



Reference Memo

November 2016

Streaming Copyright Basics

Background

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.

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 In addition, Global Music Rights is a new performing rights organization which is siphoning off some popular artists from ASCAP, BMI and SESAC and will be charging additional fees to music users.

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 since the Internet is a non-broadcast form of digital audio.

Based on the fact that digital technology allows flawless copying, sound recording copyright owners obtained the exclusive right to “perform” 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 transmissions via the Internet.

The 1995 act created new rights for sound recordings, but not a mechanism for payment of royalties. The Digital Millennium Copyright Act of 1998 (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 need to obtain the consent of each individual copyright owner to use the sound recording or risk a claim of copyright infringement.

An entity called SoundExchange is charged with collecting sound recording royalties and distributing those 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 record companies. SoundExchange handles only royalties for streaming

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**Eligibility for
Statutory
License**

that is subject to the statutory license. 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. An advance program schedule or prior announcement of song titles may not be transmitted by text, video or audio. 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. Webcasters may name one or two artists or a particular genre of music to illustrate the type of music on a particular channel. 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 may not induce or encourage copying by transmission recipients and must disable copying by a recipient if the technology used can be disabled.

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 of lawful 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 which allow the consumer to select particular songs.

Limited Waivers Can Be Obtained. The National Association of Broadcasters (“NAB”) entered into separate Waiver Agreements with Sony Music Entertainment (“Sony”) and Warner Music, Inc. (“Warner”), in which those record companies waived some of the DMCA programming restrictions. The Sony waiver expires December 31, 2020, requires that broadcasters opt-in to the agreement, and applies to both commercial and non-commercial broadcasters. Stations wishing to opt-in to the Sony waiver can do so at http://www.mmsend61.com/link.cfm?r=a3By1qsTMCpNTLER3iAmGg~&pe=-oklTg871FUxg_iOD9rlQSfMBq1eaKWApSAyHVYUtTjzgnzFrjUIIAdJaUZ5wJj8U7NR5VuCAv9sBGwYiO014Q~. The Warner agreement expires September 30, 2019, and does not require that a broadcaster opt-in, but it applies only to commercial stations.

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 identifies the particular artists or sound recordings that will be featured at specified future times. Classical music broadcasters, however, can publish a schedule of classical music programming in accordance with their standards and practices as of September 30, 1998.
 - The Sony waiver allows broadcasters to promote in written or visual form that a program featuring a particular artist or artists will be aired at a specified future time if (a) the station airs a recurring program that features the music of that artist(s) and the program was on the air as of August 1, 2016, or (b) the station airs a tribute or documentary for special occasions, such as the death of an artist or to honor a commemorative milestone in music history or career of an artist.
- 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.
 - Sony requires that stations which opt-in to its Waiver Agreement and have more than 80,000 music ATH per month provide a “buy now”

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

Common Definitions

link to purchase a download of a sound recording through a Sony-authorized store, such as iTunes or Amazon.

- The Waiver Agreements lift the 6-month limitation on retaining ephemeral copies of recordings (such as songs from a CD copied onto a station’s hard drive music system).

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

Rates and terms for 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 2020.

The following sections describe CRB-adopted rates and alternative rates and terms in agreements between SoundExchange and 1) CPB, on behalf of certain noncommercial broadcasters, and 2) College Broadcasters, on behalf of noncommercial educational webcasters owned by educational institutions and primarily operated by students. If a webcaster is not eligible for one of these agreements or fails timely to elect the alternative rates and terms set forth in one of these agreements, CRB rates and terms apply. Review the agreements and consult with counsel before deciding which rates and terms to elect.

The CRB rates and the negotiated settlements all rely on the same 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 a station simultaneously streams a Performance for one hour to 10 Listeners, the ATH would be 10. A statutory licensee may deduct from the ATH the time during which it transmits 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 for 2015-2020, all music streamers (“Statutory Licensees”) must pay a minimum annual fee of \$500 per channel, with an annual cap of \$50,000 per commercial webcasting service. The statutory license rates effective through 2020 are:

- \$0.0017 per Performance for nonsubscription services
- \$0.0022 per Performance for subscription services

The rates will be adjusted each year based on changes in the cost of living determined by the Consumer Price Index.

To determine the royalties owed, multiply the applicable 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 2016, that \$500 covers about 33 Performances per hour for a nonsubscription service, 24 hours a day on average for the year. [Formula: \$500 minimum annual rate / 0.0017 royalty rate / 365 days / 24 hours = 33.6 Performances per hour.] That could cover, for example, streaming of 12 songs per hour to 2.8 listeners.

Noncommercial Webcasters (including Noncommercial Educational Broadcast Simulcasters). Noncommercial webcasters’ payment of a minimum annual fee of \$500 per channel covers up to 159,140 ATH per channel, per month. That averages out to 218 online 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.

CPB Agreement

Noncommercial Educational Stations Covered in CPB Agreement. CPB and SoundExchange reached agreement in which CPB pays a lump sum to cover a specified number of originating stations and other non-profit entities (“Covered Entities”) that distribute noncommercial programs. The current agreement covers the period 2016-2020. To be covered by the agreement, a non-profit entity must be a noncommercial terrestrial radio station that receives funding from the Corporation for Public Broadcasting, is an affiliate of NPR, American Public Media, Public Radio International or Public Radio

Exchange, or is a member of the National Federation of Community Broadcasters.

