Navigating the Tangled Web of Webcasting Royalties

BY CYDNEY A. TUNE AND CHRISTOPHER R. LOCKARD

Ever since Napster launched to enormous popularity in 1999 and drew the ire of heavy metal band Metallica, the record industry has looked at online music with a highly suspicious and combative eye. The last decade has seen record labels fight numerous Web sites and software makers that have facilitated the distribution of online music and even individuals who simply shared or downloaded music. But while some companies have attempted to distribute music without obtaining licenses or paying royalties, many other Web sites simply want to distribute or perform music legally within the confines of copyright law. However, such companies have encountered a confusing, impractical, and intimidating maze of laws and regulations governing music copyrights.

The last several years have seen both enormous growth in the number of Web sites seeking to capitalize on online music and tremendous controversy over the amount of royalties owed to copyright owners by Web sites that broadcast, or webcast, music online. These webcasters have struggled in the face of ever-changing rules and resistance from the record industry. Over the last year, however, copyright owners and webcasters have negotiated compromises on many of their differences, bringing some clarity to this complicated framework.

Those wanting to take advantage of the exciting opportunities associated with online music must understand what music licenses are required for different media and methods of distribution, how these licenses are obtained, and what royalties will need to be paid. These complexities are not insurmountable, and an understanding of the various licenses and royalty obligations is essential in today's webcasting environment. This article is intended as a guide through that tangled legal web.

OVERVIEW

There are myriad ways that music is used and distributed on the Internet. Services such as iTunes sell permanent downloads and ringtones that consumers download to their computers and cell phones. Other companies, such as Amazon.com, sell physical phonorecords (like records and CDs). Music is also contained in other online content, such as podcasts, commercials, and videos carried on Web sites like YouTube. Finally, thousands of Web sites, known as webcasters, stream music over the Internet to listeners. Each of these uses implicates different licensing and royalty schemes.

The term "webcasting" generally refers to the distribution of an audio or video file over the Internet using streaming media technology. Some webcasters are companies that operate Federal Communications Commission ("FCC")-licensed radio stations that stream their over-the-air programming simultaneously on the Internet. Other companies deliver their programming solely over the Internet. Even in this latter category, there is a wide range of businesses. Some webcasters offer a format similar to traditional radio, where all listeners hear the same preprogrammed set of songs at the same time. Other webcasters have developed technology that allows users to create their own channels by rating songs, artists, or genres that they do or do not like. Still other webcasters offer subscription services that allow users to select music on demand. Some webcasters are even expanding into new forms of delivery—for instance, Pandora music streams now can be listened to via iPhones and some Blu-ray players.

Under U.S. copyright law, the owner of a copyrighted work, such as a song, has the exclusive right to make copies of the work, prepare derivative works based on the copyrighted work, distribute copies of the work, and display or perform the work publicly, including, in the case of a sound recording, by means of a digital audio transmission. Webcasters' use of music may implicate three of these rights—the right to reproduce the work, the right to distribute the work, and the right to perform the work publicly.

To make matters more complicated, most recorded songs also have multiple copyright owners. Songwriters, composers, and publishers of a musical composition (a "song") have rights in the song. For example, these owners have the right to receive royalties every time a copy of the song is sold in sheet music form or as part of an album, as well as when the song is broadcast over the radio, the Internet, speakers in a restaurant, or when it is performed in a concert. Additionally, artists who perform on a recorded version of a song (a "sound recording"), and the owner of the copyrights in that sound recording (generally the record label), also have the right to receive royalties for sales of that sound recording and for the digital transmissions of that sound recording.

PERFORMANCE RIGHTS

The right to perform music publicly impacts webcasters most significantly. Traditional radio station broadcasters obtain licenses from the performance rights organizations—the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc., and SESAC (collectively, the "PROs")—that together represent virtually all songwriters, composers, and music publishers in the United States for purposes of licensing and collecting royalties from any public performance of a song. However, when music is broadcast over the Internet, the Digital Millennium Copyright Act ("DMCA") requires both traditional broadcasters and Internet-only webcasters to obtain additional licenses from, and pay additional royalties to, the owners of the copyrights in the sound recordings and the performers featured in the sound recording.

