

notice is to announce the Committee and workgroup meetings scheduled for September 1–2, 2009.

**DATES:** The Shipyard and Longshore workgroups will meet on Tuesday, September 1, 2009, 8 a.m. to 4:30 p.m., and the Committee will meet on Wednesday, September 2, 2009, from 8 a.m. to 4:30 p.m.

**ADDRESSES:** The Committee and workgroups will meet at the Newport News Marriott Hotel, 740 Town Center Drive, Newport News, VA 23606 ((757) 873-9299). Mail comments, views, or statements in response to this notice to Danielle Watson, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone (202) 693-1870; fax (202) 693-1663.

**FOR FURTHER INFORMATION CONTACT:** For general information about MACOSH and this meeting, contact: Amy Wangdahl, Acting Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693-2066. Individuals with disabilities wishing to attend the meeting should contact Danielle Watson at (202) 693-1870 no later than August 18, 2009, to obtain appropriate accommodations.

**SUPPLEMENTARY INFORMATION:** All MACOSH meetings are open to the public. All interested persons are invited to attend the MACOSH meeting at the time and location listed above. The MACOSH agenda will include: An OSHA activities update; a review of the minutes from the previous meeting; and reports from each workgroup. MACOSH may also discuss the following topics based on the workgroup reports: Surface preparation (29 CFR 1915 subpart C, Painting and Coatings); Safety and Health Injury Prevention Sheets (SHIPS) rigging guidance document; arc flash guidance; commercial fishing industry quick cards; injury and fatality data initiative; activities related to shipyard employment; scaffolding and falls (29 CFR 1915 subpart E); welding guidance; break bulk cargo safety guidance; safety zone guidance; speed limits in marine terminals; and defective containers.

**Public Participation:** Written data, views, or comments for consideration by MACOSH on the various agenda items listed above should be submitted to Danielle Watson at the address listed above. Submissions received by August 18, 2009, will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits.

**Authority:** This notice was prepared under the direction of Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), Secretary of Labor's Order 5-2007 (72 FR 31160), and 29 CFR part 1912.

Signed at Washington, DC, this 14th day of July, 2009.

**Jordan Barab,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

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**BILLING CODE 4510-26-P**

## LIBRARY OF CONGRESS

### Copyright Office

#### Notification of Agreements Under the Webcaster Settlement Act of 2009

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of agreement.

**SUMMARY:** The Copyright Office is publishing an agreement which sets rates and terms for the reproduction and performance of sound recordings made by certain specified webcasters, under two statutory licenses. Webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreement published herein rather than the rates and terms of any determination by the Copyright Royalty Judges.

**FOR FURTHER INFORMATION CONTACT:** Stephen Ruwe, Attorney Advisor, or Tanya M. Sandros, Deputy General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366. See the final paragraph of the SUPPLEMENTARY INFORMATION for information on where to direct questions regarding the rates and terms set forth in the agreement.

**SUPPLEMENTARY INFORMATION:** On June 30, 2009, President Obama signed into law the Webcaster Settlement Act of 2009 ("WSA"), Pub. L. No. 111-36, which amends section 114 of the Copyright Act, title 17 of the United States Code, as it relates to webcasters. Section 114(f)(5) as amended by the WSA allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002, order for collecting royalty payments made by eligible

nonsubscription transmission services under the section 112 and section 114 statutory licenses, *see* 67 FR 45239 (July 8, 2002), to enter into agreements on behalf of all copyright owners and performers to set rates, terms and conditions for webcasters operating under the section 112 and section 114 statutory licenses for a period of not more than 11 years beginning on January 1, 2005. The authority to enter into such settlement agreements shall expire at 11:59 p.m. Eastern time on the 30th day after the enactment of the WSA.

Unless otherwise agreed to by the parties, the rates and terms set forth in the agreement apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords. To make this point clear, Congress included language expressly addressing the precedential value of agreements made under the WSA. Specifically, section 114(f)(5)(C), states that: "Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that are party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection." 17 U.S.C. 114(f)(5)(C) (2009).

On July 7, 2009, SoundExchange notified the Copyright Office that it had negotiated an agreement for the reproduction and performance of sound recordings by "Commercial Webcasters Including Small Pureplay Webcasters" under the section 112 and section 114 statutory licenses. Therefore, in accordance with the requirement set forth in amended section 114(f)(5)(B), the Copyright Office is publishing the submitted agreement as Appendix A, thereby making the rates and terms in the agreement available to any webcasters meeting the respective eligibility conditions of the agreement as an alternative to the rates and terms of any determination by the Copyright Royalty Judges.

