foundation in the statutory language for allowing a person or organization with less than a copyright ownership interest in an exclusive right to be considered a owner of copyright or a valid claimant of a claim to copyright. The bald right to register a work is not one of the section 106 exclusive rights. Only the owner of an exclusive right (or subdivision thereof) is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by title 17. *See,* 17 U.S.C. 201(d)(2).[5]

The above discussion poses more than a theoretical problem. While the Office recognizes that transfers may be limited in time and duration, see, *Bean* v. *Littell,* 669 F. Supp.2d 1031 (D. Ariz. 2008), recent court decisions have questioned what it means to claim legal title to copyright when in fact the ''claimant'' does not in fact own any section 106 rights or may technically own those rights, but does not have the ability to exercise any of the exclusive rights.[6] At least one court has held that the standing to sue for copyright infringement is absent when underlying agreements distort or misrepresent such claimants' interests in and to the ownership of exclusive rights. ''If the plaintiff is not a proper owner of the copyright rights, then it cannot invoke copyright protection stemming from the exclusive rights belonging to the owner, including infringement of the copyright.'' [7] While the Copyright Office does not believe that all transfers relying on the footnote necessarily misrepresent who is a valid copyright claimant, there exists the real possibility that the footnote fosters questionable claims of ownership due to its ambiguous language.

The elimination of the footnote would leave numerous options for registering works to authors and copyright owners, including the owners of a single exclusive right. As noted above, the owner of an exclusive right may always register a claim in the work by listing the author as the claimant. Any authorized agent of the author, the owner of all rights, or the owner of an exclusive may similarly file an application for registration on behalf of a valid claimant by filling out the application and certifying their relationship to the claimant.

In the case of collective works, the author of articles contributed to a number of periodicals may avail himself or herself to the group registration option for contributions to periodicals established pursuant to section 408(d) of the Copyright Act. *See,* 37 CFR 202.3(b)(8). A number of other group registration options exist for other types of works, such as for unpublished collections and for published photographs. *See,* 37 CFR 202.3(a)(4) and 202.3(b)(10).

In light of the concerns raised about the footnote and the alternative registration options available to claimants, the owners of one or more exclusive rights, and agents of such persons or entities, the Office believes that elimination of the footnote is warranted. The Office believes that the elimination of the footnote would have no discernable adverse effect on the ability to register works, would foster a more accurate and meaningful record of authorship and ownership, and would reduce the possibility of fraudulent or misleading claims. Removal of the footnote would also reduce the occurrence of litigation over the validity of misleading transfers by creating a bright line rule, consistent with the rationale expressed for the original Interim Regulation, for determining who may assert a claim of copyright. The Copyright Office seeks public comment on this intended amendment to the definition of a ''claimant.''

List of Subjects in 37 CFR Part 202

Copyright, Registration.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes to amend part 202.3(a)(3) as follows:

PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 is revised to read as follows:

Authority: 17 U.S.C. 408, 409, 702.

2. Amend sec. 202.3 paragraph (a)(3)(ii) as follows:

a. In paragraph (ii), remove footnote 1.

Dated: May 10, 2012.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2012–11879 Filed 5–16–12; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 2011–3 CRB Phonorecords II]

Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations that set the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services.

DATES: Comments and objections, if any, are due no later than June 18, 2012.

ADDRESSES: Comments and objections may be sent electronically to *crb@loc.gov.* In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means for transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, comments and objections must be brought between 8:30 a.m. and 5 p.m. to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM–401, 101 Independence Avenue SE., Washington, DC 20559–6000. If delivered by a commercial courier,

exclusive rights comprised in a copyright, refers to the owner of that particular right''). However, the concept of a copyright ''owner'' need not be congruent with the concept of a copyright registration ''claimant.'' As explained *supra,* if an owner of an exclusive right could register a work, there would either be multiple registrations for particular works, thus violating the general rule of only one registration per work, or one registration by the first owner to register, thus leading to a misleading and inaccurate public record.

[5] That provision may also be interpreted to distinguish an owner of an exclusive right from a ''copyright owner'' in the broader sense of the owner of all rights.

[6] *Righthaven LLC* v. *Mostofi,* 2011 U.S. Dist. LEXIS 75810 (D. Nev. July 13, 2011). *See also, Silvers* v. *Sony Pictures Entertainment, Inc.,* 402 F.3d 881 (9th Cir. 2005), cert. den'd 546 U.S. 827 (2005) (The right to sue for an accrued claim for infringement is not an exclusive right under 17 U.S.C.S. 106. Moreover, the bare assignment of an accrued cause of action is impermissible under 17 U.S.C.S. 501(b).)

[7] *Righthaven LLC* v. *Mostofi,* 2011 U.S. Dist. LEXIS 75810 (D. Nev. July 13, 2011), *quoting, Silvers* v. *Sony Pictures Entertainment, Inc.,* 402 F.3d 881 (9th Cir. 2005), *quoting,* 4 Business and Commercial Litigation in Federal Courts, at 1062 § 65.3(a)(4) (Robert Haig ed.). *Accord, Righthaven LLC* v. *Inform Techs.,* Inc., 2011 U.S. Dist. LEXIS 119379 (D. Nev. Oct. 14, 2011).

comments and objections must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street NE., Washington, DC, and the envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue SE., Washington, DC 20559–6000.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, Program Specialist, by telephone at (202) 707–7658 or email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: Section 115 of the Copyright Act, title 17 of the United States Code, also known as the mechanical compulsory license, requires a copyright owner of a nondramatic musical work to grant a license to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee complies with the statute and regulations.

