



## **SoundExchange Licensing 101**

### **1. What is a statutory license?**

A statutory license is a government-developed agreement which allows any eligible service to have access to copyrighted material without having to seek permission from the copyright owner. The licenses are more efficient, because they do not require services to get multiple permissions and negotiate separate rates with each copyright owner whose work they wish to use. To be eligible for this efficient license, services operating under the statutory license are required to pay royalty rates established by law or regulation, and to comply with reporting requirements, restrictions, and other terms established by the law. The statutory licenses relevant to digital music services can be found in sections 112 and 114 of the Copyright Act, 17 U.S.C. §§ 112 and 114. The rates and terms applicable to the statutory licenses for digital music services can be found in Chapter 37 of the Code of Federal Regulations, Parts 260, 261, 262, 263, 270 and 380.

### **2. What digital music services are covered by a statutory license?**

The section 114 statutory license covers public performances by four classes of digital music services: eligible nonsubscription services (i.e., non-interactive webcasters and simulcasters that charge no fees), preexisting subscription services (i.e., residential subscription services which began providing music over digital cable or satellite television before July 1998), new subscription services (i.e., noninteractive webcasters and simulcasters that charge a fee), and preexisting satellite digital audio radio services (i.e., XM and SIRIUS satellite radio services). The section 112 statutory license covers ephemeral reproductions (i.e., temporary server copies) made by all digital music services covered by the section 114 license as well as certain background music services that are exempt from paying public performance royalties under section 114.

### **3. How do I know if my service is ‘non-interactive’?**

Non-interactive services are very generally defined as those in which the user experience mimics a radio broadcast. That is, the user may not choose the specific track or artist they wish to hear, but are provided a pre-programmed or semi-random combination of tracks. For services which provide an interactive service or on-demand access to certain tracks or artists (e.g. YouTube), the statutory license does not apply, and a direct license must be obtained from the copyright holder.

### **4. How do I obtain a statutory license to publicly perform sound recordings or make ephemeral copies?**

To obtain a statutory license, you must first notify sound recording copyright owners by filing a Notice of Use of Sound Recordings Under Statutory License ("Notice of Use") with the Copyright Office. All services must file a Notice of Use prior to making the first ephemeral copy or first digital transmission of a sound recording to avoid being subject to liability for copyright infringement. In addition, all services that were in operation prior to April 12, 2004 and intended to remain in operation after July 1, 2004 were required to file a Notice Of Use with the Copyright Office by July 1, 2004, even if such service previously filed a Notice of Intent with the Office. An original Notice of Use along with 3 copies should be sent by certified mail (return receipt requested) with a \$25 filing fee to: Copyright Arbitration Royalty Panel Attn: Licensing Division P.O. Box 70977 Southwest Station Washington, D.C. 20024-0400 You will not receive any confirmation (other than a return mailing receipt, if you request one) that your Notice of Use has been received by the Copyright Office. Because the section 112 and 114 licenses are statutory licenses, all rates and terms are set out in the Copyright Act and the relevant regulations, see citations above. Once a service files its Notice of Use, it may commence making digital audio transmissions, provided that it complies with all of the terms and conditions of the statutory license and makes all payments and files all statements of account and reports of use when due. Services providing a Notice of Use are subject to the default rates and terms of the statutory license as set by the Copyright Royalty Board. Services wishing to operate under alternative rates or terms set by SoundExchange should follow the instructions prescribed by that agreement, including filing a Notice of Election with SoundExchange.

#### **5. How would I qualify for the statutory license?**

There are a number of conditions to meet in order to qualify for the statutory license. For all details on eligible services, please see section 114.

#### **6. What is the performance complement?**

The performance complement (which limits the amount of times a service may transmit sound recordings from a specific artist or album during a specific period of time) is one qualification to which all webcasters must adhere in order to be eligible under the statutory license. The performance complement may only be violated if the service has received specific waivers from the owner of the sound recording copyright.

#### **7. How are rates set?**

The Copyright Royalty and Distribution Reform Act of 2004 created a board of Copyright Royalty Judges to determine the rates and terms for the statutory license. Go to [www.copyright.gov/title17/](http://www.copyright.gov/title17/) and click on the link for Copyright Royalty and Distribution Reform Act of 2004. Under the Copyright Royalty and Distribution Reform Act, "statutory rates" are set through either voluntary negotiations or trial-type hearings before the panel of three Copyright Royalty Judges. In negotiated cases, interested services negotiate rates and terms with SoundExchange and present those to the Copyright Royalty Judges for adoption. If the agreement is adopted by the Judges, it will be available for opt-in by any similarly situated parties. Any parties who have not negotiated agreements may present to the Copyright Royalty Judges, who will conduct a rate setting arbitration to establish royalty rates.

## **8. What will my rates be?**

For rates, please go to the Service Provider Section of the website and select type of provider. Alternatively, you may select the agreement you wish to operate under. All rates and terms are subject to eligibility requirements.

