Order Code RL34020

CRS Report for Congress

Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board

Updated October 19, 2008

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Prepared for Members and Committees of Congress

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Summary

On March 9, 2007, the Copyright Royalty Board (CRB) announced new statutory royalty rates for certain digital transmissions of sound recordings for the period January 1, 2006, through December 31, 2010. Implementation of these new rates marks the expiration of a previous royalty rate agreement specifically designed to benefit "small" Internet radio broadcasters, or "webcasters." The new rates went into effect on July 15, 2007. In an effort to reach a compromise payment arrangement to serve as an alternative to the royalty rate scheme provided by the CRB decision, private negotiations are currently ongoing between webcasters and the entity representing sound recording copyright owners and artists, SoundExchange.

Two similar bills, H.R. 2060 and S. 1353, both titled the Internet Radio Equality Act, were introduced in the 110th Congress. The bills would nullify the CRB's decision, change the ratemaking standard, and institute transitional rates for the current rate cycle (which is retroactive to 2006). Although Congress has addressed the interests of small commercial webcasters in the past, the proposed legislation appears to emphasize rate parity among statutory licensees who use different transmission technology, i.e., satellite, cable, and the Internet. The bills, however, permit webcasters to choose between different payment formats for the current cycle, including one based on percentage of revenue, a method sought by small webcasters.

The Webcaster Settlement Act of 2008 (H.R. 7084) was introduced on September 25, 2008, then approved by voice vote in the House on September 27 and by unanimous consent in the Senate on September 30. It was signed by President Bush on October 16 (P.L. 110-435). The purpose of the Webcaster Settlement Act is to authorize SoundExchange to negotiate and enter into alternative royalty fee agreements with webcasters that would replace the rates established under the CRB's decision, while Congress is in recess. (Under current law, such privately negotiated agreements are not effective without congressional approval *after* the CRB has issued a decision on royalties.) The act terminates SoundExchange's authority to make settlements on February 15, 2009. The act also provides that the terms of an agreement may be effective until the end of 2016. The act also permits any agreement to be precedential in future CRB ratemaking proceedings, if the parties to the agreement so agreed. However, the act in no way obliges SoundExchange to negotiate any agreement.

This report surveys both the legislative history of this issue, i.e., royalty rates for eligible nonsubscription webcasters, the Board's decision, and the public and congressional response.

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Statutory Licenses

Among the creative works that U.S. copyright law protects are sound recordings,[1] which the Copyright Act defines as "works that result from the fixation of a series of musical, spoken, or other sounds."[2] Owners of copyrighted sound recordings have exclusive rights to reproduce, adapt, or distribute their works, or to perform them publicly by *digital* means.[3] Normally, anyone who wants to exercise any of the copyright owner's exclusive rights must obtain the copyright owner's permission to do so, typically by direct negotiations between copyright owners and users. However, the copyright law also provides several types of statutory, or compulsory, licenses for sound recordings. These licenses allow third parties who pay statutorily prescribed fees to use copyrighted sound recordings under certain conditions and according to specific requirements, *without* having to negotiate private licensing agreements.[4]

In 1998, in the Digital Millennium Copyright Act (DMCA),[5] Congress amended several statutory licensing statutes to provide for and clarify the treatment of different types of Internet broadcasting, or "webcasting." Some transmissions of sound recordings are *exempt* from the public performance right,[6] for example, a

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[1] 17 U.S.C. § 102(a)(7).

[2] 17 U.S.C. § 101.

[3] 17 U.S.C. §§ 106(1)-(3) & (6). Note that owners of copyrighted sound recordings have no legal entitlement to demand payment of royalties for the performance of their works by non-digital means. Thus, terrestrial radio stations (AM and FM stations) that broadcast sound recordings through analog means, need not compensate recording artists or record labels or obtain their permission to perform the work to the public. The Performance Rights Act, introduced in the 110th Congress (H.R. 4789 and S. 2500), would eliminate this royalty exemption that applies to traditional radio stations and attempt to bring parity to the sound recording performance royalty system.

[4] For a general explanation of the mechanics of licensing copyrighted musical works (the notes and lyrics of songs) and sound recordings, *see* CRS Report RL33631, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, by Brian T. Yeh.

[5] P.L. 105-304 (October 28, 1995).

