

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 affected 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. The appellants argued that the rates were unreasonably high and that the absence of a cap on minimum fees paid per licensee was arbitrary and capricious. On July 10, 2009, the federal court of appeals issued a decision that upheld nearly all aspects of the CRB's determination of rates, although it vacated the $500 minimum annual fee per channel or station and remanded that portion of the determination for the CRB to reconsider.

Webcasters that stream copyrighted music to their listeners are obliged to pay royalties to the sound recording copyright owners at the new statutory rates established by the CRB, 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. Such voluntary agreements were encouraged and facilitated by two recent laws, the Webcaster Settlement Act of 2008 (WSA of 2008; P.L. 110-435) and the Webcaster Settlement Act of 2009 (WSA of 2009; P.L. 111-36). The purpose of these acts was to simplify the approval and adoption process regarding any alternative royalty rates negotiated between SoundExchange and individual or groups of webcasters that substitute for the statutory rates established under the CRB's decision. These settlements generally permit a webcaster to pay lower rates and may cover a longer royalty period. Before SoundExchange's authority to make settlements with webcasters expired on February 15, 2009, pursuant to a sunset provision of the WSA of 2008, three webcaster settlement agreements were reached with the Corporation for Public Broadcasting (for the online streaming of public radio stations), the National Association of Broadcasters (for online simulcasts by FM and AM radio stations), and a group of "small" webcasters. The WSA of 2009 reinstated SoundExchange's authority to negotiate settlements with webcasters for a period of 30 days starting on July 1, 2009. Under the WSA of 2009, SoundExchange negotiated a royalty agreement that is available to certain "pureplay" commercial webcasters (those that derive nearly all of their revenue from the streaming of sound recordings) such as Pandora, Live365.com, and AccuRadio. In addition, SoundExchange reached settlements with noncommercial educational webcasters (college-affiliated Internet radio stations), noncommercial religious broadcasters (that stream their AM/FM programming over the Internet), Sirius XM (concerning Internet streaming of Sirius programming as opposed to its satellite-transmitted programming), and signed a new agreement with the Corporation for Public Broadcasting that extends the earlier agreement made under the WSA of 2008.

Although the settlements cover the same royalty period as the CRB's determination (from 2006 through 2010), some rate agreements extend beyond that period, until the end of 2015. Thus, webcasters that are parties to extended agreements need not participate in the CRB proceedings to determine statutory royalty rates for the period 2011 to 2015, which were initiated in January 2009. Any webcaster that chooses not to opt-in to a settlement agreement with SoundExchange must instead comply with the applicable statutory rates and terms established by the CRB for the period 2006-2010, and will be subject to any new rates that the CRB determines for 2011-2015.

This report surveys the legislative history of this issue, the CRB's rate decision, and the congressional and public 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[9]—must negotiate a license, including royalty rates, directly with copyright owners.

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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] The Copyright Act defines "interactive service" to mean a service "that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording ..., which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7).

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)[10] 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.[11]

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.[12]

Background

The initial ratemaking proceeding for statutory royalty rates for webcasters for the period 1998 through 2005 (referred to as "Webcaster I") 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.[13] 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

[10] 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.

[11] The U.S. Court of Appeals for the Second Circuit recently ruled that a webcasting service that "specially create[s]" individualized Internet radio stations for users based on the users' ratings of songs, artists, and albums is *not* an "interactive service" within the meaning of the DMCA, and thus it may utilize the statutory license. Arista Records, LLC v. Launch Media, Inc., No. 07-2576-cv, 2009 WL 2568733 (2d Cir. Aug. 21, 2009), at *12. According to the appellate court, allowing such user input does not amount to the webcasting service providing "sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music ... " *Id.*

[12] 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. *See* Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 942-43 (D.C. Cir. 2005)(explaining that ephemeral recordings are "temporary copies necessary to facilitate the transmission of sound recordings during internet broadcastings.").

[13] 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.

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[14] 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.[15]

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.[16] 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.[17]

Copyright Royalty Board Rates for 2006-2010

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.[18]

Notice announcing commencement of the "Webcaster II" proceedings was published on February 16, 2005.[19] On March 9, 2007, the Copyright Royalty Board issued its decision, which was published as a Final Rule and Order on May 1, 2007.[20] The final determination of the CRB establishes new rates for commercial and noncommercial webcasters who qualify for the § 114 compulsory license;[21] the decision is effective on July 15, 2007.[22] Rates are as follows:

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[14] 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.