## **9. I operate a small, noncommercial internet radio station. Do I still need to submit recordkeeping information?**

The Copyright Royalty Board determined in its October 6, 2006 ruling that ALL webcasters need to submit recordkeeping information to SoundExchange on a quarterly basis- regardless of their size or commercial status. The requirement is retroactive to April 1, 2004, so noncommercial services must submit this information even if they have previously paid the “data and recordkeeping fees” which are no longer available. Any pre-paid fees will be credited to your account against any current or future liability upon receipt of Reports of Use from the corresponding periods. Reports of Use must be submitted electronically, and are due within 45 days of the end of each quarter. For more information on how to compile and submit a Report of Use, please visit the Reporting Requirements page.

## **10. I do not generate any revenue from the operation of my service. Do I qualify for the noncommercial rates?**

Noncommercial status is not necessarily related to the revenue generated by a service. In order to pay royalties as a noncommercial webcaster, a service must be one of the following: (1) Registered as exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501), (2) Awaiting confirmation of being granted the above exemption from an application received by the IRS, with a commercially reasonable expectation that it will be granted, or (3) Operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes. If your service does not meet one of the three above qualifications, then your service must pay as a commercial webcaster- even if your service does not generate revenue.

## **11. I'm going to start streaming...what do I need to do?**

Assuming your service is eligible for a statutory license, [see 'What digital music services are covered by a statutory license?'], it is quite easy for your service to satisfy the necessary requirements to begin streaming. To begin, consult the Service Provider Section of the website and select type of provider. Alternatively, you may select the agreement you wish to operate under. For the general procedure, see “How do I obtain a statutory license to publicly perform sound recordings or make ephemeral copies?” above.

## **12. Where can I get the technology to track data from the recordings I'm streaming?**

At present, we are aware of just a handful of vendors that have developed playlist tracking software. However, once the Copyright Office issues its long-awaited regulations concerning

reports of use, we anticipate that more vendors will choose to offer the necessary technological solutions. If you are interested in obtaining a list of the few vendors we are currently aware of, please contact Chris Dean at [cdean@soundexchange.com](mailto:cdean@soundexchange.com).

### **13. I already pay royalties to BMI, ASCAP and/or SESAC. Why do I have to pay royalties to SoundExchange also?**

Every musical recording embodies two distinct copyrighted works. The first is the underlying musical composition, comprised of the written notes and lyrics (a "musical work"). The songwriter and/or his or her music publisher usually own the copyright in the musical work. The second copyrighted work is 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.") A copyright holder, whether a label or an independent musician, owns the copyright or 'masters' to the sound recording. SoundExchange collects and distributes royalties associated with the sound recordings made by services operating under one of the statutory licenses. By contrast, ASCAP, BMI and SESAC collect and distribute royalties associated with the public performance of musical works. A digital audio transmission of a musical recording may require a license for both the sound recording and the underlying musical work.

### **14. How do I determine if a recording is in the public domain?**

All music in the public domain can be used without obtaining permission from the copyright owner. Determining which works reside in the public domain, however, proves challenging for a number of reasons, including the fact that every recording embodies two separate copyrighted works--a musical composition (the lyrics and the melody) and the sound recording (the recorded version of the composition). As such, you must separately determine whether each component of the recording is in the public domain. For example, if you are considering using a recent orchestral recording of a Mozart composition, the composition would be in the public domain (because it is very old) but the recording would not (because, in this example, it is recent). Changes in U.S. copyright law over the years (particularly changes to the term of copyright), also make it difficult to determine which works are in the public domain. For these reasons we recommend that you hire a private attorney to advise you with respect to the public domain status of individual songs. You may also find listings of material in the public domain on the Internet. The following books might provide additional useful information: *The Public Domain: How to Find and Use Copyright-Free Writings, Music, Art & More*, by Stephen Fishman; and *The Mini-Encyclopedia of Public Domain Songs*, 1998, by Barbara Zimmerman, et al.

### **15. What is considered "fair use"?**

The "fair use" doctrine of federal law is rather complicated. Basically, "fair use" limits the extent of the property interest granted to a copyright holder. For example, "fair use" might allow individuals to quote from copyrighted material when the quoted excerpt is used for teaching, research, news reporting, comment, criticism or parody. There are some limitations. Whether the courts will allow you to reproduce, distribute, adapt, display and/or perform copyrighted works depends upon four factors: (i) the nature of the use (commercial purposes, nonprofit, educational); (ii) the length of the excerpt; (iii) how distinctive the original work is; and (iv) how

the use will impact the market for the original work. Generally speaking, one is not allowed to take the "value" of a song without permission, and sometimes that value is found even in a three-second clip. When in doubt, it is always wise to check with the copyright owner, because in many cases even a small clip of a song may not be "fair use." Contrary to popular belief, there is no 30-second exception to copyright law nor is there any exception for music sampling.