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (''DPRSRA''), Public Law 104–39, 109 Stat. 336, which extended the mechanical license to digital phonorecord deliveries. 17 U.S.C. 115(c)(3). Consequently, the license now covers digital transmissions of phonorecords in addition to the physical copies such as compact discs, vinyl and cassette tapes. Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (''Judges'') to conduct proceedings every five years to determine the rates and terms for the section 115 license.[1] 17 U.S.C. 801(b)(1), 804(b)(4). In accordance with section 804(b)(4), the Judges commenced a proceeding to set rates and terms for the section 115 license on January 9, 2006, 71 FR 1454, and their final determination of said rates and terms was published in the **Federal Register** on January 26, 2009. 74 FR 4510. Therefore, the next proceeding to determine rates and terms for the section 115 license was to be commenced in January 2011. 17 U.S.C. 804(b)(4).

Accordingly, the Judges published a notice commencing the current proceeding and requesting interested parties to submit their petitions to participate. 76 FR 590 (January 5, 2011). Petitions to Participate were received from: Microsoft Corporation (''Microsoft''); Omnifone Group Limited (''Omnifone''); CTIA—The Wireless Association (''CTIA''); Cricket Communications, Inc. (''Cricket''); PacketVideo, Inc. (''PacketVideo''); Slacker, Inc. (''Slacker''); Google, Inc. (''Google''); Amazon Digital Services, Inc. (''Amazon''); Beyond Oblivion, Inc. (''Beyond Oblivion''); AT&T Mobility LLC (''AT&T Mobility''); Rdio, Inc. (''Rdio''); Apple, Inc. (''Apple''); the Recording Industry Association of America, Inc. (''RIAA''); Rhapsody International, Inc. (''Rhapsody''); RealNetworks, Inc. (''RealNetworks''); Thumbplay, Inc. (''Thumbplay'');[2] Pandora Media, Inc. (''Pandora''); The American Association of Independent Music (''A2IM''); Music Reports, Inc. (''Music Reports''); the National Music Publishers' Association, Inc., Songwriters Guild of America, Nashville Songwriters Association International and Church Music Publishers Association, jointly (collectively, ''Copyright Owners''); EMI Music Publishing (''EMI''); the Songwriters Guild of America (''SGA''); Napster, LLC (''Napster''); the Digital Media Association (''DiMA''); and Broadcast Music, Inc. (''BMI'').[3] The Judges set the timetable for the three-month negotiation period, *see* 17 U.S.C. 803(b)(3), and directed the participants to submit their written direct statements no later than April 30, 2012. On April 11, 2012, the Judges received a Motion to Adopt Settlement stating that ''[a]ll participants in the Proceeding are parties to the Settlement or have reviewed the Settlement and do not object to its being adopted as the basis for setting statutory rates and terms.''[4] Motion to Adopt Settlement at 2 (April 11, 2012).

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt 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 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). Rates and terms adopted pursuant to this provision are binding on all copyright owners of musical works and those using such musical works in the activities set forth in the proposed regulations.

In publishing the parties' proposed rates and terms, the Judges are removing two provisions and seeking comment on two others. The parties have included language in proposed §§ 385.10(c) and 385.20(c) that states that ''[n]either this subpart nor the act of obtaining a license under 17 U.S.C. 115 * * * and shall not constitute evidence, as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.'' Our task, as set forth in section 115 and chapter 8 of the Copyright Act, is to adopt rates and terms for the compulsory license for the making and distributing of physical and digital phonorecords. It is not our task to offer evaluations, limitations or characterizations of the rates and terms. Therefore, the Judges decline to include the language ''and shall not constitute evidence'' in our regulations. *See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Notice of proposed rulemaking,* Docket No. 2006–3 CRB DPRA, 73 FR 57033, 57034 (October 1, 2008); *Noncommercial Educational Broadcasting Statutory License, Notice of proposed rulemaking,* Docket No. 2006–2 CRB NCBRA, 72 FR 19138, 19139 (April 17, 2007).

The parties have proposed two provisions, § 385.12(e) and § 385.22(d), relating to statements of account for the

[1] The Copyright Royalty Judges, which were established by the Copyright Royalty and Distribution Reform Act of 2004, are the third entity to set the rates and terms for the section 115 license. Until its abolishment in 1993, the Copyright Royalty Tribunal (''CRT'') had the authority to adjust the statutory rates for the section 115 license. After 1993, Congress granted authority to Copyright Arbitration Royalty Panels (''CARP''), under the supervision of the Librarian of Congress, to set rates and, unlike the CRT, to also adopt terms for the mechanical license. *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, 107 Stat. 2304.

[2] Thumbplay withdrew from the proceeding on April 5, 2012.

[3] BMI's filing was styled as ''Comments in Response to Request for Petitions to Participate,'' and BMI withdrew its comments on December 1, 2011.

[4] Music Reports' signature was inadvertently omitted from the motion; its signature was provided on April 18, 2012. Since neither Beyond Oblivion nor Napster were signatories to the motion, the Judges presume that they each reviewed the settlement and do not object to its adoption, per the signatories' representation.

section 115 license. Both of these sections, which are virtually identical, appear to propose in their second sentences requirements beyond those set forth by the Register of Copyrights in 37 CFR 201.19. The authority to prescribe regulations relating to statements of account is ''the exclusive domain of the Register,'' *see Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License, Final order,* Docket No. RF 2008–1, 73 FR 48396, 48398 (August 19, 2008), and the Judges ''cannot alter requirements issued by the Register regarding statements of account.'' *Review of Copyright Royalty Judges Determination, Notice; correction,* Docket No. 2009–1, 74 FR 4537, 4543 (January 26, 2009).[5] Consequently, we particularly invite comments of the parties, and the Register of Copyrights, regarding these provisions.

