

An Overview of Compliance with the Legal Requirements Applicable to Streaming Music Over the Internet

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In October 2006 the regulatory puzzle relating to digital audio transmissions of sound recordings was completed. Since that time, anyone streaming music over the Internet must pay monthly royalties to SoundExchange, Inc., a designated "receiving agent" formerly associated with the Recording Industry Association of America ("RIAA"), keep detailed records of all songs played, and file those records on a regular basis.

There have been major developments since October 2006 which affect the regulatory landscape -- not the least of which was the Copyright Royalty Board ("CRB") decision released in late 2010 which sets the rates and terms for webcasting during 2011-2015. Commonly known as the "Webcasting III" decision. It was the subject of significantly less controversy than its March 2007 predecessor. That decision, known as Webcasting II, resulted in several organizations filing a lawsuit in the United States Court of Appeals for the District of Columbia Circuit and spawned several voluntary "webcaster settlement agreements" ("WSA") between SoundExchange, Inc. and sectors of the webcasting industry. These WSAs are elective in nature and still relevant, as they were not superceded by Webcasting III in every instance.

Many radio broadcasters simulcasting an over-the-air signal on the Internet take advantage of technology (often called "turnkey programs") advertised as the "complete solution" to simulcasting on the Internet. These advertisements are somewhat misleading, as turnkey programs do not always ensure copyright law compliance. This memorandum will assist radio

broadcasters in navigating the complex statutory licensing requirements created by the Digital Millennium Copyright Act (“DMCA”) and its implementing regulations.¹

I. Background of Copyright Law as Applied to Internet Radio.

The owner of a copyrighted work has exclusive permission, subject to only limited exceptions, to reproduce, adapt, distribute, create derivative works from, or perform that content. In the case of a song that is played on the radio or the Internet, there are two copyright holders. There is the owner of the copyright in the “musical work” – the lyrics and music – who is often referred to as the “songwriter”.² There is also the owner of the copyright in the “sound recording” – that version of the work that has been performed – often referred to as the “singer” or the “recording artist”.³ These may be identical.⁴ But each copyright holder is entitled to his or her share of the royalties when that song is performed.

Rather than requiring negotiation with each and every copyright holder for the right to perform music, several statutory or compulsory licensing schemes have been created. These licenses work by having an intermediary collect royalties from those similarly situated entities who wish to perform music; the intermediary then distributes those funds in a fair and equitable manner to the copyright holders. Certain restrictions are imposed on participants as a condition

¹ As this memorandum is written for existing clients of Fletcher, Heald & Hildreth, P.L.C. who are engaged in radio broadcasting, it is presumed that their Internet radio activities consist exclusively, or at least primarily, of the simulcasting of over-the-air radio programming. The information contained in this memorandum applies to this form of webcast. It does not apply to audiovisual works, for which there currently is no statutory licensing scheme. For purposes of this memorandum the terms “Internet radio”, “streaming” and “webcasting” will be used interchangeably to mean the playing of copyrighted music over the Internet.

² In many cases, the songwriter’s publishing company will own the copyright in the musical work.

³ The performer’s record company or “label” will often own the copyright in the sound recording.

⁴ One example is the song “Yesterday” which, according to the Guinness Book of World Records, has the most cover versions of any song in history (over 3000 registered covers). The copyright in the original musical work (before that right was later sold) was owned by the songwriters, John Lennon and Paul McCartney. They, along with the rest of the Beatles, also owned a copyright in the sound recording of “Yesterday” that appeared on the album “Help!”. When Ray Charles recorded a version of “Yesterday” in 1967, he had to pay royalties to Lennon and McCartney for use of their musical work but obtained his own copyright in his cover version. Anyone performing the Ray Charles version of “Yesterday” would have to pay royalties to both Lennon/McCartney (for the underlying musical work) and to Ray Charles (for the sound recording performed on the radio).

of eligibility for the licensing scheme. The licenses most familiar to radio broadcasters are administered by ASCAP, BMI, and SESAC, which collect the royalties for performance of musical works (the underlying music and lyrics) and distribute them to the songwriters or music publishing companies. These licenses allow radio stations to perform virtually any popular music song ever recorded without fear of being sued for copyright infringement by the owner of the musical work.

