

# **Digital Downloads and Streaming: Copyright and Distribution Issues**

**by Edward (Ned) R. Hearn**

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## **Digital Downloads and Streaming: Copyright and Distribution Issues**

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### I. Introduction.

Prior versions of this article explored how the development of digital compression technology, concurrent with the wide acceptance of the Internet created an environment that shook up many of the old rules of the music industry and challenged the traditional music business to adapt to changes in consumer preferences. There have been many changes since that time, including continued development of digital delivery technology, statutes, court cases, contractual agreements and new economic models, along with dramatic decreases in the retail sale of the music industry's principal product format, the CDs. These elements have contributed to creating a whole new paradigm on how to provide consumers with recorded music, with music publishers and record companies attempting to control the economic returns due to them and to the creators of music and sound recordings and waging a losing battle with file sharing services and depressions in the economy. This article discusses the rights of master owners, recording artists, music publishers and composers in this ever-evolving landscape. It will explain how changes to the Copyright Act, including relevant litigation and business developments, are affecting the ongoing efforts to provide an economic return for music and recordings in the legitimate digital media world as distinct from the all pervasive "shadow" digital media world of P2P file sharing. This article, for time and space limitation, will not examine all of the diverse and ever evolving mechanisms for accessing music, such as digital social networks like Facebook, imeem, Bebo, and MySpace, which merit their own analysis and review, but it will provide a basis for understanding how the legal and economic models that are available apply to the use of music and master recordings in the digital world.

In viewing the evolution of the digital marketplace, it is interesting to compare physical sales with digital sales. In 2007, there were approximately 442 million physical albums sold in the United States as compared to 382 million physical albums sold in 2008. During the same period, there were approximately 761 million digital tracks sold in the United States in 2007 (the equivalent of 76 million albums at 10 track per album) as compared to 982 million digital tracks sold in 2008 (the equivalent of 98 million albums at 10 tracks per album). Since 2000, the sale of physical product has decreased by almost 50%, while the sale of digital product has increased. While the tracks digitally downloaded are steadily growing, it is still a minority percentage of the overall recorded music market and has not grown enough to offset the revenue losses of the decreased physical sales. Also, as the physical market is steadily decreasing, the physical retail stores are working harder and harder at just trying to survive in business. This in part is due to the downward spiral of the economy in 2007 and 2008, but it also is in large measure the result of dramatic changes in the public's buying practices and the ease with which recorded music can be accessed at no cost through P2P file sharing services. Sales of physical albums in 2009

continue to decline and are behind 2008 sales year to date, while digital download sales have increased, but not proportionate to the decrease in physical sales.

## II. Digital Performance of Sound Recordings.

When you compose and record music, you essentially create two properties, both of which are protected by the copyright laws - the music you write and the musical performances you record.

As the copyright owner of the music and the sound recording, you have the exclusive right to reproduce, distribute, display, perform and create derivative works with those properties, with the sole exception that, in the United States you have no exclusive rights to perform the sound recording in a non-digital environment (as distinct from the performance of the music on the sound recording), namely anyone can perform the sound recording in a non-digital environment without having to make any payment to you for it. Examples of performing the sound recording in a non-digital environment include playing, broadcasting or transmitting those sound recordings over radio or television. This situation is the result of effective lobbying by the broadcast industry when sound recordings first became subject to federal copyright protection in 1972. The broadcast industry was able to get Congress to exclude from the exclusive rights of the owner of sound recordings the right to perform those works, since the broadcast industry already was paying the music publishers royalties for the performance of the music contained on the recordings (namely, the payments collected by BMI, ASCAP and SESAC). These royalties are distinct from synchronization fees paid for the right to fix and reproduce the music and the sound recording on the soundtrack of an audiovisual production. The recording industry has engaged in consistent efforts since the January 1, 1978 effective date of the 1976 Copyright Act to change this aspect of the Copyright Act, but to date that effort has not been successful. The pursuit of that goal continues with each new Congress, and in the current 111<sup>th</sup> Congress legislation addressing this issue again has been proposed and this time approved by the Senate Judiciary Committee, but still has some significant legislative distance to travel. The SoundExchange website ([www.soundexchange.com](http://www.soundexchange.com)) would be a good source to follow this legislative activity.

The record companies were determined not to let their experience with the performance of sound recordings on radio or television be repeated in the digital world. Consequently, amendments to the Copyright Act were enacted in 1995, namely the Digital Performance Right in Sound Recordings Act (DPRA) and in 1998, the Digital Millennium Copyright Act (DMCA). The DPRA vests in the owner of the sound recording the exclusive right to control the digital performance of the sound recordings over cable and satellite. The DMCA applies the same exclusive right to the owner of the sound recording with respect to webcasting over the Internet or wirelessly. Under each of these Acts, fees must be paid for the performance of the sound recording in the digital medium. The companies that wish to perform the sound recording digitally must get either a voluntary license for interactive streaming and conditional downloads (consumers can choose what they want to listen to whenever they want to listen to it) or a compulsory license for noninteractive streaming (consumers get to listen only to whatever selections the transmitting entity decides to program) if they are to avoid copyright infringement claims. Examples of companies that rely on the compulsory licensing opportunities are the satellite services, such as SIRIUS XM Satellite Radio, cable systems like Music Choice, and the Internet radio station features of the webcasters, such as RealNetworks' Rhapsody, imeem,

Spotify, we7, and Yahoo!'s LAUNCHcast. These entities also get voluntary licenses from the record companies for their streaming and transmittal features that do not fall within the scope of the compulsory license, such as conditional downloads and interactive streaming. The provisions of both acts are very complex, and at the end of this article there is a description of the requirements that must be satisfied for cable, satellite companies and webcasters to qualify for a compulsory license; i.e., not needing to get permission from the record companies and owners of the sound recordings to digitally perform them so long as the intent to rely on the compulsory license procedure for non-interactive streaming is filed with the Copyright Office and the rules that regulate the scope of performances under the compulsory parameters are satisfied.

Note a recent decision in the case of *Arista Records LLC et al v. Launch Media Inc.*, U.S. Second Circuit Court of Appeals, No. 07-2576, which involved Launch Media Inc., a Yahoo! unit that operated an internet radio website called LAUNCHcast, which let users create "stations" playing songs in a particular genre or similar to particular artists or songs they select. In that case, the Court found that such webcasting services cannot be classified as an "interactive service", which would require negotiated fees under agreements with the labels and artists who owned the sound recording. Rather, it decided that such webcasting services were non-interactive and instead such services must pay only the statutory licensing fees set by the Copyright Royalty Board (see below for a description of such fees).

