject to consideration in regulations dealing with a royalty to be paid for the use of sound recordings." Id.

SoundExchange vehemently opposes adoption of either proposed modification. First, SoundExchange contends that these proposed modifications constitute new terms, not a revision to an existing proposal, in violation of § 351.4(b)(3) which allows for revision of a rate proposal at any time up to and including submission of proposed findings of fact.[36] SX RFF at) 223. Next, SoundExchange asserts that

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[36] We need not address the validity of this argument since we decline to adopt this term on other grounds.

Live365's citation to the four interactive service agreements without more does not provide sufficient record support for either the need for or benefit of this request. Id. at)) 226-228. With regard to the request to redefine "aggregate tuning hours," SoundExchange argues that Live365 fails to point to anything in the record explaining, much less supporting, the need for such proposal. Id. at)) 231-232. Finally, SoundExchange points to Live365's failure to consider the potential effect of its definition of "performance" on the per-performance rate as yet another reason not to accept Live365's proposal. Id. at) 230. Were Live365's definition adopted, SoundExchange contends that an upward adjustment would be needed to the per-performance rate since neither Drs. Pelcovits nor Fratrik excluded performances of less than 30 seconds in the calculation of their respective per-performance rates.[37] Id.

The Judges decline to adopt either of Live365's proposed definitions. Live365 has provided insufficient record support for either of its proposals. This is especially true with regard to its proposed definition of "aggregate tuning hours." It appears for the first time in Live365's proposed conclusions of law without any citation to the record or any substantive explanation as to why such a change is needed or what benefits would result from its adoption. All Live365 has provided is the

[37] According to SoundExchange, the upward adjustment would result from a reduction in the number of plays in the calculation of a per-performance rate. SX RFF at) 230.

unsupported assertions of counsel. Thus, Live365 has not met its burden regarding adoption of this term. See SDARS, 73 FR 4101 (January 28, 2008) (refusal to adopt bare proposals unsupported by record evidence).

Likewise, Live365 has not met its burden with respect to adoption of its proffered definition of "performance." Neither the mere citation to the four interactive service agreements in the record here without more nor a reference to a settlement agreement adopted by the Librarian in a CARP proceeding demonstrates that a willing buyer and a willing seller would agree to such a term in the non-interactive market. Live365 simply states that its requested definition conforms to the definitions of "performance" and "play" in the agreements reviewed by Dr. Pelcovits with no discussion of or cited support for why such conformance is needed or beneficial or even appropriate here.

Live365's reference to adoption by the Librarian of the settlement agreement in a prior CARP proceeding is unpersuasive. As with its proposal regarding aggregate tuning hours, this justification is offered for the first time in Live365's proposed conclusions of law. Thus, like its proposed definition for aggregate tuning hours, the proffered justification amounts to nothing more than an unsupported argument of counsel.

More importantly, as SoundExchange correctly observes, since neither Dr. Pelcovits nor Dr. Fratrik excluded performances from the calculation of their respective per-performance rates, there would be fewer plays in such calculations, thereby

necessitating an upward adjustment to the per-performance rates. Live365 never acknowledges this effect much less addresses how to make the adjustment. See SX RFF at) 230. The lack of supportive evidence presented by Live365 when combined with the potential problematic effect on the per-performance rates requires rejection of this term.

2. Terms Proposed by SoundExchange

SoundExchange proposes several terms. We note at the outset that several of SoundExchange's proposed terms are contained in some or all of the WSA agreements, including the NAB-SoundExchange and SoundExchange-CBI agreements adopted herein. Parties are free to agree to whatever terms they choose. When such agreement is submitted to the Judges for adoption, we are obligated to adopt said agreement in the absence of objections after publication in the Federal Register. 17 U.S.C. 801(b)(7)(A); see supra at Section II.A. However, when parties litigate over the adoption of a term, even one that is contained in an adopted agreement, the requesting party must meet its burden with respect to the standards set forth supra.

