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COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

DEC 13 2002

GENERAL COUNSEL
OF COPYRIGHT

_____)	
In the Matter of)	
)	
Notification of Agreement under the Small)	Docket No. _____
Webcaster Settlement Act of 2002)	
_____)	

**NOTIFICATION OF AGREEMENT UNDER THE
SMALL WEBCASTER SETTLEMENT ACT OF 2002**

SoundExchange, the receiving agent designated by the Librarian of Congress for the collection of royalty payments made by eligible nonsubscription transmission services pursuant to sections 112 and 114 of the Copyright Act, and the Voice of Webcasters hereby notify the Copyright Office that they have reached an agreement for the reproduction and performance of sound recordings by small commercial webcasters under the section 112 and 114 statutory licenses, pursuant to the authority granted in the Small Webcaster Settlement Act of 2002 (the "SWSA"). The rates and terms comprising that agreement are set forth as Exhibit A (the "Rates and Terms"). SoundExchange and the Voice of Webcasters respectfully request that the Office promptly cause the Rates and Terms to be published in the Federal Register pursuant to the SWSA so that the Rates and Terms will be available, as an option, to any small webcaster meeting the eligibility conditions set forth therein and be binding on all copyright owners of sound recordings and other persons entitled to payment under section 114.

Background

SoundExchange is an organization formed for the purpose of administering the section 112 and 114 statutory licenses. Its member companies are affiliated with record labels accounting for over 90% of the sound recordings lawfully sold in the United States, and it is governed by a board comprised equally of representatives of copyright owners and performers. In the July 8, 2002 order of the Librarian of Congress establishing rates and terms for certain digital performances and ephemeral reproductions of sound recordings, 67 Fed. Reg. 45240 (July 8, 2002) (the "Order"), SoundExchange was designated as receiving agent for the collection of royalty payments made by eligible nonsubscription transmission services pursuant to the statutory licenses in sections 112 and 114 of the Copyright Act.

Some small webcasters who did not participate in the copyright arbitration royalty panel ("CARP") proceeding leading to the Order expressed reservations to Congress about the fee structure set forth in the Order and expressed their desire for a fee based on a percentage of revenue. Congress strongly encouraged representatives of copyright owners of sound recordings and representatives of the small webcasters to engage in negotiations to arrive at an agreement that would include a fee based on a percentage of revenue. During the summer and fall of 2002, SoundExchange had discussions with the Voice of Webcasters, a coalition of small commercial webcasters, to see if the parties could arrive at an agreement that would include a fee based on a percentage of revenue. The membership of the Voice of Webcasters includes webcasters such as IO Media Partners; 3WK LLC; Discombobulated, LLC; Radio Paradise; WebMedia Consulting, Inc.; WOLF FM, Inc.; Montpelier Communications LLC and Classical Music Detroit.

In early October, Representative James Sensenbrenner, Chairman of the Committee on the Judiciary of the House of Representatives, introduced legislation that would have given all webcasters a six-month moratorium on royalty payments. After certain parties objected to the six-month moratorium, Chairman Sensenbrenner urged the parties to reach an agreement immediately. Ultimately, in order to facilitate discussions between SoundExchange and small webcasters, Chairman Sensenbrenner and other members of the Committee proposed certain rates and terms, and requested that SoundExchange and the small webcasters agree to those rates and terms as a substitute for the moratorium legislation. SoundExchange and the small webcasters agreed to those rates and terms under the extraordinary and unique circumstances that existed, and the rates and terms were codified in the Small Webcaster Amendments Act, H.R. 5469, as passed by the House of Representatives on October 7, 2002 (the "SWAA").

Although the intent of the SWAA was to preclude the use of the rates and terms in the SWAA as precedent in future negotiations and rate proceedings, certain broadcasters were concerned that it did not adequately achieve that objective and, as a means of addressing that concern, proposed an alternative approach whereby SoundExchange would be authorized to enter into certain agreements with small commercial webcasters and noncommercial webcasters. That approach was embodied in the SWSA, as passed by Congress on November 15, 2002 and signed by the President on December 4, 2002.

