

LIBRARY OF CONGRESS

Copyright Office

Notification of Agreements Under the Webcaster Settlement Act of 2009

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreements.

SUMMARY: The Copyright Office is publishing four agreements which set rates and terms for the reproduction and performance of sound recordings made by certain 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 agreements 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"), Public Law 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 expired at 11:59 p.m. Eastern time on July 30, 2009, 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).¹

On July 30, 2009, SoundExchange notified the Copyright Office that it had negotiated four separate agreements for the reproduction and performance of sound recordings by certain webcasters under the section 112 and section 114 statutory licenses. Thus, in accordance with the requirement set forth in section 114(f)(5)(B), the Copyright Office is publishing the submitted agreements, as Appendix A (Agreement with Sirius XM Radio Inc.); Appendix B (Agreement with College Broadcasters, Inc.); Appendix C (Agreement with the Corporation for Public Broadcasting); and Appendix D (Agreement with Northwestern College), thereby making

¹ Appendix A (Section 5.3) & Appendix B (Section 6.2) expressly authorize the submission of the relevant agreements in a proceeding under 17 U.S.C. 114(f).

the rates and terms in the agreements available to any webcasters meeting the respective eligibility conditions of the agreements 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 agreements beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreements should be directed to SoundExchange (for contact information, *see* <http://www.soundexchange.com>).

Dated: August 5, 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 Webcasts by Commercial 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 CFR 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) "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 applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a Broadcaster (as defined in Section 1.2(a) of the agreement published in the **Federal Register** on March 3, 2009 at 74 FR 9299); (iv) is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i); and (v) has not elected to be subject to any other rates and terms adopted pursuant to the Webcaster Settlement Act of 2008 or the Webcaster Settlement Act of 2009.

(b) "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 in full compliance with the eligibility and other requirements of Sections 112(e) and 114 of the Copyright Act and their implementing regulations, except as expressly modified in these Rates and Terms, and of a type otherwise subject to the payment of royalties under 37 CFR Part 380.

(c) "SoundExchange" shall mean SoundExchange, Inc. and shall include its successors and assigns.

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 these Rates and Terms in their entirety, with respect to such Commercial Webcasters' Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2009, 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 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 all of the period beginning on January 1, 2009, 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 the later of (i) 15 days after publication of these Rates and Terms in the **Federal Register**; or (ii) in the case of a Commercial Webcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the **Federal Register** but begins doing so at a later time, 30 days after the Commercial Webcaster begins making such Eligible Transmissions. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 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 FR 24084 (May 1, 2007) (the "Final Determination"), any proceedings on remand from such appeal, Docket No. 2009-1 CRB Webcasting III, as noticed in the **Federal Register** at 74 FR 318-19 (Jan. 5, 2009), or any other proceedings to determine royalty rates and terms for Eligible Transmissions (as defined in Section 1.2(b)) or related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 shall not have the right to elect to be treated as a Commercial Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceedings prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 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. 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 or that it has complied with the eligibility or other 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. 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, in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015.

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.

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 Fees. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2009–2015 during which the Commercial Webcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 in minimum fees in the aggregate (for 100 or more channels or stations) in any one year. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station.

4.2 Royalty Rates. 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 on a per-performance basis, as follows:

Year	Rate per performance
2009	\$0.0016
2010	0.0017
2011	0.0018
2012	0.0020
2013	0.0021
2014	0.0022
2015	0.0024

4.3 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 may 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.

4.4 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. Once a Commercial Webcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Commercial Webcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.5 Monthly Obligations. Commercial Webcasters must make monthly payments where required by Section 4.4 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.

4.6 Past Periods. Notwithstanding Sections 4.4 and 4.5, a Commercial Webcaster's first monthly payment after

electing to be subject to these Rates and Terms shall be adjusted to reflect any differences between (i) the amounts payable under these Rates and Terms for all of 2009 to the end of the month for which the payment is made and (ii) the Commercial Webcaster's previous payments for all of 2009 to the end of the month for which the payment is made. Late fees under 37 CFR 380.4(e) shall apply to any payment previously due and not made on time, or to any late payment hereunder.

Article 5—Additional Provisions

5.1 *Applicable Regulations.* To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

5.2 *Participation in Specified 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 during any part of the 2009–2015 period and in lieu of participating at any time in a proceeding to set rates and terms for Eligible Transmissions and related ephemeral recordings 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 participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys. v. Copyright Royalty Board* (DC Circuit Docket Nos. 07–1123, 07–1168, 07–1172, 07–1173, 07–1174, 07–1177, 07–1178, 07–1179), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009–1 CRB Webcasting III), or any other proceedings to determine royalty rates and terms for Eligible Transmissions and reproduction of related ephemeral phonorecords 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 foregoing or any proceedings on remand from such an appeal, 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.

5.3 *Use of Agreement in Future Proceedings.* Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) is expressly authorized.

5.4 *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.

Article 6—Miscellaneous

6.1 *Acknowledgement.* The parties acknowledge this agreement was entered into knowingly and willingly. The parties further acknowledge that 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 Section 112(e) or 114, 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, and all limitations, exceptions and defenses available with respect thereto.

6.2 *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, DC. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court, waive any objection thereto on forum *non conveniens* or similar grounds, 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.

6.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions 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, defenses, limitations, or exceptions 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. 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.

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

Appendix B—Agreed Rates and Terms for Noncommercial Educational 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 CFR 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

1.2.1 “Noncommercial Educational Webcaster” shall mean a Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) 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 applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically-accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, and (iv) 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.

1.2.2 “Eligible Transmission” shall mean an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

1.2.3 “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

1.2.4 “ATH” or “Aggregate Tuning Hours” shall mean the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational 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 Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

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, Noncommercial Educational Webcasters may elect to be subject to the rates and terms set forth herein in their entirety, with respect to Eligible Transmissions and related ephemeral recordings, for all of any one or more calendar years during the period beginning on January 1, 2011, and ending on December 31, 2015 (the “Term”), 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 2.2.1 hereof. In addition, Noncommercial Educational Webcasters may elect to be subject to the provisions of Article 5 only, for all of the period beginning on January 1, 2009, and ending on December 31, 2010 (the “Special Reporting Term”), in lieu of reporting under 37 CFR Part 370.3, by complying with the procedure set forth in Section 2.2.3 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Noncommercial Educational Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process

2.2.1 In General. To elect to be subject to these Rates and Terms, in their entirety, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for any calendar year during the Term, a Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by January 31st of each such calendar year or, in the case of a Noncommercial Educational Webcaster that has not made Eligible Transmissions as of January 31st of a calendar year within the Term but begins doing so at a later time that year and seeks to be subject to these Rates and Terms for that year, 45 days after the end of the month in which the Noncommercial Educational Webcaster begins making such Eligible Transmissions. Even if an entity has once elected to be treated as a Noncommercial Educational Webcaster, it must make a separate, timely election in each subsequent calendar year in which it wishes (and is eligible) to be treated as such. A Noncommercial Educational Webcaster may instead elect other available rates for which it is eligible. However, a Noncommercial Educational Webcaster may not elect different rates for a given calendar year after it has elected to be subject to these Rates and Terms or for any year in which it has already paid royalties.

2.2.2 Contents of Election Form. On its election form(s) pursuant to Section 2.2.1, the Noncommercial Educational Webcaster must, among other things, provide a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by SoundExchange, that the Noncommercial Educational Webcaster (i) qualifies as a

Noncommercial Educational Webcaster for the relevant year, and (ii) did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a Statement of Account and pay required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Noncommercial Educational Webcaster's corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Noncommercial Educational Webcaster shall promptly notify SoundExchange thereof. On its election form(s), the Noncommercial Educational Webcaster must, among other things, identify which of the reporting options set forth in Section 5.1 it elects for the relevant year (provided that it must be eligible for the option it elects).