[15] 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.

[16] The Copyright Royalty Board is "the institutional entity in the Library of Congress that ... house[s] the Copyright Royalty Judges." 37 C.F.R. § 301.1. For more background, see CRS Report RS21512, *The Copyright Royalty and Distribution Reform Act of 2004*, by Robin Jeweler.

[17] 17 U.S.C. § 804(b)(3).

[18] *Id.*

[19] 70 FED. REG. 7970 (2005).

[20] 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.

[21] 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.

[22] 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 (continued...)

- For commercial webcasters: $.0008 per performance[23] 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.[24]
- For noncommercial webcasters: (i) For Internet transmissions totaling less than 159,140 Aggregate Tuning Hours (ATH) a month, an annual per channel[25] 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,[26] 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.[27]
- 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.[28] The 's determination is informed by the "Webcaster I" initial royalty

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new rate scheme).

[23] 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.

[24] 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).

[25] 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.

[26] 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.

[27] 37 C.F.R. § 380.3.

[28] 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

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proceedings of the CARP. 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 the following:

> 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.[29]

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.[30]

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.[31]

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

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> the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

[29] 72 FED. REG. at 24087.

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

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

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.[32]

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.

Reactions and Responses to the CRB Decision

The expiration of the option to pay a percentage of revenues, to be replaced by a minimum payment, per-song per-listener formula, was, predictably, not well received in the small webcasting business community, among others.[33] Some Members of Congress voiced concern as well.[34] What follows below are descriptions of the responses to the CRB decision in different settings: the negotiating table, the federal courts, and the Congress.

Private Negotiations

Following the issuance of the CRB decision, private negotiations between SoundExchange, the organization charged with collecting and distributing performance royalties, and both large and small webcasters were initiated 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.[35] 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 Small Webcaster Settlement Act of 2002, with some modifications, to certain qualified small webcasters through 2010.[36] "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

[32] *Id.* at 24092.

[33] *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).

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

[35] The Copyright Act provides that "[l]icense agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges." 17 U.S.C. § 114(f)(3).

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

webcasters from becoming larger, more profitable businesses and would limit the diversity of music that may be played.[37]

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.[38] 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.[39]

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.[40] 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.[41]

Judicial Actions

Parties to the "Webcaster II" proceeding before the CRB appealed the board's decision. On April 16, 2007, the Copyright Royalty Board issued an order denying rehearing.[42] 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.[43] 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." On July 11, 2007, a three-judge

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[37] *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.*

[38] 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.

[39] 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=.

[40] 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.

41 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.

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

[43] 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. The U.S. Court of Appeals for the D.C. Circuit has exclusive jurisdiction to hear an appeal of a CRB determination by any aggrieved participant in the proceeding who would be bound by the determination. 17 U.S.C. § 803(d)(1). The appellate court has the power to modify, vacate, or remand any portion of the CRB's determination. *Id.* at § 803(d)(3).

panel of the court of appeals denied the emergency motion to delay the CRB decision pending the parties' appeal.[44] The five separate appeals by the parties were consolidated into one case.

On July 10, 2009, the federal court of appeals issued an opinion in the case that affirmed nearly all aspects of the "Webcaster II" royalty rate proceeding, although it vacated the $500 minimum annual fee per channel or station and remanded that portion of the determination for the CRB to reconsider.[45] In evaluating the CRB's determination, the appellate court followed the standard of review provided for under the Administrative Procedure Act (APA); that is, the court was required to "uphold the results of adversarial agency proceedings unless they are arbitrary, capricious, contrary to law, or not supported by substantial evidence."[46] The court admitted that "the standard of review applicable in ratemaking cases is highly deferential."[47] According to the court, the webcasters failed to show that the CRB's rates satisfied any of the criteria under the APA that would permit the court to set them aside.[48] The court also upheld the CRB's decision to reject the small commercial webcasters' arguments for including a percentage of revenue royalty fee option, noting that the Copyright Royalty Judges are

> not required to preserve the business of every participant in a market. They are required to set 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." 17 U.S.C. § 114(f)(2)(B). If small commercial webcasters cannot pay the same rate as other willing buyers and still earn a profit, then the [Copyright Royalty] Judges are not required to accommodate them.[49]

