

## Seton Hall University eRepository @ Seton Hall

---

Law School Student Scholarship

Seton Hall Law

---

5-1-2013

# Let's Get Ready to Rumble! Competing Legislation and the Future of Radio and Royalties

Tracy Azinge

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

### Recommended Citation

Azinge, Tracy, "Let's Get Ready to Rumble! Competing Legislation and the Future of Radio and Royalties" (2013). *Law School Student Scholarship*. 150.

[https://scholarship.shu.edu/student\\_scholarship/150](https://scholarship.shu.edu/student_scholarship/150)

## LET'S GET READY TO RUMBLE! Competing Legislation and the Future of Radio and Royalties

### I. INTRODUCTION

Since the inception of sound recording rights under American Copyright law, sound recordings have enjoyed limited protection compared to other forms of fixed<sup>1</sup> creative expression. The copyright owners of sound recordings, mainly record labels and artists, fight an uphill battle for adequate compensation due to limited Copyright protection coupled with explosive technological advances in music consumption. In an attempt to recoup financial losses from limited protection and music piracy, copyright owners fight for higher royalty rates for the use of their works.<sup>2</sup>

Conversely, copyright users, such as internet radio or webcasters, fight to lower the royalty rates they pay for sound recordings. Large webcasters, such as Pandora Radio, have reportedly paid upwards of 50% of their revenue in royalties. Webcasters argue the current royalty scheme not only threatens their continued existence but also is grossly unfair compared to the rates paid by satellite radio broadcasters.<sup>3</sup> Satellite radio currently pays 6%-8% for royalties in sound recording.<sup>4</sup> Similar to webcasters, satellite radio is not only opposed to legislation that will increase their rates but is actively seeking to reduce the rates they currently pay.<sup>5</sup>

Terrestrial radio broadcasters are in the best position with respect to paying royalties for sound recordings. Due to terrestrial radio's strong lobbying power, terrestrial radio has enjoyed

a statutory exemption from paying royalties since the birthrights of sound recordings in 1971.<sup>6</sup> The rationale behind the exemption is terrestrial broadcasters and recording companies have a mutually beneficial economic relationship where terrestrial broadcasters helped promote artists' music through airplay, and in turn, increased record sales for artists.<sup>7</sup> However, given that the technological landscape has drastically changed the business model of the music industry, the rationale behind the exemption is arguably applicable to internet and satellite radio who are required to pay royalties.

Consumers play an indirect but important role in the fight over royalties between copyright owners and users over royalties. In creating legislation that will affect the royalties paid by webcasters and broadcasters, Congress needs to consider consumer expectations and the role they play in proposed solutions for leveling the royalty playing field. Due to the technological innovations in music consumption, consumers have enjoyed access to large catalogs of musical works at little to no cost. Both users and owners want the consumer to consume their respective products but the main issue is which side should bear the cost or reap the majority of the economic benefit. Does the answer lie in shrinking the owners' pot of royalties to preserve the consumers' listening experience and the webcasters' profits, or should the pot be expanded by not only increasing the royalty rates of satellite and digital broadcasters, but also forcing terrestrial broadcasters to pay higher royalties for internet transmissions of their programming?<sup>8</sup>

The two key pieces of proposed legislation that address this issue are the Internet Radio Fairness Act (IRFA)<sup>9</sup> and the Interim Fairness in Radio Starts Today (FIRST)<sup>10</sup>. Both IRFA and FIRST seek to level the economic playing field for internet radio by changing the applicable standard used by the Copyright Review Board (CRB) in setting reasonable royalty rates. IRFA

proposes changing from the “willing buyer, willing seller” standard to the 801(b) (1) standard to help reduce the disproportional percentage of revenue webcasters pay in royalties.<sup>11</sup> The rationale behind IRFA is lower rates are necessary to ensure the continued growth of internet radio.<sup>12</sup> Conversely, FIRST addresses alleged discriminatory treatment of webcasters by not only making terrestrial radio pay higher royalties for their online programming but changing the standard to “willing buyer and willing seller” for both satellite and terrestrial AM/FM simulcast transmissions.<sup>13</sup> The rationale behind FIRST is recording artists deserve fair compensation for their works, and through fair compensation, creation by artists will be nurtured and encouraged.<sup>14</sup>

Proponents of both Acts assume that changing the standard used by the CRB will magically lead to an increase or decrease in the royalty rates of the various radio platforms. The reality is that there are other factors the CRB must consider in the royalty rate proceeding before they apply the 801(b)(1) or the “willing buyer, willing seller” standard such as the market rate benchmarks and the rate structure.<sup>15</sup> In application, the market rate benchmark and the rate structure are two fact-specific determinations that have more bearing on the royalty rate determined by the CRB than the 801(b)(1) or “willing buyer, willing seller” standards. Essentially, the two seemingly different standards yield the same analysis and considerations by the CRB. While both Acts have positive secondary proposals, their main proposals concerning changing the standards are ineffectual. Furthermore, the main goal of legislation should not be increasing the profits of one side over the other in the name of fairness but rather striking the right balance of fair compensation, public access, and the promotion of arts and sciences.

The first section of this paper will address the current copyright regime and discuss the §801(b)(1) and the “willing buyer, willing seller” standards. The second section will examine both the positive and negative aspects of IRFA and FIRST. The third section will discuss

recommendations for Congressional action concerning the sound recording royalty structure going forward.

## II. COPYRIGHT LANDSCAPE AND THE HOLDER'S RIGHT IN SOUND RECORDING

### History of Copyright and Sound Recordings

Under the Copyright Act, when musical works are created, two separate rights are granted.<sup>16</sup> First, a copyright exists in the underlying music and words, which are granted to the songwriter and composer.<sup>17</sup> The second right that is created is the sound recording which is the fixation of the sounds created from the underlying musical work.<sup>18</sup> Copyright owners' rights in sound recordings were not recognized under the Copyright Act until 1971.<sup>19</sup> In 1971, Congress instituted the first copyright protection for sound recordings by creating the Sound Recording Act (SRA).<sup>20</sup> SRA protected the copyright owner's exclusive right to reproduction and distribution of sound recording.<sup>21</sup> Congress granted protection under the SRA to provide protection against phonorecord piracy due to advanced technology that had the ability to replicate sound recordings.<sup>22</sup> Unfortunately, the SRA failed to provide a performance right in sound recordings in effort to protect the interests of terrestrial radio broadcasters.<sup>23</sup> Congress reasoned that the "recording industry and broadcasters existed in a symbiotic relationship where the recording industry recognized that radio airplay was free advertising that prompted customers to purchase the recordings."<sup>24</sup> When Congress passed the Copyright Act of 1976, owners of sound recordings were granted the exclusive right to reproduce the work, make derivative works and distribute the work.<sup>25</sup> However, the 1976 Act failed to preserve a performance right for sound recordings under §106(4).