2.2.3 Election for Special Reporting Term. A Noncommercial Educational Webcaster may elect to be subject to the provisions of Article 5 only, for all of the Special Reporting Term, in lieu of reporting under 37 CFR Part 370.3 as it may from time to time exist. To do so, the Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>), which SoundExchange may combine with its form of Statement of Account. Such form must be submitted with timely payment of the Noncommercial Educational Webcaster's minimum fee for 2010 under 37 CFR 380.4(d) and the Proxy Fee described in Section 5.1.1 for both 2009 and 2010 if applicable. On any such election form, the Noncommercial Educational Webcaster must, among other things, provide (i) a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, that the Noncommercial Educational Webcaster qualifies as a Noncommercial Educational Webcaster for the Special Reporting Term, and (ii) identification of all its stations making Eligible Transmissions and which of the reporting options set forth in Section 5.1 it elects for the Special Reporting Term (provided that it must be eligible for the option it elects for the entire Special Reporting Term).

2.2.4 Participation in Specified Proceedings. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Noncommercial Educational Webcaster that has participated or is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 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 FR 24084 (May 1, 2007) (the “Final Determination”), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009–

1 CRB Webcasting III), *Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service* (Copyright Royalty Judges' Docket No. 2009–2 CRB New Subscription II), or any other proceeding to determine royalty rates or terms under Sections 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 (all of the foregoing, including appeals of the proceedings identified above, collectively “Specified Proceedings”) shall not have the right to elect to be treated as a Noncommercial Educational Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding(s) prior to submitting to SoundExchange a completed and signed election form as contemplated by Section 2.2.1 or 2.2.3, as applicable. In addition, once a Noncommercial Educational Webcaster has elected to be subject to these Rates and Terms, either for the Special Reporting Term or any part of the Term, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in any Specified Proceeding, unless subpoenaed on petition of a third party (without any action by a Noncommercial Educational Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

2.3 Representation of Compliance and Non-Waiver. By electing to operate pursuant to the Rates and Terms, either for the Special Reporting Term or any part of the Term, an entity represents and warrants that it qualifies as a Noncommercial Educational Webcaster and is eligible for the reporting option set forth in Section 5.1 that it elects. By accepting an election by a transmitting entity pursuant to these Rates and Terms or any payments or reporting made by a transmitting entity, SoundExchange does not acknowledge that the transmitting entity qualifies as a Noncommercial Educational Webcaster or for a particular reporting option or that it has complied with the eligibility or other 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 eligible for the statutory licenses under Sections 112(e) and 114 of the Copyright Act and in full compliance with applicable requirements thereof. 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 transmitting entity 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 that are not inconsistent with these Rates and Terms.

Article 3—Scope

3.1 *In General.* Noncommercial Educational Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1 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 within the Term that they have made a timely election to be subject to these Rates and Terms.

3.2 *Applicable to All Services Operated by or for a Noncommercial Educational Webcaster.* If a Noncommercial Educational Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Noncommercial Educational Webcaster and related ephemeral recordings. For clarity, a Noncommercial Educational Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations. However, a single educational institution may have more than one webcasting station making Eligible Transmissions. If so, each such station may determine individually whether it elects to be subject to these Rates and Terms as a Noncommercial Educational Webcaster. It is expressly contemplated that within a single educational institution, one or more Noncommercial Educational Webcasters and one or more public broadcasting entities (as defined in 17 U.S.C. 118(g)) may exist simultaneously, each paying under a different set of rates and terms.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Noncommercial Educational Webcasters and grant no rights, including by implication or estoppel, to any other person or entity, 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 Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual side channels, including each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it elects to be subject to these Rates and Terms. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in Section 5.1.1 shall pay a \$100 annual fee (the “Proxy Fee”) to SoundExchange.

4.2 *Additional Usage Fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours (“ATH”) on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

Year	Rate per performance
2011	\$0.0017
2012	0.0020
2013	0.0022
2014	0.0023
2015	0.0025

For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.1.3, the Noncommercial Educational Webcaster may pay Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay Usage Fees at the per-performance rates provided above in this Section 4.2 based on the assumption that the number of sound recordings performed is 12 per hour. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

A Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per channel or station basis.

4.3 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may 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.

4.4 Statements of Account and Payment

4.4.1 *Minimum Fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable,

accompanied by a statement of account in a form available on the SoundExchange Web site at <http://www.soundexchange.com> (“Statement of Account”) by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster’s election to be subject to these Rates and Terms for the applicable calendar year.

4.4.2 *Usage Fees.* Noncommercial Educational Webcasters required to pay Usage Fees shall submit a Minimum Fee and Statement of Account in accordance with Section 4.4.1, and in addition, a Statement of Account accompanying any Usage Fees owed pursuant to Section 4.2. Such a Statement of Account and accompanying Usage Fees shall be due 45 days after the end of the month in which the excess usage occurred.

4.4.3 *Identification of Statements of Account.* Noncommercial Educational Webcasters shall include on each of their Statements of Account (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Statement of Account covers a single station only, the call letters or name of the station.

4.4.4 *Payment.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange.

4.5 *Late Fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any Statement of Account or any Report of Use (as defined in Section 5.1 below) 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 the 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 (as applicable) is received by SoundExchange, provided that, in the case of a timely provided but noncompliant Statement of Account or Report of Use, SoundExchange has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

Article 5—Reporting

5.1 *Provision of Reports of Use.* Noncommercial Educational Webcasters shall have the following three options, as applicable, with respect to provision of reports of use of sound recordings (“Reports of Use”):

5.1.1 *Reporting Waiver.* In light of the unique business and operational circumstances currently existing with respect to these services, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay a nonrefundable, annual Proxy Fee of \$100 in

lieu of providing Reports of Use for the calendar year. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this Section 5.1.1 during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH per month during that calendar year. SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. The Proxy Fee is intended to defray SoundExchange's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster's election to be subject to these Rates and Terms for the applicable calendar year (or in the case of the Special Reporting Term, by the date specified in Section 2.2.3) and shall be accompanied by a certification on a form provided by SoundExchange, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage, and if applicable, measures to ensure that it will not make excess Eligible Transmissions in the future.

5.1.2 Sample-Basis Reports. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect (as described in Section 2.2.2) to provide Reports of Use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at 37 CFR 370.3 as they existed at January 1, 2009, except that notwithstanding 37 CFR 370.3(c)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency (*i.e.*, number of spins). Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These Reports of Use shall be submitted to SoundExchange no later than January 31st of the year immediately following the year to which they pertain.

5.1.3 Census-Basis Reports. If any of the following three conditions is satisfied, a Noncommercial Webcaster must report pursuant to this Section 5.1.3: (i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately

preceding calendar year, (ii) the Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year, or (iii) the Noncommercial Educational Webcaster otherwise does not elect (as described in Section 2.2.2) to be subject to Section 5.1.1 or 5.1.2. A Noncommercial Educational Webcaster required to report pursuant to this Section 5.1.3 shall provide Reports of Use to SoundExchange quarterly on a census reporting basis (*i.e.*, Reports of Use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by 37 CFR 370.3 as of January 1, 2009), except that notwithstanding 37 CFR 370.3(c)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency (*i.e.*, number of spins), during the first calendar year it is required to report in accordance with this Section 5.1.3. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this Section 5.1.3 for a full calendar year, it must thereafter include ATH or actual total performances in its Reports of Use. All Reports of Use under this Section 5.1.3 shall be submitted to SoundExchange no later than the 45th day after the end of each calendar quarter.