As noted above, the public may comment and object to any or all of the proposed regulations contained in this notice. Such comments and objections must be submitted no later than June 18, 2012.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend Part 385 of Chapter III of title 37 of the Code of Federal Regulations to read as follows:

PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

§ 385.4 [Amended]

2. Section 385.4 is amended by removing ''('' and adding ''§ '' in its place.

3. Revise heading of Subpart B to read as follows:

Subpart B—Interactive Streaming and Limited Downloads

4. Section 385.10 is amended as follows:

a. By revising paragraph (b); and

b. By adding a new paragraph (c).

The revisions and additions read as follows:

§ 385.10 General.

* * * * *

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

5. Section 385.11 is amended as follows:

a. By adding in alphabetical order definitions for ''*Affiliate*'', ''*Applicable consideration*'', and ''*GAAP*'';

b. In paragraph (2) of ''*Limited download*'', by adding ''provider'' after ''service'';

c. In paragraph for definition of ''*Offering*'', by removing ''service's'' and adding ''service provider's'' in its place, and by adding ''provider'' after ''service'';

d. By removing paragraph for definition of ''*Publication date*'';

e. In paragraph for definition of ''*Relevant page*'', by removing ''users for limited downloads or interactive streams'' and adding ''users for licensed activity'' in its place;

f. In paragraph for definition of ''*Service*'', by adding ''*provider*'' after ''*Service*'' in paragraph heading;

g. In paragraph (1) of ''*Service revenue*'', by removing ''U.S. Generally Accepted Accounting Principles'' and adding ''GAAP'' in its place;

h. In paragraphs (1)(i)–(ii) of ''*Service revenue*'', by adding ''provider'' after ''service'';

i. In paragraph (1)(iii) of ''*Service revenue*'', by adding ''provider'' after ''by the service'';

j. In paragraph (2)(i) of ''*Service revenue'',* by removing ''service'' and adding ''service provider'' in its place each place it appears; and

k. In paragraph (5) of ''*Service revenue'',* by removing ''In connection with such a bundle, if a record company providing sound recording rights to the service'' and by removing paragraphs (5)(i) and (ii).

The additions read as follows:

§ 385.11 Definitions.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a record company shall not include a copyright owner of musical works to the extent it is engaging in business as to musical works.

Applicable consideration means anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether such consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the licensed activity but nevertheless provide consideration for the identified rights to undertake the licensed activity, and including any such value given to an affiliate of a record company for such rights to undertake the licensed activity. For the avoidance of doubt, value given to a copyright owner of musical works that is controlling, controlled by, or under common control with a record company for rights to undertake the licensed activity shall not be considered value given to the record company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where such in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

GAAP means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the

[5] In the prior section 115 proceeding, the Register found the Judges' adoption of language that excluded inclusion of certain activities from the statements of account to be erroneous. *See* 74 FR at 4543. Consequently, the Judges exercised their continuing jurisdiction and deleted the offending language. *See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Final rule,* Docket No. 2006–3 CRB DPRA, 74 FR 6832 (February 11, 2009).

International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as ''GAAP'' for purposes of this subpart.

* * * * *

6. Section 385.12 is amended as follows:

a. In paragraph (b), by removing ''offering.'' and adding ''offering taking into consideration service revenue and expenses associated with such offering.'' in its place;

b. In paragraph (b)(1), by removing ''Service.'' and adding ''Offering.'' in its place and by adding ''provider'' after ''service'';

c. In paragraph (b)(1)(i), by removing ''revenue as'' and adding ''revenue associated with the relevant offering as'' in its place;

d. In paragraph (b)(2), by removing ''service, subtract'' and adding ''service provider, subtract'' in its place, by removing ''by the service'', by removing ''While'' and adding ''Although'' in its place, by removing ''under its agreements with performing rights societies as defined in 17 U.S.C. 101'', and by removing ''In the latter case,'' and adding ''In the case where the service is also engaging in the public performance of musical works that does not constitute licensed activity,'' in its place;

e. In paragraph (b)(3), by adding ''provider'' after ''service'';

f. In paragraph (b)(4), by removing ''used by the service'' and adding ''used by the service provider'' in its place each place it appears, by removing ''on or after October 1, 2010'', by removing ''if the service is'' and adding ''if the service provider is'';

g. By revising paragraph (c);

h. In paragraph (d), by removing ''For licensed activity on or after October 1, 2010,''; and

i. By adding a new paragraph (f).

The revisions and additions read as follows:

§ 385.12 Calculation of royalty payments in general.

* * * * *

(c) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%.

* * * * *

(f) *Confidentiality.* A licensee's statement of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall be maintained in confidence by any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.

7. Section 385.13 is amended as follows:

a. In paragraphs (a)(1)–(a)(5), by removing ''§ 385.12(b)(1)'' and adding ''§ 385.12(b)(1)(ii)'' in its place each place it appears, and by removing ''§ 385.12(b)(3)'' and adding ''§ 385.12(b)(3)(ii)'' in its place each place it appears;

b. In paragraph (a)(4), by adding ''providing licensed activity that is'' before ''made available to end users'' and by adding ''(including products or services subject to other subparts)'' before ''as part of a single transaction'';

c. By revising paragraphs (b) and (c);

d. By redesignating paragraph (d) as paragraph (e);

e. By adding a new paragraph (d); and

f. In newly redesignated paragraph (e), by removing ''the service shall for the relevant offering calculate its'' and adding ''the'' in its place, and by adding ''shall be calculated,'' before ''taking into account''.