Song Licenses and Royalties

Over-the-air radio station broadcasters obtain licenses from and pay royalties to the PROs for use of songs, which compensate the composers and copyright owners of songs that are broadcast by these traditional radio stations. When the signal of an over-the-air radio station is simulcast over the Internet on a nonsubscription basis, the fees for such use are generally covered by the music licenses that have already been obtained from the PROs. However, if the broadcaster is operating an Internet station

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that is not also being broadcast simultaneously over the air, or if the over-the-air license does not cover a simulcast, a separate Internet-only license must be obtained from the PROs.

Webcasters whose streaming of music is not connected to a radio broadcast station must also obtain a license from, and pay royalties to, the PROs for the use of their songs. Each PRO uses different licenses and royalty rates, although all charge a minimum royalty. In addition, they include royalties that are based either on revenues or on Web site usage. Fees may also vary based on the type of service. For example, ASCAP charges a higher fee for interactive Web sites that let users select specific songs on demand or create highly customized playlists.

Sound Recording Licenses and Royalties

The DMCA requirement that royalties be paid to performers and the copyright owners of sound recordings should not be overlooked. These performance royalties are not applicable to over-the-air broadcasts, because such radio stations had historically been viewed as providing a substantial, in-kind promotional consideration to the record labels and performers. However, this long-standing regime is the subject of legislation currently working its way through Congress (H.R. 848 and S. 379, introduced February 4, 2009). If enacted into law, terrestrial broadcasters would, for the first time, be required to obtain licenses for the airing of sound recordings. Even if that legislation does not pass, the performance right in sound recordings applicable to all webcasters will remain.

The DMCA created a compulsory license for certain digital transmissions, while other digital transmissions do not qualify for the compulsory license. A compulsory license means that one may use the sound recording without having to obtain the specific permission of the copyright owner as long as the statutory formalities are adhered to, royalties are paid, and certain usage restrictions are followed (see discussion later in this article). A compulsory license cannot be obtained for interactive services, such as on-demand performances, downloads, and podcasts. Whenever an interactive service or other digital transmission does not qualify for a compulsory license, a license must be obtained and royalties negotiated directly from the sound recording copyright owner, who has discretion over whether to give such a license and over what fees to charge.

SoundExchange is a nonprofit organization that was established by the Recording Industry Association of America ("RIAA") and designated by the U.S. Copyright Office to administer the compulsory licenses for digital performances of sound recordings, collect the royalties from such licenses, and pay the collected royalties to the sound recording copyright owners and performers. Half of the royalties collected go to the performers and half are paid to the sound recording copyright owner. The Copyright Royalty Board ("CRB"), which is appointed by the Librarian of Congress (which appointment some argue is unconstitutional), sets the royalty rates for compulsory licenses.

WHEN A WEBCASTER STREAMS MUSIC OVER THE INTERNET, THIS ACTION ALSO IMPLICATES ANOTHER IMPORTANT RIGHT MENTIONED PREVIOUSLY—THE RIGHT TO COPY A WORK.

To qualify for a compulsory license, a webcaster must meet a number of requirements, which are described in the following sections. In addition, the compulsory license is only available for webcasters that are principally engaged in playing music rather than in the sale of products, and the use of music together with visual images of a product in a way that implies an association between the music and the product is prohibited. The compulsory license only applies to recordings lawfully made, so webcasters may not lawfully play unauthorized bootlegs. To make it more difficult for members of the public to record music from the streams that are being transmitted, there are also various antipiracy efforts with which webcasters are required to cooperate.

Webcasters that offer interactive services or features, such as temporary or permanent downloads, cannot obtain a Section 114 license and thus must negotiate a performance rights license directly with the record company that owns the copyrights in that sound recording. If a webcaster does not have either a direct license or a compulsory license, that webcaster is potentially liable for copyright infringement and, as such, can be subject to damages and penalties. It is therefore important to comply fully with all of the requirements of the law, including the following.

Registration With the Copyright Office

To obtain a compulsory license for sound recordings, a webcaster must first register with the Copyright Office by filing a Notice of Use of Sound Recordings Under Statutory License and pay a filing fee before the digital transmission of music begins. When filing a Notice of Use form, webcasters need to obtain both a Section 112 and a Section 114 license. A Section 114 license grants the webcaster the right to perform the sound recording, while a Section 112 license grants it the right to make "ephemeral copies" of the work (a transient copy made during the digital transmission process).

