



Future of Music Coalition

Fact Sheet about Webcasting and the CARP

April 25, 2002

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What is a CARP?

CARP stands for Copyright Arbitration Royalty Panel. A CARP is a panel of three arbitrators from the private sector, appointed and administered by the US Copyright Office and the Library of Congress, which meet for limited times for the purpose of adjusting rates and distributing royalties. The CARP system was established in 1993, following the abolition of the Copyright Royalty Tribunal. CARPs are typically installed when opposing interests can't negotiate a workable agreement between themselves.

The panel's job is to hear evidence from witnesses, consider legal argument from all parties, and then make recommendations to the Librarian of Congress, based only

upon this information, regarding the appropriate rates that a licensee who chooses to operate under the statutory licenses should pay. The same panel also recommends terms concerning how and when royalty payments are made.

Source: http://www.loc.gov/copyright/carp/webcast_process.html

Why was a CARP created to deal with webcasting?

In 1998, the US Congress passed the Digital Millennium Copyright Act (DMCA). Among other things, the Act established a new principle that the owners of sound recording copyrights (i.e., record companies) are entitled to compensation when their works are performed via digital transmissions (i.e., webcasts).

The DMCA required the US Copyright Office to determine the appropriate performance royalty, with the amounts due to be retroactive to October 1998 (the date of the passing of the DMCA).

As required by the DMCA, the Copyright Office gave sound recording copyright owners (represented by the RIAA) and webcasters (represented by, among others, DiMA) the opportunity to negotiate a royalty. When those negotiations failed, the office authorized a Copyright Arbitration Royalty Panel (CARP) to determine an appropriate rate. From July 31– September 14th, 2001 and from October 15 – 25, 2001, dozens of witness representing both sides testified before the CARP panel of three arbitrators.

Source: www.saveinternetradio.org

What organizations participated in the 2001 CARP proceedings that set the rates and terms for two compulsory licenses?

From July-October 2001, the three-person arbitration panel representing the US Copyright Office heard testimony from a number of interested parties regarding the webcasting rates:

Witnesses representing copyright owners and performers included:

Recording Industry Association of America (RIAA)
American Federation of Television and Radio Artists (AFTRA)
American Federation of Musicians (AFM)
Association for Independent Music (AFIM)

Witnesses for broadcasters and webcasters included:

Clear Channel Communications, Inc.
National Religious Broadcasters Music License Committee
Salem Communications Corp.
AEI Music Network
Bet.com

Comedy Central
DMX Music, Inc.
Echo Networks
Entercom Communications Corp
Infinity Broadcasting Corp.
Launch Media, Inc.
Listen.com
Live365.com
National Public Radio (NPR)
MTVi Group LLC
Myplay, Inc.
Netradio Corp
RadioActive Media Partners, Inc.
Radiowave.com, Inc.
Spinner Networks, Inc.
Susquehanna Radio Corp.
XACT Radio Network, LLC.

Musicians:

David Fagin, singer, songwriter, recording and performing artist
Alanis Morissette, singer, songwriter, recording and performing artist (only submitted written direct testimony)

Expert witnesses:

William W. Fisher III, Harvard Law School
Jonathan Zittrain, Harvard Law School
Adam B. Jaffe
Michael Fine
Paul William Kempton
Michael Mazis

This list of participants is posted in the following Copyright Office document:
<http://www.loc.gov/copyright/fedreg/2001/66fr38324.html>

What did the CARP decide about webcasting royalties?

The CARP carefully considered all the information gathered throughout the process, including the evidence offered by webcasters, broadcasters, and copyright owners for what the appropriate rate and terms should be for the public performance of a sound recording over the Internet. The record for this proceeding includes a written transcript approaching 15,000 pages, many thousands of pages of exhibits, and over 1,000 pages of post-hearing submissions.

