

Streaming Your Station on the Internet?

Decision Due April 2. What's it going to be, Bunky?

It's no secret that broadcasters are today faced with biggest business challenge in the history of the medium. While past migrations in technology remained wed to broadcasting transmission, today we are in a new marketplace of audio delivery entertainment systems. Increasingly, broadcasters are recognizing the imperative to provide their programming through various forms of new media via Internet streaming and Podcasting, to name a few. Audiences, particularly younger audiences, have embraced a host of new technologies for audio entertainment, and radio broadcasters must adopt to their audiences' technology tastes just as they have adapted to their programming tastes in the past. As the Internet has come to play a major role in the delivery of musical entertainment to listeners, broadcasters have sought to compete and adapt to new technologies by streaming, but have been frustrated by the lack of acceptable licenses from performers and recording companies. Now however a path has been cleared.

On February 15, 2009 SoundExchange and the National Association of broadcasters notified the copyright office that they had negotiated an agreement for the reproduction and performance of sound recordings by broadcasters for streaming over the Internet. Broadcaster streaming, termed "webcasts," cover nonsubscription transmissions of simultaneous streaming of the broadcast signal as well as other, nonbroadcast nonsubscription transmissions over the Internet. For purposes of the agreement, broadcasters are divided into two categories, Eligible Small Broadcasters and "Other" broadcasters and have two payment options. A Small Broadcaster is one who streamed no more than 27,777 aggregate tuning hours in the prior year. That breaks down to 3.17 performances an hour for one listener, or .03

To take advantage of the new agreement, a broadcaster must notify SoundExchange before April 2 2009 by submitting a completed and signed election. An annual, nonrefundable minimum fee of \$500 is required for each individual channel, or stream, subject to a maximum basic fee of \$50,000 for multiple streams or 100 or more channels or streams. The upfront fee will be credited against royalties payable for that same channel and year. Each individual Stream, channel or HD radio side channel is considered a separate stream and charged for separately, unless they are streams for simulcast stations available at a single URL. In addition, Small Broadcasters opting out of the detailed annual census reporting on their use of sound recordings for Eligible Transmissions and ephemeral recordings must pay an additional \$100 per stream annual fee. (The reporting exemption is available only until 2016.)

There are two options for calculating the actual streaming fee that applies to all broadcasters (Small and all others). The first is to calculate a per performance fee based on a sliding scale for each song play (performance) starting at .0008 cents for 2006, .0015 cents this year and up to \$.0025 per performance in 2015. Here is the chart of the rates.

Chart 1

Year	Rate per performance
2006	\$0.0008
2007	\$0.0011
2008	\$0.0014
2009	\$0.0015
2010	\$0.0016
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

The rate applies on a per performance basis up to 27,777 aggregate tuning hours, the limit for the definition of a small broadcaster. That is equivalent to 3.17 years of solid musical play. But the consequences look dramatically different once the definition of aggregate tuning hours is factored in.

Let's do a little calculation. There are 8,760 hours in a year. If a music station averages 12 songs an hour, twenty-four hours a day, 365 days a year, that's 105,120 performances a year if only one person is listening. If the AQH is 100, that would amount to 10,512,000 performances a year, at the 2009 rate of .0015 per performance, or a fee of \$15,768.

Chart 2

Calculation for 2009

Hours in a day	24.00	+
Days in a year	<u>365.00</u>	*
Hours in a year	<u>8,760.00</u>	=
	8,760.00	+
Songs per hour	<u>12.00</u>	*
# of plays	<u>105,120.00</u>	=
	105,120.00	+
AQH	<u>100.00</u>	*
# of performances	<u>10,512,000.00</u>	=
	10,512,000.00	+
2009 Rate	<u>0.0015</u>	*
Cost of stream	<u>\$15,768.00</u>	

Further, any broadcaster taking advantage of the agreement and filing by the deadline must also account for all past periods from January 1, 2006 through February 28, 2009. If royalties haven't been paid for any or all of that period, they must be paid in by April 30, 2009, including late fees of 1.5% from the original due date, compounded monthly.

So, to take advantage of the agreement, a broadcaster would have to pay in for prior periods of streaming. If that streaming activity dated back to the beginning of 2006, payments for the same number of performances from the illustration above, at the 2006 rate would be \$8,409.60.

Chart 3

	10,512,000.00	+
2006 Rate	<u>0.0015</u>	*
(2 Items)	<u>\$8,409.60</u>	=

Recognizing the challenge presented by compliance with the census reporting requirement for paying on a per performance basis, the agreement also provides a second alternative; to pay in by Aggregate Tuning Hour (“ATH”). Broadcasters may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hour basis. The term “Aggregate Tuning Hours” means the total hours of programming transmitted by the Webcaster during the relevant period to all listeners within the United States from all its channels and stations of eligible nonsubscription or non-interactive digital audio sessions, less any directly licensed recordings pursuant to 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law.

That’s a mouthful. It’s easier to understand with this example. If a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If however, only one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would still be 10 hours. Under this alternative a Broadcaster must submit its report of use to SoundExchange on a monthly basis not later than the 45th day following the last day of the reporting month.

Reporting: Broadcasters who do not qualify for or elect the Small Broadcaster exception must report their per performance use on a single station basis. In the alternative, they may report and pay on the basis of their aggregate tuning hours as long as the total hours on any single report is below the following maximum percentages for the relevant year:

Chart 4

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

Under this option, the Broadcaster may assume that it is performing 12 sound recordings per hour and pay performance royalties (or recoup minimum fees) based on the annual rates listed in Chart 1 above.

Under the agreement there is no additional separate charge for ephemeral recordings, defined as those recordings used solely for aiding the transmission of Web Site Performances. They are further defined as those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate licensed performances. In other words, production studio work.

There is an important exception. The new arrangement is not available to any broadcaster who participated in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010.

Election Form: To be eligible to participate under the settlement. A broadcaster must submit to SoundExchange its completed and signed election form. The various election forms may be downloaded at www.soundexchange.com in the menu: Download Forms|For Digital Music Services. The deadline for submission is April 2, 2009.

If you're not now streaming, you may still take advantage of the agreement by electing to use it within the first 30 days of initial streaming and completing the election form on the SoundExchange Web site.

This article, laborious and complicated as it is, only touched the surface of the terms of the settlement agreement. Overall, it represents an improvement over full compliance with the statutory license fees and the NAB is to be commended for making a difficult problem somewhat

better. Still, for many broadcasters, these rates will represent a major new cost factor that may hasten the move away from music based programming, particularly when and combined with the prospect of a “performance tax.” Compliance with the new agreement is going to require setting up a major new reporting function. Consulting with your attorney will be important to ensure compliance. For more details, see the NAB report in the March 9 issue of NAB Pulse at <http://www.nab.org/xert/Marcomm/Newsletters/Pulse/2009/030909/streaming.html> and the memos and references contained in its links.