



Streaming Copyright Basics

How do you meet the demand to “give the consumer what they want when they want it?” Streaming your station on the Internet is one way to advance that objective. With the uncertainty having been largely resolved over what it will cost in copyright royalties, now may be the time to stream your station’s programs.

Background

Broadcasters are familiar with paying royalties to ASCAP, BMI and SESAC for playing songs over-the-air. Those fees are paid to the performing rights societies to compensate songwriters and music composers. Those societies also charge to stream music over the Internet.¹

Royalties must be paid to the copyright owner of the digital sound recording and the featured recording artists performing the music, in addition to the songwriters and composers. Traditionally, broadcasters have been exempt from making payments to record companies and performers for playing sound recordings over-the-air, because of the notion that if radio stations did not play the songs, no one would hear them and buy their records. Not so for use of music on the Internet.²

In 1995, driven by the fact that digital technology allows flawless copying, sound recording copyright owners obtained from Congress the exclusive right in the performance of their music by digital audio transmission in the Digital Performance Right in Sound Recordings Act. The exemption for broadcasters’ over-the-air transmission of digital sound recordings was preserved in that Act. That exemption, however, does not apply to the simultaneous transmission of the over-the-air broadcast via the Internet.

With no mechanism for payment of royalties to record companies and performers, Congress enacted the Digital Millennium Copyright Act of 1998 (the “DMCA”). That Act created a statutory license for performances of sound recordings over the Internet, provided certain conditions were met. Eligibility for the statutory license requires adherence to defined programming restrictions and other technical conditions, payment of royalties, recordkeeping, and making certain filings, which are discussed in greater detail below. If you are not eligible for the statutory license, or if you want to provide an interactive music service, you will need to obtain the consent of each individual copyright owner to use the music or else risk a claim of copyright infringement.

SoundExchange is the entity charged with collecting and distributing the royalties to the sound recording copyright owners and performers. Now an independent organization, SoundExchange was initially a creation of the Recording Industry Association of America (“RIAA”), which represents the

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**Eligibility for
Statutory
License**

record companies. SoundExchange is set up to handle only streaming royalties, and is not able to administer podcasting licenses.

Programming Restrictions. As a condition for using the statutory license (and in the absence of having a direct license from the copyright owners), any webcaster, including radio stations simultaneously streaming their over-the-air signal, must meet the “sound recording performance complement” on each channel streamed. What does that mean?

- During a three hour period:
 - Play no more than three songs from a particular album;
 - Play no more than two songs consecutively from a particular album;
 - Play no more than four songs by a particular artist;
 - Play no more than four songs from a boxed set; and
 - Play no more than three songs consecutively from a boxed set.

If you want to stream additional channels, not just the over-the-air broadcast transmission, those additional channels must comply with the sound recording performance complement. The sound recording performance complement also applies to archived and looped programs, defined below.

Archived Programming. Archived programs – those that are posted on a website for listeners to hear repeatedly on-demand in the same order – may not be less than five hours in duration. Permitted archived programs may reside on the website for no more than a total of two weeks. Merely changing one or two songs does not meet this condition, nor can programs be taken off for a short period of time and then made available again.

The limitations on archived programs do not apply to recorded events or broadcast transmissions that make no more than an incidental use of sound recordings, as long as such transmissions do not contain an entire sound recording or feature performances of a particular sound recording.

Looped programming. Looped or continuous programs – those that are performed continuously so that the program automatically starts over when it is finished – may not be less than three hours in duration. Archived programs, on the other hand, always start at the beginning of the program. Again, merely changing one or two songs does not meet this condition.

Repeat of other programs limited. Programs that are retransmitted at publicly-announced times in advance can be repeated only as follows:

- Repeats of a program are limited to three times in a two-week period for programs under one hour in duration.
- Repeats of a program are limited to four times in a two-week period for programs over one hour.

Limitations on prior announcements. Advance program schedule or prior announcement of song titles may not be transmitted by text, video or audio. Webcasters may name one or two artists or a particular genre of music to illustrate the type of music on a particular channel. It is permissible to announce the name of a song immediately before it is performed or to announce that a particular artist will be featured at an unspecified future time. It is the prior announcement of the song that is a problem, because such an announcement facilitates the copying of a particular musical work.

Identify song, artist and album. When performing a sound recording (*i.e.*, during, not before), a webcaster must identify, in textual data, the sound recording, the album and the featured artist, if receivers are capable of displaying the information.

Do not falsely suggest a link between recordings and advertisements. A webcaster may not perform a sound recording in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.

Take steps to disable copying by recipient. A webcaster must disable copying by a transmission recipient if the technology used by the webcaster enables the webcaster to do so, and must also take care not to induce or encourage copying by transmission recipients.

Accommodate technical protection measures. A webcaster must accommodate the transmission of measures widely-used by sound recording copyright owners to identify or protect copyrighted works, if they are technically feasible of being transmitted without imposing substantial burdens on the transmitting entity.

