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## **NAB-SoundExchange Agreement Offers Broadcasters Alternative Streaming Royalty Rates and Terms**

### **Broadcasters Must Make Election By April 2**

The Copyright Office has published the Agreement between the National Association of Broadcasters (“NAB”) and SoundExchange that sets optional terms and conditions, including copyright royalty rates, for the streaming of sound recordings by commercial broadcasters for 2006-2015. The Agreement results from negotiations conducted pursuant to the Webcaster Settlement Act of 2008.

As detailed below, the Agreement provides for reduced streaming rates for 2009 and 2010, establishes new rates with gradual increases for 2011 through 2015, sets a deadline for the payment of past-due royalties, and revises certain webcasting reporting requirements. Eligible broadcasters may elect to be subject to the Agreement’s rates and terms as an alternative to the rates and terms set by, or to be set by, the Copyright Royalty Board (“CRB”). **Broadcasters have until April 2, 2009 to make their elections.**

#### **I. Who is Eligible for the Agreement’s Rates and Terms?**

The Agreement’s rates and terms are available to any commercial AM or FM broadcaster who has obtained a statutory license to make digital transmissions of sound recordings and related ephemeral recordings under Section 114 and Section 112 of the Copyright Act, and who complies with all provisions and regulations applicable to a Sections 114 and 112 statutory licensee (*e.g.*, filing a Notice of Use of Sound Recording under Statutory License (“Notice of Use”) indicating an intent to use the statutory license, filing statements of account and reports of use, and making royalty payments). Certain noncommercial broadcasters are subject to different terms under a separate agreement entered into between the Corporation for Public Broadcasting and SoundExchange.

An otherwise qualified broadcaster who has participated in any appeal of the royalty rates established by the CRB for the 2006-2010 period, or who petitioned to participate in the ratemaking proceeding for the 2011-2015 period, must withdraw from any such proceeding prior to the electing the Agreement’s rates and terms (as discussed in Section III below). A broadcaster who elects these rates and terms is also precluded from participating in any future ratemaking proceeding covering any part of the 2006-2015 period.



II. What are the Agreement’s Key Rates and Terms?

- New Royalty Rates

Most importantly, the Agreement sets the royalty rates that electing broadcasters will pay to stream sound recordings during 2006-2015. Royalties are calculated on a “per performance” basis – that is, on the number of listeners hearing any given song. The following chart compares the new royalty rates to the royalty rates for 2006-2010 adopted by the CRB in 2007, which will continue to apply to broadcasters who do not elect the Agreement’s rates and terms. Rates for 2011-2015 applicable to non-electing broadcasters will be determined by the CRB during the ratemaking proceeding that commenced last month.

Year	New Rate Per Performance	Existing Rate Per Performance
2006	\$0.0008	\$0.0008
2007	\$0.0011	\$0.0011
2008	\$0.0014	\$0.0014
2009	\$0.0015	\$0.0018
2010	\$0.0016	\$0.0019
2011	\$0.0017	--
2012	\$0.0020	--
2013	\$0.0022	--
2014	\$0.0023	--
2015	\$0.0025	--

In short, the Agreement offers no change to the royalty rates for 2006-2008, a reduction of approximately 16% to the rates for 2009-2010, and a gradual increase in rates for each year from 2011-2015. The Agreement also includes a “Most Favored Nation” provision that provides electing broadcasters the opportunity to take advantage of any more favorable rates and terms that SoundExchange subsequently agrees to with a broadcaster negotiating independently.

- Payment of Past-Due Royalties

A broadcaster that elects the Agreement’s rates and terms must, **by no later than April 30, 2009**, submit payment for unpaid royalties due under the statutory license for the period beginning on January 1, 2006 and ending on February 28, 2009. A late fee of 1.5% per month, compounded monthly, or the highest lawful rate, whichever is lower, will be assessed from the original due date.

- Revised Reporting Requirements

The Agreement revises the requirements by which broadcasters, as statutory licensees, report their use of sound recordings. Currently, broadcasters file reports of use on a quarterly basis that detail the sound recordings publicly performed during a representative two-week period. The revised reporting requirements, in contrast, mandate monthly accounts that, with limited exceptions discussed below,



report every sound recording publicly performed during the relevant month. This all-inclusive reporting requirement is referred to as “census reporting.”

Recognizing the operational challenges inherent to census reporting, NAB and SoundExchange agreed to two census reporting exceptions. The first applies to so-called “small broadcasters,” defined generally as broadcasters that transmit less than 27,777 aggregate tuning hours of programming (including both online retransmissions of over-the-air programming and internet-only programming over side channels) during the prior calendar year and that reasonably expect to do so again during the applicable year. Broadcasters eligible for small broadcaster status must elect such status using the procedure discussed below in Section IV. Small broadcasters are exempt from the requirement to submit reports of use, but are obligated to pay an annual \$100 fee to defray costs associated with SoundExchange’s development of proxy sound recording usage data.

The second census reporting exception is available to broadcasters that do not qualify as small broadcasters. These broadcasters may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hours basis, if (1) census reporting is not reasonably practical for the programming during those hours, and (2) if the total number of hours on a single report of use, for which aggregate tuning hours reporting is used, is below the maximum percentage set forth below for the relevant year, as follows:

Year	Maximum Percentage
2009	20%
2010	18%
2011	16%
2012	14%
2013	12%
2014	10%
2015	8%

A broadcaster choosing to report and pay for usage on an aggregate tuning hours basis must do so based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour.

- Other Statutory Terms Still Apply

A broadcaster electing the Agreement’s rates and terms remains subject to all other regulations applicable to a Section 114 and Section 112 statutory licensee. This includes the requirement to file a Notice of Use, submitting monthly statements of account and royalty payments, paying the annual minimum fee of \$500 per channel, and complying with statutory conditions on streaming.<sup>1</sup>

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<sup>1</sup> Concurrent with its Agreement with SoundExchange, NAB also has entered into agreements with the major record labels that reportedly relax certain limitations on the use of sound recordings imposed by the Copyright Act’s Sound Recording Performance Complement. We will advise you of the details of these agreements once they are made public.



III. How Do You Elect the Agreement's Rates and Terms?

A broadcaster streaming sound recordings as of March 3, 2009 must submit a signed form to SoundExchange by April 2, 2009 indicating its election to be subject to the Agreement's rates and terms. The election form is available on the SoundExchange website (<http://www.soundexchange.com>) by clicking on the "Download Forms" link and selecting "For Digital Music Services." A broadcaster not yet streaming sound recordings as of March 3, 2009 will have 30 days from the commencement of streaming to make its election.

If a broadcaster has not already done so, it should file a Notice of Use with the Copyright Office prior to submitting its election form. The Notice of Use form is available on the Copyright Office website (<http://www.copyright.gov/forms/form112-114nou.pdf>). Filing a Notice of Use requires payment of a \$20 fee.

IV. How Do You Elect Small Broadcaster Status?

A broadcaster that elects to be subject to the Agreement's rates and terms and that qualifies as a small broadcaster may elect to be treated as a small broadcaster for any one or more calendar years. To do so, the small broadcaster must submit to SoundExchange a completed and signed election form available on the SoundExchange website. The small broadcaster election must be submitted by January 31 of the applicable year, except that election forms for the years 2006 through 2009 are due by April 2, 2009.

If you have any questions concerning the NAB-SoundExchange Agreement, would like assistance in preparing and submitting your royalty rate election or making a past-due royalty payment, please contact any attorney in our office.