When the Internet became popular in the 1990's, the recording industry was once again confronted with widespread piracy of its sound recordings due to online transmissions of

terrestrial broadcasters and webcasters.<sup>26</sup> The Recording Industry Association of America (RIAA) lobbied Congress to update the laws for royalties.<sup>27</sup> In 1995, Congress responded by enacting the Digital Performance Right in Sound Recording Act (DPRA).<sup>28</sup> The DPRA gave sound recordings a limited public performance right requiring broadcasters of satellite radio to pay a royalty for both the musical composition and the sound recording. It should be noted the DPRA did not apply to **non-subscription, non-interactive transmissions.**<sup>29</sup> However, as internet speeds increased in the years following the passage of DPRA the exclusion of non-subscription and non-interactive submissions proved problematic due to the hundreds of radio and webcast retransmissions that became available to millions of consumers.<sup>30</sup> In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) which added nonsubscription digital audio broadcasters to the DPRA's royalty scheme.<sup>31</sup>

The DPRA and DMCA created a compulsory license system for digital audio transmissions. Under the DMCA, the webcaster or broadcaster is required to obtain compulsory or statutory licenses for the digital performance of musical compositions,<sup>32</sup> sound recordings<sup>33</sup> and ephemeral copies<sup>34</sup> of sound recordings. Under the DMCA, the copyright holders and the users must attempt to negotiate royalty rates.<sup>35</sup> In the event the copyright holders and users cannot reach consensus CRB (initially the Copyright Arbitration Review Panel for the first Royalty rate set in 2002) is charged with the task of determining a rate.<sup>36</sup>

In creating the DMCA, Congress recognized that copyright owners of sound recording were particularly vulnerable with respect the internet transmissions of sound recordings.<sup>37</sup> Congress reasoned that the more control and access the consumer has to sound recordings online the greater the possibility for market substitution.<sup>38</sup> Therefore, the DMCA

carved out three classes of music services and afforded each class a separate royalty rate standard.

Under § 114, the class consists of preexisting subscription services (digital cable radio) and preexisting satellite digital audio services (satellite radio) which a user can obtain a compulsory license and the applicable royalty rate standard is 801(b)(1).<sup>39</sup> Under the DMCA, preexisting subscription services and preexisting satellite and digital audio services rate setting procedure is governed by the 801(b)(1) standard.<sup>40</sup> Under § 114(f)(1) the cable, satellite and subscription royalty rate is governed by the factors listed in section § 801(b)(1) which are:

1. To maximize availability of creative works to the public.
2. 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
3. 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.
4. To minimize any disruptive impact on the structure of the industries involved and generally prevailing industry practices.<sup>41</sup>

The 801(b) standard requires the CRB to analyze and consider each objective in determining the royalty rate. This standard is a heavier balancing of the copyright owners and copyright users interest because this class poses less of a threat with respect to market substitution.<sup>42</sup>

The second class of services under § 114(f) are eligible subscription services (subscription, internet radio, digital radio) and new subscription services, which are also entitled to compulsory licenses.<sup>43</sup> This second class of services are not considered completely interactive but do pose a threat to the owner's rights with respect to market substitution. Therefore, the royalty rate proceedings for this second class are governed by the "willing buyer willing seller standard." Under the "willing buyer, willing seller"

model the CRB is charged with determining a royalty rate and may consider the following factors:

- 1) Whether the use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings
- 2) The relative roles of the copyright owner and the transmitting entity in the copyrighted work and service made available to the public with respect to the creative contribution, technological contribution, capital investment, cost and risk.<sup>44</sup>

This standard is less rigorous than the 801(b)(1) standard is driven by the and the CRB is not required to even consider the factors in determining a reasonable royalty rate.<sup>45</sup>

The last class of services is the interactive services, such as iTunes, which allows the consumer access to specified songs at their request. Interactive services are not able to obtain a compulsory license.<sup>46</sup> The users are required to negotiate individual licenses with the owners.<sup>47</sup>

#### The §801(b)(1) Standard and 2006 CRB Rate Setting Proceedings for Satellite Radio

Proponents of IRFA and FIRST expect switching the CRB review standard will bring parity to the royalty rates paid by satellite radio and internet radio. Supporters of THE IRFA are certain royalty rates paid by webcasters will be reduced by changing the standard from the “willing buyer, willing seller” to 801(b)(1). On the other hand, supporters of FIRST expect that switching satellite radio from the 801(b)(1) standard to the “willing buyer willing seller” will increase the rates for satellite radio . However, both parties are overemphasizing the importance of these factors. In order to assess whether changing the applicable standards will yield the result sought by either side it is necessary to analyze how the CRB applies the factors under the different standards for setting the royalty rates.



### CRB's Determination Concerning Rate Structure

The CRB's first necessary determination was whether satellite radio's rate structure would be calculated as a percentage of revenue or whether satellite radio would pay based on a per play model.<sup>48</sup> Sound Exchange<sup>49</sup> argued for a per-play rate structure whereas XM and Sirius, collectively referred to as preexisting satellite digital audio radio services (SDARS), proposed a revenue based structure with an alternative per/play as an alternative proposal.<sup>50</sup> The CRB reasoned that a rate based on revenue was most appropriate because neither party could come up with a per-play rate structure that reflected actual usage by the satellite radio listeners.<sup>51</sup> Sound Exchange's expert witness, Dr. Pelcovits stated "the per broadcast/per subscriber metric simply does not provide an accurate and dynamic measure of listening and consumption".<sup>52</sup> The proponents of the per- play model could not come up with reasons as to why a revenue based metric would not work best.<sup>53</sup> Furthermore, the CRB was concerned that the per play- per broadcast model could be abused and manipulated because SDARS could reduce their stations while not necessarily reducing their listeners and deprive the copyright owner a fair return for their work.<sup>54</sup>

The CRB ultimately concluded that the revenue based rate model was the appropriate model based on the evidence in the record. The court concluded the revenue based metric would be the most accurate proxy for the usage based metric.<sup>55</sup> The court came to this conclusion in light of the lack of evidence demonstrating that there was a ready and calculable performance metric that could be used that would accurately reflect the SDARS usage.<sup>56</sup>

### The Comparable Market Benchmarks

The CRB next looked to comparable market place royalty rates of services similar to satellite radio as "benchmarks" or a starting point for determining what constituted a reasonable

rate.<sup>57</sup> Both SDARS and Sound Exchange proffered proposals as to comparable market benchmarks.<sup>58</sup> The CRB determined that the 13% was the highest point of the zone of reasonableness based on the market benchmarks.<sup>59</sup> Upon determining a market benchmark, the CRB adjusted the rate up or down depending on how the each specific 801(1)(b)(1) policy consideration was met.<sup>60</sup>