[6] Activities that are exempt from the public performance right may be conducted without having to seek prior authorization of the copyrighted work's owner.

nonsubscription broadcast transmission;[7] a retransmission of a radio station's broadcast within 150 miles of its transmitter; and a transmission to a business establishment for use in the ordinary course of its business.[8] In contrast, a digital transmission by an "interactive service" is not exempt from the public performance right, nor does it qualify for a statutory license. The owner of an interactive service — one that enables a member of the public to request or customize the music that he or she receives — must negotiate a license, including royalty rates, directly with copyright owners.

But, two categories of webcasting that *do* qualify for a compulsory license are specified "preexisting" subscription services (existing at the time of the DMCA's enactment)[9] and "an eligible nonsubscription transmission." A subscription service is one that is limited to paying customers. The broader category of webcasters who may qualify for the statutory license under 17 U.S.C. § 114(d) are those who transmit music over the Internet on a nonsubscription, noninteractive basis.

A licensee under § 114 may also qualify for a statutory license under 17 U.S.C. § 112(e) to make multiple "ephemeral" — or temporary — copies of sound recordings solely for the purpose of transmitting the work by an entity legally entitled to publicly perform it.[10]

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[7] A "broadcast" transmission is defined as a transmission made by a terrestrial broadcast station licensed by the FCC. 17 U.S.C. § 114(j)(3). FCC-licensed radio broadcasters argued unsuccessfully that simultaneous Internet streaming of AM/FM broadcast signals was exempt from the public performance license requirement for digital transmissions. Bonneville International Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003).

[8] 17 U.S.C. § 114(d)(1).

[9] Pursuant to definition under § 114(j), qualifying "preexisting" services include

> "(10) A 'preexisting satellite digital audio radio service' is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.
> "(11) A 'preexisting subscription service' is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service." *See* 37 C.F.R. Part 260.

[10] Ephemeral copies are reproductions of sound recordings made by webcasters or radio stations to facilitate the "streaming" of their content on the Internet. The statutory license for ephemeral copies is based upon the copyright owner's right to control reproduction of a protected work.

Background

The initial ratemaking proceeding for statutory royalty rates for webcasters for the period 1998 through 2005 proved to be controversial, perhaps reflecting in some degree the relative newness of both the DMCA and webcasting activity. A Copyright Arbitration Royalty Panel (CARP) issued a recommendation for the initial statutory royalty rate for eligible nonsubscription webcasters on February 20, 2002.[11] Small-scale webcasters objected to the proposed rates. In accordance with then-existing procedures, the Librarian of Congress, on the recommendation of the U.S. Copyright Office, rejected the CARP's recommendation and revised rates downward. Congress interceded as well with enactment of the Small Webcasters Settlement Act (SWSA) of 2002, P.L. 107-321. Although very complex, the law permitted more options than the royalty rates established by the Librarian's order. Qualifying small webcasters, for example, could elect to pay royalties based on a percentage of revenue or expenses rather than on a per-song per-listener basis. The rate agreement made pursuant to SWSA was published in the Federal Register[12] but not codified in the Code of Federal Regulations. However, by SWSA's own terms, its provisions were *not* to be considered in subsequent ratemaking proceedings.[13]

Subsequent to passage of the SWSA and the initial ratemaking proceeding, Congress substantially revised the underlying adjudicative process. Enactment of the Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, abolished the CARP system and substituted a Copyright Royalty Board composed of three standing Copyright Royalty Judges.[14] Rates established pursuant to the original ratemaking determination and SWSA were to remain in effect through 2005. As required by law,

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[11] In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, *Report of the Copyright Arbitration Royalty Panel,* February 20, 2002, at [http://www.copyright.gov/carp/webcasting_rates.pdf]. For more background, see CRS Report RL31626, *Copyright Law: Statutory Royalty Rates for Webcasters*, by Robin Jeweler.

[12] U.S. Copyright Office, *Notification of Agreement Under the Small Webcaster Settlement Act of 2002*, 67 Fed. Reg. 78510-78513 (December 24, 2002), at [http://www.copyright.gov/fedreg/2002/67fr78510.html].