Under section 114(f)(5)(A) of the Copyright Act, as added by the SWSA, SoundExchange, as receiving agent, is authorized to enter into agreements for the reproduction and performance of sound recordings under section 112 and 114 by any one or more small commercial webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004. Once published in the *Federal Register* pursuant to section

114(f)(5)(B), any such agreement is to be binding on all copyright owners of sound recordings and other persons entitled to payment under section 114, in lieu of the rates and terms provided in the Order or any other determination by a CARP or decision by the Librarian of Congress.

According to the SWSA, any such agreement for small commercial webcasters is to include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by small commercial webcasters. The Rates and Terms set forth in Exhibit A conform to such requirements and contain such additional terms and conditions. In the discussions concerning the enactment of the SWSA, it was contemplated by Congress that an agreement containing provisions substantially the same as those embodied in the SWAA would be offered to small commercial webcasters.

Since passage of the SWSA, SoundExchange and the Voice of Webcasters have reached an agreement that the Rates and Terms set forth in Exhibit A, which are substantially the same provisions embodied in the SWAA, should be made available, as an option, to small webcasters meeting the eligibility conditions set forth therein, pursuant to the procedures provided in the SWSA. Accordingly, SoundExchange and the Voice of Webcasters respectfully request that the Office promptly cause the Rates and Terms to be published in the Federal Register pursuant to the SWSA.¹

¹ The SWAA had contained terms relating to non-profit webcasters. These were inserted pursuant to Congressional request, and were not a result of negotiations between

Footnote continued on next page

Under section 114(f)(5)(B) of the Copyright Act, as added by the SWSA, the Office is to cause any such rates and terms to be published in the Federal Register and to include in such publication a statement containing the substance of section 114(f)(5)(C).

No Precedential Effect

A fundamental aspect of both the SWAA and the SWSA is that neither the legislation nor any agreement like the Rates and Terms shall have any precedential effect in any future royalty setting or notice and recordkeeping proceeding under sections 112 and 114.

Specifically, section 114(f)(5)(C) of the Copyright Act, as added by the SWSA, provides as follows:

Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions or notice and record-keeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

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SoundExchange and Voice of Webcasters. As the SWSA has provided nonprofit entities a six-month moratorium from royalty payments so that further negotiations on royalties can take place, and as Voice of Webcasters does not represent non-profit entities, no provision concerning non-profit entities is included in Exhibit A.

17 U.S.C. § 114(f)(5)(C). Similarly, section 114(f)(5)(D) of the Copyright Act, as added by the SWSA, provides as follows:

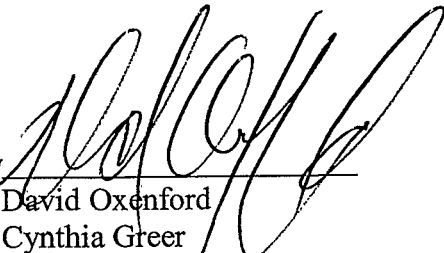
Nothing in the Small Webcaster Settlement Act of 2002 or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to section 112 and section 114.

Here, neither SoundExchange nor the Voice of Webcasters believe that the Rates and Terms provide for or in any way approximates fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. The Rates and Terms truly are a compromise motivated by extraordinary and unique circumstances and should not be given any precedential effect.

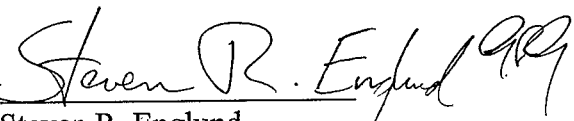
Conclusion

Pursuant to the authority granted in the SWSA, SoundExchange and the Voice of Webcasters respectfully request that the Copyright Office publish the Rates and Terms in the Federal Register pursuant to section 114(f)(5)(B) of the Copyright Act.

December 13, 2002

By 
David Oxenford
Cynthia Greer
SHAW PITTMAN, LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
(202) 663-8007 - Facsimile

Attorneys for the Voice of Webcasters

By 
Steven R. Englund
ARNOLD & PORTER
Suite 900
1600 Tysons Boulevard
McLean, Virginia 22102
(703) 720-7000
(703) 720-7399 - Facsimile

Attorneys for SoundExchange

Of Counsel:

Steven M. Marks
Gary R. Greenstein
Susan C. Munsat
SOUNDEXCHANGE
1330 Connecticut Avenue, N.W.
Suite 330
Washington, D.C. 20036
(202) 775-0101
(202) 293-0447 – Fax

Exhibit A

Rates and Terms Available to Certain Small Commercial Webcasters

1. General.

(a) As an option, an eligible small webcaster (as defined in Section 8(f) hereof), may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, in lieu of other rates and terms applicable under 17 U.S.C. §§ 112 and 114, by complying with the procedure set forth in Section 2 hereof.

