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**“WE CAN WORK IT OUT:” A CHANCE TO LEVEL THE PLAYING
FIELD FOR RADIO BROADCASTERS**

*Cassandra C. Anderson*¹

The music industry has changed dramatically during the last fifteen years. In particular, the rise of digital broadcasting illustrates the great disparity that currently exists in the royalty rate scheme for the radio broadcast industry. The current scheme dictates that Internet, satellite, and cable radio broadcasters pay royalties to both the song composer and the artist when a song is aired on their service, but terrestrial radio only pays sound recording royalties to the composer. This disparity is not the result of sound legal principles. The rationale for terrestrial radio’s exemption was that the promotional value the artists received from having AM/FM stations play their songs provided all the compensation they deserved. However, in light of the current state of the music industry, this rationale no longer justifies terrestrial radio’s exemption. New legislation pending in Congress seeks to remedy this unfairness by removing the statutory exemption for terrestrial radio broadcasters. In addition, the House and Senate versions have been amended to include the application of the first three factors of the “801(b)” standard to determine royalty rates for all radio broadcast platforms and replace the myriad regulations under which the industry currently operates under. Including this standard in the legislation is vital in addressing the current disparity in royalty payments. However, as it currently stands, the legislation fails to include one important factor of the “801(b)” standard, and Congress should amend the legislation to include this factor before passing the bill.

¹ J.D. Candidate, University of North Carolina at Chapel Hill, 2011; B.A. Journalism and Mass Communication, University of North Carolina at Chapel Hill. I would like to thank my parents and my husband for their unending support and unwavering encouragement throughout this process. I would also like to thank Professor Deborah Gerhardt for her help with this piece and for her general mentorship.

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I. INTRODUCTION

You turn up the volume just in time to hear Stevie Wonder singing “We Can Work It Out.”² But who is receiving royalties as you listen to the song, and how much is he or she getting? The answer depends on the type of radio broadcast program you have tuned in to. If you are listening to your Sirius Satellite radio³ or a Pandora⁴ station on your laptop, then Stevie Wonder, the performer, as well as Paul McCartney and John Lennon (or rather, the estate of John Lennon),⁵ the song’s composers, are receiving compensation. In this scenario the content provider⁶ pays royalties varying from 7% to 300% of its gross revenue.⁷ However, if you have turned up the volume on a stereo that is broadcasting a terrestrial radio station,⁸ Paul McCartney and the estate of John

² Stevie Wonder, *We Can Work It Out*, on SIGNED, SEALED AND DELIVERED (Motown Record Company 1970).

³ Sirius Satellite Radio is a satellite radio service owned and operated by Sirius XM Radio. It offers radio services for which it charges a fee, similar to cable television. Like cable, the fee allows users to enjoy commercial-free radio airplay on music channels. Sirius, <http://www.sirius.com/getsirius> (last visited Nov. 2, 2009) (on file with the North Carolina Journal of Law & Technology).

⁴ Pandora is an Internet radio service where users enter artists and songs they like into a personalized playlist. <http://blog.pandora.com/faq/#13> (last visited Oct. 8, 2009) (on file with the North Carolina Journal of Law & Technology). The service then analyzes the musical characteristics of the artist or song in order to provide the user with a playlist comprised of songs with musical qualities comparable to those of the provided artist or song. *Id.*

⁵ Since John Lennon is deceased, any royalties due to him from performance of songs he composed go to his estate. *See, e.g.*, <http://www.ascap.com/estates/estatesfaq.html> (last visited October 11, 2009) (on file with the North Carolina Journal of Law & Technology).

⁶ For the purposes of this Recent Development, the terms “content provider” and “platform” refer to Internet, terrestrial, and satellite and cable radio broadcasters.

⁷ *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing on S. 379 Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Robert Kimball, Executive Vice President for Corporate Development & General Counsel, RealNetworks, Inc.), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4011&wit_id=8164. [hereinafter Statement of R. Kimball].

⁸ For the purpose of this Recent Development, terrestrial radio refers to AM and FM radio stations.

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Lennon are the ones receiving royalties.⁹ Stevie Wonder, on the other hand, receives no royalties—meaning the content provider is paying 0% of its revenue to the performer in the form of royalties.¹⁰ Current proposed federal legislation, entitled the Performance Rights Act,¹¹ seeks to change this scenario so that terrestrial radio broadcasters would pay royalties to artists in addition to the composers when a song is played on their station.¹²

The Performance Rights Act is a long-overdue piece of legislation,¹³ which will herald much needed changes to the royalty rate scheme for radio.¹⁴ However, if members of Congress fail to adopt this controversial legislation¹⁵ with the full “801(b)” standard included, they run the risk of exacerbating the disparities that currently exist in the royalty rate scheme by allowing a serious imbalance to stand in the face of legislation seeking to end decades of inequity in the radio industry. This legislation provides an opportunity for Congress to not only provide fairness to artists by compensating them when their songs are broadcast over terrestrial radio, but also to level the playing field by applying the same royalty rate standard across all platforms of radio. Congress should seize the opportunity to correct this current disparity, which has significant economic implications,¹⁶ by applying all four factors of the “801(b)” standard to each radio broadcast platform.

Part II of this Recent Development discusses the passage of two pieces of legislation which were pivotal in establishing the current state of the recorded music industry and have laid the groundwork for the inequities the industry operates under today.

⁹ ASCAP Estate FAQ Page, *supra* note 4.

¹⁰ Statement of R. Kimball, *supra* note 6.

¹¹ S. 379, 111th Cong. (2009); H.R. 848, 111th Cong. (2009).

¹² *Id.*

¹³ Steven J. D’Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 170 (1982).

¹⁴ *Id.*

¹⁵ See Emily F. Evitt, *Money, That’s What I Want: The Long and Winding Road to a Public Performance Right In Sound Recordings*, INTELL. PROP. & TECH. L.J., Aug. 2009, 10, 11–13 (discussing the arguments raised by both opponents and proponents of the bill).

¹⁶ See *infra* text accompanying notes 89–94.

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Part III lays out the royalty rate scheme under which Internet, satellite and cable, and terrestrial radio currently operate. Part IV highlights the events that have led to the renewed debate over royalty rates, culminating in an introduction of the Performance Rights Act of 2009. Part V discusses why the “801(b)” standard is better than the alternative “willing buyer, willing seller” or “fair market value” standards that have been proposed and argues that this federal legislation needs to be amended to include the fourth factor of the “801(b)” standard.