### The 801(b)(1) Policy Considerations

#### *Maximizing the Availability of Creative Works to the Public*

Under this inquiry, the CRB looked at whether an adjustment of the rate was necessary based on analyzing the promotion or substitution effect.<sup>61</sup> The promotion and substitution effect addresses the issue of whether the technology involved is increasing or promoting the sound recording owner's sales versus supplanting the owner's market for their sound recording(s).<sup>62</sup> The SDARS argued that they foster the availability of music by making sure the music is more widely disseminated than terrestrial radio, by promoting the artists through airplay.<sup>63</sup> Therefore, SDARS reasoned the rate should be as low as possible to maximize availability of the musical product to the public.<sup>64</sup> SDARS offered no evidentiary support for their contention that there was a promotion effect that justified making a downward adjustment or credit in their favor.<sup>65</sup> The SDARS only made a conclusory assertion that satellite radio had a promotional effect.<sup>66</sup>

On the other hand, Sound Exchange argued that copyright owners, such as record labels and artists, would not have an incentive to increase creative output if their compensation is compromised.<sup>67</sup> Sound Exchange reasoned that given the decline of physical CD sales, higher royalty rates were necessary to ensure the continued production of music.<sup>68</sup> SoundExchange offered marketing surveys of several consumers conducted by their expert to support the

contention that there was a substitution effect that justified the rate staying at the highest point of the zone of reasonableness at 13%.<sup>69</sup>

The judges determined that based on no conclusive qualitative evidence offered by either side for either promotion or substitution effect that no other adjustment from the benchmark rate was necessary.<sup>70</sup> The judges determined the evidence produced to demonstrate the impact of the claimed substitution or promotion effect was indeterminate.<sup>71</sup> As a result, the judges did not make any adjustments for the first factor of maximizing the availability to the public.<sup>72</sup>

#### Fair Return to Copyright Owner and Fair Income to Copyright User

The second factor the CRB considered was whether the rate allowed a fair return to the copyright owner and fair income to the copyright user.<sup>73</sup> The CRB determined the ultimate question was “whether it is necessary to adjust the result by marketplace evidence” in order to achieve this policy objective, and if so, is there sufficient evidence available to do so”.<sup>74</sup>

Notably, SDARS argued a fair return for the user was sufficient to generate a competitive return on past and future investments.<sup>75</sup> The CRB determined that the measure of a fair return for the copyright user is not dictated by the royalty rate guaranteeing a profit in excess of the user’s fair expectation.<sup>76</sup> In other words, a high rate of return is not indicative of whether a royalty rate allows a fair and reasonable return for the user.<sup>77</sup>

The CRB further provided that fair income is not one that allows the user to utilize its resources inefficiently.<sup>78</sup> Rather, a fair income is dictated by whether the market outcome is reasonable. The CRB stated in the absence of substantial evidence of unfair market power in setting prices in the benchmark marketplace with respect to the copyright owner, an adjustment or credit in favor of the user is not needed.<sup>79</sup> In this instance, the SDARS failed to provide evidence to demonstrate unfair market power existed in the benchmark market place.<sup>80</sup>

Relative Roles of Copyright Owner and Copyright User in the Product made Available to Public  
with Respective Relative Contributions and Capital Investment

Under the third policy objective, the CRB analyzed the relative technological and creative contributions of the parties involved.<sup>81</sup> In addition, they took into account expenditures, costs and risks of both the user and the owner.<sup>82</sup> The SDARS argued that they should receive a credit under the third party objective, on the grounds, they made creative contributions to music channels and developing and airing non-music programming.<sup>83</sup> The CRB judges found the SDARS creative contribution to music was secondary to copyright owners' creative contribution. The CRB then analyzed the technological contribution and cost, risk, and expenditure of SDARS and the record labels to figure out whether an adjustment downward in favor of SDARS was warranted.<sup>84</sup>

The CRB found that while SDARS made technological contributions, took business risks, and made substantial expenditures, record companies also take equally great risks and make irreversible investments in talent.<sup>85</sup> In order to keep incentivizing investment and encourage continued investment, the owner must receive compensation that reflects the value. The CRB found there was very little to distinguish the SDARS contribution from other digital providers with the exception of the SDARS expenditure for satellite technology.<sup>86</sup> The CRB judges did not make an adjustment under the third objective.<sup>87</sup> Thus illustrating the expenditure on behalf of the user must distinguish their relative contributions from others within the digital market to receive a credit under the third objective.

Minimizing Any Disruptive Impact on Structure of the Industries Involved and on Generally  
Prevailing Industry Practices

The CRB did in fact allow for a rate adjustment under the fourth factor.<sup>88</sup> Both SoundExchange and SDARS argued impending doom for their respective industries if the rates were either set too high or set too low.<sup>89</sup> However, the CRB judges determining that an example of disruptive impact is if the SDARS was forced to cease operation based on the rates set.<sup>90</sup> The CRB stated there are two circumstances that justify the credit for downward adjustment from the upper bound of the zone of reasonableness at 13%.<sup>91</sup> First, Satellite Radio paid rates between 2.0% and 2.5%.<sup>92</sup> Given that Satellite Radio was new and did not have an established customer base, the CRB determined that vast jump would have be in danger of having and adverse impact on the SDARS.<sup>93</sup> Second, the CRB was concerned about the constraint on SDARS ability to make satellite investments.<sup>94</sup> Inability to meet their investment goals during the planned period could potentially disrupt the consumer service.<sup>95</sup> The CRB judges ultimately determined the rates as follows: 6.0% for 2007, 6.0% for 2008, 6.5% for 2009, 7.0% for 2010, 7.5% for 2011, and 8.0% for 2012.<sup>96</sup>

#### The Willing Buyer/ Willing Seller Standard and Rate and 2005 Negotiations for Webcasters

In the 2005 Negotiations between Sound Exchange and Commercial Webcasters, the CRB used the “willing buyer/ willing seller standard”.<sup>97</sup> “The willing buyer, willing seller” standard concerns replicating terms that would have been negotiated in a “hypothetical marketplace”.<sup>98</sup> The rate the CRB determined must reflect rates “that would have been negotiated in the market place.”<sup>99</sup> Section 114(f)(2)(b) provides “in determining the rates the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties”.<sup>100</sup> In analyzing the Willing Buyer/ Willing selling standard the CRB Judges can consider the following factors:

- a) Whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright's owner's other streams of revenue sound recordings.
- b) The relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.<sup>101</sup>

However, a glaring difference between the factors in the Willing Buyer/ Willing Seller standard at the 801(b)(1) standard is that in 801(b)(1) the rate must be analyzed and measured against each four objectives to ensure the objectives mentioned are being furthered. “willing buyer, willing seller” standard the factors may considered but they it is not required the CRB take the factors into account. The factors are meant to be used as relevant factors to be considered by the CRB Judges under the willing buyer/ willing seller standard.<sup>102</sup>