[13] P.L. 107-321, § 4(c): "It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b)." Congressional findings in § 2(5)-(6) also emphasize that Congress makes no determination that the agreements reached between small webcasters and copyright owners are fair and reasonable or represents terms that would be negotiated by a willing buyer and a willing seller.

[14] For more background, see CRS Report RS21512, *The Copyright Royalty and Distribution Reform Act of 2004*, by Robin Jeweler.

the Copyright Royalty Board recently announced royalty rates for the period that commences (retroactively) from January 1, 2006, through December 31, 2010.[15]

Copyright Royalty Board Rates

The general process for statutory license ratemaking factors in a three-month period, during which interested parties are encouraged to negotiate a settlement agreement. In the absence of an agreement, written statements and testimony are gathered, discovery takes place, hearings are held, and the Copyright Royalty Board issues a ruling.[16]

Notice announcing commencement of the subject proceedings was published on February 16, 2005.[17] On March 9, 2007, the Copyright Royalty Board issued its decision, which was published as a Final Rule and Order on May 1, 2007.[18] The final determination of the CRB establishes new rates for commercial and noncommercial webcasters who qualify for the § 114 compulsory license;[19] the decision is effective on July 15, 2007.[20] Rates are as follows:

- For commercial webcasters: $.0008 per performance[21] for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. This includes fees for making an ephemeral recording under 17 U.S.C. § 112.[22]

- For noncommercial webcasters: (i) For Internet transmissions totaling less than 159,140 Aggregate Tuning Hours (ATH) a month,

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[15] 17 U.S.C. § 804(b)(3).

[16] *Id.*

[17] 70 FED. REG. 7970 (2005).

[18] Library of Congress, Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 72 FED. REG. 24084 (May 1, 2007). *See* 37 C.F.R. Part 380.

[19] A noncommercial webcaster is a licensee that is tax exempt under § 501 of the Internal Revenue Code, 26 U.S.C. § 501 or which is operated by a state entity for public purposes. 37 C.F.R. § 380.2.

[20] 72 FED. REG. at 24112 (establishing a deadline of 45 days after the end of the month in which the CRB's final determination of rates is published in the Federal Register, for the payment of retroactive royalties for 2006 under the new rate scheme).

[21] A performance is a single sound recording publicly performed by digital audio transmission, heard by a single listener. 37 C.F.R. § 380.2(i). For example, if a webcaster streams 30 songs to 100 listeners in the course of a day, the total would be 3000 performances for that day.

[22] In the Copyright Royalty Board's order denying rehearing, see *infra,* it authorized an optional transitional Aggregate Tuning Hours (ATH) fee for the years 2006 and 2007. 37 C.F.R. § 380.3(a)(ii).

an annual per channel[23] or per station performance royalty of $500 in 2006, 2007, 2008, 2009, and 2010. (ii) For Internet transmissions totaling more than 159,140 Aggregate Tuning Hours (ATH) a month,[24] a performance royalty of $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. These rates include fees for making an ephemeral recording under 17 U.S.C. § 112.

- Minimum fee. Commercial and noncommercial webcasters will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part thereof.[25]

This rate structure does not make special provision for "small" webcasters, who were addressed in the SWSA by reference to revenues.

Rationale

The standard for establishing rates, set forth by statute, is known as the "willing buyer/willing seller" standard.[26] The Board's determination is informed by the initial

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[23] The CRB did not provide a definition for a "channel." However, under the CRB decision, a webcaster that transmits multiple channels is responsible for paying $500 per channel. Webcasters often have multiple channels; for example, among the largest commercial webcasters, Yahoo, RealNeworks, and Pandora broadcast thousands of channels.

[24] Aggregate Tuning Hours is defined, in part, as "the total hours of programming ... transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming[.]" 37 C.F.R. § 380.2(a). For example, if a webcaster streamed one hour of music to 1 listener, the Aggregate Tuning Hours for that webcaster would be 1. If 2 listeners each listened for half an hour, the ATH would also be 1. If 10 listeners listened to 1 hour, the ATH would be 10, and so forth.

[25] 37 C.F.R. § 380.3.