5.2 Delivery of Reports. Reports of Use submitted by Noncommercial Educational Webcasters shall conform to the following additional requirements:

5.2.1 Noncommercial Educational Webcasters shall either submit a separate Report of Use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

5.2.2 Noncommercial Educational Webcasters shall transmit each Report of Use in a file the name of which includes (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Report of Use covers a single station only, the call letters or name of the station.

5.2.3 Noncommercial Educational Webcasters shall submit reports of use with headers, as such headers are described in 37 CFR 370.3(d)(7).

5.3 Server Logs. To the extent not already required by the current regulations set forth in 37 CFR Part 380, as they existed on January 1, 2009, Noncommercial Educational Webcasters shall retain for a period of at least three full calendar years server logs 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 Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least three full calendar years and/or that such server logs be

provided to, and maintained by, the Noncommercial Educational Webcaster.

Article 6—Additional Provisions

6.1 Applicable Regulations. To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. Noncommercial Educational 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 Use of Agreement in Future Proceedings. Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) by any participant in such proceeding is expressly authorized.

6.3 Effect of Direct Licenses. Any copyright owner may enter into a voluntary agreement with any Noncommercial Educational Webcaster setting alternative rates and terms governing the Noncommercial Educational Webcaster's 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.

6.4 Default. A Noncommercial Educational 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 Noncommercial Educational Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Educational Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated by further written notice; provided, however, that such period shall be 60 (rather than 30) days in the case of any such notice sent by SoundExchange between May 15 and August 15 or between December 1 and January 30. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given at least two notices of noncompliance. Any transmission made by a Noncommercial Educational 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 Section 112(e) or 114, 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, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 *Acknowledgement.* The parties acknowledge these Rates and Terms were entered into knowingly and willingly.

7.2 *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, DC. SoundExchange and each Noncommercial Educational Webcaster 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.

7.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions 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, defenses, limitations, or exceptions 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.

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

Appendix C—Agreement Concerning Rates and Terms for Public Radio

This Agreement Concerning Rates and Terms for Public Radio (“*Agreement*”), dated as of July 30, 2009 (“*Execution Date*”), is made by and between SoundExchange, Inc. (“*SoundExchange*”) and the Corporation for Public Broadcasting (“*CPB*”), on behalf of all Covered Entities (SoundExchange, and CPB each a “*Party*” and, jointly, the “*Parties*”).

Capitalized terms used herein are defined in Article 1 below.

Whereas, SoundExchange is the “receiving agent” as defined in 17 U.S.C. 114(f)(5)(E)(ii) designated for collecting and distributing statutory royalties received from Covered Entities for their Web Site Performances;

Whereas, the Webcaster Settlement Act of 2009 (Pub. L. 111–36; to be codified at 17 U.S.C. 114(f)(5)) authorizes SoundExchange to enter into agreements for the reproduction and performance of Sound Recordings under Sections 112(e) and 114 of the Copyright Act that, once published in the **Federal Register**, shall be binding on all Copyright Owners and Performers, in lieu of any determination by the Copyright Royalty Judges;

Whereas, in view of the unique business, economic and political circumstances of CPB, Covered Entities, SoundExchange, Copyright Owners and Performers at the Execution Date, the Parties have agreed to the royalty rates and other consideration set forth herein for the period January 1, 2011 through December 31, 2015;

Now, Therefore, pursuant to 17 U.S.C. 114(f)(5), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

Article 1—Definitions

The following terms shall have the meanings set forth below:

1.1 “*Agreement*” shall have the meaning set forth in the preamble.

1.2 “*ATH*” or “*Aggregate Tuning Hours*” means the total hours of programming that Covered Entities have transmitted during the relevant period to all listeners within the United States from all Covered Entities that provide audio programming consisting, in whole or in part, of Web Site Performances, less the actual running time of any sound recordings for which the Covered Entity has obtained direct licenses apart from this Agreement. By way of example, if a Covered Entity transmitted one hour of programming to ten (10) simultaneous listeners, the Covered Entity’s Aggregate Tuning Hours would equal ten (10). If three (3) minutes of that hour consisted of transmission of a directly licensed recording, the Covered Entity’s Aggregate Tuning Hours would equal nine (9) hours and thirty (30) minutes. As an additional example, if one listener listened to a Covered Entity for ten (10) hours (and none of the recordings transmitted during that time was directly licensed), the Covered Entity’s Aggregate Tuning Hours would equal 10.

1.3 “*Authorized Web Site*” means any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator (“*URL*”) owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.

1.4 “*CPB*” shall have the meaning set forth in the preamble.

1.5 “*Collective*” shall have the meaning set forth in 37 CFR 380.2(c).

1.6 “*Copyright Owners*” are Sound Recording copyright owners who are entitled to royalty payments made pursuant to the

statutory licenses under 17 U.S.C. 112(e) and 114(f).

1.7 “*Covered Entities*” means NPR, American Public Media, Public Radio International, and Public Radio Exchange, and, in calendar year 2011, up to four-hundred and ninety (490) Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Covered Entities hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations considered to be Covered Entities is permitted to grow by no more than 10 Originating Public Radio Stations per year beginning in calendar year 2012, such that the total number of Covered Entities at the end of the Term will be less than or equal to 530. The Parties agree that the number of Originating Public Radio Stations licensed hereunder as Covered Entities shall not exceed the maximum number permitted for a given year without SoundExchange’s express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Covered Entities as provided in Section 4.4.

1.8 “*Ephemeral Phonorecord*” shall have the meaning set forth in Section 3.1(b).

1.9 “*Execution Date*” shall have the meaning set forth in the preamble.

1.10 “*License Fee*” shall have the meaning set forth in Section 4.1.

1.11 “*Music ATH*” means ATH of Web Site Performances of Sound Recordings of musical works.

1.12 “*NPR*” shall mean National Public Radio, with offices at 635 Massachusetts Avenue, NW., Washington, DC 20001.

1.13 “*Originating Public Radio Stations*” shall mean a noncommercial terrestrial radio broadcast station that (i) is licensed as such by the Federal Communications Commission; (ii) originates programming and is not solely a repeater station; (iii) is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; (iv) qualifies as a “noncommercial webcaster” under 17 U.S.C. 114(f)(5)(E)(i); and (v) either (a) offers Web Site Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501), or (b) in the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

1.14 “*Party*” shall have the meaning set forth in the preamble.

1.15 “*Performers*” means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the individuals and entities identified in 17 U.S.C. 114(g)(2)(D).

1.16 “*Person*” means a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

1.17 “*Phonorecords*” shall have the meaning set forth in 17 U.S.C. 101.

1.18 “*Side Channel*” means any Internet-only program available on an Authorized Web Site or an archived program on such Authorized Web Site that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

1.19 “*SoundExchange*” shall have the meaning set forth in the preamble and shall include any successors and assigns to the extent permitted by this Agreement.

1.20 “*Sound Recording*” shall have the meaning set forth in 17 U.S.C. 101.

1.21 “*Term*” shall have the meaning set forth in Section 7.1.

1.22 “*Territory*” means the United States, its territories, commonwealths and possessions.

1.23 “*URL*” shall have the meaning set forth in Section 1.3.

1.24 “*Web Site*” means a site located on the World Wide Web that can be located by a Web Site User through a principal URL.

1.25 “*Web Site Performances*” means all public performances by means of digital audio transmissions of Sound Recordings, including the transmission of any portion of any Sound Recording, made through an Authorized Web Site in accordance with all requirements of 17 U.S.C. 114, from servers used by a Covered Entity (*provided that* the Covered Entity controls the content of all materials transmitted by the server), or by a sublicensee authorized pursuant to Section 3.2, that consist of either (a) the retransmission of a Covered Entity’s over-the-air terrestrial radio programming or (b) the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Covered Entity. This term does not include digital audio transmissions made by any other means.