#### Rate Structure and Judge's Determination

The CRB judges determined that a per-performance fee structure was more appropriate than a revenue based fee structure.<sup>103</sup> First, the CRB Judges determined the a per performance fee structure was most appropriate because per-performance fee structure was a better proxy for usage with Internet Radio.<sup>104</sup> Second, the Judges determined revenue would be difficult to determine, particularly when the Digital broadcaster offers other features unrelated to music.<sup>105</sup> Additional, the parties could not agree as to what constitute revenue.<sup>106</sup> Whereas Sound Exchange supported a broader definition and scope of revenue, the commercial webcasters wanted a restricted scope of revenue.<sup>107</sup> The Judges concluded “the absence of persuasive evidence of what constitutes an unambiguous definition of revenue that properly

relates the fee to the value of the rights being provided militates against reliance on a revenue based metric.”<sup>108</sup>

In determining the benchmark rate, the CRB decided the interactive market was the best measure of how parties are negotiating on the private market.<sup>109</sup> The CRB made an adjustment for or interactivity that webcasters services lack when accounting for the benchmark rate.<sup>110</sup> In analyzing the “willing buyer, willing seller” factors the court determined that the factors were already built into the market rate and no further adjustments were needed.<sup>111</sup> Due to the fact webcasters vary in size, the CRB made a separate rate for smaller webcasters and larger webcasters such as Pandora.<sup>112</sup> The webcasters appealed to Congress claiming the rates were excessive and Congress enacted the Webcaster Settlement Act (WSA) of 2008.<sup>113</sup> Under the WSA, SoundExchange and the webcasters were given another opportunity to negotiate the royalty rates.<sup>114</sup> The Pureplay Agreement for 2006-2015 resulted from negotiations under WSA.<sup>115</sup>

### III. CONGRESSIONAL ACTION AND FAIRNESS CONCERNING SOUND RECORDINGS AND RADIO PLATFORMS

#### The Internet Radio Fairness Act (IRFA)

Internet Radio Fairness Act seeks to end discrimination against internet radio in the digital marketplace by treating internet Radio the same as satellite and cable radio. The Act will enable new internet radio startups to succeed and create jobs, foster competition, and the expansion of the music marketplace in part so the artist can obtain broader exposure and more compensation.<sup>116</sup> Supporters for the bill include Pandora, the consumer Electronics Association (members include Google, Microsoft, Yahoo, EBay and Pandora) and the Digital Media Association (DiMa).<sup>117</sup>

The main purpose behind the IRFA is to lower royalty rates for internet radio by switching them from a “willing buyer, willing seller” standard to the §801(b)(1) standard the CRB uses for satellite and cable radio. Other aspects of the IRFA include allowing radio broadcasters to make digital back-ups (ephemeral copies) already legally obtained, requiring the CRB have minimum level of expertise pertaining to their duties and mandate CRB follow Federal Rules and the Federal Rules of Evidence, taking steps to establish transparency in the royalty rate market and establishing a global music database.<sup>118</sup>

The purpose of IRFA is to promote technological growth of digital broadcasting. Due to the higher percentage of revenue paid in royalty rates by webcasters, smaller startup webcaster are dissuaded from entering the internet radio market. The intended result of lowering the royalty rate is to expand the music marketplace. The main argument is that expansion of the music marketplace through the entry of more webcasters will increase both exposure and compensation to the artist.<sup>119</sup>

The Consumer Electronics Association (CEA) claims the “irrational and unfair royalty system hinders investment and innovation in internet radio.” The CEA is the preeminent trade association promoting growth in the 206 Billion US Consumer electronics industry.<sup>120</sup>

Conversely, BTIG<sup>121</sup> Analyst Richard Greensfeld argues:

“On the surface the rates paid by Pandora and other radio services appear in need of congressional relief. However, the reason why companies such as Pandora pay such high royalty rates as a percentage of revenues is that they severely limit audio advertising to protect the user experience. If Pandora ran several minutes of audio advertising per hour (the way terrestrial radio does) instead of 15 second spots the percentage of revenues paid out as royalties would be dramatically lower and comparable to the rates paid by satellite and radio. “

Greensfeld further provides :

“Pandora is essentially asking the government to intervene and reduce its costs structure to help it remain viable business because it knows its business model only works while running limited advertising at the expense of the musicians.”<sup>122</sup>



### Switching to the 801(b)(1) Standard under IRFA

Proponents of IRFA expect switching internet radio broadcasting from the Willing Buyer/Willing Seller model to the 801(b)(1) standard will bring internet radio rates on parity with satellite radio's rates.

However, in comparing the CRB's analysis in both rate determination proceedings, it appears that the analysis is similar and the results would be the same for webcasters regardless of what standard is applied. First, both standards merely serve as a basis for adjusting the benchmark rate that is set. Therefore, the setting of the benchmark rate has far more bearing on the rate than which standard is applied.

Secondly, the rate structure, such as whether the rate is determined as a percentage of revenue or is based on a per-play model, makes a significant difference. The reason Pandora and other commercial Webcasters pay as much as 50% of revenue is because of the per-play rate structure currently in place. In both rate-setting proceedings, the rate structure determined by the CRB is one that appropriately captures actual usage. The CRB judges justified the per-performance usage fee structure by stating the 'per-performance structure was the directly tied to the nature of the right being licensed, as opposed to revenue'.<sup>123</sup> A percentage of revenue would be difficult to calculate because it would be difficult to identify relevant webcaster revenue when the webcaster offers other features that are not related to music which causes ambiguity in what constitutes revenue for webcasters.<sup>124</sup> Unless, webcasters and copyright owners are able to agree on what constitutes revenue, how to calculate it and a way to capture usage in revenue than the CRB is likely to maintain a per-performance fee structure for webcasters.

Lastly, similar considerations are made under the “willing buyer, willing seller” standard in the rate determination. If Congress were to change the standard for Webcasters, the CRB’s reasoning in the rate proceeding for satellite radio suggest the royalty rate would not change. In the Satellite rate setting proceeding, the first factor, which seeks to ensure the availability of creative works to the public is maximized, the CRB focused heavily on substitution effect and promotional effect based on the evidence, or lack thereof, by the parties.<sup>125</sup> The CRB deferred to the interactive benchmark market and stated the substitution/promotion effect was already accounted for.<sup>126</sup> Similar in the satellite radio rate setting preceding the judges factored in the substitution and promotion effect and similarly deferred to the benchmark market.<sup>127</sup>

The second factor under 801(b)(1) considers the fair return of users and owners, is not explicitly mentioned in “willing buyer, willing seller” factors. Since the basis of the “willing buyer/ willing seller” standard replicates a hypothetical market where the rate is based on what the seller would be willing to sell, a fair rate of return to the user is built into the standard. IRFA’s proponents claim the royalty system badly discriminates against internet radio and hinders investment and innovation in internet radio.<sup>128</sup> Tim Wistergreen, founder and CEO of Pandora, claims in an advertisement played on Pandora that royalty rates at 50% hinders them from seeing a fair rate of return.<sup>129</sup> The CRB state with respect to this objective and fair income to the user, “A fair income is not the same thing as guaranteeing them a profit in excess of fair expectations of a highly leveraged enterprise.<sup>130</sup> A fair income is also not one which allows the SDARS to utilize its other resources inefficiently”.<sup>131</sup> Therefore, not generating excessive profits is not automatically indicative of a return that is not fair to the user, especially when the user has other efficient options. Webcasters have options such as charging a subscription or sell more advertising. Furthermore, internet radio would need to provide substantial evidence to show the

exercise of unfair market power by copyright owners in setting of prices in the benchmark marketplace which is the interactive webcasting market