When the Internet became a popular medium, radio stations realized they could reach beyond the physical limits of their FCC licenses to gain new listeners. Many began the relatively simple process of simulcasting an over-the-air signal on the Internet. Recording artists vociferously argued that performing a song simultaneously over-the-air and on the Internet constituted two separate performances of that song.

ASCAP, BMI and SESAC reacted by amending their radio licenses or adding addenda to their current licenses to allow broadcasters to pay for performance of musical works via the Internet (in addition to the already-existing rights to over-the-air performance of musical works). Congress reacted by passing the DMCA, which requires that separate royalties be paid for the separate performance of the sound recording over the Internet.⁵ The DMCA created a new statutory license, found in Section 114 of the Copyright Act, covering to these Internet webcasts. The RIAA's then-subsiary SoundExchange, Inc. was designated to collect royalties pursuant to this statutory license from every entity streaming music over the Internet.

The following table might make it easier to understand the interaction between musical works, sound recordings, over-the-air performance, and webcasting:

⁵ But the DMCA still does not require payment for performance of the sound recording in an over-the-air broadcast.

	<u>Over-the-Air Broadcast</u>	<u>Internet Webcast</u>
<u>Musical Work</u> (underlying music and lyrics)	Royalties paid to ASCAP/BMI /SESAC	Royalties Paid to ASCAP/BMI/SESAC
<u>Sound Recording</u> (particular rendition of a song)	No requirement to pay royalties	Royalties paid to SoundExchange

In separate rulemakings over the course of several years, the Copyright Office published rules governing the payment of royalties through SoundExchange to performers of sound recordings played over the Internet. These rules, most recently updated in the Webcasting III decision issued in December 2010, consist not only of a fee structure for royalty payments by eligible Internet radio operators, but also recordkeeping and filing requirements to allow for equitable distribution of those royalties to copyright holders. A webcaster is now required to:

- File the required “Notice of Use of Sound Recording Under Statutory License”;
- Comply with DMCA playlist and technical restrictions affecting the Internet stream’s content and structure and, if the stream is simulcast, affecting the over-the-air broadcast;
- Pay monthly royalties; and
- Keep detailed records and filing quarterly or monthly reports of all songs performed over the Internet.

II. Filing the Required “Notice of Use of Sound Recording Under Statutory License.”

Every Internet webcaster must notify the Copyright Office of an intention to participate in the statutory licensing scheme in order to reap the benefits of this license. This is the easiest aspect of compliance and simply involves the filing of a form entitled “Notice of Use of Sound Recordings Under Statutory License,” which can be found on the Copyright Office’s website at:

<http://www.copyright.gov/forms/form112-114nou.pdf>

An original and three copies of this one-page form are mailed to the Copyright Royalty Board in Washington, DC, along with a filing fee in the amount of \$ 25.00. It is important to note that that this form must be filed before commencing webcasting.

III. Compliance with DMCA Playlist and Technical Restrictions.

After resolving to begin Internet webcasting and filing the required "Notice of Use of Sound Recordings Under Statutory License" form, a webcaster must take steps to conform its playlists to the requirements of the DMCA. This may especially impact those radio broadcasters simulcasting an over-the-air signal, as the DMCA may require changes to the over-the-air playlist, meaning you must educate all radio staff about this law. Failure to comply with the DMCA's technical requirements could result in forfeiture of eligibility for the statutory licensing program, though the NAB has entered into agreements with certain record labels that do not require radio stations to comply with these technical requirements.⁶

The technical conditions imposed by the DMCA are intended primarily to prevent music piracy. They fall into 5 basic categories:

A. No Interactive Services.

Webcasters are prohibited from providing an "interactive service" which allows listeners to automatically select songs they want to hear. This does not prevent radio stations from taking requests, as long as the ultimate choice as to the playlist rests with station employees, not listeners.

⁶ A list of the record labels with whom the NAB has entered into an agreement to waive these technical requirements will be provided upon request. It is recommended that a webcaster comply with these technical requirements at all times unless it has discussed the issue with a Fletcher, Heald & Hildreth, P.L.C. attorney who confirms that the webcaster can deviate from these rules with regard to specific sound recordings.

B. Required and Prohibited Information About Songs, Albums and Performers.

Prohibitions against pre-announcing upcoming songs exist to prevent listeners from predicting exactly when they can hear a favorite song or artist and then setting up software to capture, save and download specific music. The titles of specific upcoming songs, the records containing those songs, or the name of featured artists can only be published on the station's website or pre-announced over the air if the exact time of the song's airing is not mentioned.