Compliance With the Performance Restrictions

To qualify for a compulsory license, a webcaster must comply with a number of restrictions covering how the sound recordings are used. These restrictions are intended to reduce the incidence of unauthorized downloading of a specific sound recording being webcast by making it more difficult for listeners to anticipate certain music selections. It is important to note that these restrictions do not allow some practices that are commonly used by over-the-air radio stations and may thus require some webcasters to modify their practices to qualify for a compulsory license, although recent ne-

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gotiations have resulted in relaxation of some restrictions, as described below).

The Service May Not Be Interactive. Generally the term "interactive" refers to a service that allows a listener to select specific sound recordings on demand or develop a program specially created for that listener. Thus, an Internet transmission for which the webcaster selects the music qualifies for the compulsory license, but one that allows a consumer to select from a menu of specific sound recordings does not. It is acceptable for a webcaster to receive play requests as long as the webcaster decides which requests to play and when they will be played.

However, what exactly constitutes an interactive service is the subject of some confusion and debate. Yahoo!'s LAUNCHcast music service has been embroiled in an eight-year-long case with record labels over whether its service is interactive. On August 22, 2009, the U.S. Court of Appeals for the Second Circuit issued an important decision concluding that LAUNCHcast was not interactive and thus could obtain a compulsory license. Despite the fact the service allows users to customize individual stations based on their favorite songs, artists, albums, and music genres, the court found that LAUNCHcast users could not predict playlists and thus the service was not a substitute for the purchase of music; therefore, it did not fall within the scope of what Congress intended to exclude from the compulsory license.

While this case provides a helpful road map for creating a Web site that is not interactive, the decision turned on specific facts and is limited to the Second Circuit; therefore, similar cases could turn out differently, and the definition of interactive is still an open question. Given the complex and changing analysis involved, if a webcaster wishes to allow listeners to develop personalized music streams, the webcaster should seek legal counsel to determine whether the service would qualify for the compulsory license.

The Webcaster May Not Automatically and Intentionally Cause Any Device Receiving the Transmission to Switch Channels. The webcaster may not automatically and intentionally cause the device receiving the transmission to switch from one program channel to another. There is an exception for transmissions to a business establishment.

The Webcaster Must Transmit Copyright Information While the Music Is Playing. While the music is playing, the webcaster must identify in text on its Web site certain information, including the title, the album from which it came, and the featured artist. Note that this information may *not* be displayed *before* the music is played. In addition, if technically feasible, the music must be accompanied by information that is encoded by the copyright owner, identifying the sound recording title, featured artist, and related information concerning the sound recording.

The Webcast Must Comply With Specific Sound Recording Restrictions. There are restrictions on how often music from the same artist or from the same album may be played. These restrictions are called the "sound recording performance complement" and have two components:

- *One-Album Restriction*. Programming may not include more than three selections from any one album on a particular channel within any three-hour period, and no more than two such selections may be played consecutively.
- *Featured-Artist Restriction*. Programming may not include more than four different selections by the same featured artist, or from any set or compilation, on a particular channel within any three-hour period, and no more than three such selections may be played consecutively.

A Program Schedule May Not Be Published in Advance. The webcaster may not publish in advance a program schedule that identifies when a specific sound recording, album, or featured artist will be played. The webcaster is permitted to announce that a particular sound recording or artist will be coming up, but the exact time may not be provided. However, certain over-the-air simulcasters are exempt from this restriction.

ROYALTIES

If a webcaster does not qualify for the compulsory license, a license must be negotiated directly with the sound recording copyright owner, who is free to charge any royalty rate it desires or refuse to grant a license at all. On the other hand, the royalties that are paid by webcasters under the compulsory license are set on an industry-wide basis. In January 2006, the CRB was established to set rates and adjust them every five years. The CRB, which has three judges and also hears cases concerning compulsory license issues, issued its rates decision in March 2007, retroactive to January 2006 and lasting through December 2010. It mandated that all commercial webcasters eligible for the compulsory license pay a minimum annual fee of $500 per channel or station plus royalties calculated on a per-performance basis. In a per-performance calculation, a performance is one listener listening to one song; if two listeners listen to the same song, that would be two performances. The per-song/per-listener rate established by the CRB is $0.0018 in 2009 and $0.0019 in 2010. Royalty rates for programming that primarily involves "talk" are lower. For webcasters that operate many channels/stations through the same service, the minimum annual fees are capped at $50,000.

