

# Webcasting Royalties and The Value of Copyright

By Noah Schwartz

Recently there has been much discussion and debate in the media, Washington and the United States in general about rising Internet radio royalty rates. This article outlines the evolution of this debate and tracks it to the current situation unfolding in the board rooms of large and small Internet radio providers, SoundExchange (a performing rights organization) and both houses of Congress.

## Timeline

1976 - US Copyright law established that radio stations were required to pay publishing royalties. Publishing royalties are fees paid by licensees (typically radio stations, restaurants, bars etc.) for rights to publicly perform a musical composition. These royalties are paid to songwriters and publishers and are generally collected by performing rights organizations. In the United States the big performing rights organizations are ASCAP, BMI and SESAC.

1995 - The Digital Performance Right in Sound Recording Act established rights for owners of sound recordings. Sound recordings are performances that are captured on a recordable media. The Act provided an exemption for traditional radio and TV. From 1995 on, all new media broadcasters had to pay performance royalties. Performance royalties are fees paid by licensees (in this case webcasters) for the right to make transmissions of sound recordings. Royalties are collected by SoundExchange and paid to performers.

1998 - The Digital Millennium Copyright Act established enforcement of intellectual copyright laws for the Internet. It also made allowances for direct licenses that could be negotiated between the party that owns the copyright and the party that is licensing it.

2002 - The Library of Congress recommended that webcasters pay royalties in accordance to the 1995 Act. However, the Small Webcasters Settlement Act of 2002 allowed webcasters to pay a percentage of their revenue to SoundExchange until 2006.

2007- The United States Copyright Royalty Board ruled In the Matter of: Digital Performance Right In Sound Recordings And Ephemeral Recordings. **This ruling is what the following article is about.** Like the 2002 Library of Congress recommendation the CRB stipulated a statutory license model for performance royalties from webcasters and rejected a model based on percentage of revenue. However, direct licenses can be negotiated with SoundExchange using different payment models. In response various webcasters pushed to have the Internet Radio Equality Act introduced to both the houses of Congress. This bill would mandate a percentage of revenue payment option for all webcasters.

## Analysis

Under US Copyright law webcasters have to obtain statutory licenses to play sound recordings. This ruling affects commercial (for profit) and non-commercial (not for profit) webcasts, as well as rebroadcasts and simultaneous broadcasts of traditional radio. The Copyright Royalty Board (CRB) is a panel of three judges who set the rates of statutory licenses for copyrights. They have ruled on new performance royalty rates for Internet radio stations (webcasters), for the 2006-2010 licensing period.<sup>1</sup>

### Per Song Royalty Rates

2006 \$.0008

2007 \$.0011

2008 \$.0014

2009 \$.0018

2010 \$.0019

The CRB ruled that commercial webcasters have to pay royalties per song played retroactively back to 2006. Along with a \$500 per channel minimum per year, this counts as credit for initial royalty payments. The commercial rates also apply to most Internet rebroadcasts of traditional radio.

Non-commercial webcasters are required to pay the \$500 station fee per year, if they broadcast under 159140 “aggregate tuning” hours a month to all listeners. If the station broadcasts for longer than that they have to pay the same rate as the commercial webcasters.

The Board selected the not for profit royalty collection agency SoundExchange, as the sole designated “collective” (the sole agency) to collect royalties from webcasters.<sup>2</sup> SoundExchange represents many different labels (including all the majors labels) and artists. They lobbied to get the new royalty rates put in place.<sup>3</sup>

The basic foundations of the royalty models for webcasters lie in the Digital Performance Right in Sound Recording Act of 1995<sup>4</sup> and the Digital Millennium Copyright Act of 1998<sup>5</sup>. These Acts made it necessary for most webcasters to pay performance royalties on top of publishing royalties and did not allow simultaneous broadcasts of traditional radio to be exempt. Traditional radio stations are exempt from paying performance royalties because of section 114(d)(1)(A) of the US Copyright Code.

In 2002 The Copyright Arbitration Royalty Board, a division of the Library of Congress, ruled on royalty rates for webcasters<sup>6</sup>. Webcasters objected because they were too high.