If the cable and satellite industries and webcasters do not satisfy the compulsory license provisions provided for the digitally transmitted performance of the sound recordings in a non-interactive manner, then they must get permission from the owners of the sound recordings. The granting of such permission is voluntary and the owners can set their own rates based on negotiations with the digital music service providers, as further described below in the section on digital phonorecord deliveries of sound recordings.

With regard to the compulsory licensing under the DPRA for non-interactive streaming, the record, cable and satellite industries tried to negotiate and establish the rates that would be used to compute the fees to be paid. They could not reach agreement and an arbitration panel, under the auspices of the Copyright Office, reviewed the matter and set the rates. The record companies were arguing for a royalty of 15% to 20% of the receipts of the cable and satellite companies, and the latter were offering 1% to 2% of their revenues. The initial license fees imposed on the cable and satellite industries for the period through 2006 was 6.5% of their gross revenues. This percentage was adjusted by the Copyright Royalty Board to 6% in 2007 and 2008; 6.5% in 2009; 7% in 2010; 7.5% in 2011; and 8% in 2012. Thereafter, the rates must be re-negotiated, or if that is not successful, then submitted to the Copyright Royalty Board for a hearing and determination. The fees paid, based on that percentage, are allocated 50% to the record company (i.e., the owner of the sound recording), 45% to the featured artist, 2.5% to non-featured musicians and 2.5% to non-featured vocalists. There have been millions of dollars collected to date under the DPRA, which have been paid to SoundExchange ([www.soundexchange.com](http://www.soundexchange.com)) as the representative of the sound recording copyright owners and artists. SoundExchange disburses that money to the labels and to the recording artists in their respective shares on a quarterly basis.

A similar situation occurred under the DMCA with respect to webcasters for non-interactive streaming. The disparity in fees sought by the labels and offered by the webcasters paralleled the

same positions experienced between the record companies and the satellite and cable companies. As the representatives of the record and webcasting industries were not able to settle on fees, the matter was submitted to arbitration before the Copyright Royalty Board under the auspices of the Copyright Office. Eventually the Copyright Office issued its findings and directed in the first round of rulemaking that the rate to be paid to the record companies by webcasters for non-interactive subscription and non-subscription services was 0.0762¢ per performance or 0.88¢ per aggregate tuning hour (ATH) (i.e., a measurement of the period of time that a consumer user is logged onto the service and streaming the music) for simulcast broadcast, or 1.17¢ per ATH for programming other than simulcast broadcast, or a proportionate share of 10.9% of the subscription service revenues, but not less than 27¢ per month per subscriber. The rates schedule also requires that the digital audio service providers pay minimum annual fees of between \$200 and \$5,000 per channel against the per performance and per tuning hour rates described above. In 2008, these rates were adjusted by the Copyright Royalty Board panel of judges to include per-play, per-listener royalties for commercial broadcasters of \$.0008 in 2006, \$.0011 in 2007, \$.0014 in 2008, \$.0018 in 2009, and \$.0019 in 2010. A minimum per-station fee of \$500 was also imposed, up to \$50,000 according to a resolution reached between the major webcasters and SoundExchange. The Copyright Royalty Board imposed a per-channel fee of \$500 on non-commercial broadcasters. The rate applies for a total of 159,140 ATH, after which commercial rates apply. ATH is calculated by multiplying every broadcast hour by the total number of listeners. Qualifying smaller webcasters were given the option of paying 10% of gross annual revenues totaling \$250,000; 12% of gross revenues exceeding \$250,000; or 7% of expenses. A minimum fee of \$2,000 or \$5,000 applied, depending on the amount of gross revenues in question. These terms, which covered 2004 and 2005, were a by-product of the Small Webcasters Settlement Act of 2002. Non-commercial broadcasters received a lowered rate of \$.0002 per performance, plus an additional 8.8% for any temporary or “ephemeral” recordings made. An annual \$500 per-channel fee also applied (see Digital Music News, July 16, 2007). These rates were appealed and a hearing before the Copyright Royalty Board was held on March 19, 2009. Subsequent negotiation resulted in these rates being adjusted, as further described below. Note also, that in July, 2009, D.C. Circuit upheld almost all of the webcasting rates and terms set by the Copyright Royalty Board for the 2006 to 2010 term.

Smaller webcasters took issue with these rates saying it could put them out of business. At the request of Congress, SoundExchange extended the terms covered by the Small Webcaster Settlement Act until 2010. “Artists and labels are offering a below-market rate to subsidize small webcasters because Congress has made it clear that this is a policy it desires to advance, at least for the next few years”, stated SoundExchange executive director John Simson. Because of the alarm expressed by the smaller webcasters, in the Fall of 2008, Congress enacted the Webcaster Settlement Act of 2008 to give the players more time to negotiate an industry agreement on rates, but the results of that effort were unsuccessful. Congress then enacted the Webcaster Settlement Act of 2009, once again suspending the implementation of these new rates, pending further negotiation between webcasters and the rights holders, which has resulted in agreements being reached among industry participants.

As a follow-up to that 2009 Act, SoundExchange announced on July 6, 2009 that it has agreed on new streaming music royalties for “pureplay” commercial webcasters, i.e., webcasters who derive an “overwhelming portion of their revenue from the streaming of sound recordings”. The “experimental rate agreement” includes revenue sharing for most services, as well as more

thorough reporting requirements, in exchange for a discount on per stream rates. The new deal applies to all commercially released sound recordings used under the government “statutory” licenses, not just recordings of members of SoundExchange.

The agreement provides for three pureplay rate classes based on the revenues and level of streaming activity of the eligible pureplay webcaster and the type of service it provides. The three rate classes are: (a) large commercial webcasters (defined as earning more than \$1.25 million in annual revenues); (b) small commercial webcasters (defined as those earning \$1.25 million or less in total revenues with a cap on the amount of sound recordings streamed); and (c) webcasters providing bundled, syndicated, or subscription services.