(b) Any eligible small webcaster relying upon the statutory licenses set forth in 17 U.S.C. §§ 112 and 114 shall comply with the requirements of those sections, these Rates and Terms and other governing provisions established by the Copyright Office.

(c) These Rates and Terms are without prejudice to, and subject to, any voluntary agreements that an eligible small webcaster may have entered into with any sound recording copyright owner.

(d) An eligible small webcaster that elects to be subject to the Rates and Terms agrees that it has elected these terms in lieu of participating in a copyright arbitration royalty panel ("CARP") proceeding to set rates for the 2003-2004 period and in lieu of any different rates and terms that may be determined through such a CARP proceeding. Thus, once a webcaster has elected the Rates and Terms, it cannot opt out of these Rates and Terms in order to elect different rates and terms arrived at by a CARP. However, should there be any voluntarily negotiated rates and terms arrived at between copyright owners and webcasters that are adopted by the Librarian of Congress as rates and terms for eligible nonsubscription transmission services following publication of such rates and terms in the Federal Register pursuant to 37 C.F.R. § 251.63(b), any eligible small webcaster that qualifies for such rates and terms may by written notice to SoundExchange elect, for any calendar year which has not yet begun, to pay royalties under the rates and terms adopted by the Librarian in lieu of the Rates and Terms applicable hereunder.

2. Election for Treatment as Eligible Small Webcaster.

(a) Election Process. An eligible small webcaster that wishes to elect the royalty rates specified in these Rates and Terms in lieu of any other royalty rates that otherwise might apply under 17 U.S.C. §§ 112 and 114 for the period beginning on October 28, 1998, and ending on December 31, 2002, or the period 2003 and 2004, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange website at <http://www.soundexchange.com> by no later than the first date on which the webcaster would be obligated under these Rates and Terms to make a royalty payment for such period. An eligible small webcaster that fails to make a timely election shall pay royalties as otherwise provided in 17 U.S.C. §§ 112 and 114. If a webcaster timely elects to be treated as an eligible small webcaster for the period beginning on October 28, 1998, and ending on December 31, 2002, or for 2003 and 2004, the webcaster shall thereafter be obligated to pay royalties under and comply with the provisions of these Rates and Terms as an eligible small webcaster through December 31, 2004, without need to submit any further election form, provided that

such webcaster continues to meet the conditions for eligibility as an eligible small webcaster, as set forth in Section 8(f), except to the extent that the eligible small webcaster elects otherwise in accordance with Section 1(d).

(b) Default. As a condition of the election provided in Section 2(a), an eligible small webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the eligible small webcaster that, unless the breach is remedied within thirty days from the date of notice and not repeated, the eligible small webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. § 501 and fully subject to the remedies provided by 17 U.S.C. §§ 502-506 and 509.

3. Royalty Rates for Eligible Small Webcasters

(a) For the Period 1998-2002. For eligible nonsubscription transmissions made by an eligible small webcaster during the period beginning on October 28, 1998, and ending on December 31, 2002, the royalty rate shall be 8 percent of the webcaster's gross revenues during such period, or 5 percent of the webcaster's expenses during such period, whichever is greater, except that an eligible small webcaster that is a natural person shall exclude from expenses those expenses not incurred in connection with the operation of a service that makes eligible nonsubscription transmissions, and an eligible small webcaster that is a natural person shall exclude from gross revenues his or her income during such period, other than income derived from –

- (1) a media or entertainment related business that provides audio or other entertainment programming, or
- (2) a business that primarily operates an Internet or wireless service,

that is in either case directly or indirectly controlled by such natural person, or of which such natural person beneficially owns 5 percent or more of the outstanding voting or non-voting stock.

(b) For 2003 and 2004. For eligible nonsubscription transmissions made by an eligible small webcaster during 2003 or 2004, the royalty rate shall be 10 percent of the eligible small webcaster's first \$250,000 in gross revenues and 12 percent of any gross revenues in excess of \$250,000 during the applicable year, or 7 percent of the webcaster's expenses during the applicable year, whichever is greater.