Cooperate to defeat scanning. A webcaster must cooperate with copyright owners to prevent recipients from automatically scanning transmissions in order to select particular recordings, if it will not impose substantial costs or burdens on the transmitting entity.

Transmission of bootlegs not covered. The statutory license is limited to transmissions made from lawful copies of sound recordings. Transmissions made from bootlegs or pre-released recordings (unless the performance of a pre-released recording is otherwise authorized by the copyright owner) are not covered by the statutory license.

Automatic switching of channels prohibited. Webcasters must not automatically and intentionally cause a device receiving the transmission to switch from one program channel to another. The statutory license does not

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

cover interactive services where the consumer selects the songs.

Transmission of copyright management information required. If technically feasible, transmissions by a webcaster must be accompanied by the information encoded in the sound recording by the copyright owner that identifies the title of the song, the featured artist and any other related information.

Commercial Webcasters (including Broadcast Simulcasters). Under the rates adopted in 2007, all music streamers (“Statutory Licensees”) must pay a minimum annual fee of \$500 per channel. The statutory license rates effective through 2010 are as follows:

2008	\$0.0014 per performance
2009	\$0.0018 per performance
2010	\$0.0019 per performance

To determine your royalties, multiply that rate times each song times the number of people logged on to receive the streamed song. Royalties are offset against the \$500 minimum annual fee each calendar year. That \$500 works out to cover about 40 performances per hour (e.g., 10 songs per hour times 4 listeners = 40 performances) 24 hours a day on average for the year. [Formula: \$500 minimum annual rate / 0.0014 royalty rate / 365 days / 24 hours.]

“Performance” under the Copyright Office regulations means “each instance in which any portion of a sound recording is publicly performed to a Listener” but excludes:

1. a sound recording that is not copyrighted (*i.e.*, because of its age, it is in the public domain³);
2. a sound recording for which the licensee had a direct license from the copyright owner; and
3. an incidental performance that both:
 - a. makes no more than incidental use of the music (*e.g.*, “brief musical transitions in or out of commercials or program segments, brief performances during news, talk or sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events”), and
 - b. “other than ambient music that is background at a public

event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds” (e.g., theme song).

Noncommercial Webcasters (including Broadcast Simulcasters).

Noncommercial webcasters’ payment of a minimum annual fee of \$500 per channel covers up to 159,140 Aggregate Tuning Hours (ATH) streamed on that channel per month. That averages out to 218 listeners per hour on line in any month. All additional “performances” over that ATH threshold per month are to be paid at the commercial “per performance” rates listed above. CPB has been in negotiations with SoundExchange on a deal that applies only to CPB and NPR stations.

“Aggregate Tuning Hours” are the total hours of programming the Statutory Licensee transmitted to all “Listeners,” defined as a player, receiving device or other point capable of receiving the digital sound recording (read that to mean computer terminal). For example, if the station or webcaster streamed on the Internet for one hour to 10 simultaneous Listeners, the ATH would be 10. Noncommercial statutory licensees may deduct from the ATH the time during which it transmitted a song for which it obtained a direct license from the copyright owner.

Small Commercial Webcasters

Small Commercial Webcasters (including Broadcast Simulcasters).

Although the provisions of an agreement reached under the Small Webcasters Settlement Act (“SWSA”) have expired, SoundExchange offered to extend the terms to 2010 for eligible Small Commercial Webcasters. Pursuant to that agreement, small commercial webcasters can elect to pay the rates set forth below, or those set forth above for commercial webcasters. Services that meet the definition of an “eligible small webcaster” and file a timely notice of election, pay the following rates: The greater of 10 percent of the first \$250,000 in gross revenues and 12 percent of any gross revenues in excess of \$250,000 during the applicable year, or 7 percent of the webcaster’s expenses during the applicable year.

Small webcasters/broadcast simulcasters are required to pay an annual minimum fee of either \$2,000 if the webcaster has gross revenues of not more than \$50,000, or \$5,000 if the webcaster has gross revenues of more than \$50,000.

Generally, a “small webcaster” is an entity with not more than \$1,250,000 in gross annual revenues (including from its affiliates, subscriptions services, and third-party participation revenues – e.g., sale of advertising or sale of sound recordings). Gross revenues include all revenues from media and entertainment related businesses, not just web generated revenues. The full definition of gross revenues contained in the Small Webcasters Agreement should be reviewed to determine how to calculate gross revenues for a specific webcaster’s business, as certain variations may apply.

Timing of Payments

Timing of Payments. All payments must be submitted monthly with a Statement of Account available at <http://www.soundexchange.com>. Payments are made monthly within 45 days after the end of each month. The minimum annual fee is paid by January 31 each year, or upon initiation of service, which fee is credited toward the royalties owed each month until depleted. A new minimum annual fee is paid at the beginning of each year.

