



To All Broadcast Clients

April 24, 2007

## **Copyright Royalty Board Denies Motions for Rehearing of Webcasting Royalty Rates Decision**

The Copyright Royalty Board (CRB) denied the Motions for Rehearing of its decision raising the royalty rates for the digital performance of sound recordings for the years 2006-2010 on the grounds that the moving parties did not make a sufficient showing of new evidence, clear error or manifest injustice that would warrant a rehearing. The Motions for Rehearing were made by commercial and noncommercial broadcasters, and Internet-only webcasters.

The new royalty rates will apply to all webcasters that take advantage of the statutory licenses under Sections 112 and 114 of the Copyright Act, which govern the digital transmission (*i.e.*, "webcasting" or "streaming") of sound recordings. "Webcasters" include those services that make eligible transmissions of digital audio programming over the Internet, either through a retransmission of a terrestrial broadcast or a transmission intended solely for Internet use.

However, the CRB did issue two points of clarification of its Initial Decision. First, although the Initial Decision does not allow payments based on an Aggregate Tuning Hour (ATH) basis, the CRB agreed that the Per Performance metric that it has adopted as the sole method of royalty fee calculation will cause compliance burdens on certain webcasters. As a consequence, the CRB will allow all webcasters to use an ATH rate for a transitional period of 2006-2007.

For commercial webcasters and noncommercial webcasters (to the extent they exceed the per month 159,140 ATH cap, which is covered by their \$500 minimum annual payment), the ATH rates for 2006-2007 are as follows:

2006: \$.0123 per hour for Internet-only webcasters; \$.0092 per hour for broadcasters that simulcast their over-the-air programming; and \$.0011 for broadcast stations that stream programming reasonably classified as news/talk, sports, or business programming

2007: \$.0169 per hour for Internet-only webcasters; \$.0127 per hour for broadcasters that simulcast their over-the-air programming; and \$.0014 for broadcast stations that stream programming reasonably classified as news/talk, sports, or business programming

The CRB also clarified and confirmed that its Initial Decision covers webcasting services delivered over cellular networks.

The CRB denied the requests of several webcaster groups to stay implementation of the new royalty rates until all legal appeals had been exhausted. Thus, retroactive payments for 2006 and the first two months of 2007, annual minimum payments, and/or monthly payments for March remain payable by May 15, 2007.

The Initial Decision setting the rates will now go to the Librarian of Congress for approval, after which it will be published in the Federal

Register. Any judicial appeals of the Initial Decision must be brought before the D.C. Court of Appeals within a 30-day window following publication in the Register.

The CRB did not address the requests for rehearing of the annual minimum payment of \$500 for each channel or station that is required for both commercial and noncommercial webcasters.

Certain aspects of the CRB's Initial Decision may be negotiable with SoundExchange, the entity that collects and distributes royalty payments under the statutory license. According to an April 19, 2007 news release issued by SoundExchange, it is in discussions with some unidentified webcasting services and is "exploring mutually beneficial business arrangements that help to foster growth of the Internet radio and provides fair compensation to creators of

music." While SoundExchange maintains that the CRB's decision is sound and the new rates are fair, SoundExchange claims that it "stands ready and willing to engage the webcasters on issues of importance to them."

Although some modification of rates is also possible on appeal or via legislative relief, webcasters are currently obligated to make timely payments under the new regulation, regardless of any challenges to the CRB's decision that may be pending.

If you have any questions about the impact of the new regulation and rates for the 2006-2010 license period, please contact our office.

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This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact Suzanne Head (202) 416-1082 or any other attorney in our office.