[26] 17 U.S.C. § 114(f)(2)(B), provides in pertinent part:

> In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including —
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment,

(continued...)

royalty proceedings of the CARP, which it refers to as "Webcaster I." In essence, both the previous CARP and the current Copyright Royalty Board attempt to implement the statutorily mandated standard to reach a royalty rate. Explaining its interpretation of the governing language, the CRB wrote:

> Webcaster I clarified the relationship of the statutory factors to the willing buyer/willing seller standard. The standard requires a determination of the rates that a willing buyer and willing seller would agree upon in the marketplace. In making this determination, the two factors in section 114(f)(2)(B)(i) and (ii) must be considered, but neither factor defines the standard. They do not constitute additional standards, nor should they be used to adjust the rates determined by the willing buyer/willing seller standard. The statutory factors are merely to be considered, along with other relevant factors, to determine the rates under the willing buyer/willing seller standard.[27]

The Board considered the proposals of representatives for "small" webcasters that rates be structured as a percentage of revenue, but ultimately rejected them:

> In short, among the parties on both sides who have proposed rates covering Commercial Webcasters, only Small Commercial Webcasters propose a fee structure based solely on revenue. However, in making their proposal, this group of five webcasters clearly is unconcerned with the actual structure of the fee, except to the extent that a revenue-based fee structure — especially one in which the percent of revenue fee is a single digit number (i.e., 5%) — can protect them against the possibility that their costs would ever exceed their revenues.... Small Commercial Webcasters' focus on the amount of the fee, rather than how it should be structured, is further underlined by the absence of evidence submitted by this group to identify a basis for applying a pure revenue-based structure to them. While, at times, they suggest that their situation as small commercial webcasters requires this type of structure, there is no evidence in the record about how the Copyright Royalty Judges would delineate between small webcasters and large webcasters.[28]

And, in a substantive footnote, the Board expressed its view that it lacks statutory authority to carve out royalty rate niches for the emergent business models promoted by small commercial webcasters:

> It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners. Furthermore, it would involve the Copyright Royalty Judges in making a policy

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[26] (...continued)
cost, and risk.

[27] 72 FED. REG. at 24087.

[28] *Id.* at 24088-89 (footnotes and citations omitted).

decision rather than applying the willing buyer/willing seller standard of the Copyright Act.[29]

In setting the rates, the Board looked to proposed "benchmark" agreements to determine what a hypothetical buyer and seller would agree to in the marketplace. It rejected the proposals advanced by the radio broadcasters and small commercial webcasters that the appropriate benchmark was the fee paid to performing rights organizations (PROs), such as ASCAP, BMI and SESAC, for the digital public performance of the underlying musical composition. It also rejected a proposal that analog over-the-air broadcast music radio be used as a benchmark, with reference to musical composition royalties paid by such broadcasters to the PROs. Based on the evidence before it, the Copyright Royalty Board found that the most appropriate benchmark agreements are those in the market for interactive webcasting covering the digital performance of sound recordings, with appropriate adjustments.[30]

In summary, the Copyright Royalty Board's decision, like that of its predecessor, the CARP, declines to delineate a separate class or to integrate a separate market analysis on behalf of "small" webcasters.

Public Reaction

The expiration of the option to pay a percentage of revenues, to be replaced by a minium payment, per-song per- listener formula, was, predictably, not well received in the small webcasting business community, among others.[31] Some Members of Congress voiced concern as well.[32]

Parties to the proceeding are appealing the Board's decision. On April 16, 2007, the Copyright Royalty Board issued an order denying rehearing.[33] On May 30, 2007, several parties, including the Digital Media Association, National Public Radio, and a coalition of small commercial webcasters filed suit in the U.S. Court of Appeals for the D.C. Circuit requesting a stay pending their appeal of the Board's decision.[34] The motion alleges that the Board's decision is arbitrary and capricious in several

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[29] *Id.* note 8 at 24088.

[30] *Id.* at 24092.

[31] *See, e.g.,* Robert Levine, "A Fee Per Song Can Ruin Us, Internet Radio Companies Say," THE N.Y. TIMES, March 19, 2007 at C4. Doc Searles, *Internet Radio on Death Row,* posted March 8, 2007 at [http://www.linuxjournal.com/comment/reply/1000196]; Carey Lening, "Policy Group Advocates Tech-Neutral Competitive Sound Recording Royalty Rates," 74 BNA PATENT, TRADEMARK & COPYRIGHT J. 93 (May 18, 2007).