Evaluating SoundExchange's proposals in this light, we find that SoundExchange has not met its burden.

a. Server Log Retention

SoundExchange urges the Judges to clarify that server logs are among the records to be retained for three years pursuant to § 380.4(h) and to be made available during an audit conducted pursuant to § 380.6. See Second Revised Rates and Terms of SoundExchange, Inc., Section III.A., Proposed

Regulations, § 380.4(h) (July 23, 2010); Kessler Corrected WDT at 27. Although SoundExchange believes that retention of these records is required under the current regulations, it requests an amendment to include server logs since oftentimes such logs are not retained. SX PFF at)) 556-57; Kessler Corrected WDT at 27. SoundExchange asserts that "[t]he evidence indicates marketplace acceptance of such a term," citing to the SoundExchange- CBI agreement which contains an equivalent term. SX PFF at) 555.

In its opposition to this term, Live365 notes that neither the NAB-SoundExchange agreement nor the Commercial Webcasters agreement contains this term nor do any of the interactive service agreements submitted in this proceeding. Live365 RFF at) 555. Live365 further argues that SoundExchange failed to establish how the benefits to SoundExchange of this term outweigh the burden on licensees to comply. Id. at) 557.

Section 380.4(h), which governs the retention of records, requires licensees to retain "books and records" relating to royalty payments. The language does not include server logs and SoundExchange's assumption that it does is incorrect. The question remains, however, whether server logs should be included, and the Judges answer in the negative because the record evidence does not support such a finding. None of the interactive agreements in evidence here contain such specificity. Live365 Exs. 17 and 18; McCrady WDT, Exs. 104-DR & 106-DR. Rather, the agreements require licensees only to retain records relating to their obligations under the

agreement and in terms no more specific than in the current regulation. See, e.g., Live365 Exs. 17 at) 7(h) and Ex. 18 at) 7(h); McCrady WDT, Exs. 104-DR at) 6(j) and 106-DR at) 4(h). Since these agreements were negotiated in a setting free from the constraints of the regulatory scheme, they provide the best evidence of the agreement of a willing buyer and a willing seller in this respect.

We disagree with SoundExchange's assertion that inclusion of this term in the SoundExchange-CBI WSA agreement constitutes "marketplace acceptance." As discussed supra and as acknowledged by SoundExchange, such agreements were reached under atypical marketplace conditions, since their negotiations were overshadowed by the possibility of a regulatory proceeding. See supra at Section II.B.3.b.ii.; see also 9/30/10 Tr. at 547:20-548:5 (SoundExchange Closing Argument). Furthermore, while the SoundExchange-CBI agreement contains the term, the NAB-SoundExchange and Commercial Webcasters agreements do not despite the assertion of Ms. Kessler that server logs contain data that is "critical for verifying that licensees have made the proper payments." Kessler Corrected WDT at 27; see also 4/20/10 Tr. at 455:15-17 (Kessler). If such data is "critical," it is difficult to understand why server logs were not included in the NAB-SoundExchange and Commercial Webcasters agreements, particularly where these agreement were negotiated by SoundExchange and cover "webcasters representing a substantial part of [the webcasting] market." 9/30/10 Tr. at 508:3-4 (SoundExchange Closing Argument); see supra at Section II.B.3.b.ii.

Finally, retention of server logs for a three-year period may present significant issues to webcasters regarding storage and costs. No evidence was adduced by SoundExchange as to these important considerations, and the Judges are hesitant to adopt a term without such data. In sum, SoundExchange's request for retention of server logs appears to be more of a want than a need, and we decline to amend § 380.4(h) of our rules.

b. Standardized Forms for Statements of Account

SoundExchange proposes to require licensees to submit statements of account on a standardized form prescribed by SoundExchange in order to simplify licensees' calculations of the royalties owed and to facilitate SoundExchange's ability to efficiently collect information from licensees. SX PFF at)) 572, 575. SoundExchange currently provides a template statement of account on its Web site. Id. at) 574. SoundExchange notes that noncommercial educational webcasters are required pursuant to their WSA agreement to use a form supplied by SoundExchange. McCrady WDT, Ex. 103-DP at section 4.4.1.

