

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

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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 by Internet radio broadcasters, or "webcasters," for the period January 1, 2006, through December 31, 2010. The new rates went into effect on July 15, 2007. Several parties, including the Digital Media Association, National Public Radio, and a coalition of small commercial webcasters, appealed the CRB's decision to the U.S. Court of Appeals for the District of Columbia Circuit; a decision in the case is not expected until summer 2009. In the meantime, webcasters who stream copyrighted music to their listeners are obliged to pay royalties to the sound recording copyright owners at the new statutory rates, in the absence of privately negotiated settlements with SoundExchange, the entity that collects performance royalties on behalf of sound recording copyright owners and recording artists.

The Webcaster Settlement Act (WSA) of 2008 (P.L. 110-435) was signed into law on October 16, 2008. The purpose of the act was to simplify the approval and adoption process regarding any alternative royalty rates negotiated between SoundExchange and webcasters that substitutes for the statutory rates established under the CRB's decision. Before SoundExchange's authority to make such settlements expired on February 15, 2009, pursuant to a sunset provision of the WSA, three agreements were made. The Corporation for Public Broadcasting and SoundExchange reached a "comprehensive agreement" on the royalty rates to be paid for Internet streaming of sound recordings by approximately 450 public radio webcasters. The agreement covers a royalty period from January 1, 2005, through December 31, 2010. The National Association of Broadcasters (NAB) and SoundExchange negotiated a settlement agreement covering an extended royalty period (from January 1, 2006, through December 31, 2015), for terrestrial AM or FM radio broadcasters who stream their signal or other programming on the Internet. Finally, a group of "small" webcasters reached an agreement with SoundExchange for the same royalty period as the NAB's license. However, other webcasters, including the largest commercial webcasters such as Pandora, Live365, and RealNetworks, did not reach an agreement with SoundExchange prior to the termination of SoundExchange's authority to make such agreements under the WSA.

In the 111th Congress, the Webcaster Settlement Act of 2009 (H.R. 2344, S. 1145) has been introduced that would reinstate SoundExchange's authority to negotiate settlement agreements with webcasters for a period of 30 days from the date of the measure's enactment. The House Judiciary Committee voted to report H.R. 2344 favorably to the House on May 13, 2009. The Senate bill has been referred to the Senate Judiciary Committee.

This report surveys the legislative history of this issue, 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 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

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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 (H.R. 848, S. 379) would eliminate this royalty exemption that applies to traditional radio stations and attempt to bring parity to the sound recording performance royalty system. For more information on this issue, see CRS Report RL34411, *Expanding the Scope of the Public Performance Right for Sound Recordings: A Legal Analysis of the Performance Rights Act (H.R. 848 and S. 379)*, by Brian T. Yeh.

[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.

[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
(continued...)

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]

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]

(...continued)

> 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.

[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 (continued...)

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, in March 2007 the Copyright Royalty Board announced royalty rates for the period that commenced (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]

(...continued)

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.

[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 3,000 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).

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

[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, cost, and risk.

> 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 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]

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[27] 72 FED. REG. at 24087.

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

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

[30] *Id.* at 24092.

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 before the CRB 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 alleged that the Board's decision is arbitrary and capricious in several respects, but particularly with regard to the requirement of a minimum fee "per station" or "per channel."[35] On July 11, 2007, a three-judge panel of the court of appeals denied the emergency motion to delay the CRB decision pending the parties' appeal.[36] The separate appeals by the parties have been consolidated into one case.[37] Oral argument was heard in the case on March 19, 2009.[38] A decision is likely to be issued by summer 2009.

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

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[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.

[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] Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board, U.S. Court of Appeals for the District of Columbia Circuit, Docket 07-1123.

[38] Paul Maloney, *Webcasters' Oral Arguments in CRB Appeal Scheduled for March 19,* RADIO AND INTERNET NEWSLETTER (RAIN), Jan. 27, 2009; Michael Schmitt, *Attorneys Argue During Webcast Royalty Appeal that Library of Congress' CRB Appointments Unconstitutional,* RADIO AND INTERNET NEWSLETTER (RAIN), Mar. 20, 2009.

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.[39]

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.[40] "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, was 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.[41]

Another proposal that was 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.[42] In exchange for this cap, the webcasters 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 ephemeral 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.[43]

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.[44] 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.[45]

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

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

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

[41] *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.*

[42] 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.

