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# Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties

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# Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties

by Emily D. Harwood\*

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## I. INTRODUCTION

More than 20 years ago, WOXY-FM, an independently-owned station based on Oxford, Ohio, launched its modern rock format, making it one of the first stations of its kind in the country.<sup>1</sup> Also known as “97X—The Future of Rock and Roll,” the station had garnered a small, but loyal, audience in its listening area.<sup>2</sup> Those who tuned in on their radios, however, comprised just a portion of WOXY’s fan base. Following the advent of the World Wide Web, the music of 97X reached a much broader group of listeners, making it one of the most popular stations on the Internet.<sup>3</sup>

On May 13, 2004, WOXY’s Internet and radio listeners heard its transmissions for the last time. When WOXY’s owners sold their broadcast license to the Dallas-based First Broadcasting, they did so with the intent of continuing the Web transmission.<sup>4</sup> Due to the costs of webcasting, however, 97X’s Internet streams died on the same day that the broadcast stopped airing. According to the station’s owners, the costs of running an Internet station exceeded those of operating the traditional station.<sup>5</sup>

Ironically, it was WOXY’s online popularity that may have also been its downfall. Unlike AM/FM radio stations, who pay a fairly fixed amount for the right to play songs, webcasting fees are assessed based on the number of people who listen to a station.<sup>6</sup> Although the station’s owners hope to return to the Internet eventually, for now, the Future of Rock and Roll has fallen silent.

WOXY is not the only station unable to afford an Internet transmission. In June of 2002, the Librarian of Congress issued new royalty rates for Internet radio stations, also known as webcasters. Commercial stations choosing to transmit music via the Net would now be required to

1. *About Us*, WOXY.com, at <http://www.woxy.com/update.shtml> (last visited May 16, 2004) (on file with the Journal).

2. Rick Bird, *WOXY is Sold, But Its Concept Lives On*, CINCINNATI POST, Online Edition, at <http://www.cincypost.com/2004/05/11/woxy051104.html> (May 11, 2004) [hereinafter *WOXY is Sold*].

3. *See id.*

4. *Id.* Although the station’s new owners plan to maintain the modern rock format, WOXY’s original owners maintain ownership of the station’s CD and album collection. *Id.*

5. *Internet Broadcast Status Update*, WOXY.com, at <http://www.woxy.com/update.shtml> (Apr. 28, 2004).

6. *WOXY is Sold*, *supra* note 2; *see also infra*, note 82.

pay \$.0007 per musical performance.<sup>7</sup> For a station with 1,000 listeners, that could total more than \$1,000 per hour, crippling small and independent webcasters who generated little or no revenue. Unable to garner the advertising base necessary to help pay royalties, many webcasts, including simultaneous Internet transmissions of AM/FM radio stations, went silent in the months leading up to, and following, the Librarian's recommendations.<sup>8</sup>

Although many stations could not afford operation costs, the new royalties did not usher in the complete annihilation of Internet radio. In fact, Web stations continue to draw more and more listeners each year, with many of the most successful stations being owned by Internet megacompanies like Yahoo! and America Online ("AOL") that can afford to pay the costs of webcasting. The success of such stations, however, should not be a sign that all in the webcasting world is fine and well. Many stations that lack the financial base and advertising power to pay existing royalties have been unable to survive.<sup>9</sup> Losing these stations also signals the loss of the diverse, independent spectrum of voices that helps make the Internet such a unique medium.

This Note traces the rise, the fall, and the reinvention of the Internet radio industry. It argues that, as Internet radio gathers more and more listeners, the medium will continue to resemble the AM/FM industry in terms of its relationship with the recording industry and its ability to generate record sales. Therefore, copyright laws should treat Internet stations that behave much like AM/FM stations (i.e., those that are not interactive and do not require a subscription) the same as their traditional counterparts. Part II gives a brief history of music copyright law, from its beginnings in the U.S. Constitution to its post-Internet changes, culminating in the passage of the Digital Millennium Copyright Act ("DMCA"). Part III reviews the most recent history of Internet radio regulations, including current legislation that may have a positive effect on the CARP system. Part IV discusses why Congress should consider a return to the exemption for all nonsubscription, noninteractive transmissions, as set forth in the Digital Performance Right in Sound Recordings Act ("DPRA"). Part V concludes with a plea for Congress and the recording industry to make provisions that will best help webcasters negatively affected by the DMCA.

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7. *Id.*

8. *See infra*, Part III.A.

9. *See id.*

## II. COPYRIGHT LAW AND MUSICAL RECORDINGS

### A. *Early Regulations*

Beginning with the adoption of the U.S. Constitution, the government has placed a priority on artists' rights to share their creations as they see fit. Article I of the Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>10</sup> In 1790, Congress adopted the first Copyright Act, which granted little protection when compared to today's version.<sup>11</sup> "In the first decade of U.S. copyright law, only five percent of the books published received copyright protection; copyrighted works joined the more numerous uncopyrighted works in the public domain after just fourteen years."<sup>12</sup> Today, however, "virtually every creative work imaginable is automatically copyrighted."<sup>13</sup> This includes musical creations.<sup>14</sup>

Two copyright privileges exist in musical recordings. The "musical composition" copyright, usually granted to the songwriter, is the right to the "original words and arrangement of the music."<sup>15</sup> The "song recording" copyright, on the other hand, recognizes a right in the recorded version of the song.<sup>16</sup>

Until recently, the government only recognized the "musical composition" copyright.<sup>17</sup> The public performance of a sound recording, including transmission via AM or FM radio,<sup>18</sup> generally "require[d] a

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10. U.S. CONST. art. I, § 8, cl. 8.

11. See Edward L. Carter, Note, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters*, 2002 BYU L. REV. 1155, 1156-57 (2002).

12. *Id.* (citing Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1061-62 (2001)).

13. *Id.* at 1157.

14. 17 U.S.C. § 106(4) (2000).

15. Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 321 (2002) (citing Library of Congress, U.S. Copyright Office, *Circular 56: Copyright Registration for Sound Recordings*, available at <http://www.copyright.gov/circs/circ56.pdf> (Jan. 2004); and *Circular, 56(a); Copyright Registration of Musical Compositions*, available at <http://www.copyright.gov/circs/circ56a.pdf> (Aug. 2003)).

