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MEMORANDUM

Date: **October 22, 2007**

From: **M. Scott Johnson and Kevin M. Goldberg**

To: **Sharon Tinsley**

Re: **An Overview of Compliance with the Legal Requirements Applicable to Streaming Music Over the Internet**

Interim final rules published in the Federal Register on October 6, 2006 complete the regulatory puzzle related to digital audio transmissions of sound recordings. Simply put, anyone streaming music (or other copyrighted materials) over the Internet must now pay monthly royalties to a designated receiving agency overseen by the Recording Industry Association of America ("RIAA"), keep detailed records of all songs played on the Internet, and file those records on a quarterly basis.

Many radio broadcasters simulcasting an over-the-air signal on the Internet take advantage of technology (often called "turnkey programs") advertised as the complete solution to simulcasting on the Internet. These advertisements are somewhat misleading, as turnkey programs rarely assist in copyright law compliance. This memorandum will assist radio

broadcasters in navigating the complex statutory licensing requirements created by the Digital Millennium Copyright Act ("DMCA") and its implementing regulations.[1]

I. Background of Copyright Law as Applied to Internet Radio.

The owner of a copyrighted work has exclusive permission, subject to only limited exceptions, to reproduce, adapt, distribute or perform that content. In the case of a popular song that is played on the radio, there are two copyright holders. There is the owner of the copyright in the "musical work" – the lyrics and music – who is often referred to as the songwriter.[2] There is also the owner of the copyright in the "sound recording" – that version of the work that has been performed – often referred to as the singer or the artist.[3] These may or may not be identical.[4] But each copyright holder is entitled to his or her share of the royalties when that song is performed live, through radio airplay, or via an Internet stream.

Rather than requiring negotiation with each and every copyright holder for the right to perform music, several statutory or compulsory licensing schemes have been created. Whether based in law (statutory) or binding contractual agreement (compulsory), these licenses work by

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1 As this memorandum is written for existing clients of Fletcher, Heald & Hildreth, P.L.C. who are engaged in radio broadcasting, it is presumed that their Internet radio activities consist exclusively, or at least primarily, of the simulcasting of over-the-air radio programming. The information contained in this memorandum applies to this form of webcast. It does not apply to audiovisual works, for which there currently is no statutory licensing scheme. For purposes of this memorandum the terms "Internet radio", "streaming" and "webcasting" will be used interchangeably to mean the playing of copyrighted music over the Internet.

2 In many cases, the songwriter's publishing company will own the copyright in the musical work.

3 The performer's record company or "label" will often own the copyright in the sound recording.

4 One example is the song "Yesterday", which according to the Guinness Book of World Records has the most cover versions of any song in history (over 2500 registered covers). The copyright in the original musical work (before that right was later sold) was owned by the songwriters, John Lennon and Paul McCartney. They, along with the rest of the Beatles, also owned a copyright in the sound recording of "Yesterday" that appeared on the album "Help!". When Ray Charles recorded a version of "Yesterday" in 1967, he had to pay royalties to Lennon and McCartney for use of their musical work but obtained his own copyright in his cover version. Any radio station which then played the Ray Charles version of "Yesterday" would have to pay royalties to both Lennon/McCartney (for the underlying musical work) and to Ray Charles (for the sound recording performed on the radio).

having an intermediary collect royalties from those similarly situated entities who wish to perform music and then distributing those funds in a fair and equitable manner to the copyright holders. Certain restrictions are imposed on participants as a condition of eligibility for the licensing scheme. The licenses most familiar to radio broadcasters are administered by ASCAP, BMI, and SESAC. They allow radio stations to perform virtually any popular music song ever recorded without fear of being sued for copyright infringement by the owner of the musical work or the sound recording.

When the Internet became a popular mass medium, radio stations realized they could reach beyond the physical limits of their FCC licenses to gain new listeners. Many began the relatively simple process of simulcasting an over-the-air signal on the Internet. Recording artists, through the RIAA, vociferously argued that playing a song simultaneously over-the-air and on the Internet constituted two separate performances of that song. They also claimed that the ASCAP, BMI, and SESAC licenses only applied to the over-the-air broadcast of the song.