In measuring internet radio against the third factor of the relative roles of the contribution of the copyright user and the copyright owner the CRB look at the contributions both creative and technological.<sup>132</sup> In the SDARS proceeding, SDARS argued they were entitled to a credit under the third objective because of the enhancement they made in their music channels and their non-music programming.<sup>133</sup> The CRB notes “While SDARS’ creative contributions to music channels may be relevant, it is certainly subsidiary to and dependent on the creative contributions of the record companies and artists to the making of the sound recordings that are the primary focus of those music channels.”<sup>134</sup> In other words, the creative contributions of SDARS are secondary to the creative contributions of the owner because SDARS music programming is entirely dependent on the creative output of the owners.

The CRB further notes on to state that with respect to the technical contributions, capital investment, cost, risk, and the opening of new markets both SDARS and the record labels make substantial contributions.<sup>135</sup> As a result, the CRB judges determined that a credit was not warranted under this objective.<sup>136</sup> However, the CRB judges note that the primary expenditure that distinguishes satellite radio from other digital distributors is their investment in satellite technology.<sup>137</sup> Webcasters do not incur the same costs, and expenditures and risk as satellite radio. In addition, webcasters such as Pandora, offer only music to its customers which the CRB notes is secondary, which relegates webcasters creative contributions as secondary to the Copyright owners.

The fourth factor that did end up securing a credit in favor of Satellite radio was minimizing any disruptive impact on the industries involved and on generally prevailing industry

practices.<sup>138</sup> At the time the SDARS proceeding Satellite was a relatively new service and paid 2.0%-2.5%.<sup>139</sup> The CRB judges determined that charging Satellite Radio the upper bound of zone of reasonableness (13%) and cause a disruptive impact.<sup>140</sup> The CRB notes that at the time SDARS had not yet obtained a sufficient fan base.<sup>141</sup> The CRB was concerned that satellite radio would be inhibited from making satellite investments. Webcasters, like Pandora, are not new and have an established listener base. In addition, webcasters have paid the royalty rates and are still able sustainable business enterprises in spite of the reportedly high rates. The CRB would most likely not grant a credit to adjust the rate if Internet Radio was being under the fourth objective.

#### IRFA's Additional Proposals

IRFA proposes allowing radio broadcasters to make digital back-ups (ephemeral copies) already legally obtained.<sup>142</sup> Under the current regime, digital backups of music legally purchased is generally illegal. As such, Webcasters are vulnerable to litigation from record labels for backing up copies to their servers. IRFA proposes granting Webcasters the right to back up legally obtained ephemeral copies provided the back ups are used only to facilitate webcasting.

Additionally, IRFA would require CRB judges have minimum level of expertise pertaining to their duties, mandate CRB follow Federal Rules and Federal Rules of Evidence, and that the judges be nominated by the President and confirmed by the Senate.<sup>143</sup> Additionally, IRFA would take steps to “shine a light” on the types of royalty rates are negotiated between private parties in private contracts.<sup>144</sup> It is difficult for the CRB judges to try to determine rates figure out comparable benchmark markets in the absence of knowing what real negotiated rates

are. As it stands now the market is “opaque and transparency is needed order for the CRB judges to effectively set reasonable rates for both Satellite and Internet radio platforms.<sup>145</sup>

Lastly, in order to help facilitate artists and Copyright owners in combating copyright infringement, IRFA proposes the creation of a global music rights database.<sup>146</sup> The database will include information related to musical works, the owners, authorized licensors and the author of the work.<sup>147</sup> The expectation with the database is that copyright information will be readily available and the owners can hold broadcasters and users accountable for their compensation.<sup>148</sup> In terms of compensation it is unclear where this fits into the Internet Radio royalty discussion however considering how complicated to pin down information concerning Copyright rights holders<sup>149</sup> this innovation would provide a great benefit to owners and user’s alike. This proposal for a global registry is definitely a policy Congress should look into whether the main provision of IRFA passes or fails.

#### Interim Fairness in Radio Starts Today (FIRST)

In contrast to IRFA, FIRST seeks to increase royalty rates by applying the same market-based royalty standard that Webcasters pay to the rates Satellite Radio pays. The rationale behind the introduction of this bill is that artists should be properly compensated for their works to nurture and encourage investment and innovation in the recording industry. Some important findings that serve as a catalyst for the bill include:

- 1) Supporting recording artists and copyright owners, as well as the creativity they inspire, is vital to the economic and cultural future of the United States.
- 2) Sound recordings are the only works capable of being performed that do not have a full performance right in the United States.
- 3) All other Organization for Economic Co-operation and development (OECD) countries besides the United States provide a performance right in sound recordings.
- 4) Even the largest radio broadcaster in the United States has now recognized that recording artists and their investors deserve compensation for the public performance of their intellectual property.
- 5) Just as all radio platforms should compensate creators and copyright owners for the use of their music, all radio platforms should pay compensation based the same royalty standard, regardless of the technology or business model they employ.<sup>150</sup>

The first major component of FIRST involves applying the “willing buyer, willing seller” model to satellite radio in order to properly compensate creators. The CRB engage in similar analysis concerning the two standards. Whereas it appears the 801(b)(1) standard attempts to strike a better balance, the hearings demonstrate that the CRB deferred heavily to the benchmark market rates in the absence of substantial evidence offered to make upward or downward adjustments. For instance, in the satellite rate proceeding, the CRB deferred to the benchmark market rates for the first and second factor.<sup>151</sup> However, the one major difference between the two standards is that CRB goes through each objective to ensure that the market rate satisfies the objective.<sup>152</sup> Under the “willing buyer/willing seller” model the judges weigh the two factors broadly.<sup>153</sup> Therefore, even though the analysis is similar for the two standards, the inquiry under the 801(b)(1) standard is more extensive.

There are key differences between satellite radio and internet radio that warrants different treatment under the two standards. First, Satellite consumers do not have the ability to control their listening experience to the extent that the music can be skipped or cued as a favorite with internet radio. While webcasting is not considered an interactive service, internet radio allows the user to have a lot more control over their listening experience by allowing the user to skip songs and pick favorite artists and songs. Therefore, the potential or threat of market substitution is greater with webcasters and as a result the “willing buyer, willing seller” standard is most appropriate. Since the threat is not as likely with satellite radio because the listener has no control over the music order or flow, the “willing buyer, willing seller” standard is not appropriate for satellite radio.