Thus, a playlist or announcement by a DJ saying: "'Yesterday' by The Beatles will be played at 5:23 pm, followed by two minutes of commercials and then 'Born to Run' by Bruce Springsteen at 5:30 pm" would be prohibited. But an announcer could utilize a teaser such as: "We'll go to commercial and have some Beatles for you when we come back" or "Coming up, we go back to the archive for 'Yesterday.'"

At the same time, the DMCA requires Internet webcasters to affirmatively identify certain copyright information so that listeners and copyright owners can readily determine which works are being performed on the station and assist in preventing copyright infringement. There must be a textual identification of the sound recording during (but, of course, not before) the performance which contains the song title, album title, and name of the performer.

C. Restrictions on the Number of Songs which can be Played from Any Given Album or Artist Within a Certain Time Period.

There are strict limitations on the frequency with which a given performer or songs from a specific album can be featured in a specific time period:

- No single song can be played more than once in an hour;
- Within any three hour period, no single internet radio stream can contain more than three selections from any one album or compact disc. None of these three selections can be played consecutively; and

- Within any three hour period, the Internet stream can include no more than four songs by the same artist or compilation. No more than three of these four songs can be played consecutively.

D. Restrictions on Archived or Repeated Programs.

One of the great benefits of the Internet is that it allows for greater storage of programming and, thus, allows listeners to hear certain programs multiple times. But there are strict rules related to archiving and repeating programs on a station's website:

- No archived programs may be less than five hours in duration;
- Programs of five hours or greater in duration may only be archived for a maximum period of two weeks;
- "Looped programming" – programming which is repeated consecutively without change – must be at least three hours in length; and
- Programs which are less than one hour in duration and repeated at scheduled times can only be repeated three times in a two week period; if the program is one hour or more in duration, it can be repeated four times in a two week period.

E. Other Technical Requirements.

There are several other technical requirements which are intended to prevent piracy, including:

- A prohibition on the transmission of visual images contemporaneously with the transmission of the sound recording in a manner that deceives the listener into believing there is some connection between the artist and the station;
- An agreement to cooperate in preventing transmission recipients from automatically scanning the transmissions and creating pirated CDs;
- An agreement to play only those recordings which have been released by the copyright owner for play to the public (no bootlegs); and
- An agreement not to interfere with the technical measures widely used by sound recording owners to identify or protect copyrighted works.

IV. Paying Monthly Royalties.

The entire statutory licensing scheme exists to provide an efficient manner of effectuating royalty payments. So it goes without saying that royalty fee payments are probably the most important part of the overall structure. The royalty rates were originally set by the Librarian of Congress in 2002 and updated every two years; the CRB later took over this job and is now responsible for amending the rates every five years.

On March 2, 2007, the Copyright Royalty Board issued onerous new royalty rates which sharply increased the payments made by webcasters during the years 2006-2010. The Webcasting II decision was met with significant opposition, eventually leading to an appeal of the CRB decision to the United States Court of Appeals for the District of Columbia Circuit. That appeal was pending in 2009, when the CRB initiated proceedings to determine the rates paid by webcasters for the years 2011-2015. While the appeal was pending, and as the 2011-2015 ratemaking proceeding was starting up, separate agreements between SoundExchange and the NAB and CPB became effective, offering an alternative royalty rate to participating webcasters for the entire period from 2006-2015. More agreements were reached in subsequent months, including one agreement applicable to noncommercial webcasters generally and another applicable to noncommercial educational entities.

On December 14, 2010, the CRB issued its Webcasting III decision setting the rates and terms for 2011-2015. Perhaps the biggest effect of this decision was to streamline the ratemaking structure. As a result of Webcasting III, a radio station simulcasting at least one of its channels on the Internet will be considered one of the following:

- Commercial Broadcaster;
- Noncommercial Public Radio Stations;

- Noncommercial Educational Webcaster;
- Noncommercial Webcaster Covered by the General Noncommercial Webcaster Settlement Agreement; or
- Noncommercial Webcaster Covered by Webcasting III.