Recordkeeping

Records to be Maintained. The Copyright Office adopted interim recordkeeping requirements.⁴ For each song that is streamed, the following records must be kept:

1. Name of Service (e.g., XYZ Broadcasting, Inc.).
2. Transmission Category (e.g., “Eligible nonsubscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming” defined in the rule as category code “B”).
3. Featured Artist (the full name of the individual or band).
4. Sound Recording Title (the song title).
5. Sound Recording Identification – either:
 - a. Album Title and Marketing Label (if a particular sound recording has been released for promotional purposes before the album title is available, the information must be kept only if it is available before or at the time of the performance, but must be supplied if it is available for subsequent performances), or
 - b. International Standard Recording Code (ISRC) (imbedded in promotional and commercially released sound recordings which can be read by software).
6. Total Performances – either:
 - a. Aggregate Tuning Hours (measures the total number of listener hours by all who have accessed a service during a give time period), Channel (for broadcasters, call sign or facility ID number) or Program Name, and Play Frequency (the total times a sound recording is “played” – i.e., offered or transmitted by the service – regardless of the number of listeners, during the reporting period), or
 - b. Actual Total Performances (for those with the technological ability to identify accurately the number of times a sound recording is “performed” – i.e., listened to or accessed – and a separate record is required for each “play”).

Filing Requirements

Notice of Use of Sound Recordings under Statutory License. Before you start streaming, a Notice of Use must be filed with the Copyright Office in Washington, DC. The current filing fee is \$20.

Statements of Account. Monthly Statements of Account must be filed with SoundExchange forty-five days after the close of each month, even if you have not incurred royalties that exceed the minimum annual fee. Once the minimum annual payment has been depleted, royalty payments must be submitted with the Statement of Account.

Reports of Use. The records described above must be maintained by the music streamer, which identify the featured artist, the song title, album title, marketing label, and number of performances (*i.e.*, number of listeners per song). Reports of Use must be submitted to SoundExchange quarterly based on two weeks per quarter. The two weeks can be consecutive or two separate 7-day periods within the quarter. The 7-day consecutive period can start on any day of the week.

While the interim recordkeeping rules are based on a two-week survey during the quarter, the Copyright Office anticipates its future rules will require periodic reporting of sound recording performances on a year-round census so that all transmitted sound recordings are counted and their listeners measured. The records are needed so that royalties can be distributed to copyright owners based on actual use of their music.

The precise file format is set forth in Copyright Rule 370.2(g) found at <http://www.loc.gov/crb/fedreg/2006/71fr59010-9.pdf>. SoundExchange also posts an Excel spreadsheet at www.soundexchange.com containing a file properly formatted that statutory licensees can download.

Conclusion

Streaming is now an established platform and should be ignored only at your peril as on-line music providers nibble away at your audience. With the future of the Internet going mobile, it makes even more sense to stream. The SoundExchange website provides more details regarding royalty rates, and offers easy access to its forms on-line. Please note, however, that this article is only an overview of the requirements. Specific questions and situations unique to your business should be directed to counsel.

Streaming without following the rules is perilous. Failing to take advantage of the statutory license means copyright infringement. When statutory damages can exceed \$150,000 per song per play, figuring out how to play by the rules seems a small price to pay. Do not think the record companies will not go after you. After all, they sued college students for illegal music downloads – there is no reason to think they won't also come after you.



Endnotes

¹ Under the industry-wide blanket licenses negotiated between the Radio Music License Committee (“RMLC”) and ASCAP and between RMLC and BMI, royalties applicable to streaming the station’s over-the air signal have been folded into the blanket over-the-air license.

SESAC requires a separate Internet license, which can be obtained through its website at <http://www.sesac.com/licensing/internetLicensing.asp> (minimum fee is \$110 per six months per web page).

Webcasters, and broadcasters who transmit streams in addition to the stream of their over-the-air signals, need to obtain Internet licenses from ASCAP (<http://www.ascap.com/weblicense/> - minimum annual fee is \$288), BMI (<http://www.bmi.com/licensing/webcaster/> - minimum annual fee in 2007 is \$299, increasing by the CPI annually thereafter), and SESAC (see web site address above).

² As with any industry, copyright has its own terminology. “Use” in its simplest terms for broadcasters means playing the song. A “performance” also means playing the song. When it comes to royalty calculations for Internet transmissions, however, playing one song heard by one listener is a single performance. If one song is heard by multiple listeners, the number of performances is multiplied by the number of listeners. Digital “listeners” are the receiving devices (*e.g.*, computers), not how many people may be nearby who hear the stream.

³ Determining which recordings are in the public domain can be a complex task which should be undertaken only with the assistance of counsel. For example, a ruling out of the New York Court of Appeals held that recording artists’ recordings are protected in perpetuity under that state's common law standards.

⁴ The recordkeeping requirements for entities electing to pay royalties as Small Commercial Webcasters have slightly more onerous recordkeeping requirements, including not only the types of records mentioned but also additional requirements set forth at pages 5 and 6 of the document available at this link: http://www.soundexchange.com/licensee/documents/Rates_Terms.pdf.

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