16. *Id.*

17. See *Bonneville Int'l. Corp. v. Peters*, 153 F. Supp. 2d 763, 766 (E.D. Pa. 2001); Rose, *supra* note 15, at 321.

18. See *Bonneville*, 153 F. Supp. 2d at 766 n.3; Alison Neumer, *Stations Seek Fee Break: Knocked Offline by Rules, Colleges Ready Web Return*, CHI. TRIB., Nov. 25, 2002 (corrected Dec. 3, 2002), available at 2002 WL 103521634.

license from the owner of the musical composition; no permission was required from the holder of the copyright in the sound recording itself.”<sup>19</sup>

In the 1920s, the music industry asked Congress to extend copyright protection to sound recordings as well as to the actual recording of the performance, but Congress was hesitant to do so.<sup>20</sup> It was not until the second half of the twentieth century that Congress granted this request, albeit in a limited fashion. The Sound Recording Amendment Act of 1971 (“SRA”)<sup>21</sup> gave provisional rights for music reproduction and distribution, “[b]ut the amendment made clear that it was *not* conferring a public performance right.”<sup>22</sup> When Congress revised the Copyright Act in 1976, it made the provisional rights of the SRA permanent but granted no additional rights.<sup>23</sup> In refusing to acknowledge a sound recording right, Congress recognized the mutual benefit that artists and broadcasters provide each other:

The history of copyright protection for sound recordings reflects a dominant, recurring theme: Congress repeatedly took pains to ensure that the grant of copyright protection did not affect the symbiotic relationship between the radio broadcasters and the record industry. Congress recognized both that the record industry reaps huge benefits from the public performance of their recordings by radio stations, and that the granting of a public performance right could alter that relationship to the detriment of both industries.<sup>24</sup>

It took almost two decades, and the advent of an entirely new broadcast medium, for Congress to rethink this position.

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19. *Bonneville*, 153 F. Supp. 2d at 766.

20. *Id.*; Samuel Fifer & Gregory R. Naron, *Changing Horses in Mid-Stream: The Copyright Office’s New Rule Makes Broadcasters Pay for “Streaming” Their Signals over the Internet*, 3 VAND. J. ENT. L. & PRAC. 182, 183 (2001) (citations omitted).

21. The Sound Recording Amendment Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

22. Fifer & Naron, *supra* note 20, at 183 (construing The Sound Recording Amendment Act of 1971). The Act states:

[T]his right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

*Id.*

23. *Bonneville*, 153 F. Supp. 2d at 766; Fifer & Naron, *supra* note 20, at 183.

24. *Copyrighted Webcast Programming on the Internet; Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 140 (2000) (prepared statement of Edward O. Fritts, President and CEO, National Association of Broadcasters) [hereinafter Fritts Statement]; *see also* Fifer & Naron, *supra* note 20, at 183.

## B. *The Birth of the Internet*

The 1990s saw the development and subsequent explosion of the Internet, which provided an entirely new stage for the public performance of sound recordings. One Internet-related development came in the form of “streaming audio.” Streaming, unlike downloading, does not enable listeners to request and permanently store audio files on their computers. On the other hand, it is more like listening to a radio station—the listener only has access to what is playing at that moment.<sup>25</sup> In 1995, the development of the RealAudio player made it simple for anyone with Internet access to listen to music on the Web. The demand for the technology was great. “More than 100,000 people logged onto Progressive Networks’ computer” to access the free download on the day it was introduced.<sup>26</sup> Other companies such as Nullsoft and Microsoft followed suit with their own media players, helping give rise to “Web-based radio stations . . . providing everything from rebroadcasts of existing, traditional radio station programming to interactive jukeboxes where users could create their own play-lists of their favorite songs.”<sup>27</sup>

In the years following the development of streaming audio technology, Internet radio has proven its staying power. Thousands of stations exist online.<sup>28</sup> Arbitron, a media research and rating service, estimates that more than 108 million Americans have listened to or watched online programming,<sup>29</sup> and approximately 51 million Americans stream information in a given month.<sup>30</sup> The top ten Internet radio networks draw more than 2.8 million weekly listeners.<sup>31</sup>

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25. Fifer & Naron, *supra* note 20, at 183.

26. Joshua Quittner, *Radio Free Cyberspace; Broadcasters are Taking Their Shows to the Internet. Has the Silicon Age of Radio and Television Begun?*, TIME, May 1, 1995, at 91, available at LEXIS, TIME File.

27. Rose, *supra* note 15, at 317.

28. Steven Levy, *Labels to Net Radio: Die Now*, NEWSWEEK, July 15, 2002, at 51, available at LEXIS, N WEEK File.

29. ARBITRON/EDISON MEDIA RESEARCH, INTERNET AND MULTIMEDIA 12: THE VALUE OF INTERNET BROADCAST ADVERTISING 3 (2004), available at <http://www.arbitron.com/downloads/IM12Summary.pdf> [hereinafter ARBITRON 2004 STUDY] (citing results of a phone survey of 2,290 of “Arbitron’s Fall 2003 survey diary keepers”).

30. *Id.*

31. See Press Release, Arbitron/Edison Media Research, *Arbitron Internet Broadcast Services Releases the Last Ratings Using the MeasureCast System* (Apr. 13, 2004) [hereinafter *Arbitron March Ratings*] (on file with the Journal). Arbitron computes the cumulative number of listeners per week by estimating “the total number of unique listeners who had one or more listening sessions lasting five minutes or longer during the reported time period.” *Id.*

One explanation for Internet radio's popularity is its eclectic mix of musical styles not often heard on "lobotomized playlists of broadcast radio."<sup>32</sup>

Webcasters and fans of Internet radio would readily agree that the diversity that is (by many accounts) missing in the broadcast world is alive and well across the spectrum of streaming choices available online. Net radio outlets cater to listeners unsatisfied with what's available over the air. Genres like classical, jazz, independent rock, electronic, international styles, and early country and bluegrass—categories largely ignored by commercial broadcasters—have found homes and enthusiastic audiences on Internet radio.<sup>33</sup>

Recent Arbitron ratings, which place stations featuring jazz, folk, and classical formats among the top channels on the Internet, support this theory.<sup>34</sup> Some of the stations are found only on the Web, while others are simulcasts of broadcast radio stations.<sup>35</sup>

### C. *The Digital Performance Right in Sound Recordings Act*

Sensing the Internet's current and potential impacts on the music industry, Congress passed the DPRA in 1995.<sup>36</sup> The DPRA gave copyright holders of sound recordings the exclusive right, with exceptions, "to perform the copyrighted work publicly by means of a digital audio transmission."<sup>37</sup> The Senate Committee on the Judiciary felt that these new regulations were necessary "to address all of the issues . . . dealing with the digital transmission of sound recordings and musical works and . . . to protect the livelihoods of [those] who depend upon revenues derived from traditional record sales."<sup>38</sup> The Committee was particularly concerned with the development of "pay-per-listen" or "audio-on-demand" services that allow a listener to request and hear any song at any time.<sup>39</sup>

The legislation was intended as a "carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings" and involved a "three-tiered system for categorizing digital

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32. Levy, *supra* note 28, at 51.