For purposes of the statutory license applicable to webcasting, a noncommercial webcaster is not defined by its FCC license. Instead, a webcaster -- educational or not -- is defined as "noncommercial" if it:

- Is exempt from taxation under Section 501 of the Internal Revenue Code;
- Has applied for status as an entity exempt from taxation under Section 501 of the Internal Revenue Code; or
- Is a government entity acting within its public purpose.

What appears below is a summary of the royalty payment regulations that compares the rate schemes for these various categories.

A. Commercial webcasters.

Commercial webcasters streaming on the Internet -- whether they decide to participate in the WSA between SoundExchange and the NAB or not -- must calculate royalties on a "per performance" basis. A "performance" defined as "the streaming of one song to one listener".⁷ So a webcaster with 100 listeners during a given song will have 100 performances to be charged at the rates below for that song.

⁷ A performance is any instance in which any portion of a sound recording is webcast to a listener excluding:

- a. A performance of a sound recording that does not require a license;
- b. A performance of a sound recording for which a license has already been obtained directly from the copyright owner; and
- c. An incidental performance that makes no more than a brief use of the sound recording including brief musical interludes into and out of commercials, brief performances during sports, talk, or news programming and brief performances during commercials which are less than 60 seconds in duration, as well as ambient music in the background at a public event which does not feature a particular sound recording of more than 30 seconds.

Commercial webcasters must pay an annual minimum of \$ 500 per channel due January 31. The webcaster must then use the proper "Statement of Account" form found on the SoundExchange website to pay royalties on a monthly basis according to the following rate structure (the Webcasting III decision set an identical rate for 2011-2015 to that already in place under the webcaster settlement agreement between SoundExchange and the NAB):

- 2011: \$ 0.0017 per performance
- 2012: \$ 0.0020 per performance
- 2013: \$ 0.0022 per performance
- 2014: \$ 0.0023 per performance
- 2015: \$ 0.0025 per performance

These rates apply to all commercial broadcasters, regardless of size.⁸ A late fee of 1.5% per month, compounded monthly, is applied to any payment not made within 45 days of the end of the applicable month.

There is one more wrinkle: stations are allowed to calculate a portion of their monthly rates on an aggregate tuning hour basis if the station chooses to compile an allowed portion of its monthly playlist requirement on that basis as well. The station will assume 12 songs are played per hour, with that number multiplied by the number of listeners per hour and then again by the applicable royalty rate for the year. This can occur for up to:

- 2011: 16 percent of all programming per month
- 2012: 14 percent of all programming per month
- 2013: 12 percent of all programming per month
- 2014: 10 percent of all programming per month
- 2015: 8 percent of all programming per month

⁸ Small commercial broadcasters are treated differently, but only for playlist reporting purposes. That distinction is discussed in Section V(C)(1) below.

B. Certain Noncommercial Public Radio Stations

The simplest class of noncommercial webcasters includes those generally considered "public radio." SoundExchange reached an agreement with the Corporation for Public Broadcasting, the terms of which were released on March 3, 2009 as well and which is elective, not mandatory, in nature and available to any noncommercial terrestrial radio broadcast station that meets the following 5 criteria:

- Is licensed as such by the Federal Communications Commission;
- Originates programming and is not solely a repeater station;
- Is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or is a public radio station that is qualified to receive funding from CPB;
- Qualifies as a "noncommercial broadcaster" under the statutory licensing rules; and
- Either webcasts as part of the mission that entitles the owner to be exempt from taxation under Section 501 of the Internal Revenue Code or, if it is owned by a government entity, operates for a public purpose.

A station which elects to be governed by the CPB/SoundExchange agreement will not pay royalties to SoundExchange through 2015. Instead CPB has agreed to pay \$ 1.85 million to SoundExchange covering all eligible stations. These stations make all payments and filings through NPR's Public Radio Interactive Service.

C. Noncommercial Educational Webcasters

The next classification is that of noncommercial educational webcaster. This is another instance in which the Webcasting III decision erased any meaningful distinction between those participating in a WSA and those that do not.