**II. FOUNDATION OF THE CURRENT STATE OF THE RADIO
BROADCAST INDUSTRY**

In recent history, the recorded music industry’s fear of the effect of new technology and the opposing interests of powerful industry lobbyists¹⁷ has forced it to operate under great inequities. These factors are best examined in light of two pieces of legislation passed in the last fifteen years: the Digital Performance Right in Sound Recording Act (“DPRA”)¹⁸ of 1995 and the Digital Millennium Copyright Act (“DMCA”)¹⁹ of 1998.

The DPRA amended the Copyright Act by granting a limited public performance right in sound recordings.²⁰ However, this limited performance right attached only to new radio broadcast platforms employing digital audio transmissions,²¹ meaning

¹⁷ For a detailed discussion on the issues creating the landscape of the music industry today, see, e.g., Kevin C. Parks, *Black Hole or Celestial Jukebox?*, 1 NO. 2 LANDSLIDE 46 (2008); Sunny Noh, *Better Late than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83 (2009).

¹⁸ Digital Performance Right in Sound Recording Act, Pub. L. No. 104-39, 109 Stat. 336 (1995).

¹⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

²⁰ See Digital Performance Right in Sound Recordings Act, *supra* note 18.

²¹ 17 U.S.C. § 114(j)(5) (2006) (defining a “digital audio transmission” as “a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.”).

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Internet, satellite, and cable radio.²² Traditional, longstanding broadcast platforms employing analog transmissions,²³ such as terrestrial radio, were exempt.²⁴ Then, in 1998 Congress passed the DMCA, which categorized digital music service providers as Internet, satellite and cable, and terrestrial radio and applied a different royalty rate to each for its use of sound recordings.²⁵ The exemption granted to terrestrial radio broadcasters in the DPRA illustrates the music industry's apprehension that the rise in popularity of digital technology would lead to a decrease in record sales.²⁶ The fear was that digital technology provided consumers with an opportunity to obtain high-quality access to single songs, perhaps meaning they would no longer have a desire for or need to purchase traditional CDs.²⁷ Even more troubling to music industry insiders was the opportunity digital technology provided for

²² Kristina Sherry, *Radio Stations Step up Battle Against Performance Rights Act*, LOS ANGELES TIMES, July 3, 2009, available at <http://articles.latimes.com/2009/jul/03/business/fi-ct-radio3>.

²³ An analog transmission is one "in which a continuous electrical signal sent on wires, cables, or radio is a precise replica of the acoustical pressure variations in the speech wave." See 1 FRITZ E. FROELICH & ALLEN KENT, THE FROELICH/KENT ENCYCLOPEDIA OF TELECOMMUNICATIONS 79–80 (1991).

²⁴ See Sherry, *supra* note 21; see also Eric S. Slater, *Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL'Y 25, 33–34 (1997); see *infra*, Part III.A.3 (discussing why terrestrial radio was granted a statutory exemption).

²⁵ Posting of David Oxenford to Broadcast Law Blog, *Copyright Royalty Board Asks for Comment on Music Choice Royalty—Satellite Radio is Next*, <http://www.broadcastlawblog.com/2007/11/articles/intellectual-property/copyright-royalty-board-asks-for-comment-on-music-choice-royalty-satellite-radio-is-next/> (Nov. 8, 2007) (on file with the North Carolina Journal of Law & Technology).

²⁶ S. Comm. on the Judiciary, 104th Cong.; Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 14 (statements by Sen. Hatch). "[C]urrent copyright law is inadequate to . . . protect the livelihoods of the recording artists . . . who depend upon revenues derived from traditional record sales." See also Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC'Y U.S.A. 473, 491–92 (2004).

²⁷ CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW 542 (7th ed. 2006).

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consumers to replicate and possibly distribute copies of the songs, further crippling record sales.²⁸

In addition, the categories established in the DMCA also illustrate how the fears of industry insiders contributed to the inequalities in the industry today. These categorizations were, in part, the result of apprehension within the music industry over what the new technology involved in digital broadcasting would do to the status-quo of consumption within the music industry.²⁹ Industry insiders also worried about losing control over the distribution of their product, realizing that the rise of digital broadcasting put more power in the hands of the consumer to determine where and how they received and used the industry's product.³⁰

Terrestrial radio's exemption from the public performance right in the DPRA also provides insight into the second cause of the inequities present in the industry today—the power of music industry lobbyists. With the passage of the DPRA, lobbyists for terrestrial radio, such as the National Association of Broadcasters (“NAB”), were able to convince Congress that terrestrial, over-the-air broadcasters did not pose a threat to the status quo of the recorded music industry, and instead promoted artists and consequently boosted record sales.³¹ Lobbyists, such as the NAB, were able to leverage this supposed promotional value as a reason to exempt terrestrial radio broadcasters from paying statutory royalty payments to artists for performance of their songs on the radio.

The categorizations of broadcasters established in the DMCA also show the part music industry lobbyists had in creating the current inequities. In an effort to secure as much revenue as possible for the artists they ultimately represent, lobbying organizations used the fear over what digital broadcasting might do

²⁸ *Id.*

²⁹ See Parks, *supra* note 17, at 47 (describing how the music industry is changing from a business model of ownership of CDs to “music as a service”).

³⁰ *Id.*

³¹ See *infra* at 51 (statement of Marybeth Peters).

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to the status quo of the music industry to advocate for the highest royalty payments they could get. In an age where the industry was changing and record sales were declining, lobbying organizations such as the Recording Industry Association of America (“RIAA”)³² sought to get the most money it could from any medium possible.

An examination of the past fifteen years illustrates that the inequities that currently exist in the structure of sound recording royalties are the result of unsound legal doctrines.³³ Rather, they are the result of fear over a changing business model, the industry’s inability to embrace such changes, and the lobbying efforts of powerful industry players. The rise of the Performance Rights Act of 2009 gives Congress the opportunity to address the disparities created by these legally unsound principles at the same time.

III. THE CURRENT STRUCTURE OF RADIO INDUSTRY ROYALTY RATES

A. *Internet Radio*

The DMCA granted Internet radio stations a blanket license, for which they paid a fee determined by an adjudication process presided over by the Copyright Royalty Board (“CRB”).³⁴ The standard used by the CRB to determine sound recording royalty

³² The RIAA is “the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members’ creative and financial vitality.” RIAA—Who We Are, <http://www.riaa.org/aboutus.php> (last visited Nov. 4, 2009) (on file with the North Carolina Journal of Law & Technology).

³³ Parks, *supra* note 17, at 48.

³⁴ The Copyright Royalty Board was created in 2004 under the Copyright Royalty and Distribution Reform Act. This Act phased out the Copyright Arbitration Royalty Panel system and replaced it with a system of three administrative Copyright Royalty Judges, who are appointed by the Librarian of Congress. The judges determine rates for statutory licenses and rule on the distribution of royalties collected by the Copyright Office. Currently, the board is comprised of James Scott Sledge (Chief Copyright Royalty Judge), William J. Roberts and Stanley Wisniewski. *See, e.g.*, CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW 543–46 (7th ed. 2006).