33. Paul Maloney, "Un-consolidated" Radio is Alive and Well on the Internet, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/013103/index.asp> (Jan. 31, 2003).

34. See *Arbitron March Ratings*, *supra* note 31.

35. *Id.*

36. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

37. 17 U.S.C. § 106(6) (2000); Digital Performance Right in Sound Recordings Act, § 2.

38. S. REP. NO. 104-128, at 14 (1995).

39. *Id.*



transmissions based on their likelihood to affect record sales.<sup>40</sup> The interactive, subscription services that appear to have fueled the passage of the DPRA were subject to the highest levels of regulation.<sup>41</sup> The DPRA required the operators of these services to negotiate royalty payments with copyright owners.<sup>42</sup> The second tier of regulation applied to subscription services that were noninteractive.<sup>43</sup> These services were subject to statutory licenses,<sup>44</sup> which enabled a webcaster to play unlimited recordings without receiving a license for each one.<sup>45</sup> The third tier encompassed services that were altogether exempt from the DPRA.<sup>46</sup> Among the exemptions were nonsubscription, noninteractive transmissions.<sup>47</sup> These transmissions included radio and television broadcasts that were available free of charge and were considered to be the most important exemption to the DPRA.<sup>48</sup> They were not seen to pose the same threat to the recording industry as did interactive and certain subscription services.<sup>49</sup> It is important to note, however, that these exemptions extended beyond AM/FM broadcasts to also include all nonsubscription, noninteractive digital transmissions.<sup>50</sup>

#### D. *The Digital Millennium Copyright Act*

Just three years after the DPRA's passage, Congress tightened the reins on Internet transmissions, once again granting more authority to copyright holders of sound recordings. President Clinton signed the Digital Millennium Copyright Act ("DMCA") on October 28, 1998.<sup>51</sup> As part of the DMCA, Congress amended the U.S. Code to limit the DPRA's third

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40. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 767 (E.D. Pa. 2001).

41. *Id.*

42. 17 U.S.C. § 114(e)(1); Digital Performance Right in Sound Recordings Act, § 3.

43. Digital Performance Right in Sound Recordings Act, § 3. According to the DPRA, an "interactive" service is one that

enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive.

*Id.*

44. 17 U.S.C. § 114 (d)(2)(A)(i); Digital Performance Right in Sound Recordings Act, § 3.

45. Susan Chertkof Munsat, *Statutory Licensing for Webcasters: Everything You Wanted to Know But Were Afraid to Ask*, in *MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS*, at 149 (PLI Intellectual Prop., Vol. 1, 2001).

46. *Bonneville*, 153 F. Supp. 2d at 768.

47. Digital Performance Right in Sound Recordings Act, § 3.

48. See H.R. REP. NO. 104-274, at 14 (1995).

49. See *id.* at 13; *Bonneville*, 153 F. Supp. 2d at 768.

50. Digital Performance Right in Sound Recordings Act, § 3.

51. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

tier of services, those considered exempt from royalties or licensing.<sup>52</sup> Under the DMCA, only “nonsubscription *broadcast* transmission[s]” were exempted from licensing requirements.<sup>53</sup> This meant that nonbroadcast transmissions (e.g., webcasts) previously exempted from the DPRA were now subject to royalty requirements. These transmissions were among those in the now-expanded category of those qualifying for a statutory license.<sup>54</sup>

To receive a statutory license under the DMCA, nonsubscription webcasters were required to adhere to a number of requirements, including:<sup>55</sup> (1) “a [webcaster] must ensure that a listener cannot select particular songs or artists to listen to, but instead may only have limited input on songs selected, such as choosing a genre or style of music to listen to”;<sup>56</sup> (2) the station cannot allow instantaneous switching from one channel to another;<sup>57</sup> (3) a webcast cannot include more than three songs from one album in a three-hour period, and no more than two of them can play consecutively;<sup>58</sup> (4) a webcaster cannot announce the titles of songs in advance;<sup>59</sup> and (5) the webcaster is required “during the broadcast of any particular song, [to] identify in text on its web site the name of the recording artist, the title of the song, and the title of the album or CD on which the song is included.”<sup>60</sup> The authors of the DMCA shared the concerns of those who crafted the DPRA, that digital technology posed a threat to those in the recording business:

The DMCA amendments affecting section 114(d)(1)(A) of the Copyright Act were created in response to “a remarkable proliferation of music services offering digital transmission of sound recordings to the public.” The House Manager noted that “services commonly known as ‘webcasters’ have begun offering the public multiple highly-themed genre channels of sound recordings on a nonsubscription basis.”<sup>61</sup>

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52. *Bonneville*, 153 F. Supp. 2d at 768-69.

53. 17 U.S.C. 114(d)(1)(A) (2000) (emphasis added); Digital Millennium Copyright Act, § 405 (emphasis added).

54. H.R. CONF. REP. No. 105-796, at 80 (1998), cited in *Bonneville*, 153 F. Supp. 2d at 769. See *infra*, Part II.E, for a discussion of what constitutes a “broadcast” transmission.

55. See Martha F. Phelps, *Complying with Requirements for a Statutory License in Sound Recordings Under the Digital Millennium Copyright Act of 1998*, BOSTON B. J., Mar.-Apr. 2001, at 6, 21-22; R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 248-49 (2001).

56. Phelps, *supra* note 55, at 20 (citation omitted).

57. 17 U.S.C. § 114(d)(2)(A)(ii).

58. *Id.* §§ 114(d)(2)(C)(i), (j)(13)(A).

59. *Id.* § 114(d)(2)(C)(ii).

60. Phelps, *supra* note 55, at 21 (construing 17 U.S.C. § 114(d)(2)(C)(ix)).

61. *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 769 (E.D. Pa. 2001) (citing

Under the DMCA, the Librarian of Congress was required to publish notice in the Federal Register “of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments.”<sup>62</sup> If negotiations failed, the Librarian of Congress was to “convene a copyright arbitration royalty panel [“CARP”] to determine and publish in the Federal Register a schedule of rates and terms.”<sup>63</sup>

### *E. Bonneville Int’l Corp. v. Peters*

Before the rates could be determined, the recording industry and the radio industry came to blows on another question: Was an AM or FM station that streamed transmissions on the Internet subject to the DMCA? The Recording Industry Association of America (“RIAA”) sent a petition to the Copyright Office (“Office”), asking for an answer to this question. According to the RIAA, “until the Office rules, the parties will not agree on who qualifies for the Section 114 performance license.”<sup>64</sup> In response to the petition, the Office postponed setting the royalty rates until the matter had been resolved.<sup>65</sup> In December 2000, the Office amended “its regulatory definition of a ‘Service’ . . . to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under . . . the Copyright Act.”<sup>66</sup>

In protest of the Office’s determination, a group of radio broadcasters filed suit in the Eastern District of Pennsylvania claiming that the language of the DMCA clearly exempted them from liability.<sup>67</sup> The court disagreed and granted the defendant’s motion for summary judgment.<sup>68</sup> The court determined that the Office’s interpretation of the DMCA was reasonable and agreed “that the term ‘nonsubscription broadcast transmission’ was not intended to include AM/FM webcasting.”<sup>69</sup>

The Third District Court of Appeals court upheld the lower court’s decision.<sup>70</sup> In doing so, it determined that webcasts of AM/FM radio should

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*Staff of House Comm. on the Judiciary*, 105th Cong., Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, at 50 (Comm. Print 1998)).

