



Reference Memo

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Streaming Copyright Basics

How do you meet the demand to “give the consumer what they want when they want it?” Streaming your station on the Internet is one way to advance that objective. With the uncertainty having been largely resolved over what it will cost in copyright royalties, now may be the time to stream your station’s programs.

Background

Broadcasters are familiar with paying royalties to ASCAP, BMI and SESAC for playing songs over-the-air. Those fees are paid to the performing rights societies to compensate songwriters and music composers. Those societies also charge to stream music over the Internet.¹

Royalties must also be paid to the copyright owner of the digital sound recording and the featured recording artists performing the music, in addition to the songwriters and composers. Traditionally, broadcasters have been exempt from making payments to record companies and performers for playing sound recordings over-the-air, because of the notion that if radio stations did not play the songs, no one would hear them and buy their records. Not so for use of music on the Internet.²

In 1995, driven by the fact that digital technology allows flawless copying, sound recording copyright owners obtained from Congress the exclusive right in the performance of their music by digital audio transmission in the Digital Performance Right in Sound Recordings Act. The exemption for broadcasters’ over-the-air transmission of digital sound recordings was preserved in that Act. That exemption, however, does not apply to the simultaneous transmission of the over-the-air broadcast via the Internet.

With no mechanism for payment of royalties to record companies and performers, Congress enacted the Digital Millennium Copyright Act of 1998 (the “DMCA”). That Act created a statutory license for performances of sound recordings over the Internet, provided certain conditions were met. Eligibility for the statutory license requires adherence to defined programming restrictions and other technical conditions, payment of royalties, recordkeeping, and making certain filings, which are discussed in greater detail below. If you are not eligible for the statutory license, or if you want to provide an interactive music service, you will need to obtain the consent of each individual copyright owner to use the music or else risk a claim of copyright infringement.

SoundExchange is the entity charged with collecting and distributing the royalties to the sound recording copyright owners and performers. Now an independent organization, SoundExchange was initially a creation of the Recording Industry Association of America (“RIAA”), which represents the

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Eligibility for Statutory License

record companies. SoundExchange is set up to handle only streaming royalties, and is not able to administer podcasting licenses.

Programming Restrictions. As a condition for using the statutory license (and in the absence of having a direct license from the copyright owners), any webcaster, including radio stations simultaneously streaming their over-the-air signal, must meet the “sound recording performance complement” on each channel streamed. What does that mean?

- During a three hour period:
 - Play no more than three songs from a particular album;
 - Play no more than two songs consecutively from a particular album;
 - Play no more than four songs by a particular artist;
 - Play no more than four songs from a boxed set; and
 - Play no more than three songs consecutively from a boxed set.

If you want to stream additional channels, not just the over-the-air broadcast transmission, those additional channels must comply with the sound recording performance complement. The sound recording performance complement also applies to archived and looped programs, defined below.

Archived Programming. Archived programs – those that are posted on a website for listeners to hear repeatedly on-demand in the same order – may not be less than five hours in duration. Permitted archived programs may reside on the website for no more than a total of two weeks. Merely changing one or two songs does not meet this condition, nor can programs be taken off for a short period of time and then made available again.

The limitations on archived programs do not apply to recorded events or broadcast transmissions that make no more than an incidental use of sound recordings, as long as such transmissions do not contain an entire sound recording or feature performances of a particular sound recording.

Looped programming. Looped or continuous programs – those that are performed continuously so that the program automatically starts over when it is finished – may not be less than three hours in duration. Archived programs, on the other hand, always start at the beginning of the program. Again, merely changing one or two songs does not meet this condition.

Repeat of other programs limited. Programs that are retransmitted at publicly-announced times in advance can be repeated only as follows:

- Repeats of a program are limited to three times in a two-week period for programs under one hour in duration.
- Repeats of a program are limited to four times in a two-week period for programs over one hour.

Limitations on prior announcements. Advance program schedule or prior announcement of song titles may not be transmitted by text, video or audio. Webcasters may name one or two artists or a particular genre of music to illustrate the type of music on a particular channel. It is permissible to announce the name of a song immediately before it is performed or to announce that a particular artist will be featured at an unspecified future time. It is the prior announcement of the song that is a problem, because such an announcement facilitates the copying of a particular musical work.

Identify song, artist and album. When performing a sound recording (*i.e.*, during, not before), a webcaster must identify, in textual data, the sound recording, the album and the featured artist, if receivers are capable of displaying the information.

Do not falsely suggest a link between recordings and advertisements. A webcaster may not perform a sound recording in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.

Take steps to disable copying by recipient. A webcaster must disable copying by a transmission recipient if the technology used by the webcaster enables the webcaster to do so, and must also take care not to induce or encourage copying by transmission recipients.

Accommodate technical protection measures. A webcaster must accommodate the transmission of measures widely-used by sound recording copyright owners to identify or protect copyrighted works, if they are technically feasible of being transmitted without imposing substantial burdens on the transmitting entity.

Cooperate to defeat scanning. A webcaster must cooperate with copyright owners to prevent recipients from automatically scanning transmissions in order to select particular recordings, if it will not impose substantial costs or burdens on the transmitting entity.

Transmission of bootlegs not covered. The statutory license is limited to transmissions made from lawful copies of sound recordings. Transmissions made from bootlegs or pre-released recordings (unless the performance of a pre-released recording is otherwise authorized by the copyright owner) are not covered by the statutory license.

Automatic switching of channels prohibited. Webcasters must not automatically and intentionally cause a device receiving the transmission to switch from one program channel to another. The statutory license does not