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## Communications Broadcast Advisory

### Licensing and Royalty Basics for “Broadcasting” Music over the Internet

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**The digital world can seem confusing and intimidating to those who want to “broadcast” music over the Internet, but moving into cyberspace also presents exciting new opportunities. There are myriad ways that music is used on the Internet. There are companies that operate Federal Communications Commission (“FCC”) licensed radio stations that “stream” their over-the-air programming simultaneously on the Internet. There are also companies that deliver their program material directly on the Internet. For purposes of this discussion, both types of Internet users are called “webcasters.”**

Some webcasters offer subscription services that allow users to select music on demand. Other webcasters offer streaming of music performances or digital downloads. Some webcasters focus on sales of music downloads or of other music-related products and include webcast streaming. New forms of delivery to consumers are also available - such as delivery to digital recording devices – and are growing. Cell phones and other mobile devices have developed the capability to receive digital content and this area is exploding. As these new uses of music proliferate, it is important for webcasters to understand what music licenses are required for different media and for different delivery methods, 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 broadcasting environment.

#### Performance Rights Licenses

At least initially there was wide spread confusion among many webcasters who believed that the licenses obtained from the performance rights societies ASCAP, BMI, and SESAC (“PRSs”) for their FCC licensed radio stations satisfy their licensing and royalty requirements for online uses of music. Licenses from PRSs, however, apply only to the public performance rights in the music composition (the “Song”) when a Song is

played over-the-air and simultaneously streamed on the Internet by the webcaster. As is discussed below in more detail, for digital transmissions there is an additional license that must be obtained and additional royalties to be paid, to compensate the copyright owners of the sound recording (a “Sound Recording”) and the performers in the Sound Recording. A “Sound Recording” is the particular recorded version of a Song and the record company typically owns the rights in a Sound Recording.

## Song Licenses and Royalties

Over-the-air broadcasters pay royalties for use of Songs to the PRSs, which compensate the composers and copyright owners of Songs that are broadcast by traditional radio stations. When Internet radio stations simulcast the signal of an over-the-air radio station on a non-subscription basis, the fees for such use are covered by the broadcast licenses that have already been obtained from the PRSs. However, if the broadcaster is operating an Internet station that is not also being broadcast simultaneously over-the-air, a separate Internet-only license must be obtained.

Webcasters whose music is not made available over a radio broadcast station must still pay the PRSs for the use of their Songs. Each of these organizations has a form of license for these types of webcasters, and each of these licenses, and the royalties that they charge, are somewhat different. However, all include a minimum royalty. In addition to such minimum, they include royalties that are based either on revenues or on website usage. Each of these companies provides information concerning the specific fees on its website<sup>1</sup>.

## Sound Recording Licenses and Royalties

### Licenses

Unlike the traditional over-the-air broadcast of music, when music is publicly performed by means of a digital transmission, which is how everything is transmitted over the Internet, there is a performance right in the Sound Recording as well as in the Song. The Digital Millennium Copyright Act (“DMCA”) requires that royalties be paid to the copyright owners of the Sound Recordings and to the performers who are featured on such Sound Recordings. The DMCA created a “compulsory license” for some digital transmissions (discussed below) while other digital transmissions do not qualify for the compulsory license. A compulsory license, for example, cannot be obtained for on-demand services, including downloads and podcasts. Whenever an on-demand service or other webcaster does not qualify for the compulsory license, a license must be sought directly from the copyright owner and the royalties to be paid must be individually negotiated.

**Compulsory Licenses.** A compulsory license means that one can use the Sound Recording without having to obtain the permission of the copyright owner as long as the statutory formalities are followed, royalties are paid, and certain usage restrictions are followed (see discussion below). If a digital transmission does not qualify for a compulsory license, a license must be obtained and negotiated directly from the Sound Recording copyright owner, who has the right to decline the license.

SoundExchange is a non-profit organization that was established to administer the compulsory licenses for digital performances of Sound Recordings, to collect the royalties from such licenses, and to pay the collected royalties to the Sound Recording copyright owners and to the performers. Half of the royalties col-

<sup>1</sup> <http://www.ascap.com/weblicense>; <http://www.bmi.com/licensing/webcaster>;  
<http://www.sesac.com/licensing/internetLicensing.asp>

lected go the performers and half are paid to the Sound Recording copyright owner. The Copyright Royalty Board, which is an agency of the federal government, sets the royalty rate for compulsory licenses.

In order to qualify for a compulsory license, a webcaster must meet a number of requirements. In addition to the requirements described below, the compulsory license is only available for webcasters that are principally engaged in playing music rather than in the sales of products. Also, 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 under the compulsory license scheme. The compulsory license only applies to recordings lawfully made so webcasters should not play bootlegs. There are also various anti-piracy efforts with which webcasters are required to cooperate, in order to make it more difficult for members of the public to record music from the streams that are being transmitted.