[43] 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=.

[44] 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.

45 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.

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 (H.R. 2060 and S. 1353) that would have nullified the Board's decision and substituted different rates and terms. Neither were enacted. However, another bill was passed by the 110th Congress (the Webcaster Settlement Act of 2008, P.L. 110-435) that authorized SoundExchange to enter into settlement agreements with webcasters that effectively replace the CRB's decision. Such authority expired on February 15, 2009. In the 111th Congress, the Webcaster Settlement Act of 2009 (H.R. 2344, S. 1145) has been introduced that would reinstate SoundExchange's authority to negotiate settlement agreements with webcasters for a period of 30 days from the date of the measure's enactment.

H.R. 2060, 110th Cong., 1st Sess. (2007), the Internet Radio Equality Act

H.R. 2060 would have expressly nullified the Board's rate determination and repeal the willing buyer/willing seller standard under § 114(f)(2)(B). It would have replaced 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.[46]

These standards apply to terms and rates for other compulsory license royalty payments, in general,[47] and to the preexisting subscription services eligible under § 114(d)(2).[48] Hence, it was

[46] 17 U.S.C. § 801(b)(1).

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

[48] 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.

the goal of the legislation to create "royalty parity" among the different delivery systems.[49] The bill would have capped a minimum annual royalty at $500 for each service provider.[50]

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 have been 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 have selected their payment method. Hence, all nonsubscription, noninteractive Internet radio webcasters eligible for the statutory license under § 114(f) would have had the option of paying pursuant to a per-hour, per-listener or percentage-of-revenue basis. For the next determination of royalty rates (governing the period from 2011-2015), the Board would have been required to apply the more flexible standards under § 801, which are already used in connection with preexisting subscription services under § 114(f)(1).

The bill would have amended 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 have broadened the scope of "nonprofit institution" to encompass college radio.[51] It included a transitional rate of 1.5 times the total fees paid for applicable usage in the year 2004.

Finally, the bill would have required 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 took the same general approach as the House bill. It had slightly different transition rates for noncommercial broadcasters under § 118, and omitted the reporting requirements in the House bill.

The sponsors in both the House and the Senate emphasized that the goal of the legislation was to promote greater equality, that is rate parity, among webcasters who utilize compulsory licensing.[52] Unlike the SWSA, it was not directed solely at small commercial webcasters. Furthermore, it did not alter the historically based exemption that terrestrial broadcasters receive from paying any copyright royalty for the performance of sound recordings.

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[49] 153 CONG. REC. E874 (daily ed. April 26, 2007) (statement of Rep. Inslee).

[50] H.R. 2060, § 3.

[51] 153 CONG. REC. S5931 (daily ed. May 10, 2007) (statement of Sen. Wyden).

[52] 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.

P.L. 110-435, the Webcaster Settlement Act of 2008

The Webcaster Settlement Act (WSA) 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 President Bush on October 16, 2008 (P.L. 110-435). The purpose of the act was 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 was in recess for the November 2008 elections.[53] However, the act provided a limited period of time for reaching voluntary accords, as it terminated SoundExchange's authority to make settlements with webcasters on February 15, 2009.[54] 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."[55] However, the act did *not* mandate that SoundExchange negotiate agreements with webcasters.[56]

The WSA amended 17 U.S.C. § 114(f)(5), which had been added to the Copyright Act by the "Small Webcaster Settlement Act of 2002."[57] The act deleted references to "small" webcasters, thereby allowing the section to pertain to all webcasters regardless of size.[58] The act also amended 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.[59] The WSA also provided that the terms of a negotiated agreement may be effective for up to a period of 11 years beginning on January 1, 2005.[60] The act permitted any agreement to be precedential in future CRB rate-making proceedings, if the parties to the agreement so expressly authorized.[61] Finally, the act declared that nothing in the WSA (or any agreement entered into under the WSA) 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.[62] As noted earlier, oral arguments in this case were heard on March 19, 2009.

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[53] A privately negotiated agreement is not effective without congressional approval *after* the CRB has issued a decision on royalty rates for a statutory license—thus, the parties would continue to be bound by the CRB decision. *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 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.").