The Copyright Office has no responsibility for administering the rates and terms of the agreement beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreement should be directed to SoundExchange (for contact information, see <http://www.soundexchange.com>).

Dated: July 13, 2009.

Marybeth Peters,

Register of Copyrights.

**Note:** The following Appendix Will Not Be Codified in the Code of Federal Regulations.

#### **APPENDIX A – AGREED RATES AND TERMS FOR COMMERCIAL WEBCASTERS INCLUDING SMALL PUREPLAY WEBCASTERS ARTICLE 1 – DEFINITIONS**

1.1 *General.* In general, words used in the rates and terms set forth herein (the "Rates and Terms") and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

##### **1.2 Additional Definitions**

(a) "Affiliate" of a transmitting entity is a person or entity that directly, or indirectly through one or more intermediaries –

(1) has securities or other ownership interests representing more than 50 percent of such person's or entity's voting interests beneficially owned by –

(A) such transmitting entity; or

(B) a person or entity beneficially owning securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity;

(2) beneficially owns securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity; or

(3) otherwise Controls, is Controlled by, or is under common Control with the transmitting entity.

(b) "Bundled Service" means any package of services or products provided to end users by a Commercial Webcaster, Affiliate, or any third party with which a Commercial Webcaster has a Third Party Business Arrangement that meets each of the following requirements:

(1) the package of products or services includes a digital music service through which Eligible Transmissions are made and at least one other product or service that does not consist only of the offering of Eligible Transmissions; and

(2) the package of products or services that constitute any particular package is only offered to end users for a fee (whether one-time, recurring or otherwise) that does not differentiate among the various components of the package. The fact that the package of products or services, or any component part(s) thereof, is offered to end users for a limited duration without a fee (i.e., on a promotional basis) shall not disqualify the package from treatment as a Bundled Service.

(c) "Commercial Webcaster" shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has obtained a compulsory license under 17 U.S.C. § 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(I).

(d) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract or otherwise.

(e) "Eligible Transmission" shall mean an eligible nonsubscription transmission, or a transmission through a new subscription service, made by a Commercial Webcaster over the internet that is subject to the payment of royalties under 37 C.F.R. Part 380.

(f) "Expenses" –

(1) means all costs incurred (whether actually paid or not) by a Small Pureplay Webcaster, except that capital costs shall be treated as Expenses allocable to a period only to the extent of charges for amortization or depreciation of such costs during such period as are properly allocated to such period in accordance with U.S. Generally Accepted Accounting Principles ("GAAP");

(2) includes the fair market value of all goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property) provided by a Small Pureplay Webcaster to any third party in lieu of a cash payment and the fair market value of any goods or services purchased for or provided to a Small Pureplay Webcaster by an Affiliate of such webcaster; and

(3) shall not include –

(A) the imputed value of personal services rendered by up to 5 natural persons who are, directly or indirectly, owners of the Small Pureplay Webcaster, and for which no compensation has been paid;

(B) the imputed value of occupancy of residential property for which no Federal income tax deduction is claimed as a business expense;

(C) costs of purchasing phonorecords of sound recordings used in the Small Pureplay Webcaster's service;

(D) royalties paid for the public performance of sound recordings; or

(E) the reasonable costs of collecting overdue accounts receivable, provided that the reasonable costs of collecting any single overdue account receivable may not exceed the actual account receivable.

(g) "Gross Revenues" means all revenue of any kind earned by the Commercial Webcaster or its Affiliates from all its operations, in accordance with U.S. Generally Accepted Accounting Principles, and includes –

(A) all cash or cash equivalents;

(B) the fair market value of goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property);

(C) in-kind and cash donations and other gifts (but not capital contributions made in exchange for an equity interest in the recipient); and

(D) amounts earned by such person or entity but paid to an Affiliate of such person or entity in lieu of payment to such person or entity.

For the avoidance of doubt, Gross Revenues includes revenue from activities other than making Eligible Transmissions, including revenue from transmissions of sound recordings licensed directly from the relevant copyright owners. Commercial Webcasters with substantial revenue from activities other than making Eligible Transmissions under the statutory licenses in Sections 112(e) and 114 may wish not to elect to be subject to these Rates and Terms.