While the D.C. Circuit Court of Appeals sustained the royalty rates that were the result of the "Webcaster II" proceeding, the court vacated the minimum fee provision of the CRB determination that would have required webcasters to pay a minimum fee of $500 per channel or station. The court first observed that the Copyright Act requires the CRB to set a minimum fee[50] that licensees must pay to cover the "administrative costs of the copyright owners in administering the license."[51] While acknowledging that some webcasters represented by the Digital Media Association had reached an agreement with SoundExchange in 2007 to cap the minimum fees at $50,000 per year per license, the court explained that not all parties that would be bound by the CRB decision had contracted around the statutory minimum fee requirement and thus the issue was not moot.[52] The court expressed concern that the CRB's determination on minimum fees did not reveal an awareness of the possibility of a licensee paying "hundreds of thousands of dollars or more" in minimum fees, depending on the potential interpretation of the phrase "per channel or station":

> Depending on future interpretations of "channel or station," the Judges' determination might impose enormous fees on some business models and tiny fees on others, based on regulations

[44] 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).

[45] Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd., 571 F.3d 69 (D.C. Cir. July 10, 2009).

[46] *Id.* at 75 (citing 17 U.S.C. § 803(d)(3); 5 U.S.C. § 706).

[47] *Id.* at 79.

[48] *Id.* at 80.

[49] *Id.* at 81.

[50] 17 U.S.C. § 114(f)(2)(B).

[51] *Intercollegiate Broadcast System,* 571 F.3d at 81 (citation omitted).

[52] *Id.*

> that have not yet been defined. Such a regime is arbitrary and does not appear to represent what "would have been negotiated in the marketplace between a willing buyer and a willing seller."[53]

Consequently, the appellate court remanded the minimum fee portion of the determination to the CRB for further reconsideration.[54]

Congressional Response

Two bills related to the CRB's decision were introduced in the 110th Congress (the Internet Radio Equality Act, H.R. 2060, S. 1353) that would have nullified the board's decision and substituted different rates and terms.[55] Neither were enacted, however. Instead, the 110th Congress passed 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 (P.L. 111-36) was passed to reinstate SoundExchange's authority to negotiate settlement agreements with webcasters for a period of 30 days starting on July 1, 2009.

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

The Webcaster Settlement Act of 2008 (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 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.[56] However, the act provided a

[53] *Id.* at 82.

[54] *Id. See also* Library of Congress, Copyright Royalty Board, *Proceeding of the Copyright Royalty Board; Remand,* 74 FED. REG. 38532 (Aug. 4, 2009).

[55] The Internet Radio Equality Act 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 that the board uses in setting royalty rates for webcasters with the objectives set forth under 17 U.S.C. § 801(b)(1), namely, that rates be calculated to realize the following objectives: (1) to maximize the availability of creative works to the public; (2) 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; (3) 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; and (4) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. (This "801(b)(1)" standard is currently used by the CRB in setting royalty rates for the compulsory license used by satellite radio companies and digital cable television operators that transmit sound recordings on music channels.) The legislation would have capped a minimum annual royalty at $500 for each service provider. If the bill had been enacted, providers could have elected to pay either of the following rates for the royalty period 2006-2010: 0.33 cents per hour of sound recordings transmitted to a single listener, or 7.5% of the annual revenues received by the provider that are directly related to the provider's digital transmissions of sound recordings.

[56] 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.").

limited period of time for reaching voluntary accords, as it terminated SoundExchange's authority to make settlements with webcasters on February 15, 2009.[57] 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."[58] However, the act did *not* mandate that SoundExchange negotiate agreements with webcasters.[59]

The WSA of 2008 amended 17 U.S.C. § 114(f)(5), which had been added to the Copyright Act by the Small Webcaster Settlement Act of 2002.[60] The act deleted references to "small" webcasters, thereby allowing the section to pertain to all webcasters regardless of size.[61] 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.[62] 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.[63] The act permitted any agreement to be precedential in future CRB ratemaking proceedings, if the parties to the agreement so expressly authorized.[64] Finally, the act declared that nothing in the WSA of 2008 (or any agreement entered into under it) 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.[65]

Agreements Reached Under the WSA of 2008

Three negotiated royalty agreements have been made under the authority of the WSA of 2008.

Corporation for Public Broadcasting

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.[66] The agreement, which substitutes for the statutory rates determined by the CRB in May 2007, covers a royalty period from January 1, 2005,[67] through December 31, 2010. Under

[57] H.R. 7084, § 2(5).

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

[59] 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."

[60] P.L. 107-321.

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

[62] H.R. 7084, § 2(1)(D).

[63] H.R. 7084, § 2(1)(B).

