

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Tenth Congress

May 17, 2007

John L. Simson
Executive Director
SoundExchange, Inc.
1121 Fourteenth Street, NW, Suite 700
Washington, DC 20005

Dear Mr. Simson:

On April 30, 2007, the Copyright Royalty Board (“CRB”), pursuant to the adjudicative process established by the Copyright Royalty and Distribution Reform Act of 2004 (the “Reform Act”), Public Law 108-419, 118 Stat. 2341, published its final rule and order in Docket No. 2005-1. This decision prescribes terms for the collection, distribution and administration of royalty payments for both the Digital Performance Right in Sound Recordings and Ephemeral Recordings for a five-year period, which runs from January 1, 2006 to December 31, 2010.

In enacting section 114 of the Copyright Act, Congress provided a means for non-interactive digital audio transmission services to compel copyright owners to make their full repertoire of protected works available for digital transmission on uniform terms and without first negotiating individual licenses.

In return for compelling sound recording copyright owners to make their works available, the qualifying services agree to meet the terms and conditions of the compulsory license, which, *inter alia*, requires the periodic filing of statements of account and the timely payment of statutory royalties to the copyright owners whose works they have elected to perform.

As we understand it, the royalty rates that govern such performances have remained fixed at .000762 cents per performance since October 28, 1998. We further understand this rate was extended to December 31, 2005, by the terms of the Reform Act, which means the rate was not adjusted for more than seven years.

In the absence of a newly negotiated agreement, it appears the continued use of covered sound recordings beyond that date was “out of license.” It appears also that many digital audio transmission services elected to exercise the option of requesting a rate-making proceeding before the CRB rather than choosing to negotiate a new voluntary royalty rate and requesting it apply during the 2006-2010 period.

The CRB's final rule provides annual adjustments in the royalty rate for commercial webcasters. Over time, these adjustments would result in a graduated increase from .0008 cents per performance in 2006, which amounts to less than a 5% increase from 2005 to 2006, to .0019 cents per performance in 2010.

Both commercial and noncommercial webcasters are also obliged to pay an annual minimum fee of \$500 per channel or station, which, according to the CRB, is intended to recoup administrative expenses incurred by SoundExchange in performing services on behalf of the licensees. We understand this minimum fee to be creditable towards the per performance royalties that may be due and that, in many cases, the minimum fee will constitute full payment from a given service during a given year.

The CRB's final rule also appears to distinguish between commercial and noncommercial webcasters. It appears the majority of the latter class will, upon payment of the \$500 minimum administrative fee per channel "satisfy the full royalty obligations of such webcasters," providing they do not exceed certain audience thresholds, which are specified in the final order.

Before making their determinations, the 117-page final rule and order reveals the Copyright Royalty Judges, over an 18-month period, received testimony for 48 days, compiled a transcript of 13,288 pages, admitted 192 exhibits and entered 475 pleadings, motions and orders onto the docket.

Though many have expressed concern about individual aspects of the final rule, we have not yet been provided with a single credible assertion by a party to the proceeding that tends to demonstrate the CRB deviated from the process specified in the Reform Act. The process, we note, was to a great degree, designed and implemented to address perceived deficiencies and specific concerns raised by webcasting services in relation to the prior Copyright Arbitration Royalty Panel (CARP) process.¹

We are told that certain parties to the proceeding have filed or have stated an intent to file an appeal with the U.S. Court of Appeals for the D.C. Circuit to challenge various aspects of the CRB's ruling. Accordingly, there is strong precedent that militates against Congress becoming actively involved in adjudicating a dispute that is formally and properly before the Judiciary.

¹ Indeed, the Digital Media Association (DiMA) issued, in relevant part, the following statement on final passage of the Reform Act:

On November 17th, the House of Representatives accepted the Senate amendments to H.R. 1417, the Copyright Royalty and Distribution Reform Act, and on a vote of 407-0 sent the bill to the White House to be signed into law by President Bush. On behalf of webcasters nationwide, and especially our member companies that are among the world's leading Internet radio services, DiMA worked on this legislation for several years.

"DiMA is thrilled that the Copyright Royalty and Distribution Act of 2004 has been approved by the House and Senate and will now become law. The redesigned royalty arbitration process will be more efficient and produce more consistent decisions than did the old system. As a result, royalty rates will be more fair to all participants - licensors and licensees."

actively involved in adjudicating a dispute that is formally and properly before the Judiciary.

Notwithstanding these factors, we are concerned that the application of the new terms and conditions to certain small commercial and noncommercial webcasters, including some NPR stations, may prove, in the near term, to be unduly burdensome.

