

public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

17 U.S.C. 114(f)(5)(C) (2002).

Request for Publication of Negotiated Rates and Terms Available to Certain Noncommercial Webcasters

On June 2, 2003, SoundExchange, and a group of membership organizations, including American Council on Education, Collegiate Broadcasters, Inc., the Intercollegiate Broadcasting System, Inc., Harvard Radio Broadcasting Co., Inc., and the National Religious Broadcasters Music License Committee, on behalf of their members and/or stations that operate or plan to operate noncommercial webcasting services, notified the Copyright Office that they had negotiated such an agreement for the reproduction and performance of sound recordings by noncommercial webcasters under the section 112 and section 114 statutory licenses, and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under section 114(f)(5)(B) of the Copyright Act, as amended by the SWSA.

Thus, in accordance with the requirement set forth in amended section 114(f)(5)(B), the Copyright Office is publishing the submitted agreement, as Appendix A, thereby making the rates and terms in the agreement available to any noncommercial webcaster meeting the eligibility conditions of the agreement as an alternative to the rates and terms announced by the Librarian in his July 8, 2002 order. Moreover, publication of the agreement in the **Federal Register** makes the agreement binding on all copyright owners of sound recordings and other persons entitled to payment under section 114 in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress and fulfills the Copyright Office's responsibility with respect to this agreement.

Beyond publication of this document, the Copyright Office has no

responsibility for administering the rates and terms of the agreement. For this reason, questions regarding the rates and terms set forth in this agreement should be directed to SoundExchange (for contact information, see <http://www.soundexchange.com>). Similarly, questions regarding the previously published agreement between SoundExchange and small commercial webcasters should also be directed to SoundExchange.

Dated: June 6, 2003.

Marybeth Peters,
Register of Copyrights.

Note: This appendix will not be codified in Title 37, part 261, of the Code of Federal Regulations.

Appendix A

Rates and Terms Available to Certain Noncommercial Webcasters

1. General

(a) *Availability of Rates and Terms.* The rates and terms set forth herein (the "Rates and Terms") cover the making of public performances of sound recordings by means of digital audio transmissions under the statutory license of 17 U.S.C. 114 by "Noncommercial Webcasters" (as defined in Section 9(e) hereof), and the reproduction of ephemeral recordings used solely to facilitate such transmissions under the statutory license of 17 U.S.C. 112(e), during the period beginning on October 28, 1998, and ending on December 31, 2004. A Noncommercial Webcaster may elect to be subject to these Rates and Terms, in their entirety, by complying with the procedure set forth in Section 2 hereof.

(b) *Relationship to Other Provisions.* Subject to Section 7, any Noncommercial Webcaster relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 under these Rates and Terms shall comply with the requirements of 17 U.S.C. 112 and 114, these Rates and Terms and other governing provisions established by the Copyright Office. Any terms determined in accordance with 17 U.S.C. 112 and 114 and applicable to the collection and distribution by SoundExchange of payments under 17 U.S.C. 112 and 114 from commercial eligible nonsubscription transmission services (e.g. terms relating to distribution of royalties by SoundExchange, deductions from distributions, unclaimed funds, possible designation of successors to SoundExchange in the event of its dissolution, retention of records, verification, and confidentiality of payment information) shall apply to payments under these Rates and Terms except to the extent inconsistent with these Rates and Terms.

(c) *Relationship to Other Agreements.* These Rates and Terms are without prejudice to, and subject to, any voluntary agreements that a Noncommercial Webcaster may have entered into with any sound recording copyright owner. Should there be any voluntarily negotiated rates and terms arrived

at between copyright owners and webcasters that are adopted by the Librarian of Congress during 2003 as rates and terms for eligible nonsubscription transmission services following publication of such rates and terms in the **Federal Register** pursuant to 37 CFR 251.63(b), any Noncommercial Webcaster that qualifies for such rates may, by written notice to SoundExchange, elect, for 2004, to pay royalties under the rates and terms adopted by the Librarian in lieu of the rates and terms applicable hereunder; provided that if a Noncommercial Webcaster does so, it shall at the time its first 2004 payment is due under the terms adopted by the Librarian, pay any additional amount that would have been due under the rates and terms adopted by the Librarian for the period beginning on October 28, 1998, and ending on December 31, 2003, in excess of the royalties previously paid by the Noncommercial Webcaster for that period under these Rates and Terms.

(d) *CARP Proceedings.* A Noncommercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected these terms in lieu of participating in a copyright arbitration royalty panel ("CARP") proceeding to set rates for the 2003–2004 period and in lieu of any different rates and terms that may be determined through such a CARP proceeding. Thus, once a Noncommercial Webcaster has elected these Rates and Terms, it shall refrain from participating in any such CARP proceeding and can opt out of these Rates and Terms only as provided in Section 1(c).

2. Election for Treatment as a Noncommercial Webcaster

(a) *Election Process.* A Noncommercial Webcaster that wishes to elect to be subject to these Rates and Terms in lieu of any other royalty rates and terms that otherwise might apply under 17 U.S.C. 112 and 114 for the period beginning on October 28, 1998, and ending on December 31, 2004, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than the date 30 days after publication of these Rates and Terms in the **Federal Register**. Notwithstanding the preceding sentence—

(1) if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election by no later than the first date on which it would be obligated under these Rates and Terms to make a royalty payment for the use of sound recordings under the section 112 or 114 statutory license; and

(2) an "NEE" (as defined in Section 9(d)) may make its election by no later than October 15, 2003.

(b) *Effect of Election or Nonelection.* A Noncommercial Webcaster that fails to make a timely election shall pay royalties as otherwise provided under 17 U.S.C. 112 and 114 (the "Statutory Rate"). Subject to Section 1(c), if a Noncommercial Webcaster timely elects to be covered by these Rates and Terms, the Noncommercial Webcaster shall thereafter be obligated to pay royalties under