



Reference Memo

September 2009

Streaming Copyright Basics

How do you give listeners what they want when they want it? Streaming your radio station on the Internet is one way to meet that goal. This memo helps you understand some basic copyright principles and helps you choose the best plan for paying copyright royalties.

Background

Broadcasters are familiar with ASCAP, BMI and SESAC royalties for playing songs over-the-air. Those fees are paid to the performing rights societies to compensate songwriters and music composers who own interests in musical works. Those societies also charge to stream musical works over the Internet.¹

Royalties must also be paid to the copyright owner of the digital sound recording and the featured recording artists performing the music. Traditionally, broadcasters have been exempt from making payments to record companies and performers for playing sound recordings over-the-air, based on the theory that if radio stations did not play the songs, no one would hear them and buy their records. This exemption does not apply to music on the Internet.²

Based on the fact that digital technology allows flawless copying, sound recording copyright owners obtained from Congress the exclusive right to “performance” the sound recording by digital audio transmissions in the Digital Performance Right in Sound Recordings Act of 1995. The exemption for over-the-air transmission of sound recordings was preserved, but was not extended to the simultaneous transmission of the over-the-air broadcast via the Internet.

The 1995 act created new rights for sound recordings, but not a mechanism for payment of royalties. Congress created that mechanism in the Digital Millennium Copyright Act of 1998 (the “DMCA”). The DMCA created a statutory license for performances of sound recordings over the Internet, provided certain conditions are met. Eligibility for the statutory license requires adherence to defined programming restrictions and other technical conditions, payment of royalties, recordkeeping, and certain filings, which are discussed below. If you are not eligible for the statutory license, or if you want to provide an interactive music service, you will need to obtain the consent of each individual copyright owner to use the sound recording or else risk a claim of copyright infringement.

An entity called SoundExchange is charged with collecting and distributing sound recording royalties to copyright owners and performers. Now an independent organization, SoundExchange was initially a creation of the Recording Industry Association of America (“RIAA”), which represents the

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**Eligibility for
Statutory
License**

record companies. SoundExchange handles only royalties for streaming. It does not administer podcasting, RSS feeds, or interactive streaming licenses.

Programming Restrictions. The statutory license is subject to a “sound recording performance complement” on each channel streamed. What does that mean?

During a three hour period one may:

- Play no more than three songs from a particular album;
- Play no more than two songs consecutively from a particular album;
- Play no more than four songs by a particular artist;
- Play no more than four songs from a boxed set; and
- Play no more than three songs consecutively from a boxed set.

If you want to stream “side” channels, in addition to streaming the over-the-air broadcast programs, those additional channels must also comply with the sound recording performance complement. The sound recording performance complement also applies to archived and looped programs, defined below.

Limitations on prior announcements. Advance program schedule or prior announcement of song titles may not be transmitted by text, video or audio. Webcasters may name one or two artists or a particular genre of music to illustrate the type of music on a particular channel. It is permissible to announce the name of a song immediately before it is performed or to announce that a particular artist will be featured at an unspecified future time. The prior announcement that a sound recording will be played at a particular time is prohibited because such an announcement facilitates the copying of that recording.

Identify song, artist and album. When performing a sound recording during, not before the performance, one must identify, in textual data, the sound recording, the album and the featured artist, if receivers are capable of displaying the information.

Transmission of copyright management information required. If technically feasible, digital transmissions must be accompanied by information encoded in the sound recording that identifies the title of the song, the featured artist and any other related information.

Archived Programming. Archived programs – those that are posted on a website for listeners to hear repeatedly, on demand, in the same order – may not be *less* than five hours in duration. Permitted archived programs may reside on the website for no more than a total of two weeks. Merely changing

one or two songs does not meet this condition, nor can programs be taken off for a short period of time and then be made available again.

The limitations on archived programs do not apply to recorded events or broadcast transmissions that make no more than an incidental use of sound recordings, as long as such transmissions do not contain an entire sound recording or feature performances of a particular sound recording.

Looped programming. Looped or continuous programs – those that are performed continuously so that the program automatically starts over when it is finished – may not be *less* than three hours in duration. Again, merely changing one or two songs does not create a new program.

Repeat of other programs limited. Programs that are retransmitted at publicly-announced times in advance can be repeated only if:

- The repeats of a program are limited to three times in a two-week period for programs under one hour in duration.
- The repeats are limited to four times in a two-week period for programs over one hour.