Under this deal, these services would pay either the new per-stream rates (see below) or 25% of their gross U.S. revenues, whichever is greater, if a large webcaster (i.e., making more than \$1.25 million a year), with a \$25,000 per-year minimum payment against which the per performance rates or shares of revenue would be applied. Small webcasters making less than \$1.25 million a year (with a cap on music streamed) can pay either the new per-stream rates (see below) or the greater of a percentage of revenue or a percentage of expenses, namely 12% of their first \$250,000 in gross U.S. revenues and 14% of any revenues above that, or 7% of expenses, but this includes a cap on the amount of music these services can stream, which for 2009 is based on aggregate tuning hours of 8 million. That’s up from the 5 million tuning hours in an earlier offer that most small webcasters rejected. This cap increases to 9 million tuning hours in 2011, and to 10 million tuning hours for the 2012-2014 timeframe. Retroactively, the cap is 7 million tuning hours for the 2006 - 2008 timeframe. Also, for the 2006 to 2007 time frame retroactive payments of 10% will be made for the first \$250,000 in U.S. gross revenue, and 12% of U.S. gross revenue above \$250,000.

The rates for commercial webcasters providing bundled, syndicated, or subscription services are the same as agreed to by the NAB. The deal lowers the per-stream rates to \$.0008 for 2006, \$.00084 for 2007, \$.00088 for 2008, \$.00093 for 2009, \$.00097 for 2010, \$.00102 for 2011, \$.00110 for 2012, \$.00120 for 2013, \$.00130 for 2014, and \$.00140 for 2015. That is substantially lower than the original CRB rates of, for example, \$.0011 for 2007, \$.0014 for 2008, \$.0018 for 2009 and \$.0019 for 2010. Webcasters, however, can skip paying the per-song streams and instead pay a flat percentage of revenue as detailed above.

If payments due for the period January 1, 2006, through publication in the Federal Register of the Agreement under the Webcaster Settlement Act of 2009 (“Agreement”) (which publication happened on July 17, 2009), have not previously been made, then those payments must be made within 60 days following publication of the Agreement, including late fees on previously due royalties. Otherwise, minimum payments are due by January 31 each year, and running royalties are paid monthly. Small pureplay webcasters may make quarterly payments of the annual minimum.

Commercial webcasters electing this Agreement generally must provide census reporting (actual recordings played and total listenership) and retain server logs for at least four years. These reporting requirements facilitate processing royalty payments to artists and master recording copyright holders. Small webcasters eligible for the “microcaster” rates and the terms published

in March, 2009, under the Webcaster Settlement Act of 2008 will continue to be able to opt for less demanding reporting requirements in exchange for payment an additional “proxy fee”.

Further, the Copyright Royalty Board also has ordered that most digital music services must provide “census reporting” of all songs/masters played on their services, along with other information, such as the number of listeners who heard each song each time it was played. The details of the obligations of webcasters and other digital services are set out in the rules published in the October 16, 2009 Federal Register.

A commercial webcaster that elects to opt into this Agreement, but which participated in the appeal of the Webcasting II proceeding (to set rates for 2006-2010) or in the Webcasting III proceeding (to set rates for 2011-2015) must elect to withdraw from those proceedings when it opts to enter into this Agreement. Additionally, pureplay commercial webcasters that opt-in to this Agreement may not participate in rate proceedings before the Copyright Royalty Board for any part of the period from 2006-2015.

Services that determine to opt in to the Agreement for any of the periods between 2006 and 2009 must have done so no later than 30 days after the Agreement is published in the Federal Register, i.e., July 17, 2009. Thereafter, services must elect annually at the beginning of each year.

The new deal is retroactive through 2006 and expires in 2015, or in 2014 for smaller webcasters. While this deal is available for all qualified commercial pureplay webcasters, they can opt not to sign and instead pay the prevailing Copyright Royalty Board set rates for the 2011 to 2015 period to be set by a pending Copyright Royalty Board proceeding.

The rates for commercial webcasters providing bundled, syndicated, or subscription services are to be the same as the rates agreed to by the National Association of Broadcasters (NAB) for the period 2009 to 2015. The NAB reached a settlement with SoundExchange for the streaming of their programs over the internet that its members (for example, Clear Channel and CBS) would pay, namely \$1.50 per 1,000 listeners in 2009 and 2010; increasing to \$2.50 per 1,000 listeners by 2015, or a per performance rate as follows: \$0.0008 for 2006, \$0.0011 for 2007, \$0.0014 for 2008, \$0.0015 for 2009, \$0.0016 for 2010, \$0.0017 for 2011, \$0.0020 for 2012, \$0.0022 for 2013, \$0.0023 for 2014, and \$0.0025 for 2015.

The Corporation for Public Broadcasting negotiated with SoundExchange a flat fee covering all of its member stations of \$1.85 million for the 2006 to 2010 period, and 2.4 million for the period covering 2011 to 2015.

SoundExchange and College Broadcasters, Inc. entered into an agreement that offers special rates to college radio that stream sound recordings over the internet. Under that agreement, college stations choosing to opt-in would pay a \$500 minimum fee for up to 159,140 aggregated tuning hours per month (about 5,000 listeners tuning in for one hour every day that month, or 1,700 listeners for three hours a day each). If the station exceeded that number, they would pay a per performance rate per track, per listener. Those rates are identical the same as those agreed to by SoundExchange and the National Association of Broadcasters earlier this year (see above).

SoundExchange, and the National Religious Broadcasters Music License Committee entered into an agreement on royalty rates for webcasting for the years 2006-2015. Under that agreement, religious and non-commercial stations will pay a “per performance” (rate per listener, per track). The rate will rise steadily each year through 2015. Small stations also may be eligible to pay an additional fee to be exempted from requirements that they report each recording played.

SoundExchange and SIRIUS XM Satellite Radio also entered into a new agreement governing SIRIUS XM’s streaming of sound recordings over the internet. These terms, which include a per-performance rate and a \$500 minimum fee per channel, will allow SIRIUS XM to develop its business while recognizing the rights of artists and labels to be compensated when their recordings are played. Per-performance rates are charged per track, per listener, and detailed recordkeeping requirements are to be kept to facilitate the artists and labels being compensated accurately. This deal extends through 2015, with annual increases.

The offer also eliminates certain obstacles that have kept webcasters from signing onto previous offers. For instance, companies offering more than just Internet streaming services were asked to pay royalties on their gross revenues, including revenues derived from services other than Internet radio. This includes subscription services like Rhapsody, and other bundled and syndicated services.

Certain small webcasters have announced that they would sign this arrangement, namely radioIO, Digitally Imported, and AccuRadio. Pandora, a large webcaster, also stated it would sign this new agreement. How many smaller webcasters will sign up for the deal is still to be determined, but it is expected that most will opt in since otherwise they would have to pay the rates established by the Copyright Royalty Board, which are much higher.

