

## Clock Ticking for Webcasters to Opt in to Copyright Royalty Settlement by April 2 Deadline

By Janet Fries and Philip J. Cardinale

Webcasters have until **Thursday, April 2, 2009**, to elect to participate in a settlement reached recently between the National Association of Broadcasters (NAB) and SoundExchange, Inc. (SoundExchange) the organization designated by the U.S. Copyright Office to collect and distribute royalties for certain uses of copyrighted sound recordings over the Internet.

As this deadline fast approaches, all parties streaming sound recordings online are urged to give this settlement serious consideration. The royalty rates and terms negotiated under the NAB-SoundExchange settlement are preferable to the rates set by the Copyright Royalty Board (CRB) in 2007. For most webcasters, the rates negotiated by NAB for 2009 are approximately 16 percent lower than the 2009 rate set by the CRB. While this roll back is substantial, unfortunately, it may not be enough of a reduction for some broadcasters that are deciding they must cease webcasting, either temporarily or permanently.

For “small broadcasters” especially, the settlement represents a potential opportunity for financial savings, but this category is very strictly defined and many will not be eligible. In order to qualify as a “small broadcaster,” streaming must be limited to 27,777 “aggregate tuning hours” per year. For websites that stream music 24/7, the audience can average no more than three (3) listeners per hour throughout the year. However, websites with larger audiences that broadcast music intermittently may still qualify for “small broadcaster” status.

Electing to participate in the NAB settlement requires the following:

- > A Notice of Election form must be submitted to SoundExchange by **April 2, 2009**, by all broadcasters who were webcasting as of **March 3, 2009**. This form is available at [http://www.soundexchange.com/assets/download\\_forms/2006-2015-NoticeOfElection-Broadcasters-vFINAL.pdf](http://www.soundexchange.com/assets/download_forms/2006-2015-NoticeOfElection-Broadcasters-vFINAL.pdf).

Webcasters must be mindful of the following additional dates set forth in the settlement agreement:

- > **April 2, 2009**, is the date by which “small broadcasters” that are eligible for payment of the 2009 minimum fee are required to submit a Statement of Account exempting them from recordkeeping requirements for 2008. This Statement is obtainable at: [http://www.soundexchange.com/assets/download\\_forms/2009forms/SOA\\_for\\_Commercial\\_MinFee\\_2009\\_FINAL\\_TP.pdf](http://www.soundexchange.com/assets/download_forms/2009forms/SOA_for_Commercial_MinFee_2009_FINAL_TP.pdf).
- > **April 30, 2009**, is the date on which royalty payments are due to SoundExchange for past use. Late fees of 1.5 percent per month, compounded monthly, will be applied.
- > **January 31** of each year is the due date for the minimum annual payments of \$500 per channel required by “small broadcasters” as an advance against royalties due.
- > Going forward , monthly royalty payments will be due to SoundExchange on the **45<sup>th</sup> day following the end of each month** in which charges were incurred.

Interested parties who elect not to join the settlement will either have to pay the rates set by the CRB or discontinue online streaming of copyrighted sound recordings.

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## Background

The NAB settlement, announced on March 3, 2009, was the outcome of a dispute ignited by a 2007 CRB ruling that webcasters protested was overly favorable to the music industry. See Dkt. No. 2005-1 CRB DTRA, 72 *Fed. Reg.* 24084 (May 1, 2007). This ruling changed the method for calculating royalty payments payable to SoundExchange under Sections 112 and 114 of the Copyright Act.

Sections 112 and 114 provide compulsory licenses that, among other things, allow webcasters to stream songs upon payment of statutory royalties rather than negotiating with copyright holders individually. The Section 112 license applies to reproductions of copyrighted works, and the Section 114 license applies to public performances of those works.

SoundExchange is the nonprofit performing rights organization designated to collect copyright royalties for sound recordings broadcast on digital cable television, satellite television, Internet radio and satellite radio, and then to distribute those royalties to copyright owners, including record labels.

The webcasting royalty scheme announced by the CRB in 2007 abandoned a percentage-of-revenue rate in favor of a per-performance, per-listener rate applicable to all stations exceeding an annual threshold. Small webcasters asserted that the new rates would bankrupt them and through the NAB and other organizations, interested parties sought financial relief by litigation, legislation and negotiation. An appeal was filed with the U.S.

of the CRB. In Congress, the Internet Radio Equality Act was proposed in 2008; this bill would have reversed the CRB decision. When efforts to pass this bill failed late in the 110<sup>th</sup> Congress, proponents successfully enacted the Webcaster Settlement Act of 2008, extending the deadline for the parties to reach a negotiated settlement until February 15, 2009.

At the close of the negotiation period, the NAB and SoundExchange, along with several other affected parties, reached a total of three separate settlements. Details of these settlements were published in the *Federal Register* on March 3, 2009, including a 30-day period during which parties are entitled to join the NAB settlement. (See <http://edocket.access.gpo.gov/2009/pdf/E9-4439.pdf>.)

## NAB Settlement Details

The NAB-SoundExchange settlement applies the following rates on a per-performance basis, whereby the number of “performances” is calculated by multiplying the number of songs played by an Internet radio station times the number of listeners. For example, an hour of broadcasting in 2009 during which 12 songs are streamed to 1,000 listeners would result in an \$18.00 royalty fee.

Year	Rates
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

By contrast, the 2007 CRB ruling set the following per-performance rates: 2006 - \$.0008; 2007 - \$.0011; 2008 - \$.0014; 2009 - \$.0018; and 2010 - \$.0019. The NAB settlement rate table represents a reduction in rates for 2009-2010 and greater certainty for the years 2011-2015, a period for which the CRB has not yet set rates. Using the CRB scheme, the same hour of broadcasting in 2009 sampled above would result in a \$21.60 royalty fee.

Other important details of the settlement include the following:

- > **Reporting Requirements:** Calculations of royalties due will be based primarily on census reporting, which requires detailed recordkeeping including song title, artist, album, and ISRC code for each song transmitted. The settlement provides an alternative means of calculation based on

Court of Appeals for the Federal Circuit, challenging the constitutional legitimacy

“aggregate tuning hours” (ATH) which assumes that 12 songs are played hourly; calculations based on ATH can be substituted for census reporting for up to 20 percent of songs transmitted in 2009, and for lower percentages of total transmissions in later years under the agreement.

- > **\$500 Minimum Fee: Small Broadcaster Exception:** Broadcasters that stream less than 27,777 ATH, are eligible to pay the \$500 annual fee and for an additional \$100 may be exempted from other reporting requirements. As noted above, elections for 2009 “small broadcaster” status – along with elections to join the NAB settlement – must be made by the April 2 deadline.

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Should you have any questions about the NAB-SoundExchange settlement on webcasting royalties, please do not hesitate to contact either Janet Fries at [janet.fries@dbr.com](mailto:janet.fries@dbr.com), (202) 354-1333 or Philip J. Cardinale at [philip.cardinale@dbr.com](mailto:philip.cardinale@dbr.com), (202) 230-5160.

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