At this point Congress acted by passing the DMCA. That Act clarifies that the money paid by radio broadcasters to ASCAP, BMI, and SESAC covers over-the-air broadcasts, as well as the royalties required to be paid to the copyright owner of the underlying musical work played over the Internet. Separate royalties must be paid for the separate performance of the sound recording over the Internet. The Act provided for these payments by creating in Section 114 of the Copyright Act a new statutory license related to these Internet webcasts. The RIAA designated its subsidiary SoundExchange, Inc. to collect royalties pursuant to this statutory license from every entity streaming music over the Internet. In separate rulemakings over the course of several years, the Copyright Office published rules governing the payment of royalties through SoundExchange to performers of sound recordings played over the Internet. These rules consist not only of a fee structure for royalty payments by eligible Internet radio operators, but

also recordkeeping and filing requirements to allow for equitable distribution of those royalties to copyright holders.

The last of these rulemaking proceedings was completed by the Copyright Royalty Board ("CRB") on October 6, 2006. This proceeding in Docket Number RM 2005-2 ("Notice and Recordkeeping for Use of Sound Recordings Under Statutory License"), means that those engaged in Internet streaming finding themselves now concerned with four legal matters arising from the Section 114 statutory license:

- Filing the required "Notice of Use of Sound Recording Under Statutory License";
- Compliance with DMCA playlist and technical restrictions affecting the Internet stream's content and structure and, if the stream is a simulcast, the over-the-air broadcast as well;
- Paying monthly royalties; and
- Keeping detailed records and filing quarterly reports of all songs performed over the Internet.

II. Filing the Required "Notice of Use of Sound Recording Under Statutory License."

Any Internet webcaster broadcaster must notify the Copyright Office, Copyright Royalty Board, and all copyright holders of an intention to participate in the statutory licensing scheme in order to reap the benefits of this license. This is the easiest aspect of compliance and simply involves the filing of a form entitled "Notice of Use of Sound Recordings Under Statutory License," which can be found on the Copyright Office's website at:

http://www.copyright.gov/forms/form112-114nou.pdf

An original and three copies of this one-page form are mailed to the CRB in Washington, DC, along with a filing fee in the amount of $20. It is important to note that that this form must be filed before commencement of Internet webcasting.

III. Compliance with DMCA Playlist and Technical Restrictions.

After resolving to begin Internet operation and filing the required notification form, a webcaster must take steps to conform its proposed playlists to the requirements of the DMCA. This will especially impact those radio broadcasters simulcasting an over-the-air signal, as the DMCA may require changes to the over-the-air playlist as well as education of radio staff on this law. Failure to comply with the DMCA's technical requirements may result in forfeiture of eligibility for the statutory licensing program.

The technical conditions imposed by the DMCA are intended primarily to prevent music piracy. They fall into 5 basic categories:

A. Restrictions on the Number of Songs which can be Played from Any Given Album or Artist Within a Certain Time Period.

There are strict limitations on the frequency with which a given performer or songs from a specific album can be featured in a specific time period. They include:

- No single song can be played more than once in an hour;
- Within any three hour period, no single internet radio stream can contain more than three selections from any one album or compact disc. None of these three selections can be played consecutively; and
- Within any three hour period, the Internet stream can include no more than four songs by the same artist or compilation. No more than three of these four songs can be played consecutively.

B. No Interactive Services.

Webcasters are prohibited from providing an "interactive service" which allows listeners to automatically select songs they want to hear. This does not prevent radio stations from taking requests, as long as the ultimate choice as to the playlist rests with station employees, not listeners.