(h) "Small Pureplay Webcaster" shall mean a Commercial Webcaster that (a) together with its Affiliates, has not had annual Gross Revenues of more than \$1,250,000 from its (or their) worldwide

activities, in any two previous calendar years, and (b) in any calendar year in which it is to be considered a Small Pureplay Webcaster reasonably expects to have, together with its Affiliates, (i) annual Gross Revenues of not more than \$1,250,000 from its (or their) worldwide activities; and (ii) average monthly aggregate tuning hours for all programming transmitted within the United States, less the actual running time of any sound recording licensed directly from the relevant copyright owners, that is less than the relevant threshold from the following table:

| YEAR      | MAXIMUM AGGREGATE TUNING HOURS |
|-----------|--------------------------------|
| 2006–2008 | 7 million ATH                  |
| 2009      | 8 million ATH                  |
| 2010      | 8.5 million ATH                |
| 2011      | 9 million ATH                  |
| 2012–2014 | 10 million ATH                 |

Small Pureplay Webcaster status is available in 2006–2014 only (not 2015).

(i) “*SoundExchange*” shall mean SoundExchange, Inc. and shall include its successors and assigns.

(j) “*Subscription Service*” means a service providing Eligible Transmissions that are subscription transmissions (as defined in 17 U.S.C. § 114(j)(14)).

(k) “*Syndicated Service*” means a service providing Eligible Transmissions selected or controlled, or made using ephemeral recordings controlled, by the relevant Commercial Webcaster but presented in such a manner that (i) the end user can receive Eligible Transmissions without visiting a page, interface, display, application, player, software or other electronic property predominantly associated with the service, or (ii) the end user can receive Eligible Transmissions through a website, application, player, software or other electronic property of any kind that is owned, controlled or branded by a third party, in whole or in part, directly or indirectly pursuant to a Third Party Business Arrangement.

(l) “*Third Party Business Arrangement*” means any arrangement with a third party where the third party (or another party on behalf of such third party) provides monies or other consideration recognizable as revenue under GAAP to a Commercial Webcaster or an Affiliate. For the avoidance of doubt, the provision of a “white label” service would constitute a Third Party Business Agreement.

## ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

### 2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement

Act of 2009, and subject to the provisions set forth below, Commercial Webcasters may elect to be subject to the rates and terms set forth herein (the “Rates and Terms”) in their entirety, with respect to such Commercial Webcasters’ Eligible Transmissions and related ephemeral recordings, for any calendar year that it qualifies as a Commercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Commercial Webcaster and make a timely election pursuant to Section 2.2 must comply with otherwise applicable rates and terms.

**2.2 Election Process in General.** To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for any one or more calendar years that it qualifies as a Commercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, a Commercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than 30 days after publication of these Rates and Terms in the **Federal Register**. On any such election form, the Commercial Webcaster must, among other things, certify that it qualifies as a Commercial Webcaster for the relevant year. Even if an entity has once elected to be treated as a Commercial Webcaster, it must make a separate, timely election in each subsequent year in which it wishes (and is eligible) to be treated as such. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Section 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 Fed. Reg. 24084 (May 1, 2007) (the “Final Determination”) or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Section 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015

(including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the **Federal Register** at 74 Fed. Reg. 318–20 (Jan. 5, 2009)) shall not be treated as a Commercial Webcaster or have the right to claim the benefit of these Rates and Terms, unless it withdraws from such proceeding no later than five business days after submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

**2.3 Election of Small Pureplay Webcaster Status.** A Commercial Webcaster that elects to be subject to these Rates and Terms and qualifies as a Small Pureplay Webcaster may elect to be treated as a Small Pureplay Webcaster for any one or more calendar years that it so qualifies during the period 2006–2014. To do so, the Commercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than 30 days after publication of these Rates and Terms in the **Federal Register**. On any such election form, the Commercial Webcaster must, among other things, certify that it qualifies as a Small Pureplay Webcaster for the relevant year and provide Gross Revenues and aggregate tuning hours information relevant to determining eligibility. Even if an Eligible Small Webcaster has once elected to be treated as a Small Pureplay Webcaster, it must make a separate, timely election in each subsequent year in which it wishes (and is eligible) to be treated as such. For the avoidance of doubt, if a Commercial Webcaster that has once made an election to be subject to these Rates and Terms as a Small Pureplay Webcaster wishes to not make such an election in subsequent years, and is eligible to be treated as an Eligible Small Webcaster under the agreement entered into by SoundExchange under the Webcaster Settlement Act and published in the **Federal Register** at 74 Fed. Reg. 9302 (March 3, 2009), the Commercial Webcaster may elect to be treated as an Eligible Small Webcaster under such agreement for such subsequent years. ≤

**2.4 Representation of Compliance and Non-waiver.** By electing to operate pursuant to these Rates and Terms, an entity represents and warrants that it qualifies as a Commercial Webcaster, and if applicable, as a Small Pureplay Webcaster. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates

and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Commercial Webcaster, Small Pureplay Webcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Commercial Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.