1.26 “*Web Site Users*” means all those who access or receive Web Site Performances or who access any Authorized Web Site.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2009

2.1 *General.* This Agreement is entered into pursuant to the Webcaster Settlement Act of 2009 (Pub. L. 111–36; to be codified at 17 U.S.C. 114(f)(5)).

2.2 *Eligibility Conditions.* The only webcasters (as defined in 17 U.S.C. 114(f)(5)(E)(iii)) eligible to avail themselves of the terms of this Agreement as contemplated by 17 U.S.C. 114(f)(5)(B) are the Covered Entities, as expressly set forth herein. The terms of this Agreement shall apply to the Covered Entities in lieu of other rates and terms applicable under 17 U.S.C. 112 and 114.

2.3 *Agreement Nonprecedential.* Consistent with 17 U.S.C. 114(f)(5)(C), this Agreement, including any rate structure, fees, terms, conditions, and notice and recordkeeping requirements set forth therein, is nonprecedential and shall not be introduced nor used by any Person, including the Parties and any Covered Entities, as evidence or otherwise taken into account in any administrative, judicial, or other 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 under 17 U.S.C. 114(f)(4) or 112(e)(4), or any administrative or judicial proceeding pertaining to rates, terms or reporting obligations for any yet-to-be-created right to collect royalties for the performance of Sound Recordings by any technology now or hereafter known. Any royalty rates, rate structure, definitions, terms, conditions and notice and recordkeeping requirements included in this Agreement shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers, and the participation by NPR on behalf of itself and its member stations in *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III (the pending proceeding before the Copyright Royalty Judges to set statutory rates and terms for 2011–2015), 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) of the Copyright Act.

2.4 *Reservation of Rights.* The Parties agree that the entering into of this Agreement shall be without prejudice to any of their respective positions in any proceeding with respect to the rates, terms or reporting obligations to be established for the making of Ephemeral Phonorecords or the digital audio transmission of Sound Recordings after the Term of this Agreement on or by Covered Entities under 17 U.S.C. 112 and 114 and their implementing regulations. The Parties further acknowledge and agree that the entering of this Agreement, the performance of its terms, and the acceptance of any payments and reporting by SoundExchange (i) do not express or imply any acknowledgement that CPB, Covered Entities, or any other persons are eligible for the statutory license of 17 U.S.C. 112 and 114, and (ii) shall not be used as evidence that CPB, the Covered Entities, or any other persons are acting in compliance with the provisions of 17 U.S.C. 114(d)(2)(A) or (C) or any other applicable laws or regulations.

Article 3—Scope of Agreement

3.1 General

(a) *Public Performances.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that publicly perform under Section 114 all or any portion of any Sound Recordings through an Authorized Web Site, within the Territory, by means of Web Site Performances, may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such transmissions are made in strict conformity with the provisions of 17 U.S.C. 114(d)(2)(A) and (C); and (ii) such Covered Entities comply with all of the terms and conditions of this Agreement and all applicable copyright laws. For clarity, there is no limit to the number of Web Site Performances that a Covered Entity may transmit during the

Term under the provisions of this Section 3.1(a), if such Web Site Performances otherwise satisfy the requirements of this Agreement.

(b) *Ephemeral Phonorecords.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that make and use solely for purposes of transmitting Web Site Performances as described in Section 3.1(a), within the Territory, Phonorecords of all or any portion of any Sound Recordings (“*Ephemeral Phonorecords*”), may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such Phonorecords are limited solely to those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances licensed hereunder; (ii) such Phonorecords are made in strict conformity with the provisions set forth in 17 U.S.C. 112(e)(1)(A)–(D); and (iii) the Covered Entities comply with 17 U.S.C. 112 (a) and (e) and all of the terms and conditions of this Agreement.

3.2 *Limited Right to Sublicense.* Rights under this Agreement are not sublicensable, except that a Covered Entity may employ the services of a third Person to provide the technical services and equipment necessary to deliver Web Site Performances on behalf of such Covered Entity pursuant to Section 3.1, but only through an Authorized Web Site. Any agreement between a Covered Entity and any third Person for such services shall (i) contain the substance of all terms and conditions of this Agreement and obligate such third Person to provide all such services in accordance with all applicable terms and conditions of this Agreement, including, without limitation, Articles 3, 5 and 6; (ii) specify that such third Person shall have no right to make Web Site Performances or any other performances or Phonorecords on its own behalf or on behalf of any Person or entity other than a Covered Entity through the Covered Entity’s Authorized Web Site by virtue of this Agreement, including in the case of Phonorecords, pre-encoding or otherwise establishing a library of Sound Recordings that it offers to a Covered Entity or others for purposes of making performances, but instead must obtain all necessary licenses from SoundExchange, the copyright owner or another duly authorized Person, as the case may be; (iii) specify that such third Person shall have no right to grant any further sublicenses; and (iv) provide that SoundExchange is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third party.

3.3 Limitations

(a) *Reproduction of Sound Recordings.* Except as provided in Section 3.2, nothing in this Agreement grants Covered Entities, or authorizes Covered Entities to grant to any other Person (including, without limitation, any Web Site User, any operator of another Web Site or any authorized sublicensee), the right to reproduce by any means, method or process whatsoever, now known or hereafter developed, any Sound Recordings, including, but not limited to, transferring or

downloading any such Sound Recordings to a computer hard drive, or otherwise copying the Sound Recording onto any other storage medium.

(b) *No Right of Public Performance.* Except as provided in Section 3.2, nothing in this Agreement authorizes Covered Entities to grant to any Person the right to perform publicly, by means of digital transmission or otherwise, any Sound Recordings.

(c) *No Implied Rights.* The rights granted in this Agreement extend only to Covered Entities and grant no rights, including by implication or estoppel, to any other Person, except as expressly provided in Section 3.2. Without limiting the generality of the foregoing, this Agreement does not grant to Covered Entities (i) any copyright ownership interest in any Sound Recording; (ii) any trademark or trade dress rights; (iii) any rights outside the Territory; (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other Person; or (v) any rights outside the scope of a statutory license under 17 U.S.C. 112(e) and 114.

(d) *Territory.* The rights granted in this Agreement shall be limited to the Territory.

(e) *No Syndication Rights.* Nothing in this Agreement authorizes any Web Site Performances to be accessed by Web Site Users through any Web Site other than an Authorized Web Site.

3.4 *Effect of Non-Performance by any Covered Entity.* In the event that any Covered Entity breaches or otherwise fails to perform any of the material terms of this Agreement it is required to perform (including any obligations applicable under Section 112 or 114), or otherwise materially violates the terms of this Agreement or Section 112 or 114 or their implementing regulations, the remedies of SoundExchange shall be specific to that Covered Entity only, and shall include, without limitation, (i) termination of that Covered Entity's rights hereunder upon written notice to CPB, and (ii) the rights of SoundExchange and Copyright owners under applicable law. SoundExchange's remedies for such a breach or failure by an individual Covered Entity shall not include termination of this Agreement in its entirety or termination of the rights of other Covered Entities, except that if CPB breaches or otherwise fails to perform any of the material terms of this Agreement, or such a breach or failure by a Covered Entity results from CPB's inducement, and CPB does not cure such breach or failure within thirty (30) days after receiving notice thereof from SoundExchange, then SoundExchange may terminate this Agreement in its entirety, and a prorated portion of the License Fee for the remainder Term shall, after deduction of any damages payable to SoundExchange by virtue of the breach or failure, be credited to statutory royalty obligations of Covered Entities to SoundExchange for the Term as specified by CPB.