(c) Ephemeral Recordings. The royalty payable under 17 U.S.C. § 112(e) for any reproduction of a phonorecord made during the period beginning on October 28, 1998, and ending on December 31, 2004, and used solely by an eligible small webcaster to facilitate transmissions for which it pays royalties as and when provided in Sections 3 and 4 hereof shall be deemed to be included within, and to comprise 9 percent of, such royalty payments.

4. Payment of Royalties.

(a) For the Period 1998 – November 2002. Except as provided in Sections 5(a)(1), 5(a)(2) and 5(b), the balance of any amounts specified in Section 3(a) for eligible nonsubscription transmissions made by an eligible small webcaster during the period beginning on October 28, 1998, and ending on November 30, 2002, which has not already been paid, shall be paid in three equal installments, with the first due by January 15, 2003, the second due by May 31, 2003, and the third due by October 31, 2003.

(b) For the Period December 2002 - 2004. The amounts specified in Section 3 for eligible nonsubscription transmissions made by an eligible small webcaster during December 2002 or any month thereafter shall be paid on or before the last day of the month next succeeding such month.

(c) Qualification to Make Current Payments as Eligible Small Webcaster in 2003 and 2004. If the gross revenues, plus the third party participation revenues and revenues from the operation of new subscription services, of a transmitting entity and its affiliates have not exceeded \$1,250,000 in any year, and the transmitting entity expects to be an eligible small webcaster in 2003 and 2004, the transmitting entity may make payments for 2003 or 2004, as the case may be, on the assumption that it will be an eligible small webcaster for that year for so long as that assumption is reasonable.

(d) True-Up Between Gross Revenues and Expenses. In making payments under Section 3, an eligible small webcaster shall, at the time a payment is due, calculate its gross revenues and expenses for the year through the end of the applicable month and pay the applicable percentage of gross revenues or expenses, as the case may be, for the year through the end of the applicable month, less any amounts previously paid for such year.

(e) True-Up if Eligibility Condition is Exceeded. If a transmitting entity has made payments under Section 3(b) for 2003 or 2004 based on the assumption that it will qualify as an eligible small webcaster, as provided in Section 4(c), but the actual gross revenues in 2003, or the actual gross revenues plus third party participation revenues and revenues from the operation of new subscription services in 2004, of the eligible small webcaster and its affiliates, exceed the maximum amounts provided in Section 8(f), then the transmitting entity shall immediately commence to pay monthly royalties based on the royalty rates otherwise applicable under 17 U.S.C. §§ 112 and 114, and on the third payment date after the month in which such maximum amounts are exceeded, it shall pay an amount of royalties based on such otherwise applicable rates for the whole year through the end of the immediately preceding month, less any amounts previously paid under Section 3(b) for such year.

(f) Remittance. Payments of all amounts specified in Section 3 shall be made to SoundExchange and shall under no circumstances be refundable, but if an eligible small webcaster makes overpayments during a year, it shall be entitled to a credit in the amount of its overpayment, and such credit shall be applicable to its payments in subsequent years. Payments shall be accompanied by a statement of account in the form made available on the SoundExchange website located at <http://www.soundexchange.com>.

5. Minimum Fee.

(a) Minimum Amounts. Notwithstanding Section 3, eligible small webcasters that elect the royalty rates specified in Section 3 shall pay a minimum fee for the periods specified in this Section 5(a), as follows:

- (1) For eligible nonsubscription transmissions made by an eligible small webcaster during the period beginning on October 28, 1998, and ending on December 31, 1998, the minimum fee for the year shall be \$500.
- (2) For eligible nonsubscription transmissions made by an eligible small webcaster in any part of calendar years 1999 through 2002, the minimum fee for each year in which such transmissions are made shall be \$2,000.
- (3) For eligible nonsubscription transmissions made by an eligible small webcaster in any part of calendar years 2003 and 2004, the minimum fee for each year in which such transmissions are made shall be \$2,000 if the eligible small webcaster had gross revenues during the immediately preceding year of not more than \$50,000 and expects to have gross revenues during the applicable year of not more than \$50,000.
- (4) For eligible nonsubscription transmissions made by an eligible small webcaster in any part of calendar years 2003 and 2004, the minimum fee for each year in which such transmissions are made shall be \$5,000 if the eligible small webcaster had gross revenues during the immediately preceding year of more than \$50,000 or expects to have gross revenues during the applicable year of more than \$50,000.