Live365 opposes adoption of this term on the grounds that it is addressed more appropriately in a notice and recordkeeping proceeding. Live365 RFF at) 574.

We are not persuaded that a need for mandatory use of a standardized statement of account exists at this time nor do we find support in the record for adoption of this term. As Mr. Funn testified, the majority of webcasters currently use the template

form made available on SoundExchange's Web site. Funn WRT at 2; 8/2/10 Tr. at 492:2-3 (Funn) ("much more than half" of webcasters currently use template). Mr. Funn provided no information quantifying the additional work for SoundExchange to process a statement of account for the few webcasters who choose not to use the template. The only example given in this regard focused on Live365 and its submission of an altered form using incorrect rates, which is irrelevant to SoundExchange's request. See Funn WDT at 3-4; 8/2/10 Tr. at 465:19-22 (Funn).

Our skepticism regarding the need to require use of a standardized form also stems from the fact that neither the NABSoundExchange WSA agreement nor the Commercial Webcasters WSA agreement contains this term. McCrady WDT, Exs. 101-DP and 102-DP. Moreover, although the SoundExchange-CBI WSA agreement requires use of a SoundExchange-supplied form, see McCrady WDT, Ex. 103-DP at section 4.4.1, such language was not included in the SoundExchange-CBI agreement submitted to the Judges and adopted herein. See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Proposed rule), 75 FR 16377, 16385 (§ 380.23(f)) (April 1, 2010).

Given the already widespread use of SoundExchange's template form, the lack of quantification in the record of the time savings to SoundExchange by having a standardized form, and SoundExchange's failure to include this term in the NABSoundExchange and Commercial Webcasters WSA agreements or the SoundExchange-CBI

agreement submitted to the Judges, we find that the record before us does not support the adoption of this term.

c. Electronic Signature on Statement of Account

SoundExchange seeks to eliminate the requirement in the current § 380.4(f)(3) of a handwritten signature on the statement of account. SX PFF at) 576. According to SoundExchange, allowing electronic signatures would make it easier for licensees to submit their statements of account. Id., citing Funn WRT at 3 n.1. SoundExchange further asserts that "none [of the WSA agreements in evidence] requires that statements of account bear a handwritten signature." SX PFF at) 577.

Live365 does not oppose this request as its own proposed regulations eliminate the requirement for a handwritten signature on the statement of account. See Attachment to PFF, Proposed Regulations, § 380.4(f)(3).

The Judges determine that the record evidence does not support adoption of this term. The WSA agreements, as submitted as exhibits to Mr. McCrady's written direct testimony do, despite SoundExchange's assertions to the contrary, require a handwritten signature on a statement of account. SoundExchange is correct that each agreement requires statements of account to be provided each month, although neither agreement sets forth the specific information to be included. See McCrady WDT, Ex. 101-DP at section 4.6 (NAB), Ex. 102-DP at section 4.5 (Commercial Webcasters), and Ex. 103-

DP at section 4.4.1 (CBI). However, SoundExchange ignores the provision in each agreement which states "[t]o the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms." See McCrady WDT, Ex. 101-DP at section 6.1 (NAB), Ex. 102-DP at section 5.1 (Commercial Webcasters) and Ex. 103-DP at section 6.1 (CBI). Current § 380.4(f)(3) requires a handwritten signature; such requirement is not inconsistent with the agreements' general requirement to simply submit statements of account. Our interpretation is confirmed by the fact that the NAB-SoundExchange and SoundExchange-CBI WSA agreements submitted to the Judges for adoption here each retained the requirement for a handwritten signature. See Proposed rule, 75 FR 16380 (§ 380.13(f)(3)), 16385 (§ 380.23(f)(4)) (April 1, 2010). Since we are adopting those provisions as proposed on April 1, 2010, to accept SoundExchange's proposal here would create an inconsistency in terms that does not exist currently.