A noncommercial educational webcaster is a noncommercial webcaster that:

- Is directly operated by or affiliated with and officially sanctioned by a domestically-accredited primary or secondary school, college, university or other post-secondary degree granting institution; and
- Has its webcasting operations be substantially staffed by students

A noncommercial educational webcaster must also pay only an \$ 500 annual minimum per station or channel per year fee for the year. This is the full extent of its royalty obligations for the year unless it exceeds 159,140 aggregate tuning hours in a given month.⁹ If that occurs, the excess royalty obligation will be calculated at the per-performance commercial rates which are:

- 2011: \$ 0.0017 per performance
- 2012: \$ 0.0020 per performance
- 2013: \$ 0.0022 per performance
- 2014: \$ 0.0023 per performance
- 2015: \$ 0.0025 per performance¹⁰

These rates apply to all noncommercial educational webcasters, regardless of size.¹¹ A late fee of 1.5% per month, compounded monthly, is applied to any payment not made within 45 days of the end of the applicable month.

Noncommercial educational webcasters must file a statement of account for every station or channel with SoundExchange every month, regardless of whether the threshold was exceeded and royalties incurred.

⁹ The term “aggregate tuning hours” refers to the total hours of programming that the licensee has transmitted during the monthly period to all listeners within the United States from all channels on which it streams copyrighted content, minus the running time of any programming which does not require a copyright license in order to be streamed (such as original programming) or for which a license has already been obtained directly from the copyright owner. The Copyright Office offers the following clarification: if a station streams one hour of programming to 10 simultaneous listeners, then it has engaged in 10 aggregate tuning hours of programming. However, if 30 minutes of this programming consists of a directly licensed program, then the station’s aggregate tuning hours is 9 hours, 30 minutes. As another example, if one listener listens to the stream for 10 hours, and none of the programming was directly licensed, the station has also engaged in 10 aggregate tuning hours of programming.

¹⁰ As with the other noncommercial webcasters, the \$ 500 annual minimum acts as a deposit against royalties incurred during the year. So actual payment will only occur when the sum of all excess usage payments exceeds \$ 500.

¹¹ Noncommercial educational microcasters are treated differently, but only for playlist reporting purposes. That distinction is discussed in Section V(C)(3) below.

D. General Noncommercial Webcasters.

If a noncommercial webcaster is not part of the Public Radio WSA and is not affiliated with an educational institution whose webcasting operations are substantially staffed by students, it is considered a general noncommercial webcaster. General noncommercial webcasters are treated differently depending on whether they opt into the general webcaster settlement agreement or not. We strongly suggest that a noncommercial webcaster opt into that agreement, but each classification is summarized in turn.

1. General Noncommercial Webcasters Covered by the WSA.

In August 2009, a lengthy negotiation was completed which set new rates for any noncommercial webcaster choosing to be bound by the terms of the general noncommercial WSA. A noncommercial webcaster electing this status will pay a \$ 500 annual minimum fee per station or channel. It has no further royalty obligations unless it exceeds 159,140 aggregate tuning hours in a given month. If it does exceed that maximum, the station will calculate the excess at the following per performance rates, which you can see are significantly lower than either their commercial or non-participating, noncommercial counterparts:

- 2011: \$ 0.00057 per performance
- 2012: \$ 0.00067 per performance
- 2013: \$ 0.00073 per performance
- 2014: \$ 0.00077 per performance
- 2015: \$ 0.00083 per performance¹²

These rates apply to all noncommercial webcasters, regardless of size.¹³ A late fee of 1.5% per month, compounded monthly, is applied to any payment not made within 45 days of the end of the applicable month.

¹² Again, the \$ 500 annual minimum acts as a deposit against royalties incurred during the year. So actual payment will only occur when the sum of all excess usage payments exceeds \$ 500.

These noncommercial webcasters also must file a statement of account for every station or channel with SoundExchange every month, regardless of whether the aggregate tuning hour threshold was exceeded and royalties incurred.

2. General Noncommercial Webcasters Covered by *Webcasting III*.

These noncommercial stations still pay an annual minimum fee of \$500 per station or channel by January 31. Again, this will be the station's entire royalty obligation for the year unless it exceeds the 159,140 aggregate tuning hour maximum for a given month. If a noncommercial webcaster who is not part of a WSA exceeds 159,140 aggregate tuning hours in the month, it will must calculate its royalty obligation at a per performance rate that is significantly higher than those noncommercial webcasters participating in the general noncommercial WSA:

- 2011: \$ 0.0019 per performance
- 2012: \$ 0.0021 per performance
- 2013: \$ 0.0021 per performance
- 2014: \$ 0.0023 per performance
- 2015: \$ 0.0023 per performance

Note that the \$ 500 annual minimum payment made each year acts as a deposit for noncommercial stations. So the station really doesn't pay any more money to SoundExchange until the sum of its excess usage payments, if they exist, exceed \$ 500 in the year. But the noncommercial webcaster must still file a statement of account form for every station or channel every month, even if it does not exceed 159,140 aggregate tuning hours and, therefore, does not incur any royalty obligations.

