Advisory

pillsbury

Intellectual Property | Communications

March 24, 2009

Licensing and Royalty Requirements for Webcasters: Details and Deadlines

by Cydney A. Tune and Christopher R. Lockard

This Advisory is intended specifically to help guide individuals and companies, that wish to distribute recorded music over the Internet for pleasure or profit, through the maze of licenses and royalties required for such "webcasting" activities. It discusses the recent settlement agreements entered into between SoundExchange and the Corporation for Public Broadcasting ("CPB") and the National Association of Broadcasters ("NAB"). For certain commercial radio stations considering whether to take advantage of the NAB/SoundExchange settlement, April 2, 2009 is a critical "opt-in" deadline.

Introduction

Music licensing has always been a complex and controversial subject. The rise of the Internet has served to take this complexity and controversy to a whole new level. The last several years have seen a multitude of developments in online music, both in the types and successes of music-related websites and in the laws and regulations governing music copyrights.

To those who want to distribute music over the Internet, the digital world and its tangled legal web can seem confusing and intimidating. But cyberspace also presents exciting opportunities for existing web-casters as well as for newcomers. As uses of online music proliferate, it is important for companies to understand what music licenses are required for different media and for different 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.

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 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 websites like YouTube. Finally, thousands of websites 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, like Pandora, deliver their program material 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 pre-programmed 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 United States copyright law, the owner of a copyrighted work, such as a song, has the exclusive right to make copies of the work, to prepare derivative works based on the copyrighted work, to distribute copies of the work and to display or perform the work publicly, including, in the case of a sound recording, by means of a digital audio transmission. Webcaster uses 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. These rights are discussed in detail below.

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 instance, 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 that impacts webcasters most significantly is the right to perform the music publicly. 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. Both sets of licenses are described in detail in this Advisory.

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 tra-

ditional radio stations. When the signal of an over-the-air radio station is simulcast over the Internet on a non-subscription basis, the fees for such use are generally covered by the music licenses that have already been obtained from the PROs, although it is important for a broadcaster engaged in simultaneously streaming its signal over the Internet to confirm that its license covers such simulcasts. However, if the broadcaster is operating an Internet station 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 of these organizations has a form of license for 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. Fees may also vary based on the type of service. For instance, ASCAP charges a higher fee for "interactive" websites—that is, websites that let users select specific songs on demand or create highly customized playlists. Each of these companies provides information concerning the specific fees on its website, which can be found at: www.ascap.com/weblicense/; www.bmi.com/licensing/webcaster/; and www.sesac.com/licensing/internetLicensing.asp.

Sound Recording Licenses and Royalties

Licenses

The DMCA requirement that royalties be paid to performers and the copyright owners of Sound Recordings should not be overlooked. This performance right is not applicable to over-the-air broadcasts, as such radio stations have generally 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 introduced in 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. This Section 114 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 followed, royalties are paid, and certain usage restrictions are followed (see discussion later in this Advisory). A compulsory license cannot be obtained for interactive services like 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 the right to decline the license.

SoundExchange is a non-profit 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, to collect the royalties from such licenses, and to pay the collected royalties to the Sound Recording copyright owners and performers. Half of the royalties collected 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 rates 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 later in this Advisory, the compulsory license is only available for web-

casters that are principally engaged in playing music rather than in the sale of products. In addition, 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 may not lawfully play unauthorized "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.

Webcasters who offer interactive services or features such as temporary or permanent downloads and thus cannot obtain a Section 114 license 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 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, 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 currently $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 at www.copyright.gov/forms/form112-114nou.pdf.

The Notice of Use form asks whether a Section 112 or 114 license is being obtained—a webcaster needs both types of licenses. 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. 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 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 are intended to make it more difficult for listeners to anticipate certain music selections in an attempt to reduce the incidence of unauthorized downloading of a specific Sound Recording being webcast. It is important to note that these restrictions do not allow some practices that are commonly 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. Recent "waiver" agreements between the NAB and the record labels, related to but outside the SoundExchange/NAB settlement, have resulted in some relaxation of these restrictions on the streaming portion of a radio station's simultaneous transmission of its programming over the Internet. Those changes are discussed later in this Advisory. The restrictions include the following:

The service may not be interactive.

What exactly constitutes an "interactive" service is the subject of some confusion and debate and may be clarified at some point; however, generally the term 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 in 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. 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 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. In addition, 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.

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.

As described in more detail below, the sound recording performance complement restrictions are relaxed for certain over-the-air broadcasters as a result of the recent NAB settlement.

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. There is a very limited exception for certain noncommercial classical music radio stations that had published program

guides before 1998. This restriction is also relaxed for over-the-air broadcasters opting in to the NAB settlement.