Do not falsely suggest a link between recordings and advertisements. A sound recording may not be performed in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.

Take steps to disable copying by recipient. Under the statutory license, one must disable copying by a transmission recipient if the technology used can be disabled, and not induce or encourage copying by transmission recipients.

Accommodate technical protection measures. One must accommodate measures widely-used by sound recording copyright owners to identify or protect copyrighted works if those measures do not impose substantial burdens on the transmitting entity.

Cooperate to defeat scanning. The transmitting entity must cooperate with copyright owners to prevent recipients from automatically scanning transmissions in order to select particular recordings if such cooperation will not entail substantial costs or burdens.

Transmission of bootlegs not covered. The statutory license is limited to transmissions made from lawful copies of sound recordings. Transmissions made from bootlegs or pre-released recordings (unless the performance of a pre-released recording is authorized by the copyright owner) are not covered by the statutory license.

Automatic switching of channels prohibited. Digital transmissions may not automatically and intentionally cause a device receiving the transmission to

Limited Waivers of Statutory Eligibility Requirements

switch from one program channel to another. The statutory license does not cover interactive services where the consumer selects the songs.

Limited Waivers Can Be Obtained. The National Association of Broadcasters (“NAB”) entered into separate Waiver Agreements with EMI Music North America (“EMI”), Sony Music Entertainment (“Sony”), UMG Recordings, Inc. (“UMG”), Warner Music, Inc. (“Warner”), and Association of Independent Music (“A2IM”), in which those record companies waived some of the DMCA programming restrictions. The waivers commence with the effective date of the NAB-SoundExchange Agreement described below and continue through December 31, 2015.

Only commercial broadcasters who elect to be bound by the NAB-SoundExchange rates and terms are eligible to take advantage of the exemptions in the Waiver Agreements relating to EMI, Sony, UMG and Warner music. In contrast, the A2IM Waiver Agreement is not limited to broadcasters electing to participate in the NAB-SoundExchange rates and terms. Nevertheless, under all of the Waiver Agreements, broadcasters qualify for the waivers on condition that a substantial majority of the audience is from over-the-air listeners rather than from the station’s streaming recipients. Noncommercial stations are not covered under the Waiver Agreements.

Each Waiver Agreement is slightly different, but, generally, they allow the following:

- Despite the restrictions in the “sound recording performance complement” defined above, the Waiver Agreements allow broadcasters to transmit consecutively up to one-half of an entire album of sound recordings and allow for the transmission of certain classical musical works in their entirety, regardless of duration.
- The Waiver Agreements allow prior aural announcement but not prior publication of a written or visual advance program schedule that specifies the particular artists or sound recordings that will be featured at specified future times. Commercial classical music broadcasters, however, can publish a schedule of classical music programming in accordance with their standards and practices as of September 30, 1998.
- To the extent that music-intensive stations use third-party programming over which the broadcaster does not have the right or ability to control music selection, or programming not performed using a digital music file system, the Waiver Agreements waive the requirement that textual data must identify the artist, song title, and album while the song is streamed.

**Digital Sound
Recording
Royalty Rates
Payable to
SoundExchange**

Although the NAB Waiver Agreements do not apply to all webcasters, some webcasters have obtained waivers directly from labels.

Rates and terms applicable to use of the statutory license are determined by the Copyright Royalty Board (“CRB”), unless separate terms are negotiated between SoundExchange and various industry groups. Current CRB rates expire at the end of 2010. Proceedings are under way to determine rates for 2011 through 2015.

The following sections briefly describe the CRB-adopted rates and alternative rates and terms prescribed in agreements entered into between SoundExchange and 1) NAB, applicable to commercial broadcasters, 2) CPB, applicable to certain noncommercial educational broadcasters, 3) College Broadcasters, 4) Northwestern College, an agreement negotiated by the National Religious Broadcasters, which is available to any eligible noncommercial broadcaster, 5) commercial pureplay webcasters, and 6) some small commercial webcasters based on acceptance of a unilateral SoundExchange offer. If a webcaster is not eligible for one of these agreements or fails timely to elect the negotiated alternative rates and terms set forth in one of these agreements, the CRB rates and terms apply. Review the agreements and consult with counsel before deciding which set of rates and terms to elect.

Common Definitions

The CRB rates and the negotiated settlements all rely on the same statutory definitions of “performance” and “aggregate tuning hour.”