[54] H.R. 7084, § 2(5).

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

[56] 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."

[57] P.L. 107-321.

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

[59] H.R. 7084, § 2(1)(D).

[60] H.R. 7084, § 2(1)(B).

[61] H.R. 7084, § 2(3)(C).

[62] H.R. 7084, § 2(4)(B).

Agreements Reached Under the WSA of 2008

Three negotiated royalty agreements have been made under the authority of the Webcaster Settlement Act of 2008. The Corporation for Public Broadcasting (CPB) and SoundExchange announced on January 15, 2009, that they had reached a "comprehensive agreement" on the royalty rates to be paid for Internet streaming of sound recordings by approximately 450 public radio webcasters, including CPB-supported station websites, NPR, NPR members, National Federation of Community Broadcasters members, American Public Media, Public Radio Exchange, and Public Radio International.[63] The agreement, which substitutes for the statutory rates determined by the CRB in May 2007, covers a royalty period from January 1, 2005,[64] through December 31, 2010. Under the agreement, CPB is required to pay SoundExchange a single, "up-front" flat-fee royalty payment of $1.85 million. In addition, CPB, on behalf of the public radio system, is to provide SoundExchange with consolidated usage and playlist reporting in order to "improve the efficiency of the payment process helping to ensure that performers and sound recording copyright owners are accurately paid for the use of their recordings."[65] As a condition of the agreement, NPR also agreed to drop its appeal of the CRB's royalty rate decision.

On February 15, 2009, the National Association of Broadcasters (NAB) and SoundExchange informed the Copyright Office that they had made an agreement that covers an extended royalty period (from January 1, 2006, through December 31, 2015) for terrestrial AM or FM radio broadcasters (licensed by the Federal Communications Commission) who simulcast their signal or stream other programming over the Internet.[66] The negotiated agreement calls for each broadcaster to pay an annual minimum fee of $500 for each of its channels, although no broadcaster is required to pay more than $50,000 on the minimum fees.[67] In addition, broadcasters must pay royalty rates on a per-performance basis, as follows:

[63] Corporation for Public Broadcasting, *Agreement Reached for Public Radio's Webcasting Royalty Rates,* available at http://www.cpb.org/pressroom/release.php?prn=699.

[64] The 2005 date is not a typographic error. The Webcaster Settlement Act of 2008 permitted parties to negotiate rates governing a royalty period "of not more than 11 years beginning on January 1, 2005." P.L. 110-435, § 2 (amending 17 U.S.C. § 114(f)(5)(A)). Therefore, the law allowed negotiated agreements to apply retroactively from the start of 2005, compared with the CRB's decision that covers a royalty period beginning on January 1, 2006. The Corporation for Public Broadcasting's license establishes a royalty payment for a period that began on January 1, 2005, whereas the other two agreements discussed in this section use royalty periods that commence on January 1, 2006.

[65] Corporation for Public Broadcasting, *Agreement Reached for Public Radio's Webcasting Royalty Rates,* available at http://www.cpb.org/pressroom/release.php?prn=699.

[66] U.S. Copyright Office, Library of Congress, *Notification of Agreements Under the Webcaster Settlement Act of 2008*, 74 Fed. Reg. 9293, 9299 (Mar. 3, 2009).

[67] *Id.* at 9300.

Table 1. Royalty Rates for Local Radio Broadcasters Who Stream Music Over the Internet

Year	Rate Per Performance (per song, per listener)
2006	$0.0008
2007	$0.0011
2008	$0.0014
2009	$0.0015
2010	$0.0016
2011	$0.0017
2012	$0.0020
2013	$0.0022
2014	$0.0023
2015	$0.0025

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 9293, 9300 (Mar. 3, 2009).

Broadcasters must also submit, on a monthly basis, "census" reports to SoundExchange that detail information about the songs that they play over the Internet, including song title, artist, album, number of times a song is played, and the number of listeners for each song.[68] "Small" broadcasters that stream less than 27,777 aggregate tuning hours per year may pay $100 per year to obtain a waiver from this detailed annual census reporting requirement.[69]

Finally, on February 15, 2009, a limited number of "small" webcasters reached an agreement with SoundExchange for the same royalty period as the NAB's license (2006-2015).[70] The webcasters that are party to this agreement must comply with census reporting requirements[71] and pay annual minimum fees that vary from $500 to $5,000, depending on specified gross revenue limits.[72] The negotiated royalty rate for these small webcasters[73] is as follows:

[68] *Id.* at 9301.