(b) Time of Payment. The minimum fees specified in Sections 5(a)(1) and (2) shall be paid by January 15, 2003, except in the case of an eligible small webcaster with gross revenues during the period beginning on November 1, 1998, and ending on November 30, 2002, of not more than \$100,000, which may pay such minimum fees in three equal installments at the times specified in Section 4(a). The minimum fees specified in Sections 5(a)(3) and (4) shall be paid in two equal installments, with the first due by January 31 of the applicable year and the second due by June 30 of the applicable year.

(c) Remittance. Payments of all amounts specified in this Section 5 shall be made to SoundExchange and shall under no circumstances be refundable.

(d) Credit Toward Royalties. All amounts paid under this Section 5 shall be fully creditable toward amounts due under Section 3 for the year for which such amounts are paid under this Section 5, but not any subsequent year.

6. Notice and Recordkeeping.

(a) Reports to Be Provided. For either or both of calendar years 2003 and 2004, an eligible small webcaster that makes an election pursuant to Section 2 covering that year shall, for that year, keep records, and make available to each designated agent of copyright

owners of sound recordings and other persons entitled to payment under 17 U.S.C. § 114(g), reports of use, covering the following on a channel by channel basis:

- (1) The featured recording artist, group or orchestra;
- (2) The sound recording title;
- (3) The title of the retail album or other product (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the eligible small webcaster for purchase of the sound recording);
- (4) The marketing label of the commercially available album or other product on which the sound recording is found –
 - (A) for all albums or other products commercially released after 2002; and
 - (B) in the case of albums or other products commercially released before 2003, for 67 percent of the eligible small webcaster's digital audio transmissions of such pre-2003 releases during 2003 and all of the eligible small webcaster's digital audio transmissions during 2004;
- (5) The International Standard Recording Code ("ISRC") embedded in the sound recording, if available –
 - (A) for all albums or other products commercially released after 2002; and
 - (B) in the case of albums or other products commercially released before 2003, for 50 percent of the eligible small webcaster's digital audio transmissions of such pre-2003 releases during 2003, and for 75 percent of the eligible small webcaster's digital audio transmissions of such pre-2003 releases during 2004, to the extent that such information concerning such pre-2003 releases can be provided using commercially reasonable efforts;
- (6) The copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P) (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track) –
 - (A) for all albums or other products commercially released after 2002; and
 - (B) in the case of albums or other products commercially released before 2003, for 50 percent of an eligible small webcaster's digital audio transmissions of such pre-2003 releases during 2003, and for 75 percent of an eligible small webcaster's digital audio transmissions of such pre-2003 releases during 2004, to the extent that such information concerning such pre-2003 releases can be provided using commercially reasonable efforts;

- (7) The aggregate tuning hours, on a monthly basis, for each channel provided by the eligible small webcaster as computed by a recognized industry ratings service or as computed by the eligible small webcaster from its server logs;
- (8) The channel for each transmission of each sound recording; and
- (9) The start date and time of each transmission of each sound recording.

(b) Computation of Percentages. For purposes of Sections 6(a)(4)(B), 6(a)(5)(B), and 6(a)(6)(B), all percentages shall be computed for the full year, rather than on a monthly basis.

(c) Provision of Reports. Reports of use described in Section 6(a) shall be provided, at the same time royalty payments are due under Section 4(b), to the designated agents.

(d) Other Matters as Provided by Regulation. For calendar years 2003 and 2004, details of the means by which copyright owners may receive notice of the use of their sound recordings, and details of the requirements under which reports of use concerning the matters identified in Section 6(a) shall be made available, shall be as provided in regulations issued by the Librarian of Congress under 17 U.S.C. § 114(f)(4)(A).

7. Additional Requirements.

(a) Proof of Eligibility. An eligible small webcaster that makes an election pursuant to Section 2 shall make available to SoundExchange, within 30 days after SoundExchange's written request at any time during the 3 years following a period during which it is to be treated as an eligible small webcaster for purposes of these Rates and Terms, sufficient evidence to support its eligibility as an eligible small webcaster during that period. Any proof of eligibility provided hereunder shall be provided with a certification signed by the eligible small webcaster if a natural person, or by an officer or partner of the eligible small webcaster if the eligible small webcaster is a corporation or partnership, stating, under penalty of perjury, that the information provided is accurate and the person signing is authorized to act on behalf of the eligible small webcaster.

