THE COPYRIGHT ROYALTY BOARD SETS MUSIC ROYALTY RATES AND CONGRESS PASSES THE WEBCASTER SETTLEMENT ACT OF 2008

With the advent of music sharing programs, streaming music websites, webcasting radio stations, and digital music services, copyright royalties have become a key issue for both these services and for the copyright owners. To compensate for the various rights in a piece of music, the Copyright Act contemplates statutory royalties to artists, composers and recording studios. Two recent events will impact the statutory rates. First, the Copyright Royalty Board ("CRB") established new royalties to be paid composers for physical phonorecords, permanent digital downloads and ringtones. Second, Congress passed the Webcaster Settlement Act of 2008, which will allow webcasters and SoundExchange to negotiate the statutory royalty rates for recording artists.

The Music Copyright Landscape

Any piece of music has two types of copyrights: the *musical work* copyright and the *sound recording* copyright. Musical works are the notes and lyrics of a song, and the composer owns that copyright. The sound recording copyright, in contrast, covers the recorded version of a song and is owned by the recording artists or their record label. A company providing music over the Internet may need to pay royalties for both types of copyrights.

A musical works copyright includes the right to reproduce, distribute, perform and display the musical work and to prepare derivative works.[1] A sound recording copyright includes the same rights of reproduction, distribution and preparation of derivative works.[2] In addition, sound recording copyright holders have a limited public performance right for digital audio transmissions.[3]

Licenses to musical works and sound recordings are either negotiated with the copyright holders or defined by statute. The Copyright Act establishes statutory licenses for the reproduction and distribution (*but not the public performance*) of musical works in § 115 and for sound recordings in § 114.[4] The § 115 statutory license allows the licensee to make a new sound recording of a musical work after the copyright owner has distributed the work to the public.[5] Royalties for

[1] 17 U.S.C. § 106.

[2] 17 U.S.C. §§ 106, 114. If the recording artist is not the composer, the artist will need to license the musical work from the composer before the artist can reproduce and distribute the sound recording.

[3] 17 U.S.C. §§ 106, 114.

[4] 17 U.S.C. §§ 114, 115.

[5] 17 U.S.C. § 115(a).

public performances of musical works are not covered by a statutory license.[6] Instead, these royalties are negotiated and collected by performing rights organizations such as ASCAP, BMI and SESAC.[7]

Before 1995 there was no royalty for the public performance of a sound recording; broadcast radio stations only paid royalties for the musical works. The rationale for exempting analog radio broadcasters was that airplay benefited the recording artists by stimulating record and CD sales. Congress amended § 114 in 1995 and 1998 to cover the public performance of sound recordings through digital audio transmissions.[8] Analog broadcast radio stations, however, are still exempt from paying royalties for the public performance of sound recordings. Section 114 bases the statutory license on whether digital transmissions are (1) interactive services (both subscription and non-subscription),[9] which are not covered by the statutory license (and must voluntarily negotiate licenses with the copyright holder), (2) non-interactive subscription services and satellite digital radio services,[10] which are covered by the statutory license, or (3) non-interactive, non-subscription services,[11] which are statutorily exempt from any licensing fees for the public performance of a sound recording. These public performance sound recording royalties are administered by SoundExchange, a non-profit organization created by the Recording Industry Association of America ("RIAA").

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[6] "To perform or display a work 'publicly' means - (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101.

[7] ASCAP (The American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.), and SESAC (originally the Society of European Stage Authors & Composers) traditionally collected royalties from radio stations, television broadcasters and the like, and paid these royalties to composers, lyricists and music publishers.

[8] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[9] Interactive services transmit digital sound recordings at a user's request.

[10] "A 'new subscription service' is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service." 17 U.S.C. § 114(j)(8). "A 'preexisting subscription service' is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998." 17 U.S.C. § 114(j)(11). "A 'preexisting satellite digital audio radio service' is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998." 17 U.S.C. § 114(j)(10).

[11] Non-interactive, non-subscription services transmit digital sound recordings that are usually streamed and offered for free to the consumer and the transmitting entity. Certain retransmissions of non-subscription services can also qualify for a statutory license.

The Copyright Royalty Board's Determination Of Rates For Musical Works

The rates for the §§ 114 and 115 statutory licenses are set by the CRB, a three-judge panel appointed by the Librarian of Congress. The judges set the rates and terms of the statutory licenses and determine the distribution of the royalties. Pursuant to the Copyright Act, the CRB began considering the royalty rates to be paid to musical works copyright holders under § 115 for making and distributing phonorecords (i.e., records, CDs, and digital phonorecord deliveries ("DPDs")) in January 2006.[12, 13] Parties such as the Songwriters Guild of America, National Music Publishers' Association, Apple Computer, America Online, RealNetworks, Napster, Sony Connect, Digital Media Association ("DiMA"), MTV Networks, and the RIAA filed petitions to participate in the proceedings.

Limited Downloads and Interactive Streaming. The parties settled part of the issue before the CRB: royalties for limited downloads and interactive streaming. The settlement agreement, published in the Federal Register on October 1, 2008, sets a royalty of 10.5% of revenue (less the amount a party owes to ASCAP, BMI and SESAC for musical works performance royalties).[14] The parties also agreed that no royalty is due for non-interactive streaming services.[15] Public comments on the draft regulations are due by October 31, 2008.