d. Identification of Licensees and Late Fee for Reports of Use

SoundExchange requests that the Judges harmonize identification of licensees among the notice of intent to use the sections 112 and 114 licenses, the statements of account and the reports of use, and to impose a late fee for reports of use. These two requests differ from the rest of their requests in that these are notice and recordkeeping terms .38 39 See Kessler Corrected WDT at 20-23, 27-28. This is not the first time we have been asked to adopt terms

regarding notice and recordkeeping in this context. Webcaster II, 72 FR 24109 (May 1, 2007); SDARS, 73 FR 4101 (January 28, 2008). While the Copyright Act grants us the authority to adopt such terms here (said terms would supersede those set forth in 37 CFR Part 370), such authority is discretionary. 17 U.S.C. 803(c)(3). To date, we have declined to exercise this discretion. Webcaster II, 72 FR at 24109-10 (May 1, 2007); SDARS, 73 FR at 4101 (January 28, 2008).

Our prior refusals stemmed from our findings that the issues presented, such as census reporting, were more appropriately addressed in the context of a rulemaking proceeding and that "no persuasive testimony compelling an adjustment of the current recordkeeping regulations" was presented in either instance. SDARS, 73 FR 4101 (January 28, 2008), citing Webcaster II, 72 FR 24110 (May 1, 2007). In light of the record before us, we decline to adopt SoundExchange's proposals regarding the harmonization of licensee identification and the imposition of a late fee for reports of use because the evidence does not compel us to amend the current recordkeeping regulations here; rather, these issues are more appropriately addressed in a future rulemaking proceeding, for the reasons discussed below.

i. Identification of Licensees

SoundExchange asserts that harmonization of the identification of licensees can be accomplished by (1) requiring licensees to identify themselves on their statements of account and reports of use "in exactly the same way [they are] identified on the

corresponding notice of use * * * and that they cover the same scope of activity (e.g., the same channels or stations)," SX PFF at) 568, Kessler Corrected WDT at 28; (2) making the regulations clear that the "Licensee" is "the entity identified on the notice of use, statement of account, and report of use and that each Licensee must submit its own notice of use, statement of account, and report of use," id. (emphasis in original); and (3) requiring licensees to use an account number issued by SoundExchange. Id. at) 571. In support of these requests, Ms. Kessler testified that these proposals would allow SoundExchange to more quickly and efficiently match the requisite notice of use, statement of account and report of use to the correct licensee. Kessler Corrected WDT at 29; 4/20/10 Tr. at 461:2-8 (Kessler). She also claims that such requirements would impose "little or no evident cost" to licensees, and licensees' accounting and reporting efforts would be simplified by use of an account number. Kessler Corrected WDT at 29. SoundExchange also points out that these proposals are included in the NAB-SoundExchange and SoundExchange-CBI agreements.[38] SX PFF at) 569.

While Live365 does not dispute SoundExchange's proposed findings of fact on this issue, it did not stipulate to the language provided by SoundExchange.

These claims are not sufficiently supported in the record. For instance, there is nothing in the record

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[38] We note that neither agreement mandates the use of an account number.

that supports Ms. Kessler's assertion regarding the potential costs, or lack thereof, to licensees in complying with such a requirement. Without input from licensees regarding such information, we are reluctant to adopt such a proposal. Similarly, there is insufficient evidence to support mandating the use of an account number. None of the WSA agreements in evidence contain such a provision. McCrady WDT, Exs. 101-DP (NAB), 102-DP (Commercial Webcasters) and 103-DP (CBI). All that exists is Ms. Kessler's assertion that use of an account number may simplify a licensee's accounting and reporting. Kessler Corrected WDT at 29. Moreover, while the SoundExchange-CBI agreement as adopted herein requires that statements of account list the licensee's name as it appears on the notice of use, see § 380.23(f)(1), it does not impose that requirement with regard to reports of use. Compare McCrady Ex. 103-DP, section 5.2.2 with § 380.23(g). Thus, even if we adopted SoundExchange's proposal, there would still be an inconsistency within the webcasting regulations. We are, therefore, not persuaded that such a proposal should be adopted here; rather, this issue is more appropriately addressed in a future rulemaking proceeding.