(b) Third Party Participation Revenues. An eligible small webcaster that makes an election pursuant to Section 2 shall provide to SoundExchange, by not later than January 31 of the year following a period during which it is to be treated as an eligible small webcaster for purposes of these Rates and Terms, a good faith estimate of its third party participation revenues for the previous year. For the year 2004, the eligible small webcaster shall provide an accounting of such third party participation revenues. SoundExchange may share with individual copyright owners the accounting provided by an eligible small webcaster under this Section 7(b) if SoundExchange does so in such a way that the eligible small webcaster cannot readily be identified.

(c) Regulations Applicable. Any otherwise applicable terms determined in accordance with 17 U.S.C. §§ 112 and 114 and applicable to payments under 17 U.S.C.

§§ 112 and 114 shall apply to payments under these Rates and Terms except to the extent inconsistent with these Rates and Terms.

(d) Cooperation in Study. An eligible small webcaster that makes an election pursuant to Section 2 shall use commercially reasonable efforts to cooperate with the Comptroller General of the United States and the Register of Copyrights in preparing their report to Congress concerning the economic arrangements among eligible small webcasters and third parties, and the effect of those arrangements on royalty fees payable on a percentage of revenue or expense basis, as required by Section 6 of the Small Webcaster Settlement Act of 2002. For purposes of this Section 7(d), “commercially reasonable efforts” shall not be interpreted to include any requirement that any principal or employee of an eligible small webcaster travel to attend any proceedings held in connection with such study, or provide confidential business information unless that information will only be disclosed to the public in such a way that the eligible small webcaster cannot readily be identified.

8. Definitions. As used in these Rates and Terms, the following terms shall have the following meanings:

(a) An “affiliate” of a transmitting entity is a person or entity that directly, or indirectly through one or more intermediaries –

(1) has securities or other ownership interests representing more than 50 percent of such person’s or entity’s voting interests beneficially owned by –

(A) such transmitting entity; or

(B) a person or entity beneficially owning securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity;

(2) beneficially owns securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity; or

(3) otherwise controls, is controlled by, or is under common control with the transmitting entity.

(b) The term “aggregate tuning hours” has the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002.

(c) A “beneficial owner” of a security or other ownership interest is any person or entity who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, has or shares voting power with respect to such security or other ownership interest.

(d) The term “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract or otherwise.

(e) The term “designated agent” shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002.

(f) An “eligible small webcaster” means a person or entity that has obtained a compulsory license under 17 U.S.C. §§ 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings that –

- (1) for the period beginning on October 28, 1998, and ending on December 31, 2002, has gross revenues during the period beginning on November 1, 1998, and ending on June 30, 2002, of not more than \$1,000,000;
- (2) for 2003, together with its affiliates, has gross revenues during 2003 of not more than \$500,000; and
- (3) for 2004, together with its affiliates, has gross revenues plus third party participation revenues and revenues from the operation of new subscription services during 2004 of not more than \$1,250,000.

In determining qualification under this Section 8(f), a transmitting entity shall exclude –

- (A) income of an affiliate that is a natural person, other than income such natural person derives from another affiliate of such natural person that is either a media or entertainment related business that provides audio or other entertainment programming, or a business that primarily operates an Internet or wireless service; and
 - (B) gross revenues of any affiliate that is not engaged in a media or entertainment related business that provides audio or other entertainment programming, and is not engaged in a business that primarily operates an Internet or wireless service, if the only reason such affiliate is affiliated with the transmitting entity is that (i) it is under common control of the same natural person or (ii) both are beneficially owned by the same natural person.
- (g) The term “expenses” –
- (1) means all costs incurred (whether actually paid or not) by an eligible small webcaster, except that capital costs shall be treated as expenses allocable to a period only to the extent of charges for amortization or depreciation of such costs during such period as are properly allocated to such period in accordance with United States generally accepted accounting principles (“GAAP”);
 - (2) includes the fair market value of all goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property) provided by an eligible small webcaster to any third party in lieu of a cash payment and the fair market value of any goods or services purchased for or provided to an eligible small webcaster by an affiliate of such webcaster; and

