

Copyright Royalty Board Decision May Mean Fewer Sources for Independent Music

Future of Music Coalition responds to CRB's webcasting rate decision

March 13, 2007

On March 4, 2007, the Copyright Royalty Board (CRB) announced new royalty rates for webcasts, effective from 2006 to 2010. The retroactive rate for 2006 was set at \$0.0008 per song per user, with rates increasing annually to:

- \$.0011 (2007) per song, per user
- \$.0014 (2008) per song, per user
- \$.0018 (2009) per song, per user
- \$.0019 (2010) per song, per user.

The rates set by the CRB are in line with those suggested by SoundExchange, the agency designated by the Copyright Office to collect and distribute digital performance royalties. Critics of these higher royalty rates say that these fees could be equal to or greater than many small internet stations' total revenues, an untenable position that would force many existing stations offline.

In response to this announcement, FMC urges stakeholders – small webcasters, commercial webcasters, artists, SoundExchange – to work together to strike a balance that recognizes the value of webcasting, but also properly compensates artists, performers and labels for uses of their work. While the proposed method of calculating rates based on gross revenue may work for many of the larger commercial webcasters, it's unlikely there will ever be a "one size fits all" resolution to rate calculations. Nobody benefits if small webcasting stations, those that are the most likely to represent the richest diversity of music available, are forced offline because of an inability to pay the proposed licensing fees. A structure and process that sets reasonable rates for different but clearly defined categories of webcasters would be the best strategy.

FMC has participated in the majority of the prior webcasting rate and reporting requirement proceedings.¹ During each prior proceeding we have emphasized the same basic principles:

¹ In April 2002, FMC filed comments in the US Copyright Office's NPRM on reporting requirements: <http://www.futureofmusic.org/news/CARPreCORDingreqs.cfm>

We also filed reply comments in this proceeding, underscoring the undue burden that many proposed reporting requirements would have on small webcasters and questioning the feasibility of the proposed "listener logs". <http://www.futureofmusic.org/news/CARPreplycomments.cfm>

In the same month, responding to widespread confusion about the rulemaking process, FMC published an easy-to-read CARP Fact Sheet that described the webcast license proceedings, as well as royalty and reporting requirements. <http://www.futureofmusic.org/CARPfactsheet.cfm>

Terrestrial Radio's Weakness is Internet Radio's Strength

Radio is important to the music industry. In the traditional music business model, radio is seen as the best – and possibly only – way to “break” a record. Except in some rare cases, breaking a record on commercial radio has been a prerequisite to the sale of the hundreds of thousands of copies that are needed for labels to recoup costs. _

Despite its importance to broadcasters, advertisers, musicians, labels and the listening public, there is mounting evidence that the traditional commercial radio model is broken. _ As we have documented in two substantial reports,² the consolidation of radio station ownership that has occurred since the 1996 Telecommunications Act has had a dramatic effect on the state of radio for musicians and the American public. According to our December 2006 study:

- Just fifteen formats make up three-quarters of all commercial programming. Moreover, radio formats with different names can overlap up to 80% in terms of the songs played on them.
- Niche musical formats like Classical, Jazz, Americana, Bluegrass, New Rock, and Folk, where they exist, are provided almost exclusively by smaller station groups and noncommercial broadcasters.

The Telecom Act unleashed an unprecedented wave of radio mergers that left a highly consolidated national radio market and extremely consolidated local radio markets. Radio programming from the largest station groups remains focused on just a few formats—many of which overlap with each other, enhancing the homogenization of the airwaves.

Contrast this with the internet which, by design, allows webcasters to offer just about any possible mix of music and information. Webcasters can not only specialize in underrepresented genres such as classical, New Orleans jazz, punk rock, or bluegrass, but for the first time they can legitimately make a business out of aggregating small numbers of fans of these niche genres all across the world. This possibility is strengthened by the

In May 2002, FMC's Executive Director Jenny Toomey participated in the Copyright Office Roundtable. FMC's testimony underscored the need for multiple licensing levels that recognized the difference between large commercial, small commercial, noncommercial, and hobbyist webcasters. We also called for reasonable reporting requirements and the automation of the reporting process, and we urged the Copyright Office to drop the use of ephemeral copy logs and the threat of perjury for non-reporting.