C. Restrictions on Archived or Repeated Programs**.**

One of the great benefits of the Internet is that it allows for greater storage of programming and greater accessibility to stored programming by listeners, especially those listeners who may want to hear certain programs multiple times. Of course, this offers greater potential that programs or music will be pirated. For that reason, there are strict rules related to archiving and repeating programs on a station's website:

- No archived programs may be less than five hours in duration;
- Programs of five hours or greater in duration may only be archived for a maximum period of two weeks;
- "Looped programming" – programming which is repeated consecutively without change – must be at least three hours in length; and
- Programs which are less than one hour in duration and repeated at scheduled times can only be repeated three times in a two week period; if the program is one hour or more in duration, it can be repeated four times in a two week period.

D. Required and Prohibited Information About Songs, Albums and Performers**.**

Prohibitions against pre-announcing upcoming programming exist to prevent listeners from predicting exactly when they can hear a favorite song or artist and then setting up software to capture, save and download specific music. The titles of specific upcoming songs, the records containing those songs, or the name of featured artists can only be published on the station's website or pre-announced over the air if the exact time of the song's airing is not mentioned.

Thus, a playlist or announcement by a DJ saying: "'Yesterday' by The Beatles will be played at 5:23 pm, followed by two minutes of commercials and then 'Born to Run' by Bruce Springsteen at 5:30 pm" would be prohibited. But an announcer could utilize a teaser such as: "We'll go to commercial and have some Beatles for you when we come back" or "Coming up, we go back to the archive for 'Yesterday.'"

At the same time, the DMCA requires Internet webcasters to affirmatively identify certain copyright information so that listeners and copyright owners can readily determine which

works are being performed on the station and assist in preventing copyright infringement. There must be an identification in the text of the sound recording during (but, of course, not before) the performance which contains the song title, album title, and name of the performer.

E. Other Technical Requirements.

There are several other technical requirements which are intended to prevent piracy, including:

- A prohibition on the transmission of visual images contemporaneously with the transmission of the sound recording in a manner that deceives the listener into believing there is some connection between the artist and the station;
- An agreement to cooperate in preventing transmission recipients from automatically scanning the transmissions and creating pirated CDs;
- An agreement to play only those recordings which have been released by the copyright owner for play to the public (no bootlegs); and
- An agreement not to interfere with the technical measures widely used by sound recording owners to identify or protect copyrighted works.

IV. Paying Monthly Royalties.

The entire statutory licensing scheme is nothing more than an efficient manner of effectuating royalty payments. So it goes without saying that royalty fee payments are an important part of the overall structure. The royalty rates were originally set by the Librarian of Congress in 2002 and updated every two years; the CRB recently took over this job and is now responsible for amending the rates every five years.

On March 2, 2007, the Copyright Royalty Board issued onerous new royalty rates which sharply increase the payments that will be made by Internet radio stations for the years 2006-2010. What appears below is a summary of the royalty payment regulations that compares the rate schemes for those years up to 2006 and for 2006 and beyond.

A. Pre-2006 Royalty Fee Payment

Every webcaster had to calculate and submit its royalty fees to SoundExchange using a form called a "Statement of Account." These forms can be found on the SoundExchange website: http://www.soundexchange.com/licensee/forms.html#services

The first Statement of Account filed each year included the minimum payment required for that year ($ 500.00 per channel or station or $ 2500.00 per licensee, whichever was less); every monthly filing thereafter included any "overages" which may result. Each Statement of Account had to be filed within 45 days of the end of the month to which it applied (i.e., the January 2007 filing is due no later than March 15, 2007). There was a late fee of 0.75 percent for any missed payments.