Under the CRB rates, noncommercial webcasters pay an annual minimum fee of $500 in exchange for the right to broadcast up to 159,140 aggregate tuning hours per month (an average of about 215 simultaneous users). For aggregate tuning hours, one listener who listens for one hour would be one aggregate tuning hour, while two listeners who listen for half an hour each would also constitute one aggregate tuning hour. Two listeners who listen for one hour each would constitute two aggregate tuning hours. Noncommercial webcasters exceeding this usage limit must pay a per-performance fee equal to what commercial webcasters are charged.

The CRB rates were heavily criticized by webcasters large and small, commercial and noncommercial, and many, like Pandora, argued they would have to go out of business if they are forced to pay the CRB-set rates. The rates were alleged to cost large webcasters as much as 70 percent of their revenue and small webcasters as much as 1,200 percent of revenues. Despite the significant criticism, the CRB refused to revisit its decision, and the controversy moved to the courtroom as various webcasters appealed the rate determination. On July 10, 2009, the U.S. Court of Appeals for the District of Columbia released its opinion in the closely watched consolidated ap-

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peal, generally upholding the CRB rates as not being "arbitrary and capricious," although it remanded to the district court SoundExchange's mandatory $500 per-channel minimum fee.

However, while the legal challenge played out, webcasters took their battle to the media and to Congress, pressuring SoundExchange to strike a compromise. In October 2008 and again in June 2009, Congress passed Webcaster Settlement Acts, giving SoundExchange authority to enter into royalty rate settlement agreements with webcasters that would be legally binding on all sound recording copyright owners. After intense, drawn-out negotiations, numerous settlements were eventually reached.

Public Radio

On January 15, 2009, SoundExchange and the Corporation for Public Broadcasting ("CPB") announced that they had agreed on statutory performance royalties for noncommercial educational public radio entities. The agreement, which covers National Public Radio, American Public Media, Public Radio International, Public Radio Exchange, and up to 450 public radio webcasters selected by CPB, ensures SoundExchange a single up-front royalty payment of $1.85 million and requires stations to provide consolidated usage and playlist reporting to SoundExchange. The payment covers all royalties owed by these stations from the period of January 1, 2005, through December 31, 2010 (although the CPB will owe SoundExchange additional fees, if estimated aggregate tuning hours exceed the expected amount). On July 30, 2009, SoundExchange and the CPB reached another settlement extending their settlement through 2015 in exchange for a $2.4 million payment by the CPB, with additional fees of up to $480,000 due if the covered stations collectively exceed certain aggregate tuning hour limits in a given year. Additionally, although the biggest webcasters will be obligated to provide SoundExchange with detailed reporting information, the agreement gives small stations significantly reduced reporting obligations.

Over-the-Air Radio Station Broadcasters

On February 15, 2009, SoundExchange and the National Association of Broadcasters ("NAB") announced that they had reached a settlement over rates owed by the thousands of over-the-air broadcast stations that offer simulcasts or stand-alone webcasts. Under the agreement, stations participating in the settlement pay rates about 16 percent lower than the rates set by the CRB for 2009 and 2010, but will then owe increased rates for the period of 2011–15, a period for which the CRB has not yet set rates. The rates range from $0.0015 per performance for 2009 to $0.0020 for 2012 and $0.0025 for 2015. Broadcasters also must pay an annual minimum fee of $500 per channel or unique stream (up to a maximum of $50,000), which is credited against the per-performance royalties.

Additionally, commercial radio stations that qualify as small broadcasters (webcasting less than 27,777 aggregate tuning hours per calendar year) may pay a $100 proxy fee in place of filing records-of-use reports. New webcasters may opt in within 30 days of the date when a station begins webcasting. Broadcasters participating in the settlement are prohibited from participating in the CRB's rate determination proceeding for the period of 2011–15.