62. 17 U.S.C. § 114(f)(1)(A); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 § 405 (1998) (codified in scattered sections of 17 U.S.C.).

63. 17 U.S.C. § 114(f)(1)(B); Digital Millennium Copyright Act, § 405.

64. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,292 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201) (citation omitted).

65. *Id.* at 77,292.

66. *Id.*

67. *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001).

68. *Id.*

69. *Id.* at 779.

70. *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485 (3d. Cir. 2003).

not fit within the DMCA's exemption because they did not fit the definition of a broadcast transmission as found in the U.S. Code, which is "a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission."<sup>71</sup> The court determined that the term "broadcast station" applies only "to the physical radio station facility that broadcasts radio signals over the air, and not to the business entity that operates the radio station."<sup>72</sup> To hold otherwise, the court said, would exempt any business entity with at least one FCC-licensed station from the DMCA requirements on any, and as many, nonsubscription, noninteractive transmissions it wished to operate.<sup>73</sup> The court also held that AM/FM webcasts do not qualify as "retransmissions of broadcast transmissions," which are also exempt from statutory licenses.<sup>74</sup>

The court also interpreted exemptions in the DMCA and DPRA as evidence of Congress's continuing relationship with the radio and television industries. According to the court, the nonsubscription broadcast exemption in the DPRA indicated that "Congress had in mind the symbiotic relationship between the recording industry and broadcasters, and did not seek to change the existing relationship."<sup>75</sup> The court also stated that Congress's decision to exempt nonsubscription broadcasts from the DMCA's licensing and royalty plan indicated a clear "desire not to impose 'new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.'"<sup>76</sup>

### III. THE DEATH OF INTERNET RADIO? PROPOSED ROYALTIES AND NEW SOLUTIONS

#### A. *The CARP Recommendations*

Groups that both supported and opposed the proposed royalties negotiated, but they could not reach an industry-wide agreement.<sup>77</sup> As a result, "the U.S. Copyright Office and the Library of Congress ordered that a Copyright Arbitration Royalty Panel . . . be established."<sup>78</sup> The

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71. *Id.* at 492 (quoting 17 U.S.C. §114(j)(3)(2000)).

72. *Id.* at 495.

73. *See id.* at 493.

74. *See id.* at 495-96.

75. *Id.* at 497 (citation omitted).

76. *Id.* at 487 (quoting H.R. REP. NO. 104-274, at 14 (1995)).

77. Kevin McNamara, *What CARP Means to You*, RADIO, Jan. 1, 2003, available at [http://beradio.com/departments/radio\\_carp\\_means/index.html](http://beradio.com/departments/radio_carp_means/index.html).

78. *Id.*

proceedings began in late 1998, and in February 2002, the CARP released its rate recommendations.<sup>79</sup>

CARP heavily based its conclusions on an agreement between the RIAA and Yahoo! Inc., “a major webcaster and Internet retransmitter of broadcast signals.”<sup>80</sup> Unfortunately, these rates may not have been appropriate for all webcasters because they were “negotiated by a webcaster much too large to represent the interests of many in the Internet radio community.”<sup>81</sup> Following the rate schedule set forth in the RIAA/Yahoo! agreement, the CARP established a rate of \$.0014 per performance<sup>82</sup> for Internet-only transmitters. Webcasters who retransmitted a radio broadcast were to pay \$.0007 per performance.<sup>83</sup> The rate was less for noncommercial broadcasters,<sup>84</sup> who would be charged \$.0002 for simultaneous retransmissions of radio broadcasts, \$.0005 “for other Internet retransmissions, including up to two side channels of programming consistent with the station’s public broadcasting mission, and \$.0014 for transmissions on any other side channels.”<sup>85</sup>

Most webcasters’ reaction to the CARP proposal was anything but enthusiastic. According to the *Radio and Internet Newsletter*, the proposed royalty payments were “double or triple (or even more)” of the annual revenues of some webcasters.<sup>86</sup> Internet-only webcasters were hit especially hard by the proposal. They were not only required to pay twice as much as their counterparts who were retransmitting terrestrial radio broadcasts, but they also generally lacked the income that radio stations had. Because Internet-only stations ran fewer advertisements than AM/FM webcasts, they were playing more songs per hour and were subject to a higher

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79. *Id.*

80. Copyright Office, Library of Cong., Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, available at [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html) (last updated Feb. 24, 2003) [hereinafter Copyright Office Summary].

81. Allison Kidd, Note, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 352 (footnote omitted).

82. “For purposes of paying the royalty, each transmission to each *individual recipient* is counted as one performance.” Copyright Office Summary, *supra* note 80 (emphasis added).

83. *Id.*

84. This rate did not apply to noncommercial broadcasters affiliated with the Corporation for Public Broadcasting, who “negotiated a separate royalty rate in a private agreement.” *Id.*

85. *Id.*

86. Paul Maloney, *CARP, Congress, & Compromise: Radio and the Internet in 2002*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/010603/index.asp> (Jan. 6, 2003).

performance fee.<sup>87</sup> A group of “independent webcasters” determined that, collectively, they had streamed 40 million hours of radio in one year.<sup>88</sup> In that time, they earned combined revenues of \$93,000.<sup>89</sup> Applying the CARP rates, they would pay \$710,000 in royalties for that same period.<sup>90</sup>

Some thought the CARP proposals, if passed, could bring about “the death of webcasting.”<sup>91</sup> Many webcasters, frightened by the new royalty requirements, played their songs in cyberspace for the last time. Through much of 2002, *RAIN* featured a list of both Web-only and radio broadcast stations, commercial and public, that had been “silenced by royalties.”<sup>92</sup> At one point, more than 150 stations and multistation networks were included on the list.<sup>93</sup> Hundreds of webcasters and broadcasters demonstrated their disapproval of the royalties by joining together for a Day of Silence on May 1, 2002.<sup>94</sup> Some stations “substituted their normal music programming with sound effects or simple silence,” while others “opted to carry a simulcast of a 12-hour talk show meant to inform listeners of the situation the industry faces, and inspire them to express their dismay to their representatives in Congress.”<sup>95</sup> The event was a success, as listeners visited the *SaveInternetRadio* Web site at a rate of three visitors per second,<sup>96</sup> and stations airing the talk show (or even sporadic public service announcements) were among the top stations of the day, according to Shoutcast.com.<sup>97</sup>

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87. See Paul Maloney, *Industry Reacts to CARP Royalty Rates for Internet Broadcast*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/022102/index.asp> (Feb. 21, 2002).