ii. Late Fee for Reports of Use

SoundExchange seeks the imposition of the same late fee of 1.5% for reports of use as currently exists for late payments and statements of account. See 37 CFR 380.4(c). In support of its request, SoundExchange proffered the testimony of Ms. Kessler. She testified that currently there is widespread noncompliance with reporting

requirements, either failure to file a report of use at all or provision of late and/or "grossly inadequate" reports. Kessler Corrected WDT at 28. Given that a report of use is "a critical element in the fair and efficient distribution of the royalties," 4/20/10 Tr. at 458:21-22 (Kessler), such noncompliance significantly hampers SoundExchange's ability to timely distribute the royalties. Kessler Corrected WDT at 28. Ms. Kessler further noted "that late fees in other areas does [sic] help with our compliance situation." 4/20/10 Tr. at 458:19-20 (Kessler). SoundExchange also points to the inclusion of a late fee for untimely reports of use in the NAB-SoundExchange and SoundExchange-CBI WSA agreements as further support for its request. SX PFF at) 564. Live365 questions SoundExchange's characterization of a payment as being useless without a report of use given that both the NAB-SoundExchange and CBI-SoundExchange agreements contain reporting waivers. Live365 RCL at) 20.

We are not persuaded by the record before us that there is a need to adopt a late fee for reports of use in this context. The record evidence does not show that a willing buyer and a willing seller would agree to a late fee with respect to reporting, as none of the interactive agreements in evidence contain such a term. Live365 Exs. 17, 18; McCrady WDT, Exs.104-DR and 106-DR. Although the NAB-SoundExchange and SoundExchange-CBI WSA agreements do contain the late fee, they were negotiated under the shadow of a regulatory proceeding, and we note that this late fee was not included in the Commercial

Webcasters WSA agreement negotiated by SoundExchange.

D. Contested Terms for Noncommercial Webcasters

IBS has proposed two terms. The first is an exemption from the recordkeeping reporting requirements for the small and very small noncommercial webcaster subcategories it proposed in its rate request. As discussed, supra, the Judges declined to recognize the proffered subcategories, thus making IBS' request for recordkeeping reporting exemptions moot. The second term proposed by IBS is an express authorization that SoundExchange "may elect to accept collective payments on behalf of small and very small noncommercial webcasters." IBS PFF at) 26. This request is also moot.[39]

V. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact based on the record. Relying on these Findings of Fact, the Copyright Royalty Judges unanimously adopt this Final Determination of Rates and Terms for the statutory licenses for the digital audio transmission of sound recordings, pursuant to 17 U.S.C. 114, and for the making of ephemeral

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[39] Even if the request were not moot, it seems unnecessary. SoundExchange is authorized, by virtue of its recognition as the collective under the sections 112 and 114 licenses, to accept payments on behalf of copyright owners, from one or more users of the licenses.

phonorecords, pursuant to 17 U.S.C. 112(e), for the license period 2011-2015.

So ordered.

Dated: January 5, 2011.

James Scott Sledge,

Chief U.S. Copyright Royalty Judge.

William J. Roberts, Jr.,

U.S. Copyright Royalty Judge.

Stanley C. Wisniewski,

U.S. Copyright Royalty Judge.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Subpart A—Commercial Webcasters and Noncommercial Webcasters

Sec.

380.1 General.

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

Subpart A—Commercial Webcasters and Noncommercial Webcasters

37 CFR § 380.1

§ 380.1 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 as set forth in this subpart 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 January 1, 2011, through December 31, 2015.

(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.

37 CFR § 380.2

§ 380.2 Definitions.

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

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is

licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

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).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that 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, but that is not—

(1) A Broadcaster as defined in § 380.11; or

(2) A Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) 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

(ii) 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).

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.

