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## **Copyright Royalty Board Tries, Tries Again**

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Today we're playing "Copyright Jeopardy!". The category is "Annual Minimum Payments", and the answer is: \$500.

Contestant No. 1: "What is the amount required to be paid by non-interactive webcasters at the beginning of each year for the right to perform sound recordings over the Internet?"

Host: "No, I'm sorry. That *would* have been the right answer, except the United States Court of Appeals declared that required payment to be arbitrary and capricious earlier this year."

Contestant No. 2: "What is the amount that will probably soon be required to be paid by non-interactive webcasters at the beginning of each year for the right to perform sound recordings over the Internet?"

Host: "Correct!"

A subtle but important distinction: the \$500 fee is *not* now in effect, but the Copyright Royalty Board (CRB) is working to change that.

We've written plenty – in previous *Memos to Clients* and also on our blog ([www.CommLawBlog.com](http://www.CommLawBlog.com)) about the challenge to the March 2, 2007 decision of the Copyright Royalty Board which instituted rates and terms to be paid to owners of sound recordings for the years 2006-2010, including the appeal of that decision by several sectors of the webcasting community to the U.S. Court of Appeals for the D.C. Circuit.

Last July the U.S. Court of Appeals for the D.C. Circuit upheld most aspects of the CRB decision. The only issue that the Court tossed back to the CRB: the annual minimum fee to be paid by both commercial and noncommercial webcasters. The Court of Appeals concluded that the CRB had provided absolutely no justification supporting this amount. Why \$500? Why not \$100? Why not \$250? The CRB's inability to justify the \$500 requirement violated the Administrative Procedure Act's requirement that, at a minimum,

a new rule have some factual or legal underpinning – *i.e.*, it was not reached in an arbitrary or capricious manner.

So the Court sent the CRB back to the drawing board. And in late December, 2009, the CRB began sketching, issuing a Notice of Proposed Rulemaking in which it proposes to require every commercial and noncommercial webcaster to pay an annual minimum fee of – you guessed it –\$500 per channel. These webcasters will only pay more at such time as their cumulative webcasting royalties for the year exceed \$500.

Our conversations with clients lead us to believe that the \$500 per channel annual minimum payment was one of the *least* controversial aspects of the 2007 CRB decision. Most commercial webcasters are going to exceed \$500 pretty quickly anyway, so this is merely a down payment applied to later royalty payments. The noncommercial webcasters view the \$500 payment as minimally burdensome even if they never exceed the monthly allowed maximum of 159,140 aggregate tuning hours which triggers additional payments.

As a result, we envision minimal objection or contrary suggestions and expect the \$500 annual minimum payments to be reinstated in the near future. But for the time being, at least, the \$500 annual minimum payment is *not* something that needs to be paid.