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rates for Internet radio is referred to as the “willing buyer and a willing seller.”³⁵ Under this standard, the CRB judges look only at the perceived economic value of the sound recording when making their decision.³⁶ This standard is predicated on the economic idea of choosing the rate at which two parties in a competitive marketplace would agree to buy and sell the product.³⁷ Judges do not consider interests of the public under this standard—that is to say, they are not concerned with balancing the competing considerations of charging a fair rate against providing “goods” to the public.³⁸ Under this standard, Internet radio broadcasters pay performance royalty fees to the various licensing organizations³⁹ that range anywhere from 47% to 300% of their gross revenue.⁴⁰

B. *Satellite and Cable Radio*

The second categorization created by the DMCA, after Internet radio, included cable and satellite radio.⁴¹ The standard used to determine the royalty rate for these two broadcasters is found in § 801(b)(1) of the Copyright Act.⁴² Under this standard, the CRB Judges consider a variety of factors,⁴³ including maximizing the amount of copyrighted works available to the public, minimizing any disruptive impact that might result from changes in royalties, insuring the copyright owner receives a fair return on his creativity, and evaluating the contributions made by the parties in

³⁵ 17 U.S.C. § 112(e)(4) (2006).

³⁶ Posting of David Oxenford to Broadcast Law Blog, *Satellite Radio Music Royalty Reconsideration Denied by Copyright Royalty Board—What a Difference a Standard Makes*, <http://www.broadcastlawblog.com/2008/01/articles/internet-radio/satellite-radio-music-royalty-reconsideration-denied-by-copyright-royalty-board-what-a-difference-a-standard-makes/> (Jan. 12, 2009).

³⁷ 17 U.S.C. § 112(e)(4)(2006).

³⁸ *Id.*

³⁹ The licensing organizations referred to include ASCAP, BMI, and SESAC.

⁴⁰ See Statement of R. Kimball, *supra* note 6 (citing various sources, including “Communications Industry Forecast 2008–2012,” Veronis Suhler Stevenson; “Radio Revenue drops 10% in 2008,” Radio & Records; and, “The State of the News Media,” The Project for Excellence in Journalism, 2008).

⁴¹ 17 U.S.C. § 114(j)(5) (2006).

⁴² 17 U.S.C. § 801(b)(1)(A)–(D) (2006).

⁴³ *Id.*

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providing the public with their “creative contribution, technological contribution, [or] capital investment.”⁴⁴ Under this standard, in 2008 satellite radio broadcasters paid sound recording royalties ranging from 6% to 8% of their gross revenue—a much lower rate than Internet radio broadcasters paid under the “willing buyer, willing seller” standard.⁴⁵

C. Terrestrial Radio

The final category developed under the DMCA, terrestrial radio, does not currently pay a royalty fee for its traditional music broadcasts.⁴⁶ In 2008, terrestrial radio earned \$16.5 billion in profits, yet paid 0% of that revenue to artists for sound-recording royalties.⁴⁷ When Congress passed the DMCA in 1995, it exempted terrestrial radio from paying royalties to performers because it believed there was a mutually beneficial relationship between terrestrial radio and the music industry, in which radio provided free promotion to artists to boost record sales.⁴⁸ Believing that this promotional value provided just compensation to the artists, Congress bought the argument of lobbyists that the promotional value offered by radio airplay provided sufficient justification. Thus, Congress exempted terrestrial radio from

⁴⁴ *Id.*

⁴⁵ See Statement of R. Kimball, *supra* note 6 and accompanying text.

⁴⁶ The United States is one of the only industrialized nations in the world that does not require its terrestrial radio stations to pay royalties to artists for the use of their copyrighted sound recordings, aligning the U.S. with North Korea, China, and Iran on the issue. See Future of Music Newsletter #79, <http://futureofmusic.org/newsletter/future-music-newsletter-79-august-20-2009> (Aug. 20, 2009); but see *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 492–94 (3d Cir. 2003) (holding that stations simultaneously broadcasting on terrestrial radio and streaming live on the Internet have to pay the DPRA royalties for the Internet broadcasts.).

⁴⁷ See Statement of R. Kimball, *supra* note 6.

⁴⁸ This mentality arose, in part, as a result of heavy lobbying by organizations such as the National Association of Broadcasters. See, e.g. *The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong.* (2009) (statement of Steven Newberry, Commonwealth Broadcasting Corporation, On Behalf of the National Association of Broadcasters) [hereinafter Statement of S. Newberry].

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having to pay the royalty fees that other radio broadcasters were required to pay for sound recordings.⁴⁹

IV. THE PERFORMANCE RIGHTS ACT

A. *The Plight of the Music Industry and Prior Attempts to Introduce a Performance Rights Act*

The music industry has changed drastically in the last fifteen years,⁵⁰ and the industry's inability to successfully handle these changes has resulted in its decline. Record sales are down nearly 50% from what they were in 2000,⁵¹ and the rise in popularity of Internet, satellite, and cable broadcasting has created significant changes to the way people consume music.⁵² In addition, Internet radio listenership is up 17% from 2008 to 2009, with sixty nine million Americans tuning in every month.⁵³

⁴⁹ *But see* Alex Mindlin, *Radio Listeners Seem to Buy Less Music*, N.Y. TIMES, July 23, 2007 (discussing a 2007 study by Stan Liebowitz which indicated that radio play actually hurts record sales); *see also* *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing on S. 379 Before the S. Comm. On the Judiciary*, 111th Cong. (2009) (statement of Ralph Oman, Pravel, Hewitt, Kimball and Kreiger Professorial Lecturer in Intellectual Property and Patent Law at The George Washington University Law School) (“Certainly radio broadcasters promote other types of programming—such as sporting events—but the broadcasters do not argue that they need not negotiate and pay for a license to broadcast baseball games because the broadcasts help build a team’s following and sell tickets to the game. They negotiate licenses in the normal course of business. The same practice makes sense for their use of sound recordings.”) [hereinafter Statement of R. Oman].

⁵⁰ Parks, *supra* note 17, at 47 (describing how the music industry is “still reeling from a decade of peer-to-peer file sharing that spawned . . . litigation against the industry’s own customers. . . [and] plummeting CD sales that portend the end of the music business as recent generations have known it.”).

⁵¹ *See* John Seabrook, *Annals of Entertainment, The Price of the Ticket*, THE NEW YORKER, Aug. 10, 2009, at 34.