[64] H.R. 7084, § 2(3)(C).

[65] H.R. 7084, § 2(4)(B).

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

[67] The 2005 date is not a typographic error. The Webcaster Settlement Act of 2008 permitted parties to negotiate rates (continued...)

the agreement, CPB is required to pay SoundExchange a single, "up-front" flat-fee royalty payment of $1.85 million. The agreement applies to 450 public radio stations in the years 2005-2007, with an allowance for growth in the number of stations of up to 10 per year starting in 2008 (therefore a maximum of 480 stations in 2010). 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."[68] As a condition of the agreement, NPR also agreed to drop its appeal of the CRB's royalty rate decision.

National Association of Broadcasters

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.[69] 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.[70] In addition, broadcasters must pay royalty rates on a per-performance basis, as follows:

Table 1. Royalty Rates for Local Radio Broadcasters Who Stream Music Over the Internet, 2006-2015

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

(...continued)

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.

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

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

[70] *Id.* at 9300.

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.[71] "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.[72]

Certain "Small" Webcasters

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).[73] The webcasters that are party to this agreement must comply with census reporting requirements[74] and pay annual minimum fees that vary from $500 to $5,000, depending on specified gross revenue limits.[75] The negotiated royalty rate for these small webcasters[76] is as follows:

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

Transmissions Not Exceeding 5 Million Aggregate Tuning Hours per month –	Transmissions Exceeding 5 Million 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.[77]

[71] *Id.* at 9301.

[72] *Id.* at 9300.

[73] 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.

[74] *Id.* at 9305.

[75] 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.

[76] 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.

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

P.L. 111-36, 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.[78] The Webcaster Settlement Act of 2009 (WSA 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. On June 9, 2009, the House passed H.R. 2344 by voice vote under suspension of the Rules of the House. The Senate passed H.R. 2344 without amendment by unanimous consent on June 17, 2009. President Obama signed the bill on June 30, 2009 (P.L. 111-36). The WSA of 2009 reinstated SoundExchange's authority to negotiate settlement agreements for a 30-day period starting on July 1, 2009.

Agreements Reached Under the WSA of 2009

Pursuant to the WSA of 2009, SoundExchange negotiated five royalty agreements.

"Pureplay" Webcasters

The first agreement was announced on July 7, 2009, and is available to certain "pureplay" commercial webcasters (those that derive nearly all of their revenue from the streaming of sound recordings) such as Pandora, AccuRadio, and Live365.com.[79] Commercial pureplay webcasters can either opt-in to the agreement or choose not to sign onto it and instead comply with the CRB-issued rates and terms. The pureplay agreement covers three rate classes: large commercial webcasters (those exceeding $1.25 million in annual revenues); small pureplay webcasters (those with an annual gross revenue of less than $1.25 million and that do not exceed certain monthly aggregate tuning hour limits[80]); and webcasters that provide bundled, syndicated, or subscription services.[81] The pureplay webcaster agreement pertains to the royalty period starting on January 1, 2006, and ending on December 31, 2015 (although it expires at the end of 2014 for small webcasters). Commercial webcasters that want to claim the benefit of the rates and terms under this agreement must submit to SoundExchange an election form every year.[82] The agreement contains the following warning:

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[78] 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.

[79] Library of Congress, U.S. Copyright Office, *Notification of Agreements Under the Webcaster Settlement Act of 2009*, 74 FED. REG. 34796 (July 17, 2009).

[80] The average monthly aggregate tuning hours for all programming transmitted by the small webcaster may not exceed the following limits each year: (1) 2006-2008, 7 million ATH, (2) 2009, 8 million ATH, (3) 2010, 8.5 million ATH, (4) 2011, 9 million ATH, and (5) 2012-2014, 10 million ATH. *Id.* at 34798.

[81] Such webcasters "offer a white label or syndicated service to some third party, where the service is offered to the public under the name of the third party and not the webcaster," or they offer the service by subscription. David Oxenford, "Pureplay Webcasters and SoundExchange Enter Into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006-2015," *at* http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-20062015/.

[82] 74 FED. REG. 34796, 34798.

> It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. ... SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.[83]

The rates available under the pureplay webcaster agreement are described in **Table 3**.

[83] *Id.* at 34799.