Article 4—Consideration

4.1 *License Fee.* The total license fee for all Web Site Performances and Ephemeral Phonorecords made during the Term shall be two million four hundred thousand dollars (\$2,400,000) (the "License Fee"), unless additional payments are required as

described in Section 4.3 or 4.4. CPB shall pay such amount to SoundExchange in five equal installments of four hundred eighty thousand dollars (\$480,000) each, which shall be due December 31, 2010 and annually thereafter through December 31, 2014.

4.2 *Calculation of License Fee.* The Parties acknowledge that the License Fee includes: (i) an annual minimum fee of five hundred dollars (\$500) for each Covered Entity for each year during the Term; (ii) additional usage fees calculated at a royalty rate equal to one third the royalty rate applicable to commercial broadcasters under the Webcaster Settlement Act of 2008 (see 74 FR 9299 (March 3, 2009)); and (iii) a discount that reflects the administrative convenience to SoundExchange of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

4.3 Total Music ATH True-Up

(a) If the total Music ATH for all Covered Entities, in the aggregate for any calendar year during the period 2011–2015, as reported or estimated in accordance with Attachment 1, is greater than the Music ATH cap for the year specified in the table below, CPB shall make an additional payment to SoundExchange for all such Music ATH in excess of such Music ATH cap for all Covered Entities in the aggregate on the basis of the per performance rate for the year specified in the table below, which shall be applied to excess Music ATH by assuming twelve (12) performances for each hour of excess Music ATH:

Year	Music ATH cap	Per performance rate
2011	279,500,000	\$0.00057
2012	280,897,500	0.00067
2013	282,301,988	0.00073
2014	283,713,497	0.00077
2015	285,132,065	0.00083

(b) Payments under Section 4.3(a) shall be due no later than March 1 of the year following the year to which they pertain. SoundExchange may distribute royalties paid under Section 4.3(a) in accordance with its generally-applicable methodology for distributing royalties paid on the basis of ATH.

(c) Notwithstanding the foregoing provisions of this Section 4.3, CPB shall not be required to make payments under this Section 4.3 exceeding four hundred eighty thousand dollars (\$480,000) in the aggregate during the Term. Because the limitation stated in the immediately preceding sentence is to be applied in the aggregate over the Term, CPB shall make all payments otherwise due under this Section 4.3 for excess Music ATH until such time as such payments, if any, for the Term reach four hundred eighty thousand dollars (\$480,000) in the aggregate, and thereafter CPB shall owe no further payments under Section 4.3(a) regardless of the amount of excess Music ATH.

4.4 *Station Growth True-Up:* If the total number of Originating Public Radio Stations

that wish to make Web Site Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Covered Entities in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Web Site Performances apart from this Agreement, CPB may elect by written notice to SoundExchange to increase the number of Originating Public Radio Stations considered Covered Entities in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to SoundExchange for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Covered Entity, in the amount of five hundred dollars (\$500) per Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Covered Entity.

4.5 *Late Fee.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(e) as if that section (and the applicable definitions provided in 37 CFR 380.2) were set forth herein.

4.6 Payments to Third Persons

(a) SoundExchange and CPB agree that, except as provided in Section 4.6(b), all obligations of, *inter alia*, clearance, payment or attribution to third Persons, including, by way of example and not limitation, music publishers and performing rights organizations (PROs) for use of the musical compositions embodied in Sound Recordings, shall be solely the responsibility of CPB and the Covered Entities.

(b) SoundExchange and CPB agree that all obligations of distribution of the License Fee to Copyright Owners and Performers in accordance with 37 CFR 380.4(g) shall be solely the responsibility of SoundExchange. In making such distribution, SoundExchange has discretion to allocate the License Fee between Section 112 and 114 in the same manner as the majority of other webcasting royalties.

Article 5—Reporting, Auditing and Confidentiality

5.1 *Reporting.* CPB and Covered Entities shall submit reports of use and other information concerning Web Site Performances as set forth in Attachments 1 and 2.

5.2 *Verification of Information.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(h) and 380.6 as if those sections (and the applicable definitions provided in 37 CFR 380.2) were set forth herein. The exercise by SoundExchange of any right under this Section 5.2 shall not prejudice any other rights or remedies of SoundExchange.

5.3 *Confidentiality.* The Parties hereby agree to the terms set forth in 37 CFR 380.5 as if that section (and the applicable definitions provided in 37 CFR 380.2) were set forth herein, except that:

(a) The following shall be added to the end of the first sentence of § 380.5(b): "or documents or information that become publicly known through no fault of

SoundExchange or are known by SoundExchange when disclosed by CPB”;

(b) the following shall be added at the end of § 380.5(c): “and enforcement of the terms of this Agreement”; and

(c) the following shall be added at the end of § 380.5(d)(4): “subject to the provisions of Section 2.3 of this Agreement”.

Article 6—Non-Participation in Further Proceedings

CPB and any Covered Entity making Web Site Transmissions in reliance on this Agreement shall not directly or indirectly participate as a party, *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 digital audio transmission or the reproduction of Ephemeral Phonorecords under Section 112 or 114 of the Copyright Act for all or any part of the Term, including *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III, any appeal of the determination in such case, any proceedings on remand from such an appeal, or any other related proceedings, unless subpoenaed on petition of a third party (without any action by CPB or a Covered Entity to encourage such a petition) and ordered to testify in such proceeding. Notwithstanding anything to the contrary herein, any entity that is eligible to be treated as a “Covered Entity” but that does not elect to be treated as a Covered Entity may elect to participate in such proceedings.

Article 7—Term and Termination

7.1 *Term*. The term of this Agreement commences as of January 1, 2011, and ends as of December 31, 2015 (“*Term*”). Through August 27, 2009, CPB shall have the right to rescind this Agreement in its entirety by notifying SoundExchange in writing that it wishes to exercise such right; provided however, that CPB may only exercise such right in the event that the Board of Directors of CPB fails to approve CPB’s entering into the Agreement. As conditions precedent to reliance on the terms of this Agreement by any Covered Entity, (a) CPB must pay the License Fee as and when specified in Section 4.1, and (b) NPR must withdraw from participation in the proceeding before the Copyright Royalty Judges entitled *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III (see 74 FR 318 (Jan. 5, 2009)) by no later than September 3, 2009 (which NPR has agreed to do if CPB does not exercise its right of rescission).

7.2 *Mutual Termination*. This Agreement may be terminated in writing upon mutual agreement of the Parties.

7.3 Consequences of Termination

(a) *Survival of Provisions*. In the event of the expiration or termination of this Agreement for any reason, the terms of this Agreement shall immediately become null and void, and cannot be relied upon for making any further Web Site Performances or Ephemeral Phonorecords, except that (i) Articles 6 and 8 and Sections 2.3, 2.4, 3.3, 5.2, 5.3 and 7.3 shall remain in full force and effect; and (ii) Article 4 and Section 5.1 shall

remain in effect after the expiration or termination of this Agreement to the extent obligations under Article 4 or Section 5.1 accrued prior to any such termination or expiration.

(b) *Applicability of Copyright Law*. Any Web Site Performances made by a Covered Entity or other Originating Public Radio Station in violation of the terms of this Agreement or Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with this Agreement), outside the scope of this Agreement, or after the expiration or termination of this Agreement for any reason shall be fully subject to, among other things, the copyright owners’ rights under 17 U.S.C. 106(6), the remedies in 17 U.S.C. 501 *et seq.*, the provisions of 17 U.S.C. 112(e) and 114, and their implementing regulations unless the Parties have entered into a new agreement for such Web Site Performances.

Article 8—Miscellaneous

8.1 *Applicable Law and Venue*. This Agreement 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 this Agreement shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC, or if it does not have subject matter jurisdiction, other courts located in the District of Columbia. The Parties and Covered Entities, to the extent permitted under their State or Tribal law, 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 address set forth in this Agreement (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.