88. Kurt Hanson, *Day of Silence is ON! Webcasters to Deliver “Mayday! Mayday! Message to Listeners, Press, and Congress on May 1st*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/042502/index.asp> (Apr. 25, 2002).

89. *Id.*

90. *Id.*

91. Paul Maloney, *CARP Recs’s .07¢ Fee For Radio Webcasts, Twice That For ‘Net Only*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/022002/index.asp> (Feb. 20, 2002).

92. *Silenced by Royalties*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/silenced.asp> (last updated Oct. 11, 2002).

94. See *id.*

94. Paul Maloney, *Today is the Day of Silence: Hundreds of Webcasters Fall Silent in Protest of CARP Royalty Rates, Others Stream Informative Talk Show*, RAIN: RADIO AND INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/050102/index.asp> (May 1, 2002).

95. *Id.*

96. *Id.*

97. Paul Maloney, *“Day of Silence” Draws Huge Audience, Listener Response*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/050202/index.asp> (May 2, 2002).

### B. *The Librarian of Congress's Approach*

Acting upon a recommendation from the Register of Copyrights, the Librarian of Congress rejected a two-tiered structure that distinguished between Web-only and AM/FM webcast stations.<sup>98</sup> The Librarian reduced Internet-only performance fees to \$.0007, making these fees equal to those paid by AM/FM webcasters.<sup>99</sup> The Librarian deemed CARP's rationale for charging a higher rate for Internet-only transmissions faulty, stating:

One of the most significant errors by the CARP was its conclusion that the parties must have agreed that radio retransmissions have a tremendous positive promotional impact on sales of phonorecords—an impact that it did not find Internet-only transmissions have—and that this promotional impact explained the decision of RIAA and Yahoo! to set a higher rate for Internet-only transmissions. . . . The Librarian agreed with the Register of Copyrights that the CARP's conclusion about promotional value was arbitrary and was not supported by the evidence in the record, which provided no basis for concluding that radio retransmissions provide a promotional value that Internet-only transmissions do not provide.<sup>100</sup>

The Librarian also reduced CARP-recommended rates for archived programming on noncommercial radio stations from \$.0005 to \$.0002.<sup>101</sup>

Webcasters asked the Librarian to consider revenue-based royalties, but the Librarian upheld the per-performance rate formula adopted in the CARP recommendations.<sup>102</sup> The CARP chose the per-performance rate for several reasons, including their “conclusion that a per-performance rate is directly tied to the right being licensed (i.e., the right of public performance).”<sup>103</sup> The CARP also noted the complexities of using a revenue-based system and stated that, because some webcasters make little or no money, they would have to pay little or nothing for the use of recorded music.<sup>104</sup>

Regardless of the Librarian's rationale, many webcasters were still not pleased with his decision. According to *RAIN*, the proposed rates would still require some small webcasters to pay more in royalties than they receive in revenues.<sup>105</sup>

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98. Copyright Office Summary, *supra* note 80.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *\$.0007/performance! Librarian Cuts Internet-only Royalty in Half. Decision Based on Same Yahoo! Deal that CARP used. Rate Still >100% of Revenues for Many Webcasters.*, *RAIN: RADIO & INTERNET NEWSL.*, at <http://www.kurthanson.com/archive/news/062002/index.asp> (June 20, 2002).

### C. *The Small Webcaster Settlement Act*

Although the Librarian's recommendations dealt a sharp blow to webcasters, those in the Internet radio industry continued to fight for what they believed was a fairer system. In September of 2002, webcasters sought help from House Judiciary Committee Chairman F. James Sensenbrenner (R-Wisc.). Sensenbrenner introduced a bill that would postpone the rates set by CARP for six months.<sup>106</sup> Sensenbrenner later pulled the bill.<sup>107</sup> Objection to Sensenbrenner's strategy caused him to "urge the parties to reach an agreement immediately."<sup>108</sup> He and other Committee members "proposed certain rates and terms, and requested that the small [W]ebcasters and SoundExchange, the organization appointed to receive the royalty payments, agree to those rates and terms as a substitute for the moratorium legislation."<sup>109</sup> The two parties approved the rates and terms, which then became the substance of the Small Webcaster Amendments Act ("SWAA"), passed by the House on October 7, 2002.<sup>110</sup> Though it won approval in the House, the SWAA "failed to reach the Senate floor on the final day of the Congressional session."<sup>111</sup>

Another attempt at revenue-based royalties, introduced by Congressman Sensenbrenner and ultimately known as the Small Webcaster Settlement Act, ("SWSA"),<sup>112</sup> received support from "virtually all players on both sides of the debate."<sup>113</sup> It was also successful in both the House and the Senate, and President George W. Bush signed the bill into law on December 4, 2002.<sup>114</sup> The SWSA differed from the SWAA in that it did not include any definitions of "small Webcaster," nor did it establish any rates and terms. Instead, "the bill grant[ed] both sides the right to enter into a

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106. David Ho, Associated Press, *Record Industry and Webcasters Reach Deal on Royalty Rates, Officials Say* (Oct. 7, 2002), available at <http://www.detnews.com/2002/technology/0210/07/technology-605753.htm>.

107. *Id.*

108. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, p.3, [hereinafter Soundexchange Notification] (on file with the Journal).

109. *Id.*

110. *Id.*

111. Paul Maloney, *SWAA Dead in Senate*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/101802/index.asp> (Oct. 18, 2002).

112. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

113. Kurt Hanson, *SWSA Passes! : "Small Webcaster Settlement Act (H.R. 5469)" Passes in Both Senate and House; Supported by Virtually All Players*, RAIN: Radio & Internet Newsl. Vol. 2 ,at <http://www.kurthanson.com/archive/news/111502/index.asp> (Nov. 15, 2002) [hereinafter *SWSA Passes*].

114. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002) [hereinafter Library of Congress Notification].



voluntary agreement” that deviated from the CARP decision with no fear of potential liability:<sup>115</sup>

Specifically, the bill does so by permitting the receiving agent of royalty payments (i.e., SoundExchange) to negotiate on behalf of all copyright owners . . . for the period beginning October 28, 1998 (i.e., the passage of the DMCA) and ending December 31, 2004. Under the new mechanism established by the act, the voluntary agreement envisioned would be submitted to the Copyright Office, published in the Federal Register, and subsequently made available to all qualifying webcasters.<sup>116</sup>

The Copyright Office published the terms of the agreement in the Federal Register on December 24, 2002.<sup>117</sup> Under the terms, a small webcaster<sup>118</sup> was required to pay the greater of “8 percent of the webcaster’s gross revenues, . . . or 5 percent of the webcaster’s expenses” from October 28, 1998 to December 31, 2002.<sup>119</sup> Transmissions made in 2003 or 2004 are subject to a royalty rate of “10 percent of the eligible small webcaster’s first \$250,000 in gross revenues and 12 percent of any gross revenues in excess of \$250,000 . . . or 7 percent of the webcaster’s expenses . . . whichever is greater.”<sup>120</sup> Small webcasters are also required to pay minimum fees that differ for various time periods between 1998 and 2004.<sup>121</sup> A webcaster who consents to these terms “cannot opt out of these Rates and Terms in order to select different rates and terms arrived at by a CARP.”<sup>122</sup>

#### D. *The State of Internet Radio After the SWSA*

Although the SWSA provided a reprieve for some small webcasters, many streaming stations faced royalty costs that challenged their survival. In November, 2002, shortly after the passage of the SWSA, WebRock.net, a Christian modern rock station, and CyberRadio2000.com, a multichannel webcaster based in Chicago, were among stations announcing the end of their streams, at least on a temporary basis.<sup>123</sup> As of May, 2004, CyberRadio2000.com, one of those hoping to return to the Internet in the

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115. *SWSA Passes*, *supra* note 114.

116. *Id.*

117. Library of Congress Notification, *supra* note 114.

118. *Id.* at 78,513.

119. *Id.* at 78,511.

120. *Id.*

121. *Id.* at 78,512.

122. *Id.* at 78,511.

123. Paul Maloney & Kurt Hanson, *SWSA Can't Save 'Em All as at Least 3 More Services Go Silent*, RAIN: RADIO & INTERNET NEWSL., at [www.kurthanson.com/archive/news/120202/index.asp](http://www.kurthanson.com/archive/news/120202/index.asp) (Dec. 2, 2002).

near future,<sup>124</sup> had not resumed its webcasts. Web-only stations were not the only ones pulling the plug on their streaming audio transmissions. Approximately 150 stations owned by Clear Channel, the nation's largest radio network, stopped streaming in January of 2003, after the network told stations they would be paying webcasting costs along with their local budgets.<sup>125</sup>

A major obstacle to Clear Channel and other AM/FM stations operating online was in drawing enough advertising to support Internet streams.<sup>126</sup> Only about two percent of a station's listeners generally listen online. Depending on the size of the station, this could mean an audience of between a few dozen and 2,000 people could be listening at any given time.<sup>127</sup> Advertisers who choose to buy ads online may also be required to "pay additional royalties to the commercials' actors."<sup>128</sup> Some Clear Channel stations that continue to stream often shut down during transmissions to avoid payment.<sup>129</sup>

The week of December 16, 2002, the Clear Channel Radio Network was the top-rated network on the Internet in terms of total hours of listening time.<sup>130</sup> In the month following the shutdown, the station failed to make the top ten.<sup>131</sup>

### *E. Internet Radio, Reinvented*

Although royalties imposed on Internet radio sounded the apparent death knell for many webcasters, the industry as a whole did more than just survive; in the period following the Librarian's rate recommendations, the number of Americans who stream either audio or video at least once a month has increased by 27.5%.<sup>132</sup>

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124. *Id.*

125. Randy Dotinga, *Radio Ditches Webcasts en Masse*, WIRED NEWS, at <http://www.wired.com/news/digiwood/0,1412,57134,00.html> (Jan. 9, 2003).

126. *See id.*

127. *Id.*

128. *Id.*

129. *See, e.g.*, 1130 WISN (Milwaukee), at <http://www.newstalk1130.com/streaming.html#> (last visited May 13, 2004) ("During the broadcast, you may notice periods of intermittent interruptions, or silence, which is normal. These periods of silence are covering local on-air commercials, which we are not allowed to broadcast over the Internet.").

130. Press Release, Arbitron, Internet-Only Stations MUSICMATCH and RADIOIO Top Arbitron's MeasureCast Ratings (Jan. 2, 2003) (on file with Journal).

131. Press Release, Arbitron, RADIOIO Eclectic Ranks as the Top Individual Internet Radio Station According to Arbitron's MeasureCast Ratings (Feb. 6, 2003) (on file with Journal).

132. *Compare* ARBITRON 2004 STUDY, *supra* note 29, at 3 ("The estimated number of Americans who have used Internet broadcasts in the past month was 51 million people as of

With so many stations ending their transmissions due to DMCA fee requirements, how have these millions of people been able to access Web radio? In spite of DMCA royalties, certain groups of radio stations have found success on the Web. Two of today's top stations, Radio@AOL and Yahoo!'s Launch.com have the backing of large companies to support them. In March 2004, these two stations were the two most popular networks on the Internet, according to Arbitron.<sup>133</sup> Additionally, 26 of the top 50 radio stations belonged to the Radio@AOL network.<sup>134</sup>

Instead of relying solely on advertising or other income to pay new royalties, some webcasters decided to share the costs with their audiences. These stations continue to offer a limited selection of free stations, while creating a subscription-only "premium service" that includes special features such as better sound quality, advertisement-free listening, or additional channels.<sup>135</sup>

Both before and after royalties claimed numerous casualties, listeners have tuned in to Internet transmissions of public radio stations, which are broadcast in cities throughout the nation.<sup>136</sup> Along with the subscription services mentioned *supra*, many of them receive financial support from listeners.<sup>137</sup> As indicated by the number of public radio streams available online,<sup>138</sup> the DMCA did not appear to kill this group of webcasters.

The popularity of these and other stations stand as proof of Web radio's ever-growing audience. Without the financial obstacles imposed on them, perhaps more Web channels and networks could have flourished, as well.

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January 2004."), with ARBITRON/EDISON MEDIA RESEARCH, INTERNET 8: ADVERTISING VS. SUBSCRIPTION—WHICH STREAMING MODEL WILL WIN? 2 (2002), available at <http://www.arbitron.com/downloads/Internet8.pdf> ("In a typical month, 24% of those online (equal to approximately 40 million Americans) listen to or watch Internet audio or video.").