Licensees had the option of determining their payment obligation in one of two ways:

- Per Performance Option: A licensee could pay $0.000762 (.0762 cents) per performance.[5] In calculating this fee, licensees automatically excluded four percent of all performances, in order to compensate for various problems which presumably arise from time to time (such as technical glitches) that would prevent listeners from receiving all performances; or

- Aggregate Tuning Hours Option: Licensees could also choose to pay either (i) $0.000762 (.0762 cents) per aggregate tuning hour for news, talk, sports or business programming and (ii) $0.0088 (.88 cents) per aggregate tuning hour for broadcast simulcast programming that was not reasonably classified as news, talk, sports or business programming – in other words, music.[6]

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[5] A performance is any instance in which any portion of a sound recording is webcast to a listener excluding:

a. A performance of a sound recording that does not require a license;
b. A performance of a sound recording for which a license has already been obtained directly from the copyright owner; and
c. An incidental performance that makes no more than a brief use of the sound recording including brief musical interludes into and out of commercials, brief performances during sports, talk, or news programming and brief performances during commercials which are less than 60 seconds in duration, as well as ambient music in the background at a public event which does not feature a particular sound recording of more than 30 seconds.

[6] The term "aggregate tuning hours" is perhaps the most confusing aspect of these rules. This term refers to the total hours of programming that the licensee has transmitted during the monthly period to all listeners within the United States from all channels on which it streams copyrighted content, minus the running time of any programming which does not require a copyright license in order to be streamed (such as original programming) or for which a license has already been obtained directly from the copyright owner. The Copyright Office offers the following clarification: if a station streams one hour of programming to 10 simultaneous listeners, then it has engaged in 10 aggregate tuning hours of programming. However, if 30 minutes of this programming consists of a directly licensed program, then the station's aggregate tuning hours is 9 hours, 30 minutes. As another example, if one listener listens to the stream for 10 hours, and none of the programming was directly licensed, the station has also engaged in 10 aggregate tuning hours of programming.

The royalty payments differed for smaller and noncommercial webcasters. Any webcaster which had gross annual revenues of $1,250,000 or less was eligible for reduced royalty payments. This revenue ceiling was determined by looking at the gross revenues of the webcaster and any associated company; a radio licensee could not simply set up a webcasting operation under a different name to take advantage of these rates. The royalties paid by eligible small webcasters were not based upon per performance or aggregate tuning hours. Instead, they were the higher of ten percent of the first $250,000 in revenues earned that year or seven percent of all expenses. In either case, there was a minimum payment of $2,000 per year for webcasters with less than $50,000 in gross revenue or $5,000 per year for webcasters with $50,000 or more in gross revenue.

Noncommercial webcasters who transmitted over the Internet had even lower royalty payments. There was a $500 minimum annual royalty payment which allowed for transmission to an average of 200 listeners at a time for 146,000 aggregate tuning hours per month. In the unlikely event that the noncommercial webcaster exceeded this minimum, it had to make an election to pay at a reduced per performance or aggregate tuning hour rate.

B. Rates for 2006 and Beyond

The new royalty rates published on March 2, 2007 include several changes that will ultimately result in payment of increased fees by all types of radio stations for the years 2006-2010. Stations will no longer be able to pay royalties on an "aggregate tuning hour" basis; all royalties will be calculated on a "per performance" basis. Nor is there any special rate that is applicable to smaller webcasters. Finally, noncommercial stations will continue to pay an annual minimum fee of $500.00 and nothing more unless the station exceeds an aggregate tuning hour maximum of 159,000 for the month.

Commercial Webcasters

Commercial stations streaming on the Internet will have calculated royalties on a "per performance" basis, with a "performance" defined as "the streaming of one song to one listener" (subject to the same exceptions found in footnote 5 above). A station with 100 listeners during a given song will have 100 "performances" to be charged at the rate below for that song. These new per performance rates are:

i. Payment of $ 0.0008 per performance for 2006
ii. Payment of $ 0.0011 per performance for 2007
iii. Payment of $ 0.0014 per performance for 2008
iv. Payment of $ 0.0018 per performance for 2009
v. Payment of $ 0.0019 per performance for 2010

Small Commercial Webcasters

There is no longer an exemption for those webcasters with gross revenues of under $ 1.25 million per year. Even the smallest commercial stations will have to pay the same as larger ones.