Secondly, Satellite Radio offers non-music programming in addition to stations that are exclusively music and make greater technical contributions to the musical landscape. With

respect to internet radio, sound recordings are their sole and exclusive product and is inexpensive to start up. Since satellite radio makes greater investments, such as satellite equipment, and has varied programming substantial analysis provided by the 801(b)(1) standard is necessary.

The second component of FIRST includes charging AM/FM simulcasters of terrestrial radio higher rates to account for the fact that terrestrial radio has enjoyed the benefits of not paying for the use of sound recordings.<sup>154</sup> Supporters include Sound Exchange, the RIAA, American Federation of Musicians and the musicFIRST Coalition.<sup>155</sup> Under the American Copyright Act, terrestrial radio has long enjoyed an exemption based on the belief that record labels and artists have a symbiotic relationship with terrestrial broadcasters and enjoy a promotional benefit from the broadcasters.<sup>156</sup> However, given that the terrestrial radio has seen a decrease in its listening audience, that belief is now a myth that no longer offers a workable explanation as to why terrestrial radio does not pay royalties for over the air transmissions for sound recordings. While this is an innovative feature of FIRST that indirectly gets at artist compensation from terrestrial radio, it does not go as far as to remove the exemption enjoyed by terrestrial radio broadcasters. The rationale behind the exemption under the statute is no longer reasonable given the landscape of technology and availability radio listening options. While AM/FM terrestrial radio has also lost listenership as a result of the technological boom and radio listening alternatives, there is no reason why they should still not pay royalties for the use of sound recordings. While they may not be in a position to pay higher royalty rate, fairness dictates the copyright owner receive compensation for terrestrial radio's use of sound recordings.

FIRST notes in its findings that the United States is the only OECD country that does not recognize a right in sound recording.<sup>157</sup> As a result, foreign broadcasters in other countries that play American music pay royalties to foreign societies that do not disburse the royalties due to

lack of reciprocity.<sup>158</sup> American artists, and right holders have uncollected royalties as a result of not only the terrestrial broadcast exemption but also the lack of recognized right in sound recordings.

#### IV. RECOMMENDATIONS

##### Changing Standards for Internet Radio is Inconsequential Therefore a Change is Not Necessary

Both Acts wish treat satellite radio and internet radio similarly ,however, maintaining the current standard for internet and satellite radio is in fact warranted. As aforementioned, the belief all radio platforms should pay compensation based on the same royalty standard, regardless of the technology or the business model they employ is not logical considering the technologies involved are drastically different. Broadcast and satellite radio have certain limitations that are not the same in the webcast context with regard to interactivity. Both terrestrial and satellite radio have advertising and shows in addition to music played. On the other hand, webcasters have only one product, being music, which justifies have the pay per play rate structure as opposed to a percentage of their revenue. Furthermore, the culprit that lends to higher rates for webcasters is the royalty rate structure and the chosen comparable market place benchmarks. Whether the standard is the 801(b) (1) standard or the “willing buyer, willing seller”, the standard only serves s an adjuster from the benchmark rate.

Additionally, The digital performance licenses are statutory or compulsory licenses which is an intrusion on the owners’ exclusive rights under the Copyright Act. Given compulsory licenses strips the owner of the right to bargain for the value of the sound recording in the market place, the owner should have the upper hand in negotiating royalty rates for the licenses. The equities do not lie in “cutting internet radio a break” for the sake of allowing them



to make higher profits. If webcasters were not entitled to a compulsory license, they would have less bargaining power in negotiations because without the sound recordings there is no internet radio.

#### The Terrestrial Radio Exemption Should be Removed

Based on FIRST's language, it is unclear whether the proposal is to remove the exemption from the statute, or have commercial broadcasters who have an AM/FM simulcast pay a higher royalty to account for the terrestrial broadcaster's exemption. Congress needs to remove the exemption from terrestrial radio completely. The rationale concerning the exemption and the mutually beneficial relationship that broadcasters and right holders' is no longer reality. The same rationale could be used to justify an exemption for both satellite and internet radio.

Rights holders suffer a loss of compensation for the royalties of sound recording played over American radio. The United State is the only industrialized nation that does not recognize a performance right over terrestrial radio.<sup>159</sup> As a result, royalties are collected for American music played on international radio stations but American artists/ rights holders cannot collect the United States does not recognize a performance right over terrestrial radio.<sup>160</sup>

#### Work Collaboratively Together Reach a Settlement Agreement without the CRB

It is in the best interest for the users and owners to work together, as demonstrated by the Webcaster's Settlement Agreement of 2002.<sup>161</sup> Broadcasters should support fair compensation for the rights holders. Conversely the rights holders should not push for rates that are unreasonable and cripple digital advancements in music platforms. The Vice President of the RIAA acknowledges that digital downloads in 2011 totaled \$2.6 billion, up from the prior year. Additionally, "Digital albums showed particularly strong gains, up to 25% by value to 1.1 billion and digital individual track sales grew to 1.5 billion, and 1.3 billion copies. Music subscription

grew to a new height in 2011 of \$241 million.”<sup>162</sup> Radio platforms, particularly satellite radio, webcasters, and simulcast broadcasters, and rights holders have a symbiotic relationship and growth of the user and the holder depend on continued successful relationships between the two parties. Both parties are in a better position than the legislature or the judiciary to negotiate rates that are manageable for both parties. As demonstrated in the Settlement Act of 2002 and the Webcasters Settlements Agreements, the parties in interest are in a better position to determine what the rates should be.

### Webcasters Should Share Costs

#### With Consumers to Reduce Their Royalty Costs

Instead of expecting the copyright holders, more specifically artists, to subsidize the cost of royalties for webcasters, consumers need to pay their fair share. Prior to the technological advances of the internet, rights holders had exclusive control over their works. Most consumers, with the exception of bootleggers, had to buy the physical embodiment of the work. The ease of access and quality of sound recording transmissions does not mean that the corresponding cost and time expenditure in its creation has decreased. Rights holders are entitled to profit from their works and the answer is not to subsidize the cost for consumers at the expense of compensation of the right's holders in an attempt to give the consumer the world of music at little to no cost.

If webcasters' rates were reduced to similar rates paid by satellite radio that would only create a race to the bottom. Arguably, lowering rates to make it easier for smaller webcasters to break into the business will not necessarily yield more innovation but rather replication of what is already technologically available. However, if webcasters charged subscriptions, more innovation would result because in order to be sustainable, the consumer would have to be

persuaded the service was worth the expenditure. Furthermore, a modest subscription will generate more revenue for the webcaster to help shoulder the cost of royalties

#### Transparency of the Royalty Rate Markets by Users and Owners

Both sound recording owners and radio platforms make conclusory assertions concerning the future of their industries without any concrete evidence, as demonstrated in the rate setting proceedings. Both owners and users claim rates set either too high or too low will stifle the future of their industries. Neither side produced evidence concerning the royalties they pay or receive. In both proceedings, both SoundExchange and the Broadcasters brought in economist and professors to make general assertions that the CRB is forced to make a determination on, in the absence of concrete figures. The music industry refuses to discuss how much artists are paid or how much record companies make after the royalty checks are paid. Conversely, webcasters discuss their plight in broad percentages and numbers. Greater transparency is needed to help the CRB make a well-reasoned rate determination that are fair to both sides.