⁵² Parks, *supra* note 17, at 47 (“digital broadcasting platforms now supplement traditional radio, fostering a shift in music consumption from ‘ownership’ of physical product toward ‘music as a service,’ where consumers pay for access to broad libraries of recorded content.”).

⁵³ *See* Statement of R. Kimball *supra* note 6 (citing study by Arbitron and Edison Research).

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As a result of these changes, many in the industry are beginning to see that terrestrial radio's rationale for not paying a royalty to artists, which Congress accepted⁵⁴ in light of the current state of the music industry.⁵⁵ The idea that terrestrial radio should not pay royalties to artists because of the promotional value the artist receives from having his or her song played on the radio does not carry as much weight in light of the changes happening within the music industry.⁵⁶

These changes in the music industry have also led to a rebirth of the long standing and heated debate over whether or not

⁵⁴ Noh, *supra* note 17, at 86. (“[A]t the root of Congress’s justification for denying this right time and time again is the economic balance it seeks to maintain between the promotional value of radio for album sales and recording artists’ entitlements.”).

⁵⁵ *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing on H.R. 4789 Before the Subcomm. On Courts, the Internet and Intellectual Property, H. Comm. On the Judiciary*, 109th Cong. (2007) (statement of Marybeth Peters, U.S. Register of Copyrights) (“While in the past, broadcasters’ argument that airplay promotes the sale of records may have had validity, such a position is hard to justify today in light of recent technological developments and the alternative sources of music from other music services, and declining record sales.”)[hereinafter Statement of M. Peters]; *see also* Mindlin, *supra* note 49; Statement of R. Oman, *supra* note 48 (“Promotional value cannot justify free use.”).

⁵⁶ Press Release, National Association of Broadcasters, Prepared Oral Testimony for Broadcast Executives Steve Newberry and Charles Warfield (June 11, 2008) http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=12401 (on file with the North Carolina Journal of Law & Technology). (“In a paper just released, economist and Ph.D., Dr. James Dertouzos, completed an economic analysis that measures the promotional value of free radio airplay to record sales. According to this analysis, Dertouzos found that a significant portion of record industry sales of albums and digital tracks can be attributed to local radio airplay—at a minimum 14% and as high as 23%. That translates to between \$1.5 and \$2.4 billion of promotion annually. These numbers only include the promotional value to record sales—it would go even higher if it included the promotional value to concerts tickets and merchandise sales. And this is promotion that artists and the labels are getting for FREE.”); *but see*, DelNero, *supra* note 26 (discussing the argument that performers help radio because advertisers pay to advertise on a radio station knowing that, because of the music played, there will be an audience).

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terrestrial radio broadcasters should pay royalty rates to artists for sound recordings.⁵⁷ In November 2007, a Senate Committee on the Judiciary met to discuss the scope of performance rights in music.⁵⁸ This hearing, chaired by Chair of the Judiciary Committee Senator Patrick Leahy (D-VT), focused on the idea of fairness to artists for their music and included testimony by a number of performers, who urged Congress to expand royalty rates to include terrestrial broadcasters.⁵⁹ Building on the momentum from this hearing, Representative Howard Berman (D-CA) and twenty others introduced a bill titled the Performance Rights Act of 2007 on December 18, 2007,⁶⁰ and Senator Leahy introduced the Senate version later that same day.⁶¹ The debate that ensued was heated and passionate, with lobbyists from both sides presenting arguments for and against the 2007 Performance Rights Act.⁶² As a result of its controversial nature, the 2007 Performance Rights Act never went to the floor for a vote.⁶³

However, by June 2008, Congress again felt the need to address the disparity in royalty rates among radio platforms. On June 11, 2008, the Subcommittee on Courts, the Internet, and

⁵⁷ See Noh, *supra* note 17 at 89–93 (detailing the history of the performance right in sound recording legislation); see also DelNero, *supra* note 26, at 475 (“Since 1926, over twenty-five bills seeking to grant a full public performance right in sound recordings have been presented, without success, in the U.S. Congress.”).

⁵⁸ *Exploring the Scope of Public Performance Rights: Hearing Before the S. Comm. On the Judiciary*, 110th Cong. 110-254 (2007).

⁵⁹ *Id.*

⁶⁰ H.R. 4789, 110th Cong., (2007). This bill sought to amend §§ 106(6) and 114(d)(1) of the U.S. Copyright Act by eliminating the statutorily-created distinction between digital and terrestrial transmissions, thus granting a full performance right to artists for their sound recordings.

⁶¹ S. 2500, 110th Cong., (2007).

⁶² See Noh, *supra* note 17, at 94 (describing how opponents of the Performance Rights Act of 2007 introduced the Local Radio Freedom Act in response to the Performance Rights Act. The Local Radio Freedom Act stated that extending performance royalties to terrestrial radio broadcasters would essentially be an onerous performance tax and “would be detrimental to the radio industry.”).

⁶³ *Id.*

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Intellectual Property of the House Judiciary Committee heard testimony from artists who again pushed for fairness.⁶⁴ In July 2008, Senator Diane Feinstein (D-CA), who previously sponsored the Platform Equality and Remedies for Rights Holders in Music Act in 2006,⁶⁵ chaired a hearing entitled “Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms.”⁶⁶ In this hearing, Joe Kennedy, President and Chief Executive Officer of Pandora Media, Inc., highlighted the gross disparities in royalties paid by each radio platform and noted that the royalties Pandora pays to songwriters through ASCAP,⁶⁷ BMI,⁶⁸ and SESAC⁶⁹ licenses “further highlight[s] the absurdity of the sound recording rates established by the Copyright Royalty Board.”⁷⁰

⁶⁴ See H.R. 4789, 110th Cong. (2007).

⁶⁵ Platform Equality and Remedies for Rights Holders in Music Act, S. 2644, 109th Cong. (2006).

⁶⁶ *Hearing on S. 256 Before the S. Comm. On the Judiciary*, 109th Cong., (2008).

⁶⁷ The American Society of Composers, Authors and Publishers is “a membership association of more than 360,000 U.S. composers, songwriters, lyricists, and music publishers of every kind of music. . . . ASCAP is the only U.S. performing rights organization created and controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from the membership.” <http://www.ascap.com/about/> (last visited Oct. 9, 2009) (on file with the North Carolina Journal of Law & Technology).

⁶⁸ Broadcast Music, Inc. “collects license fees from businesses that use music, which it distributes as royalties to songwriters, composers & music publishers.” <http://www.BMI.com> (last visited Oct. 9, 2009) (on file with the North Carolina Journal of Law & Technology).