8.2 *Rights Cumulative*. The remedies provided in this Agreement 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 the other Party hereto. This Agreement 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 this Agreement). 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. Neither this Agreement nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under this Agreement 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 either Party of full performance by the other Party in any one or

more instances shall be a waiver of the right to require full and complete performance of this Agreement and of obligations under applicable law thereafter or of the right to exercise the remedies of SoundExchange under Section 3.4.

8.3 *Severability*. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provisions shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

8.4 *Amendment*. This Agreement may be modified or amended only by a writing signed by the Parties.

8.5 *Entire Agreement*. This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

8.6 *Headings*. The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

In Witness Whereof, the Parties hereto have executed this Agreement as of the date first above written.

Attachment 1—Reporting

1. *Definitions*. The following terms shall have the meaning set forth below for purposes of this Attachment 1. All other capitalized terms shall have the meaning set forth in Article 1 of the Agreement.

(a) “*Content Logs*” shall have the meaning set forth in Section 3(a)(ii) of this Attachment 1.

(b) “*Major Format Group*” shall mean each of the following format descriptions characterizing the programming offered by various Covered Entities: (i) Classical; (ii) jazz; (iii) music mix; (iv) news and information; (v) news/classical; (vi) news/jazz; (vii) news/music mix; and (viii) adult album alternative. A Covered Entity’s Major Format Group is determined based on the format description best describing the programming of the principal broadcast service offered by the Covered Entity and will include all channels streamed.

(c) “*Reporting Data*” shall mean, for each Sound Recording for which Reporting Data is to be provided, (1) the relevant Covered Entity (including call sign and community of license of any terrestrial broadcast station and any Side Channel(s)); (2) the title of the song or track performed; (3) the featured recording artist, group, or orchestra; (4) the title of the commercially available album or other product on which the Sound Recording is found; (5) the marketing label of the commercially available album or other product on which the sound recording is found; and (6) play frequency.

2. *General*. All data required to be provided hereunder shall be provided to SoundExchange electronically in the manner provided in 37 CFR 370.3(d), except to the extent the parties agree otherwise. CPB shall consult with SoundExchange in advance

concerning the content and format of all data to be provided hereunder, and shall provide data that is accurate, to the best of CPB's and the relevant Covered Entity's knowledge, information and belief. The methods used to make estimates, predictions and projections of data shall be subject to SoundExchange's prior written approval, which shall not be unreasonably withheld.

3. *Data Collection and Reporting.* CPB shall provide data regarding Web Site Performances during the Term to SoundExchange, and Covered Entities shall provide such data to CPB, consistent with the following terms:

(a) *ATH and Content Logs.* For each calendar quarter during the Term:

(i) *Music ATH Reporting.* CPB shall provide reports (the "ATH Reports") of Music ATH by all Covered Entities. Such ATH reports shall be accompanied by the Content Logs described in Section 3(a)(ii) for the periods described therein for all Covered Entities. All ATH Reports and Content Logs for a quarter shall be provided by CPB together in one single batch, but all data shall be broken out by Covered Entity and identify each Covered Entity's Major Format Group. The ATH Reports shall be in a form similar to CPB's Streaming Census Report dated October 18, 2007, except as otherwise provided in this Section 3(a)(i).

(ii) *Reporting Period and Data.* The information about Music ATH referenced in Section 3(a)(i) shall be collected from Covered Entities for two 7-consecutive-day reporting periods per quarter. The ATH Reports shall be provided within thirty (30) days of the end of each calendar quarter. During these reporting periods, Covered Entities shall prepare logs containing Reporting Data for all their Web Site Performances ("Content Logs"). These Content Logs shall be compared with server-based logs of Music ATH throughout the reporting period before the ATH Report is submitted to SoundExchange.

(iii) *Additional Data Reporting.* Each quarter, CPB shall, for Covered Entities representing the highest 30% of reported Music ATH, provide SoundExchange Reporting Data collected continuously during each 24 hour period for the majority of their Web Site Performances, along with the Covered Entity's Music ATH, for the relevant quarter. If during any calendar quarter of the Term, additional Covered Entities, in the ordinary course of business, collect Reporting Data continuously during each 24 hour period for the majority of their Web Site Performances, CPB shall provide SoundExchange such data, along with each such Covered Entity's Music ATH, for the relevant quarter.

(b) *ATH and Format Surveys.* CPB shall semiannually survey all Covered Entities to ascertain the number, format and Music ATH of all channels (including but not limited to Side Channels) over which such Covered Entities make Web Site Performances. CPB shall provide the results of such survey to SoundExchange within sixty (60) days after the end of the semiannual period to which it pertains.

(c) *Consolidated Reporting.* Each quarter, CPB shall provide the information required

by this Section 3 in one delivery to SoundExchange, with a list of all Covered Entities indicating whether any are not reporting for such quarter.

(d) *Timing.* Except as otherwise provided above, all information required to be provided to SoundExchange under this Section 3 shall be provided as soon as practicable, and in any event by no later than sixty (60) days after the end of the quarter to which it pertains. Such data shall be provided in a format consistent with Attachment 2.

Attachment 2—Reporting Format

1. *Format for Reporting Data.* All Reporting Data provided under Attachment 1, Section 3(a)(ii) shall be delivered to SoundExchange in accordance with the following format:

Column 1	Station or Side Channel
Column 2	Sound Recording Title
Column 3	Featured Artist, Group or Orchestra
Column 4	Album
Column 5	Marketing Label
Column 6	Play Frequency

2. *Format for Music ATH.* All Music ATH reporting by Covered Entities under Attachment 1 shall be delivered to SoundExchange in accordance with the following format:

Column 1	Station or Side Channel
Column 2	Major Format Group
Column 3	ATH
Column 4	Reporting Period

3. *Major Format Groups.* All requirements to provide "Major Format Group" as that term is defined in Attachment 1, Section 1(b), shall correspond with one of the following:

Major Format Groups
Classical
Jazz
Music Mix
News and Information
News/Classical
News/Jazz
News/Music Mix
Adult Album Alternative

Appendix D—Agreed Rates and Terms for Noncommercial 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 CFR 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) "Aggregate Tuning Hour" or "ATH" shall have the same meaning as set forth in the applicable regulations at 37 CFR 380.2(a) as it existed on July 30, 2009.

(b) "Broadcast Retransmissions" shall mean Eligible Transmissions that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Noncommercial Webcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or

clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming transmitted on an Internet-only side channel.

(c) "Eligible Transmission" shall mean an eligible nonsubscription transmission made by a Noncommercial Webcaster over the Internet.

(d) "Noncommercial Microcaster" shall mean a Noncommercial Webcaster that for any of its channels or stations over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate, in any calendar year in which it is to be considered a Noncommercial Microcaster, meets the following additional eligibility criteria: (i) During the prior year did not make eligible nonsubscription transmissions exceeding 44,000 aggregate tuning hours; and (ii) during the applicable year reasonably does not expect to make eligible nonsubscription transmissions exceeding 44,000 aggregate tuning hours; provided that, one time during the period 2006–2015, a Noncommercial Webcaster that qualified as a Noncommercial Microcaster under the foregoing definition as of January 31 of one year, elected Noncommercial Microcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 44,000 aggregate tuning hours during that year, may choose to be treated as a Noncommercial Microcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 44,000 aggregate tuning hours during that following year. Without limitation, as to channels or stations over which a Noncommercial Webcaster transmits Broadcast Retransmissions, the Noncommercial Webcaster may elect Noncommercial Microcaster status only with respect to its channels or stations that meet both of the foregoing criteria.