Also acting as an impediment in the earlier small webcaster settlement offer was a provision for payments that should be made if a small webcaster was acquired by a larger company. In the current offer, the acquiring company would have to pay the difference in royalties for up to four years retroactively if after the acquisition the new company makes more than \$1.25 million a year, or 30% of the transaction value.

Under the Webcaster Settlement Act of 2009, any webcaster agreeing to this new deal will have its terms apply industry wide, and not just with SoundExchange.

*(Note, a number of the preceding paragraphs are derived from the July 8, 2009 BILLBOARD BULLETIN online newsletter, the July 8, 2009 online issue of DIGITAL MUSIC NEWS, and the FAQs posted on the SoundExchange website.)*

Keep in mind that the rates described for the various categories of digital audio services are subject to ongoing changes and new developments occur almost daily. For that matter, the Copyright Royalty Board has announced that it will start its next proceeding to reset the royalty rates for webcasters for the 2011 to 2015 periods. To get an updated report on what rates are being charged and the results of ongoing negotiations, visit the SoundExchange website ([www.soundexchange.com](http://www.soundexchange.com)) and the Digital Media Association website ([www.DIMA.com](http://www.DIMA.com)), which provide substantial sources of information on the rates that apply and the requirements to be met by the cablecasters and webcasters.

To put these statutory rates in perspective, an analysis done by BILLBOARD using the billions of tracks streamed per month through such services as Spotify and using combined 90% interactive and 10% non-interactive web streaming rates, the analysis quantified a value per stream of 0.6843¢. Using that value number, a billion streams in a month would have a transactional value of \$6.85 million due in royalty payments to content owners. Payments at these rate levels are not being paid presently, and for advertised supported services, not to mention subscription paid services, to meet this economic threshold is presently beyond what the use market will support.

### III. Digital Performance of Music.

In addition to fees for the streaming of sound recordings by satellite, cable or webcasting, the streaming companies must sign license agreements with the music performance rights societies, BMI, ASCAP and SESAC, for the performance of the music embodied on the sound recordings. The performing rights societies allocate the fees as collected and make payment to the publishers and writers. There has been no dispute about the right of the performing rights societies to collect such sums nor any dispute about the obligation of the satellite, cable and webcasting companies to obtain licenses and pay for the performances of music. Most cable and satellite companies, and webcasters and streaming media companies, such as MusicNet, Real Networks, and Pandora, have obtained licenses from the performing rights societies. The issue has been how much to pay. The Web sites of the performing rights societies ([www.ascap.com](http://www.ascap.com), [www.bmi.com](http://www.bmi.com), and [www.sesac.com](http://www.sesac.com)) provide details on how they compute the fees for the performance of music over the Internet. Fees also have been negotiated on a case-by-case basis, and also have been litigated, such as the hearings before the ASCAP Rate Court, which in April, 2008, held that the large webcasters, Yahoo!, AOL, and RealNetworks, had to pay monthly 2.5% of revenues received in connection with the music portions of their websites (a music use adjustment factor). AOL thereafter reached a settlement on the amount it would pay, but Yahoo! and RealNetworks have appealed. This decision applies just to these 3 services and still leaves to be resolved the fees to be paid by them to BMI and SESAC, and the fees to be paid to the performing rights societies by the other webcasters which have not reached a direct accord with the performing rights organizations. YouTube recently was ordered to pay ASCAP \$1.6 million for the period 2005 to 2008, and to start paying \$70,000 per month as of January 1, 2009. AT&T was directed to pay \$1.5 million as a retroactive performance fee, and 2.5% of music generated services income per month going forward.

Note that the National Music Publishers Association (NMPA) takes the position that a digital delivery or download of a phonorecord or a ringtone containing music requires payment of a performance fee as well as a mechanical royalty. That position, however, was determined by the ASCAP Rate Court and the Copyright Office not to be the case as a download's principal purpose is to deliver a digital file of the music for a sound recording to the consumer and not to provide a performance, although that decision is part of an appeal, which is still pending, on a number of matters that were determined by the ASCAP Rate Court. The performing rights societies also argue that the previewing of the songs by consumers to determine whether to purchase a download of a song or of a ringtone constitutes a public performance, and for that reason as well a performance fee is owed. Also, the performing rights societies are continuing to seek the enactment of legislation that would treat a download as a performance and for the public performance of music when played by a consumer on his/her mobile device in a public setting.

As recently as October 15, 2009 a federal court in San Francisco ruled a cell phone ringtone that sounds in a public place does not constitute a public performance, and that the performing rights societies are not entitled to an additional royalty payment from the performance of ringtones.

Since changes in this area happen almost daily, you need to frequently review developments to stay current with the economic and legal aspects of this field.

#### IV. Digital Phonorecord Deliveries of Sound Recordings.

Since the right to reproduce and distribute copies of sound recordings is recognized as an exclusive right of the copyright owner, the DPRA and the DMCA did not have to address rules that would apply to digital phonorecord deliveries as they relate to sound recordings. The Copyright Act gives the copyright owners of the master recordings the right to negotiate rates with the potential legitimate downloaders. As such, the economics of digital phonorecord delivery has evolved based on marketplace experiments and contractual arrangements between recording companies and other owners of sound recordings and artists on one hand, and the third parties that license those sound recordings to distribute them digitally to consumers on the other hand. Sound recordings can be digitally delivered directly to consumers' computers over the Web, wirelessly through carriers to mobile devices and through kiosks at retail outlets that have connections to the Internet or have the masters stored on servers at the retailer. At the kiosks, consumers can download masters and have them burned into compact discs or loaded into portable MP3 players.

The real birth of the significant digital download market happened in the spring of 2003, when Apple launched its iTunes store. Apple was the first company to convince the major labels to make their masters available for digital downloads to consumers' desktop and laptop computers and now to mobile devices. This undertaking coincided with Apple's launch of the iPod, which has been the dominant product in the portable digital marketplace. That arrangement between Apple and the majors opened the door for other companies to pursue supplying digital files to consumers in this market and for other labels to get their content into the digital distributed mediums. Since the launch, Apple has extended its reach beyond the United States to Canada, the U.K., Europe, Japan and Australia. Apple is now the leading music retailer in the United States having downloaded in excess of 6 billion tracks since the Spring of 2003, and counting. The approximate number of downloaded tracks from Apple's iTunes for each of 2007 and 2008 was 2 billion. While, on its face, that is a significant number, it is still only a small percentage of the total number of physical albums sold during that same 6 year time period. This is not to say that the initiative that has been launched by Apple is not significant, as clearly it is, but rather it underscores that we are still in the initial stage of the digital distribution revolution. On the other hand, billions upon billions of illegal downloads have occurred through P2P file sharing systems, which is where the real revolution has been occurring with substantial impact on the recorded music industry and the artists, labels, publishers and writers that depend on the sales of music for their livelihood.