### ARTICLE 3 – SCOPE

**3.1 In General.** In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Commercial Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as

otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for each calendar year during the period beginning on January 1, 2006, and ending on December 31, 2015, during which they have made such an election.

**3.2 Applicability to All Eligible Services Operated by or for a Commercial Webcaster.** If a Commercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Commercial Webcaster that qualify as a Performance under 37 C.F.R. § 380.2(i), and related ephemeral recordings.

**3.3 No Implied Rights.** These Rates and Terms extend only to electing Commercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

### ARTICLE 4 – ROYALTIES

**4.1 Minimum Fee.** Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$25,000. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee paid against any royalties payable by it under these Rates and Terms for the same calendar year.

**4.2 Royalty Rates in General.** Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall be payable as provided in this Section 4.2, except as provided in Section 4.3.

(a) A Commercial Webcaster that makes Eligible Transmissions through a Bundled Service, Syndicated Service or

Subscription Service, shall pay royalties for such Eligible Transmissions on a per performance basis, as follows:

| YEAR | RATE PER PERFORMANCE |
|------|----------------------|
| 2006 | \$0.0008             |
| 2007 | \$0.0011             |
| 2008 | \$0.0014             |
| 2009 | \$0.0015             |
| 2010 | \$0.0016             |
| 2011 | \$0.0017             |
| 2012 | \$0.0020             |
| 2013 | \$0.0022             |
| 2014 | \$0.0023             |
| 2015 | \$0.0025             |

(b) To the extent a Commercial Webcaster is not required to pay royalties under Section 4.2(a), it shall pay royalties equal to the greater of the following (on an annual basis, as provided in Section 4.5):

(i) A usage-based royalty computed on a per-performance basis, or in the years where specified on an aggregate tuning hour basis, as follows:

| YEAR | PER PERFORMANCE | PER AGGREGATE TUNING HOUR |
|------|-----------------|---------------------------|
| 2006 | \$0.00080       | 1.2¢                      |
| 2007 | \$0.00084       | 1.26¢                     |
| 2008 | \$0.00088       | 1.32¢                     |
| 2009 | \$0.00093       |                           |
| 2010 | \$0.00097       |                           |
| 2011 | \$0.00102       |                           |
| 2012 | \$0.00110       |                           |
| 2013 | \$0.00120       |                           |
| 2014 | \$0.00130       |                           |
| 2015 | \$0.00140       |                           |

(ii) 25% of Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101).

**4.3 Royalty Rates for Small Pureplay Webcasters Through 2014.** For Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), during the period 2006–2014, electing Small Pureplay Webcasters shall pay royalties equal to the greater of the following (on an annual basis, as provided in Section 4.5):

(i) A percentage of Gross Revenues, as follows:

YEAR

PERCENTAGE

2006–2008

10% of the first \$250,000 in Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101), and 12% of any Gross Revenues in excess of \$250,000 from activities in the United States, during the applicable year

| YEAR      | PERCENTAGE                                                                                                                                                                                               |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2009–2014 | 12% of the first \$250,000 in Gross Revenues from activities in the United States, and 14% of any Gross Revenues in excess of \$250,000 from activities in the United States, during the applicable year |

(ii) 7% of Expenses during the applicable year

Provided, however, that Eligible Transmissions shall be subject to the royalty rates provided in Section 4.2(a) if they are (a) above the aggregate tuning hour thresholds in Section 1.2(h) or (b) made through a Bundled Service, Syndicated Service or Subscription Service;

And Further Provided, however, that if a Commercial Webcaster has made payments for a calendar year based on the expectation that it will qualify as a Small Pureplay Webcaster, but it exceeds the \$1.25 Million Gross Revenues cap for the year, it shall pay for that entire year and the following year (if it again exceeds \$1.25 Million Gross Revenues cap for that following year) at a rate that is the greater of (x) a royalty determined as provided above in this Section 4.3 and (y) 25% of Gross Revenues from activities in the United States (as defined in 17 U.S.C. § 101), except that if the year in which the Commercial Webcaster exceeds the \$1.25 Million Gross Revenues cap is 2014, it shall in 2015 pay pursuant to Section 4.2. For the avoidance of doubt, the rate set forth in this paragraph shall be available to a Commercial Webcaster for no more than two years in total (whether those years are consecutive or not), and if a Commercial Webcaster has exceeded the \$1.25 Million Gross Revenues cap for two previous years, it shall thereafter be ineligible for Small Pureplay Webcaster status and must make payments pursuant to Section 4.2.