“Performance” under the Copyright Office regulations means “each instance in which any portion of a sound recording is publicly performed to a Listener” but excludes:

1. a sound recording that is not copyrighted (*e.g.*, because of its age, it is in the public domain³);
2. a sound recording for which the licensee has a direct license from the copyright owner; and
3. an incidental performance that both:
 - a. makes no more than incidental use of the music (*e.g.*, “brief musical transitions in or out of commercials or program segments, brief performances during news, talk or sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events”), *and*

- b. “other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds” (e.g., theme song).

“Aggregate Tuning Hours” (“ATH”) are the total hours of programming the Statutory Licensee transmits to all “Listeners.” A Listener is a computer, not a person. “Listener” is defined as a player, receiving device or other point capable of receiving the digital sound recording. For example, if the station streamed for one hour to 10 simultaneous Listeners, the ATH would be 10. A statutory licensee may deduct from the ATH the time during which it transmitted a song for which it obtains a direct license from the copyright owner.

CRB Rates & Terms

Commercial Webcasters (including Broadcast Simulcasters). Under the CRB rates adopted in 2007, all music streamers (“Statutory Licensees”) must pay a minimum annual fee of \$500 per channel. The statutory license rates effective now through 2010 are as follows:

2009	\$0.0018 per performance
2010	\$0.0019 per performance

To determine the royalties owed, multiply that rate times each song times the number of devices logged on to receive the song. Royalties are offset against the \$500 minimum annual fee each calendar year. In 2009, that \$500 covers about 31.7 performances per hour, 24 hours a day on average for the year. [Formula: \$500 minimum annual rate / 0.0018 royalty rate / 365 days / 24 hours = 31.7 performances per hour.] That could cover, for example, the transmission of 10 songs per hour, streamed to 3.17 listeners, or 5 songs streamed to 6.34 listeners.

Noncommercial Webcasters (including Broadcast Simulcasters). Noncommercial webcasters’ payment of a minimum annual fee of \$500 per channel covers up to 159,140 ATH streamed on that channel per month. Regardless of the number of performances per hour, that averages out to 218 on-line listeners per hour in any month. All additional “performances” over that ATH threshold per month are to be paid at the commercial “per performance” rates listed above.

NAB Rates and Terms for Commercial Broadcasters

Commercial Broadcasters Electing to Participate. NAB entered an agreement with SoundExchange altering the rates and terms of the statutory license for commercial broadcasters that stream sound recordings. To qualify for the NAB deal, commercial broadcasters that stream must elect to be bound by the agreement by no later than April 2, 2009, and re-elect by January 31 of each year to participate in the agreement. A commercial broadcaster that starts streaming after those dates must elect within 30 days after it begins streaming. The election form is available on SoundExchange’s web site at www.SoundExchange.com.

The NAB agreement covers the period from January 1, 2006, through December 31, 2015. The NAB rates are the same as the CRB rates for 2006 through 2008, and reduced for 2009 and 2010. The NAB rates applicable for 2009 through December 31, 2015, are:

2009	\$0.0015 per performance [CRB rate = \$0.0018]
2010	\$0.0016 per performance [CRB rate = \$0.0019]
2011	\$0.0017 per performance [CRB rate = TBD]
2012	\$0.0020 per performance
2013	\$0.0022 per performance
2014	\$0.0023 per performance
2015	\$0.0025 per performance

The minimum annual fee remains \$500 per streamed channel, capped at \$50,000 for 100 or more channels streamed by the same broadcaster. The rates apply to all channels a commercial broadcaster streams, including any additional nonsubscription streams a broadcaster offers on its website but does not broadcast over-the-air.

In 2009, the \$500 minimum fee will cover about 38 performances per hour (e.g., 10 songs per hour times 3.8 listeners = 38 performances) 24 hours a day on average for the year. [Formula: \$500 minimum annual rate / 0.0015 royalty rate / 365 days / 24 hours = 38 performances per hour.] By 2015, that \$500 fee covers 22.8 performances per hour (e.g., 10 songs per hour times 2.28 listeners = 22.8 performances) 24 hours a day on average for the year. [Formula: \$500 minimum annual rate / 0.0025 royalty rate / 365 days / 24 hours = 22.8 performances per hour.]