Noncommercial Webcasters

Noncommercial stations still pay an annual minimum of $500. This will continue to be all the station pays unless it exceeds the aggregate tuning hour maximum for a given month. That aggregate tuning hour maximum (calculated by multiplying the number of listeners by the hours of copyrighted material streamed in the month) has increased from 146,000 to 159,140 per month, but even noncommercial webcasters will pay at the commercial rates listed above that if the aggregate tuning hour limit is exceeded.

V. Keeping Detailed Records and Filing Quarterly Reports of All Songs Performed on the Internet.

Of course, paying royalties to SoundExchange is only half of the equation. SoundExchange must allocate the proper amount to each copyright owner. To accomplish this, SoundExchange must understand how often each performer's works are played over the Internet. The CRB requires webcasters to compile this information and provide it to SoundExchange on a quarterly basis.

A. Content of the Quarterly Reports

Any entity that streams copyrighted materials over the Internet must keep records consisting of six items of data per sound recording. Interim final rules published on March 11, 2004 announced the following items that must be included in reports to be filed with SoundExchange:

Name of Service: The name of the service is simply the full legal name of the licensee as it has been reported to the Copyright Office in the "Notice of Use of Sound Recordings Under Statutory License."

Transmission Category: This is a technical term defined by the Copyright Office which pertains to the legal status by which the Copyright Office identifies the streamer. A service must list one of eleven lettered category codes to describe itself.[7]

Featured Artist: The licensee must provide the name of the featured artist of each sound recording transmitted during the relevant recording period. The full name (first and last) must be provided if the recording artist is an individual or entity (full band name). No abbreviations are

[7] Rather than list all eleven transmission category codes, it will be noted at this time that category "B" will apply to most radio broadcasters simulcasting an over-the-air signal via the Internet: "Eligible non-subscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming." Those not simulcasting a radio signal, or those engaged in simulcasting and another form of webcasting, should contact a Fletcher, Heald & Hildreth, P.L.C. attorney for more information.

permitted. In instances where the songwriter and recording artist differ, only the recording artist is to be reported.

Sound Recording Title: The actual title of every performed song must be reported. It is not sufficient to report the name of the album from which it was taken.

Sound Recording Identification: A licensee has two options under this category. It can either record (a) the International Standard Recording Code ("ISRC")[8] or (b) the Album Title and Marketing Label.[9]

Total Performances: A licensee must list the total number of performances of each sound recording during the relevant reporting period. This can be done by providing either (a) the number of actual total performances during the reporting period[10] or (b) the aggregate tuning hours applicable to the reporting period, the channel or program name, and the play frequency.[11]

These records must be compiled for a two week period of every calendar quarter dating back to April 1, 2004. A two week period is not defined as two consecutive calendar weeks. It can simply be any two seven day periods, starting on any day of the week, in the calendar quarter. These records must be maintained by the webcaster for three years. They must also be filed with SoundExchange as described below.

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[8] This is a unique identifier that is embedded in promotional and commercially released sound recordings and can be read by currently available software.

[9] In some instances, the album title or marketing label may not be available to the licensee. In such a situation, the webcaster should provide information it actually possesses. However, it cannot "lose" the relevant information to ease the recordkeeping burden.

[10] The actual total performances are the number of times the song was performed multiplied the number of listeners logged on to the stream during each performance.

[11] Aggregate tuning hours has the same definition as used in determining royalty rates. The channel or program name is simply the FCC call sign of an Internet simulcaster. The final requirement, play frequency, requires the licensee to provide the overall number of times a sound recording is offered.

B. Format and Filing of Records

Although the March 11, 2004 interim final rules detailed the content to be included in the reports to SoundExchange, those rules did not indicate how the reports would be filed or when filing would begin. At the time, licensees were admonished that they would eventually have to file reports dating back to April 1, 2004; most simply stored that information in the backs of their brains and few compiled the required reports on a quarterly basis.

Everything changed on October 6, 2006 when a second set of interim final rules was published by the CRB. The filing requirement became effective on that date and failure to file these reports in the proper format on a quarterly basis immediately became a basis for losing eligibility to participate in the statutory licensing scheme and the distinct possibility of a lawsuit for copyright infringement.

