
Internet Radio Royalty Dispute Reaching—End For Now

Recent Settlements and Court Rulings Bring Clarity to Royalty Landscape

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The long-running battle over royalties owed by webcasters—companies that broadcast music over the Internet—took several significant leaps towards conclusion last month with important developments both inside and outside of the courtroom. Spurred by the Webcaster Settlement Act of 2009, signed by President Obama on June 30, SoundExchange and webcasters entered into a total of five Congressionally blessed settlement agreements that are open to other webcasters and are binding on all copyright owners and performers. Additionally, decisions were announced in two appellate cases. Set forth below are summaries of the key terms and important deadlines.

Commercial Webcasters

“Pureplay” Webcasters

On July 7, a coalition of major “pureplay” webcasters reached an agreement with SoundExchange for royalties owed by the webcasters for streaming music online for the period of 2006 through 2015. SoundExchange is a non-profit performance rights organization established by the Recording Industry Association of America and designated by the Copyright Royalty Board (“CRB”) as the receiving agent to collect royalties for public performances of sound recordings and distribute them to copyright owners and performers. These royalties are in addition to the royalties webcasters also owe to songwriters, composers and publishers via the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC.

The deal, struck between SoundExchange and webcasters AccuRadio, Digitally Imported and RadiolO, is open to all “pureplay” webcasters; that is, stand-alone non-interactive webcasters that derive most of their revenue from their webcasting operations. The agreement is designed for both large and small “pureplay” webcasters, and the popular service Pandora has announced it will participate in the settlement (but as a result, will start charging its biggest users).

Under the terms of the settlement, “large” pureplay webcasters, those with revenue in excess of \$1.25 million, would pay royalties to SoundExchange equal to the greater of 25% of their revenue or a per performance rate that is substantially less than the previously set CRB rates. The new rates start at \$0.0008 per performance (per song, per listener) for 2006, gradually rise to \$0.00097 for 2010, and max out at \$0.0014 for 2015. By contrast, under the CRB rates, webcasters would pay \$0.0018 in 2010.

Instead of paying per performance royalties, “small” pureplay webcasters that participate in the deal have the option of paying SoundExchange the greater of 7% of their expenses or 12% (10% for 2006-2008) of their first \$250,000 in gross revenue, and 14% (12% for 2006-2008) of revenue above \$250,000. These webcasters would be subject to a cap on the number of aggregate tuning hours they can broadcast monthly as well as a recapture provision that would force these webcasters to retroactively pay four years worth of the money that would have been owed under per performance rates if they are sold to a larger entity (unless such webcaster pays per performance rates for one year prior to the acquisition). Pureplay webcasters can opt into the small webcaster rates each year, so they are not bound to the agreement through 2015 if a better option becomes available. Additionally, the small webcaster rates end in 2014.

A third category of pureplay webcasters, those that offer bundled, syndicated or subscription services, will owe royalties at the same per performance rates agreed to between SoundExchange and the National Association of Broadcasters (“NAB Settlement”) in February. Those rates start at \$0.0008 for 2006, increase to \$0.0015 for 2010, and max out at \$0.0025 for 2015.

All webcasters participating in the settlement will owe a minimum annual payment of \$25,000. To participate in the settlement, webcasters must file a Notice of Election, available at www.soundexchange.com by January 31 each year, although the deadline for electing into the settlement for the period of 2006-2009 has expired. Those webcasters that elect into the settlement will be prohibited from participating in the CRB’s 2011-2015 rate-making proceedings.

“Other” Webcasters

For other commercial webcasters that cannot, or do not, elect into the pureplay settlement or the NAB Settlement, they also have the option of being governed by a settlement reached on July 30 between SoundExchange and SIRIUS-XM (“Sirius-XM Settlement”). This agreement covers the period of 2009-2015, and results in slightly lower royalty rates—\$0.0016 in 2009 and \$0.0017 in 2010—than under the CRB rates set in 2007. The 2009 and 2010 rates are not as low as those under the NAB Settlement, but end up cheaper than the NAB Settlement rates in 2013-2015, maxing out at \$0.0024. There is also a \$500 per channel minimum fee, which cannot exceed \$50,000.

Current webcasters have until August 27, 2009, to elect into the Sirius-XM Settlement, and those that do so are locked into the rates through 2015, even if the CRB sets lower rates. Participants in the settlement are also prohibited from participating in litigation regarding the CRB’s rate-making proceedings.

Noncommercial Webcasters

On July 30, 2009, the last day on which it had authority to do so under the Webcaster Settlement Act of 2009, SoundExchange reached settlement agreements with three groups representing noncommercial webcasters, including public broadcasting stations, college stations, and religious broadcasters. These settlements now present noncommercial webcasters with several options.