On February 20, 2002 the CARP delivered its report, recommending rates and terms for the statutory license for eligible non-subscription webcasting services:

Type of service	Performance Fee	Ephemeral License Fee
1. Webcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07 ¢	9% of Performance Fees Due
(b) All other internet transmissions	0.14¢	9% of Performance Fees Due
2. Commercial Broadcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	9% of Performance Fees Due
(b) All other internet transmissions	0.14¢	9% of Performance Fees Due
3. Non-CPB, Non-Commercial Broadcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM broadcasts.	0.02¢	9% of Performance Fees Due
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.05¢	9% of Performance Fees Due
(c) Transmissions on any other side channels	0.14¢	9% of Performance Fees Due
4. Business Establishment Service:		
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. §114(d)(1)(C)(iv)	Statutorily Exempt	10% of Gross Proceeds
5. Minimum Fee:		
\$500 per year for each licensee.		

When do these royalty rates take effect?

The proposed rates and terms are currently under review by the Copyright Office, but the statute requires the Librarian of Congress to accept the proposed rates and terms no later than May 21, 2002.

The Librarian, however, may adopt some recommendations and reject others. If this occurs, the Librarian has an additional 30 days to issue a final determination setting the rates and terms for the licenses.

Source: http://www.loc.gov/copyright/carp/webcast_process.html

Once the rates are adopted, they will be effective retroactively to October 28, 1998.

How will the royalties be collected?

Once rates and terms are set, the webcasting royalties due from statutory licensees will be collected, administered and disbursed to artists. The CARP recommended that two entities – SoundExchange and Royalty Logic – be designated to handle this process. Note that the Librarian doesn't necessarily have to accept these designations so, strictly speaking, we don't know who will be performing these functions.

SoundExchange is an entity created by the Recording Industry Association of America (RIAA) to collect and distribute the digital performance royalty. Initially, SoundExchange was governed and controlled by a board that largely represented label interests but, in 2001, negotiations led to its structural reform. According to the new agreement, the Sound Exchange board is now comprised of both artist and label interests. Future of Music Coalition currently holds a seat on the SoundExchange board.

Once the royalty rate has been adopted, the payments due from the webcasters to the “receiving agent” (SoundExchange and/or Royalty Logic) are retroactive to the date that the webcaster commenced webcasting under the statutory license. The retroactive nature of these royalties means that those webcasters who submitted a Notice of Intent to the Copyright Office in order to be legally licensed webcasters will hypothetically be expected to back pay for the music they have played since the date they began webcasting.

How will the royalties be distributed?

Once the royalty rate is set, SoundExchange and/or Royalty Logic will collect, administer and distribute the royalties to the sound recording copyright owners, featured and non-featured artists directly to the appropriate parties. This means SoundExchange and/or Royalty Logic will pay:

- 50% to the copyright holder (usually the record label);
- 45% to the featured artist, which will be paid directly to a designated payee (artist, management company, etc.)
- 2.5% to AFM for non-featured musicians; and
- 2.5% to AFTRA for non-featured vocalists.

Source: <http://www.soundexchange.com/royalty.cfm>

Note that the direct payment of 45% of the performance royalty to the featured artist is another victory for musicians. When the payment structure was first announced, SoundExchange and the labels proposed that all the webcasting royalties be paid to the copyright holder (usually the record label), which would then distribute the 45%

to its artists. Many artist groups, including the FMC, criticized this decision and urged SoundExchange and the Copyright Office to pay artists directly. This amendment was adopted in fall 2001 and now artists will be paid directly by SoundExchange.

How can citizens, artists and webcasters comment on the webcasting rates?

According to Copyright Office documents, there is no provision in the rules for the Copyright Office or Librarian of Congress to consider comments from the general public. The rules governing CARP proceedings permit the Copyright Office and the Librarian to consider only the arguments made by parties to the proceeding. The Copyright Office has stated that “webcasters, broadcasters, and copyright owners [were] well represented in this proceeding and have had multiple opportunities and every incentive to provide the Office with all the reasons why the CARP report should either be accepted, rejected, or modified.”