Stations participating in the settlement also receive the advantage of waiver agreements that NAB negotiated with EMI Music North America; Sony Music Entertainment; UMG Recordings, Inc.; Warner Music Inc.; and the Association of Independent Music. These agreements allow such broadcasters to webcast without many of the restrictions imposed by the Section 114 "performance complement" discussed previously. So long as the substantial majority of the audience is over-the-air listeners and a broadcast does not depart materially from typical over-the-air programming practices, broadcasters simulcasting their over-the-air broadcasts will not be subject to restrictions on consecutive performances of songs by the same artist or album, provided that not more than one-half of a single album is played consecutively. Such broadcasters may also announce the song name and artist before a song is played, but only if a written or visual schedule does not specify the time of a particular performance. The waiver agreements also eliminated the requirement that webcasters retain records of their ephemeral recordings for six months. A webcaster, however, still may not post its playlist on any Web site.

Small Webcasters

SoundExchange also made a settlement offer in February 2009 to small webcasters, defined as those with less than $1.25 million in annual revenues. Under this offer, webcasters would pay an annual minimum fee, which is credited against royalties owed by the webcaster. Royalties are calculated as a percentage of revenue or expenses, rather than per performance. However, if a small webcaster transmits more than 5 million aggregate tuning hours in a year, royalties for the excessive transmissions will be charged at the CRB-set rates. In summary:

- "Microcasters," or webcasters with less than $5,000 in revenue, $10,000 in expenses, and 18,067 aggregate tuning hours annually, pay only $500 with no additional royalties owed, as well as a $100 proxy fee that exempts them from certain reporting requirements.
- Webcasters with annual revenues between $5,000 and $50,000 pay an annual fee of $2,000, plus royalties equaling the greater of (i) 10 percent of their first $250,000 in gross revenue and 12 percent of their additional revenue, or (ii) 7 percent of all their expenses.
- Webcasters with annual revenues of more than $50,000 would pay a minimum fee of $5,000, plus royalties equaling the greater of (i) 10 percent of their first $250,000 in gross revenue and 12 percent of their additional revenue, or (ii) 7 percent of all their expenses.

However, this settlement offer was not attractive to most small webcasters because it requires them to pay additional royalty amounts at the higher CRB-set rates, retroactive to 2006, if the webcaster is sold. Additionally, the rates were set through 2015, and participating webcasters are excluded from participating in the CRB rate determination proceedings for the period of 2011–15. A new, small webcaster wishing to elect into this settlement must file an election notice with SoundExchange no later than the first date on which the webcaster would be obligated to make a royalty payment for such year.

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"Pureplay" Webcasters

On July 7, 2009, a deal was struck with SoundExchange that is available to all "pureplay" webcasters; that is, stand-alone, noninteractive webcasters that derive most of their revenue from their webcasting operations. Under that deal, large pureplay webcasters, those with revenue in excess of $1.25 million, which participate in the settlement pay royalties to SoundExchange equal to the greater of 25 percent of their revenue or a per-performance rate that is substantially less than the previously set CRB rates. The new rates start at $0.00093 per performance for 2009, rise to $0.00110 for 2012, and max out at $0.0014 for 2015.

Instead of paying per-performance royalties, small pureplay webcasters that participate in the deal have the option of paying SoundExchange the greater of 7 percent of their expenses or 12 percent of their first $250,000 in gross revenue, and 14 percent of revenue above $250,000. These webcasters would be subject to a cap on the number of aggregate tuning hours they can broadcast monthly as well as a recapture provision that would force these webcasters to pay retroactively four years' worth of the money that would have been owed under per-performance rates if they are sold to a larger entity (unless such webcaster pays per-performance rates for one year prior to the acquisition). Also, the small pureplay webcaster rates end in 2014.

A third category of pureplay webcasters, those that offer bundled, syndicated, or subscription services, will owe royalties at the same per-performance rates agreed to between SoundExchange and the NAB. All webcasters participating in this settlement owe a minimum annual payment of $25,000. To participate, webcasters must file a notice of election with SoundExchange no later than January 31 each year. Those doing so will be prohibited from participating in the CRB's 2011–15 rate-making proceedings.

