

## **Will Internet Radio Stations that Stream Music Have to Shut Down?**

By

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### Introduction

Creative and adventurous entrepreneurs, who could never afford to buy a broadcast radio station, have set up many internet radio stations that stream music and offer features that could only be made available over the internet. [www.live365.com](http://www.live365.com) allows you to find stations that play almost any type of music imaginable. Yahoo's Launchcast, (<http://music.-yahoo.com/launchcast/>), now managed by CBS Radio, <http://yahoo.client.shareholder.com/-release-detail.cfm?ReleaseID=351938>, and Pandora, <http://www.pandora.com/> allow you to type in names of favorite artists or songs and will then play songs, based upon those choices. With Pandora you can set up as many "channels" as you want, with each based on a different artist or set of artists (i.e. with each song by the artist selected or an artist with a similar sound).

Although Congress has passed laws to promote experimentation, growth and development on the internet by limiting liability exposure of the owners of commercial websites, Congress has also passed laws that have put internet radio, and all that it offers, on the verge of extinction.

### Background

In the United States, songwriters (and publishers for songwriters) have traditionally received "public performance" royalties when their songs were played on broadcast radio and in other public forums. Royalties for songs are collected by ASCAP, BMI and SESAC and, for internet radio, total royalties have been in the range of 3.5 - 5% of gross income derived from the broadcast of the music. Owners of the copyrights in sound recordings have traditionally received no royalties for public performances in the United States. This continued to be the case until enactment of the Digital Performance Right in Sound Recordings Act of 1995. This Act provided that copyright owners of sound recordings would have a public performance right in audio recordings that were transmitted by a station requiring a subscription, such as satellite radio, and in any digital transmission that was "interactive."

In 1998, the Digital Millennium Copyright Act was enacted, which, among other things, included provisions, codified in 17 USC § 106(6) and § 114, that expanded performing rights of the owners of sound recordings to include sound recordings transmitted digitally over the internet (i.e. via internet radio). In connection with this right, Congress also provided for a set ("statutory") royalty rate to be established for non-interactive internet radio stations that met certain other criteria. If not decided by negotiation among stakeholders, it provided that the royalty rate would be determined by an ad hoc Copyright Arbitration Royalty Panel.

The statutory rates would only apply if the webcast was not "interactive" and other criteria were met, such as, limiting notice of when songs would be played, to make it unlikely that webcast streaming would become a substitute for music downloads.

There were two problems with Congress' approach. First, to benefit from a set royalty rate (which would be better for each station than having to negotiate separately with each record label), the station could not be "interactive." Unfortunately, Congress defined "interactive" broadly and ambiguously so many stations do not know whether they are interactive or not. Second, Congress' wording of the standard the arbitrators were to use for determining the statutory rates encouraged the arbitrators to impose unreasonably high royalties.

### Determining Whether a Station Is Interactive

The definition of "interactive" set forth in the Digital Millennium Copyright Act reads, in pertinent part, as follows:

An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.

17 USC § 114(j)(7).

The phrase "a program specially created for the recipient" is ambiguous. As referred to in the above Introduction, using advanced techniques, some of the most popular internet radio stations utilize input from the listener to create a "personalized station." So does that result in programs that are "specially created for the listener"?

In 2001, Sony BMG, and other record labels, filed a lawsuit against Launchcast internet radio for copyright infringement, claiming Launchcast was an "interactive" radio station and had no right to stream music under the statutory license granted to non-interactive radio stations. On November 3, 2005, the United States District Court for the Southern District of New York held that whether or not Launchcast was "interactive" was a jury question. Arista Records, Inc. v. Launch Media, Inc., 2005 WL 2898735 (S.D.N.Y.), and on April 27, 2007, a jury found that Launchcast was not interactive. Sony BMG said it would appeal. As of this writing, the author has not seen any order relating to the appeal of that decision.