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

37 CFR § 380.3

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

(a) Royalty rates. Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) Commercial Webcasters: For all digital audio transmissions, including simultaneous digital audio

retransmissions of overthe- air AM or FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(2) Noncommercial Webcasters: (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2011, 2012, 2013, 2014, and 2015.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(b) Minimum fee—(1) Commercial Webcasters. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011-2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each

individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than $50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) Noncommercial Webcasters. Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011-2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) Ephemeral recordings. The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

37 CFR § 380.4

§ 380.4 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 § 380.3 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 § 380.3 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(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced 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 this paragraph (b)(2), 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(g) 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 § 380.3 on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) 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 related statement of account are received by the Collective.

(f) Statements of account. Any payment due under § 380.3 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 payment;

(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:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

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

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

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

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) 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

(g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 380.8.

(h) 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.

37 CFR § 380.5

§ 380.5 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 § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(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.

37 CFR § 380.6

§ 380.6 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 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.

37 CFR § 380.7

§ 380.7 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 or 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.

37 CFR § 380.8

§ 380.8 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—Broadcasters

37 CFR § 380.10

§ 380.10 General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) Legal compliance. Broadcasters 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 not inconsistent with the rates and terms set forth herein.

(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 digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

37 CFR § 380.11

§ 380.11 Definitions.

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

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that:

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are

retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 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).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible 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).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a

compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) 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

(ii) 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).

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.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and

stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011-2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of "Small Broadcaster" if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

37 CFR § 380.12

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

(a) Royalty rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(b) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes

Eligible Transmissions, for each calendar year or part of a calendar year during 2011-2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the "Proxy Fee") to the Collective for the reporting waiver discussed in § 380.13(g)(2).

37 CFR § 380.13

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

(a) Payment to the Collective. A Broadcaster shall make the royalty payments due under § 380.12 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 Broadcasters due under § 380.12 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) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced 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 this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board 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(g) that have themselves authorized such 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 and reporting. Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day

following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) Late fees. A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) Statements of account. Any payment due under § 380.12 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 payment;

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

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

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

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation 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 owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) Reporting by Broadcasters in General. (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g) (2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective

report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small

Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to this paragraph (g)(3), the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) Election of Small Broadcaster Status. To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at http://www.soundexchange.com) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Broadcasters 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 and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph

(g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first 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.

(j) Retention of records. Books and records of a Broadcaster 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.

37 CFR § 380.14

§ 380.14 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 Broadcaster 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 Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(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 Broadcaster 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 not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

37 CFR § 380.15

§ 380.15 Verification of royalty payments.

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

(b) Frequency of verification. The Collective may conduct a single audit of a Broadcaster, 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 Board a notice of intent to audit a particular Broadcaster, 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 Broadcaster 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 Broadcaster 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 Broadcaster 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 Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error 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 Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

37 CFR § 380.16

§ 380.16 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 or Performer must file with the Copyright Royalty Board 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.

37 CFR § 380.17

§ 380.17 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.

Subpart C—Noncommercial Educational Webcasters

37 CFR § 380.20

§ 380.20 General.

(a) Scope. This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) Legal compliance. Noncommercial Educational Webcasters 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 not inconsistent with the rates and terms set forth herein.

(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 digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

37 CFR § 380.21

§ 380.21 Definitions.

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

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 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).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible 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).

Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically

accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(4) Is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) 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

(ii) 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).

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.

37 CFR § 380.22

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

(a) Minimum fee. Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the "Minimum Fee") for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a $100 annual fee (the "Proxy Fee") to the Collective.

(b) Additional usage fees. If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning

Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees ("Usage Fees") for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report

ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs

(a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

37 CFR § 380.23

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

(a) Payment to the Collective. A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 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 Noncommercial Educational Webcasters due under § 380.22 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(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced 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 this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board 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(g) that have themselves authorized such 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) Minimum fee. Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated,

on a form provided by the Collective, that the Noncommercial Educational Webcaster.