If the requirements for a compulsory license are not met and the webcaster does not obtain a direct license to use the Sound Recording, the webcaster is liable for copyright infringement and, as such, can be subject to damages and penalties. It is therefore important to carefully comply with all of the requirements, including the following:

- **Registration with the Copyright Office.** To obtain a compulsory license, the first step is for the webcaster to register with the Copyright Office by filing a Notice of Use of Sound Recordings Under Statutory License *before* the digital transmission of music begins. This form must be submitted with a filing fee that is presently \$20. If a webcaster is making multiple streams available on the same website, a single filing can be made. The Notice of Use form, and instructions for completing and filing the form, are available on the Copyright Office's website<sup>2</sup>.

The Notice of Use form asks whether a section 112 or 114 license is being obtained - a webcaster needs both types of license. A Section 114 license grants the right to perform the Sound Recording while a Section 112 license grants the right to make "ephemeral copies" of the work. An "ephemeral copy" is a transient copy that is made during the digital transmission process.

The Notice of Use also asks whether the webcaster will be a subscription or a nonsubscription service. Just as it sounds, the answer depends on whether the consumer is charged a fee to use the service. There is a box on the form for "Pre-existing subscription services"; these are digital subscription services that existed in 1998 and which are subject to a different royalty than those that have started since that time. Any service that started after 1998 is either a "New Subscription Service" or a "New Nonsubscription Service."

- **Compliance with the Performance Restrictions.** In order to qualify for a compulsory license, a webcaster must meet a number of restrictions covering how the Sound Recordings are used. As you will see, these restrictions focus on the ability, or inability, of the listeners to record a digital copy of a specific Sound Recording being webcast. It is important to note that these restrictions do not allow some practices that are used by over-the-air FCC licensed radio stations and may thus require some webcasters to modify their practices in order to qualify for a compulsory license. The restrictions include the following:
  - **The Service Must Not Be Interactive.** An interactive service is one that allows a listener to select the Songs to be played. Thus, a broadcast transmission in which the webcaster selects the music qualifies for the compulsory license but one that allows a consumer to select from a menu of music

<sup>2</sup> <http://www.copyright.gov/forms/form112-114nou.pdf>

does not. It is acceptable for a station to play call-in requests as long as the webcaster decides which requests to play and when they will be played.

- **The Webcaster Does 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 and This Must be Done While the Music is Playing.** While the music is playing, the webcaster must identify in text on its website certain information including: the title, the album (or CD, both of which will be referred to in this article as an “album”) from which it came, and the featured artist. Note that this information may *not* be displayed *before* the music is played. Also, if technically feasible, the music must be accompanied by information that is encoded by the copyright owner, identifying the sound recording title, the featured artist, and related information concerning the Sound Recording.
- **Specific Sound Recording Restrictions Must be Complied With.** There are restrictions on how often music from the same artist or from the same album can be played. These restrictions are called the “sound recording performance compliment” 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 Cannot 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. There is a very limited exception for certain noncommercial classical music radio stations that had published program guides before 1998.

## Royalties

As noted above, if a webcaster does not qualify for the compulsory license, the royalties to be paid must be negotiated directly with the Sound Recording copyright owner and that copyright owner is free to charge any royalty rate it desires.

On the other hand, the royalties that are paid by webcasters under the compulsory license are set on an industry-wide basis. Initially the rates were set by a panel of arbitrators selected by the Copyright Office. As of January 2006, however, the rates are set by the newly created Copyright Royalty Board and will be adjusted once every five years. The Board has three Judges and will also hear cases concerning compulsory license issues.

The initial royalty rates were set in 2002 and modified by settlement agreements entered into between the recording industry and different groups of webcasters. The current royalty rates technically expired at the end of 2005 but royalty payments are currently being made at the 2005 rate. There is a proceeding pending before the Copyright Royalty Board to set the royalty rates for 2006 through 2010. When these rates are set, they will be **retroactive** to the beginning of 2006. At that time an adjustment will need to be made in which webcasters will either be entitled to a rebate or will have to pay more, depending on the level at which the rates are set.

The specific royalty rates that were in effect in 2005 for various types of Internet broadcasters, and the forms for submitting royalty payments, are included on the SoundExchange website<sup>3</sup>. Different industry groups pay at different rates. Please note that SoundExchange does not bill webcasters. Rather, each webcaster must determine the amount of royalties it owes and when they are due, and must submit the royalties to SoundExchange along with the required reports. For the most part, the fees and reports must be filed monthly.