The revisions and additions read as follows:

§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.

* * * * *

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3), and (4) of this section, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams and limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expensed by the service

provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(d) *Payments by third parties.* If a record company providing sound recording rights to the service provider for a licensed activity—

(1) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed activity and its affiliates, and

(2) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,

(3) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraphs (b)(1), (b)(2), (c)(1), or (c)(2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

* * * * *

8. Section 385.14 is amended as follows:

a. In paragraphs (a)(1)(iii)(A)–(C), by removing ''service'' and adding ''service provider'' in its place each place it appears;

b. In paragraph (a)(1)(iii)(A), by removing ''commencing on or after October 1, 2010, except'' and adding ''other than'' in its place;

c. In paragraph (a)(3), by removing ''the service shall provide'' and adding ''the service provider shall provide'' in its place, by removing ''the service shall have'' and adding ''the service provider shall have'' in its place, and by removing ''the service (but'' and adding ''the service provider (but'' in its place;

d. By revising paragraph (b)(1);

e. In paragraph (b)(4), by removing ''the service, and not'' and adding ''the service provider, and not'' in its place; and

f. By revising paragraph (d).

The revisions read as follows:

§ 385.14 Promotional royalty rate.

* * * * *

(b) * * *

(1) No applicable consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, any of its affiliates, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

* * * * *

(d) *Interactive streaming of clips.* In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed 90 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

9. Add Subpart C to read as follows:

Subpart C—Limited Offerings, Mixed Service Bundles, Music Bundles, Paid Locker Services and Purchased Content Locker Services

Sec.

Subpart C—Limited Offerings, Mixed Service Bundles, Music Bundles, Paid Locker Services and Purchased Content Locker Services

§ 385.20 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for certain reproductions or distributions of musical works through limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services provided in accordance with the provisions of 17 U.S.C. 115. For the avoidance of doubt, to the extent that product configurations for which rates are specified in subpart A of this part are included within licensed subpart C of this part activity, the rates specified in subpart A of this part shall not apply, except that in the case of a music bundle the compulsory licensee may elect to pay royalties for the music bundle pursuant to subpart C of this part or for the components of the bundle pursuant to subpart A of this part.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes reproduction or distribution of musical works in limited offerings, mixed service bundles, music bundles, paid locker services or purchased content locker services shall comply with the requirements of that sections, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

§ 385.21 Definitions.

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

Affiliate shall have the meaning given in § 385.11.

Applicable consideration shall have the meaning given in § 385.11, except that for purposes of this subpart references in the definition of ''Applicable consideration'' in § 385.11 to licensed activity shall mean licensed subpart C of this part activity.

Free trial royalty rate means the statutory royalty rate of zero in the case of certain free trial periods, as provided in § 385.24.

GAAP shall have the meaning given in § 385.11.

Interactive stream shall have the meaning given in § 385.11.

Licensee shall have the meaning given in § 385.11.

Licensed subpart C of this part activity means—

(1) In the case of a limited offering, the applicable interactive streams or limited downloads;

(2) In the case of a locker service, the applicable interactive streams, permanent digital downloads, restricted downloads or ringtones;

(3) In the case of a music bundle, the applicable reproduction or distribution of a physical phonorecord, permanent digital download or ringtone; and

(4) In the case of a mixed service bundle, the applicable—

(i) Permanent digital downloads;

(ii) Ringtones;

(iii) To the extent a limited offering is included in a mixed service bundle, interactive streams or limited downloads; or

(iv) To the extent a locker service is included in a mixed service bundle, interactive streams, permanent digital downloads, restricted downloads or ringtones.

Limited download shall have the meaning given in § 385.11.

Limited offering means a subscription service providing interactive streams or limited downloads where—

(1) An end user is not provided the opportunity to listen to a particular sound recording chosen by the end user at a time chosen by the end user (i.e., the service does not provide interactive streams of individual recordings that are on-demand, and any limited downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the end user over a period of time are substantially limited relative to services in the marketplace providing access to a comprehensive catalog of recordings (e.g., a service limited to a particular genre, or permitting interactive streaming only from a monthly playlist consisting of a limited set of recordings).

Locker service means a service providing access to sound recordings of musical works in the form of interactive streams, permanent digital downloads, restricted downloads or ringtones, where the service has reasonably determined that phonorecords of the applicable sound recordings have been purchased by the end user or are otherwise in the possession of the end use prior to the end user's first request to access such sound recordings by means of the service. The term service locker does not extend to any part of a service otherwise meeting this definition as to which a license is not obtained for the applicable reproductions and distributions of musical works.

Mixed service bundle means an offering of one or more of permanent digital downloads, ringtones, locker services or limited offerings, together with one or more of non-music services (e.g., Internet access service, mobile phone service) or non-music products (e.g., a device such as a phone) of more than token value, that is provided to users as part of one transaction without pricing for the music services or music products separate from the whole offering.

Music bundle means an offering of two or more of physical phonorecords, permanent digital downloads or ringtones provided to users as part of one transaction (e.g., download plus ringtone, CD plus downloads). A music bundle must contain at least two different product configurations and cannot be combined with any other offering containing licensed activity under subpart B of this part or subpart C of this part.

(1) In the case of music bundles containing one or more physical phonorecords, the physical phonorecord component of the music bundle must be sold under a single catalog number, and the musical works embodied in the digital phonorecord delivery configurations in the music bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the music bundle contains a set of digital phonorecord deliveries sold by the same record company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), up to 5 sound recordings of musical works that are included in the stand-alone version of such set of digital phonorecord deliveries but are not included on the physical phonorecord may be included among the digital phonorecord deliveries in the music bundle. In addition, the seller must permanently part with possession of the physical phonorecord or phonorecords sold as part of the music bundle.

(2) In the case of music bundles composed solely of digital phonorecords deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the music bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Paid locker service means a locker service that is a subscription service.

Permanent digital download shall have the meaning given in § 385.2.

Purchased content locker service means a locker service made available to end-user purchasers of permanent digital downloads, ringtones or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the permanent digital downloads, ringtones or physical phonorecords, with respect to the sound recordings embodied in permanent digital downloads or ringtones or physical phonorecords purchased from a qualifying seller as described in paragraph (1) of the definition of ''Purchased content locker service,'' whereby the locker service enables the purchaser to engage in one or both of the qualifying activities identified in paragraph (2) of the definition of ''Purchased content locker service.'' In addition, in the case of a locker service made available to end-user purchasers of physical phonorecords, the seller must permanently part with possession of the physical phonorecords.

(1) A qualifying seller for purposes of this definition of ''purchased content locker service'' is the same entity operating such locker service, one of its affiliates or predecessors, or—

(i) In the case of permanent digital downloads or ringtones, a seller having another legitimate connection to the locker service provider set forth in one or more written agreements (including that the locker service and permanent digital downloads or ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords, a seller having an agreement with—

(A) The locker service provider whereby such parties establish an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service; or

(B) A service provider that also has an agreement with the entity offering the locker service, where pursuant to those agreements the service provider has established an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service.

(2) Qualifying activity for purposes of this definition of ''purchased content

locker service'' is enabling the purchaser to—

(i) Receive one or more additional phonorecords of such purchased sound recordings of musical works in the form of permanent digital downloads or ringtones at the time of purchase, or

(ii) Subsequently access such purchased sound recordings of musical works in the form of interactive streams, additional permanent digital downloads, restricted downloads or ringtones.

Record company shall have the meaning given in § 385.11.

Restricted download means a digital phonorecord delivery distributed in the form of a download that may not be retained and played on a permanent basis. The term restricted download includes a limited download.

Ringtone shall have the meaning given in § 385.2.

Service provider shall have the meaning given in § 385.11, except that for purposes of this subpart references in the definition of ''Service provider'' in § 385.11 to licensed activity and service revenue shall mean licensed subpart C of this part activity and subpart C of this part service revenue, respectively.

Subpart C of this part offering means a service provider's offering of licensed subpart C of this part activity that is subject to a particular rate set forth in § 385.23(a) (e.g., a particular subscription plan available through the service provider).

Subpart C of this part relevant page means a page (including a Web page, screen or display) from which licensed subpart C of this part activity offered by a service provider is directly available to end users, but only where the offering of licensed subpart C of this part activity and content that directly relates to the offering of licensed subpart C of this part activity (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed subpart C of this part activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for licensed subpart C of this part activity from such page (in most cases this will be the page where the transmission takes place).

Subpart C of this part service revenue. (1) Subject to paragraphs (2) through (6) of the definition of ''Subpart C of this part service revenue,'' and subject to GAAP, subpart C of this part service revenue shall mean the following:

(i) All revenue recognized by the service provider from end users from the provision of licensed subpart C of this part activity;

(ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third-party ''in-stream'' or ''in-download'' advertising as part of licensed subpart C of this part activity (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of transmissions of a musical work that constitute licensed subpart C of this part activity); and

(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a subpart C of this part relevant page of the service or on any page that directly follows such subpart C of this part relevant page leading up to and including the transmission of a musical work that constitutes licensed subpart C of this part activity; provided that, in the case where more than one service is actually available to end users from a subpart C of this part relevant page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of ''Subpart C of this part service revenue,'' such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed subpart C of this part activity that they were unable to use due to technical faults in the licensed subpart C of this part activity or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of ''Subpart C of this part service revenue,'' such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed subpart C of this part activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of ''Subpart C of this part service revenue.'' By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;

(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions);

(iii) Revenue generated from the sale of actual locker service storage space to the extent that such storage space is sold at a separate retail price;

(iv) In the case of a locker service, revenue derived from the sale of permanent digital downloads or ringtones; and

(v) Revenue derived from other music or music-related products and services that are not or do not include licensed subpart C of this part activity.

(4) For purposes of paragraph (1) of the definition of ''Subpart C of this part service revenue,'' advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) In the case of a mixed service bundle, the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of ''Subpart C of this part service revenue'' shall be the greater of—

(i) The revenue recognized from end users for the mixed service bundle less the standalone published price for end users for each of the non-music product or non-music service components of the bundle; provided that, if there is no such standalone published price for a non-music component of the bundle, then the average standalone published price for end users for the most closely comparable non-music product or non-music service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and

(ii) Either—

(A) In the case of a mixed service bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle, 40% of the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the

most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (5)(ii)(B) of the definition of ''Subpart C of this part service revenue'' applied; or

(B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

(6) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee—

(i) Service revenue shall be 150% of the record company's wholesale revenue from the music bundle; and

(ii) The times at which distribution and revenue recognition are deemed to occur shall be in accordance with § 201.19 of this title.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.24.

§ 385.22 Calculation of royalty payments in general.

(a) *Applicable royalty.* Licensees that make or authorize licensed subpart C of this part activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty rates and subscriber-based royalty floors for specific types of services provided in § 385.23, except as provided for certain free trial periods in § 385.24.

(b) *Rate calculation methodology.* Royalty payments for licensed subpart C of this part activity shall be calculated as provided in paragraph (b) of this section. If a service provides different subpart C of this part offerings, royalties must be separately calculated with respect to each such subpart C of this part offering taking into consideration service revenue and expenses associated with such offering. Uses subject to the free trial royalty rate shall be excluded from the calculation of royalties due, as further described in this section and the following § 385.23.

(1) *Step 1:* Calculate the All-In Royalty for the Subpart C of this Part Offering. For each accounting period, the all-in royalty for each subpart C of this part offering of the service provider is the greater of:

(i) The applicable percentage of subpart C of this part service revenue associated with the relevant offering as set forth in § 385.23(a) (excluding any subpart C of this part service revenue derived solely from licensed subpart C of this part activity uses subject to the free trial royalty rate), and

(ii) The minimum specified in § 385.23(a) for the subpart C of this part offering involved.

(2) *Step 2:* Subtract applicable performance royalties to determine the payable royalty pool, which is the amount payable for the reproduction and distribution of all musical works used by the service provider by virtue of its licensed subpart C of this part activity for a particular subpart C of this part offering during the accounting period. From the amount determined in step 1 in paragraph (b)(1) of this section, for each subpart C of this part offering of the service provider, subtract the total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such subpart C of this part offering during the accounting period that constitute licensed subpart C of this part activity (other than licensed subpart C of this part activity subject to the free trial royalty rate), or in connection with previewing of such subpart C of this part offering during the accounting period. Although this amount may be the total of the payments with respect to the service for that subpart C of this part offering for the accounting period, it will be less than the total of such public performance payments if the service is also engaging in public performance of musical works that does not constitute licensed subpart C of this part activity, or previewing of such licensed subpart C of this part activity. In the case where the service is also engaging in the public performance of musical works that does not constitute licensed subpart C of this part activity, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed subpart C of this part activity uses (other than free trial royalty rate uses), and previewing of such uses, in connection with the relevant subpart C of this part offering, as determined in relation to all uses of musical works for which the public performance payments are made for the accounting period. Such allocation shall be made on the basis of plays of musical works or, where per-play information is unavailable due to bona fide technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 3 in paragraph (b)(3) of this section.

(3) *Step 3:* Calculate the Per-Work Royalty Allocation for Each Relevant Work. This is the amount payable for the reproduction and distribution of each musical work used by the service provider by virtue of its licensed subpart C of this part activity through a particular subpart C of this part offering during the accounting period. To determine this amount, the result determined in step 2 in paragraph (b)(2) of this section must be allocated to each musical work used through the subpart C of this part offering. The allocation shall be accomplished as follows:

(i) In the case of limited offerings (but not limited offerings that are part of mixed service bundles), by dividing the payable royalty pool determined in step 2 in paragraph (b)(2) of this section for such offering by the total number of plays of all musical works through such offering during the accounting period (other than free trial royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than free trial royalty rate plays) through the offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step 3 only (i.e., after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the service provider is not

capable of tracking play information due to bona fide limitations of the available technology for services of that nature or of devices usable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service provider for making royalty payment allocations for the use of individual sound recordings.

(ii) In the case of mixed service bundles and locker services, by—

(A) Determining a constructive number of plays of all licensed musical works that is the sum of the total number of interactive streams of all licensed musical works made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed musical works made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through such offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads);

(B) Determining a constructive per-play allocation that is the payable royalty pool determined in step 2 of paragraph (b)(2) of this section for such offering divided by the constructive number of plays of all licensed musical works determined in paragraph (b)(3)(ii)(A) of this section;

(C) For each licensed musical work, determining a constructive number of plays of that musical work that is the sum of the total number of interactive streams of such licensed musical work made through such offering during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of such licensed musical work made through such offering during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of such licensed musical work made through such offering during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads); and

(D) For each licensed musical work, determining the per-work royalty allocation by multiplying the constructive per-play allocation determined in paragraph (b)(3)(ii)(B) of this section by the constructive number of plays of that musical work determined in paragraph (b)(3)(ii)(C) of this section.

(E) Notwithstanding the foregoing, if a service provider offers both a paid locker service and a purchased content locker service, and with respect to the purchased content locker service there is no subpart C of this part service revenue and the applicable subminimum is zero dollars, then the service provider shall be permitted to include within the calculation of constructive plays under paragraphs (b)(3)(ii)(A) and (b)(3)(ii)(C) of this section for the paid locker service, the licensed subpart C of this part activity made through the purchased content locker service (i.e., the total number of interactive streams of all licensed musical works made through the purchased content locker service during the accounting period (other than free trial royalty rate interactive streams), plus the total number of plays of restricted downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider tracks plays (other than free trial royalty rate restricted downloads), plus 5 times the total number of downloads of all licensed musical works made through the purchased content locker service during the accounting period as to which the service provider does not track plays (other than free trial royalty rate downloads)); provided that the relevant licensed subpart C of this part activity made through the purchased content locker service is similarly included within the play calculation for the paid locker service for the corresponding sound recording rights.

(iii) In the case of music bundles, by—

(A) Allocating the payable royalty pool determined in step 2 of paragraph (b)(2) of this section to separate pools for each type of product configuration included in the music bundle (e.g., CD, permanent digital download, ringtone) in accordance with the ratios that the standalone published prices of the products that are included in the music bundle bear to each other; provided that, if there is no such standalone published price for such a product, then the average standalone published price for end users for the most closely comparable product in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and

(B) Allocating the product configuration pools determined in paragraph (b)(3)(iii)(A) of this section to individual musical works by dividing each such pool by the total number of sound recordings of musical works included in products of that configuration in the music bundle.

(c) *Overtime adjustment.* For purposes of the calculations in step 3 of paragraph (b)(3)(i) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of plays as follows:

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays

(6) For playing times of greater than 10 minutes, continue to add .2 plays for each additional minute or fraction thereof.

(d) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and § 201.19 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-work allocations (including information sufficient to demonstrate whether and how a minimum royalty payment pursuant to § 385.23 does or does not apply) and, for each subpart C of this part offering reported, also indicate the type of licensed subpart C of this part activity involved and the number of plays or downloads, as applicable, of each musical work (including an indication of any overtime adjustment applied, if applicable) that is the basis of the per-work royalty allocation being paid.

(e) *Confidentiality.* A licensee's statements of account, including any and all information provided a licensee with respect to the computation of a subminimum, shall be maintained in confidence of any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information

for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.

§ 385.23 Royalty rates and subscriber-based royalty floors for specific types of services.

(a) *In general.* The following royalty rates and subscriber-based royalty floors shall apply to the following types of licensed subpart C of this part activity:

(1) *Mixed service bundle.* In the case of a mixed service bundle, the percentage of subpart C of this part service revenue applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.

(2) *Music bundle.* In the case of a music bundle, the percentage of subpart C of this part service revenue applicable in step 1 of § 385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) and (3) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%.

(3) *Limited offering.* In the case of a limited offering, the percentage of subpart C of this part service revenue applicable in step 1 of § 385.22(b)(1)(i) is 10.5%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 21%; and

(ii) The aggregate amount of 18 cents per subscriber per month.

(4) *Paid locker service.* In the case of a paid locker service, the percentage of subpart C of this part service revenue applicable in step 1 of § 385.22(b)(1)(i) is 12%. The minimum for use in step 1 of § 385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 17.11%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 20.65%; and

(ii) The aggregate amount of 17 cents per subscriber per month.

(5) *Purchased content locker service.* In the case of a purchased content locker service, the percentage of subpart C of this part service revenue applicable in step 1 of § 385.22(b)(1)(i) is 12%. For the avoidance of doubt, paragraph (1)(i) of the definition of ''Subpart C of this part service revenue'' shall not apply. The minimum for use in step 1 in § 385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to § 385.23(b)(1) is 18%, and the sound recording-only percentage applicable to § 385.23(b)(2) is 22%, except that for purposes of paragraph (b) of this section the applicable consideration expensed by the service for the relevant rights shall consist only of applicable consideration expensed by the service, if any, that is incremental to the applicable consideration expensed for the rights to make the relevant permanent digital downloads and ringtones.

(b) *Computation of subminima.* For purposes of paragraph (a) of this section, the subminimum for an accounting period is the aggregate of the following with respect to all sound recordings of musical works used in the relevant subpart C of this part offering of the service provider during the accounting period—

(1) Except as provided in paragraph (b)(3) of this section, in cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C of this part activity with respect to a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, the appropriate all-in percentage from paragraph (a) of this section of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to engage in licensed subpart C of this part activity with respect to a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, the appropriate sound recording-only percentage from paragraph (a) of this section of the total amount expensed by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(3) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee, the appropriate all-in percentage from paragraph (a) of this section of the record company's total wholesale revenue from the music bundle in accordance with GAAP for the accounting period, which amount shall equal the applicable consideration for such music bundle at the time such applicable consideration is properly recognized as revenue under GAAP, subject to the provisions of § 201.19 of this title concerning the times at which distribution and revenue recognition are deemed to occur.

(4) If a record company providing sound recording rights to the service provider for a licensed subpart C of this part activity—

(i) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed subpart C of this part activity and its affiliates, and

(ii) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,

(iii) Then such revenue shall be added to the amounts expensed by the service provider solely for purposes of paragraph (b)(1) or (2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable

by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

(c) *Computation of subscriber-based royalty rates.* For purposes of paragraphs (a)(3) and (4) of this section, to determine the subscriber-based minimum applicable to any particular subpart C of this part offering, the total number of subscriber-months for the accounting period shall be calculated, taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the free trial royalty rate as described in § 385.24. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber shall be used as the subscriber-based component of the minimum for the accounting period.

§ 385.24 Free trial periods.

(a) *General provisions.* This section establishes a royalty rate of zero in the case of certain free trial periods for mixed service bundles, paid locker services and limited offerings under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the free trial royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission, as part of a mixed service bundle, paid locker service or limited offering, of a sound recording that embodies such musical work, only if—

(1) The primary purpose of the record company in providing or authorizing the free trial period is to promote the applicable subpart C of this part offering;

(2) No applicable consideration for making or authorizing the transmissions is received by the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or audiovisual works embodying musical works or the paid use of music services through which sound recordings or audiovisual works embodying musical works are available;

(3) The free trial period does not exceed 30 consecutive days per subscriber per two-year period;

(4) In connection with authorizing the transmissions, the record company has obtained from the service provider it authorizes a written representation that—

(i) The service provider agrees to maintain for a period of no less than 5 years from the end of each relevant accounting period complete and accurate records of the relevant authorization, and identifying each sound recording of a musical work made available through the free trial period, the licensed subpart C of this part activity involved, and the number of plays or downloads, as applicable, of such recording;

(ii) The service is in all material respects operating with appropriate license authority with respect to the musical works it is using; and

(iii) The representation is signed by a person authorized to make the representation on behalf of the service provider;

(5) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the free trial royalty rate by that service;

(6) The free trial period is offered free of any charge to the end user; and

(7) End users are periodically offered an opportunity to subscribe to the service during such free trial period.

(b) *Recordkeeping by record companies.* To rely upon the free trial royalty rate for a free trial period, a record company making or authorizing the free trial period shall keep complete and accurate contemporaneous written records of the contractual terms that bear upon the free trial period; and further provided that, if the record company itself is conducting the free trial period, it shall also maintain any additional records described in paragraph (a)(4)(i) of this section. The records required by this paragraph (b) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed subpart C of this part activity in the ordinary course of business, but in no event for less than 5 years from the conclusion of the licensed subpart C of this part activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (b) with respect to a specific free trial period, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(4)(i) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) *Recordkeeping by services.* If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(4)(i) of this section by a service authorized by a record company with respect to a specific promotion, the service provider shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of free trial periods or sound recordings, the service provider shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service provider does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the free trial royalty rate and the service provider (but not the record company)

will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(d) *Interpretation.* The free trial royalty rate is exclusively for audio-only licensed subpart C of this part activity involving musical works subject to licensing under 17 U.S.C. 115. The free trial royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the free trial royalty rate (including without limitation licensed subpart C of this part activity beyond the time limitations applicable to the free trial royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 *et seq.*

§ 385.25 Reproduction and distribution rights covered.

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed subpart C of this part activity, solely for the purpose of providing such licensed subpart C of this part activity (and no other purpose).

§ 385.26 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Dated: May 10, 2012.

Stanley C. Wisniewski,

Copyright Royalty Judge.

[FR Doc. 2012–11751 Filed 5–16–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2011–0851, FRL–9673–6]

Approval and Promulgation of Implementation Plans; State of Montana; State Implementation Plan and Regional Haze Federal Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; corrections.

SUMMARY: EPA is correcting a proposed rule that appeared in the **Federal Register** on April 20, 2012. The proposed rule includes the proposed Federal Implementation Plan (FIP) to address regional haze in the State of Montana and the proposed approval of revisions to the Montana SIP submitted by the State of Montana through the Montana Department of Environmental Quality on February 17, 2012. We are correcting some typographical errors and clarifying some information with this document.

FOR FURTHER INFORMATION CONTACT: Vanessa Hinkle, EPA, Region 8, (303) 312–6561.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we'' or ''our'' is used it means the EPA.

On April 20, 2012, EPA published the proposed rule titled ''Approval and Promulgation of Implementation Plans; State of Montana; State Implementation Plan and Regional Haze Federal Implementation Plan'' (77 FR 23988). *See* docket number EPA–R08–OAR–2011–0851. The following corrections are made to the proposed rule:

1. On page 23992, Footnote 7 is amended to read as follows: ''*Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, EPA–454/B–03–005, available at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*, (hereinafter referred to as ''our 2003 Natural Visibility Guidance''); and *Guidance for Tracking Progress Under the Regional Haze Rule,* (September 2003, EPA–454/B–03–004, available at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf,* (hereinafter referred to as our ''2003 Tracking Progress Guidance'').''

2. On page 24002, Footnote 27 is amended to read as follows: '' ''Modeling Protocol: Montana Regional Haze Federal Implementation Plan (FIP) Support'', University of North Carolina, Contract EP–D–07–102, November 21, 2011.''

3. On page 24004, Footnote 40 is amended to read as follows: ''Ash Grove Update March 2012 (Ash Grove's letter indicates a mean of 14.4 lbs./ton clinker and a 99th percentile of 18.6 lb NO_X/ton clinker. This is significantly greater than the 2006 emissions shown in Table 10 for the Midlothian kilns.).''

4. On pages 24013 and 24014, Footnote 75 is amended to read as follows: ''BART analysis by Holcim for Trident Cement Plant, Three Forks, MT (''Holcim Initial Response'') (July 6, 2007); Responses to EPA comments on BART analysis for Trident Cement Plant (''Holcim 2008 Responses'') (Jan. 25, 2008); BART analysis by Holcim for low NO_X burners for Trident Cement Plant (''Holcim Additional Response, June 2009'') (June 9, 2009); Response to EPA letter regarding Confidential Business Information (CBI) claims on BART analysis for Trident Cement Plant (''Holcim Additional Response, August 2009'') (Aug. 12, 2009); Response to EPA request for NO_X and SO_2 emissions data for 2008–2010 (''Holcim 2011 Response'') (June 30, 2011); Response to EPA request for emissions and clinker production for Holcim pursuant to CAA section 114(a) (''Holcim 2012 Response'') (Mar. 2, 2012).''

5. On page 24014, in the first column, the first sentence of the second paragraph is amended to read, ''We identified that the following previously described NO_X control technologies are available: LNB, MKF, FGR, SNCR, and SCR.''

6. On page 24018, in Table 52, the annual emissions reduction for fuel switching option 2 is amended to 31.1 tpy, the remaining annual emissions for fuel switching option 2 is amended to 19.1 tpy, the annual emissions reduction for fuel switching option 1 is amended to 16.1 tpy, and the remaining annual emissions for fuel switching option 1 is amended to 34.1 tpy.

7. On page 24020, in Table 60, the emissions reductions from fuel switching option 1 are amended to 16.1 tpy, the average cost effectiveness for fuel switching option 1 is amended to 14,938 dollars per ton, the emissions reduction from fuel switching option 2 is amended to 31.1 tpy, and the average cost effectiveness for fuel switching option 2 is amended to 21,211 dollars per ton.

8. On page 24021, in Table 63, the average cost effectiveness for fuel switching option 2 is amended to 21,211 dollars per ton, and the average cost effectiveness for fuel switching option 1 is amended to 14,938 dollars per ton.

9. On page 24023, Footnote 113 is amended to read as follows: ''Baseline emissions were determined by averaging