The CRB believes the filing requirements to be "reasonable," admitting that for radio stations, "reasonable" = "cheap" while for the music industry, as represented by SoundExchange, "reasonable" = "submission in the form easiest to understand." It seems as though the CRB's view of "reasonable" skews closer to SoundExchange's, as the filing requirements, much like the fee payment and recordkeeping requirements, necessitate significant effort on the part of webcasters.

1. Format of Records

The records contained in quarterly reports must be compiled and saved in electronic format – no paper filing is allowed.[12] The information must be contained in a spreadsheet using ASCII computer formatting and either: (a) Microsoft Excel or (b) Corel Quatro Pro.

[12] Most broadcasters complained during the comment period that electronic filing would be very difficult because, other than gomusic1.com, there appear to be no commercially available companies that will automatically generate ASCII formatted spreadsheets from existing scheduling programs. SoundExchange countered that RCS Selector, Music Master, and PowerGold should be able to automatically generate these forms in the near future and that, in any event, market forces will eventually provide other options.

The reports are not required to be filed with a header at the top. However, if headers are included, they should look like this:

Row No. (Do not include row numbers)	Field definition (Do not include field definition description)	Example
1	Service full name	ACME MUSIC SERVICE.
2	Contact Person	JOHN DOE.
3	Street Address	1000 WASHINGTON STREET.
4	City, State, Zip	WASHINGTON, DC 10000.
5	Phone	202–555–1212.
6	E-mail	DOE@ACMEMUSIC.COM.
7	Start of Reporting Period (DDMMYY)	01012006.
8	End of Reporting Period (DDMMYY)	31032006.
9	Report Generation Date (DDMMYY)	15042006.
10	Number of rows	60000.
11	Text Indicators	^.
12	Field delimiters	|.
13	Blank line	

The fourteenth row will then contain the report headers which are prescribed in the Interim Regulations (Featured Artist, Sound Recording Title, Marketing Label, etc.).

The fifteenth row begins the actual information pertaining to each song, with everything in upper case letters.

2. Filing

There are four permitted delivery methods (note that there is not a web-based filing mechanism):

File Transfer Protocol (FTP): This will require the filer to get a username, password and delivery instructions from SoundExchange, who must provide this information by December 5, 2006.

Electronic Mail: If filed via electronic mail, the report is filed as an attachment. The body of the electronic mail message must include:

- Name and address of the licensee;
- Contact person's name, telephone number and E-mail;
- Start and end date of the reporting period;

- Number of total rows in the attached report; and
- A file name of the webcaster's choosing (example ACMEMusicCo20060101-20060331.txt)

CD-ROM: The filer must ensure that the entire report fits onto a single CD-ROM. The CD-ROM is filed with a cover letter that contains the same five pieces of information that would be included in the body of an electronic mail message.

Floppy Disc: The filer can put the entire report on a single 3.5 inch computer disk that must be in MS/DOS format. As with a CD-ROM, the floppy disc will be sent with a cover letter identifying the five pieces of information required in the body of an electronic mail message.

VI. Conclusion

The publication of the October 6, 2006 interim final rules means that SoundExchange will certainly increase its efforts to enforce payment, recordkeeping and filing requirements against anyone who is streaming copyrighted material over the Internet. In fact, even before October 6, SoundExchange had taken advantage of its power to audit those participating in the statutory licensing scheme. Thus, anyone who has filed a "Notice of Use of Sound Recording Under Statutory License" is now doubly in danger – due to royalty payment and record filing requirements – of being caught for non-compliance and being declared ineligible for a statutory license. Those who have not filed that form and do not comply with payment or recordkeeping regulations run the risk of being banned from ever taking advantage of this license and facing lawsuits for copyright infringement.

Please note that this memorandum provides only an overview of the requirements for Internet streaming. We advise you to contact a Fletcher, Heald, & Hildreth, P.LC. attorney prior to commencing an Internet webcasting operation and for periodic advice on whether ongoing operations comply with these regulations.