Royalties

As noted previously, 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 which 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. In 2002, a panel of arbitrators selected by the Copyright Office set initial royalty rates which were subsequently modified by settlement agreements entered into between the recording industry and different groups of webcasters. Those settlements expired at the end of 2005.

In January 2006, the Copyright Royalty Board ("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 who are eligible for the compulsory license pay the greater of a minimum annual fee of $500 per channel or station or 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 annual fees are capped at $50,000. The CRB decision eliminated the previous option of paying royalties based on the easier-to-calculate method of "aggregate tuning hours." It also eliminated the option that allowed smaller webcasters to pay royalties based on a percentage of revenue.

The CRB determination of rates has been heavily criticized by webcasters large and small, commercial and non-commercial, and many, like Pandora, have argued they will have to go out of business if they are forced to pay the CRB-set rates. The rates have been estimated to cost large webcasters as much as 70% of their revenue, and for smaller webcasters that figure rises to as high as 1200% of revenues. Despite the significant criticism, the CRB has refused to revisit its decision, although SoundExchange did offer small commercial webcasters—those earning $1.25 million or less in gross revenues—the option until September 2007 to elect to pay royalties under the pre-CRB rates. Many small webcasters did not accept this compromise, however, because it was only applicable to Sound Recordings licensed by SoundExchange (an estimated 5% of Sound Recordings are not controlled by SoundExchange).

Under the CRB's March 2007 decision, noncommercial webcasters were to pay an annual minimum fee of $500 in exchange for the right to broadcast up to 159,140 aggregate tuning hours ("ATH") per month. 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. Noncommercial webcasters that exceed this usage limit must pay a per-performance fee equal to what commercial webcasters are charged.

On October 16, 2008, then-President Bush signed into law the Webcaster Settlement Act of 2008, which gave SoundExchange and webcasters until February 15, 2009 to reach a settlement agreement over the statutory royalties. The bill, which was supported by webcasters, the RIAA, the Digital Media Association ("DiMA") and National Public Radio, gave SoundExchange the authority to enter into a royalty rate settlement agreement with webcasters that would be legally binding on all Sound Recording copyright owners for the period of January 1, 2005 to December 31, 2010. Three different settlement agreements were reached by the deadline.

Public Radio

On January 15, 2009, SoundExchange and the 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, assures SoundExchange a single up-front royalty payment of $1.85 million and requires these stations to provide consolidated usage and playlist reporting to SoundExchange. This payment covers all royalties owed by these stations from the period of January 1, 2005 through December 31, 2010 (although CPB will owe SoundExchange additional fees if estimated aggregate tuning hours exceed the expected amount).

Over-the-Air Station Broadcasters

On February 15, 2009, SoundExchange and the NAB announced 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 that opt-in to the agreement by April 2, 2009 will pay rates about 16% lower than the rates set by the CRB for 2009 and 2010, but then increased rates for the period of 2011-2015, for which the CRB has not yet set rates. The rates—which are retroactive to a rate of $0.0008 per performance in 2006, $0.0011 in 2007, and $0.0014 in 2008—will be $0.0015 in 2009, $0.0016 in 2010, $0.0017 in 2011, $0.0020 in 2012, $0.0022 in 2013, $0.0023 in 2014, and $0.0025 in 2015. Broadcasters must pay an annual minimum fee of $500 per channel or unique "stream" (up to a maximum of $50,000); this fee is credited against the per-performance royalties owed by the broadcaster.

Any station currently engaged in webcasting that wishes to take advantage of these new NAB negotiated rates must opt-in by *April 2, 2009*; in the absence of a timely opt-in, such stations will remain subject to the existing CRB-established rates and terms. If a station has not been webcasting, it must opt-in within 30 days of the date when the station began webcasting in order to take advantage of the SoundExchange/NAB settlement. Broadcasters that opt-in to the settlement will be prohibited from participating in any rate-making proceedings involving the royalty rates previously set by the CRB or the rates CRB will be setting for 2011-2015.

Additionally, commercial radio stations that qualify as "small broadcasters" may pay a $100 proxy fee in place of filing records of use reports. The NAB/SoundExchange agreement defines a "small broadcaster" as one that whose webcasts aggregate less than 27,777 ATH per calendar year. For the years 2006-2009, such broadcasters that are currently streaming must file a separate election by April 2. Otherwise, they must file for their "small broadcaster" exception by January 31 of the applicable year. These election forms are also available on the SoundExchange website at www.soundexchange.com.

Stations that opt-in under the NAB/SoundExchange settlement agreement may also take advantage of "waiver" agreements that NAB concurrently negotiated with EMI Music North America, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Inc., and the Association of Independent Music, which allow many broadcasters to webcast without many of the restrictions imposed by the Section 114 "sound recording 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 so long as 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 so long as a written or visual schedule does not specify the time of a particular performance. The "waiver" agreements also eliminate the requirement that webcasters retain for

six months records of their ephemeral recordings. Despite these relaxations, a webcaster may not post its playlist on any website.

