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# US Copyright Royalty Board ignored the market when setting webcasting rates, says SoundExchange

By [Chris Cooke](#) | Published on Friday 9 February 2018



While the American music industry generally **welcomed the recent ruling** by the US Copyright Royalty Board on what mechanical royalties streaming services should pay songwriters and music publishers, there remains resentment over an earlier CRB decision on the royalties paid by webcasters and personalised radio services to artists and labels.

The CRB sets royalty rates in the US wherever a compulsory licence applies, ie when copyright law obliges rights owners to license certain licensees in certain scenarios. Compulsory licences cover mechanical rights on the songs side in America and webcasting services on the recordings side. The latter is administrated by the collecting society SoundExchange.

It rocked up at an appeals court in Washington yesterday to argue why the CRB got it wrong last time it set the rates for webcasters and streaming services of the Pandora variety a couple of years back. The society reckons rates should be higher, and also didn't like the CRB setting different rates for free and premium services.

SoundExchange says the current royalty rates came about because the CRB judges failed to meet requirements under US copyright law that say they must set rates akin to those that could have been achieved if there was no compulsory licence and labels and webcasters were negotiating in the open market.

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**According to Law360**, SoundExchange’s legal rep Benjamin J Horwich argued that the CRB judges based their rates on what they thought the digital market “should look like” rather than actual market realities. This, he argued, ran contrary to what the 1998 Digital Millennium Copyright Act says about the way the CRB should go about setting webcaster royalties.

Said Horwich of those DMCA provisions: “The purpose there was to move the industry to market rates ... and Congress wanted to get out of the business of having any sort of policy-driven rate-setting proceeding of the sort that it did grandfather in for those legacy services. But it said henceforth, we want this to be on market rates”.

The SoundExchange compulsory licence is a one-way commitment, in that licensees can negotiate bespoke deals with rights owners if they so wish, and still fall back on the compulsory licence if needs be. When the CRB last considered webcasting rates back in 2015, some bespoke licences had already been done between services like Pandora and certain labels.

Those deals offered the streaming services better top line rates, though the arrangements were akin to bulk-buy packages, in that the lower royalties were linked to promo and curation benefits that meant participating labels should see more income overall.

Nevertheless, the webcasters used those deals to argue that market rates were lower than the record industry was arguing, and therefore the CRB should set a lower compulsory licence rate overall.

Responding to that, Horwich said yesterday that those bespoke deals needed to be considered in their totality – ie commitments to prioritise catalogue can’t be offered to everyone, so the rates in those deals shouldn’t apply across the board either. Norwich added: “It’s mathematically impossible to steer in favour of everyone. You can’t play everyone’s record above average”.

Arguing against the record industry society in this hearing were both the US government and representatives from the American broadcasting industry, which both claim that the CRB judges complied with their legal requirements when setting the most recent webcasting rates.

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3CM Enterprises Ltd, Kemp House,  
152 City Road, London EC1V 2NX  
020 7099 9050