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) Usage fees. In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) Late fees. A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per

month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) Statements of account. Any payment due under § 380.22 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

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

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

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

(6) The date of signature;

(7) The title or official position held by the person signing the statement of account;

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

(9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) Reporting by Noncommercial Educational Webcasters in general— (1) Reporting waiver. In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of $100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total

ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) Sample-basis reports. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at §

370.4 of this chapter, except that, notwithstanding § 370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) Census-basis reports. If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to this paragraph (g)(3) shall provide reports of use to the Collective quarterly on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant quarter),

containing information otherwise complying with applicable regulations (but no less information than required by § 370.4 of this chapter), except that, notwithstanding § 370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with this paragraph (g)(3). For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this paragraph (g)(3) for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under this paragraph (g)(3) shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters 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 and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.4 of this chapter and this subpart, except that

in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, 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.

(i) Server logs. Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and

maintained by, the Noncommercial Educational Webcaster.

37 CFR § 380.24

§ 380.24 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 Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster 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 Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(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 Noncommercial Educational Webcaster 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.

37 CFR § 380.25

§ 380.25 Verification of royalty payments.

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) Frequency of verification. The Collective may conduct a single audit of a Noncommercial Educational Webcaster, 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 Board a notice of intent to audit a particular Noncommercial Educational Webcaster, 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 Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) Acquisition and retention of report. The Noncommercial Educational Webcaster 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 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 Noncommercial Educational Webcaster 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 Noncommercial Educational Webcaster 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 Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment,

bear the reasonable costs of the verification procedure.

37 CFR § 380.26

§ 380.26 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 or Performer must file with the Copyright Royalty Board 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 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 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.

37 CFR § 380.27

§ 380.27 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.

Dated: January 5, 2011.

James Scott Sledge,

Chief U.S. Copyright Royalty Judge.

Approved by:

James H. Billington,

Librarian of Congress.

APPENDIX E

Relevant Portions of United States Code

UNITED STATES CODE ANNOTATED

Const. Art. II § 2, cl. 2

…[H]e [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

UNITED STATES CODE
Title 17: Copyrights

Section 114
Scope of Exclusive Rights in Sound Recordings

17 U.S.C. § 114(f)(2)(B)

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base

their decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

UNITED STATES CODE
Title 17: Copyrights

Section 801
Copyright Royalty Judges; Appointment and Functions

17 U.S.C. § 801(a)-(b)(1)

(a) Appointment.—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint 1 of the 3 as the Chief Copyright Royalty Judge. The Librarian shall make appointments to such positions after consultation with the Register of Copyrights.

(b) Functions.–Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

(1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product

made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

UNITED STATES CODE
Title 17: Copyrights

Section 802
Copyright Royalty Judges; Staff

17 U.S.C. § 802(f)-(i)

(f) Independence of Copyright Royalty Judge.—

(1) In making determinations.—

(A) In general.—

(i) Subject to subparagraph (B) and clause (ii) of this subparagraph, the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact.

(ii) One or more Copyright Royalty Judges may, or by motion to the Copyright Royalty Judges, any participant in a proceeding may, request from the Register of Copyrights an interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the

course of the proceeding. Any request for a written interpretation shall be in writing and on the record, and reasonable provision shall be made to permit participants in the proceeding to comment on the material questions of substantive law in a manner that minimizes duplication and delay. Except as provided in subparagraph (B), the Register of Copyrights shall deliver to the Copyright Royalty Judges a written response within 14 days after the receipt of all briefs and comments from the participants. The Copyright Royalty Judges shall apply the legal interpretation embodied in the response of the Register of Copyrights if it is timely delivered, and the response shall be included in the record that accompanies the final determination. The authority under this clause shall not be construed to authorize the Register of Copyrights to provide an interpretation of questions of procedure before the Copyright Royalty Judges, the ultimate adjustments and determinations of copyright royalty rates and terms, the ultimate distribution of copyright royalties, or the acceptance or rejection of royalty claims, rate adjustment petitions, or petitions to participate in a proceeding.