CPB Agreement

Noncommercial Educational Stations Covered in CPB Agreement. CPB and SoundExchange reached two agreements in which CPB pays a lump sum to cover a specified number of originating stations and other non-profit entities that distribute noncommercial programs. One agreement applies retroactively to 2005 and ends in 2010. The second agreement extends coverage to 2015. To be covered by the agreement, a non-profit entity must be a noncommercial terrestrial radio station that is a member or affiliate of NPR, American Public Media, Public Radio International or Public Radio Exchange, a participating member of the National Federation of Community Broadcasters, or a public radio station that receives funding from the Corporation for Public Broadcasting (a “Covered Entity”).

Eligible public stations must elect to participate by registering through CPB's website at <http://www.cpb.org/stations/musicrights/registration.html>. Stations on CPB's list do not have to pay a minimum annual fee to SoundExchange, but do need to provide data regarding use of music (i.e., song title, featured artist, album title, marketing label, play frequency, and start time and duration for transmitted sound recordings) so that CPB can provide system-wide reports of use to SoundExchange. If a station is not a Covered Entity, it must

**Noncommercial
Broadcast Streamers
(Negotiated by
Religious
Broadcasters)**

abide by the CRB rates and terms applicable to noncommercial webcasters or elect an alternative deal for which it is eligible.

Any Noncommercial Broadcaster Electing to Participate. The National Religious Broadcasters, acting through Northwestern College, entered into a deal with SoundExchange that provides a discount on CRB noncommercial rates and provides some exemptions from recordkeeping. A noncommercial broadcaster that streams may elect to participate in this agreement, even if it is not a religious broadcaster.

As with the CRB noncommercial rates and terms, the \$500 minimum annual fee covers 159,140 ATH per month (an average of 218 listeners per hour). The rates applicable per performance in excess of that monthly ATH, however, are substantially discounted. For the 2006 through 2010 period, the rates are:

- \$0.0002176 per performance;
- \$0.00251 per ATH, for music-formatted channel; or
- \$0.0002 per ATH for news, talk, sports or business channel.

Thereafter, the per performance rate is:

- 2011 - \$0.00057
- 2012 - \$0.00067
- 2013 - \$0.00073
- 2014 - \$0.00077
- 2015 - \$0.00083

If the noncommercial broadcast streamer is unable to calculate actual total performances, the rates can be determined using ATH by assuming that 12 songs per hour are transmitted. Stations with non-music formats assume 1 song per hour is transmitted.

College Broadcasters

Accredited Educational Institutions. Noncommercial Internet radio stations that are not CPB-qualified but that are operated by accredited educational institutions and staffed mostly by enrolled students may elect to participate in the College Broadcasters deal. Like the CRB rates and terms, the \$500 minimum annual fee covers 159,140 ATH per month. If that monthly ATH is exceeded in a given month, the additional performances are paid on a per performance basis at the same per performance rates as negotiated in the NAB deal. If the educational institution is unable to calculate actual total performance however, it can calculate royalties using ATH figures and assume that 12 songs per hours are played.

**Commercial Pureplay
Webcasters**

Commercial Webcasters. This deal is available to large commercial streaming operations, such as Pandora, but any commercial webcaster may opt to participate. The minimum annual fee is \$25,000 for all channels, regardless of the number of channels offered. For bundled, syndicated, or subscriptions services, licensees pay the same per performance rate set forth

in the NAB deal. If the service provided is not bundled with other products, syndicated programming, or part of a subscription service, licensees pay the greater of the following per performance rate applicable for that year:

2009 - \$0.00093

2010 - \$0.00097

2011 - \$0.00102

2012 - \$0.0011

2013 - \$0.0012

2014 - \$0.0013

2015 - \$0.0014

or

25% of Gross Revenues

**Small Commercial
Pureplay Webcasters**

Small Commercial Webcasters. A webcaster that does not exceed \$1,250,000 in annual gross revenues in either of the 2 prior calendar years, can elect to participate in the Commercial Pureplay Webcasters Agreement. The \$25,000 minimum annual fee can be paid in quarterly installments. The following average monthly ATH thresholds cannot exceed:

2009 - 8 million

2010 - 8.5 million

2011 - 9 million

2012-14 - 10 million

If participants meet the above eligibility requirements, their royalties are the greater of:

12% of first \$250,000 in gross revenues, and

14% of gross revenues over \$250,000

or

7% of the webcaster's expenses.

SoundExchange receives a special fee if a business is sold and the buyer does not qualify as a Small Pureplay Webcaster. Within 30 days of closing, the buyer must pay SX either i) the difference between Commercial and Small Pureplay Webcaster rates for prior 4 years, or ii) 30% of the value of the transaction.