Here is a summary of the principle rates that webcasters are presently paying:

- **Commercial Webcasters.** All commercial webcasters who do not fall within the definition of a “small commercial webcaster” (discussed below) and who are eligible for the compulsory license pay royalties based on listening. Such webcasters have the option to pay on a “per performance” basis (per song per listener) or based on an “aggregate tuning hours” basis. Most webcasters prefer to pay royalties based on aggregate tuning hours, primarily because of the difficulties in tracking listeners on a per-performance basis. The royalty rates are:
  - Per Performance. A “performance” is one listener listening to one song; if two listeners listen to the same song that would be two performances. The rate is .0762 cents per song per listener, except that 4% of all performances can be excluded.
  - Per Aggregate Tuning Hour. 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 and two listeners who listen for one hour each would constitute two aggregate tuning hours. The rate for an Internet-only webcaster is 1.17 cents per aggregate tuning hour. The rate for a broadcast simulcast, which is identical to an over-the-air broadcast except for the commercials, is .88 cents per aggregate tuning hour.

The minimum annual rate for commercial webcasters is the lesser of (1) \$2,500 or (2) \$500 per channel. Royalty rates for programming that primarily involves “talk” are lower.

- **Small Commercial Webcasters.** Shortly after the royalties were established by the initial royalty arbitration proceeding, there was a strong protest that the royalties were so high that smaller commercial entities would be driven out of business. The recording industry reached an agreement with “small commercial webcasters” to establish a special royalty rate. A “small commercial webcaster” is one with less than \$1.2 million in revenue. The “settlement rate” (noted below) is an option that a small commercial webcaster may elect to pay when registering with SoundExchange. Note, however, that the election is binding and a small commercial webcaster who has exercised the option may not subsequently choose

  
<sup>3</sup> <http://www.soundexchange.com>

to pay the regular statutory rate if that rate turns out to be more favorable. It is thus quite important for a small commercial webcaster to carefully consider the royalties that it would pay under both approaches before it elects to pay the special royalty rate.

Assuming that a small commercial webcaster has exercised the option, it pays a royalty (the “settlement rate”) equal to the higher of (1) 10% of its revenue on the first \$250,000 of its revenues and 12% of all revenues thereafter or (2) 7% of its expenses.

The \$1.2 million eligibility figure is based on revenues of both the webcaster and any company under common control that uses Sound Recordings as the basis of its income. Thus, a broadcaster with both on-air and Internet programming and that has revenues greater than \$1.2 million is not eligible for the special royalty rate, even if the webcasting is done through a separate company if both the webcasting company and its related traditional broadcasting company are under common control.

- **Subscription Services.** A webcaster that offers a subscription service may elect to pay royalties on the same per performance or aggregate tuning hour rates basis discussed above for commercial webcasters, or it may elect to pay royalties based on 10% of its “subscription revenues.” For the purpose of determining royalties payable to SoundExchange, “subscription revenues” include revenues received from subscription fees, from banner ads on the subscription home page, from advertising in the subscription streams, and from any sale or other use of information gathered about the subscribers. The election requires such webcasters to pay a minimum fee of 27 cents per subscriber per month, with a minimum annual fee of \$5,000.

The election by the subscription service must be made at the time the service begins and may not be changed.

- **Nonprofit Webcasters.** Nonprofit webcasters pay a negotiated rate of \$500 per year, which allows them to stream to an average of 200 simultaneous listeners or 146,000 aggregate monthly tuning hours. If a nonprofit webcaster exceeds those amounts, it pays either on the basis of performances or on the basis of aggregate tuning hours. The nonprofit royalty rate for listening above 146,000 aggregate tuning hours per month is .02176 cents per performance or .251 cents per aggregate tuning hour. This rate is available whether or not the nonprofit webcaster is a subscription service.

The Corporation for Public Broadcasting negotiated a private agreement with the recording industry that allows its member stations to webcast music on their websites without paying royalties. The terms of this agreement are confidential. Broadcasters who receive money from the Corporation for Public Broadcasting should consult CPB to determine whether their webcasting activities are covered by the agreement. However, this agreement may be scheduled to expire soon because National Public Radio is participating in the current Copyright Royalty Board proceeding concerning the 2006 royalty rates.

## Conclusion

The above discussion 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 compulsory license, specific reporting requirements set by SoundExchange must be met so that it can determine that the royalties have been properly computed and paid by the broadcaster.

It is important to note that only licenses and royalties for webcasters have been discussed above. There are other statutory licenses available for satellite radio, digital cable radio and digital business services that are not covered here.

It's a brave new world for broadcasters but one that offers many exciting possibilities and opportunities!

### Live Links

The American Society of Composers, Authors and Publishers (ASCAP) New Media & Internet Licenses

Broadcast Music, Inc. (BMI) and the Internet

SESAC Internet Licensing

Notice of Use of Sound Recordings under Statutory License, United States Copyright Office, July 2006 (PDF)

SoundExchange

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