



M E M O R A N D U M

TO: Section 112 and Section 114 Statutory Licensees

FROM: SoundExchange™

DATE: September 25, 2002 (Revised 10/17/02)

SUBJECT: Payment of Statutory Royalties by Eligible Nonsubscription Transmission Services Operating Under Section 112 and Section 114 Statutory Licenses

On Thursday, June 20, 2002, the Librarian of Congress issued final regulations for the payment of royalties by webcasters and simulcasters. The Librarian's final order setting forth the regulations was published in the Federal Register on July 8, 2002. A copy of the Librarian's final order can be found at <http://www.copyright.gov/fedreg/2002/67fr45239.html>.

Services that webcast or simulcast songs to listeners under the statutory license at any time during the period October 28, 1998 through August 31, 2002, must remit payment for all of those transmissions by October 20, 2002.¹ Payments for transmissions and ephemeral phonorecords are required even if the service has discontinued operations or ceased making transmissions and/or ephemeral phonorecords under a statutory license. Failure to submit timely payment may subject the service to liability for copyright infringement. Payments for performances on or after September 1, 2002 are due by the 45th day after the end of each month for that month.²

Payment is to be made to SoundExchange™, the Receiving Agent designated to receive statements of account and royalty payments from statutory licensees. Checks should be made payable to SoundExchange™ and mailed to the following address, along with a completed statement of account:

SoundExchange™
Attn: Royalty Department
1330 Connecticut Avenue, N.W., Suite 330
Washington, D.C. 20036

Services that would prefer to make electronic payments should contact the Royalty Administrator at

¹ 37 C.F.R. § 261.4(e). All references to Part 261 of title 37 of the Code of Federal Regulations (37 C.F.R. § 261) are to the new provisions adopted by the Librarian of Congress. Those regulations are available at http://www.copyright.gov/carp/webcast_regs.html.

² 37 C.F.R. § 261.4(d).

202.828.0120 x9686 for further information on this option. No cash payments will be accepted.

Concurrently with the delivery of payment to SoundExchange™, statutory licensees are required to send a duplicate copy of the relevant statement of account to Royalty Logic, Inc. (“RLI”), a Designated Agent.³ No royalty payments are to be made to RLI. Duplicate statements of account should be mailed to RLI at the following address:

Royalty Logic, Inc.
405 Riverside Drive
Burbank, CA 91506
Phone: 818.955.8900

The statement of account form needed for calculating a service’s royalty liability is located on the SoundExchange™ website at <http://www.soundexchange.com/soa.cfm>.

The Librarian of Congress has established different performance royalty rates depending upon the type of service making the transmission. Those rates for the different types of services are as follows:

Webcaster and Commercial Broadcaster Performance Royalty. For all Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster and a Commercial Broadcaster shall pay a performance royalty of 0.07¢ (\$0.0007) per performance.⁴

³ 37 C.F.R. § 261.4(d).

⁴ A “performance” is defined as:

[E]ach instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained license from the copyright owner of such sound recording; and

(3) An *incidental* performance that *both* (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events *and* (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).”

37 C.F.R. § 261.2.

Non-CPB, Non-Commercial Broadcaster Performance Royalty. There are two different rates to be paid by Non-CPB, Non-Commercial Broadcasters⁵ (i.e., public radio stations not affiliated with, for example, NPR, or eligible for CPB funding). First, for simultaneous Internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a royalty of 0.02¢ (\$0.0002) per performance. This rate of 0.02¢ per performance also applies to other Internet transmissions, including up to two side channels of programming consistent with the mission of the station. Second, for Internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a royalty of 0.07¢ (\$0.0007) per performance.

Estimating Number of Performances. Under the Librarian's decision, "until December 31, 2002, or the effective date of final rules governing records of use of these performances, whichever is later, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances *if the actual number is not available*. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours⁶ by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming)." 37 C.F.R. § 261.3(b) (emphasis added).

Ephemeral Royalties. Each service availing itself of the Section 112(e) statutory license for the making of multiple ephemeral phonorecords is also required to pay a separate royalty for the making of such ephemeral phonorecords (e.g., multiple server copies of sound recordings used to facilitate transmissions). For the making of any number of ephemeral phonorecords to facilitate the Internet transmission of a sound recording, each service is required to pay an additional royalty equal to 8.8% of their total performance royalty obligation.⁷ Webcasters, Commercial Broadcasters and Non-CPB, Non-Commercial Broadcasters operating under the Section 112 statutory license must pay these fees. If a service does not avail itself of the Section 112(e) statutory license, then no ephemeral royalty payment is due.

Minimum Fees. Each statutory licensee (other than Business Establishment Services) is required to pay a minimum fee of \$500 for each year, or partial year, that it has operated under a statutory license (e.g., if a service commenced operation in December 1998, then it owes the \$500 minimum

⁵ 37 C.F.R. § 261.2.

⁶ "Aggregate Tuning Hours" is defined as:

the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users with in the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service's Aggregate Tuning Hours would equal 10.

37 C.F.R. § 261.2

⁷ 37 C.F.R. § 261.3(c).

fee for 1998). Therefore, services that have operated under the Section 112 or Section 114, or both, statutory licenses since October 28, 1998 (a period of 5 years) have a minimum royalty liability of \$2,500 regardless of the number of performances that they have made during that period. The annual minimum fee is nonrefundable, but services may recoup against the annual minimum the royalties that are payable on a monthly basis.

For example, each service is required to pay the \$500 annual minimum for any year during which the service operates under one or both of the applicable statutory licenses but if the service's calculated per performance liability is less than \$500 for the entire year, then no additional payment is due. Thus, if a service paid the \$500 annual minimum and then calculated a \$315 liability under the per performance methodology set forth above, the service would not pay the additional \$315. Only after the calculated per performance liability exceeds the annual minimum fee is the licensee required to pay those liabilities that are in excess of the minimum fee (e.g., if the service calculated a liability of \$720, then it would pay \$220 in addition to the \$500 annual minimum).

Business Establishment Services. Separate fees apply for services operating under the exemption contained in 17 U.S.C. § 114(d)(1)(C)(iv). These exempt services must pay a section 112(e) ephemeral royalty fee equal to "ten percent (10%) of the Licensee's annual gross proceeds derived from the use in such service of the musical programs which are attributable to copyrighted recordings." See 37 C.F.R. § 261.3(d). In addition, Business Establishment Services are required to pay a minimum fee of \$10,000 for each year, or partial year, that it has operated under a statutory license (e.g., if a service commenced operation in December 1998, then it owes the \$10,000 minimum fee for 1998). Therefore, services that have operated under the Section 112(e) statutory license since October 28, 1998 (a period of 5 years) have a minimum royalty liability of \$50,000 regardless of their gross proceeds during that period. The annual minimum fee is nonrefundable, but services may recoup against the annual minimum the royalties that are payable on a monthly basis.

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The statements set forth in this letter are for informational purposes only. Each service should separately review the Librarian's final order and seek the advice of an attorney if there are any questions about the service's liability under the Section 112 or Section 114, or both, statutory licenses.

For further information, please visit the SoundExchange™ website at <http://www.soundexchange.com> or call us at 202.828.0120.