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**March 15, 2007**

## **The New Webcast Royalties – What they are, what happens next and what you should be prepared for.**

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A Copyright Royalty Board (CRB) has issued its final decision in a 18-month proceeding to determine rates and terms for royalties to be paid when a sound recording is transmitted digitally (streamed) over the internet from (retroactively) January 1, 2006 through 2010.



**If you are a broadcaster or webcaster who streams music over the Internet - whether a simulcast of your live stream or one or more "side channels", this decision affects you and your business.**

I could write volumes explaining the royalties, what they cover and how we got here. I could also expound on the politics of this decision, as there will no doubt be continued heated battles and appeals on the part of webcasters and broadcasters to have the decision overturned or modified. But I will refrain from doing either here.

Instead, the purpose of this white paper is to give our streaming clients and friends a plain-English "heads up" overview of what to expect and plan for in the coming months based on the information we have as of March 15, 2007. All of this can change. **And this information should not be a substitute for your own legal counsel.**

Following is our take on some of the most Frequently Asked Questions:

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## What are the new rates and how do they compare to the old rates?

Up until now, webcasters and broadcasters have been paying royalties under the “old” (2005 and prior) rates. Since the new rates took effect January 1, 2006, retroactive payments will have to be made to make up the difference between the old rates and the new ones.

To understand how this affects you, it’s first important to know a couple of terms. There are two primary ways that most radio stations and larger webcasters pay their royalties now\*. Royalties are paid based on either:

- **The number of performances.** A “performance” is one song streamed to one listener. One listener that hears 1000 songs = 1000 performances. 10 listeners that each hear 100 songs = 1000 performances, etc. **OR**
- **Aggregate Tuning Hour (ATH).** One listener tuned to your station for 10 hours over the course of a month = 10 ATH. 100,000 listener sessions with an average TSL of 30 minutes = 50,000 ATH. This is the most common way that stations report their royalties as it’s the easiest measurement to calculate, and is readily available from your streaming provider. Until 2006, there were TWO ATH royalty rates:
  - A lower rate for Broadcast Simulcasts (based on playing about **12** songs per hour)
  - A higher rate for Internet-Only webcasts – Side Channels for example (based on playing about **16** songs per hour)

**Important Note: The new CRB ruling does not provide for an ATH method – only a “per performance” royalty. And because of this, it makes no distinction between Internet-Only and Broadcast Simulcasts.**

OK, if you’re still with us, let’s try to compare the old rates to the new rates. But since decimals make some people dizzy, we’re going to base these costs on **1000 performances** or **1000 ATH** (sort of a “Cost per Thousand” look at this). Here’s the chart:

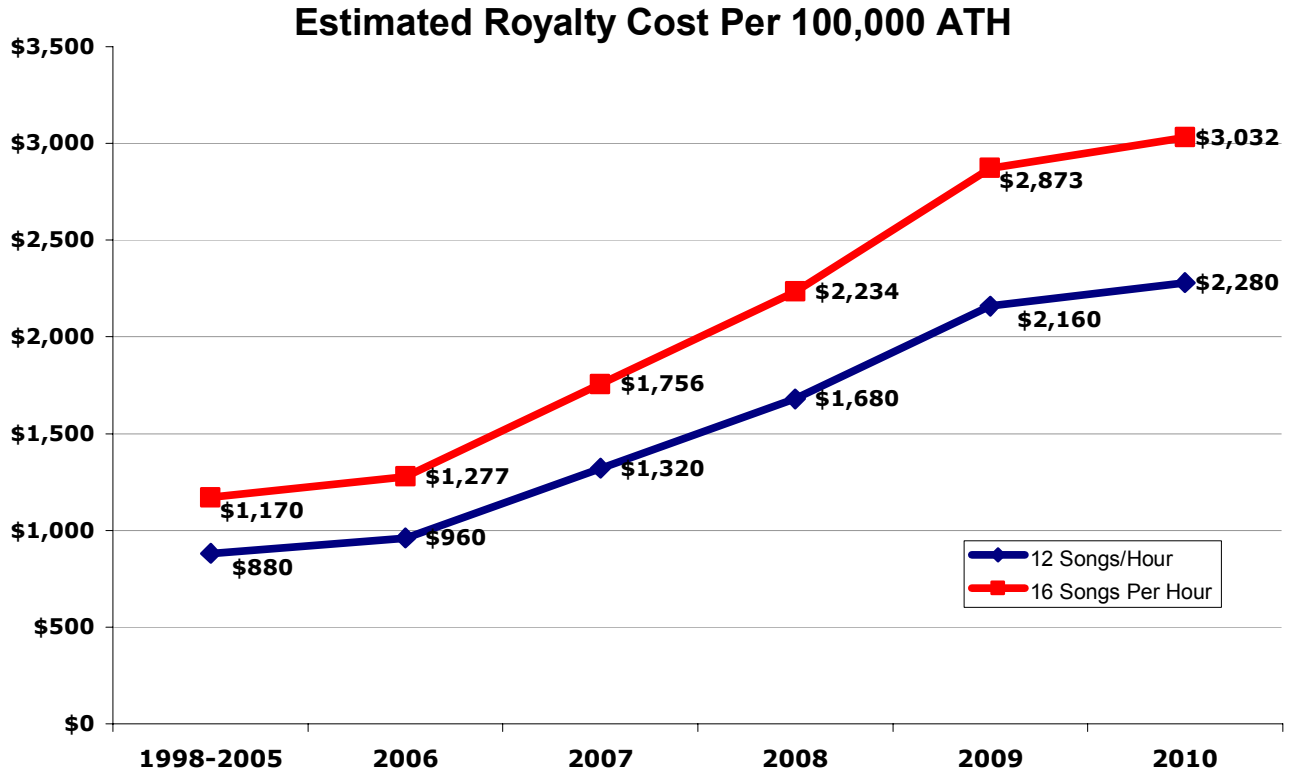
	98-05	2006	2007	2008	2009	2010
<b>Per Performance Royalty Amount:</b>	\$0.0007	\$0.0008	\$0.0011	\$0.0014	\$0.0018	\$0.0019
<b>Cost Per 1000 Performances</b>	\$0.73	\$0.80	\$1.10	\$1.40	\$1.80	\$1.90
<b>Est Cost Per 1000 ATH (12 Songs/Hour)</b>	\$8.80	\$9.60	\$13.20	\$16.80	\$21.60	\$22.80

Note that each station or channel is subject to a **\$500 minimum annual fee.**

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- This discussion deals only with commercial web/broadcasters who were not operating and paying royalties under the Small Webcaster’s Settlement Act (SWSA) or NPR/Non commercial arrangements.

Remember, the CRB decision did not provide a rate for the familiar "ATH" method, so these are estimates for comparison purposes only based on the previous ATH method of rate calculation.

Let's look at it on a graph. This shows the cost comparison for the period 1998-2005 though 2010 based on **100,000 ATH**.



### How much will our station owe retroactively for 2006 royalties we've already paid under the old rate?

If your station paid and reported based on ATH for broadcast simulcasts, you will have to come up with approximately \$.80 (80 cents) for every 1000 ATH you streamed in 2006 assuming you stream an average of 12 songs per hour. Example: if your station does 100,000 ATH per month, that's an additional \$80 per month or \$960 for the year.

In **2007** you'll have to come up with an additional **\$4.40** for every 1000 ATH you streamed and paid for this year so far under the old rates.

## How will we calculate the "per performance" royalty when all we have is ATH numbers from our streaming provider?

The answer to this remains unclear. It may in fact be technically unfeasible for radio stations to provide a true per-performance statistic for every song played on their stream. It is hoped that the CRB will provide some clarification on this. But even if they don't, as a practical matter SoundExchange will likely be forced to accept estimates based on ATH and average number of songs played per hour on your station or channel. (or alternately, the total number of "spins" for the reporting period). Here's one possible scenario:

Let's say your station plays an average of 300 songs per day (24 hours) - that's 12.5 songs per hour. There are 720 hours in a 30-day month resulting in 9000 "song spins." If your station streams 100,000 ATH during the month, then each hour accounts for 139 ATH (100,000/720). This means there are an average of 139 listeners tuned in at any time during an average hour. Therefore each "spin" gets an average of 139 performances. Your total royalty for the month (2007 Rates) would be:

**9000 (spins) X 139 (performances) X \$0.0011 ('07 Royalty Rate) = \$1376.10**

## How will we have to report what we play?

Currently, under interim rules from the U.S. Copyright Office, webcasters are required to keep track of the songs they play and the number of performances for each song OR total ATH and the number of times a song is played. Under current rules, we are supposed to report our music use for a two-week period every quarter starting with the second quarter of 2004. Reports are due within 45 days of the end of each quarter. Song information that must be reported includes:

**Song Title**

**Recording Artist**

**Album**

**Marketing Label**

For more information, visit the SoundExchange website at:

[http://www.soundexchange.com/licensee/licensee\\_cws.html#reporting](http://www.soundexchange.com/licensee/licensee_cws.html#reporting)

As of this date we are not aware of any changes to these interim recordkeeping rules. However, we expect that the CRB may address the recordkeeping issues in the near future, especially in light of their decision that does not include an ATH model for calculating royalties. Meantime, we advise stations to maintain good records of all songs streamed as well as complete streaming statistics. Stay tuned for more on this topic...

## **What about our Side Channels we stream through Custom Channels?**

If you're a Custom Channels client (including Christmas Channel clients), you know that we handle all of the SoundExchange royalties for your stream. The good news (for you!) is that we are obligated to absorb the difference for any retroactively due royalties and we won't be coming after you for the difference.

The bad news is that in most cases, Custom Channels will have to raise our rates going forward to cover the additional costs of the licenses and recordkeeping. We will honor all contracts currently in place but will be contacting clients with details on the rate increase per the terms of our agreement within the next few weeks.

## **When do the new rates take effect?**

Technically, they are in effect now. But no one – even SoundExchange to our understanding - is quite sure when the necessary Statements of Account will be available. We would expect such an announcement to be made by SoundExchange to licensees within the next 30-60 days. Stay tuned.

## **Is there any way to appeal the decision – might it get overturned?**

Only parties that participated in the CRB proceeding may launch an appeal in district court. We understand that some parties with the wherewithal to undertake another long and expensive court battle may do just that. But an appeal, even if successful, may take a year or more to complete.

## **Could Congress get involved and lower the rates?**

Yes. And there appears to be some significant 'noise' being made within the halls of Congress by the public, and both small and large web/broadcasters to have the legislature take another look at this decision and intervene. But (and this is just my opinion here), it seems that if Congress were to intervene, it would be on the behalf of the small webcasters we mentioned above. Unless the NAB and/or the major broadcast groups get more involved and bring pressure to bear on Congress to overhaul the DMCA and the rate-setting process, many radio stations may be stuck with the determined rates.

There may be other options including a new voluntary negotiation (SoundExchange may not find the idea of spending an other year in court all that appealing, either!), so we're not giving up hope for lower rates.

## **Do we have to pay the higher rates while the decision is under appeal?**

Most likely yes. Our understanding is that until the rates are changed by appeal, congressional action or voluntary negotiation, rate payers will be obligated to make payments under the new rate scheme. There's some debate, however, about when and whether the "retroactive" royalties will be due if the matter is under appeal. Stay tuned for more on this.

## **What happens if the new rates are later reduced?**

Most likely, it will result in the web/broadcaster receiving a credit for the difference with SoundExchange.

## **Should our station keep streaming?**

Obviously, this is a decision each station will have to make on their own after evaluating the costs and the revenue potential of their streams now and in the future.

But the media landscape in 2007 almost mandates that stations not only keep streaming, but develop other forms of digital media in the form of Internet and HD2 side channels, podcasts, video, music downloads and more. After all:

- Radio faces more and more competition from cell phones, satellite radio, iPods, large webcast portals and a host of other digital media.
- Over 50 million Americans stream regularly (Arbitron/Edison). Regardless of what radio does with streaming, our bet is that listeners' adoption of Internet streaming will continue to grow at a fast pace. If stations aren't streaming, radio isn't there for its listeners.
- The computer has become the preferred "entertainment center" – especially at-work. As WiFi and broadband cell service becomes even more widespread, the notion of completely portable and even in-car Internet radio is not science fiction; it's a near future reality. Unfortunately, single AM or FM signal just isn't enough anymore to reach listeners where, when and how they want to be reached; radio needs to be on the 'net.
- Internet advertising is set to eclipse radio advertising in 2007 (over \$20 billion annually). A portion of this growing revenue pie is being spent on streaming media. Radio needs to get its share of new media advertising and streaming is one of our most valuable saleable assets.
- Streaming providers like SBR Custom Channels and Liquid Compass offer powerful tools such as video gateways, in-stream ad-insertion, advertising management and more to help stations maximize revenue from their on-line streaming traffic.