⁶⁹ SESAC, Inc. is a “performing rights organization with headquarters in Nashville and offices in New York, Los Angeles, Atlanta, Miami and London Performing rights organizations (there are three of us in the U.S.) are businesses designed to represent songwriters and publishers and their right to be compensated for having their music performed in public.” <http://www.sesac.com> (last visited Oct. 9, 2009) (on file with the North Carolina Journal of Law & Technology)).

⁷⁰ See *Music in the 21st Century: Hearing on S. 256 Before the S. Comm. on the Judiciary*, 109th Cong. (2008) (statement of Joe Kennedy, President and Chief Executive Officer, Pandora Media, Inc.) [hereinafter Statement of J. Kennedy]; see also 17 U.S.C. § 801(b)(1) (establishing that the function of the CRB is “To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and

B. *The Current Performance Rights Act Legislation*

It is no secret that the radio landscape is biased against digital broadcasters and in favor of terrestrial broadcasters.⁷¹ Great disparities exist in the rates broadcasters pay, which arise solely as a result of the type of technology the broadcaster is employing to distribute its content.⁷² In spite of the growing popularity of Internet radio, its revenue is hundreds of millions of dollars, while satellite and terrestrial radio enjoy revenue in the billions.⁷³ The question then remains why this disparity continues to exist for these various radio platforms, which are broadcasting the same music.⁷⁴ In today's world, where technology is advancing at a rapid pace, disparities such as this are especially egregious.⁷⁵ When one piece of equipment is capable of receiving and playing a song from various radio broadcasters,⁷⁶ how can Congress justify making one broadcaster pay much higher royalties than another when the consumer is listening to the same song on the same device?⁷⁷ Furthermore, how can Congress justify imposing royalty payments on Internet radio broadcasters that are so absurdly high

1004.”). *See generally* 17 U.S.C. § 803 (establishing the proceedings of the CRB).

⁷¹ *See The Performance Rights Act: Hearing on H.R. 4789 Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Nancy Sinatra) (“The competitive landscape thus is biased in favor of the old establishment players and against new start-up and innovative technologies Now we have a situation where one format—AM/FM radio—has a competitive advantage over another: digital radio. . . . This isn't any more fair to digital radio than it is to artists.”).

⁷² *See supra* note 2–11.

⁷³ *See* statement of R. Kimball, *supra* note 6.

⁷⁴ *See supra* note 2–11.

⁷⁵ There should not be disincentives to the creation and implementation of new technologies, but allowing disparities such as this to stand create such disincentives. *See* Statement of R. Kimball *supra* note 6.

⁷⁶ For example, a Samsung Omnia Smartphone can receive terrestrial radio transmissions as well as Internet radio transmissions. <http://www.samsungmobileusa.com/Omnia.aspx> (last visited October 19, 2009) (on file with the North Carolina Journal of Law & Technology).

⁷⁷ *See* Statement of R. Kimball *supra* note 6 (discussing how the varying royalty rates are creating “winners and losers among radio programmers based on the technology they use to distribute programming.”).

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that these broadcasters are threatened with the prospect of shutting down?⁷⁸ Questions such as this have led members of Congress to once again seek to cure these inequities by introducing legislation to end the exemption given to terrestrial radio broadcasters.

On February 4, 2009, Representatives John Conyers (D-MI) and Darrell Issa (R-CA), and Senators Patrick Leahy (D-VT) and Orin Hatch (R-UT) introduced bipartisan bills, H.R. 848 and S. 379, respectively, again titled the Performance Rights Act.⁷⁹ As they currently stand, the House and Senate versions of the bill seek to amend § 106(6) and § 114 of the Copyright Act by deleting the distinction between digital and terrestrial broadcasters, thus ending the exemption currently in place for terrestrial radio.⁸⁰ Although this legislation was recommended previously and failed, in light of current trends in the music industry continuing to withhold from artists the rights that would be granted in this legislation is “inconsistent with [the] legislative intent of the Copyright Act”⁸¹ and contradictory to the theories supporting Intellectual Property Law in general.⁸² The passage of the bill in the House Committee

⁷⁸ Statement of J. Kennedy, *supra* note 70 (“Internet radio has the smallest of all radio revenue streams, but we pay proportionately the highest royalties. While we have made great progress as a 3 year old company in monetizing our service and plan to achieve \$25 million in revenue this year, based on the dramatic rate increases established by the Copyright Royalty Board we are facing the prospect of paying \$18 million in sound recording royalties in 2008, over 70% of our anticipated \$25 million in revenue. This is simply a crushing amount which will put us out of business if it is not remedied.”).

⁷⁹ Performance Rights Act, H.R. 848 111th Cong. (2009); S. 379 111th Cong. (2009).

⁸⁰ The Act seeks to amend § 106(6) by striking the word “digital,” thus leaving it to read “in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.” The Act also seeks to amend Section 114(d)(1) by striking the word “digital,” thus ending the distinction between digital and terrestrial broadcasts .

⁸¹ See Noh, *supra* note 17 at 95–97 (discussing the ways in which the Performance Rights Act aligns with the Congressional Intent of Copyright Law.

⁸² See Noh, *supra* note 17 at 94 (detailing the theories supporting Intellectual Property); U.S. CONST. art. I, § 8, cl. 8.

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in May, 2009⁸³ and in the Senate Judiciary Committee on October 15, 2009⁸⁴ proves that the time is right to establish parity in performance rights for radio broadcasters. This is the furthest this bill has ever gone, and it is the first time in eighty years that legislation to establish parity in performance rights for radio broadcasters has been approved by a full Congressional Committee.⁸⁵ With the introduction of the Performance Rights Act of 2009, Congress has the opportunity to not only provide fairness to artists, but to level the playing field across all media of broadcast radio as well.

V. ADDRESSING PLATFORM PARITY IN THE PERFORMANCE RIGHTS ACT

A. The Need for Platform Parity

As Jeffrey Harleston⁸⁶ stated in his testimony during the Music and Radio in the 21st Century hearing:

Right now, the law is a patchwork of rules written at different times for different emerging radio technologies. Now that these technologies have matured into sophisticated businesses that compete with each other to offer consumers multiple services, it's time to update the law to ensure that the playing field upon which they compete is as level and fair as possible.⁸⁷

Currently, there is an extreme disparity in the rates paid by different platforms.⁸⁸ For example, as Joe Kennedy illustrated in his testimony, under the current “patchwork of rules,”⁸⁹ if a

⁸³ http://www.opencongress.org/bill/111-h848/actions_votes (last visited Oct. 21, 2009) (on file with the North Carolina Journal of Law & Technology).

⁸⁴ <http://judiciary.senate.gov/index.cfm?renderforprint=1&> (last visited Oct. 21, 2009) (on file with the North Carolina Journal of Law & Technology).