Source: http://www.loc.gov/copyright/carp/webcast_process.html

So the short answer is, there is no more opportunity for public comment. If you weren't a party to earlier proceedings, you can't comment on the rates now.

Some smaller webcasters and artists have disagreed with these statements about participation, noting that they didn't have the resources or the clout to join the initial debate.

Reporting Requirements:

Why did the CARP also propose reporting requirements for webcasters?

The CARP did not propose reporting requirements. In a separate but related proceeding, the US Copyright Office was required to draw up reporting requirements because of the requirements outlined in the Digital Millennium Copyright Act: “The DMCA directs the Librarian of Congress to establish regulations to require eligible Services to give copyright owners reasonable notice that their sound recordings are being used under one or both of the licenses and create and maintain records of use and make them available to copyright owners.”

<http://www.loc.gov/copyright/fedreg/2002/67fr5761.html>

The Copyright Office drafted interim reporting requirements in 1997 and 1998. In May 2001, the RIAA submitted a petition to the US Copyright Office requesting that the Office conduct rulemaking proceedings to develop notice and recordkeeping requirements that substantively address the 1998 DMCA amendments.

What information would webcasters be required to submit under the proposed rules?

Under the proposed rules radio stations, internet stations, and satellite companies would have to report the following information about every streamed program:

1. The name of the service
2. The channel of the program (AM/FM stations use station ID)
3. The type of program (Archived/Looped/Live)
4. Date of transmission
5. Time of transmission
6. Time zone of origination of transmission
7. Numeric designation of the place of the sound recording within the program
8. Duration of transmission (to nearest second)
9. Sound recording title
10. The ISRC code of the recording
11. The release year of the album per copyright notice and, in the case of compilation albums, the release year of the album and copyright date of the track
12. Featured recording artist
13. Retail album title
14. Record label
15. UPC code of the retail album
16. Catalog number
17. Copyright owner information
18. Musical genre of the channel or program (station format)

And a listener's log listing:

1. The name of the service or entity
2. The channel or program
3. The date and time that the user logged in (the user's timezone)
4. The date and time that the user logged out (the user's timezone)
5. The time zone where the signal was received (user)
6. Unique user identifier
7. The country in which the user received the transmissions

All of this information and more would be required to be in a specific data file format and reported.

Who was part of the decision-making process?

The RIAA filed a petition with the Copyright Office in May 2001 that became the basis for this list of proposed reporting requirements. The Office has received comments from a number of interested parties and will be conducting a public roundtable for further discussion of the proposed rules. For more info about how to participate in the roundtable, go [here](#):

<http://www.copyright.gov/fedreg/2002/67fr18148.html>

As a result of this process, the final rules may change substantially from the initial proposal.

What will the information be used for?

According to Copyright Office documents, “Adoption of such rules will enable copyright owners to receive their royalty payments as expeditiously as possible.”

Source: <http://www.loc.gov/copyright/fedreg/2002/67fr5761.html>

In other words, these structures will determine which categories of information about songs that are webcast will be necessary to collect. Theoretically this information must be collected in order for organizations like SoundExchange to be able to accurately collect and distribute webcasting royalties. However, there is some concern among smaller webcasters that the CARP’s reporting requirements recommend the collection of far more data than is actually necessary for accurate distribution of webcast royalties.

Who will see this collected information?

According to Copyright Office documents, only the copyright holders will see this information: “Confidentiality. Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.”

Source: <http://www.loc.gov/copyright/fedreg/2002/67fr5761.html>

There is some concern that the labels for which SoundExchange acts as an agent will have access to this collected data and use it for purposes beyond the intended purpose of distributing royalties. Some have argued that, instead of allowing access to just a select group of copyright owners, it would be better for the collected information to be reported into a publicly held and transparent database.

How can citizens, artists and webcasters comment on the reporting requirements?