(e) "Noncommercial Webcaster" shall mean a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i). A Noncommercial Webcaster that owns or operates multiple terrestrial AM or FM radio stations may elect to treat each such terrestrial AM or FM radio station as a separate Noncommercial Webcaster.

(f) "SoundExchange" shall mean SoundExchange, Inc. and shall include its successors and assigns.

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, a Noncommercial Webcaster may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, with respect to such Noncommercial Webcaster's Eligible Transmissions and related ephemeral recordings, for any calendar year that it qualifies as a Noncommercial 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 Noncommercial 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. A Noncommercial Webcaster that wishes 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 calendar year that it qualifies as a Noncommercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, 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 September 15, 2009. Notwithstanding the immediately preceding sentence, if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election by no later than 30 days after the Noncommercial Webcaster begins making such transmissions under the section 114 statutory license. On any such election form, the Noncommercial Webcaster must, among other things, certify that it qualifies as a Noncommercial Webcaster, and SoundExchange shall require only such information on that form as is reasonably necessary to determine the Noncommercial Webcaster's election. If a Noncommercial Webcaster has elected to be treated as a Noncommercial Webcaster in any calendar year, that election shall apply to subsequent calendar years unless the Noncommercial Webcaster notifies SoundExchange by January 31 of the relevant year that it is revoking that election in favor of otherwise applicable rates. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Noncommercial Webcaster that has participated in any way in the appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 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 FR 24084 (May 1, 2007) (the "Final Determination"), any proceedings before the Copyright Royalty Judges on remand from such appeal, or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 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 FR 318–20 (Jan. 5, 2009)) shall not have the right to elect to be treated as a Noncommercial Webcaster or claim the benefit of these Rates and Terms, unless, prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section

2.2, it withdraws from (a) any such proceedings before the Copyright Royalty Judges and (b) the appeal of the Final Determination if the U.S. Court of Appeals of the DC Circuit still retains jurisdiction over that appeal at the time such election is made.

2.3 Election of Noncommercial Microcaster Status. A Noncommercial Webcaster that elects to be subject to these Rates and Terms and qualifies as a Noncommercial Microcaster may elect to be treated as a Noncommercial Microcaster for any one or more calendar years that it qualifies as a Noncommercial Microcaster. To do so, the Noncommercial 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 September 15, 2009. Notwithstanding the immediately preceding sentence, if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election to be treated as a Noncommercial Microcaster by no later than 30 days after the Noncommercial Webcaster begins making such transmissions under the section 114 statutory license. On any such election form, the Noncommercial Webcaster must, among other things, certify that it qualifies as a Noncommercial Microcaster; provide information about its prior year aggregate tuning hours and the genres of music it uses; and use commercially reasonable efforts to provide such other information as may be reasonably requested by SoundExchange for use in creating a royalty distribution proxy. Even if a Noncommercial Webcaster has once elected to be treated as a Noncommercial Microcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Noncommercial Microcaster.

2.4 Representation of Compliance and Non-waiver. 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 Noncommercial Webcaster or Noncommercial Microcaster or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). 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 transmitting entity 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). SoundExchange and copyright owners reserve all their rights to take enforcement

action against a transmitting entity that is not in compliance with those 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, Noncommercial 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 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 any calendar year that they qualify as a Noncommercial Webcaster, and have made such an election, during the period beginning on January 1, 2006, and ending on December 31, 2015.

3.2 Applicability to All Eligible Services Operated by or for a Noncommercial Webcaster. If a Noncommercial 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 Noncommercial Webcaster that qualify as Performances under 37 CFR 380.2(i), and related ephemeral recordings. For the avoidance of doubt, a Noncommercial Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations.

3.3 No Implied Rights. These Rates and Terms extend only to electing Noncommercial 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 Fees. Each Noncommercial Webcaster shall pay SoundExchange an annual, nonrefundable minimum fee of \$500 for each of its individual channels or stations over which it makes Eligible Transmissions, including each of its individual side channels and each of its individual Broadcast Retransmission stations, for each calendar year or part of a calendar year during 2006–2015 during which the Noncommercial

Webcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114. Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable hereunder for the same calendar year for the same channel or station. In addition, an electing Noncommercial Microcaster also shall pay a \$100 annual fee (the "Proxy Fee") to SoundExchange for the reporting waiver discussed in Section 5.1. Minimum fees and, where applicable, the Proxy Fee shall be paid by January 31 of each year.

4.2 Royalty Rates

(a) The nonrefundable minimum fee payable under Section 4.1 shall constitute full payment for Eligible Transmissions totaling not more than 159,140 aggregate tuning hours per month on the relevant channel or station. If, in any month, a Noncommercial Webcaster makes Eligible Transmissions on a channel or station in excess of 159,140 aggregate tuning hours, the Noncommercial Webcaster shall pay SoundExchange additional royalties for those Eligible Transmissions in excess of 159,140 aggregate tuning hours at the following rates, subject to an election as provided in Section 4.3:

(i) 2006–2010:

(a) \$0.0002176 per performance; or

(b) \$0.00251 per ATH, 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 \$0.0002 (.02¢) per aggregate tuning hour;

(ii) 2011–2015:

Year	Per performance rate
2011	\$0.00057
2012	0.00067
2013	0.00073
2014	0.00077
2015	0.00083

(b) For a transitional period, to enable Noncommercial Webcasters to implement systems that enable payment on a per performance basis, for years 2011–2013, the Noncommercial Webcaster may pay for those Eligible Transmissions in excess of 159,140 aggregate tuning hours on an ATH basis, assuming 12 performances per 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 Noncommercial Webcaster may assume one performance per hour, and calculate its payment based on the per performance rates in Section 4.2(a) above. In addition, in years 2014–2015, for a Noncommercial Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.3, the Noncommercial Webcaster may pay for those Eligible Transmissions in excess of 159,140 aggregate tuning hours on an ATH basis using the estimates set forth in this provision

and calculating its payment based on the per performance rates in Section 4.2(a) above. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis.

(c) For the avoidance of doubt, a Noncommercial Webcaster shall calculate its aggregate tuning hours of Eligible Transmissions on each channel or station each month and shall pay any additional royalties owed for such month as provided above in this Section 4.2, but the Noncommercial Webcaster shall not owe any additional royalties for any subsequent months until such time as the Noncommercial Webcaster again exceeds the 159,140 aggregate tuning hour threshold on any channel or station during a given month.

4.3 Election of Per Performance or Aggregate Tuning Hour Rate.

A Noncommercial Webcaster must consistently pay any additional royalties hereunder based on either the per performance royalties or the aggregate tuning hour royalties set forth in Section 4.2 for all of its channels and stations within any calendar year. The first time each year a Noncommercial Webcaster is required to pay additional royalties under Section 4.2, the Noncommercial Webcaster shall elect to pay all of its additional royalties under Section 4.2 for all of its channels and stations during the remainder of the year based on either the per performance royalties or the aggregate tuning hour royalties set forth in Section 4.2. Thus, for example, a Noncommercial Webcaster may not in one month when its Eligible Transmissions exceed 159,140 aggregate tuning hours calculate its additional royalties based on the per performance royalty and in another month calculate its additional royalties based on the aggregate tuning hour royalty.

4.4 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may 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 *Statements of Account.* A Noncommercial Webcaster shall submit to SoundExchange a monthly statement of account identifying its aggregate tuning hours of Eligible Transmissions for the month, regardless of whether the Noncommercial Webcaster is obligated to pay additional royalties under Section 4.2. Statements of Account, together with any payments required by Section 4.2, shall be due by the 45th day after the end of each month. Each statement of account shall identify (i) the name of the Noncommercial Webcaster, exactly as it appears on its notice of use, and (ii) if the statement covers a single AM or FM radio station only, the call letters of the station.