⁸⁵ musicfirstcoalition.org/background (last visited Oct. 21, 2009).

⁸⁶ Executive Vice President and General Manager of Geffen Records.

⁸⁷ *Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms: Hearing on S. 256 Before the S. Comm. On the Judiciary*, 109th Cong. (2008) (statement of Jeffrey Harleston, Executive Vice President and General Manager, Geffen Records on Behalf of the Recording Industry Association of America) [hereinafter Statement of R. Kimball].

⁸⁸ See *supra* note 2–11 and accompanying text.

⁸⁹ See Statement of J. Kennedy, *supra* note 70.

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satellite and Internet broadcaster both made \$25 million in revenue, the Internet broadcaster would pay \$18 million in sound recording royalties to artists—the equivalent of 70% of its gross revenue.⁹⁰ The satellite broadcaster, on the other hand, would pay only \$1.6 million in sound recording royalties to the artist—the equivalent of about 6.5% of its revenue.⁹¹ Also, illustrating what is perhaps the greatest unfairness present in the current legislation is the fact that a terrestrial radio station enjoying profits of \$25 million would not pay a single penny in sound recording royalties to the performer.⁹²

The inclusion of the “801(b)” standard in the Performance Rights Act is vital in addressing the current disparity in royalty payments, which are a result of the application of different rate-determining standards to different radio broadcasters. However, as it currently stands, the legislation fails to include an important factor of the “801(b)” standard, and Congress should amend the legislation to include this factor. As Ralph Oman testified on August 4, 2009 during the hearing “*The Performance Rights Act and Parity Among Music Delivery Platforms*”:

[A] broadcast performance right will finally put over-the-air broadcasters on the same level playing field as satellite, cable and Internet radio. All four should pay a reasonable royalty for the use of sound recordings. . . . This solution will establish the parity we need to ensure a competitive and robust marketplace for the distribution of music, and give consumers a rich menu of services from which to choose.⁹³

In choosing a standard, it is important to note that the different platforms of radio operate under varying business models, and as such, may never pay exactly the same percentage of their revenue

⁹⁰ This is in addition to the royalties paid to songwriters. However, the rate for such royalties is much more reasonable, holding at around 3% of revenue. See Statement of J. Kennedy *supra* note 69.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Statement of R. Oman, *supra* note 48. The “fair market value” standard was first proposed by Senator Feinstein (D-CA) in the PERFORM Act of 2007. The PERFORM Act sought to replace the “willing buyer, willing seller” standard currently used under 17 U.S.C. § 112(e)(4). *Id.*

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in royalty payments.⁹⁴ However, Congress can still ensure parity among them and offer a level playing field.⁹⁵ To do this, Congress should amend the current legislation by replacing the varying provisions of § 114⁹⁶ with all four factors of the “801(b)” standard. While there are a few different standards that have been suggested as replacements for the varying § 114 provisions, adopting the full “801(b)” standard will best end the inequities that currently exist in the industry.

B. *Support for applying the “801(b)” standard to determine royalty rates*

1. *The “Fair Market Value” Standard*

Some proponents of platform parity are lobbying for the adoption of the “fair market value” standard in determining royalty rates among radio broadcasters.⁹⁷ Under the “fair market value” standard, royalty rates would be determined by private negotiations between the parties.⁹⁸ If the parties are unable to reach an agreement during negotiations, the CRB Judges would determine the “fair market value” by examining evidence from the marketplace of what that value might be.⁹⁹

Adoption of the “fair market value” standard has some positive implications. For example, under this standard, parties would be free to consider the benefit of free promotion that terrestrial radio purports to confer on artists when negotiating a royalty rate.¹⁰⁰ Thus, terrestrial radios would still receive a return for the benefit they believe they offer to artists. However, this benefit would be merely one consideration in determining the rates to be paid to artists, rather than being the sole reason for an exemption from royalty payments. Furthermore, many believe that letting private

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 17 U.S.C. § 114(j)(5)(2006).

⁹⁷ See Statement of R. Oman, *supra* note 48.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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parties negotiate in the marketplace is the best way to do business.¹⁰¹

However, adoption of this standard has some negative implications. The “fair market value” standard was used to determine royalties for satellite and cable television until Congress was forced to amend the standard after it resulted in royalties for satellite programming that were eleven times higher than cable programming.¹⁰² Similar results could be expected if this standard were to be applied to Internet and terrestrial radio broadcasters.¹⁰³

Another problem with adopting the “fair market value” standard is that the monopolistic nature of the “marketplace” makes establishing an accurate market value very difficult.¹⁰⁴ Currently, SoundExchange¹⁰⁵ has a monopoly on the licensing, collection, and distribution of sound recording rights from digital broadcasters on behalf of recording artists and record labels. This means there would be no competition for the CRB to utilize in determining what the “fair market value” is.

Finally, as Joe Kennedy stated in the 2008 Senate hearing “Music and Radio in the 21st Century,” “determining ‘fair market value’ in a single-seller marketplace is a very complex undertaking, and the Copyright Royalty Board could require several proceedings before becoming comfortable with a new standard and its application to different business models.”¹⁰⁶ In light of the changing radio broadcasting landscape, the industry cannot afford to operate in a state of flux while the CRB adjusts to

¹⁰¹ *Id.*

¹⁰² See Statement of R. Kimball, *supra* note 6.

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 9 (discussing how the “highly concentrated” nature of the broadcast market leaves the CRB with no “competitive benchmark,” which makes it impossible to achieve “undistorted market rates”).

¹⁰⁵ SoundExchange is the administrative entity designated by the U.S. Copyright Office to collect sound recording licensing fees from radio broadcasters. In 2007, SoundExchange was reaffirmed as the exclusive collection entity by the CRB. See SoundExchange, Inc., Sound Exchange, www.SoundExchange.com. (last visited Nov. 3, 2009) (on file with the North Carolina Journal of Law & Technology).

¹⁰⁶ See Statement of J. Kennedy, *supra* note 70.

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a new standard. The fact that the music industry has handled its changing business model so poorly in the past decade¹⁰⁷ illustrates that it would be better served by a well-established standard as opposed to one that takes time to adjust to and apply consistently.

2. *The “Willing Buyer, Willing Seller” Standard*

A second option that Congress could adopt for use in determining royalty rates is the “willing buyer, willing seller” standard.¹⁰⁸ This standard, established in 17 U.S.C. § 12(e)(4), requires the CRB judges to “base their decision on economic, competitive, and programming information presented by the parties” when establishing royalty rates.¹⁰⁹ This standard has been applied to Internet radio stations and has resulted in such high royalty rates that Congressional remedy was necessary to encourage industry negotiations that would reduce the rate determined by the CRB.¹¹⁰ In addition, the crippling royalties established by this standard have led some parties to cease the operation of their Internet radio services.¹¹¹ Therefore, this standard has little hope of providing benefits when applied to all radio broadcast platforms and should not be considered in an amended Performance Rights Act.