Faced with related concerns in 2002, Congress made a policy decision to enact the Small Webcaster Settlement Act ("SWSA") (Public Law 107-321). That act, which terminated at the end of 2005, was designed to provide a temporary measure of relief to small webcasters who asserted that prior rate-setting procedures had effectively precluded their participation in the process. Significantly, the Reform Act removed the structural barriers that many representatives of small webcasters believed had unfairly limited their participation.

SWSA guaranteed these small webcasters, for a limited time, the ability to make below-market payments to sound recording copyright owners. In doing so, Congress noted the presence of "extraordinary and unique circumstances." Congress further noted the parties' agreement that they did not regard the rates as "in any way approximat[ing] fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." Given these circumstances, Congress also found the agreed rates were to be considered non-precedential and directed they not be "admissible as evidence or otherwise taken into account in any government proceeding involving the setting or adjustment of the royalties payable to copyright owners of sound recordings for the public performance ... of such works, [or] the determination of terms or conditions related thereto ..."

By enacting SWSA, Congress responded to small webcasters' concerns that truly exceptional circumstances existed and that these conditions merited special consideration. Many, if not all, the small webcasters presented evidence their services should be distinguished from large highly-capitalized commercial webcasters. They also presented compelling evidence that their interests had not been adequately presented to decision-makers in the earlier rate proceeding. These and other equitable considerations led Congress to conclude the appropriate action was to set aside the new royalty rate for a small subset of webcasters and require, on policy grounds, sound recording copyright owners to temporarily accept less than the full market value of their protected works.

In assessing the possible impact of the final rule and order on small commercial and noncommercial webcasters, including some NPR and college stations, we note the following statements from the CRB's ruling:

- 1) "Certainly, there is a significant history of Noncommercial Webcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates ... [and SoundExchange's] ... own economic expert suggests a continuation of differentiated rates where the service offered by such Noncommercial Webcasters does not appear to pose any threat of making serious inroads into the business of those services paying the commercial rate;"

- 2) "Based on the available evidence, we find that, *up to a point*, certain "noncommercial" webcasters may constitute a *distinct segment* of the non-interactive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined ... for Commercial Webcasters;" and
- 3) The "evidence in the record weighs in favor of a per-performance usage fee structure for Commercial Webcasters. This does not mean that some revenue-based metric could not be successfully developed as a proxy for the usage-based metric at some time in the future by the parties if the problems noted ...were remedied."

Taken as a whole, these statements demonstrate there to be ample precedent of privately negotiated agreements providing lower-than fair market rates to certain classes of small and noncommercial webcasters. The statements also suggest that, at least on a temporary basis, it would be appropriate to extend below-market rates to a subset of small commercial webcasters and the vast majority of noncommercial webcasters, which includes many college and NPR-affiliated stations, who do not compete with large commercial webcasting services.

We share the concerns of independent recording artists and the many listeners of Internet radio who value the diversity of programming offered by webcasters. We strongly believe the public interest will be best served by ensuring a broad spectrum of webcasters will be able to continue to perform sound recordings. We believe this purpose will be best served by the private negotiation of an agreement to permit small commercial and noncommercial webcasters to continue to pay a rate below the full commercial rate.

While we regard it as inappropriate for Congress to seek to micro-manage the interests of the various parties or to become involved in negotiating the specifics of a private arrangement, we wish to make clear that Congress has the authority and the ability to impose a resolution if the parties prove unable or unwilling to voluntarily address our concerns.

We request and strongly encourage SoundExchange to immediately initiate good faith private negotiations with small commercial and noncommercial webcasters with the shared goal of ensuring their continued operations and viability. It is our hope and expectation that all parties will reciprocate good faith efforts and that each will work towards resolving these matters without delay. To the extent any negotiated settlement includes a below market rate, our view is the precedent established in the SWSA - that such rate should not be admissible as evidence or otherwise taken into account in any future government or rate setting proceeding - should be extended.

Finally, we are mindful that applicable law and regulations require webcasters to provide a retroactive payment for the 2006 and 2007 royalty obligations incurred by July 15, 2007. As such, we request that we be immediately informed of the existence of any privately negotiated agreement and that, such resolution be achieved no later than June 15, 2007. We will continue to actively monitor developments that affect small commercial and noncommercial webcasters and will plan to advance legislation if we determine that it is in the public interest.

We appreciate your consideration of our views and look forward to receiving your expedited response.

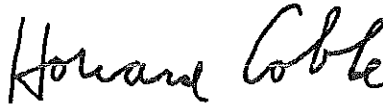
Sincerely,



Howard L. Berman

Chairman

Subcommittee on Courts, the Internet and
Intellectual Property



Howard Coble

Ranking Minority Member

Subcommittee on Courts, the Internet and
Intellectual Property

cc: Members, House Committee on the Judiciary
James Sledge, Chief Judge, Copyright Royalty Board
David Oxenford