4.6 *Past Periods.* Notwithstanding anything else in this Agreement, to the extent that a Noncommercial 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 July 31, 2009, 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 September 15, 2009, and for purposes of Section 4.7, any such outstanding payments shall be considered due no earlier than July 30, 2009. If a Noncommercial Webcaster has paid royalties to SoundExchange under the 17 U.S.C. 112(e) and 114 statutory licenses that exceed the amount due under these Rates and Terms, SoundExchange shall credit the amount of such overpayment against anticipated future royalties owed by that Noncommercial Webcaster under these Rates and Terms. If the Noncommercial Webcaster reasonably anticipates that it will not incur royalty payment obligations under these Rates and Terms that exceed the amount of such overpayment on or before December 31, 2010, SoundExchange shall return any excess amounts previously paid by that Noncommercial Webcaster.

4.7 *Late Fees.* A Noncommercial 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 the 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, provided that, in the case of a timely provided but noncompliant statement of account or report of use, SoundExchange has notified the Noncommercial Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

Article 5—Reporting

5.1 *In General.* On an experimental basis, for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these Noncommercial Webcasters, these Rates and Terms require less than census reporting in certain circumstances and require full census reporting in other circumstances. SoundExchange hopes that offering graduated reporting options to electing Noncommercial Webcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers.

5.2 *Noncommercial Microcasters.* Electing Noncommercial Microcasters shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related ephemeral recordings. The immediately preceding sentence applies even if the Noncommercial Microcaster actually makes Eligible Transmissions for the year exceeding 44,000 aggregate tuning hours, so long as it qualified

as a Noncommercial Microcaster at the time of its election for that year. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Microcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Noncommercial Microcasters shall pay to SoundExchange a \$100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of the smallest webcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. If it is practicable for a Noncommercial Webcaster to report its usage pursuant to Section 5.4, it may wish not to elect Noncommercial Microcaster status.

5.3 Census Reporting for Services Paying Usage-Based Additional Royalties for 2011–2015. Beginning in 2011, a Noncommercial Webcaster must report its usage as provided in this Section 5.3 in the year following any year in which its average monthly Eligible Transmissions exceeds 159,140 aggregate tuning hours (i) on any channel or station over which it transmits Broadcast Retransmissions, or (ii) for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate. Such Noncommercial Webcasters shall submit reports of use in full compliance with then-applicable regulations (presently 37 CFR 370.3), except that notwithstanding the provisions of applicable regulations from time to time in effect, Noncommercial Webcasters shall submit reports of use on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant quarter and the number of plays thereof) and may report on an aggregate tuning hour basis as set forth in 5.4(a) below, and the provisions of Section 5.5 shall apply. Such reports must be submitted for any such channel or station over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate, if the same had average monthly Eligible Transmissions exceeding 159,140 aggregate tuning hours. For the avoidance of doubt, if a Noncommercial Webcaster providing reports on a census basis pursuant to this provision does not make average monthly Eligible Transmissions exceeding 159,140 aggregate tuning hours on a channel or station for which it is submitting census reports pursuant to this section in a given calendar year, the Noncommercial Webcaster is entitled to revert to providing reports on a sample basis in accordance with Section 5.4(b) (*i.e.*, two weeks per calendar quarter) beginning in the following calendar year.

5.4 Other Reporting by Noncommercial Webcasters. A Noncommercial Webcaster that is not a Noncommercial Microcaster and is not required to report its usage under Section 5.3 must report its usage as provided in this Section 5.4. Such Noncommercial Webcasters shall submit reports of use in

compliance with then-applicable regulations (presently 37 CFR 370.3), except that notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Such Noncommercial Webcasters may report on an aggregate tuning hour basis (*i.e.*, reporting their total ATH on a channel, program or station) in lieu of providing actual total performances.

(b) Such Noncommercial Webcasters may report on a sample basis as presently provided in 37 CFR 370.3(c)(3) (*i.e.*, reporting their usage for two weeks per calendar quarter).

(c) The provisions of Section 5.5 shall apply.

5.5 Detailed Requirements for Reports of Use. Notwithstanding the provisions of applicable regulations from time to time in effect, the following provisions shall apply to all reports of use required hereunder:

(a) Noncommercial Webcasters shall submit reports of use to SoundExchange on a quarterly basis.

(b) Noncommercial Webcasters shall submit reports of use by no later than the 45th day following the last day of the quarter to which they pertain.

(c) Noncommercial Webcasters that are broadcasters transmitting Broadcast Retransmissions shall either submit a separate report of use for each of their stations transmitting Broadcast Retransmissions, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

(d) Noncommercial Webcasters shall transmit each report of use in a file the name of which includes (i) the name of the Noncommercial Webcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single AM or FM radio station only, the call letters of the station.

Article 6—Additional Provisions

6.1 Applicable Regulations. To the extent not inconsistent with the terms herein, use of sound recordings by Noncommercial Webcasters shall be governed by, and Noncommercial Webcasters shall comply with, applicable regulations, including 37 CFR 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 CFR 380.4(h) and 380.6) shall apply hereunder. Noncommercial 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 Noncommercial 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 during any part of the 2006–2015 period 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 Noncommercial 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 except pursuant to a subpoena or other formal discovery request, 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.

6.3 Use of Agreement in Future Proceedings. Noncommercial 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 Noncommercial 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 Noncommercial Webcaster setting alternative rates and terms governing the Noncommercial 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 Noncommercial Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to comply in all material respects with the requirements of these Rates and Terms, SoundExchange may give written notice to the Noncommercial Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated upon further written notice. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Noncommercial Webcaster outside the scope of Section 112(e) or 114 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, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 Applicable Law. 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 under these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC, or if it does not have subject matter jurisdiction, in other courts located in Washington, DC. SoundExchange and Noncommercial Webcasters consent to the jurisdiction and venue of the foregoing courts and consent that any process or notice of motion or other application to said courts 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(e) 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. Neither these Rates and Terms nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. 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 Noncommercial Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Noncommercial Webcaster with respect to the subject matter hereof.

[FR Doc. E9–19299 Filed 8–11–09; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the *Federal Register* at 74 FR 12153, and no substantial comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: <http://www.reginfo.gov/public/do/PRAMain>. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to splimpto@nsf.gov. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT:

Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington,

VA, 22230, or by e-mail to splimpto@nsf.gov.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION: *Title of Collection:* Research in Disabilities Education Program On-Line Project Data Management System.

OMB Control No.: 3145–0164.

Abstract

The National Science Foundation (NSF) requests a reinstatement of the information collection for the Program for Persons with Disabilities, now called the Research in Disabilities Education (RDE) program. This on-line, annual data collection will describe and track the impact of RDE program funding on Nation's science, technology, engineering and mathematics (STEM) education and STEM workforce.

NSF funds grants, contracts, and cooperative agreements to colleges, universities, and other eligible institutions, and provides graduate research fellowships to individuals in all parts of the United States and internationally. The Directorate for Education and Human Resources (EHR), a unit within NSF, promotes rigor and vitality within the Nation's STEM education enterprise to further the development of the 21st century's STEM workforce and public scientific literacy. EHR does this through diverse projects and programs that support research, extension, outreach, and hands-on activities serving STEM learning and research at all institutional (e.g. pre-school through postdoctoral) levels in formal and informal settings; and individuals of all ages (birth and beyond). The RDE program focuses specifically on broadening the participation and achievement of people with disabilities in all fields of STEM education and associated professional careers. The RDE program has been funding this objective since 1994 under the prior name Program for Persons with Disabilities. Particular emphasis is placed on contributing to the knowledge base by addressing disability related differences in secondary and post-secondary STEM learning and in the educational, social and pre-professional experiences that influence student interest, academic performance, retention in STEM degree programs,