**4.4 Ephemeral Royalty.** The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Commercial Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015.

**4.5 True-Up for Greater of Royalties.** In making monthly payments, a Commercial Webcaster subject to Section 4.2(a) or 4.3 shall, at the time a payment is due, calculate its liability for the year through the end of the applicable month under all relevant subparts of the royalty calculation, and pay the applicable royalty for the year through the end of the applicable

month, less any amounts previously paid for such year.

**4.6 True-Up for Certain Corporate Transactions.** If a transmitting entity that has at any time elected to be treated as a Small Pureplay Webcaster under these Rates and Terms, and has not ceased to qualify as such through growth in its business and thereafter paid full royalties under Section 4.2 for a period of at least twelve (12) full months, becomes a party to or subject of any merger, sale of stock or all or substantially all of its assets, or other corporate restructuring, such that, upon the consummation of such transaction, the transmitting entity or its successor (including a purchaser of all or substantially all of its assets) does not qualify, or reasonably expect to qualify, as a Small Pureplay Webcaster for the then-current year, then the transmitting entity or its successor shall, within thirty (30) days after the consummation of such transaction, pay to SoundExchange either –

(i) the difference between (a) the payment the transmitting entity would have been required to make under Section 4.2 for each year in which it elected to be treated as a Small Pureplay Webcaster under these Rates and Terms, from January 1, 2006 through the date of such transaction, or if it elected to be treated as a Small Pureplay Webcaster under these Rates and Terms for more than four years between January 1, 2006 and the date of such transaction, for the most recent four such years, and (b) the royalty payments it made under these Rates and Terms for such years; or

(ii) 30% of all value inuring in connection with such transaction to the transmitting entity and its Affiliates, shareholders, management personnel and other persons and entities associated with the transmitting entity receiving value in consideration for such transaction, including money, and the fair market value of securities and other consideration, provided for stock in the transmitting entity or assets of the transmitting entity, the value of consideration provided in connection with any merger, and compensation that becomes payable to management personnel of the transmitting entity and their family members in connection with such transaction.

The burden of proof shall be on the transmitting entity or its successor to demonstrate its actual usage for

purposes of determining the payment it would have been required to make under such commercial webcasting rates for each such year.

**4.7 Payment.** Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees shall be paid by January 31 of each year, except that Small Pureplay Webcasters may elect to make their minimum payments in four equal quarterly installments, which shall be due on January 31, April 14, July 15 and October 15.

**4.8 Monthly Obligations.** Commercial Webcasters must make monthly payments once its royalty obligation exceeds the minimum fee it has paid, and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

**4.9 Past Periods.** Notwithstanding anything else in this Agreement, to the extent that a Commercial Webcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on the last day of the month in which these Rates and Terms are published in the **Federal Register**, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than 60 days after publication of these Rates and Terms in the **Federal Register**, including late fees as provided in Section 4.10 from the original due date.

**4.10 Late Fees.** A Commercial Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange.

**ARTICLE 5 – REPORTING**

5.1 *Census Reporting.* Commercial Webcasters shall submit reports of use on a per-performance basis in full compliance with the regulations set forth in 37 CFR Part 370 and any subsequent amendments or modifications thereto or replacement regulations, except that the following provisions shall apply notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Commercial Webcasters shall submit reports of use to SoundExchange on a monthly basis.

(b) As provided in Section 4.8, Commercial Webcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(c) Commercial Webcasters shall submit reports of use to SoundExchange on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(d) Commercial Webcasters shall transmit each report of use in a file the name of which includes the name of the Commercial Webcaster, exactly as it appears on its notice of use.

(e) Commercial Webcasters shall submit reports of use with headers, as presently described in 37 C.F.R. § 370.3(d)(7) or as may be provided by successor regulations.

(f) Commercial Webcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes the name of the Commercial Webcaster, exactly as it appears on its notice of use.