[32] "Royalty Board Sets Webcasting Royalties, Lawmakers Quick to Respond," 73 BNA PATENT, TRADEMARK & COPYRIGHT J. 1809 (March 9, 2007).

[33] U.S. Copyright Royalty Judges, *Order Denying Motions for Rehearing* at [http://www.loc.gov/crb/proceedings/2005-1/motion-denial.pdf].

[34] Digital Media Assoc. v. Copyright Royalty Board, No. 07-1172 (D.C.Cir. May 30, 2007). Motion for stay pending appeal available online at BNA PATENT, TRADEMARK & COPYRIGHT J., *at* [http://pub.bna.com/ptcj/DMAMay31.pdf].

respects, but particularly with regard to the requirement of a minimum fee "per station" or "per channel."[35] On July 9, 2007, a three-judge panel of the court of appeals denied the emergency motion to delay the CRB decision pending the parties' appeal.[36] A decision in the case has not yet been reached as of the date of this report.

Meanwhile, in parallel to the judicial proceedings, private negotiations between SoundExchange, the organization charged with collecting and distributing performance royalties, and both large and small webcasters are currently ongoing, in an attempt to reach a compromise royalty rate agreement that would serve as an alternative to the payment scheme provided by the CRB decision. Should the negotiations between the parties fail to reach a settlement, webcasters who did not remit the required royalty payments by the July 15, 2007, deadline may be responsible for substantial late fees, as interest has been accruing on overdue payments since that date.[37]

In response to a request from the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property, SoundExchange offered in May 2007 to extend the terms of the SWSA, with some modifications, to certain qualified small webcasters through 2010.[38] "Small" webcasters, those with annual revenues of less than $1.25 million, could pay royalties based on a percentage of revenue model, that is, fees of 10 percent of all gross revenue up to $250,000, and 12 percent for gross revenue above that amount. SoundExchange's proposal for small webcasters, however, has been met by criticism that the deal would effectively restrict small webcasters from becoming larger, more profitable businesses and would limit the diversity of music that may be played.[39]

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[35] Plaintiff/Appellants argue that a minimum fee per channel or station would lead to billions of dollars in royalty payments, when the prior minimum fee for each licensee, regardless of channels or stations, could not exceed $2500. *Id.* at 11.

[36] Carey Lening, "Inslee Vows Not to Let Web 'Music Die,' But Court Won't Delay New Royalty Rates," 74 BNA PATENT, TRADEMARK & COPYRIGHT J. 1826 (July 13, 2007).

[37] Jeff Cox, "Internet Radio Gets a Reprieve," CNNMoney.com (July 17, 2007), *at* [http://money.cnn.com/2007/07/17/technology/internet_radio/].

[38] Press Release, SoundExchange, "SoundExchange Extends Offer to Small Webcasters," May 22, 2007, *available at* [http://sev.prnewswire.com/entertainment/20070522/DCTU07222052007-1.html].

[39] *See* David Oxenford, "Another Offer From SoundExchange — Still Not a Solution," *at* [http://www.broadcastlawblog.com/archives/internet-radio-another-offer-from-soundexchange-still-not-a-solution.html]. These critics observe that the agreement only allows the small webcasters to play sound recordings from SoundExchange members, which does not include many independent artists and record labels. Webcasters interested in playing music made by artists not represented by SoundExchange must pay the full royalty rates set forth in the Copyright Royalty Board's decision. *Id.*

Another proposal that has been discussed and subsequently agreed to between several of the largest webcasters and SoundExchange is a $50,000 per year cap on the $500 annual-per-channel minimum fee through 2010.[40] In exchange for this cap, the webcasters have agreed to provide SoundExchange with a comprehensive annual accounting of all songs performed (24 hours a day, 365 days a year) and to form a committee with SoundExchange to evaluate the issue of unauthorized copying of Internet radio streams (a practice known as "streamripping," or the process of converting ephermeral Internet-streamed content into permanent recordings). The agreement does not require webcasters to implement technological measures aimed at preventing their listeners from engaging in streamripping, however.[41]

In a unilateral offer put forth by SoundExchange, qualified small webcasters (those earning $1.25 million or less in total revenues) would be permitted to stream sound recordings of all SoundExchange members by paying royalties under the old percentage-of-revenue scheme.[42] Over twenty small webcasters have since accepted this offer, the terms of which are retroactive to January 1, 2006, and continue through December 31, 2010.[43]

Although the parties have agreed to cap the annual-per-channel minimum royalty fee at $50,000, the actual royalty rates (per-song, per-listener) mandated by the CRB's decision have not yet been altered through settlement negotiations. These royalty rates, which increase each year until 2010, are still a cause for concern among webcasters that did not accept or did not qualify for SoundExchange's offer to small webcasters.