#### CONCLUSION

Overall, Congressional action that changes the standard is not the going adequately address disproportionately high rates paid by webcasters. The standard rather is inconsequential as applied to Webcasters because the analysis under the standards is relatively similar. Based on the rate proceedings the most important determinations were the rate structure and the benchmark market rate. Once the rate structure and the bench market rate are determined, the factors within the standards serve as grounds for merely adjusting the rate up or down.

Given the licenses are compulsory, the answer does not lie in reducing the compensation of the owners whose hands are already tied with respect to the licenses. Rather the solution lies

in encouraging users such as Pandora to run their businesses with more efficiency by increasing advertising or making consumers pay a modest subscription.

Both copyright owners and users need to work together for the same desirable result which is mass consumption of their respective goods. If royalty rates are set too high, there is a potential danger the availability of internet radio platforms will be negatively impacted.

However, if the rates are set too low, investment in music could decline drastically and reduce the creative output of artists and record companies. Either way, the constitution seeks to ensure continued growth of technological innovations such as music platforms and the continued creative output and investment by artists and record companies for the sake of the public at large. Royalty rates that threaten extinction of either industry will only be detrimental to the public and violate the principles set forth under the Constitution

- <sup>1</sup> 17 U.S.C. §102(a)(1)-(8) (2006) (listing various categories of works of authorship such as literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works; motion pictures and audiovisual works, sound recordings, and architectural works).
- <sup>2</sup> This paper deals exclusively with royalty rates related to sound recording royalties.
- <sup>3</sup> Jennifer Martinez, *Lawmakers introduce Pandora-backed Music Royalty Legislation*, THE HILL (last visited Apr. 15, 2013). <http://thehill.com/blogs/hillicon-valley/technology/251037-lawmakers-introduce-pandora-backed-music-royalty-legislation>.
- <sup>4</sup> Ed Christman, *Sirius XM Files Lawsuit Against Sound Exchange and A2IM, Alleging Licensing Interference*, BILLBOARD MAGAZINE. <http://www.billboard.com/biz/articles/news/1098205/siriusxm-files-lawsuit-against-soundexchange-and-a2im-alleging-licensing> (Last visited Apr. 25, 2013).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Arista Records v. Launch Media Inc.*, 578 F.3d 148 (2d Cir. 2009) (holding internet radio service is not interactive).
- <sup>7</sup> *Id.* at 152.
- <sup>8</sup> AM/FM radio currently pays royalties for AM/FM simulcast which transmitted over the internet.
- <sup>9</sup> The IRFA was introduced in the House by Representatives Jason Chaffetz and Jared Polis and in the Senate by Senator Ron Wyden.
- <sup>10</sup> *Nadler seeks Fair Compensation and Rate Parity for Performing Artist*, NADLER.HOUSE.GOV (Apr. 25, 2013), <http://nadler.house.gov/press-release/nadler-seeks-fair-compensation-and-rate-parity-performing-artists> (last visited Apr. 25, 2013).
- <sup>11</sup> InternetRadio Fairness Act of 2012, H.R. 6480 112th Cong. (2011).
- <sup>12</sup> *CEA Endorses Internet Radio Fairness Act*, MARKETWATCH.COM, (last visited Apr. 25, 2013), <http://www.marketwatch.com/story/cea-endorses-internet-radio-fairness-act-2012-09-21>.
- <sup>13</sup> Discussion Draft, House of Representatives, Interim Fairness in Radio Starts Today Act of 2012, (Apr. 25, 2012), [http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER\\_153\\_xml.pdf](http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf).
- <sup>14</sup> *Id.* at 3.
- <sup>15</sup> Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed Reg. 4080 (Library of Cong., Copyright Royalty Bd. Jan, 24, 2008) (to be codified at 37 C.F.R. pt. 382) [hereinafter CRB Satellite Radio Final Decision].
- <sup>16</sup> 17 U.S.C. §102(a)(2), (7) (2006).
- <sup>17</sup> *Id.* §102(a)(2).
- <sup>18</sup> *Id.* § 102(a)(7).
- <sup>19</sup> *Arista*, 578 F.3d at 151.
- <sup>20</sup> *Id.* at 152.
- <sup>21</sup> *Id.*
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.*
- <sup>25</sup> 17 U.S.C. §106(1), (2), (3)(2006).
- <sup>26</sup> *Arista*, 578 F.3d at 153.
- <sup>27</sup> *Id.* at 153.
- <sup>28</sup> *Id.*
- <sup>29</sup> Jeremy Delibero, *Copyright Arbitration Royalty Panels and the Webcasting Controversy: The Antithesis of Good Alternative Dispute Resolution*, 5 PEPP. DISP. RESOL. L.J. 83, 87 (2005).
- <sup>30</sup> *Id.* at 89.
- <sup>31</sup> Paul Musser, *The Internet Equality Act: A Needed Substantive Cure For Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 LOY L. & TECH. ANN. 1(2009).
- <sup>32</sup> 17 U.S.C. §§101, 115(a)(1), (c)(3)(J)(i) (2006).
- <sup>33</sup> *Id.* at § 114.
- <sup>34</sup> *Id.* at § 112.
- <sup>35</sup> *Id.* at § 114(f)(2).
- <sup>36</sup> *Id.* at § 114 (f)(1)(B).
- <sup>37</sup> H.R. Rep. No. 104- 274 at 13(1995).
- <sup>38</sup> *Id.*

