

UNIVERSITY OF LOUISIANA

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Radio and Webcasting Music Licensing National College Media Convention

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Legal Background

- The copyright law of the United States is intended to give the owners of intellectual works the exclusive right to authorize others to reproduce, distribute, or publicly perform their protected property. In the specific case of the performance of music, two discrete categories of protected works must be considered: “musical works” and “sound recordings” (17 U.S.C. § 102).
- A “musical work” refers to the musical composition – the musical notes and arrangement – and any accompanying lyrics (17 U.S.C. § 101).
- A “sound recording” is the “fixation of a series of musical, spoken, or other sounds, ... regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied” (17 U.S.C. § 101).
- To “perform” a work means to “recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible” (17 U.S.C. § 101).
- Rights to perform musical works can be obtained directly from the composer or publisher of the work; however, in the case of a music user regularly performing multiple musical works, a blanket license obtained from a performance rights society is often the more expedient means to avoid infringement on the intellectual property right. Three such performance rights societies operate in the United States: the American Society of Composers, Authors and Publishers (“ASCAP”); Broadcast Music, Inc. (“BMI”); and SESAC, Inc.
- A “blanket license” is an annual license which permits the licensee to perform any work in the repertoire represented by the particular agent. Through the use of such a license the music user avoids the burden of individually locating and securing licenses from each of the owners.
- Congress has provided for, in some instances, statutory compulsory licenses for the use of copyrighted materials; any party meeting the requirements of the statutory license, including the payment of the applicable royalty, must be granted use of the copyrighted material. Procedures for determining the terms of the compulsory licenses are established under accompanying provisions of the statute.
- The process for determining the rates and terms for any statutory license is presently overseen by the Copyright Royalty Judges (“CRJs”), a body of the Library of Congress, as established by the Copyright Royalty and Distribution Reform Act (2004).
- Noncommercial educational broadcast stations and other public broadcasting entities are provided with a compulsory statutory license for the performance of musical works (17 U.S.C. § 118).
- In the case of the statutory license for the performance of musical works, all proceeds flow directly to the copyright owner.
- As for digital transmissions of musical works, including through Webcasting, all three of the performance rights societies currently offer blanket licenses specifically tailored to the new media.

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- Congress first recognized a *limited* performance right in sound recordings when it enacted the Digital Performance Right in Sound Recordings Act (1995).
- Rather than applying the new sound recording performance right broadly, Congress specifically limited the new protection to digital transmissions in order to avoid disruption to existing business relationships; the DPRA also specifically exempted from sound recording performance royalty obligations anticipated terrestrial digital broadcast transmissions, now variously referred to as In-Band/On-Channel (“IBOC”), or the trademarked name “HD-Radio” (17 U.S.C. § 114(d)(1)(A)).
- Congress extended, through the Digital Millennium Copyright Act (1998), the statutory sound recording digital performance license to newly emerging non-subscription, non-interactive transmissions – which almost exclusively included at the time services commonly known as Webcasts.
- The statute additionally distinguishes two separate uses of copyrighted sound recordings through digital transmissions. First is the basic public performance use protected under Section 114 of the amended Copyright Act, and second is the right to make “ephemeral” copies of digital recordings under Section 112. Ephemeral copies refer to temporary copies of sound recordings made to enable or facilitate the digital transmission of such recordings.
- The statutory license for the digital performance of sound recording divides royalty receipts between the copyright owner, the featured artist or artists performing on the recording, non-featured vocalists, and non-featured musicians.
- The statute provides that copyright owners are to receive 50 percent of the royalty proceeds under the sound recording digital performance statutory license, while featured artists are to receive 45 percent of the proceeds and non-featured vocalists and non-featured musicians each receive a 2½ percent share (17 U.S.C. § 114(g)(2)). The non-featured vocalist portion is managed by an administrator jointly appointed by copyright owners and the American Federation of Television and Radio Artists, regardless of membership; the non-featured musician portion is managed by an administrator appointed by copyright owners and the American Federation of Musicians, regardless of membership.
- The CRJs (and the previous Copyright Arbitration Royalty Panel, or “CARP”) determined that SoundExchange should be the single collective to receive royalty payments made by services operating under the sound recording statutory license, thus reducing the transactional costs for implementing these statutory licenses through the designation of a single administrative body (CARP Report, 2002; CRJ Report, 2007).
- The CRJs issued their first-ever Webcasting royalty determination on May 1, 2007, covering transmissions under the compulsory sound recording license during the period 2006-2010. The CRJs set per-performance rates for all services – commercial and noncommercial – increasing from \$0.0008 to \$0.0019 per-listener-per-song from 2006-2010, and a \$500 per-channel minimum fee. Noncommercial services are allowed to stream 159,140 monthly Aggregate Tuning Hours for the minimum fee before encountering the per-performance rates.
- An appeal of the CRJs’ determination is pending before the United States Court of Appeals for the District of Columbia Circuit. Opening and final written briefs have been filed with the court, but oral argument has not yet been scheduled.
- Copyright owner and services’ notices of intent to participate in the rate setting for the years 2011-2015 will be due to the CRJs in early 2009.
- The Webcaster Settlement Act of 2008 passed both houses of Congress and was signed into law by the president on October 16, 2008. This act will allow services and SoundExchange (on behalf of all copyright owners) to negotiate alternative rates, much as they did under the Small Webcaster Settlement Act of 2002, covering a period of up to 11 years beginning on January 1, 2006, when the new CRB rates went into effect retroactively. The deadline for these negotiations is February 15, 2009.
- On December 18, 2007, Howard Berman (D-CA) introduced into the House the Performance Rights Act (H.R. 4789), which seeks to extend the sound recording royalty to terrestrial broadcasters. The bill would allow a flat

