



## LEVENTHAL CENTER & LERMAN PLLC

### **New Royalty Rates Available for “Small Commercial Webcasters”**

#### **I. The Small Webcaster Settlement Act of 2002**

President Bush recently signed into law the Small Webcaster Settlement Act of 2002 (“SWSA”), which allowed eligible Small Commercial Webcasters as a group and the music industry’s royalty collector to negotiate an agreement giving Small Commercial Webcasters an alternative methodology for calculating royalties due for the performance of sound recordings over the Internet. The new legislation was spurred by complaints from small webcasters over the royalty rates set last year by the U.S. Copyright Office and the Librarian of Congress. As explained below, the Small Commercial Webcasters and the music industry’s royalty collector have already reached an implementing agreement.

Webcasting, or streaming music over the Internet, implicates two separate copyrights: the right to publicly perform the sound recording, and the right to make ephemeral copies of the sound recording in the course of streaming the copyrighted work. The Copyright Act provides for statutory licenses that obligate a webcaster to pay a royalty fee for its use of copyrighted music. Royalty rates under the statutory licenses for the period October 28, 1998 through December 31, 2002 were set by the Librarian of Congress last summer. The U.S. Copyright Office recently initiated the process that will set royalty rates for 2003 and 2004.

The SWSA does not set new royalty rates. Rather, the SWSA provides two possible avenues of relief from the existing royalty scheme: (1) non-commercial webcasters (other than Small Commercial Webcasters) now have an additional period until June 20, 2003 to make royalty payments that have not already been paid for the period beginning October 28, 1998 and ending May 31, 2003; and (2) the SWSA authorizes Small Commercial Webcasters and Sound Exchange, the agent for the recording industry, to negotiate an agreement on royalty rates for the period beginning October 28, 1998 and continuing through 2004. These negotiated rates are to be based on a percentage of revenue or expenses, and would apply in lieu of rates set by the U.S. Copyright Office and the Librarian of Congress. Sound Exchange is not obligated to negotiate a new royalty payment scheme under the SWSA. But, a negotiated agreement under the SWSA is available as an option to any Small Commercial Webcaster that meets the agreed upon eligibility requirements.

#### **II. The Sound Exchange Agreement**

Shortly after the SWSA become law, Sound Exchange and the Voice of Webcasters negotiated an agreement (the “Agreement”) on rates and terms, set out below, available to qualifying Small Commercial Webcasters. Qualifying Small Commercial Webcasters can elect to be bound by the



royalty rates and terms of this Agreement rather than the rates set by the Copyright Office.

### **a. Eligibility**

Small Commercial Webcasters must meet the following conditions to be eligible for the negotiated royalty rates and terms: (1) for the royalty period beginning October 28, 1998 and ending December 31, 2002, the webcaster's gross revenues between November 1, 1998 and June 30, 2002 must not have exceeded \$1,000,000; (2) for the 2003 royalty period the gross revenues of the webcaster and its affiliates<sup>1</sup> during 2003 must not exceed \$500,000; and (3) for the 2004 royalty period the gross revenues of the webcaster and its affiliates during 2004 must not exceed \$1,250,000.

For the purposes of both eligibility and royalty rates, "gross revenues" are defined by the Agreement as all revenue of any kind earned by a person or entity, including all cash or cash equivalents; the fair market value of goods, services, or other non-cash consideration; and in-kind and cash donations and other gifts. Gross revenues do not include revenues from the sale of phonorecords or digital phonorecord deliveries; the actual costs of other products and services sold through the webcasting service, as well as the related sales and use taxes imposed on those transactions, shipping costs for those products, allowance for bad debts, and credit card and similar fees paid to unrelated third parties; and revenue from the sale of capital assets or the sale of assets of the webcasting entity.

### **b. Royalty Rates**

The royalty rates available under the Agreement are as follows: For the period from 1998 through 2002, the public performance royalty rate is 8% of the webcaster's gross revenue during the period, or 5% of the webcaster's expenses during the period, whichever is greater. For the years 2003 and 2004, the public performance royalty rate is 10% of the webcaster's first \$250,000 in gross revenues and 12% of gross revenues above \$250,000 during that year, or 7% of the webcaster's expenses during that year, whichever is greater. These amounts are deemed to include the payment of royalties for the making of ephemeral recordings.

The Agreement also includes a minimum yearly fee. The minimum fee for webcasting during 1998 is \$500. The minimum yearly fee for the years 1999 through 2002 is \$2,000. Minimum yearly fees for 2003 and 2004 depend on the webcaster's gross revenues. If an eligible small commercial webcaster had gross revenues of less than \$50,000 in the preceding year, and expects to have gross revenues of less than \$50,000 during the applicable year, then the minimum yearly fee is \$2,000. If the gross revenues exceeded \$50,000 in the preceding year and are expected to exceed \$50,000 in the applicable year then the minimum yearly fee is \$5,000.

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<sup>1</sup> An affiliate is defined as a person or entity that, directly or indirectly, (1) has ownership interests representing more than 50 percent of the voting interests of the webcasting entity; or (2) controls, is controlled by, or is under common control with the webcasting entity.



Minimum fees are due regardless of whether a webcaster streamed copyrighted music for one day in a calendar year or for 365 days. The minimum fee is not refundable, but it is credited against royalty amounts due during that calendar year. Qualifying Small Commercial Webcasters who did not previously pay the minimum fees for 1998 through 2002 must do so by January 15, 2003.<sup>2</sup> The yearly fees for 2003 and 2004 are to be paid in two installments per year, with the first payment due January 31st and the second payment due June 30<sup>th</sup> of the applicable year.

### **c. Payment Requirements**

Under the Agreement, royalty payments continue to be made to Sound Exchange, and must be accompanied by a Statement of Account. For the period from October 28, 1998 through November 30, 2002, amounts not already paid shall be due in three installments (by January 15, 2003; by May 31, 2003; and by October 31, 2003). Royalty payments for webcasting during the period December 1, 2002 through December 31, 2004 must be paid on a monthly basis, and are due by the last day of the following month. For instance, royalty payments for December 2002 are due no later than January 31, 2003.

### **d. Recordkeeping Requirements**

The Agreement also includes notice and recordkeeping requirements. Eligible small commercial webcasters who elect to be bound by the Agreement must keep records and reports of use that details the following information: (1) the recording artist, group, or orchestra; (2) the title of the sound recording; (3) the title of the album; (4) the marketing label of the album; (5) the International Standard Recording Code embedded in the sound recording, if available; (6) the copyright owner information as set forth in the copyright notice on the album; (7) monthly aggregate tuning hours for each webcasting channel; (8) the webcasting channel for each transmission of each sound recording; and (9) the start date and time of each transmission of each sound recording. These reports must be submitted to Sound Exchange along with the monthly royalty payment.

The royalty rates and terms set forth in the Agreement are only available to eligible Small Commercial Webcasters, but such entities are not required to choose this royalty scheme. Small Commercial Webcasters, and all other webcasters, can meet their royalty obligations by complying with the rates and terms determined by the U.S. Copyright Office and the Librarian of Congress.

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<sup>2</sup> If an eligible small commercial webcaster's gross revenues were not more than \$100,000 during that period then the retroactive yearly minimum fees can be paid in three installments due January 15, 2003; May 31, 2003; and October 31, 2003.