**Small Commercial
Webcasters**

Small Commercial Webcasters. SoundExchange unilaterally offers terms which are available to "eligible small webcasters" meeting the requirements set forth below.

An "eligible small webcaster" is an entity with not more than \$1,250,000 in gross annual revenues (from its affiliates, subscriptions services, and third-party participation revenues – e.g., sale of advertising). Gross revenues

include all revenues from media, wireless, and entertainment-related businesses, not just web-generated revenues. The full definition of gross revenues contained in the Small Webcasters Agreement should be reviewed to determine how to calculate gross revenues for a specific webcaster's business. Noncommercial webcasters do not qualify for these terms.

Services that meet the definition of an "eligible small webcaster" and file a timely notice of election pay the greater of

- 10 percent of the first \$250,000 in gross revenues and
- 12 percent of any gross revenues in excess of \$250,000 during the applicable year,
- or
- 7 percent of the webcaster's expenses during the applicable year.

Those rates cover up to 5,000,000 ATH per month (6,945 average simultaneous listeners). Usage over that ATH is paid at the commercial per performance rates set by CRB.

Small webcasters are required to pay an annual minimum fee of either \$2,000 if the webcaster has gross revenues of not more than \$50,000, or \$5,000 if the webcaster has gross revenues of more than \$50,000.

If the small webcaster business is sold to an entity that does not qualify for the rates, the buyer must pay SoundExchange within 30 days of closing the difference between commercial CRB rate and Small Commercial Webcaster rate for each year the small commercial webcaster had elected these rates. If records are insufficient to determine the amount owed SoundExchange, the parties must assume they transmitted 5,000,000 ATH per month and 15.375 performances per ATH.

**Commercial
Microcasters**

The Small Webcaster Agreement includes special terms for "microcasters," who have gross annual revenues of not more than \$5,000, annual expenses no greater than \$10,000, or transmissions not exceeding 18,067 ATH per year. A microcaster pays a \$500 minimum annual fee provided it maintains its microcaster status throughout the year. Microcasters also pay an additional \$100 "Proxy Fee" each year to avoid having to file the reports of use described below.

Timing of Payments

Timing of Payments. With the exception of the lump sum payments made by CPB, payments under agreements described above must be submitted monthly with a Statement of Account available at <http://www.soundexchange.com>. Payments are made monthly within 45 days after the end of each month. The minimum annual fee is due January 31 each year, or within 45 days after the month in which a service first commences streaming, which fee is credited toward the royalties owed each month until depleted. A new annual fee is paid at the beginning of each year.

Late Fees

The late fee is 1.5% per month, compounded monthly. The late fee applies not only to late payment of royalties, but also to the payment amount associated with any late or noncompliant statement of account under the CRB terms. Under the separately negotiated deals, that late fee extends to late or noncompliant reports of use, discussed below. The late fee accrues until correct statements and reports are received by SoundExchange, provided that SoundExchange gives notice within 90 days of SoundExchange discovering noncompliance. The 90-day notice provision is not part of the CRB terms or agreements with commercial non-broadcast entities.

Recordkeeping

Records to be Maintained. CRB adopted interim recordkeeping requirements.⁴ For each song that is streamed, the following records must be kept:

1. Name of Service (e.g., XYZ Broadcasting, Inc.).
2. Transmission Category (e.g., “Eligible nonsubscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming” defined in the rule as category code “B”).
3. Featured Artist (the full name of the individual or band).
4. Sound Recording Title (the song title).
5. Sound Recording Identification – either:
 - a. Album Title and Marketing Label (if a particular sound recording has been released for promotional purposes before the album title is available, the information must be kept only if it is available before or at the time of the performance, but must be supplied if it is available for subsequent performances), or
 - b. International Standard Recording Code (ISRC) (imbedded in promotional and commercially released sound recordings which can be read by software).
6. Total Performances – either:
 - a. Aggregate Tuning Hours (measures the total number of listener hours by all who have accessed a service during a give time period), Channel (for broadcasters, call sign or FCC facility ID number) or Program Name, and Play Frequency (the total times a sound recording is “played” – *i.e.*, offered or transmitted by the service – regardless of the number of listeners, during the reporting period), **or**

Filing Requirements

- b. Actual Total Performances (for those with the technological ability to identify accurately the number of times a sound recording is “performed” – i.e., listened to or accessed a separate record is required for each “play”).