\$1,000 annual fee for noncommercial stations eligible for the Section 118 statutory license. The bill was forwarded by the Subcommittee on Courts, the Internet, and Intellectual Property to the full Committee on the Judiciary on June 26, 2008. A companion bill (S. 2500) was introduced into the Senate by Patrick Leahy (D-VT), where, as of July 29, 2008, hearings have been held by the Committee on the Judiciary.

- On July 10, 2008, the Register of Copyrights issued a Notice of Proposed Rulemaking to clarify that an additional royalty must be paid, under Section 115 of the Copyright Act, to music publishers for the reproductions of the musical compositions being made in the Webcasting process. On September 23, 2008, the Digital Media Association (“DiMA”), the National Music Publishers’ Association (“NMPA”), the Recording Industry Association of America (“RIAA”), the Nashville Songwriters Association International (“NSAI”) and the Songwriters Guild of America (“SGA”) announced a voluntary agreement that, among other terms, “non-interactive, audio-only streaming services do not require reproduction or distribution licenses from copyright owners” (source: joint press release). So, even should the Copyright Office to determine that there is a digital phonorecord delivery made during the Webcasting process, at least for the length of this agreement – assuming that it is approved by the CRJs – no royalty will be assessed.

Sound Recording Digital Performance Content Restrictions

- The statute contains several limitations on programming transmitted under the terms of the statutory license (17 U.S.C. § 114). Key elements include:
 1. Webcasting services under these licenses cannot be interactive. Accepting a listener request, as is typical of many radio stations, does not necessarily make a service interactive. The statute only prohibits programming consisting substantially of sound recordings performed within one hour of the request – such as some all-request programs – or playing a request at a time designated by either the listener or broadcaster.
 2. In a three hour period a Webcaster can transmit no more than:
 - (a.) three songs from one album or compact disc, if no more than two of these are played in a row, and
 - (b.) four songs by the same featured artist or from the same box set, if no more than three of these are played in a row.
 3. Advance announcements or program schedules listing the titles of specific sound recordings, album titles, or names of featured recording artists are prohibited, with limited exceptions; however, a general announcement that a featured artist will be played at an unspecified future time is permitted.
 4. Provide a text display for the receiving device, at the time the sound recording is performed, of the title of the sound recording, the album title, and the name of the featured recording artist.
 5. Archived programming of less than five hours in length is not permitted, and archived programming cannot be made available for a period exceeding two weeks.
 6. Looped programming cannot be less than three hours in duration.
 7. An identifiable program that plays songs in a predetermined order cannot be repeated more than three times in any two-week period if the program is less than one hour in duration, or cannot be repeated more than four times in a two week period if the program is one hour or more in duration.

Sound Recording Digital Performance Recordkeeping and Reports of Use

- Reporting Period: Two periods of seven consecutive days for each calendar quarter of the year. The two weeks need not be consecutive, but both weeks must be completely within the calendar quarter.
- Content:

1. The name of the service.
2. The category transmission code.
3. Song and Performance Data:
 - (a.) Artist Name;
 - (b.) Song Title;
 - (c.)(i.) International Standard Recording Code (“ISRC”), or
(ii.) the Album Title and Marketing Label;
 - (d.)(i.) The actual total performances of the sound recording during the reporting period (“performances” means total number of streaming connections to each song, not the number of times a song is played), or
(ii.) Aggregate Tuning Hours, channel or program name, and play frequency (the number of times a song is played).
- Format and delivery:
 1. Reports of use must be maintained and delivered electronically in an ASCII format specified by the CRJs.
 2. A spreadsheet template is posted on the SoundExchange Web site which will convert the entered data into the required ASCII format (http://soundexchange.com/licensee/documents/Excel_Template.xls).
 3. Reports of use must be given a name followed by the start and end date of the reporting period, which must be separated by a dash and in the format (YYYYMMDD) with the file type extension of “.txt” (e.g., AcmeMusicCo20080101-20080331.txt).
 4. Reports of use will be accepted by SoundExchange via FTP, e-mail attachments, CD-ROM, or floppy disks.
 5. Stations need to retain copies of their reports for three years.