The other significant players involved in the digital distribution content include eMusic, RealNetworks, MusicNet and Amazon.com. Other players, such as AOL/MusicNow, Yahoo!, and MTV's Urge and Sony Connect, either have left the scene or transferred or merged their business units with others, such as: RealNetworks' Rhapsody, which is now a joint venture

between MTV and RealNetworks; Yahoo!'s Launch, which is operated by CBS; Microsoft's MSN and its intended iPod competitor, Zune, which has fared poorly; Liquid, which services Wal-Mart; and Napster, which is the successor-in-interest in name only to the original Napster, having purchased that mark from the bankrupt original Napster and which, in turn, has been purchased by Best Buy. Amazon.com launched a DRM-free store in 2007, and now Apple has introduced a DRM-free option for its customers. There are other niche market digital download stores, but clearly iTunes has been and continues to be the major market leader. For that matter, as mentioned above, iTunes is now the major music retailer in the United States, with eMusic, Amazon.com, and Napster trailing in the distance. eMusic's download store is often cited as #2, and has sold approximately 250 million downloads between 2003 and 2008.

In the most common economic model for digital phonorecord deliveries (i.e., downloads to computers and mobile devices), the average retail price to the consumer for a single track is 99¢ from iTunes, and 89¢ or lower from Amazon.com, and from Wal-Mart's download stores serviced by Liquid at 74¢ or lower. On average, album downloads are sold at \$9.99 or \$8.99 or lower from Amazon.com and Wal-Mart. By way of illustration, from a 99¢ price point, the digital distributor will pay the label between 60¢ and 70¢ as a wholesale price (or \$6 to \$7 for an album) (i.e., on average 30%), and sometimes a bit higher with regard to major label superstars, and will keep the difference as its share. In January, 2009, iTunes introduced variable pricing levels of 69¢, 99¢, and \$1.29 for catalog, standard, and "superstar" releases with essentially the same 70/30 split between the labels and iTunes. From that wholesale payment, the label will pay the mechanical royalties, 9.1¢ per download (the rate in effect through December 31, 2012), and a royalty to the artist and producer, which is usually based on the royalty rate paid to the artist/producer on the retail sale price of physical product. For artists/producers with a 12% royalty, they would see 12¢ on a 99¢ download. The label keeps the difference. Occasionally, a label may treat the artist/producer so that he/she would share fifty-fifty or some other percentage of the wholesale price paid for the download minus mechanicals. That, however, is the exception rather than the rule. Most labels will not take packaging deductions or free goods allowances on the downloads, since there obviously is no packaging and there are no free goods, but which are "standard" deductions in physical product market. Sometimes the artist and the label may agree to distribute a track at no cost as a promotional device.

Some digital distributors, such as eMusic, have a subscription system for permanent downloads that will allow a certain number of downloads for a monthly subscription fee. In those situations, the average download price per master, inclusive of mechanical, would be as low as 22¢ (for example, 90 downloads for \$19.99 per month), which is a lot less than the per download fee paid under the arrangements that Apple and its competitors have with the major and independent labels. If the eMusic subscriber does not download the full monthly allocation, then the value attributed to each track actually downloaded is higher. Generally, eMusic will share with the label on a fifty-fifty basis the accounted for value per download based on the actual number of downloads from the allowable subscription allocation, after deduction of the mechanicals payable to publishers and other costs that are defined in the agreement between eMusic and the labels. From the 50% share of that net amount received by the label, the label must pay the artist and producer royalties. In June, 2009, eMusic introduced a new pricing package when it entered into a deal to access the master catalogs of Sony; for example, \$12.00 per month for 30 tracks instead of 50 tracks, and \$19.99 per month for 50 tracks instead of 90 tracks.

A number of the companies, in addition to the download model, also have subscription streaming and conditional download programs. Streaming is like listening to the radio, but occurs over the Internet, as for example, RealNetworks' Rhapsody. A conditional download is a temporary download, i.e., it only lasts for the period of time that the consumer maintains a subscription. Based on negotiations, labels receive a percentage of the subscription revenue, which they share with the artists and producers. Usually, the digital music service provider for streaming and conditional downloads pay around 40% of gross subscription revenue, often including advertising income, or 50% of the net with deductions somewhere in the range of 15% to 20%, into a pool that is distributed to the labels based on the percentage of their content that is streamed or delivered to the consumer as a conditional download in proportion to the total number of the content of all labels that is streamed and conditionally downloaded. In lieu of that formula approach, some digital music service providers will pay anywhere from a fraction of a penny to a full penny per stream. Subscriptions can range from at little at \$6 per month to as much as \$15 per month. The higher monthly rates usually accompany those subscription services that enable the customer to port the conditional downloads from their computer to a portable device so they can take their rented music library with them when they leave the home. If the monthly subscription lapses, then any content in the conditional download library is lost. The labels must compensate the artists/producers from the labels' share of these subscription fees, with the most common approach being done on a fifty-fifty split.

In addition to the download of audio content, most digital music service providers also provide video content in their services. The average charge to the consumer for the download of a video is \$1.99. An average wholesale price to the label of that video content is \$1.40. From that \$1.40, the label must cover publishing costs (which, in the video medium, includes synchronization, as well as mechanical rights), artist, producer and other video content supplier royalty participants, with the balance being retained by the label for itself. These same companies are also providing video streaming as part of their subscription service, with payments to the labels and arrangements with the consumers being similar to those provided for streamed audio content.

The other development of significance in the digital distribution market is the delivery of content directly to mobile devices, including ringtones (namely monophonic (a cover recording having only a single melodic line of the song which is now essentially an abandoned format), polyphonics (a cover recording having both the melody and harmony of the song), mastertones (a digital sound recording of the original master recording of the song that largely has superseded polyphonics), ringbacks (a recording of the song that the caller hears while waiting for the person being called to answer the call), OTAs (i.e., over-the-air download of full tracks) and videos, as well as audio and video streaming. While the major labels have the depth and breadth of catalog to be able to do direct deals with carriers (i.e., the companies with the "pipes" to do the deliveries), few of the independent labels, let alone individual artists, have that capacity, and thus must go through aggregators to get into the market for the download of tracks and albums and videos, and of ringtones and OTAs. There is a group of mobile aggregator companies with which the carriers will deal in accessing such non-major label content, such as Moderati, Mobile Streams, and Jamster. These companies license from labels the rights for mastertones, OTAs and video, to sell such content to the consumer for downloads to cell phones and other mobile devices. These companies also will make deals with the carriers to be able to utilize the carriers' platforms to use the "delivery pipes" for sales to the consumer. The economics of these arrangements are described below, with the carriers and the labels getting a major share of the

income and the aggregators getting a small percentage to cover their cost of business and relatively slim profit margins. Consumers, in turn, in purchasing ringtone downloads may do it à la carte or they may subscribe for a monthly fee that enables them to download a finite number of mastertones. These services also have gotten into the market of selling “wallpaper” (i.e., visual images) and voice tones (for example, personality announcements), either à la carte or as part of the subscription menu.