3. *The “801(b)” Standard*

Finally, the standard adopted in both the House and Senate versions of the bill, and the one Congress should adopt for application to all platforms of radio, is the “801(b)” standard.¹¹² However, as reported out of both Houses, the bill only applies the first three of the four factors of the “801(b)” standard. This standard requires that, in determining royalty rates, CRB judges decide on a rate that achieves the following goals:

- (A) To maximize the availability of creative works to the public.

¹⁰⁷ See *supra* Part II.

¹⁰⁸ 17 U.S.C. § 12(e)(4) (2006).

¹⁰⁹ *Id.*

¹¹⁰ See Statement of R. Kimball, *supra* note 6.

¹¹¹ See *id.* (discussing how AOL and Yahoo! had to shut down their radio services in the wake of significant royalties).

¹¹² 17 U.S.C. § 801(b)(1) (2006).

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(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.¹¹³

When used in proceedings to determine a royalty rate for sound recordings, the first factor of the “801(b)” standard often primarily benefits recording artists and producers.¹¹⁴ The second factor results in royalty rates that represent a fair balance between the compensation given to the artist and producer and the return seen by the broadcaster.¹¹⁵ The third factor evaluates the contributions of the various parties, and the fourth factor requires selecting a royalty rate that will stave off volatility as a result of a broadcaster’s current economic condition.¹¹⁶

One of the most positive aspects of the “801(b)” standard is that it is most in line with the aims of copyright law. Article I, Section 8 of the U.S. Constitution gives Congress the power to “promote the progress of science and the useful arts.”¹¹⁷ Copyright laws seek to achieve this constitutional purpose by balancing the interests of consumers’ ability to access information with creators’ ability to protect their artistic work, thus incentivizing creativity.¹¹⁸ The “801(b)” standard is most sensitive to these constitutional goals. By requiring CRB judges to determine a royalty rate that balances the maximization of artistic works made available to

¹¹³ *Id.*

¹¹⁴ See Statement of R. Kimball, *supra* note 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ U.S. CONST. art I, § 8, cl. 8.

¹¹⁸ See, e.g., 17 U.S.C. (2006); see also *Mazer v. Stein* 344 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

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society with considerations of fairly compensating artists for their work, the resulting rates will ensure fairness while furthering the overall objectives of copyright law.¹¹⁹

Another indicator that the “801(b)” standard will best ensure parity among the various radio platforms is that since its adoption in 1976, the royalty rates determined under this standard have been upheld by the courts in four separate proceedings.¹²⁰ Also, unlike the “fair market value” standard, which was also suggested for possible inclusion in the PRA, the parties involved in the cases dealing with the “801(b)” standard did not seek congressional remedy for the decisions made by the courts.¹²¹ In a proceeding before the Copyright Arbitration Royalty Panel, *Recording Industry Ass’n of America, Inc. v. Librarian of Congress*,¹²² the court upheld the 6.5% royalty rate which the Librarian of Congress established after interpreting § 801(b) of the Copyright Act.¹²³ Although the RIAA disagreed with this holding, it did not seek congressional remedy of the situation, as was the case in the “fair market value” proceedings.¹²⁴ Also, in a proceeding before the CRB on the “Determination of Rates and Terms for Preexisting Subscription Services and satellite Digital Audio Radio Services,”¹²⁵ evaluation of the four factors established in the “801(b)” standard resulted in royalties between 6% to 8% of revenue. As Kimball noted in his testimony at “Music in the 21st Century,” 6% to 8% is a reasonable rate when compared to European broadcasters, who pay royalty rates to artists ranging from 3% to 8% of revenue. It is also reasonable considering the rate of 3% to 5% of revenue that all radio broadcasters pay to music publishers and songwriters through their licenses with ASCAP, BMI, and SESAC. Furthermore, this rate strikes a balance between fairly compensating artists when their songs are

¹¹⁹ *See id.*

¹²⁰ *See* Statement of R. Kimball, *supra* note 6.

¹²¹ *Id.*

¹²² 176 F.3d 528, 532 (D.C. Cir. 1999).

¹²³ 17 U.S.C. § 801(b) (2006).

¹²⁴ *See* Statement of R. Kimball, *supra* note 6.

¹²⁵ *Id.*

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played and not requiring broadcasters to pay such devastatingly high royalty rates that they are threatened with shutting down.

Finally, the industry will be best served by adopting a well-established standard that has consistently yielded fair royalty payments for broadcasters.¹²⁶ As Joe Kennedy stated in his testimony in the July 2008 hearing “Music and Radio in the 21st Century,” “it seems prudent to rely on the traditional four-factor test that has served so well for so long, and which seems to balance all the competing interests fairly.”¹²⁷ By assessing the royalty rates under this standard, the CRB Judges would be examining the seeming dichotomy that exists between providing as much information to society as possible while and offering artists just compensation for their creative endeavors. After balancing these competing interests, the “801(b)” standard would ensure that the rate settled on by the CRB acknowledges this dichotomy and works to neutralize it.

While adoption of this standard has few negative implications, some in the industry have voiced concerns. One such concern, articulated by John Simson, president of SoundExchange, during the hearing “Music and Radio in the 21st Century,”¹²⁸ was that that the “801(b)” standard needed to be amended to reflect the current landscape of radio.¹²⁹ One concern in particular was over the issue of “substitution”—would a radio listener’s use of a song serve as a substitute for its purchase, resulting in decreased revenue for the

¹²⁶ See *supra* note 119–24 and accompanying text; Statement of J. Kennedy, *supra* note 70. “Under [the “801(b)”] standard . . . the Copyright Royalty Board determined that satellite radio royalties should be between 6% and 8% of revenue. [T]hese figures are much more reasonable than the results for Internet radio under the willing buyer-willing seller standard.

¹²⁷ See Statement of J. Kennedy, *supra* note 70.

¹²⁸ *Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms: Hearing on S. 256 Before the S. Comm. On the Judiciary, 109th Cong.*, (2008).

¹²⁹ Posting of David Oxenford to Broadcast Law Blog, *Senate Hearing: The Search for Compromise on Music Performance*, <http://www.broadcastlawblog.com/2008/07/articles/internet-radio/senate-hearing-the-search-for-compromise-on-music-performance-royalties-part-one-the-issue-of-standards/> (July 30, 2009) (on file with the North Carolina Journal of Law & Technology).