Commercial radio stations considering whether to opt-in under the NAB/SoundExchange settlement agreement should consult with counsel before doing so because along with the benefits of opting in, certain waivers of rights are also implicated.

Small Webcasters

SoundExchange also submitted a settlement offer to "small webcasters," defined as those with less than $1.25 million annual revenues. Under this offer, webcasters 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, and will be retroactive to 2006. 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% of their first $250,000 in gross revenue and 12% of their additional revenue, or (ii) 7% 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% of their first $250,000 in gross revenue and 12% of their additional revenue, or (ii) 7% of all their expenses.

However, this settlement offer is not attractive to most smaller webcasters as it will require them to pay additional royalty amounts at the higher CRB-set rates, retroactive to 2006, if the webcaster is sold. Additionally, the rates would be set through 2015, and a webcaster will not be able to participate in the CRB rate determination proceedings for the period of 2011-2015. A small webcaster that wishes to elect into this settlement offer must sign an election form available on the SoundExchange website no later than the first date on which the webcaster would be obligated to make a royalty payment for such year.

Ongoing Dispute

For other webcasters that are not eligible for, or do not opt-in to, one of these settlements, the rates set by CRB in 2007 still apply. Although SoundExchange and major webcasters represented by DiMA were reportedly very close to reaching an agreement prior to the February 15th deadline—an agreement where royalties would be calculated as a percentage of a webcaster's revenue—negotiations apparently reached a stalemate over SoundExchange's insistence that a webcaster's revenue attributed to things other than streaming music should also be counted. SoundExchange also failed to reach a settlement with groups of college webcasters and religious radio webcasters. Even if these groups continue to negotiate, unless Congress passes legislation to extend the Webcaster Settlement Act, SoundExchange lacks authority to enter a settlement binding on Sound Recording copyright owners that do not belong to SoundExchange. Without that authority, it is unlikely webcasters will agree to a settlement, and the dispute will likely be settled by a court. Oral arguments on the consolidated appeal of the CRB rate determination were heard March 19, 2009, before the U.S. Court of Appeals for the District of Columbia as Intercollegiate Broadcasting System, Inc. vs. Copyright Royalty Board (07-1123). A decision by the court is not expected for several months.

For information on specific royalty rates and other requirements, as well as the forms for submitting royalty payments, please visit the SoundExchange website at www.soundexchange.com. 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. Webcasters can incur late fees of 1.5% for any late royalty payments. Ignorance of what is required will not be accepted as a defense against non-payment. Webcasters are also subject to detailed reporting requirements, described in more detail on the SoundExchange website.

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 as part of the 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 to SoundExchange and the PROs described in the Performance Rights section above, no other licenses or royalties are usually required.

However, webcasters who 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, also obtain licensing for their reproduction and delivery of music. A license and 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 songwriters, composers and music publishers who own copyrights in the Song 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 websites such as iTunes and Amazon.com that offer permanent music downloads rates would remain at $0.091 per download for five-year period from January 1, 2008 through December 31, 2012. This CRB 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 set by the CRB.

Royalties owed for interactive music streaming and limited downloads were the subject of a deal negotiated by the RIAA, DiMA, the National Music Publisher's Association, the Nashville Songwriter's Association and the Songwriters Guild of America in September 2008. The deal, officially approved by the CRB in January 2009, sets the mechanical royalty at 10.5% of revenue effective as of January 1, 2007, and a rate of 8.5% applied retroactively to revenue earned between December 31, 2001 and December

31, 2007, minus royalties paid to the PROs for the performance royalties described previously. 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 to both subscription-based websites and websites supported by advertising, and also contains flexibility for new business models. The agreement also establishes minimum royalties: a set fee per subscriber for subscription-based services, and for non-subscription-based services, the fee is a percentage of the royalties paid to record companies for the Sound Recording license. Webcasters who offer non-interactive, 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 Advisory 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 validly hold a 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.

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.

The Internet offers many exciting possibilities and opportunities for companies, but legal complexities as well. And, like quickly evolving technology, copyright law is ever-changing. It is critical that webcasters stay abreast of the latest technological and legal developments.

For further information, please contact:

Cydney A. Tune (bio)
San Francisco
+1.415.983.6443
cydney.tune@pillsburylaw.com

Christopher R. Lockard (bio)
San Francisco
+1.415.983.1375
christopher.lockard@pillsburylaw.com

Richard R. Zaragoza (bio)
Washington, DC
+ 1.202.663.8266
richard.zaragoza@pillsburylaw.com