[69] *Id.* at 9300.

[70] This group of "small webcasters" are Attention Span Radio; Blogmusik (Deezer.com); Born Again Radio; Christmas Music 24/7; Club 80's Internet Radio; Dark Horse Productions; Edgewater Radio; Forever Cool (Forevercool.us); Indiwaves (Set YourMusicFree.com); Ludlow Media (MandarinRadio.com); Musical Justice; My Jazz Network; PartiRadio; Playa Cofi Jukebox (Tropicalglen.com); Soulsville Online; taintradio; Voice of Country; and Window To The World Communications (WFMT.com). *Id.* at 9294, note 1.

[71] *Id.* at 9305.

[72] For example, there is a $500 annual minimum fee for "microcasters" who had gross annual revenues not exceeding $5,000 and made transmissions not exceeding 18,067 aggregate tuning hours; a $2,000 minimum fee for small webcasters with less than $50,000 gross revenues; and a $5,000 minimum fee for small webcasters with gross revenues of more than $50,000. *Id.* at 9303, 9306.

[73] These royalty rates do not apply to "microcasters," who need only pay the minimum annual fees and a $100 fee to be exempt from the census reporting requirements. *Id.* at 9303.

Table 2. Royalty Rates for Eligible Small Webcasters, 2006-2015

Transmissions Not Exceeding 5,000,000 Aggregate Tuning Hours per month –	Transmissions Exceeding 5,000,000 Aggregate Tuning Hours per month –
the greater of: (1) 10% of the small webcaster's first $250,000 in gross revenues, or 12% of any gross revenues in excess of $250,000, or (2) 7% of the small webcaster's annual expenses	Either the rates provided by the CRB for the royalty period 2006-2010 or the "then-applicable commercial webcasting rates" for the royalty period 2011-2015.

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 9293, 9303 (Mar. 3, 2009).

All of the three agreements described above provide that their rates and terms are nonprecedential, and "shall not be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of" royalties for Internet transmission of copyrighted music.[74]

H.R. 2344, S. 1145, the Webcaster Settlement Act of 2009

Although SoundExchange successfully negotiated new rates with certain categories of webcasters discussed above, SoundExchange did not reach agreements with all webcasters, including the largest commercial webcasters such as Pandora, Live365, and RealNetworks, prior to the February 15, 2009, sunset of SoundExchange's settlement authority under the WSA of 2008. SoundExchange appealed to Congress to renew such authority due to "positive developments in its discussions" with these webcasters.[75] The Webcaster Settlement Act of 2009 (H.R. 2344, S. 1145) was introduced in the House on May 12, 2009, by Representative Inslee, and in the Senate by Senator Wyden on May 21, 2009. The bills would amend Section 114 of the Copyright Act to provide that SoundExchange's authority to negotiate agreements under the Webcaster Settlement Act of 2008 would expire "at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009" (rather than February 15, 2009, as the statute currently requires). Effectively, this change would reinstate SoundExchange's settlement authority for a 30-day period after enactment of the legislation. The House Judiciary Committee voted to report H.R. 2344 favorably to the House on May 13, 2009. The Senate bill has been referred to the Senate Judiciary Committee.

CRB Proceedings to Determine Royalty Rates for 2011-2015

Although the past two years have been consumed with the reactions to the CRB's May 2007 decision in various private and public settings, time marches on, and the CRB announced on January 5, 2009, that it would soon begin the third proceeding to determine the royalty rates for

[74] *Id.* at 9295, 9302.

[75] SoundExchange, *SoundExchange Statement Regarding Seeking an Extension of the Webcaster Settlement Act to Facilitate Webcaster Negotiations, available at* http://www.mi2n.com/press.php3?press_nb=119838.

the statutory license covering Internet transmissions of sound recordings, applicable to the next royalty period that runs from January 1, 2011, through December 31, 2015.[76]

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[76] Copyright Royalty Board, Library of Congress, *Digital Performance in Sound Recordings and Ephemeral Recordings*, 74 Fed. Reg. 318 (Jan. 5, 2009).