(B) Novel questions.—

(i) In any case in which a novel material question of substantive law concerning an interpretation of those provisions of this title

that are the subject of the proceeding is presented, the Copyright Royalty Judges shall request a decision of the Register of Copyrights, in writing, to resolve such novel question. Reasonable provision shall be made for comment on such request by the participants in the proceeding, in such a way as to minimize duplication and delay. The Register of Copyrights shall transmit his or her decision to the Copyright Royalty Judges within 30 days after the Register of Copyrights receives all of the briefs or comments of the participants. Such decision shall be in writing and included by the Copyright Royalty Judges in the record that accompanies their final determination. If such a decision is timely delivered to the Copyright Royalty Judges, the Copyright Royalty Judges shall apply the legal determinations embodied in the decision of the Register of Copyrights in resolving material questions of substantive law.

(ii) In clause (i), a 'novel question of law' is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

(C) Consultation.—Notwithstanding the provisions of subparagraph (A), the Copyright Royalty Judges shall consult with the Register of Copyrights with respect to any determination or ruling that would require that any act be performed by the Copyright

Office, and any such determination or ruling shall not be binding upon the Register of Copyrights.

(D) Review of legal conclusions by the Register of Copyrights.—The Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges. If the Register of Copyrights concludes, after taking into consideration the views of the participants in the proceeding, that any resolution reached by the Copyright Royalty Judges was in material error, the Register of Copyrights shall issue a written decision correcting such legal error, which shall be made part of the record of the proceeding. The Register of Copyrights shall issue such written decision not later than 60 days after the date on which the final determination by the Copyright Royalty Judges is issued. Additionally, the Register of Copyrights shall cause to be published in the Federal Register such written decision, together with a specific identification of the legal conclusion of the Copyright Royalty Judges that is determined to be erroneous. As to conclusions of substantive law involving an interpretation of the statutory provisions of this title, the decision of the Register of Copyrights shall be binding as precedent upon the Copyright Royalty Judges in subsequent

proceedings under this chapter. When a decision has been rendered pursuant to this subparagraph, the Register of Copyrights may, on the basis of and in accordance with such decision, intervene as of right in any appeal of a final determination of the Copyright Royalty Judges pursuant to section 803(d) in the United States Court of Appeals for the District of Columbia Circuit. If, prior to intervening in such an appeal, the Register of Copyrights gives notification to, and undertakes to consult with, the Attorney General with respect to such intervention, and the Attorney General fails, within a reasonable period after receiving such notification, to intervene in such appeal, the Register of Copyrights may intervene in such appeal in his or her own name by any attorney designated by the Register of Copyrights for such purpose. Intervention by the Register of Copyrights in his or her own name shall not preclude the Attorney General from intervening on behalf of the United States in such an appeal as may be otherwise provided or required by law.

(E) Effect on judicial review.—Nothing in this section shall be interpreted to alter the standard applied by a court in reviewing legal determinations involving an interpretation or construction of the provisions of this title or to affect the extent to which any construction or interpretation of the provisions of this title shall be accorded deference by a reviewing court.

(2) Performance appraisals.—

(A) In general.—Notwithstanding any other provision of law or any regulation of the Library of Congress, and subject to subparagraph (B), the Copyright Royalty Judges shall not receive performance appraisals.

(B) Relating to sanction or removal.—To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copyright Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

(g) Inconsistent duties barred.—No Copyright Royalty Judge may undertake duties that conflict with his or her duties and responsibilities as a Copyright Royalty Judge.

(h) Standards of conduct.—The Librarian of Congress shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against ex parte communications, which shall govern the Copyright Royalty Judges and the proceedings under this chapter.

(i) Removal or sanction.—The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted

under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Royalty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension.

UNITED STATES CODE
Title 17: Copyrights

Section 803
Proceedings Copyright Royalty Judges

17 U.S.C. § 803(d)(1)&(3)

(d) Judicial review.—

(1) Appeal.—Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any aggrieved participant in the proceeding under subsection (b)(2) who fully participated in the proceeding and who would be bound by the determination. Any participant that did not participate in a rehearing may not raise any issue that was the subject of that rehearing at any stage of judicial review of the hearing determination. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges shall be final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in paragraph (2).

. . .

(3) Jurisdiction of court.—Section 706 of title 5 shall apply with respect to review by the court of appeals under this subsection. If the court modifies or vacates a determination of the Copyright Royalty Judges, the court may enter its

own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).