
LIBRARY OF CONGRESS
Copyright Office
Notification of Agreement Under the Small Webcaster Settlement Act of 2002

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreement.

SUMMARY: The Copyright Office is publishing an agreement which sets rates and terms for the performance of sound recordings under two statutory licenses by small commercial webcasters. Small commercial webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreement published herein rather than the rates and terms adopted by the Librarian of Congress in an earlier proceeding.

FOR FURTHER INFORMATION CONTACT:

Susan Grimes, CARP Specialist, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423. See the final paragraph of the **SUPPLEMENTARY INFORMATION** for information on where to direct questions regarding the rates and terms set forth in the agreement.

SUPPLEMENTARY INFORMATION: On Wednesday, December 4, 2002, President Bush signed into law the Small Webcaster Settlement Act of 2002 ("SWSA"), Pub. L. 107-321, 116 Stat. 2780, which amends the [section 112](#) and [section 114](#) statutory licenses in the Copyright Act, title 17 of the United States Code, as they relate to small webcasters and noncommercial webcasters. Among other things, the SWSA allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002, order for collecting royalty payments made by eligible nonsubscription transmission services under the section 112 and section 114 statutory licenses, *see* [67 FR 45239](#) (July 8, 2002), to enter into agreements on behalf of all copyright owners and performers to set rates, terms and conditions for small commercial

webcasters operating under the section 112 and section 114 statutory licenses.

The rates and terms set forth in such agreements apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings. To make this point clear, Congress included language expressly addressing the precedential value of such agreements. Specifically, section 114(f)(5)(C), as added by the SWSA, states that:

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 recordkeeping 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 recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and 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).

17 U.S.C. 114(f)(5)(C) (2002).

On December 13, 2002, SoundExchange and the Voice of Webcasters, a coalition of small commercial webcasters, notified the Copyright Office that they had negotiated such an agreement for the reproduction and performance of sound recordings by small commercial webcasters under the section 112 and section 114 statutory licenses and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under section 114(f)(5)(B) of the Copyright Act, as amended by the SWSA.

Thus, in accordance with the requirement set forth in amended section 114(f)(5)(B), the Copyright Office is publishing the submitted agreement, as Appendix A, thereby making the rates and terms in the agreement available to any small commercial webcasters meeting the eligibility conditions of the agreement as an alternative to the rates and terms

announced by the Librarian in his July 8, 2002 order.

The Copyright Office has no responsibility for administering the rates and terms of the agreement beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreement should be directed to SoundExchange (for contact information, see <http://www.soundexchange.com>).

Dated: December 18, 2002.

Marybeth Peters,

Register of Copyrights.

Note: This Appendix Will Not Be Codified in Title 37, Part 261, of the Code of Federal Regulations.

Appendix 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 CFR § 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 Web site 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 Web site 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

(A) 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.

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