Notice of Use of Sound Recordings under Statutory License. Before you start streaming, a Notice of Use must be filed with the Copyright Office in Washington, DC. The current filing fee is \$25.

Statements of Account. Under most of the SoundExchange agreements, monthly Statements of Account must be filed with SoundExchange forty-five days after the close of each month, even if no additional royalties have been incurred that exceed the minimum annual fee. One exception to this requirement is that those participating in the College Broadcasters deal file a Statement of Account only when a fee must also be paid. Once the minimum annual payment has been depleted, royalty payments must be submitted with the Statement of Account.

Reports of Use. Licensees must maintain records which identify the featured artist, the song title, album title, marketing label, and number of performances (i.e., number of listeners per song). Under the CRB terms, reports of use must be submitted to SoundExchange quarterly based on two weeks per quarter. The two weeks can be consecutive or two separate 7-day periods within the quarter. The 7-day consecutive period may start on any day of the week.

While the interim recordkeeping rules are based on a two-week survey during the quarter, CRB has proposed to require reporting of sound recording performances on a year-round census basis so that all transmitted sound recordings are counted and their listeners measured. The rationale is that complete records are needed so that royalties can be distributed to copyright owners based on actual use of their music.

The precise file format for most reports other than for Covered Entities under the CPB deal is set forth in Copyright Rule 370.2(g) found at <http://www.loc.gov/crb/fedreg/2006/71fr59010-9.pdf>. SoundExchange also posts an Excel spreadsheet at http://www.soundexchange.com/licensee/documents/Excel_Template.xls containing a properly formatted file that statutory licensees can download.

Full Census Reporting under NAB Agreement

The NAB deal requires additional reporting to SoundExchange. Rather than reporting the use of music (i.e., each featured artist, song title, album information, and total performances) for two weeks each quarter, reports of use for commercial broadcasters electing to participate in the NAB deal must file monthly reports of use on a full census basis – i.e., every song streamed.

Recognizing that data to complete full census reporting for every song performed may not be available (e.g., from program syndicators), the NAB agreement allows broadcasters to report a certain percentage of their programming hours based on ATH. They may do so if: a) census reporting is

College and Religious Broadcasters Reporting Requirements

not reasonably practical for programming during those limited hours, and b) the total number of ATH hours on a single report of use does not exceed the maximum percentage of total programming hours allowed. The maximum percentages of programming hours that ATH reporting can be used in any given year are:

2009	20%
2010	18%
2011	16%
2012	14%
2013	12%
2014	10%
2015	8%

If a broadcaster chooses to report and pay for usage on this limited ATH basis, it must assume 12 performances per hour during the relevant programming hours in calculating its royalties, and provide complete playlist information for those hours in its reports of use.

The Commercial Pureplay Webcaster agreement requires full census reporting, but offers no ATH reporting transition.

The College Broadcasters and Religious Broadcasters were able to negotiate some flexibility in their reporting requirements depending upon the number of listeners. Under the College Broadcasters agreement, a noncommercial college webcaster that did not exceed 159,140 ATH per channel for more than a month in the prior year must prepare Reports of Use that cover two 7-day periods per quarter, filed annually by January 31 each year. If the college webcaster is unable to calculate actual total performances or ATH, they may report channel & play frequency. If it exceeded 159,140 ATH for more than a month in the prior year, the college broadcaster must file full census Reports of Use each quarter. During the first year the channel reports on a full census basis, it will have a 1 year grace period to include ATH or total performances in its Report of Use.

Under the Northwestern College deal, a noncommercial station must file a quarterly Report of Use with full census data starting in 2011 if its average monthly usage exceeded 159,140 ATH per month in the prior year. It may report using ATH figures as opposed to total actual performances. If the noncommercial webcaster has between 159,140 average monthly ATH and more than 44,000 ATH in the prior year, it must file quarterly Reports of Use based on 2 weeks per quarter and may use ATH in lieu of total actual performances.

**Small Broadcaster
& Microcaster
Exemption from
Reporting**

Several of the agreements provide an exemption from preparing Reports of Use if the webcaster qualifies for the exemption and pays an additional \$100 annual fee (called a “Proxy Fee”).