On February 7, 2002 the US Copyright Office issued a Notice of Proposed Rulemaking (NPRM), which allowed for copyright owners, webcasters and other interested parties to submit comments on the reporting requirements. The comments were due on April 5, 2002, and are posted on the Copyright Office’s website here:

<http://www.loc.gov/copyright/carp/114/comments.html>

Reply comments may be filed up to April 26, 2002. The Copyright Office has reviewed the comments received to this point and is aware that the proposed notice and recordkeeping provisions are contentious. It is the Office's desire to adopt regulations that provide sufficient notification and information to copyright owners of the use of their sound recordings yet are not unduly burdensome on those making use of the statutory licenses.

Based on the amount of concern expressed by both the webcasting and artists' communities, the US Copyright Office has announced a roundtable discussion to talk about these reporting requirements.

The roundtable discussion will be held on Friday, May 10, 2002, beginning at 9 a.m. and continuing until 5 p.m. Requests to participate or to attend the roundtable discussion must be submitted by close of business on Monday May 6, 2002. See this website for more information about submitting a request to participate:
<http://www.loc.gov/copyright/fedreg/2002/67fr18148.html>

Webcasting and Licensing

Do you need a license to webcast?

Yes, in fact you need two. The first licenses the underlying musical composition, comprised of the written notes and lyrics (for purposes of copyright law, the musical composition is referred to as a "musical work").

These licenses are issued by the performing rights organizations, namely BMI, ASCAP and SESAC.

The second part of the license covers the actual recording itself - the sounds, including the recording artist's interpretation of the musical composition, and the creative efforts of the producer, sound engineers and background musicians. (This is referred to in copyright law as a "sound recording.") The copyrighted recording brings to life the written notes and lyrics of the musical work.

These second kind of licenses for webcasting are issued either by the copyright owner or, for certain webcasters and other non-interactive digital audio services, through a license created by the Digital Millennium Copyright Act called a "statutory license." This statutory license is an efficient way for webcasters to obtain a license because it permits a webcaster to perform all of the sound recordings it wishes to perform without obtaining separate licenses from each copyright owner.

The webcasting statutory license applies to webcasters that:

1. offer non-interactive programming (i.e., not on-demand or personalized programming);
2. primarily offer audio or other entertainment programming as opposed to primarily selling or promoting particular products or services; and
3. abide by certain conditions spelled out in the statute.

To see this fairly lengthy list of “certain conditions”, go to the RIAA’s fact sheet on webcasting here: <http://www.riaa.com/Licensing-Licen-3a.cfm>

How do you get licenses from the performing rights organizations, and how much do they cost?

Each of the PROs has a place on their website where you can download a form to obtain a blanket license that covers their repertoire. How much they cost usually depends on your internet station’s estimated gross revenue. Each PRO provides worksheets for you to generate the license estimate.

ASCAP: <http://www.ascap.com/weblicense/webfaq.html>

Downloadable form: <http://www.ascap.com/weblicense/ascap.pdf>

BMI: <http://www.bmi.com/licensing/webcaster/webans1.asp>

BMI has two downloadable forms, based on your webcasting needs

SESAC: http://www.sesac.com/licensing/Get_Music_Performance_License.htm

How do you obtain a statutory webcasting license, and how much does it cost?

Webcasters wishing to operate under the statutory license must first notify sound recording copyright owners by filing an "Initial Notice" with the US Copyright Office. The Copyright Office has published a simple, one-page suggested form of the Initial Notice at <http://www.loc.gov/copyright/licensing/format.html> that you can download as a PDF.

This Initial Notice should be sent by certified mail (return receipt requested) with a \$20 filing fee to:

Library of Congress, Copyright Office
Licensing Division
101 Independence Avenue, S.E., Washington, D.C. 20557-6400.

All webcasters must file an Initial Notice prior to making transmissions of sound recordings.

Note that this "Initial Notice" filing may soon be replaced by a "Notice of Use" according to the Copyright Office's own rulemaking proposals. All webcasters -- including those who previously filed an "Initial Notice" -- would need to file this new form.

A prototype of it is available here:

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