### Statutory (Set) Rates

For reasons that are likely related to which groups had the more effective lobbyists, the standard for determining statutory rates as provided for in the acts referred to above, was made much more favorable to existing satellite radio, than to webcasters. The Digital Performance Right in Sound Recordings Act of 1995, in a provision codified at 17 USC § 801(b), directed ad hoc Copyright Arbitration Panels **to set royalty rates for pre-existing satellite radio that are reasonable and are calculated to maximize the availability of creative works to the public, to afford the copyright owner a fair return on his or her investment and the copyright user a fair income, to consider the contributions and risks taken by each party and to minimize any disruptive impact on the industries involved.** The Digital Millennium Copyright Act, in a provision codified at 17 USC §§ 114(f) (2) (A), directed the Copyright Arbitration Royalty Panels **to set royalty rates for webcasters (as well as others including new, i.e. not preexisting, satellite radio stations) "that would have been negotiated ....between a willing**

**buyer and a willing seller.”** No language indicated that the Panels should be concerned about maximizing the availability of creative works or the disruptive impact on internet radio.

As a result, in 2002, royalties for internet radio were set at an amount that would put many internet radio stations, already earning little if any money, out of business. Webcasters appealed the decision to the D.C. Circuit Court of Appeals. The D.C. Circuit Court of Appeals affirmed the decision. See, Beethoven.com LLC v. Library of Congress, 394 F.3d 939 (D.C. Cir. 2005); and See generally, Melville B. Nimmer and David Nimmer, Nimmer on Copyright 8-352 (Rel.61-8/2003).

In 2002, partly because of concerns over the adverse effects of the high rates, Congress passed the Small Webcaster Settlement Act of 2002. The new Act led to an agreement among the participating stake holders of an alternative rate equal to 5% of expenses or 8% of gross revenues, depending on which is greater, through 2002 for "small webcasters," with increases scheduled for 2003 and 2004. See, Nimmer on Copyright, 8-352.12 (Rel.61-8/2003).

### Current Royalties for Webcasting

On March 7, 2007, the Copyright Royalty Judges, who had replaced the ad hoc Copyright Arbitration Panels and are sometimes referred to as the Copyright Royalty Board, set the rates for webcasting beginning at .08 cents per performance for 2006 with yearly increases reaching .19 cents per performance for 2010, with a minimum fee of \$500 per channel per year. The \$500 per channel fee could be interpreted to require the payment of much more than the rates per song for stations like Pandora, that permit each user to set up multiple "stations." Daniel McSwain, Radio and Internet Newsletter, "CRB Coverage," March 2, 2008.

<http://textpattern.kurthanson.com/crb/58/webcast-royalty-rate-decision-announced>; See also, "free103point9 Newsroom," <http://blog.free103point9.org/labels/internet%20radio.html>. On April 17, 2007, the Copyright Royalty Board rejected an appeal. David DeJean, Information Week, April 17, 2007. "Copyright Royalty Board Puts Internet Radio On Death Watch," [http://www.informationweek.com/blog/main/archives/2007/04/copyright\\_royal.html](http://www.informationweek.com/blog/main/archives/2007/04/copyright_royal.html); See also, "free103point9 Newsroom", <http://blog.free103point9.org/labels/internet%20radio.html>.

In contrast, based on the differences in the statutory formulas for setting royalties for webcasters versus pre-existing satellite radio, in 2006, the Copyright Royalty Judges set royalty rates for pre-existing satellite radio that were much more favorable to the owners of the radio stations, resulting in fees of anywhere between 6.0% to 8.0% of gross income. Most internet radio stations would much prefer having their royalties based on their revenue rather than on the number of times songs are played.

An appeal from the order setting the rates for webcasters was filed in the US Court of Appeals for the District of Columbia. No court decision has been published to date. David Oxenford, Broadcast Law Blog, <http://www.broadcastlaw-blog.com/archives/internet-radio-nab-joins-the-fray-on-internet-radio-appeals-and-a-request-for-stay-are-filed-and-a-settlement-offer-is-made-to-noncommercial-webcasters.html>; See also, "free103point9 Newsroom" <http://blog.free103point9.org/labels/internet%20radio.html>.

Finally, on October 1, 2008, Congress enacted the Webcaster Settlement Act that permits the

webcasters and SoundExchange (the collecting agency for the record labels and performers) to negotiate rates lower than the statutory rates, which helps only to the extent the record labels recognize that internet radio can promote the sale of records and be another source of revenue.

### Conclusion

The law relating to internet radio is still evolving, but up to now fails to support internet radio as it has other web based businesses. The royalty payments required for internet radio have been set at levels so high that they could cause many popular webcasters to shut down. As Congress did with pre-existing satellite radio, to "unleash the power of the internet," with respect to internet radio, Congress should set standards for maximum royalties that do not exceed 8% of a radio station's gross income.

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