Table 3. Royalty Rates for "Pureplay" Webcasters, 2006-2015 (2014 for small webcasters)

	Large Commercial Webcasters			Small Pureplay Webcasters		Bundled Webcasters	
Annual Minimum Fees[a]	$25,000			$25,000		$25,000	
Royalty Rate	The greater of either—(1) 25 % of total annual gross revenue, or (2) per performance rate as follows:			The greater of either—(1) 7% of annual expenses, or (2) a percentage of gross revenues, as follows:		Per performance rate as follows:	
	Year	**Per Performance**	**Per Aggregate Tuning Hour**	**Year**	**Percentage**	**Year**	**Per Performance**
	2006	$0.00080	1.2¢	2006-2008	10% of the first $250,000 in gross revenues, and 12% of any gross revenues in excess of that	2006	$0.0008
	2007	$0.00084	1.26¢	2009-2014	12% of the first $250,000 in gross revenues, and 14% of any gross revenues in excess of that	2007	$0.0011
	2008	$0.00088	1.32¢			2008	$0.0014
	2009	$0.00093				2009	$0.0015
	2010	$0.00097				2010	$0.0016
	2011	$0.00102				2011	$0.0017
	2012	$0.00110				2012	$0.0020
	2013	$0.00120				2013	$0.0022
	2014	$0.00130				2014	$0.0023
	2015	$0.00140				2015	$0.0025

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 34796, 34799-800 (July 17, 2009).

a. Payment of the minimum fee results in a credit for that amount against any royalties paid by the webcaster in that calendar year.

Under the pureplay agreement, commercial webcasters must provide monthly census reports to SoundExchange concerning every sound recording performed during that month and the number of performances of each recording.[84] The agreement also provides that its rates and terms may not be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding concerning the setting of royalties for public performance of sound recordings.[85] Furthermore, the agreement contains a clause that expresses the following sentiment:

> These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of Commercial 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.[86]

Noncommercial Educational Webcasters

The agreement with college-affiliated Internet radio webcasters covers those that are "directly operated by, or [are] affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically-accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution."[87] The college webcaster agreement covers the period from January 1, 2011, until December 31, 2015. There is a minimum annual fee of $500 for each individual channel and each station that the college webcaster operates. For college webcasters that make total transmissions in excess of 159,140 aggregate tuning hours (ATH), the webcaster must pay additional usage fees at the following per-performance rates:

Table 4. Royalty Rates for College Webcasters That Exceed 159,140 ATH, 2011-2015

Year	Rate Per Performance
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. 40614, 40618 (Aug. 12, 2009).

College webcasters that do not exceed 55,000 total ATH per month for any individual channel may pay a $100 annual "proxy" fee in lieu of providing reports of use to SoundExchange. Those not exceeding 159,140 total ATH per month may submit reports of use on a sample basis (two weeks per calendar quarter) and such reports need only report how many times a song is played (rather than ATH or actual total performances). College webcasters that exceed 159,140 total ATH

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Library of Congress, U.S. Copyright Office, *Notification of Agreements Under the Webcaster Settlement Act of 2009,* 74 FED. REG. 40614, 40616 (Aug. 12, 2009).

must submit census reporting (name of each song performed and how many listeners for each song). The college webcaster agreement expressly provides that the rates and terms contained within the agreement may be used as precedent in future ratemaking proceedings.[88]

Noncommercial Religious Broadcasters

The noncommercial religious broadcaster agreement governs the royalty period from 2006 to 2015. Like the agreement made with noncommercial college webcasters, this agreement requires religious webcasters to pay SoundExchange an annual minimum fee of $500 for each individual channel or station through which they stream sound recordings over the Internet. This minimum fee constitutes "full payment" for the religious webcaster to stream up to 159,140 monthly ATH of programming on each channel or station.[89] If religious webcasters stream in excess of that amount per month, they must pay SoundExchange additional royalties at the following rates:

Table 5. Royalty Rates for Religious Webcasters That Exceed 159,140 ATH, 2006-2015

Year	Rate
2006-2010	$0.0002176 per performance, or $0.00251 per ATH; or If the programming may be substantially classified as news, talk, sports, or business, $0.0002 per ATH
2011	$0.00057
2012	$0.00067
2013	$0.00073
2014	$0.00077
2015	$0.00083

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 40614, 40626 (Aug. 12, 2009).

Religious webcasters that do not exceed 44,000 ATH per year[90] may pay SoundExchange a $100 proxy fee to waive the reporting requirement. Those not exceeding 159,140 total ATH per month may submit reports of use on a sample basis (two weeks per calendar quarter) and such reports must describe total ATH.[91] Religious webcasters that exceed 159,140 total ATH per month must submit census reporting (total performances and number of listeners). Unlike the noncommercial educational webcaster agreement, the noncommercial religious broadcaster agreement does not authorize its rates to be precedential in future administrative, judicial, or other government proceeding involving royalty rate setting.[92]

[88] *Id.* at 40619.

