

publication of a final rule, and shall cover the period from January 1, 2002, to December 31, 2007.

List of Subjects in 37 CFR Part 260

Copyright, Digital Audio
Transmissions, Performance Right,
Sound Recordings.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes amending part 260 of 37 CFR as follows:

PART 260—USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE

1. The authority citation for part 260 continues to read as follows:

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

2. The heading of Part 260 is revised as follows:

PART 260—RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES' DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE MAKING OF EPHEMERAL PHONORECORDS

3. Section 260.1 is revised to read as follows:

§ 260.1 General

(a) This part 260 establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114(d)(2), and the making of ephemeral phonorecords in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

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

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

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

4. Section 260.2 is amended as follows:

a. By revising the section heading;
b. By revising paragraphs (a) and (b);
c. By redesignating paragraph (c) as paragraph (e), and adding a new paragraph (c);

d. By redesignating paragraph (d) as paragraph (f), and adding a new paragraph (d);

e. In redesignated paragraph (e)(1)(ii) by adding “a” before “recognized advertising agency”;

f. In redesignated paragraphs (e)(1)(iii) and (vi), by removing “Programming Service” and adding “programming service” in its place; and

g. In redesignated paragraphs (e)(1)(viii) and (e)(2), by removing “(c)” and adding “(e)” in its place.

The additions and revisions to § 260.2 read as follows:

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

(a) Commencing January 1, 2002 and continuing through December 31, 2003, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.0% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(b) Commencing January 1, 2004 and continuing through December 31, 2007, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(c) Commencing in the year 2003 and continuing through the year 2007, each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ephemeral phonorecords pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year; Provided, however, that for 2003, the annual advance payment shall be due on [the 20th day following the month in which these rates and terms are published in the **Federal Register** notice as a final rule]. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any

payment received after the due date. Late fees shall accrue from the due date until payment is received.

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5. Section 260.3 is amended as follows:

a. In paragraph (b), by removing “twentieth” and adding “forty-fifth” in its place;

b. By revising paragraphs (d) and (e); and

c. By adding a new paragraph (f).
The additions and revisions to § 260.3 read as follows:

§ 260.3 Terms for making payments of royalty fees.

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(d) The designated agent may deduct from any of its receipts paid by Licensees under § 260.2, prior to the distribution of such receipts to any person or entity entitled thereto, the reasonable costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that the parties entitled to receive royalty payments according to the provisions set forth at 17 U.S.C. 114(g)(1) & (2) who have authorized a designated agent may agree to deduct such other costs agreed to by such other parties and the designated agent.

(e) Until such time as a new designation is made, SoundExchange, which initially is an unincorporated division of the Recording Industry Association of America, Inc., shall be the agent receiving royalty payments and statements of account and shall continue to be designated if it should be separately incorporated.

(f) A Licensee shall make any payments due under § 260.2(a) for digital transmissions or ephemeral phonorecords made between January 1, 2002, and [last day of the month in which these rates and terms are published in the **Federal Register** as a final rule] 2003, to the Designated Agent, less any amounts previously paid by such period to the Recording Industry Association of America, Inc., or SoundExchange by [the 45th day following the month in which these rates and terms are published in the **Federal Register** notice as a final rule].

6. Section 260.4 is amended as follows:

a. In paragraphs (a) and (b), by removing “nonexempt subscription digital transmission service” in each place it appears and adding “nonexempt preexisting subscription service” in its place; and

b. By revising paragraphs (d)(1) and (e).

The revisions to § 260.4 read as follows: