

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

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In the Matter of )	
)	
Digital Performance Right in Sound )	
Recordings and Ephemeral Recordings )	Docket No. 2004-1 (CARP DTRA4)
for Noncommercial Webcasters )	
for 2005 and 2006 pursuant to Sections 112 )	
and 114 of the Copyright Act. )	
_____ )	

**JOINT PETITION FOR ADJUSTMENT OF RATES AND TERMS FOR  
STATUTORY LICENSES APPLICABLE TO NONCOMMERCIAL  
WEBCASTERS MAKING ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS**

Pursuant to 17 U.S.C. §§ 112(e), 114 & 803 and 37 C.F.R. § 251.63(b), SoundExchange, Inc., the nonprofit collective jointly controlled by representatives of recording artists and sound recording copyright owners, previously designated by the Librarian of Congress as the sole receiving agent for the collection of royalty payments made by eligible nonsubscription transmission services pursuant to Sections 112 and 114 of the Copyright Act, and Intercollegiate Broadcasting System, Inc., whose members include Noncommercial Webcasters<sup>1</sup> and Harvard Radio Broadcasting Co., Inc. (licensee of WHRB (FM)), (collectively referred to as the “Petitioners”), hereby submit this Joint

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<sup>1</sup> A “Noncommercial Webcaster” means a Webcaster that:  
(1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. § 501);  
(2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or  
(3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Petition to advise the Copyright Office of their settlement of the controversy over the rates and terms to be established in this proceeding for noncommercial entities making eligible nonsubscription transmissions and ephemeral phonorecords under statutory license. Specifically, the Petitioners have reached agreement on proposed rates and terms for the use of sound recordings in eligible nonsubscription transmissions together with related ephemeral recordings (collectively “Covered Activities”) for the 2005 through 2006 statutory license period. Petitioners hereby request that the Office publish the attached proposed rates and terms set forth in Exhibit A for public comment pursuant to 37 C.F.R. § 251.63(b) in lieu of convening a Copyright Arbitration Royalty Panel (“CARP”) to determine rates and terms for the Covered Activities for the years 2005 through 2006.

## **I. BACKGROUND**

The Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”) created a new exclusive right “to perform sound recordings publicly by means of a digital audio transmission.” 17 U.S.C. § 106(6). The DPRA limited this right in several respects, including by the creation of a statutory license for performances by certain subscription services. 17 U.S.C. § 114(f). In 1998, the Digital Millennium Copyright Act (“DMCA”) amended the statutory license in Section 114 to clarify coverage of certain categories of transmission services, including services making eligible nonsubscription transmissions and new subscription services. *See* 17 U.S.C. § 114(d)(2). It also amended Section 112 to address ephemeral reproductions that facilitate the making of certain digital audio transmissions, including those pursuant to the statutory license in Section 114. *See* 17 U.S.C. §§ 112(a) & (e).

The Copyright Office conducted a CARP proceeding that established royalty rates and terms for these statutory licenses applicable to eligible nonsubscription services for the period from October 28, 1998, to December 31, 2002. *See* Final Rule and Order in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, 67 Fed. Reg. 45,239 (July 8, 2002) (the “Final Order”). With the enactment of the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002), Congress authorized SoundExchange to negotiate rates and terms binding on all copyright owners and performers and available to noncommercial licensees as an alternative to the statutory rates and terms established in the Final Order. Such rates and terms, however, were not binding on Noncommercial Webcasters, which were permitted to elect to pay royalties under the Final Order or the rates and terms adopted pursuant to SWSA.

SoundExchange and the noncommercial entities signatory hereto agreed to alternative rates to those established under the Final Order pursuant to authority granted under SWSA, and the parties submitted those rates and terms to the Copyright Office on May 31, 2003. Those rates and terms were published in the Federal Register on June 11, 2003, and established alternative rates and terms for the period October 28, 1998 through December 31, 2004. *See* 68 Fed. Reg. 35,008.

On January 6, 2004, the Copyright Office published a notification of the initiation of the voluntary negotiation period to establish rates and terms for eligible nonsubscription transmissions and related ephemeral phonorecords for the period 2005 through 2006. 69 Fed. Reg. 689. Pursuant to that notification, parties may submit a voluntary settlement of rates and terms to the Copyright Office and request that the

Office publish the proposed rates and terms in the Federal Register for public comment. *Id.* at 690. “If no party with a substantial interest and an intent to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms, the Librarian may adopt the proposed terms and rates without convening a [CARP]”. *Id.*

## **II. THE PETITIONERS AND THEIR AGREEMENT**

The Petitioners have reached agreement on proposed rates and terms governing the use of sound recordings in Covered Activities for the 2005 through 2006 statutory license period. Exhibit A to this Joint Petition contains proposed regulations that implement the agreement. The Petitioners hereby request that the Copyright Office promulgate the proposed regulations in Exhibit A.

Each of the Petitioners has a “significant interest” in the rates and terms that are the subject of the two relevant CARP proceedings within the meaning of Section 803(a) of the Copyright Act. 17 U.S.C. § 803(a).

SoundExchange represents as follows: It is a nonprofit organization jointly controlled by representatives of sound recording copyright owners and performing artists and was established to administer the Section 112 and Section 114 statutory licenses on behalf of the vast majority of sound recording copyright owners and performers in the United States. SoundExchange was the sole collective designated to receive and distribute royalties paid by statutory licensees for the 2003-2004 rate period and one of two collectives designated to receive and distribute royalties paid by statutory licensees during the 1998 through 2002 rate period. SoundExchange’s member record companies create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

The Intercollegiate Broadcasting System, Inc., is a Rhode Island not-for-profit corporation with over nine hundred non-profit member radio stations and webcasters throughout the United States, representing the bulk of the not-for-profit educationally affiliated radio stations/webcasters.

Harvard Radio Broadcasting Co., Inc., is a Massachusetts eleemosynary corporation, licensee of Station WHRB (FM), Cambridge, Massachusetts.

### **III. NONPRECEDENTIAL NATURE OF NEGOTIATED RATES AND TERMS**

SWSA provided that neither the legislation nor any agreement negotiated pursuant thereto shall “be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving” the establishment of royalties or notice and recordkeeping provisions under Sections 112 and 114. That is, the rates and terms negotiated pursuant to SWSA were to be considered non-precedential. Because Petitioners are essentially seeking to have the rates and terms that are in effect for 2004 and which were negotiated pursuant to SWSA pushed forward for an additional two-year statutory period, they believe the non-precedential effect of those rates should apply for the 2005-06 rate period and request that the Federal Register notice announcing the settlement set forth that it is non-precedential. The rates and terms negotiated by the Petitioners represent a compromise motivated by extraordinary and unique circumstances and should not be given any precedential effect whatsoever.

**IV. CONCLUSION**

Pursuant to 17 U.S.C. §§ 112(e), 114 and 803 and 37 C.F.R. § 251.63(b), the Petitioners respectfully request that the Copyright Office publish the rates and terms set forth in Exhibit A for public comment and thereafter adopt such rates and terms for the years 2005 and 2006.

Respectfully submitted,

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August 26, 2004

## Exhibit A

### 37 CFR Part 263

#### **Rates and Terms for Certain Transmissions and the Making of Ephemeral Reproductions by Noncommercial Licensees**

##### **263.1 General.**

(a) *Scope.* This part 263 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Noncommercial Webcasters in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Noncommercial Webcasters in accordance with the provisions of 17 U.S.C. 112(e), during the License Period.

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

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by sound recording copyright owners and Noncommercial Webcasters making digital audio transmissions of sound recordings or ephemeral recordings shall apply in lieu of the rates and terms of this part to transmissions or recordings within the scope of such agreements.

##### **263.2 Definitions.**

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

(a) *Aggregate Tuning Hours* means the total hours of programming that a Noncommercial Webcaster has transmitted during the relevant period to all listeners within the United States over the relevant channels and stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions, less the actual running time of any sound recordings for which the Noncommercial Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Webcaster transmitted 1 hour of programming to 10 simultaneous listeners, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10.

(b) *Broadcaster Simulcast* means a simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, where such Internet transmission or retransmission is made by a Noncommercial Webcaster that owns or operates the over-the-air radio station making the AM or FM broadcast.

(c) *Copyright Owner* is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

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

(e) *Incidental Performance* is a Performance that both:

(1) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk, sports and business programming, brief background performances during disk jockey announcements, brief performances during commercials of 60 seconds or less in duration, or brief performances during sporting or other public events; and

(2) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than 30 seconds (as a sound recording used as a theme song is featured).

(f) *License Period* means the period commencing on January 1, 2005 and ending on December 31, 2006.

(g) *Listener* is a player, receiving device or other point receiving and rendering a transmission of a public performance of a sound recordings made by a Licensee, irrespective of the number of individuals present to hear the transmission.

(h) *Noncommercial Educational Entity* or *NEE* is a Noncommercial Webcaster that is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(g))

qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

- (i) *Noncommercial Webcaster* means a Webcaster that –
  - (1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);
  - (2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or
  - (3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

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

- (1) a performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);
- (2) a performance of a sound recording for which the Noncommercial Webcaster has previously obtained a license from the copyright owner of such sound recording; and
- (3) an Incidental Performance.

(k) *Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(l) *Webcaster* means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefore to make eligible nonsubscription transmissions and ephemeral recordings.

### **263.3 Election for payment of royalty rates available to Noncommercial Webcasters under section 263.4.**

(a) *General.* A Noncommercial Webcaster may elect to be subject to the rates and terms set forth in section 263.4 by complying with the procedures set forth in 263.3(b).

(b) *Election process.* A Noncommercial Webcaster making digital audio transmissions of sound recordings that wishes to elect for the first time to be subject to

the rates and terms set forth in section 263.4 in lieu of the rates and terms set forth in section 263.5 for the License Period shall submit to SoundExchange, Inc. a completed and signed election form (available on the SoundExchange web site at <http://www.soundexchange.com>) by no later than \_\_\_\_\_ [Copyright Office to insert the date that would be 30 days after publication of these Rates and Terms in the Federal Register]; provided, however, that any Noncommercial Webcaster that has previously elected to pay royalties under the rates and terms published in the Federal Register on June 11, 2003, 68 Fed. Reg. 35008, need not file a new election with SoundExchange. Notwithstanding the preceding sentence—

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

(2) a NEE may make its election by the later of (i) 45 days after the month in which the Noncommercial Webcaster first made a digital audio transmission of a sound recording under statutory license or (ii) the first day of the calendar quarter following the quarter in which the NEE commenced digital audio transmissions of sound recordings under statutory license.

(c) *Effect of election or nonelection.*

(1) *Election.* If a Noncommercial Webcaster timely elects under section 263.3(b) to be covered by the rates and terms set forth in section 263.4, then the Noncommercial Webcaster shall thereafter be obligated to pay royalties under and comply with the provisions of section 263.4 through the remainder of the License Period, provided that such Noncommercial Webcaster continues to meet the conditions for eligibility as a Noncommercial Webcaster.

(2) *Nonelection.* A Noncommercial Webcaster that does not make a timely election under section 263.3(b) shall pay royalties as otherwise provided under section 263.5 for the License Period.

(d) *Proof of eligibility.* A Noncommercial Webcaster that makes an election pursuant to section 263.3(b) shall make available to SoundExchange, within 30 days after SoundExchange's written request at any time during the 3 years following such election, sufficient evidence to support its eligibility as a Noncommercial Webcaster and, if applicable, as an NEE. Any proof of eligibility provided hereunder shall be provided with a certification signed by the chief executive officer of the Noncommercial Webcaster, or other person with similar management authority over the Noncommercial Webcaster, certifying that the information provided is accurate and the person signing is authorized to act on behalf of the Noncommercial Webcaster.

(e) *Limitation on participation in certain CARP proceedings.* A Noncommercial Webcaster that elects to be subject to the rates and terms in section 263.4 agrees that it has elected those rates and terms in lieu of participating in a copyright arbitration royalty panel (“CARP”) proceeding to set rates and terms for the License Period and in lieu of any different rates and terms that may be determined through such a CARP proceeding. Once a Noncommercial Webcaster has elected the rates and terms in section 263.4, it shall be prohibited from participating in any such CARP proceeding for the License Period.

**263.4 Royalty fees for public performances of sound recordings and for ephemeral recordings for Noncommercial Webcasters electing under section 263.3(b).**

(a) *Minimum annual fees for Noncommercial Webcasters electing under 263.3(b).*

(1) *NEEs transmitting a single channel.* Except as provided in section 263.4(a)(3) and subject to section 263.4(b), each NEE shall pay a nonrefundable minimum annual fee of \$500 for each year of the License Period, except in the case of an NEE (i) that is, or is affiliated with, an educational institution with fewer than 10,000 enrolled students or (ii) where substantially all of the programming transmitted by such NEE is reasonably classified as news, talk, sports or business programming, in which case the minimum annual fee shall be \$250. The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the NEE makes a Performance of a sound recording under the section 114 statutory license.

(2) *Other Noncommercial Webcasters transmitting a single channel.* Except as provided in section 263.4(a)(3) and subject to section 263.4(b), each Noncommercial Webcaster that is not an NEE shall pay a nonrefundable minimum annual fee of \$500 for each year of the License Period, except in the case of a Noncommercial Webcaster where substantially all of the programming transmitted by such Noncommercial Webcaster is reasonably classified as news, talk, sports or business programming, in which case the minimum annual fee shall be \$250. The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the Noncommercial Webcaster makes a Performance of a sound recording under the section 114 statutory license.

(3) *Noncommercial Webcasters transmitting multiple channels.* Notwithstanding Sections 263.4(a)(1) or (2), the nonrefundable minimum annual fee shall be \$500 for each year of the License Period for any Noncommercial Webcaster that makes a Performance of a sound recording on more than one channel or station of programming; provided that—

(i) if the Performances of sound recordings over any channels or stations in excess of one consist only of Incidental Performances, then

the nonrefundable minimum annual fee shall be as provided in Sections 263.4(a)(1) or (2) as applicable;

(ii) if substantially all of the programming on all of a Noncommercial Webcaster's channels and stations is reasonably classified as news, talk, sports or business programming, then the minimum annual fee for such Noncommercial Webcaster shall be \$250;

(iii) if a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts, then—

(A) a nonrefundable minimum annual fee otherwise determined in accordance with this section 263.4(a)(3) shall extend to only three such Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to section 263.4(c));

(B) additional nonrefundable minimum annual fees shall be payable under this Section 263.4(a)(3) for additional groups of up to three Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to section 263.4(c));

(C) each such group of up to three such Internet channels or stations, as well as associated Internet-only channels (subject to section 263.4(c)), shall be treated as a separate Noncommercial Webcaster for purposes of sections 263.4(a)(3)(ii), (b) and (c);

(D) all such channels or stations offering Broadcaster Simulcasts in a group shall be treated as a single channel or station for purposes of section 263.4(c);

(E) any additional channels or stations considered with the group for purposes of section 263.4(c) shall also be considered with the group for purposes of section 263.4(b); and

(F) accordingly, the Noncommercial Webcaster may offer two additional Internet-only channels or stations with each group of up to three channels or stations offering Broadcaster Simulcasts without triggering payments under section 263.4(c)(2), but all of such channels or stations (up to a total of five) shall be considered together for purposes of determining whether the

Noncommercial Webcaster exceeds the 146,000 Aggregate Tuning Hours threshold in section 263.4(b); and

(iv) for purposes of determining the number of channels or stations of programming offered by a Noncommercial Webcaster, an “archived program” (as defined in 17 U.S.C. 114(j)(2)) that complies with the conditions in 17 U.S.C. 114(d)(2)(C)(iii)(I) and (II) shall not be considered a separate channel or station of programming except in the case of a Noncommercial Webcaster that exclusively makes digital audio transmissions of archived programming.

(v) The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the Noncommercial Webcaster makes a Performance of a sound recording under the section 114 statutory license.

(b) *Usage fees for Noncommercial Webcasters making election under 263.3(b).*

(1) *In General.* Subject to section 263.4(c), the nonrefundable minimum annual fee payable under section 263.4(a) for each year of the License Period shall constitute full payment for digital audio transmissions totaling not more than 146,000 Aggregate Tuning Hours per month. If in any month during the License Period a Noncommercial Webcaster makes digital audio transmissions of sound recordings under statutory license in excess of 146,000 Aggregate Tuning Hours, then the Noncommercial Webcaster shall pay additional usage royalties for those digital audio transmissions in excess of 146,000 Aggregate Tuning Hours at the following rates, subject to the election provided in section 263.4(b)(2):

(i) \$0.0002176 (.02176¢) per Performance; or

(ii) \$.00251 (.251¢) per Aggregate Tuning Hour, except in the case of channels or stations where substantially all of the programming is reasonably classified as news, talk, sports or business programming, in which case the royalty rate shall be \$.0002 (.02¢) per Aggregate Tuning Hour.

For the avoidance of doubt, a Noncommercial Webcaster shall calculate its Aggregate Tuning Hours of digital audio transmissions each month and shall pay any additional royalties owed for such month as provided above in this section 263.4(b), but the Noncommercial Webcaster shall not owe any additional royalties for any subsequent months until such time as the Noncommercial Webcaster again exceeds the 146,000 Aggregate Tuning Hour threshold during a given month.

(2) *Election of Per Performance or Aggregate Tuning Hour Rate.* The first time a Noncommercial Webcaster is required to pay usage royalties under section 263.4(b)(1) during the License Period, the Noncommercial Webcaster shall notify SoundExchange in writing on a form to be made available by SoundExchange of the method that it shall use to calculate its liability under section 263.4(b)(1) for the remainder of the License Period, if any. Specifically, the Noncommercial Webcaster shall make an election to calculate royalties on either a Performance basis as set forth in section 263.4(b)(1)(i) or an Aggregate Tuning Hour basis as set forth in section 263.4(b)(1)(ii). Thus, for example, a Noncommercial Webcaster may not in one month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its usage additional royalties based on the Performance royalty and in another month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its additional royalties based on the Aggregate Tuning Hour royalty.

(c) *Fees for more than three channels of programming for Noncommercial Webcasters electing under 263.3(b).* Subject to section 263.4(a)(3)(iii), if in any year of the License Period a Noncommercial Webcaster makes digital audio transmissions of sound recordings on more than three channels or stations of programming, then—

(1) the Noncommercial Webcaster shall by written notice to SoundExchange at the time of its first payment for each year of the License Period or its inception of its first channel or station in excess of three, whichever is later, designate three channels or stations for which the nonrefundable minimum annual fee payable under section 263.4(a)(3), and any additional usage royalty payments under section 263.4(b), shall constitute full payment; and

(2) the Noncommercial Webcaster shall pay royalties for all its digital audio transmissions of sound recordings under statutory license over its other channels and stations at the statutory rates for digital audio transmissions made by commercial eligible nonsubscription transmission services at such time (i.e., the successor to the rates set forth for 2003-2004 in section 262.3), provided that—

(i) the Noncommercial Webcaster shall not be required to make any minimum annual payments that otherwise apply to commercial eligible nonsubscription transmission services;

(ii) the nonrefundable minimum annual fee payable under section 263.4(a)(3) shall not be creditable toward such payments for its other channels and stations;

(iii) such payments for its other channels and stations shall be due at the times provided in section 263.6(b) rather than any different times otherwise applicable to commercial eligible nonsubscription transmission services, except that if the statutory rate for digital audio transmissions made by commercial eligible nonsubscription transmission

services has not then been determined, such payments for its other channels and stations shall be due 45 days following the month in which the statutory rate is determined; and

(iv) the Noncommercial Webcaster shall comply with other terms relating to royalty payments that otherwise apply to commercial eligible nonsubscription transmission services (e.g., terms concerning any election among payment options, as set forth in part 262).

For the avoidance of doubt, by operation of Section 263.4(a)(3), when a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts: (i) such Broadcaster Simulcasts shall in no event be subject to the statutory rates for digital audio transmissions made by commercial eligible nonsubscription transmission services, and (ii) only programming offered on Internet-only channels or stations in excess of two that may be associated with a group of up to three channels or stations offering Broadcaster Simulcasts may be subject to that statutory rate as provided in this section.

(d) *Payment in lieu of providing reports of use for Noncommercial Webcaster electing under 263.3(b).*

(1) *No obligation to provide reports of use.* Notwithstanding any other regulations adopted by the Librarian of Congress or the Copyright Office, a Noncommercial Webcaster making an election under section 263.3(b) shall not be required to provide reports of use of sound recordings to SoundExchange for the License Period. The payment required by section 263.4(d)(2) is intended to facilitate SoundExchange's ability to collect or otherwise acquire substitute data on which to base distributions to Copyright Owners and Performers of payments made by Noncommercial Webcasters, although SoundExchange shall be under no obligation to spend such payments in any particular way or to collect or otherwise acquire any particular data by any particular means. Subject to section 263.6(h), SoundExchange may base its distributions to Copyright Owners and Performers of payments made by Noncommercial Webcasters on any data or methodology determined by its board of directors.

(2) *Payment in lieu of reports of use.* A Noncommercial Webcaster making an election under section 263.3(b) shall, in addition to the nonrefundable minimum annual fees paid for each year of the License Period, pay an additional payment of \$25 for each year of the License Period in lieu of the provision of reports of use of sound recordings. The payment due under this section 263.4(d)(2) shall be due at the time minimum annual fees are paid under section 263.4(a).

(3) *Participation in Task Force.* The task force created pursuant to Section 7(b) of the May 31, 2003 noncommercial webcaster agreement, negotiated under the Small Webcaster Settlement Act of 2002 and published in the Federal Register on June 11, 2003 (68 Fed. Reg. 35,008), shall continue to be obligated to use reasonable efforts to work with SoundExchange to determine data fields and report formats and recommend policies, procedures and systems for the delivery of electronic reports of use of sound recordings to SoundExchange sufficient to permit SoundExchange, beginning in 2007, to distribute the royalties paid by Noncommercial Webcasters to those Copyright Owners and Performers whose sound recordings are transmitted by Noncommercial Webcasters based on data reported by or on behalf of Noncommercial Webcasters. In the absence of substantial consensus among the Noncommercial Webcasters concerning the membership of such task force, each Noncommercial Webcaster shall be obligated to use reasonable efforts to do the foregoing.

(e) *Ephemeral Recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of any reproductions of a phonorecord during the License Period, and used solely by a Noncommercial Webcaster making an election under section 263.3(b) to facilitate transmissions for which it pays royalties as and when provided in this section 263.4(a)-(c) shall be deemed to be included within, and to comprise 8.8% percent of, the Noncommercial Webcaster's royalty payments under section 263.4(a)-(c).

(f) *Reporting.* Each Noncommercial Webcaster making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall report its Aggregate Tuning Hours of digital audio transmissions to SoundExchange in a monthly statement of account to be filed under section 263.6. Each Noncommercial Webcaster having a statutory license during the License Period and not making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall so certify in the statement of account accompanying its first payment following the end of a calendar year within the License Period, including the payment of any minimum annual fees, if any. For the avoidance of doubt, the statements of account filed by a Noncommercial Webcaster for the years 2006 and 2007 (with the payment of each year's minimum annual fee) shall state that the Noncommercial Webcaster did not exceed 146,000 Aggregate Tuning Hours in any month of 2005 or 2006, as the case may be, if true. A Noncommercial Webcaster whose transmissions exceeded 146,000 Aggregate Tuning Hours in some, but not all, months of a given calendar year during the License Period shall not be required to certify its Aggregate Tuning Hours in the statement of account accompanying its first payment following the end of that year but shall only be required to report its Aggregate Tuning Hours in the statement(s) of account submitted for those months in which its Aggregate Tuning Hours exceeded 146,000.

**263.5 Fees for Noncommercial Webcasters not making an election under section 263.3(b).**

(a) *General.* The following rates and terms shall apply to Noncommercial Webcasters not making an election under 263.3(b).

(b) *Minimum Annual Fee.* A Noncommercial Webcaster not making an election under section 263.3(b) shall pay a nonrefundable, nonprorated minimum annual fee of \$500 for each year of the License Period during which the Noncommercial Webcaster makes digital audio transmissions of sound recordings or ephemeral phonorecords under statutory license.

(c) *Performance Fees.* A Noncommercial Webcaster not making an election under section 263.3(b) shall pay the following fees for the making of digital audio transmissions of sound recordings:

- (1) for Broadcast Simulcasts, a royalty of \$0.0002 (.02¢) per Performance;
- (2) for other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a royalty of \$0.0002 (.02¢) per Performance; and
- (3) for Internet transmissions on other side channels of programming, a royalty of \$.0007 (.07¢) per Performance.

(d) *Ephemeral Fees.* For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, a Noncommercial Webcaster shall pay an additional section 112(e) royalty equal to 8.8% of the Performance royalty liability calculated under Section 263.5(c).

**263.6 Terms for making payment of royalty fees and statements of account.**

(a) *Timing of payment of minimum annual fees.* The nonrefundable minimum annual fee for each year of the License Period shall be due by January 31<sup>st</sup> of such year; provided, however, when a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its first payment of a nonrefundable minimum annual fee within 45 days following the month in which the Noncommercial Webcaster commences digital audio transmissions of sound recordings under the section 114 statutory license, except in the case of a NEE making an election under section 263.3(b), which may pay its minimum annual fee at the time its election is due under 263.3(b)(2).

(b) *Timing of payment of other fees.* Any payments due under sections 263.4(b) or (c) or 263.5 shall be due 45 days following the month in which the liability accrues.

(c) *Remittance.* Payments of all amounts due under this Part 263 shall be made to SoundExchange, Inc. and shall under no circumstances be refundable. Payments shall be accompanied by the statement of account required under section 263.6(g).

(d) *Continuing obligation to pay.* If statutory rates and terms for Noncommercial Webcasters for the period beginning January 1, 2007, have not been established by December 31, 2006, then Noncommercial Webcasters shall continue to make payments at the rates established under this part 263 for the License Period until such successor rates and terms are established. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within 45 days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms.

(e) *Late payments.* A Noncommercial Webcaster shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by SoundExchange after the due date. Late fees shall accrue from the due date until payment is received by SoundExchange. Such late fees shall be without prejudice to other remedies of copyright owners.

(f) *Adjustment of schedule if this part not adopted until after January 1, 2005.* If the rates and terms established in this part 263 are not adopted in a final rule until after January 1, 2005, then any initial payments due hereunder shall be due by the later of the date set forth in this part 263 or 45 days following the publication of this part 263 in the Federal Register.

(g) *Statements of account.* To the extent a statement of account is required under this part 263, the Noncommercial Webcaster shall complete and submit the statement of account prepared by SoundExchange for Noncommercial Webcasters and made available on its web site located at <http://soundexchange.com>. A statement of account shall include only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, and, in the case of Noncommercial Webcasters paying royalties under 263.5, if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month;

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

- (3) The handwritten signature of:
  - (i) The owner of the Noncommercial Webcaster or a duly authorized agent of the owner, if the Noncommercial Webcaster is not a partnership or a corporation;
  - (ii) A partner or delegee, if the Noncommercial Webcaster is a partnership; or
  - (iii) An officer of the corporation, if the Noncommercial Webcaster is a corporation,

provided, however, that a student may not sign a statement of account for a NEE.

- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) If the Noncommercial Webcaster is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

“I, the undersigned owner or agent of the Noncommercial Webcaster, or officer or partner, if the Noncommercial Webcaster is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.”

(h) *Distribution of Payments.*

(1) SoundExchange shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); provided that SoundExchange shall only be responsible for making distributions to those Copyright Owners and Performers who provide it with such information as is necessary to identify and pay the correct recipient of such payments. SoundExchange shall distribute royalty payments on a basis that values all performances by a Noncommercial Webcaster equally based upon the information obtained by SoundExchange for the distribution of royalty payments; provided, however, Performers and Copyright Owners that authorize SoundExchange may agree with SoundExchange to allocate their shares of the royalty payments made by any Noncommercial Webcaster among themselves on an alternative basis.

Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with SoundExchange upon payment protocols to be used by SoundExchange that provide for alternative arrangements for the payment of royalties consistent with the percentages in 17 U.S.C. 114(g)(2).

(2) SoundExchange shall inform the Register of Copyrights of:

(i) Its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized it (hereinafter “nonmembers”), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that SoundExchange receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(iii) The final disposition by SoundExchange of any complaint specified by paragraph (h)(2)(ii) of this section, within 60 days of such disposition.

(3) SoundExchange may request that the Register of Copyrights provide a written opinion stating whether its methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(i) *Permitted Deductions.* SoundExchange may deduct from the payments made by Noncommercial Webcasters under sections 263.4 and 263.5, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g) may agree to permit SoundExchange to make any other deductions.

(j) *Retention of Records.* Books and records of a Noncommercial Webcaster and SoundExchange relating to the payment, collection and distribution of royalty payments shall be kept for a period of not less than 3 years.

### **263.7 Confidentiality.**

For purposes of this part, "Confidential Information" shall mean nonpublic information contained in a statement of account necessary to calculate liability under the statutory license. SoundExchange shall not disclose Confidential Information in a manner that reveals the identity of the service providing the Confidential Information; provided, however, that SoundExchange may disclose Confidential Information that reveals the identity of the service providing the Confidential Information as part of an audit, CARP or other legal proceeding, to comply with legal obligations generally, and to any sound recording copyright owner or performer entitled to receive statutory royalties.

Sound recording copyright owners and performers shall not publicly disclose such Confidential Information other than for enforcement purposes or sell any Confidential Information to a third party. SoundExchange and sound recording copyright owners and performers shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but in no event less than the standard of care used to safeguard their own confidential information.

### **263.8 Verification of statements of account.**

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

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

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

(d) *Acquisition and retention of records.* The Noncommercial Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than 3 years. SoundExchange shall retain the report of the verification for a period of not less than 3 years.

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

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

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

### **263.9 Verification of royalty payments.**

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

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

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

(d) *Acquisition and retention of records.* SoundExchange shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than 3 years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

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

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

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

**263.10 Unclaimed funds.**

If SoundExchange is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, SoundExchange shall retain the required payment in a segregated trust account for a period of 3 years from the date of payment. No claim to such payment shall be valid after the expiration of the 3-year period. After the expiration of this period, SoundExchange may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

**263.11 Default.**

If a Noncommercial Webcaster fails to comply with the conditions of the statutory licenses set forth in 17 U.S.C. 112 and 114, this part and any other applicable regulations, then a sound recording copyright owner or its agent may give written notice to the Noncommercial Webcaster that, unless the breach is remedied within thirty days from the date of notice and not repeated, the Noncommercial Webcaster's authorization to make public performances and ephemeral reproductions under this part will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. 501 and fully subject to the remedies provided by 17 U.S.C. 502-506 and 509.