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<sup>1</sup> 72 Fed. Reg. 24084, 24084 (May 1, 2007).

<sup>2</sup> 72 Fed. Reg. 24084, 24105 (May 1, 2007).

<sup>3</sup> Van Buskirk, Eliot. “*SoundExchange, Caught Lobbying, Says Lobbying Bar Does Not Apply*” *Wired*; August 2007 <[http://www.wired.com/entertainment/music/commentary/listeningpost/2007/08/listening\\_post\\_0806?currentPage=2](http://www.wired.com/entertainment/music/commentary/listeningpost/2007/08/listening_post_0806?currentPage=2)>

<sup>4</sup> 60 Fed. Reg. 61655, 61655 (December 1, 1995).

<sup>5</sup> *The Digital Millennium Copyright Act of 1998*. 17 U.S.C §§ 402, 405 (December, 1998),

<sup>6</sup> 17 U.S.C § 114(f)(4)(B)(i) as prescribed by United States Copyright Office Library of Congress: Rate Setting for Digital

In response to concerns that high royalties might kill the Internet radio business, the Small Webcasters Settlement Act of 2002<sup>7</sup> was implemented by Congress, and signed into law by the President.<sup>8</sup> This Act stipulated that royalties could be based on the individual revenues of webcasters. One of the terms of this act would be that it would not be considered as a precedent in finding the rates for the next time period. This is partly because this settlement was not determined fair by Congress and was “motivated by the unique business”.<sup>9</sup> The Distribution Reform Act of 2004 created the CRB with the goal of replacing the Copyright Arbitration Royalty Board.<sup>10</sup> This is why the CRB is responsible for these 2006-2010 licensing proceedings.

Many webcasters, small and large are claiming that the new royalty rates will put them out of business or severely damage their business.<sup>11</sup> The Internet Radio Equality Act of 2007 is a bill that was introduced in Congress in hopes of reversing the Board’s decision. There have been motions filed in the District of Columbia court system for a stay to the new rates. The motions were denied.<sup>12</sup> SoundExchange has offered small webcasters a revised deal that would be similar to the older royalty model they used, and would require them to pay a percentage of their revenue. They have also confirmed a cap on how much webcasters will have to pay per channel<sup>13</sup> and have talked about negotiating direct licenses with larger webcasters.<sup>14</sup>

Some major parties involved in this ruling are SoundExchange, Royalty Logic, Digital Media Association who represent Yahoo, Live 365, Microsoft and AOL, Bonneville International Corp. and Clear Channel Communications. Many other smaller webcasters, both commercial and non-commercial, were present.<sup>15</sup>

## Conclusion

In a Copyright case like this at least 3 months of testimony and discovery are undertaken before a ruling can be handed down. This is in hopes that involved parties can reach a settlement. This process began in February of 2006. No settlement was reached and in May 2007 the CRB issued a ruling. Under the terms of the Digital Millennium Copyright Act, however, direct licenses can be negotiated to take the place of the statutory rate set by the CRB. As of now and notwithstanding any prior written agreements, the artists featured on the sound recordings get 45 percent of the royalties.<sup>16</sup> This can be renegotiated for direct licenses, possibly benefiting the major labels that often own the

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Performance Rights in Sound Recordings and Ephemeral Recordings (repealed December, 2002).

<sup>7</sup> 17 U.S.C §§ 101, 114 (December, 2002).

<sup>8</sup> 67 Fed. Reg. 78510, 78510 (December 24, 2002).

<sup>9</sup> 67 Fed. Reg. 78510, 78510 (December 24, 2002).

<sup>10</sup> 17 U.S.C §§ 801 -804 (December, 2002).