The economics of the mobile delivery marketplace are different than the more traditional economics of digital distribution to computers and laptops, which on average work off of the 89¢ or 99¢ per track model (and the \$8.99 or \$9.99 per album model). The significant difference is that there is a carrier delivering the content, which puts an additional party into the mix and which take a bigger percentage of the sale than do the online digital downloaders. The retail prices with mastertone ringtones and ringbacks are higher even though the content is much less, namely just a clip to be used as a ringer on your phone. An average price for a download of a ringtone is \$2.49, with some content priced at \$1.99 and other content at \$2.99. From this amount, the carriers will take 30% to 50%, with the principal carriers being Verizon, Sprint and AT&T Mobility. Major labels generally will get 45% to 50% of the retail price against a minimum of between 75¢ to \$1.25 per download. Independents will get 30% to 40% of the retail price against a minimum of 35¢ to 50¢. The balance is kept by the aggregator. From the label’s share, it has to cover mechanicals and artist and producer royalties. Most labels apply the same royalty calculation approach to ringtones for the artists/producers as they apply to full track downloads for an Apple iTunes or other download company, namely the percentage of the retail price or wholesale price equal to the percentage paid by the label to the artist on the sale of physical product. See below in the Section on Digital Phonorecord Deliveries of Music for a discussion of mechanical royalties on ringtones.

With regard to OTAs, an average retail price is \$1.99, with the carrier, again, getting between 35% to 50% and the label getting 30% to 50%, usually against a minimum to the label of 60¢ to 95¢ per OTA download. The balance goes to the aggregator company that is selling the OTA. Often, OTA consists of a “dual” download, namely a low-bit file delivery to the cell phone or other mobile device and a high-bit file downloaded to that same consumer’s PC. On these OTA downloads, the label generally would have to pay mechanicals twice to the publisher, at least for noncontrolled compositions, since from the publisher’s perspective, two copies of the song have been delivered and a mechanical royalty should be paid for each. A single master royalty would be paid to the artist/producer. Similar economics apply to the video delivered to a mobile device.

There also is the developing advertiser supported market sponsored by such established companies as YouTube and MySpace, and pursued by companies still struggling on this space, such as we7, and imeem. These companies do not charge consumers for access to the music, but instead share their advertising revenue with the owners of the master recordings and compositions based on negotiated participation percentages, a subject that merits its own analytical article, so anymore details will be deferred to a later time, especially as these models are still evolving.

The landscape for these services keeps changing almost daily, so you need to stay alert to these adjustments as they happen if you are to stay current with the legal and economic aspects of this field.

## V. Development of Aggregators.

Just as there is a network of independent distributors that labels and artists use to get their physical product into stores, there are specialized distributors that facilitate the ability of smaller labels and artists to get their content distributed digitally to consumers through the digital music service providers. Initially, such distribution was available for the independents and artists under direct deals with Apple iTunes, MusicNet, RealNetworks, Napster and others, but making individual deals with the thousands and thousands of independent labels and artists became administratively inefficient for them. Also, the work that must be done by the labels and the artists to service the initial delivery and the ongoing submission of their content with the digital music service providers can be quite a burden, not just with regard to the major digital music service providers, but also because of the rapid increase in alternative outlets through which the independent labels and artists can have their content delivered to the consumer. As a result, digital distributors known as “aggregators” have developed. They act as the conduit to get content from the independent labels and artists into the numerous digital music service providers that are available, including the majors, such as Apple iTunes, as well as the multiplicity of smaller outlets that deal with digital downloads, streaming, ringtones, OTAs, and even in-store kiosks, as well as direct deals with manufacturers of high-tech equipment that preload their hardware with musical content, for example, Nokia’s “Comes With Music” smart phone. Significant players in the aggregator market include IODA ([www.iodalliance.com](http://www.iodalliance.com)), The Orchard ([www.theorchard.com](http://www.theorchard.com)), CD Baby ([www.cdbaby.com](http://www.cdbaby.com)) (recently purchased by Discmakers), and TuneCore ([www.tunecore.com](http://www.tunecore.com)), as well as BFM Digital ([www.bfmdigital.com](http://www.bfmdigital.com)) and Iris ([www.iris.com](http://www.iris.com)). For many smaller labels and artists, getting into the digital music service provider platforms can now only be done through such aggregators. Generally, a deal with an aggregator is done on an exclusive basis, usually for a term of one to three years. Unlike distributors in the physical market, however, the aggregator companies are much better at collecting payments, making timely payments to the labels and artists they represent, and are reasonably accurate in their reporting. In turn, many of the digital music service provider companies that do the digital delivery to the consumers, such as Apple iTunes and RealNetworks, make timely accountings and payment to the aggregators.

Generally, the aggregators, for a reasonable percentage, with the average being 15% of receipts, will take the content of the labels and artists, encode and format it for delivery to the digital music service providers, make the delivery, and collect and make timely payment based on receipts from those digital music service providers. Accounting to the labels and artists is generally done on a monthly basis, usually by no later than the end of the month following the month during which the aggregators receive payment. Since the digital music service providers generally account to the aggregators in the same time frame, i.e., within a month of the month during which the download commerce activity occurs, the labels and the artists actually receive payment on average within a couple of months from the time of the download. This is unheard of in the physical market.