The CRB's Determination. The parties were unable to agree on rates for other types of phonorecords, including records and CDs, permanent digital downloads, and ringtones. They presented the CRB with proposals for both the structure and the amount of the rates, including percentage-of-revenue and rate-per-track structures.[16]

The CRB concluded that a price-per-track was the most reasonable and straightforward rate structure because "[e]ach reproduction of the musical work on a physical CD, . . . a permanent digital download or a digital ringtone counts as a use of the musical work."[17] In addition, the previous rate structure was a "penny-rate standard" that the parties were familiar with and that the CRB concluded would minimize future disputes.[18]

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[12] 17 U.S.C. § 804(b)(4) states: "A petition . . . to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year 2006." 17 U.S.C. § 803(b)(1)(A)(i)(V) states: "The Copyright Royalty Judges shall cause to be published in the Federal Register notice of commencement of proceedings . . . by no later than January 5 of a year specified in any other provision of section 804(b) for the filing of petitions for the commencement of proceedings, if a petition has not been filed by that date."

[13] Determination of Rates and Terms, *In The Matter Of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006-3, at 1 (October 2, 2008).

[14] 73 FR 57033; Press Release, Major Music Industry Groups Announce Breakthrough Agreement (Sept. 23, 2008).

[15] *Id*.

[16] Determination, at 17-18.

[17] Determination, at 19.

[18] Determination, at 21.

The CRB analyzed four policy objectives in setting the specific rates: (1) maximizing the availability of creative works to the public, (2) affording the copyright owner a fair return for his creative work and the copyright user a fair income, (3) reflecting the roles of the copyright owner and the copyright user in the product, and (4) minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[19]

Physical Phonorecords and Permanent Downloads. After analyzing these policy objectives, the CRB determined that through 2012, the rate will be the larger of 9.1 cents or $1.75 per minute of playing time for physical phonorecords and permanent downloads. While this is the first time rates for permanent downloads have been established, this rate is the same as the rate set in 1997 for physical phonorecords (i.e., records and CDs).[20]

Ringtones. Before determining the rate for ringtones, the CRB submitted two questions to the Register of Copyrights: (1) is a ringtone a DPD subject to a § 115 statutory license, and (2) if so, what are the limitations on licensing?[21] The Register of Copyrights determined that ringtones qualify as DPDs under § 115 and that "[w]hether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is perfomed is simply the original musical work . . . or a derivative work."[22] After considering the policy objectives and market benchmarks presented by the parties, the CRB set the royalty rate at 24 cents per ringtone, the first time a rate has been set for ringtones.

Webcaster Settlement Act Of 2008

The Webcaster Settlement Act of 2008 (H.R. 7084) passed the House on September 27, 2008, and the Senate on September 30, 2008. It is awaiting signature by President Bush. The Act amends the Small Webcaster Settlement Act of 2002 to permit webcasters and SoundExchange to continue negotiating § 114 royalty rates (the royalties paid to recording artists for public performances of their works) to replace those set by the CRB in March 2007.[23]

The CRB's March 2007 rate structure, adopted wholesale from SoundExchange's proposal, is a progressive rate per streamed song, such that by 2010 webcasters would pay .0019 cents to stream one song to one listener. The 2007 decision is currently being challenged in the D.C. Circuit Court, which rejected a request by the webcasters for a stay of the CRB order (though SoundExchange has agreed not to sue the webcasters during settlement discussions).

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[19] *See* 17 U.S.C. § 801(b)(1).

[20] Determination, at 15-16.

[21] *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. RF 2006-1 (October 16, 2006).

[22] 71 FR 64303.

[23] The Small Webcaster Settlement Act of 2002 allowed small and non-commercial webcasters and SoundExchange, on behalf of sound recording copyright holders, to negotiate licensing agreements for reduced fees, rather than to pay the rates set by a Copyright Royalty Arbitration Panel (the predecessor to the CRB).

The Webcaster Settlement Act does not set new royalty rates, but will allow a simplified approval process for any settlement reached by the parties before February 15, 2009. Currently, settlements are only binding on all copyright holders if approved by the CRB. The new process would allow any settlement to go into effect upon submission to the CRB and publication in the Federal Register. The rate would then cover all copyright holders under the statutory royalty. Any negotiated royalty rate will be retroactive to 2005 and last through 2015.

Conclusion

The issues surrounding music copyrights affect composers, artists, service providers and the public. Before the CRB's October 2, 2008 rate determination, iTunes threatened to shut down if royalty rates were increased to the highest proposal of 15 cents per download. By keeping rates at the current level, at least until 2012, the CRB appears to have averted what many music listeners would consider a major crisis. With the passage of the Webcaster Settlement Act, online music services will be able to negotiate rates that will allow them to stay in business. These actions by the CRB and Congress appear to consider how the music landscape has changed in the past fifteen years and the business models that these new distribution methods employ. The challenge for the CRB will be to continue to set rates that adequately compensate copyright holders while allowing music services to operate profitably.

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October 17, 2008