<sup>11</sup> Marr, Kendra. “*Shaken Internet Radio Stations Face Specter of New Fees Sunday*” Washington Post; July 2007 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071202169.html?hpid=topnews>>

<sup>12</sup> Puzanghera, Jim. “*Judges clear way for higher Internet radio royalties*” Los Angeles Times; July 2007

<<http://www.latimes.com/technology/la-fi-radio13jul13,1,1882153.story?coll=la-headlines-technology>>

<sup>13</sup> “*SoundExchange Confirms Minimum Fee Offer*” SoundExchange; July 2007 <<http://www.soundexchange.com/>>

<sup>14</sup> Kharif, Olga. “*A Reprieve for Net Radio*” Business Week; July 2007

<[http://www.businessweek.com/technology/content/jul2007/tc20070713\\_940496.htm](http://www.businessweek.com/technology/content/jul2007/tc20070713_940496.htm)>

<sup>15</sup> 72 Fed. Reg. 24084, 24084 (May 1, 2007).

<sup>16</sup> Van Buskirk, Eliot “*Webcasting Royalties: A Modest Proposal*” Wired; July 2007

<[http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost\\_0723?currentPage=all](http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost_0723?currentPage=all)>

artist's masters. The court tried to set a rate by using the benchmarks set by the past royalty payment model. It rejected using the publishing royalty rates as a benchmark, possibly because that royalty is for another aspect of copyright in their opinion. At the heart of the ruling is the court's effort to protect the value of intellectual property rights and the value of copyright. This is why the CRB rejected a revenue based royalty model even though both sides had agreed on the premise. Small webcasters argued that the new royalties would put them out of business. The court found that costs exceeding revenues for webcasters was not the issue and differentiating between small and larger webcasters was beyond their purview. The value of Copyright is the paramount issue to the CRB, something to be protected above other considerations.

This ideological sentiment is not shared by any major party involved. Webcasters both small and large are looking to pay as few royalties as possible, to keep profits high and in some cases simply to stay in business. Congress, lobbied by the webcasters has introduced legislation to nullify the CRB's ruling and provide a revenue based option. SoundExchange has made the distinction between small and larger webcasters. They are offering small webcasters a revenue based payment model, as long as the webcaster meets certain requirements mostly to do with traffic/listener information. Also they are offering a cap on the per-station per year fees. They allow themselves a profit but also allow webcasters with thousands of stations to keep operating. (and keep paying royalties).

The CRB ruling has given SoundExchange leverage in regards to negotiating direct licenses, a fact SoundExchange was obviously aware of when they were lobbying for a ruling from the CRB. Having revenue-based royalties is in direct opposition to the core foundation of the CRB's ruling, because royalties are not paid based on the value of specific copyrights. However as the Small Webcasters Settlement Act of 2002 stated; allowing revenue based performance royalties from Internet radio was "motivated by the unique business." Even with the CRB ruling it seems that this sentiment is unlikely to change.

## **Related Cases, Legislation and Laws**

### **Digital Performance Right in Sound recording Act of 1995**

The first law that provided protection for copyright holders of sound recordings. It established a statutory license model for licensees. Exceptions were made for already existing terrestrial radio and TV stations.

### **Digital Millennium Copyright Act of 1998**

Required owners of copyrights to be compensated for their media being used on the internet for profit. Made copyright infringement through the internet illegal.

### **United States Copyright Office Library of Congress: Rate Setting for Digital Performance Rights in Sound Recordings and Ephemeral Recordings 2002**

The first recommendation on the statutory royalty rates required of webcasters. Held that webcasters should pay the statutory rate as set fourth in the Digital Performance Right in Sound Recording Act of 1995

### **Small Webcasters Settlement Act of 2002**

Passed by Congress, allowed webcasters to have more royalty payment options than set forth in the 2002 ruling. Webcasters could pay a percentage of their revenue instead of statutory license rates.

### **Bonneville International Corp. v. Peters 2003**

Upheld the requirement for payment of performance royalties on rebroadcasts and simultaneous broadcasts from terrestrial radio on the internet as set forth by the DMCA and clarified the Digital Performance Right in Sound recording Act of 1995.

### **The Internet Radio Equality of 2007**

Legislation put forth to both the House and the Senate looking to nullify the CRB's ruling and put into law a new royalty payment model that would include payment choices for the licensees (something the CRB did not allow for). The choices could possibly be \$0.33 per hour per listener or 7.5 percent of revenue.