Congressional Response

Two bills related to the CRB's decision were introduced in the 110th Congress that would nullify the Board's decision and substitute different rates and terms. Another bill was introduced and passed by the 110th Congress that authorizes SoundExchange to enter into settlement agreements with webcasters that effectively replace the CRB's decision.

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[40] Press Release, SaveNetRadio, "Agreement Reached to Remove Billion Dollar Threat to Webcasters," August 23, 2007, *at* [http://www.savenetradio.org/press_room/press_releases/070823-minimum_fee_cap.pdf].

[41] Press Release, SoundExchange, "SoundExchange Reaches Accord on Minimum Fee Cap," August 23, 2007, *available at* [http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-23-2007/0004650734&EDATE=].

[42] Press Release, SoundExchange, "SoundExchange Offers Small Webcasters Discounted Rate Agreement Through 2010," August 21, 2007, *available at* [http://sev.prnewswire.com/entertainment/20070821/DC0192021082007-1.html].

[43] Press Release, SoundExchange, "Small Webcasters Embrace SoundExchange Offer on Discounted Rate," Sept. 18, 2007, *available at* [http://sev.prnewswire.com/computer-electronics/20070918/DCTU04318092007-1.html].

H.R. 2060, 110th Cong., 1st Sess. (2007), the Internet Radio Equality Act. H.R. 2060 would expressly nullify the Board's rate determination and repeal the willing buyer/willing seller standard under § 114(f)(2)(B). It would replace the standard with objectives set forth under 17 U.S.C. § 801(b)(1), namely, that rates be calculated to realize the objectives:

> (A) To maximize the availability of creative works to the public.
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[44]

These standards apply to terms and rates for other compulsory license royalty payments, in general,[45] and to the preexisting subscription services eligible under § 114(d)(2).[46] Hence, it is the goal of the legislation to create "royalty parity"among the different delivery systems.[47] The bill would cap a minimum annual royalty at $500 for each service provider.[48]

For the period covered by the Board's decision, that is, from January 1, 2006, through December 31, 2010, rates established by the bill would be as follows:

- 0.33 cents per hour of sound recordings transmitted to a single listener; or,
- 7.5 percent of the annual revenues received by the provider that are directly related to the provider's digital transmissions of sound recordings.

Providers could select their payment method. Hence, all nonsubscription, noninteractive Internet radio webcasters eligible for the statutory license under § 114(f) would have the option of paying pursuant to a per-hour, per-listener or percentage-of-revenue basis. For the next round of royalty rates, the Board would

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[44] 17 U.S.C. § 801(b)(1).

[45] Specifically, these objectives are designed to determine reasonable royalty payments under §§ 112(e), 114, 115, 116, 118, 119 and 1004. *Id.*

[46] The preexisting subscription services include satellite digital audio radio services. For more background, see Library of Congress, Copyright Office, *Designation as a Preexisting Subscription Service: Final Order,* 71 FED. REG. 64639 (November 3, 2006), available online at [http://www.copyright.gov/fedreg/2006/71fr64639.pdf].

[47] 153 CONG. REC. E874 (daily ed. April 26, 2007) (statement of Rep. Inslee).

[48] H.R. 2060, § 3.

employ the more flexible standards under § 801, which are used in connection with preexisting subscription services under § 114(f)(1).

The bill would amend 17 U.S.C. § 118, entitled "Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting," which includes a compulsory license for noncommercial broadcasters, such as National Public Radio, to include digital performance of sound recordings, i.e., webcasting. It would broaden the scope of "nonprofit institution" to encompass college radio.[49] It includes a transitional rate of 1.5 times the total fees paid for applicable usage in the year 2004.

Finally, the bill requires analysis and reports on the competitiveness of the Internet radio market place and other matters by the National Telecommunications and Information Administration in the Department of Commerce, the Federal Communications Commission, and the Corporation for Public Broadcasting.