Eligible public stations must elect to participate by registering through CPB's website at <http://www.cpb.org/stations/musicrights/>. Stations on CPB's list do not have to pay a minimum annual fee to SoundExchange, but do need to provide data regarding Performances 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 abide by the CRB rates and terms applicable to noncommercial webcasters or elect an alternative deal for which it is eligible.

College Broadcasters Agreement

Accredited Educational Institutions. Noncommercial 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 commercial webcasters. If the educational institution is unable to calculate actual total performances however, it can calculate royalties using ATH figures and assume that 12 songs per hours are played if it is not subject to full census reporting described in the Recordkeeping Section 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 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. Late fees accrue until correct statements and reports are received by SoundExchange, provided that SoundExchange gives notice within 90 days of SoundExchange discovering noncompliance.

Recordkeeping

Records to be Maintained. Under CRB rules, the following records must be kept for each song that is streamed:

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. Actual Total Performances (the number of times a sound recording is “performed” – *i.e.*, each time a sound recording is accessed by a computing device represents a separate performance for each spin or play of a sound recording).

If a webcaster qualifies as a minimum fee webcaster (defined below), instead of reporting based on actual total performances, a minimum fee webcaster may report Aggregate Tuning Hours, Channel (for broadcasters, call sign or FCC facility ID number) or Program Name, and Play Frequency (the total times a sound recording is “played” during the reporting period – *i.e.*, offered or transmitted by the service, regardless of the number of listeners).

A “minimum fee webcaster” is a webcaster that does not owe streaming royalties in excess of the minimum annual fee for the statutory license and either 1) owns and operates an AM or FM station licensed by the FCC or 2) is a noncommercial educational webcaster operated by an accredited school staffed primarily by students not covered by CBP. For commercial webcasters, the \$500 minimum annual fee works out to about 27,777 ATH per year (approximately 3 listeners per hour). For noncommercial webcasters, the \$500 minimum annual fee covers 159,140 ATH per month (approximately 218 listeners per hour).

Filing Requirements

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 \$40.

Statements of Account. Under most of the SoundExchange licenses, 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. The 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.

Covered Entities under the CPB deal do not file Statements of Account. Instead, they must register with CPB.

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, for minimum fee webcasters the ATH, or for Covered Entities under the CPB deal the start and end times and server logs). Under the CRB terms, reports of use must be submitted to SoundExchange each month within 45 days after the end of the reporting month. Webcasters must file monthly reports of use on a full “census” basis – *i.e.*, every song streamed. Minimum fee webcasters, however, and Covered Entities under the CPB Agreement, can file quarterly based on a two-week survey 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.

The precise file format for most reports other than for Covered Entities under the CPB deal is set forth in Copyright Rule 370.4 found at <http://www.loc.gov/crb/laws/title37/>. SoundExchange also posts an Excel spreadsheet, with instructions for completing the report, at <http://soundexchange.com/service-provider/reporting-requirements/> that statutory licensees can complete and convert to a properly formatted file.

**College
Broadcasters
Agreement
Reporting
Requirements**

The College Broadcasters deal is similar to the CRB rule, with some slight variations. Under the College Broadcasters agreement, a noncommercial educational 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 noncommercial educational webcaster is unable to calculate actual total performances or ATH, it may report channel & play frequency. If it exceeded 159,140 ATH for more than a month in the prior year, the noncommercial educational webcaster 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.

**College
Broadcasters
Agreement
Proxy Fee**

The College Broadcasters deal provides 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”). Under this deal, a noncommercial educational webcaster can pay the \$100 Proxy Fee and avoid filing Reports of Use if it has no more than 80,000 ATH per channel per *month*. The ATH limit represents an average of 109 listeners per hour.

The election to be exempt from reporting must be made each year by January 31. With the election, a small noncommercial educational webcaster must provide SoundExchange with ATH numbers, music genre, and other information SoundExchange needs for creating a proxy for distributing royalties.

Conclusion

If an exempt webcaster 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.

Streaming is now an established platform that broadcasters ignore at their peril as online 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. Miniscule 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 online. 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 a commercial station’s over-the air signal have been folded into the blanket over-the-air license. Under a settlement between RMLC and SESAC, over-the-air, HD and streaming licenses are consolidated as of 2016.

Webcasters, and commercial broadcasters who transmit streams in addition to the stream of their over-the-air signals, need to obtain non-interactive Internet licenses from ASCAP (<http://www.ascap.com/weblicense/> - minimum annual fee was \$288), BMI (<http://www.bmi.com/licensing/webcaster/> - minimum annual fee in 2015 was \$351), and SESAC (<http://www.sesac.com/Licensing/internet.aspx> - minimum fee is \$301 per six months per web page in 2016).

Noncommercial broadcaster rates for public performance of music compositions are set by the Copyright Royalty Judges and are listed in 37 C.F.R. Part 381.

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.

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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