Other Noncommercial Webcasters

On July 30, 2009, the last day on which it had authority to do so under the Webcaster Settlement Act of 2009, SoundExchange reached settlement agreements with two groups representing noncommercial webcasters left out of previous settlements. An agreement with College Broadcasters, Inc. ("CBI") provides for special royalty rates and more lenient record keeping requirements for college radio stations. Webcasters opting in to that agreement pay a $500 minimum annual fee in exchange for the right to broadcast up to 159,140 aggregate tuning hours per month, which is the same as the framework under the CRB rates. However, webcasters that exceed 159,140 aggregate tuning hours will only owe per-performance rates at the same rates as agreed to by the NAB, a discount on the CRB-set rates. The agreement also allows stations averaging less than 55,000 aggregate tuning hours to pay a $100 proxy fee in lieu of providing reporting data to SoundExchange.

WHILE COMPLEX AND SEEMINGLY OVERWHELMING, IF SUCCESSFULLY NAVIGATED, THIS MAZE OF LICENSES OFFERS MANY EXCITING POSSIBILITIES AND OPPORTUNITIES FOR WEBCASTERS.

The second agreement, with Northwestern College and the National Religious Broadcasters Music License Committee, is open to both religious and other noncommercial webcasters. The agreement offers the same $500 per-channel fee for stations streaming up to 159,140 monthly aggregate tuning hours that is offered under the CBI deal. However, for those webcasters that exceed that limit, the "religious" deal offers substantial savings. Through 2010, those webcasters will owe either a royalty of $0.0002176 per performance or $0.00251 per aggregate tuning hours. For stations that are primarily news, sports, or talk, the rate would be $0.0002 per aggregate tuning hours. Going forward, these stations would owe per-performance rates of $0.00057 in 2011, escalating to $0.00083 in 2015.

These royalties are significantly lower than those set by the CRB in 2007, and they are about one-third of the cost webcasters would pay under the CBI deal. However, webcasters electing into the religious deal will have more stringent reporting requirements. Except for extremely small microcasters (those averaging less than five simultaneous listeners), religious broadcasters will not have the benefit of reduced record keeping requirements.

Other Webcasters

Commercial webcasters also have the option of being governed by a settlement reached on July 30, 2009, between SoundExchange and SIRIUS-XM. This agreement covers the period of 2009–15, and results in slightly lower royalty rates—$0.0016 in 2009 and $0.0017 in 2010—than under the CRB rates set in 2007. The 2009 and 2010 rates are not as low as those under the NAB settlement, but they end up cheaper than the NAB settlement rates in 2013–15, maxing out at $0.0024. There is also a $500 per-channel minimum fee, which cannot exceed $50,000. Webcasters that elect into the SIRIUS-XM settlement are locked into the rates through 2015, even if the CRB sets lower rates. Participants in the settlement are also prohibited from participating in litigation regarding the CRB's rate-making proceedings.

For other webcasters that are not eligible for, or do not participate in, one of these settlements, the rates set by CRB in 2007 still apply through the end of 2010. This includes small webcasters that generate minimal revenue and cannot afford the $25,000 minimum annual fee of the pureplay deal. It also includes large webcasters that derive substantial revenue from non-webcasting sources, as well as aggregator services that host small webcasters. Although there is a possibility that a compromise could be reached between SoundExchange and some of these groups with respect to the royalties owed dating back to 2006, unless Congress passes another Webcaster Settlement Act, SoundExchange lacks authority to enter a settlement that would be binding on

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sound recording copyright owners who are not members of SoundExchange. These groups will likely play a major role in CRB's rate-making proceedings for the period of 2011–15, which have already begun.

Additionally, webcasters that offer interactive services are left out of the SoundExchange royalty scheme. As discussed previously, only webcasters that qualify for the Section 114 compulsory license can take advantage of the CRB royalty process or SoundExchange settlements. Even if SoundExchange wanted to reach an agreement with webcasters that offer interactive services, such as on-demand performances, downloads, and podcasts, it does not have the authority to do so under current copyright law.

REPRODUCING AND DISTRIBUTING MUSIC

When a webcaster streams music over the Internet, this action also implicates another important right mentioned previously—the right to copy a work. The act of transmitting the digital audio files creates "ephemeral" or transient copies of the work on a computer. Section 112 of the Copyright Act gives webcasters a statutory right to make ephemeral recordings part of its broadcast of sound recordings pursuant to the Section 114 compulsory licenses previously described. Royalties paid to SoundExchange cover this reproduction, which is why a webcaster must obtain a Section 112 license in addition to a Section 114 license when filing a Notice of Use, as previously described. Once a webcaster has obtained Section 112 and Section 114 licenses, as well as licenses from the PROs, and pays the associated royalties described in the Performance Rights section to SoundExchange and to the PROs, no other licenses or royalties are usually required.