133. *Arbitron March Ratings*, *supra* note 31.

134. *Id.*

135. See, e.g., LAUNCHCast Subscription Wall, LAUNCH Music on Yahoo!, at <http://launch.yahoo.com/launchcast/subscription/default.asp> (last visited May 14, 2004); Msn-Entertainment-Music Stations, MSN.COM, at <http://entertainment.msn.com/stations/Default.aspx#Style> (last visited May 14, 2004).

136. According to Arbitron's ratings for March 22-28, 2004, six of the top 15 networks were listener supported, public radio stations. See *Arbitron March Ratings*, *supra* note 31.

137. See, e.g., KEXP Community Support, KEXP 90.3 FM (Seattle), at <http://www.kexp.org/support/support.asp> (last visited May 21, 2004); Support WBUR Today!, WBUR.org (Boston), at <http://www.wbur.org/support/> (last visited May 21, 2004); Support WXPn, WXPn 88.5 (Philadelphia), at <http://www.xpn.org/support.php> (last visited May 21, 2004).

138. For an idea of the numerous public radio programs available online, see the *Public Radio Fan* Web site, <http://www.publicradiofan.com>.

### F. *Challenges and Changes to the New System*

Although the SWSA provided relief for a group of webcasters, many still sought reform. While some wanted changes to the rates and royalties themselves, others hoped to completely revamp the CARP process.

In April of 2003, the RIAA and the Digital Media Association ("DiMA"), which represents large webcasters such as Yahoo! and AOL,<sup>139</sup> struck a payment deal for 2003 and 2004 royalty payments that was designed, in part, to allow both sides to avoid CARP proceedings.<sup>140</sup> According to the original terms, eligible nonsubscription webcasters would be assessed either \$.0762 per performance (with no royalties charged on 4% of all performances), or \$.0117 per aggregate tuning hour.<sup>141</sup> New subscription services had the same payment options, but instead of paying per hour or per performance, they could choose to pay 10.9% of their service revenues.<sup>142</sup> AM/FM webcasters, though not covered by the original agreement, were later included.<sup>143</sup> Under the established terms, news, sports, talk, or business programs would pay \$.0117 per aggregate tuning hour. Musical programs would pay a lower rate of \$.0088 due to the assumption that, compared to their Web-only counterparts, broadcasts play fewer songs per hour.<sup>144</sup> AM/FM stations choosing to pay per performance would pay the same rates as Web-only stations.<sup>145</sup> In February of 2004, the Copyright Office announced their acceptance of these proposals.<sup>146</sup>

As negotiations between webcasters and the recording industry were being hammered out, the CARP system itself was also the subject of scrutiny. The CARP had been criticized by many, and some of the most

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139. David McGuire, *Deal Leaves Small Webcasters in Limbo*, WASHINGTON POST.COM, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A48030-2003Apr7&notFound=true> (Apr. 7, 2003).

140. See Press Release, DiMA, DiMA and RIAA Submit Joint Royalty Proposal: Congressional Reform Still Necessary (Apr. 3, 2003), available at <http://www.digmedia.org/Final%20DiMA%20Statement%204-3-2003.pdf>.

141. DiMA, Summary of DimA/Soundexchange Proposal for Internet Royalty Rates & Terms, available at <http://www.digmedia.org/Summary%20of%20DiMA%20SX%20Proposal.pdf> (last visited May 15, 2004) [hereinafter DiMA Proposal]. Aggregate tuning hours are defined as "the total number of hours tuned to a given station or network in the reported time period." *Arbitron March Ratings*, *supra* note 31.

142. DiMA Proposal, *supra* note 141, at 1-2.

143. Paul Maloney, *AM & FM Simulcasts Added to 2003-4 Royalty Proposal*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/050903/index.asp> (May 9, 2003).

144. *Id.*

145. *Id.*

146. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 69 Fed. Reg. 5693 (Feb. 6, 2004) (to be codified at 37 C.F.R. pts. 262-63); see also *Copyright approves 2003-04 Royalty Settlements*, RAIN: RADIO & INTERNET NEWSL., at <http://www.kurthanson.com/archive/news/020604/index.asp> (Feb. 6, 2004).

common concerns were that “CARP decisions are unpredictable and inconsistent, CARP arbitrators lack appropriate expertise to render decisions and often reflect a content or user bias, CARPs are [unnecessarily] expensive and many CARP claims are frivolous.”<sup>147</sup>

On March 27, 2003, Congressman Lamar Smith (R-Tex.) introduced the Copyright Royalty and Distribution Reform Act.<sup>148</sup> As of publication, the Bill had passed in the House and had been referred to the Senate Judiciary committee.<sup>149</sup> If passed, the Act would replace the CARP with a panel of three copyright royalty judges appointed by the Librarian.<sup>150</sup> The Act would require that one of the judges have “significant knowledge of copyright law, and the other . . . have significant knowledge of economics.”<sup>151</sup>

#### IV. WHY ALL NONINTERACTIVE, NONSUBSCRIPTION TRANSMISSIONS DESERVE THE SAME COPYRIGHT PROTECTION

Two significant observations can be made based upon the events of the past two years: (1) many webcasters and others are dissatisfied with the existing royalty and licensing process, and (2) in spite of the new system, Internet radio is more popular than ever. These observations suggest that, although the new royalty system claimed numerous casualties, these stations could flourish, if they had not been crippled by fees imposed under the DMCA.

Although there are possible steps, suggested *supra*, that may improve the quality of the ratesetting process and the level of representation for all parties, another possible solution exists: Amend the DMCA to contain the original language of the DPRA—that is, exempt *all* nonsubscription, noninteractive webcasts from statutory licensing. It appears that such a change would protect a greater number of webcasters as well as promote Congressional intent. As the legislative history suggests, Congress enacted the DPRA, primarily, as a protection against “listen on

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147. *Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 108th Cong. 1(2003) (statement of Lamar Smith, Chairman, House Subcomm. on Courts, the Internet, and Intellectual Property); see also Sara J. O’Connell, Note, *Counting Down Another Music Marathon, Copyright Arbitration Royalty Panels and the Case of Internet Radio*, 8 MARQ. INTELL. PROP. L. REV. 161 (2004) (critiquing the existing CARP system and suggesting possible reform).

148. H.R. 1417, 108th Cong. (2004).

149. Library of Cong., Bill Summary & Status for the 108th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d108:1:./temp/~bd53wV:@@L&summ2=m&/bss/d108query.html> (last visited May 20, 2004).

150. H.R. 1417, 108th Cong. § 3 (2004).

151. *Id.*

demand” services. Additionally, the symbiotic relationship between AM/FM radio and the recording industry that Congress has acknowledged as a basis for exempting terrestrial stations from the payment of additional fees currently exists between the recording industry and webcasters, and it will continue to develop.