---

<sup>39</sup> 17 U.S.C. §114(f)(1)(B) (2006).  
<sup>40</sup> *Id.* § 114(f)(1)(A).  
<sup>41</sup> *Id.* § 801 (b)(1)(A)-(D).  
<sup>42</sup> H.R. Rep. No. 104- 274 at 13(1995).  
<sup>43</sup> *Id.* at 14.  
<sup>44</sup> 17 U.S.C. §114(f)(2)(B) (2006).  
<sup>45</sup> In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings: Report of Copyright Arbitration Royalty Panel, CARP DTRA 1 & 2 Docket No. 2000-9 (Feb 20, 2002).  
<sup>46</sup> *Arista*, 578 F.3d at 154.  
<sup>47</sup> *Id.* at 154.  
<sup>48</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4085.  
<sup>49</sup> Sound Exchange, the nonprofit performance rights organization, is tasked with collecting digital and satellite royalties for copyright owners. Sound Exchange represents the labels and artists in an initial negotiation and the rate-setting proceeding.  
<sup>50</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4087.  
<sup>51</sup> *Id.* at 4085.  
<sup>52</sup> *Id.* at 4086.  
<sup>53</sup> *Id.* at 4087.  
<sup>54</sup> *Id.* at 4086.  
<sup>55</sup> *Id.*  
<sup>56</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4087.  
<sup>57</sup> *Id.* at 4088  
<sup>58</sup> *Id.* at 4089-4093.  
<sup>59</sup> *Id.* at 4093.  
<sup>60</sup> *Id.* at 4094.  
<sup>61</sup> *Id.*  
<sup>62</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4094.  
<sup>63</sup> *Id.*  
<sup>64</sup> *Id.*  
<sup>65</sup> *Id.* at 4095.  
<sup>66</sup> *Id.*  
<sup>67</sup> *Id.* at 4094.  
<sup>68</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4095.  
<sup>69</sup> *Id.*  
<sup>70</sup> *Id.*  
<sup>71</sup> *Id.*  
<sup>72</sup> *Id.*  
<sup>73</sup> *Id.*  
<sup>74</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4095.  
<sup>75</sup> *Id.*  
<sup>76</sup> *Id.*  
<sup>77</sup> *Id.*  
<sup>78</sup> *Id.*  
<sup>79</sup> *Id.* at 4096.  
<sup>80</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4096.  
<sup>81</sup> *Id.*  
<sup>82</sup> *Id.*  
<sup>83</sup> *Id.*  
<sup>84</sup> *Id.*  
<sup>85</sup> *Id.*  
<sup>86</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4097.  
<sup>87</sup> *Id.*  
<sup>88</sup> *Id.* at 4098.

---

<sup>89</sup> *Id.* at 4097  
<sup>90</sup> *Id.*  
<sup>91</sup> *Id.*  
<sup>92</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4097.  
<sup>93</sup> *Id.*  
<sup>94</sup> *Id.*  
<sup>95</sup> *Id.* at 4098.  
<sup>96</sup> *Id.*  
<sup>97</sup> Determination of Rates and Terms, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (Copyright Royalty Bd., Library of Cong. May 1, 2007) (codified at 37 C.F.R. pt. 380) [hereinafter CRB Webcasting Final Determination].  
<sup>98</sup> 17 U.S.C. §114(f)(2)(B).  
<sup>99</sup> CRB Webcasting Final Determination, *supra* note 97, at 24097.  
<sup>100</sup> *Id.* at 24087.  
<sup>101</sup> *Id.*  
<sup>102</sup> CRB Webcasting Final Determination, *supra* note 97, at 24087.  
<sup>103</sup> *Id.* at 24091.  
<sup>104</sup> *Id.* at 24090.  
<sup>105</sup> *Id.*  
<sup>106</sup> *Id.* at 24089.  
<sup>107</sup> CRB Webcasting Final Determination, *supra* note 97, at 24089.  
<sup>108</sup> *Id.* at 24090.  
<sup>109</sup> *Id.* at 24095.  
<sup>110</sup> *Id.* at 24092.  
<sup>111</sup> *Id.* at 24095.  
<sup>112</sup> Andrew Stockman, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 Va. L. Rev. 2129 (2009).  
<sup>113</sup> *Id.* at 2148.  
<sup>114</sup> *Id.*  
<sup>115</sup> *Id.*  
<sup>116</sup> Senator Ron Wyden, Statement of Introduction for the Internet Radio Fairness Act of 2012 at Senate Hearing, (Sept. 21, 2012).  
<sup>117</sup> Kevin Goldberg, *Congressional Resolution to Copyright Disparities Sometime Soon*, COMMLAWBLOG, (<http://commlawblog.com/2012/10/articles/broadcast/congressional-resolution-to-copyright-disparities-sometime-soon/print.html>). (Last visited April 25, 2013).  
<sup>118</sup> 2011 CONG US HR 6480, 112<sup>th</sup> Congress, 2<sup>nd</sup> Session (2011).  
<sup>119</sup> See Senator Ron Wyden, Statement of Introduction, *supra* note 116.  
<sup>120</sup> CEA Endorses *Internet Radio Fairness Act*, *supra* note 12.  
<sup>121</sup> CEA is a firm that specializes in global trading and investment services.  
<sup>122</sup> *In the Wake of Internet Radio Fairness Act, BTIG Analyst Suggests Pandora Should Pay More*, ALLACCESS.COM, (<http://www.allaccess.com/net-news/archive/story/110672/in-wake-of-internet-radio-fairness-act-btig-analys>) (Last visit visited Apr. 25, 2013).  
<sup>123</sup> CRB Webcasting Final Determination, *supra* note 97, at 24089.  
<sup>124</sup> *Id.*  
<sup>125</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4095.  
<sup>126</sup> CRB Webcasting Final Determination, *supra* note 97, at 24095.  
<sup>127</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4096.  
<sup>128</sup> Martinez, *supra* note 3.  
<sup>129</sup> Goldberg, *supra* note 117.  
<sup>130</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4095.  
<sup>131</sup> *Id.*  
<sup>132</sup> *Id.* at 4096.  
<sup>133</sup> *Id.*  
<sup>134</sup> *Id.*  
<sup>135</sup> *Id.*

---

<sup>136</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4096.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 4097.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> H.R. 6480, § 4.

<sup>143</sup> *Id.* §§ 2, 6.

<sup>144</sup> *Id.* § 6.

<sup>145</sup> See Senator Ron Wyden, Statement of Introduction, *supra* note 116.

<sup>146</sup> H.R. 6480 § 7.

<sup>147</sup> See Senator Ron Wyden, Statement of Introduction, *supra* note 116

<sup>148</sup> *Id.*

<sup>149</sup> Henry H. Perrit, Jr., *Cut Into Tiny Pieces: Ensuring that Fragmented Ownership Does Not Chill Creativity*, 14 VAND J. ENT & TECH L. 1 (2001).

<sup>150</sup> Discussion Draft, FIRST, *supra* note 13, at 2-5.

<sup>151</sup> CRB Satellite Radio Final Decision, *supra* note 15, at 4095.

<sup>152</sup> *Id.* at 4094.

<sup>153</sup> CRB Webcasting Final Determination, *supra* note 97, at 24087.

<sup>154</sup> Discussion Draft, FIRST, *supra* note 13, at 5.

<sup>155</sup> Martinez, *supra* note 3.

<sup>156</sup> *Arista*, 578 F.3d at 152.

<sup>157</sup> Discussion Draft, FIRST, *supra* note 13, at 2-5.

<sup>158</sup> Mary La France, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 HARV. J.L. SPORTS & ENT. 221 (2011).

<sup>159</sup> *Id.* at 221.

<sup>160</sup> *Id.*

<sup>161</sup> Stockmen, *supra* note 112, at 2149.

<sup>162</sup> News and Notes on 2011 RIAA Music Shipment Data, RIA Vice

President, (<http://76.74.24.142/FA8A2072-6BF8-D44D-B9C8-CE5F55BBC050.pdf>) (last visited Apr. 25, 2013).