[89] *Id.* at 40626.

[90] Note that in the case of college webcasters, the qualifying limit is 55,000 ATH per month.

[91] Note that college webcasters that exceed similar ATH need only report how often a song is played, not ATH (number of listeners).

[92] 74 FED. REG. 40614, 40627.

Sirius XM Radio

The agreement SoundExchange reached with Sirius XM applies not to performances of sound recordings transmitted by satellite,[93] but rather to the streaming of Sirius programming over the Internet or to mobile phones using Internet technology.[94] The Sirius agreement covers the royalty period 2009-2015, and the annual minimum fee required is $500 for each individual channel and each station. There is a $50,000 cap on this minimum fee in any one year. In addition, Sirius must pay royalties at the following per-performance rate**:**

Table 6. Royalty Rates for Sirius XM Radio, 2009-2015

Year	Per Performance Rate
2009	$0.0016
2010	$0.0017
2011	$0.0018
2012	$0.0020
2013	$0.0021
2014	$0.0022
2015	$0.0024

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 40614, 40615 (Aug. 12, 2009).

The Sirius XM agreement requires monthly statements of account and reports of use. In addition, it expressly authorizes the use of the agreement in future ratemaking proceedings.[95]

Corporation for Public Broadcasting (Second Agreement)

Under the WSA of 2009, Sound Exchange and the Corporation for Public Broadcasting (CPB) reached another agreement that extends the agreement the parties had made under the WSA of 2008. The second agreement governs the royalty period from January 1, 2011, through December 31, 2015. The total license fee that CPB must pay to SoundExchange for this royalty period is $2.4 million, payable in five equal installments each year starting December 31, 2010. The license applies to 490 public radio stations in the year 2011, with an allowance for growth in the number of stations of up to 10 per year (and a limit of 530 stations in 2015).[96] For all of these

[93] The royalty rates for satellite radio transmission of sound recordings were set by the Copyright Royalty Board in a separate proceeding. The rates established were between 6%-8% of gross revenue from the period 2007-2012. *See* Library of Congress, Copyright Royalty Board, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 73 FED. REG. 4080, 4088/2 (Jan. 24, 2008).

[94] David Oxenford, "SoundExchange Announces 4 More Settlements Under Webcaster Settlement Act – Sirius, College and Religious Noncommercial Broadcasters and A Group to be Named Later," *at* http://www.broadcastlawblog.com/2009/07/articles/internet-radio/soundexchange-announces-4-more-settlements-under-webcaster-settlement-act-sirius-college-and-religious-noncommercial-broadcasters-and-a-group-to-be-named-later/.

[95] 74 FED. REG. 40614, 40616.

[96] *Id.* at 40620.

stations, if the total music ATH exceeds certain ATH limits per year, CPB must pay additional fees to SoundExchange on a per performance basis as specified in the table below:

Table 7. Royalty Rates for the Corporation for Public Broadcasting If Specified ATH Limits Are Exceeded, 2011-2015

Year	Music ATH Limit	Per Performance Rate
2011	279,500,000	$0.00057
2012	280,897,500	$0.00067
2013	282,301,988	$0.00073
2014	283,713,497	$0.00077
2015	285,132,065	$0.00083

Source: CRS presentation of royalty rates published by the U.S. Copyright Office in the Federal Register, 74 Fed. Reg. 40614, 40622 (Aug. 12, 2009).

The agreement requires CPB-affiliated public radio broadcasters to submit reports of use, play frequency, and ATH per calendar quarter. The agreement provides that the rates, fees, and other requirements are nonprecedential and may not be introduced as evidence or taken into account in any ratemaking proceeding.[97]

Copyright Royalty Board Proceedings to Determine Royalty Rates for 2011-2015 ("Webcaster III")

Although the past two years have been consumed with the reactions to the Copyright Royalty Board's May 2007 decision, time marches on, and the CRB announced on January 5, 2009, that it would begin the third proceeding ("Webcaster III") to determine the royalty rates for 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.[98] Any webcaster that chooses not to opt-in to one of the settlement agreements described above may participate in this proceeding and would be bound by the rates and terms that the CRB shall determine.

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[97] *Id.* at 40621.

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