S. 1353, 110th Cong., 1st Sess. (2007), the Internet Radio Equality Act. Introduced in the Senate as a companion to H.R. 2060, S. 1353 takes the same general approach as the House bill. It has slightly different transition rates for noncommercial broadcasters under § 118, and omits the reporting requirements in the House bill.

The sponsors in both the House and the Senate emphasize that the goal of the legislation is to promote greater equality, that is rate parity, among webcasters who utilize compulsory licensing.[50] Unlike the SWSA, it is not directed solely at small commercial webcasters. It does not, however, reach the historically based exemption that terrestrial broadcasters receive from paying any copyright royalty for the performance of sound recordings.

P.L. 110-435, the Webcaster Settlement Act of 2008. The Webcaster Settlement Act of 2008, H.R. 7084, was introduced on September 25, 2008, by Representative Inslee and then subsequently approved by voice vote in the House on September 27 and by unanimous consent in the Senate on September 30. It was signed by the President on October 16 (P.L. 110-435). The purpose of the act is to provide limited statutory authority for SoundExchange to negotiate and enter into alternative royalty fee agreements with webcasters that would replace the rates established under the CRB's decision, while Congress is in recess. Under current law, such privately negotiated agreements are not effective without congressional approval *after* the CRB has issued a decision on royalties, and thus the parties would continue to be bound by the CRB decision.[51] However, the act provides a limited

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[49] 153 CONG. REC. S5931 (daily ed. May 10, 2007) (statement of Sen. Wyden).

[50] A broader approach to technology-neutral music licensing is set forth in S. 256, 110th Cong., 1st Sess. (2007). For background, see CRS Report RL33922, *Platform Equality and Remedies for Rights Holders in Music Act of 2007 (S. 256): Section-by-Section Analysis*, by Kate M. Manuel and Brian T. Yeh.

[51] *See* 154 CONG. REC. H10279 (daily ed. Sept. 27, 2008) (statement of Rep. Howard Berman) ("Because the parties will not be able to finish their negotiations before Congress

(continued...)

period of time for reaching voluntary accords, as it terminates SoundExchange's authority to make settlements with webcasters on February 15, 2009.[52] These agreements "shall be binding on all copyright owners of sound recordings and other persons entitled to payment ... in lieu of any determination [of royalty rates] by the Copyright Royalty Judges."[53] However, the act does *not* mandate that SoundExchange negotiate agreements with webcasters.[54]

The act amends 17 U.S.C. § 114(f)(5), which had been added to the Copyright Act by the "Small Webcaster Settlement Act of 2002."[55] The act deletes references to "small" webcasters, thereby allowing the section to pertain to all webcasters regardless of size.[56] The act also amends the section to state that agreements "may" include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and a minimum fee; the section originally provided that agreements "shall" contain these terms.[57] It also provides that the terms of a negotiated agreement may be effective for up to a period of 11 years beginning on January 1, 2005.[58] The act also permits any agreement to be precedential in future CRB rate-making proceedings, if the parties to the agreement so expressly authorized.[59] Finally, the act declares that nothing in the act (or any agreement entered into under this act) shall be taken into account by the U.S. Court of Appeals for the District of Columbia Circuit in its review of the May 1, 2007, determination of royalty rates by the Copyright Royalty Judges.[60]

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[51] (...continued)
recesses, however, and because authority by Congress is required for a settlement to take effect under the government compulsory license, we are pushing this legislation that will grant such authority and hope the negotiations will continue in a positive direction for both sides.").

[52] H.R. 7084, § 2(5).

[53] H.R. 7084, § 2(1)(C), modifying 17 U.S.C. § 114(f)(5)(A).

[54] H.R. 7084 leaves unchanged language in 17 U.S.C. § 114(f)(5)(A) that notes: "The receiving agent [SoundExchange] shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement."

[55] P.L. 107-321.

[56] H.R. 7084, §§ 2(1)(A), 2(2), 3(B), 4(A).

[57] H.R. 7084, § 2(1)(D).

[58] H.R. 7084, § 2(1)(B).

[59] H.R. 7084, § 2(3)(C).

[60] H.R. 7084, § 2(4)(B).