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CRS Report for Congress

Statutory Royalty Rates for "Small" Webcasters: Decision of the Copyright Royalty Board

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Summary

The Copyright Royalty Board (CRB) recently announced new statutory royalty rates for certain digital transmissions of sound recordings for the period January 1, 2006, through December 31, 2010. Implementation of these new rates marks the expiration of a previous royalty rate agreement specifically designed to benefit "small" webcasters. This report surveys both the legislative history of this issue, *i.e.*, royalty rates for eligible nonsubscription webcasters, and the Board's recent decision.

Statutory Licenses. The U.S. Copyright Act allows one who wishes to use copyrighted material, in certain instances, to obtain a statutory license to do so. Ordinarily, royalties and licenses for the use of protected material are the product of direct negotiations between copyright owners and users. When a statutory, or compulsory, license is available, a permitted user need only adhere to statutory requirements, including payment of established royalty rates, to use the work.

In 1998, in the Digital Millennium Copyright Act (DMCA),[1] Congress amended several statutory licensing statutes to provide for and clarify the treatment of different types of webcasting. Some transmissions of sound recordings are *exempt* from the public performance right, for example, a nonsubscription broadcast transmission;[2] a retransmission of a radio station's broadcast within 150 miles of its transmitter; and a

[1] P.L. 105-304 (Oct. 28, 1995).

[2] 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).

transmission to a business establishment for use in the ordinary course of its business.[3] In contrast, a digital transmission by an "interactive service" is not exempt from the public performance right, nor does it qualify for a compulsory license. The owner of an interactive service — one that enables a member of the public to request or customize the music that he or she receives — must negotiate a license, including royalty rates, directly with copyright owners.

But, a category of webcasting that *does* qualify for a compulsory license is "an eligible nonsubscription transmission." A subscription service is one that is limited to paying customers. Hence, webcasters who transmit music over the Internet on a nonsubscription, noninteractive basis may qualify for the statutory license under 17 U.S.C. § 114(d).

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.[4]

Background. The initial ratemaking proceeding for statutory royalty rates for webcasters for the period 1998 through 2005 proved to be controversial, perhaps reflecting in some degree the relative newness of both the DMCA and webcasting activity. A Copyright Arbitration Royalty Panel (CARP) issued a recommendation for the initial statutory royalty rate for eligible nonsubscription webcasters on February 20, 2002.[5] Small-scale webcasters objected to the proposed rates. In accordance with then-existing procedures, the Librarian of Congress, on the recommendation of the U.S. Copyright Office, rejected the CARP's recommendation and revised rates downward. Congress interceded as well with enactment of the Small Webcasters Settlement Act (SWSA) of 2002, P.L. 107-321. Although very complex, the law permitted more options than the royalty rates established by the Librarian's order. Qualifying small webcasters, for example, could elect to pay royalties based on a percentage of revenue or expenses rather than on a per song per listener basis. The rate agreement made pursuant to SWSA was published in the Federal Register[6] 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.[7]

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[3] 17 U.S.C. § 114(d)(1).

[4] The statutory license for ephemeral copies is based upon the copyright owners right to control reproduction of a protected work.

[5] In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, *Report of the Copyright Arbitration Panel,* Feb. 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.

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

[7] 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

(continued...)

Subsequent to passage of the SWSA and the initial ratemaking proceeding, Congress substantially revised the underlying adjudicative process. Enactment of the Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, abolished the CARP system and substituted a Copyright Royalty Board composed of three standing Copyright Royalty Judges.[8] Rates established pursuant to the original ratemaking determination and SWSA were to remain in effect through 2005. As required by law, the Copyright Royalty Board recently announced royalty rates for the period that commences (retroactively) from January 1, 2006, through December 31, 2010.[9]

Copyright Royalty Board Rates for Small Webcasters. 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.[10]

Notice announcing commencement of the subject proceedings was published on February 16, 2005.[11] On March 9, 2007, the Copyright Royalty Board issued its decision.[12] The decision establishes rates for commercial and noncommercial webcasters.[13] Rates are as follows:

- For commercial webcasters: $.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. This includes fees for making an ephemeral recording under 17 U.S.C. § 112.

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

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[7] (...continued)
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.

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

[9] 17 U.S.C. § 804(b)(3).

[10] *Id.*

[11] 70 Fed. Reg. 7970 (2005).

[12] U.S. Copyright Royalty Board, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, DETERMINATION OF RATES AND TERMS*, Mar. 2, 2007, at [http://www.loc.gov/crb/proceedings/2005-1/rates-terms 2005-1.pdf]. *See* 37 C.F.R. Part 380.

[13] 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.

channel 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,[14] 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 webcasters and Noncommercial webcasters will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part thereof.[15]

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.[16] The Board's rationale is laid out in a 115-page decision. Its determination is informed by the initial royalty proceedings of the CARP, which it refers to as "Webcaster I." In essence, both the previous CARP and the current Copyright Royalty Board attempt to implement the statutorily mandated standard to reach a royalty rate. Explaining its interpretation of the governing language, the CRB wrote:

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

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[14] Aggregate Tuning Hours is defined, in part, as "the total hours of programming...transmitted during the relevant period to all Listeners withing the United Sates from all channels and stations that provide audio programming[.]" 37 C.F.R. § 380.2(a).

[15] 37 C.F.R. § 380.3.

[16] 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 —
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> (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
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> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

> relevant factors, to determine the rates under the willing buyer/willing seller standard.[17]

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.[18]

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.[19]

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

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[17] U.S. Copyright Royalty Board, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings* at 13.

[18] *Id.* at 18-19 (footnotes and citations omitted).

[19] *Id.*, note 7 at 19.

interactive webcasting covering the digital performance of sound recordings, with appropriate adjustments.[20]

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

Public Reaction. The expiration of the option to pay a percentage of revenues, to be replaced by a minium payment, per song per listener formula, was, predictably, not well received in the small webcasting business community.[21] Some Members of Congress have voiced concern as well.[22] The Copyright Act's procedures permit the Board to reconsider its decision, and parties affected by it have sixty days to appeal to the U.S. Court of Appeals for the D.C. Circuit.[23] But, the issue of whether the economic needs of small commercial webcasters should be factored into statutory royalty rates is more likely to be addressed as a policy matter by Congress, acting through legislatively articulated standards, rather than by the Copyright Royalty Board or a court reviewing its determination under extant law. Congress clearly had not made a final decision on this issue with enactment of the SWSA. It is possible that the most recent royalty decision will prompt it to revisit the issue.

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[20] *Id.* at 28-32.

[21] *See, e.g.*, Robert Levine, *A Fee Per Song Can Ruin Us, Internet Radio Companies Say,* THE NEW YORK 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].

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

[23] 17 U.S.C. 803(d).