¹³ Noncommercial microcasters participating in the general noncommercial webcasting settlement agreement are treated differently, but only for playlist reporting purposes. That distinction is discussed in Section V(D) below.

These rates apply to all noncommercial webcasters, regardless of size.¹⁴ A late fee of 1.5% per month, compounded monthly, is applied to any payment not made within 45 days of the end of the applicable month.

V. Keeping Detailed Records and Filing Regular Reports of All Songs Performed on the Internet.

Of course, paying royalties to SoundExchange is only half of the equation. SoundExchange must allocate the proper amount to each copyright owner. To accomplish this, SoundExchange must understand how often each performer's works are played over the Internet, which requires collecting this information from webcasters.

A. Content of the Playlist Reports

Any entity that streams copyrighted materials over the Internet must keep records consisting of six items of data per sound recording. Interim rules published on March 11, 2004 were finalized on October 6, 2006 and announced the following items that must be included in reports to be filed with SoundExchange:

Name of Service: The name of the service is simply the full legal name of the licensee as it has been reported to the Copyright Office in the "Notice of Use of Sound Recordings Under Statutory License."

¹⁴ There is no noncommercial microcaster status available unless the webcaster opts into the general noncommercial WSA.

Transmission Category: This is a technical term defined by the Copyright Office which pertains to the legal status by which the Copyright Office identifies the streamer. A service must list one of eleven lettered category codes to describe itself.¹⁵

Featured Artist: The licensee must provide the name of the featured artist of each sound recording transmitted during the relevant recording period. The full artist or band name must be provided if the recording artist is an individual (first and last name) or entity (full band name). No abbreviations are permitted. In instances where the songwriter and recording artist differ, only the recording artist is to be reported.

Sound Recording Title: The actual title of every performed song must be reported. It is not sufficient to report the name of the album from which it was taken.

Sound Recording Identification: A licensee has two options under this category. It can either record (a) the International Standard Recording Code (“ISRC”)¹⁶ or (b) the Album Title and Marketing Label.¹⁷

Total Performances: A licensee must list the total number of performances of each sound recording during the relevant reporting period. This can be done by providing either (a)

¹⁵ Rather than list all eleven transmission category codes, it will be noted at this time the following categories are most likely to apply to most radio broadcasters simulcasting an over-the-air signal via the Internet (contact us if none appear to apply):

Eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

Eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming; and

Transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service.

¹⁶ This is a unique identifier that is embedded in promotional and commercially released sound recordings and can be read by currently available software.

¹⁷ In some instances, the album title or marketing label may not be available. In such a situation, the webcaster should provide information it actually possesses. However, it cannot “lose” the relevant information to ease the recordkeeping burden.

the number of actual total performances during the reporting period¹⁸ or (b) the aggregate tuning hours applicable to the reporting period, the channel or program name, and the play frequency.¹⁹

B. Format and Filing of Records

Although the March 11, 2004 interim final rules detailed the content to be included in the reports to SoundExchange, those rules did not indicate how the reports would be filed or when filing would begin. At the time, licensees were admonished that they would eventually have to file reports dating back to April 1, 2004; most simply stored that information in the backs of their brains, with few compiling the required reports on a regular basis.

Everything changed on October 6, 2006. The filing requirement became effective on that date. Failure to file these reports in the proper format in a timely manner immediately became a basis for losing eligibility to participate in the statutory licensing scheme and raised the possibility of a lawsuit for copyright infringement.

1. Format of Records

The records contained in playlist reports must be compiled and saved in electronic format – no paper filing is allowed. The information must be contained in a spreadsheet using ASCII computer formatting and either:

- Microsoft Excel; or
- Corel Quatro Pro

The reports are not required to be filed with a header at the top. However, if headers are included, they should look like this:

¹⁸ The actual total performances are the number of times the song was performed multiplied by the number of listeners logged on to the stream during each performance.