<http://www.futureofmusic.org/news/CARPRoundtable.cfm>

FMC expanded on this notion and filed testimony in the Senate Commerce Committee May 15 hearing, “Copyright Royalties: Where is the Right Spot On The Dial For Webcasting?”

<http://www.futureofmusic.org/news/senatejudiciarywebcasting.cfm>

² Cite our two studies.

relatively low barriers to entry for webcasting as individuals can create and launch a webcasting station with just a handful of affordable resources; access to bandwidth, some computers, software, and a little bit of know-how. The limitless spectrum and low barriers to entry also means that there's a better chance for legitimate market competition to flourish on the web.

Webcasting creates a wealth of new choices for music lovers and information seekers that, until recently, have had their choices restricted to what's being broadcast in their local area. It is abundantly clear that webcasting represents a rich and diverse set of listening opportunities that are basically nonexistent in the terrestrial world.

For Musicians and Labels, Webcasting is also a New Revenue Source

Webcasting also benefits musicians and record labels. The Internet has already created new ways for artists to promote and distribute their music, to connect directly with music fans, and build communities outside of the constraints of commercial business models. FMC believes that webcasting plays a vital and growing role in this area, both as a new mode of promotion that encourages music sales and builds fan bases, and as a new source for public performance royalties, 45% which go directly to the performer and 50% directly to the sound recording copyright owner (usually the label). As a demonstration of the royalties that digital performances represent, to date, SoundExchange has paid out over \$53 million to thousands of artists and record labels, with numbers increasing each year.

Multiple Licensing Tiers, Reasonable Reporting Requirements

In the prior webcasting rate and recordkeeping proceedings, FMC underscored the need for multiple licensing levels that recognized the difference between large commercial, small commercial, noncommercial, and hobbyist webcasters. This, in a large sense, did come to fruition. There are currently exemptions for noncommercial webcasters, and reasonable flat fees for very small webcasters.

We also called for reasonable reporting requirements and the automation of the reporting process. Early drafts of reporting requirements included more than a dozen data points for each song played, many of which were not readily available to a small webcaster. FMC was pleased when the reporting requirements were reduced to a manageable number, but we also continued to call for some automation in the process that would verify data from a centralized authentication database. This would not only reduce workload at the webcaster level, but it would also ensure that the proper rights holders would be compensated. This authentication database notion is still something FMC embraces, but we understand that costs and ownership issues make it an unlikely solution in the near future.

Possible Outcomes of the Current Proposed Rate Structure

This rate-setting announcement has generated dozens of press stories and blog entries, most of them decrying the decision as too onerous, especially for small webcasters that may now be required to pay more to SoundExchange, ASCAP, BMI and SESAC than their total current revenue. For small webcasters, operating under these new conditions would mean:

- increasing revenue by selling more advertising, thus reducing time playing music
- playing fewer pieces of music per hour, thus reducing time playing music
- going off the air, thus eliminating an existing digital performance royalty stream entirely and reducing competition in the marketplace.

Based on the first two scenarios above, there is likely to be a *reduction* in the amount of music content played by small webcasters and, subsequently, less royalties flowing back to artists and labels. In the third scenario, we might see many small webcasters go offline, which would eliminate the flow of digital performance rights entirely. Given that the niche music formats are most likely to benefit from webcasting, it will be the niche artists and less commercially viable formats that are affected the most. Given the internet's proven power to increase artist exposure and artist compensation, we find the notion of regression in the world of webcasting to be one that independent artists and music lovers should not accept.

Recommendation

FMC understands that the rates may be appealed, the Congress may intervene, or that webcasters and SoundExchange could craft a voluntary agreement. Future of Music Coalition urges the parties to work together to strike a balance that recognizes the value of webcasting, but also properly compensates artists, performers and labels for uses of their work.