- (3) shall not include –
- (A) the imputed value of personal services rendered by up to 5 natural persons who are, directly or indirectly, owners of the eligible small webcaster, and for which no compensation has been paid;
 - (B) the imputed value of occupancy of residential property for which no Federal income tax deduction is claimed as a business expense;
 - (C) costs of purchasing phonorecords of sound recordings used in the eligible small webcaster’s service;
 - (D) royalties paid for the public performance of sound recordings; or
 - (E) the reasonable costs of collecting overdue accounts receivable, provided that the reasonable costs of collecting any single overdue account receivable may not exceed the actual account receivable.
- (h) The term “gross revenues” –
- (1) means all revenue of any kind earned by a person or entity, less –
- (A) revenue from sales of phonorecords and digital phonorecord deliveries of sound recordings;
 - (B) the person or entity’s actual costs of other products and services actually sold through a service that makes eligible nonsubscription transmissions, and related sales and use taxes imposed on such transactions, costs of shipping such products, allowance for bad debts, and credit card and similar fees paid to unrelated third parties;
 - (C) revenue from the operation of a new subscription service for which royalties are paid in accordance with provisions of 17 U.S.C. §§ 112 and 114; and
 - (D) revenue from the sale of assets in connection with the sale of all or substantially all of the assets of such person’s or entity’s business, or from the sale of capital assets; and
- (2) includes –
- (A) all cash or cash equivalents;
 - (B) the fair market value of goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property);

- (C) in-kind and cash donations and other gifts (but not capital contributions made in exchange for an equity interest in the recipient); and
- (D) amounts earned by such person or entity but paid to an affiliate of such person or entity in lieu of payment to such person or entity.

Gross revenues shall be calculated in accordance with GAAP, except that a transmitting entity that computes Federal taxable income on the basis of the cash receipts and disbursements method of accounting for any taxable year may compute its gross receipts for any period included in such taxable year on the same basis.

(i) The term “new subscription service” has the meaning given that term in 17 U.S.C. § 114(j)(8).

(j) The “third party participation revenues” of a transmitting entity are revenues of any kind earned by a person or entity, other than the transmitting entity, including those:

- (1) that relate to the public performance of sound recordings and are subject to an economic arrangement in which the transmitting entity receives anything of value; or
- (2) that are earned by such person or entity from the sale of advertising of any kind in connection with the transmitting entity’s eligible nonsubscription transmissions.

soundexchange

1330 CONNECTICUT AVE, NW, SUITE 300, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM



December 13, 2002

BY HAND

David O. Carson, Esq.
General Counsel
Copyright Office
Library of Congress
Office of the General Counsel
James Madison Building, Room LM-403
First and Independence Avenue, SE,
Washington, D.C. 20559-6000

RECEIVED

DEC 13 2002

GENERAL COUNSEL
OF COPYRIGHT

Re: Notification of Agreement under Small Webcaster Settlement Act of 2002

Dear David:

In accordance with the provisions of the Small Webcaster Settlement Act of 2002 ("SWSA"), Pub. L. No. 107-321, 116 Stat. 2780, SoundExchange and the Voice of Webcasters hereby submit to the Copyright Office an original and five copies of a Notification of Agreement for the reproduction and performance of sound recordings by small commercial webcasters under the section 112 and 114 statutory licenses, pursuant to authority granted in the SWSA. We are also attaching the rates and terms comprising that agreement for publication in the Federal Register.

To facilitate the publication of the rates and terms in the Federal Register, we can provide you with a copy of the notification and rates and terms on a computer diskette or via electronic mail. Please let us me know which method you prefer.

Please return to the messenger delivering these comments a date-stamped original of the notification indicating receipt.

Sincerely,

Gary R. Greenstein
Associate Counsel
Business & Legal Affairs

Enclosures

cc: Steve Englund, Arnold & Porter (w/encl.)
David Oxenford, Shaw Pittman, LLP (w/encl.)

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Dear David:

As per my discussion with Bill Roberts, enclosed is a computer diskette that contains a copy of the notification and rates and terms that was filed with the Copyright Office on Friday, December 13, 2002. This document is formatted in Word Perfect 9.0.

Please do not hesitate to call me at (202) 857-9716 if you have any problem accessing this document.

Sincerely,

Gary R. Greenstein
Associate Counsel
Business & Legal Affairs