¹⁹ This second option is only available to smaller webcasters that do not exceed the \$ 500 annual minimum fee in a given years. Aggregate tuning hours has the same definition as used in determining royalty rates. The channel or program name is simply the FCC call sign of an Internet simulcaster. The final requirement, play frequency, requires the licensee to provide the overall number of times a sound recording is offered.

Row (Do include numbers)	No. not row	Field definition (Do not include field definition description)	Example
1		Service full name	ACME MUSIC SERVICE.
2		Contact Person	JOHN DOE.
3		Street Address	1000 WASHINGTON STREET.
4		City, State, Zip	WASHINGTON, DC 10000.
5		Phone	202-555-1212.
6		E-mail	DOE@ACMEMUSIC.COM.
7		Start of Reporting Period (DDMMYY)	01012006.
8		End of Reporting Period (DDMMYY)	31032006.
9		Report Generation Date (DDMMYY)	15042006.
10		Number of rows	60000.
11		Text Indicators	^.
12		Field delimiters	.
13		Blank line	

The fourteenth row will then contain the report headers which are prescribed in the Interim Regulations (Featured Artist, Sound Recording Title, Marketing Label, etc.). The fifteenth row begins the actual information pertaining to each song, with everything in upper case letters.

2. Filing

There are three permitted delivery methods (note that there is not a web-based filing mechanism, nor is paper filing allowed):

File Transfer Protocol (FTP): This will require the filer to get a username, password and delivery instructions from SoundExchange, who must provide this information by December 5, 2006.

Electronic Mail: If filed via electronic mail, the report is filed as an attachment.

The body of the electronic mail message must include:

- Name and address of the licensee;
- Contact person's name, telephone number and E-mail;

- Start and end date of the reporting period;
- Number of total rows in the attached report; and
- A file name of the webcaster's choosing (example
ACMEMusicCo20060101-20060331.txt)

CD-ROM: The filer must ensure that the entire report fits onto a single CD-ROM. The CD-ROM is filed with a cover letter that contains the same five pieces of information that would be included in the body of an electronic mail message.

C. Frequency of Filing by Webcaster Classification

These reports were originally quarterly in nature. In October 2009, the Copyright Royalty Board adopted "census" filing, which is the monthly filing of playlist reports containing information about all songs played during the month as the default. However, as discussed below, every classification has relaxed filing requirements to some degree, whether it is quarterly filings for eligible noncommercial and noncommercial educational webcasters or an entire exemption for qualifying and participating smaller webcasters.

1. Commercial Broadcasters

Commercial webcasters streaming on the Internet -- whether they decide to participate in the webcaster settlement agreement between SoundExchange and the NAB or not -- must engage in "census filing". This means a report must be filed every month with information about every song played during the month. It is due within 45 days of the end of the month to which it pertains.

Note that commercial broadcast stations choosing to pay a portion of royalties on an aggregate tuning hour basis as described in Section IV(A) above can report the data pertaining to that same percentage of programming per month as well. This is especially useful to stations utilizing syndicated programming for which they do not have all required information.

Most importantly, there is a separate category of "small broadcasters" which can pay an extra \$ 100 per year for a "reporting waiver" on top of their \$ 500 annual minimum fee by January 31 to receive a total exemption from the reporting requirement.

A "small broadcaster" is a commercial broadcaster who, in the prior calendar year, had less than 27,777 aggregate tuning hours' worth of webcasting and reasonably expects to do so in the upcoming year.²⁰ It is acceptable for the small broadcaster to exceed the aggregate tuning hour maximum one time, if it then implements measures to guarantee it will not exceed the maximum again before 2015 (such as by limiting the number of concurrent users accessing the site).

2. Noncommercial Public Radio Stations

As with royalty payments, any station participating in this special webcaster settlement agreement deals directly with NPR's Public Radio Interactive. Remember that these are not all noncommercial stations, but only those stations that are members of or affiliated with NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or is a public radio station that is qualified to receive funding from CPB.

3. Noncommercial Educational Webcasters

There are relaxed reporting requirements for those webcasters that elect status as a noncommercial educational webcaster. The noncommercial educational webcaster also gets to continue quarterly filing, with the filing occurring within 45 days of the end of the quarter. These reports need only cover two seven day periods during the quarter. The seven day periods

²⁰ This is actually a very low number that will eliminate all but a very few broadcasters from eligibility. Our calculations indicate that 27,777 aggregate tuning hours in a year equates to 3.17 listeners during every hour of every day.

need not be classic Sunday to Saturday "weeks", nor do they have to be consecutive seven day periods.