A small commercial broadcaster under the NAB deal is defined as one that did not exceed 27,777 ATH during the prior *year*, and does not reasonably expect to exceed 27,777 during the coming year. The 27,777 ATH per year is an average of 3.17 listeners each hour (27,777 ATH divided by 24 hours divided by 365 days per year). The 27,777 ATH limit applies across all channels the small broadcaster streams.

Under the College Broadcasters deal, a noncommercial broadcaster can pay the \$100 Proxy Fee and avoid filing Reports of Use if it has no more than 55,000 ATH per channel per *month*. The ATH limit represents an average of 75 listeners per hour.

The Northwestern College deal defines a noncommercial educational microcaster as one that does not exceed 44,000 ATH per *year* across all of the service’s channels. A microcaster can pay a \$100 Proxy Fee to be exempt from preparing Reports of Use. The ATH limit in that agreement covers roughly 5 listeners per hour.

A commercial microcaster under the unilateral SoundExchange agreement for Small Commercial Webcasters can pay the \$100 Proxy Fee to avoid preparation of Reports of Use if it transmits no more than 18,067 ATH per *year*. An Internet station qualifies as a microcaster under this agreement if it has no more than an average of 2 listeners per hour.

The election to be treated as a small broadcaster or microcaster must be made each year by January 31. With the election, a small webcaster must provide SoundExchange with ATH numbers, music genre, and other information SoundExchange needs for creating a proxy for distributing royalties.

If a small broadcaster or microcaster unexpectedly exceeds the ATH limit in a year, it may still qualify if it takes steps reasonably calculated to ensure that it will not exceed the applicable ATH limit during the following year. SoundExchange warns small webcasters that they should expect to provide full census reporting when the current agreements expire at the end of 2015.

Conclusion

Streaming is now an established platform that broadcasters ignore at their peril as on-line music providers nibble away at their audience. Streaming without following the law is perilous. Unlicensed performance of a sound recording is a form of copyright infringement. Statutory damages can exceed \$150,000 per song per play. Dwindling record sales give record companies a strong incentive to pursue infringers.

The SoundExchange website provides more details regarding royalty rates, and offers access to its forms on-line. This article is only an overview of the requirements. Specific questions and situations unique to your business should be directed to counsel.

Endnotes

¹ Under the industry-wide blanket licenses negotiated between the Radio Music License Committee (“RMLC”) and ASCAP and between RMLC and BMI, royalties applicable to streaming the station’s over-the air signal have been folded into the blanket over-the-air license.

SESAC requires a separate Internet license, which can be obtained through its website at <http://www.sesac.com/licensing/internetLicensing.asp> (minimum fee is \$116 per six months per web page).

Webcasters, and broadcasters who transmit streams in addition to the stream of their over-the-air signals, need to obtain Internet licenses from ASCAP (<http://www.ascap.com/weblicense/> - minimum annual fee is \$288), BMI (<http://www.bmi.com/licensing/webcaster/> - minimum annual fee in 2009 is \$320, increasing by the CPI annually thereafter), and SESAC (see web site address above).

² As with any industry, copyright has its own terminology. “Use” in its simplest terms for broadcasters means playing the song. A “performance” also means playing the song. When it comes to royalty calculations for Internet transmissions, however, playing one song heard by one listener is a single performance. If one song is heard by multiple listeners, the number of performances is multiplied by the number of listeners. Digital “listeners” are the receiving devices (*e.g.*, computers), not how many people may be nearby who hear the stream.

³ Determining which recordings are in the public domain can be a complex task which should be undertaken only with the assistance of counsel. For example, a ruling of the New York Court of Appeals held that recording artists’ recordings are protected in perpetuity under that state’s common law standards.

⁴ The recordkeeping requirements for entities electing to pay royalties as Small Commercial Webcasters have slightly more onerous recordkeeping requirements, including not only the types of records mentioned but also additional requirements set forth at pages 5 and 6 of the document available at this link: http://www.soundexchange.com/licensee/documents/Rates_Terms.pdf.

For further information, contact Melodie Virtue at 202-298-2527 or at mvirtue@gsblaw.com. You may also contact any of the attorneys in the Communications and Information Technology Group listed below.

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John Crigler.....	202-298-2521	Daniel J. Margolis	202-298-2179
James E. Dunstan	202-298-2534	John M. Pelkey	202-298-2528
John Wells King.....	202-298-2520	Henry A. Solomon.....	202-298-2529
Erwin G. Krasnow.....	202-298-2161	Melodie A. Virtue.....	202-298-2527