5.2 *Server Logs.* To the extent not already required by the current regulations set forth in 37 C.F.R. Part 380, Commercial Webcasters shall retain for a period of at least four years server logs reasonably sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for a Commercial Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Commercial Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least four years and/or that such server logs be provided to, and maintained by, the Commercial Webcaster. SoundExchange shall have access to all such server logs pursuant to applicable regulations for the verification of statutory royalty payments (presently 37 C.F.R. § 380.6).

**ARTICLE 6 – ADDITIONAL PROVISIONS**

6.1 *Applicable Regulations.* To the extent not inconsistent with the terms herein, use of sound recordings by Commercial Webcasters shall be governed by, and Commercial Webcasters shall comply with, applicable regulations, including 37 C.F.R. Parts 370 and 380. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. Commercial Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 *Participation in Proceedings.* A Commercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006–2015 period. Thus, once a Commercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time directly or indirectly participate as a party, intervenor, amicus curiae or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the Final Determination, any proceedings on remand from such an appeal, any proceeding before the Copyright Royalty Judges to determine royalty rates and terms applicable to the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2011–2015, any appeal of such proceeding, or any other related proceedings, unless subpoenaed on petition of a third party (without any action by a Commercial Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 *Use of Agreement in Future Proceedings.* Consistent with 17 U.S.C. § 114(f)(5)(C), Commercial Webcasters and SoundExchange agree that neither the Webcaster Settlement Act nor any provisions of these Rates and Terms shall be admissible as evidence or otherwise taken into account in any

administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges. These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of Commercial Webcasters, copyright owners and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller. No person or entity may, in any way, seek to use in any way these Rates and Terms in any such proceeding.

6.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Commercial Webcaster setting alternative rates and terms governing the Commercial Webcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 *Default.* A Commercial Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Commercial Webcaster that, unless the breach is remedied within 30 days from the date of notice, the Commercial Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms is terminated by SoundExchange. No such cure period shall apply before termination in case of material noncompliance on a recurring basis. Any transmission made by a Commercial Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501–506.

**ARTICLE 7 – MISCELLANEOUS**

7.1 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia

(without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

**7.2 Rights Cumulative.** The remedies provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

**7.3 Entire Agreement.** These Rates and Terms represent the entire and complete agreement between SoundExchange and a Commercial Webcaster with respect to the subject matter hereof and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Commercial Webcaster with respect to the subject matter hereof.

[FR Doc. E9-17092 Filed 7-16-09; 8:45 am]

**BILLING CODE 1410-30-S**

## MISSISSIPPI RIVER COMMISSION

### Sunshine Act Meetings

#### AGENCY HOLDING THE MEETINGS:

Mississippi River Commission

**TIME AND DATE:** 9 a.m., August 14, 2009.

**PLACE:** On board MISSISSIPPI V at City Front, St. Louis, MO.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., August 17, 2009.

**PLACE:** On board MISSISSIPPI V at River Park, Tiptonville, TN.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., August 18, 2009.

**PLACE:** On board MISSISSIPPI V at Mud Island, Memphis, TN.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., August 19, 2009.

**PLACE:** On board MISSISSIPPI V at City Front, Greenville, MS.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., August 21, 2009.

**PLACE:** On board MISSISSIPPI V at Port Commission Dock, Morgan City, LA.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED: (1)

Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the New Orleans District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

#### CONTACT PERSON FOR MORE INFORMATION:

Mr. Stephen Gambrell, telephone 601-634-5766.

**George T. Shepard,**

*Colonel, EN, Secretary, Mississippi River Commission.*

[FR Doc. E9-17157 Filed 7-15-09; 11:15 am]

**BILLING CODE 3720-58-P**

## NATIONAL SCIENCE FOUNDATION

### Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463 as amended), the National Science Foundation announces the following meeting:

**Name:** Site visit review of the Materials Research Science and Engineering Center (MRSEC) at Cornell University by NSF Division of Materials Research (DMR) #1203.

**Dates and Times:** Sunday, August 23, 2009; 6 p.m.-9 p.m., Monday, August 24, 2009; 7:45 a.m.-9 p.m., Tuesday, Aug 25, 2009; 8 a.m.-4:30 p.m.

**Place:** Ithaca, NY.

**Type of Meeting:** Part-Open.

**Contact Person:** Dr. Thomas Rieker, Program Director, Materials Research Science and Engineering Centers Program, Division of