## **I've read a lot about the "death of internet radio" due to this decision recently. Isn't that a bit overblown?**

When it comes to small and independent webcasters, it's not overblown at all. Prior to this decision, many small and independent webcasters were able to pay royalties based a percentage (10%-12%) of their revenue under the terms of a special relief law passed by Congress and enacted by President Bush in 2002 called the **Small Webcaster's Settlement Act**. But the CRB decision did not make any special consideration or percentage of revenue option for small webcasters for the new 2006-2010 term. The retroactive payments due from small webcasters alone will, in most cases, be enough to bankrupt them.

## **Where can I get more information about the decision?**

If you're interested in details on the CRB decision and more about what it means for you, here are a few sites and links to check out:

**Radio & Internet Newsletter (RAIN):** [www.kurthanson.com](http://www.kurthanson.com)

**Blog featuring the comments and insights of renowned broadcast and webcast attorney David Oxenford of the firm Davis, Wright, Tremaine, LLP.**

<http://www.broadcastlawblog.com/>

**SBR Creative Media's Direct Written Testimony at the CRB Hearing:**

[www.customchannels.net/downloads/SBR\\_CRB\\_Direct\\_Statement.pdf](http://www.customchannels.net/downloads/SBR_CRB_Direct_Statement.pdf)

**The CRB's Final Decision:**

<http://www.loc.gov/crb/proceedings/2005-1/rates-terms2005-1.pdf>

**Digital Media Association (DiMA):** <http://www.digmedia.org>

**SoundExchange Website:** <http://www.soundexchange.com>

**Save The Streams:** <http://www.savethestreams.org/>

**Of course, we're always happy to answer any questions. Just give me a call at 303.444.7700 or email [dave@sbrcreative.com](mailto:dave@sbrcreative.com)**

## Why Did The Rates Change?

Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998 to put into place myriad provisions protecting copyright owners (e.g. record companies and recording artists) against potential widespread piracy of their works via “perfect digital copies” being sent over the Internet.

The DMCA also provided for a *legal* way for radio stations and webcasters to transmit copyrighted music programming over the web via streaming technology without having to get the individual permission of every record company or artist beforehand. So long as the web/broadcaster followed certain rules and paid certain royalties, they were free to use copyrighted materials (e.g. musical recordings) in on-line streams.

But Congress did not set the royalty rates in the DMCA. They left that to voluntary negotiation between the record companies and the web/broadcasters. But if the parties couldn't agree, then the matter would be sent to a Copyright Arbitration Royalty Panel (CARP) where one or more judges would hear both side and make a ruling.

Long story short, previously determined webcast royalty rates set in place in 2002 to cover the period from 1998 to 2005 have expired. For the 2006 to 2010 period, the parties were again to negotiate and, failing a successful negotiation, the matter would again be sent to the copyright judges (now a three-judge Panel called the Copyright Royalty Board or CRB). This is exactly what happened.

The CRB was a long, contentious and expensive proceeding pitting the *royalty payers* - **webcasters and broadcasters** (including **SBR Custom Channels**, Clear Channel, National Public Radio, Bonneville International, Yahoo!, AOL, Microsoft, and a host of other small and large webcasters) against **SoundExchange**, the royalty collection company for the Recording Industry Association of America (RIAA) representing the *royalty receivers* (*record companies and performing artists*).

Finally, on Friday, March 2, 2006 after hearing months of testimony and receiving hundreds of thousands of pages of documents into evidence by the parties, the CRB released its decision on the rates for the period of **January 1, 2006 – December 31, 2010**.

**Broadcasters and webcasters have been continuing to pay according to “old” rates and terms, which expired December 31, 2005. Since 2006 and part of 2007 have already passed, it's important to know that the new rates terms are RETROACTIVE to January 1, 2006.**