Corporation for Public Broadcasting

In January of 2009, the Corporation for Public Broadcasting ("CPB") reached a settlement with SoundExchange for the performance royalties owed by 450 educational public radio entities through December 31, 2010. On July 30, SoundExchange and CPB reached another settlement extending their settlement through 2015. Under this agreement, CPB will pay SoundExchange \$2.4 million to cover royalties for approximately 500 stations. If the stations collectively exceed certain aggregate tuning hours ("ATH") limits in a given year, CPB will pay additional fees up to a total of \$480,000. Under the agreement, the biggest webcasters will be obligated to provide SoundExchange with detailed reporting information, but smaller stations will have significantly reduced reporting obligations.

College Stations

One agreement, with College Broadcasters, Inc. ("CBI"), creates special royalty rates and more lenient recordkeeping requirements for college radio stations. Webcasters opting into that agreement pay a \$500 minimum annual fee in exchange for the right to broadcast up to 159,140 ATH per month (an average of about 215 simultaneous users), which is the same as the framework under the CRB rates. However, webcasters that exceed 159,140 ATH will only owe per performance rates at the same rates as agreed to by the NAB, a discount on the CRB-set rates. The agreement also allows stations averaging less than 55,000 ATH to pay a \$100 proxy fee in lieu of providing reporting data to SoundExchange.

Religious and Other Broadcasters

The final agreement, reached by Northwestern College and the National Religious Broadcasters Music License Committee ("NRBMLC"), offers a deal open to both religious and other non-commercial webcasters. The agreement offers the same \$500-per-channel fee for stations streaming up to 159,140 monthly ATH that is offered under the CBI deal. However, for those webcasters that exceed that limit, the NRBMLC deal offers substantial savings. For 2006 through 2010, those webcasters will owe either a royalty of \$0.0002176 per performance or \$0.00251 per ATH. For stations that are primarily news, sports or talk, the rate would be \$0.0002 per ATH. Going forward, these stations would owe per performance rates of \$0.00057 in 2011, escalating up to \$0.00083 in 2015.

These royalties are significantly lower than those set by the CRB in 2007, and are about one-third of the cost webcasters will pay under the CBI deal. However, webcasters

electing into the NRBMLC deal will have more stringent reporting requirements. Except for extremely small "microcasters" (those averaging less than 5 simultaneous listeners), broadcasters opting into the NRBMLC deal will not have the benefit of reduced recordkeeping requirements. Stations that wish to elect into this deal must do so by September 15, 2009.

Court Decisions

On July 8, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision affirming the royalty rates set by the CRB for the public performance of sound recordings by satellite radio operators like Sirius-XM Radio. On July 10, a separate panel of the U.S. Court of Appeals for the District of Columbia Circuit released its opinion in the closely watched challenge by webcasters to the controversial royalty rates set by the CRB in 2007, generally upholding the CRB rates as not being "arbitrary and capricious," although it remanded to the district court SoundExchange's mandatory \$500 per channel minimum fee.

Conclusion

The settlements, coupled with the court rulings, essentially bring to an end the two-year battle over royalty rates owed to SoundExchange for the years 2006 through 2010-and for many webcasters, even those royalties owed through 2015. However, not all webcasters are satisfied. For webcasters that are not eligible for, or do not participate in, one of these settlements, the rates set by CRB in 2007 still apply through the end of 2010. This includes small commercial webcasters that generate minimal revenue and cannot afford the \$25,000 minimum annual fee of the "pureplay" deal. It also includes large webcasters that derive substantial revenue from non-webcasting sources, as well as aggregator services that host small webcasters. Although there is a possibility that a compromise could be reached between SoundExchange and some of these groups with respect to the royalties owed dating back to 2006, unless Congress passes another Webcaster Settlement Act, SoundExchange lacks authority to enter a settlement that would be binding on sound recording copyright owners who are not members of SoundExchange. These webcasters will likely play a major role in the CRB's rate-making proceedings for the period of 2011-2015, which have already begun.

Additionally, webcasters that offer interactive services continue to be left out of the rubric of SoundExchange royalties. These settlements, and the rates set by the CRB in general, are only available to webcasters that qualify for the compulsory license found in Section 114 of the Copyright Act, which allows performances of sound recordings without permission from the copyright owner so long as statutory formalities are followed, royalties are paid, and certain usage restrictions are followed. For webcasters that offer interactive services like on-demand performances, downloads and podcasts, a license must be obtained and royalties negotiated directly from the sound recording copyright owner (generally the record label), which may decline to provide a license.

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