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artist?¹³⁰ A careful reading of § 801(b)(1) suggests that concerns like this are already accounted for by the standard's assessment of the various risks to parties (clause C) as well as its assessment of providing a fair return (clause B).¹³¹

C. *The Fourth Factor of the "801(b)" Standard*

1. *Reasons for the Exclusion of the Fourth Factor of the "801(b)" Standard*

The absence of the fourth factor of the "801(b)" standard from both the House and Senate versions of the Performance Rights Act is a result of compromises that legislators were forced to comply with at the hands of powerful music industry lobbyists. Those who support the Performance Rights Act, such as record companies and digital online broadcasters, objected to the inclusion of the fourth factor, while opponents of the Performance Rights Act, such as terrestrial radio broadcasters, sought to include this factor.¹³² In light of the aims of the fourth factor, which states that rates determined must achieve the goal of "minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices,"¹³³ the reasons for each side supporting either the inclusion or exclusion of the fourth factor is clear.

Record companies hope to gain great profits from the passage of the Performance Rights Act both for themselves and for the artists they promote; however, the inclusion of the fourth factor of the "801(b)" standard might keep both parties from enjoying the high profits they would like, since any royalty rate would need to be low enough so as to not disrupt industry practices.¹³⁴ Since the Performance Rights Act is being introduced for the very purpose

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Posting of David Oxenford to Broadcast Law Blog, *Senate Judiciary Committee Approves Broadcast Performance Royalty—With Issues Yet to Resolve*, <http://www.broadcastlawblog.com/tags/performance-rights-act/> (Oct. 15, 2009).

¹³³ *Id.*

¹³⁴ *See supra* note 114–15.

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of changing the status quo of the royalty rate scheme in the music industry, those who oppose inclusion of the fourth factor do so because they believe it would negatively impact the benefits that would otherwise be conferred on artists and record labels.

On the other side of the debate stand those who oppose the Performance Rights Act, such as terrestrial radio broadcasters. For them, passage of the Performance Rights Act with the fourth factor of the “801(b)” standard could at least somewhat mitigate the effects such legislation will have on their business model. Inclusion of the fourth factor would require CRB judges to consider the disruptive impact rates could have on the industry and industry practices.¹³⁵ Rates would then have to be adjusted to a level that would minimize such disruptive impacts.¹³⁶ The rationale of those who support inclusion of the fourth factor is that this would inevitably lead to lower royalty rates that were less disruptive to terrestrial radio broadcaster’s business model.

2. *Support for the Inclusion of the Fourth Factor of the “801(b)” Standard*

While inclusion of the “801(b)” standard is a vital step toward ending the great inequities that currently exist in the radio broadcast industry, failure to include the fourth factor will lead to substantial broadcast performance royalty rates that might prove too disruptive to an already fledgling industry. A prime example of this was seen in the recent Sirius XM radio proceedings, where consideration of the fourth factor was imperative in reaching a fair and reasonable royalty rate.¹³⁷ In those proceedings, the CRB decided to charge a royalty rate of 13%.¹³⁸ However, because they were bound by the confines of the “801(b)” standard, the CRB Judges were forced to take into consideration the industry disruption that would result from such a high royalty.¹³⁹

¹³⁵ See *supra* note 115.

¹³⁶ *Id.*

¹³⁷ See Oxenford, *supra* note 35.

¹³⁸ *Id.*

¹³⁹ *Id.*

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Consequently, the rate was adjusted from the perceived disruptively high rate of 13% to a more manageable 6% to 8%.¹⁴⁰

In addition, the benefits of adopting a well-established standard that has consistently resulted in fair royalty payments for broadcasters will be undercut by changing the standard. By striking the final factor from the “801(b)” standard, the prudence of “rely[ing] on the traditional four-factor test that has served so well for so long,”¹⁴¹ articulated by Joe Kennedy, will be lost. Furthermore, the music industry has consistently proven to be one which is unable to easily adapt to changes.¹⁴² Thus, relying on the “801(b)” standard because of its past record, while simultaneously failing to include one of its most important factors, is counterintuitive to its purpose in being included in the legislation. If Congress truly wants to ensure fairness, it will allow the industry to utilize well-established standards which will ease the transition which will be required by the passage of the Performance Rights Act. In order to truly end the inequities that currently exist in the music industry, Congress needs to amend the legislation to include the fourth factor and allow the industry to reap the benefits of an unaltered traditional “801(b)” standard.¹⁴³

¹⁴⁰ *Id.*

¹⁴¹ See Statement of J. Kennedy *supra* note 70.

¹⁴² See *supra* Part II.

¹⁴³ As of November 9, 2009 the bill has been approved by both the House and Senate Judiciary Committees and is making its way to the full floor of both Houses for a vote. Representatives Raymond Green and Mike Conway have introduced the Local Radio Freedom Act, a bill in direct opposition to the Performance Rights Act, in the House. Currently, the bill has 252 supporters in the House and 25 supporters in the Senate. In addition, Senator Arlen Specter announced his plans to conduct a study in the Congressional Budget Office to determine the value free radio airplay provides to the music industry. Finally, leaders from both the House and the Senate have sent an invitation to the National Association of Broadcasters and musicFirst Coalition, asking them to participate in negotiations between November 17 and December 1, 2009 before the bill is considered on the floor of both Houses.

V. CONCLUSION

“We can work it out” should be Congress’s motto when thinking about royalty rates paid to artists for performance of their sound recordings. The current laws governing this practice are a “patchwork of rules,”¹⁴⁴ which were written and adopted in a piecemeal fashion as various radio broadcast technologies emerged.¹⁴⁵ In light of the current radio landscape, it is time for Congress to level the playing field for all platforms by choosing one standard to use in determining royalty rates paid to performers and applying that standard to all platforms of broadcasters.

The Performance Rights Act is necessary and will bring about long-overdue changes to the royalty rate scheme for radio. However, if left un-amended this legislation will potentially disturb an industry that has historically proven unable to swiftly and gracefully deal with change. While the passage of a Performance Rights Act bill including a common royalty rate standard in both the House and Senate is a positive indication of the bill’s potential to end the current disparity in royalty rate payments, failing to adopt the fourth factor of the “801(b)” standard is a mistake.

Thus, Congress should amend the current Performance Rights Act so that it not only ends terrestrial radio’s exemption from paying a royalty to artists when their songs are played on AM or FM stations, but also applies all four factors of the “801(b)” standard to satellite, cable, Internet, and terrestrial radio alike. Doing so would end years of inequity within the recorded music industry and potentially bring a modicum of stability to an industry that desperately needs it.

¹⁴⁴ See Statement of J. Harleston, *supra* note 86.

¹⁴⁵ *Id.*