## VI. Digital Phonorecord Deliveries of Music.

When a record is manufactured and sold, the record company must pay a mechanical royalty to the publisher for the reproduction of the music on the phonorecords. Likewise, the DPRA provided that a mechanical royalty must be paid for music that is digitally downloaded just as the

mechanical royalty is paid for music on phonorecords sold in hard medium. Most record contracts try to limit the statutory rate that has to be paid for the reproduction of music on phonorecords written by the recording artist (i.e., a controlled composition) to 75% of the statutory rate, often with a cap of 10 to 12 songs per album as opposed to the actual number of compositions on an album, if there are more than that. Under the directives of the DPRA the RIAA and the NMPA agreed that the same mechanical royalty rate would apply to both physical phonorecords and digital phonorecord deliveries (DPDs). New mechanical rate schedules were issued by the Copyright Office in October, 2008. The statutory rate through December 31, 2012 is set at 9.1¢ per song or 1.75¢ per minute for songs greater than 5 minutes for physical product and permanent digital downloads.

Under the DPRA, contractual efforts to impose a fractional limit on mechanical royalties for music on digitally delivered phonorecords that is written or controlled by an artist is not permitted, except for agreements that predate June 22, 1995 or agreements made after that date when the songs in question were recorded with the artist/songwriter thereafter agreeing, in writing, to a reduced rate. Absent these qualifications, the full statutory mechanical royalty rate must be paid for music on digital phonorecord deliveries.

The Copyright Office also has adopted the industry negotiated mechanical royalty rates for streams and “conditional downloads” or “incidental” DPDs, e.g., digital phonorecord deliveries that time out or that are streamed on demand and temporarily buffered or cached in that process. Those rates are 10.5% of revenue less music performance fees (if applicable) retroactive to January 1, 2008, with an 8.5% rate less music performance fees to apply to the prior 7 years, subject to minimal royalties which are described in detail in the Schedule for these fees released by The Harry Fox Agency (see [www.harryfox.com](http://www.harryfox.com) for the formula on the computation of these minimum rates). These rates are in effect through December 31, 2012.

For mechanical royalties on ringtones, record labels and ringtone aggregators in the past had negotiated royalty rates with the publishers in the range of 10% of the retail selling price per download against a minimum of 10¢ to 12.5¢ per download, plus a one-time fixing fee of \$25 per composition to store the music on the ringtone company’s servers. These terms are usually on a favored nations basis. The publishers’ position has been that ringtones are not phonorecords and therefore are not subject to the compulsory licensing provisions of the United States Copyright Act for statutory mechanicals, and thus the publishers could quote any fee they wanted for granting the right to use their music on the ringtones, and even to withhold permission if they wanted. The record companies (even though the majors also own publishing companies) took exception, and asked the United States Copyright Office, with opposition from the publishers, to render an opinion on whether ringtones were phonorecords and subject to the statutory mechanical compulsory licensing provisions of the United States Copyright Act. In response, the United States Copyright Office has ruled that ringtones are phonorecords, and that compositions used for ringtones do fall under the compulsory licensing provisions of the United States Copyright Act. As such, the publishers are not free to withhold permission to use their compositions or to negotiate rates with the record companies for the royalties to be paid for ringtones. The Copyright Office has issued a ruling setting the mechanical royalty rates for ringtones at 24¢ per download.

Accessing the United States Copyright Office's website ([www.copyright.gov](http://www.copyright.gov)) is a good way to monitor current development in this area as are the websites for the RIAA ([www.riaa.com](http://www.riaa.com)) the The Harry Fox Agency ([www.harryfox.com](http://www.harryfox.com)).

For the compositions used for the ringtones to be subject to the compulsory licensing provisions of the United States Copyright Act, the ringtones may not recast, transform, or adapt the music, or include additional material, in a way that it becomes an original act of authorship, i.e., a derivative work. If it does, then a license must be negotiated with the publisher.

The decision of the United States Copyright Office also makes the portion of a composition that has been recorded and sold only as a ringtone, even if it has never been released on a physical phonorecord or sold as a full track permanent download, subject to a compulsory license for use by others, as it will be deemed to have been recorded and distributed to the public as a "phonorecord" with authorization from the copyright owner, which is the condition precedent for allowing use of the statutory compulsory mechanical license.

One area of adjustments to the Copyright Act about which to stay aware affects Section 115, which deals with mechanical licenses for the reproduction of music in phonorecords. Legislation has been proposed to amend this provision of the Copyright Act to apply the concept of compulsory blanket licensing, utilize designated collection agents, and provide fixed royalty rates to music that is digitally distributed. Effectively, this would extend the compulsory mechanical licensing mechanism used for music with physical product to the digital world by allowing applications to be filed for blanket licenses by digital music service providers, record companies and others to download music as embodied on masters as permanent downloads, streams and conditional downloads. This adjustment, if made, certainly would facilitate the administration of the businesses in the digital distribution market. Issues have been raised with the proposed legislation, however, because of what has been referred to as the "General Designated Agent." That "Agent" most likely would be The Harry Fox Agency. It also could be others, but only if they represent the rights of at least 15% of all published compositions. This would make The Harry Fox Agency or a major publisher, such as EMI Music or Warner Chappell, the enshrined controllers or gatekeepers with regard to being able to access royalties for such digital uses of music and eliminate the ability of smaller publishers to represent their own interests. Basically, they would be required to align with The Harry Fox Agency or another "Agent" that satisfied the minimum percentage control requirement in order to have any expectation of receiving payments that would be due. There is certain to be much lobbying with regard to this proposed legislation before final enactment occurs, but given the size of the companies who are supporting it, some form of this legislation most likely will pass. Supporters include the RIAA, the National Music Publishers Association, the Digital Music Association, the major webcasters and digital music service providers, including AOL, Yahoo! and RealNetworks.

## VII. Litigation.

In the earliest edition of this article, there was a lengthy description of litigations that were happening at that time involving Napster and MP3.com. Those litigations are long resolved, and neither of those companies are now in existence, with the courts having found that their conduct constituted infringements in clear violation of Copyright Law. The economic repercussions of

those adverse judgments essentially put those companies out of business. Another development in terms of litigation has been the decision by the United States Supreme Court in 2005, finding that Grokster and StreamCast could be found guilty of copyright infringement in the dissemination of their P2P software, the principal, if not sole purpose of which, was to facilitate the unauthorized reproduction and mass distribution of copyrighted content, principally master recordings and the music on those master recordings. The Court concluded that if it was determined by the facts that the companies perpetuating the P2P software intended that their software be used to infringe copyrights and if they undertook the promotion of that software's ability to do just that, even if the software could also be used for non-infringing purposes, those companies could be found to be liable for copyright infringement as contributors to such infringement and for having "vicariously facilitated" such infringement. The Australian Supreme Court came to a similar conclusion in a case brought against Sharman for its use of the Kazaa P2P software. While the representatives of the recording industry have pursued pursuing similar companies, such as Limewire and eDonkey, the reality of this P2P software is that it is essentially impossible to eradicate, and so it is likely that there will always be a parallel universe of illegal file sharing of billions of tracks alongside the growing but significantly smaller legitimate world of legally authorized file distribution. Some P2P companies are trying to adapt their systems to facilitate only authorized P2P sharing. These efforts have only been marginally effective and whether these efforts to monetize the world of P2P file sharing will succeed is still to be determined.