However, webcasters that do not qualify for a Section 114 compulsory license must, in addition to obtaining direct licenses from record companies for their performance of a sound recording, obtain licensing for their reproduction and delivery of music. A license and the royalties for any ephemeral copy made should be included in any direct license from a record company.

Additionally, a royalty known as a mechanical royalty is owed to the owners of the copyrights in the songs being sold or downloaded. Such activities are addressed in Section 115 of the Copyright Act, which grants a compulsory license for the reproduction and distribution of physical phonorecords (such as CDs) and digital phonorecord deliveries (such as permanent digital downloads, limited digital downloads, and buffer copies). A mechanical license is available for any song that has been distributed to the public in the United States. Royalty fees for this license are generally included in the license royalties paid by webcasters to the record companies, and then passed on to music publishers (often via the Harry Fox Agency), and finally to songwriters and composers.

On October 2, 2008, the CRB announced that mechanical royalties owed by Web sites such as iTunes and Amazon.com that offer permanent music downloads would remain at $0.091 per download for a five-year period from January 1, 2008, through December 31, 2012. This decision also set mechanical royalties for physical phonorecords at $0.091 per song and for ringtones at $0.24 per song. For songs longer than five minutes, a rate of $0.0175 is charged for each minute or fraction thereof. The RIAA filed an appeal of the CRB decision in February 2009, protesting the late fees and royalty rate for master recording ringtones.

Royalties owed for interactive music streaming and limited downloads were the subject of a deal negotiated by the RIAA, the Digital Media Association, the National Music Publishers' Association, the Nashville Songwriters Association International, and the Songwriters Guild of America in September 2008. This deal set the mechanical royalty at 10.5 percent of revenue, minus royalties paid to the PROs for performance royalties. Limited or restricted downloads are downloads that will be deleted or become inaccessible automatically after a certain period of time or due to a failure to comply with requirements, such as payment of a monthly fee. The rule applies both to subscription-based Web sites and Web sites supported by advertising, and also contains flexibility for new business models. The agreement also established minimum royalties: a set fee per subscriber for subscription-based services; for nonsubscription based services, the fee is a percentage of the royalties paid to record companies for the sound recording license. Webcasters that offer noninteractive, audio-only streams that fall within the Section 114 compulsory license described previously are exempt from paying mechanical royalties. Webcasters are also allowed to conduct certain promotional interactive streaming without paying royalties.

CONCLUSION

This article includes only the basics of webcasting licensing and royalty payments. There are additional filing and reporting requirements for each of the licenses and royalty options. For a webcaster to hold a valid continuous compulsory license, specific reporting requirements set by SoundExchange must be met so that SoundExchange can determine that the royalties have been properly computed and paid by the webcaster. Similar requirements apply to a mechanical license. Additionally, there are separate statutory licenses available for satellite radio, digital cable radio, and digital business services that are not covered here.

While complex and seemingly overwhelming, if successfully navigated, this maze of licenses offers many exciting possibilities and opportunities for webcasters. But, like quickly evolving technology, copyright law is ever-changing, and the battle over future music royalties promises to continue to affect these still-developing laws. Therefore, it is critical that webcasters stay abreast of the latest technological and legal developments. If they can, they may find themselves the beneficiary of the next big Internet initial public offering. ❖

Cydney A. Tune leads Pillsbury's copyrights practice section and media & entertainment industry team and represents and advises clients in a variety of intellectual property issues, including copyrights and trademarks, as well as in a broad array of entertainment, licensing, and e-commerce matters. She can be reached at cydney.tune@pillsburylaw.com, and her bio can be viewed at www.pillsburylaw.com/cydney.tune.

Christopher R. Lockard is an associate in Pillsbury Winthrop Shaw Pittman Lip's San Francisco office and practices in the areas of intellectual property and corporate law, including copyright, trademark, entertainment, licensing, and internet law matters. He can be reached at christopher.lockard@pillsburylaw.com.

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