However, noncommercial educational webcasters with extremely low or high listenership will also find this requirement adjusted as follows:

- If the webcaster certifies that it had less than 55,000 aggregate tuning hours per month for all but one month in the previous year (about 75 simultaneous listeners at every moment in the month) and that it reasonably expects to stay below that number in the coming year, it can file a \$ 100 "proxy fee" and avoid having to file records of songs played.
 - The election must be made by January 31 of each year.
 - Once again, the webcaster can violate the limit in one year and retain its status, as long as it implements technical measures which ensure compliance in future years.
- If the webcaster exceeds 159, 140 average monthly aggregate tuning hours in a given year, it must engage in "census reporting" for the entire following year – every song played during the year (but it can simply report the number of times the song was performed, rather than the full listenership for each performance).

In exchange for these protections, the noncommercial educational webcaster is required to keep server logs sufficient to allow an auditor to verify all data for at least three years.

4. General Noncommercial Webcasters.

General noncommercial webcasters are treated the same as their educational counterparts in that the default is quarterly, not census, reporting. However, a general noncommercial webcaster can be required to engage in census filing if its listenership is sufficient to require actual payment of royalties beyond the \$ 500 annual minimum. Smaller noncommercial webcasters participating in the General Noncommercial WSA might be able to obtain an exemption from playlist reporting altogether.

a. Noncommercial Webcasters Covered by the General Noncommercial WSA.

Any webcaster electing to be bound by the provisions of the General Noncommercial WSA gets to continue quarterly report filing. For the truly small noncommercial webcasters, the requirement can be exempted entirely.

There is a general requirement to file records during two seven day periods during each quarter, with the filing occurring within 45 days of the end of the quarter. These do not have to be classic "weeks" in the Sunday to Saturday sense, nor do they have to be consecutive periods.

This requirement can change as follows:

- If the webcaster certifies that it had less than 44,000 aggregate tuning hours in the previous year (about 5-6 simultaneous listeners at every moment in the year) and that it reasonably expects to stay below that number in the coming year, it can file a \$ 100 “proxy fee” and avoid having to file records of songs played.
 - This certification and election must be made by January 31 of each year.
 - The noncommercial webcaster can exceed this amount one year in this time period and retain this "microcaster" status, as long as it implements technological measures to ensure it does not exceed the limit again.
- If the webcaster exceeds a monthly average 159, 140 aggregate tuning hours in a given year 2011-2015, it must engage in “census reporting” for the entire following year – every song played during the year -- though the aggregate tuning hour reporting of simply the frequency of each song played, along with the total number of listeners per hour, can be used rather than reporting the number of listeners to each particular song

These noncommercial webcasters can approximate twelve songs per hour and pay based on total listenership during that hour rather than figuring out the actual number of listeners per song (an aggregate tuning hour type calculation).

b. Noncommercial Webcasters Covered by *Webcasting III*.

Noncommercial webcasters not part of any WSA must engage in census filing of all songs played during every month. There is no "microcaster" status available under Webcasting III which allows for exemption from this requirement altogether (this provides yet another reason that we suggest that noncommercial entities opt into the general noncommercial webcaster settlement agreement).

VI. Conclusion

The publication of the October 6, 2006 interim final rules led SoundExchange to increase its efforts to enforce payment, recordkeeping and filing requirements against anyone who is streaming copyrighted material over the Internet. In fact, even before October 6, SoundExchange had taken advantage of its power to audit those participating in the statutory licensing scheme. Thus, anyone who has filed a "Notice of Use of Sound Recording Under Statutory License" is now doubly in danger – due to royalty payment and record filing requirements – of being caught for non-compliance and being declared ineligible for a statutory license. Those who have not filed that form and do not comply with payment or recordkeeping regulations run the risk of being banned from ever taking advantage of this license and facing lawsuits for copyright infringement.

Please note that this memorandum provides only an overview of the requirements for Internet streaming. We advise you to contact a Fletcher, Heald, & Hildreth, P.L.C. attorney prior to commencing an Internet webcasting operation and for periodic advice on whether ongoing operations comply with these regulations.