#### VIII. SUMMARY.

Given the speed with which technology evolves and how it is always ahead of the status of the laws and the economic models put into place that try to get commercial benefit from the use of the technology, change will be a constant and that there will be substantial adjustments to what was discussed in this article is a given. One recent real-life example was the dispute between XM Satellite and the record labels on whether the new XM portable device, which allows about four to five hours of content programming to be captured in the device, is a copying that requires the payment of a fee for the masters and the music, just as a download from Apple iTunes would, or whether this merely is a "temporary storage", comparable to using Tivo technology or a video recorder to copy a television program to watch at a later time. Sirius Satellite released a similar device, and under pressure from the labels agreed to pay a royalty to the labels for its device. XM Satellite later reached a similar settlement arrangement with the labels. Of course, since then XM Satellite and Sirius Satellite have merged into Sirius XM Satellite Radio. The short of it is that technology will continue to provide ways to expand how the consumer can access content. The creators and owners of the content need to stay alert on how to translate those technological enhancements into commerce so that their creativity, marketing and distribution efforts can be sufficiently rewarded to support and encourage their continued efforts.

#### Qualifications for Compulsory License under the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)

In 1995, the DPRA provided a public performance right in a sound recording for the copyright owner, for the first time in the United States (amending Section 106 and Section 114 of the Copyright Act). This grant applied, however, only in certain limited circumstances, as detailed below.

- Public performance by means of digital audio interactive and on-demand transmissions for which a voluntary license is required; therefore, it is the exclusive right of the sound recording owner (i.e., the record company) to decide whether to issue a license permitting interactive transmissions.
- Public performance by means of subscription non-interactive transmission—for which a compulsory blanket license applies; i.e., a voluntary license is not required from the sound recording owner. (This legislation fostered a debate on whether the DPRA applied to Internet webcasters and resulted in a provision being included in the Digital Millennium Copyright Act of 1998.)
- DPRA does not apply to digital broadcasters (i.e., transmissions by FCC licensed terrestrial broadcast stations), which are exempt from needing a public performance license (whether voluntary or compulsory) for sound recordings. The DMCA does apply to the simulcast of such stations' programs over the Internet.

The following are the conditions that must be met for a Web broadcaster to qualify for compulsory license, without which transmission would be an infringement of copyright:

- Must not exceed “sound recording performance complement;” i.e., over a three-hour period, cannot transmit more than two consecutive or three total selections from one sound recording; or more than four songs, or three in a row, from the same artist.
- Must transmit owner encoded copyright information with recordings; i.e., must identify sound recordings, the album and featured artist.
- Prior announcements are not permitted, cannot publish a program guide.
- Looped or continuous programs may not be less than three hours in duration; and programs of less than one hour and performed at scheduled times may be performed only three times in a two-week period, or four times in a two-week period if one hour or more in duration.
- Archived programs (i.e., previously performed programs or series of programs) may not be less than five hours in duration and may reside on the Web site for no more than a total of two weeks.

#### 1998 Digital Millennium Copyright Act (DMCA-SECTION 405)

The DMCA further amends Section 114 of the Copyright Act by granting a public performance license for digital transmission or streaming of sound recordings by webcasters, i.e., playing or performing (as distinct from a digital download) of audio musical sound recordings over the Internet. This activity does not fall directly within the categories addressed by the DPRA, and Section 405 of the DMCA amended the DPRA to expand the statutory (compulsory) license for non-subscription transmission to include webcasting as a new category of eligible transmission, and therefore subject to a compulsory license. As such, the sound recording's copyright owner cannot prevent the webcasting provided that all of the criteria required by the statute (see below) are satisfied by the webcaster and it has timely filed for a compulsory license.

Webcasters took the position that the DPRA did not apply to them as their conduct was a “non-subscription transmission” and “non-interactive,” and therefore exempt from requiring the permission of sound recording copyright owners.

RIAA’s position was that webcasters were required to get licenses from the sound recording copyright owners (i.e., the DPRA’s exemptions were only available to FCC terrestrial licensed broadcasters).

The DMCA confirmed that a license, either compulsory or voluntary, was required, by providing that the sound recording copyright owners have the exclusive right to control online or Internet delivery of their sound recordings.

The statutory license applies, however, only to certain noninteractive subscription and nonsubscription transmissions. Interactive service is defined in the DMCA to exclude transmission of songs specifically requested by and for a particular user, and programming that is specifically designed for a particular user.

To be eligible for the statutory license, a webcaster’s service and programming must meet several criteria. Services that do not meet the criteria must obtain (i.e., negotiate) voluntary licenses directly from the recording companies.

The eligibility criteria for the compulsory license includes the following:

1. Programming must comply with limitations designed to assure the sound recording copyright owner that webcasting (which generally occurs as uninterrupted programming) does not displace sales of records. As a condition for eligibility—

a) programming should comply with the “sound recording performance complement,” which is defined under current law (as provided in the DPRA), to provide that over a three-hour period, a service should not intentionally program more than three songs or more than two in a row from the same recording, or four songs or more than three in a row from the same recording artist or anthology;

b) archived programs that, when accessed, always start in the same place and play in the same order should be at least five hours long and should not be available for more than two weeks at a time;

c) continuous looped programs that always perform in the same order, but are accessed in a continuous play stream should be at least three hours long; and

d) rebroadcasts of programs can occur at scheduled times three times in a two-week period for programs of less than an hour and four times for programs of an hour or more.

2. The webcaster is not permitted to publish advance program guides or use other means to announce when particular sound recordings will be played.

3. The webcaster must use only sound recordings that are authorized for performance in the United States (e.g., not play bootleg recordings).

4. Webcasters must provide some means for end users to identify the song, artist and album title of the recording as it is being played.
5. Any identification or technological protection information included in the sound recording must be passed through, as long as it does not impose substantial costs or burdens on the webcaster, or create any audible or visible effects for the end user.
6. The webcaster must not deploy or support technological means to evade these requirements.
7. To the extent it is technologically available, the webcaster must set transmissions so that receiving software will inhibit the end user from doing any direct digital copying of the transmitted data and must not explicitly encourage home taping.