*A. Congress Enacted the DPRA to Address Concerns with Interactive Services.*

As discussed previously, the legislative history behind the DPRA indicates that Congress did not intend to extend the sound recordings copyright to all forms of streaming media. In fact, Congress explicitly stated that the DPRA was “a narrowly crafted response to one of the concerns expressed by representatives of the music community, namely that certain types of *subscription* and *interactive* audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.”<sup>152</sup> In other words, it appears that Congress was concerned that if listeners could access, via the Internet, any song they wished at any given time, listeners would no longer buy records.

Noninteractive webcasts do not fall within the scope of Congress’s concern. Whether transmitted only on the Web or simulcast on AM/FM radio, these stations function just like their broadcast radio counterparts. The webcaster has a set list of songs that are played without the listener’s ability to change, skip, or personally select the songs they would like to hear. Especially in the case of AM/FM webcasts, the content and format are basically the same; only the method of reception has changed.

Proponents of royalties for all Web transmissions point out that, in spite of the similarities that exist in all forms of nonsubscription, noninteractive transmissions, the unique nature of the Internet lends itself to more possibilities of an interactive listening experience. First, some have pointed out that software exists which allows listeners to record songs from webcasts and save them on their computers.<sup>153</sup> Although this method of

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152. S. REP. NO. 104-128, at 15 (1995) (emphasis added); H.R. REP. NO. 104-274, at 13 (1995) (emphasis added).

153. See, e.g., *Music on the Internet: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Judiciary Comm.*, 107th Cong. 16 (2001) (Prepared statement of Michael Stoller, Songwriter and Publisher, on Behalf of National Music Publisher’s Association, Inc.) (“[W]ith today’s Technology, a ‘listener’ can select a particular song or request a particular sub-genre of music from a webcaster, ‘listen’ to the songs, and then instruct the [recording] software to copy the songs the listener wants to keep onto a permanent, separate file in MP3 format.”).

copying music is possible, it seems highly impractical, considering the availability of easier methods of downloading music.<sup>154</sup>

Proponents also point out that many Internet radio stations, though noninteractive, are highly specialized, thus they “can better satisfy a listener’s cravings for some genres, potentially reducing CD sales.”<sup>155</sup> However, as discussed *infra*, Internet radio listeners tend to buy more albums than people who do not listen to webcasts. This statistic suggests that listening to specialized stations may direct Internet users to the type of music that interests them. Because they are more likely to hear songs they like, they may be more likely to purchase records. An emphasis on the programming differences between Internet and broadcast stations also ignores the numbers of streaming AM/FM stations that play *exactly* the same music as that heard over the airwaves.

### *B. Streaming Radio Stations are Developing a Symbiotic Relationship with the Recording Industry.*

Congress has taken great pains to protect AM/FM broadcasters from paying additional royalties because of the “symbiotic relationship” that radio stations share with the recording industry.<sup>156</sup> In enacting the DPRA, Congress did not want to “[upset] the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.”<sup>157</sup> Proof of this symbiosis is evidenced by radio’s ability to promote CDs, concerts, music videos, and other merchandise.<sup>158</sup>

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154. John Schneider, the founder of Radiopoly.com, an Internet music site, explained the impracticality of copying streaming audio:

Even if it were possible to make perfect digital copies of streamed Internet audio, there would STILL be no reason for the listener to waste countless hours and resources recording it, hoping to get a song they’re looking for (because Internet radio does not tell them what song is coming next), and editing out unwanted audio when they can go to iTunes and get a perfectly clean copy of the exact song they want for 99 cents. The above scenario would certainly end up costing a LOT more than a buck per song.

John Schneider, *Why is Radiopoly Still Silent?*, at <http://www.radiopoly.com> (last visited May 21, 2004) (on file with the Journal).

155. Jon Healey, *Webcast Measure Divides its Ranks; Some Oppose a Bill in Congress to Reduce Royalties from Small Stations, Saying it Still Would Not Help Them*, L.A. TIMES, Oct. 23, 2002 at C1 (quoting John Simson, Executive Director of SoundExchange).

156. See Fritts Statement, *supra* note 24, at 140.

157. S. REP. NO. 104-128, at 13; H.R. REP. NO. 104-274, at 12.

158. *Hearing on H.R. 1506, Digital Performance Right in Sound Recordings Act Before the Subcomm. on Courts and Intellectual Prop. of the House Judiciary Comm.*, 104th Cong. (1995) (summary of testimony, Edward O. Fritts, President and CEO of the National Association of broadcasters), available at <http://www.house.gov/judiciary/493.htm>.

As Internet radio stations continue to grow in popularity, their impact on record sales and music promotion will increase. Although advocates of the sound recording copyright reject the notion that Internet stations help sell music,<sup>159</sup> statistics prove otherwise. According to an Arbitron study, the more that people listen to Internet radio, the more CDs they will purchase.<sup>160</sup> Additionally, 48% of weekly Internet radio listeners said they purchased a CD because they were exposed to the artist via a webcast.<sup>161</sup> As mentioned *supra*, Web radio's ability to transmit more specialized, genre-specific channels also gives it the ability to publicize music generally not heard on AM/FM radio, thus possibly increasing record sales for these musicians.

Of course, in spite of the Internet's popularity, broadcast radio's listenership far exceeds that of even the most frequented Web channels.<sup>162</sup> This does not mean that the recording industry should discount the Internet's potential, either now or in the future, to promote music. As John Schneider, the founder of Radiopoly.com, stated, "[I]n the effort to avoid a music industry monopoly in the early days of commercial terrestrial radio, Congress correctly recognized that airplay represents tremendous promotional value for artists and record companies, thereby negating the need for a performance royalty fee."<sup>163</sup> It is only right, he added, that "today's fledgling broadcast medium (Internet radio) . . . be held to the same standard."<sup>164</sup>

## V. CONCLUSION

Streaming audio is more than just another way to listen to a favorite local station; it has the potential to expose its listeners to a variety of music and artists that they may never be heard on a local Top 40 station. Internet radio can, and does, open the minds and ears of its listeners to art from all around the planet. It educates, informs, and entertains in a way that no other medium has the capacity to do.

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159. See Healey, *supra* note 155.

160. ARBITRON/EDISON MEDIA RESEARCH, INTERNET 9: THE MEDIA AND ENTERTAINMENT WORLD OF ONLINE CONSUMERS, *SPECIAL RADIO INDUSTRY EDITION 21* (2002), cited in Kidd, *supra* note 81, at 366 n.164.

161. *Id.* at 25, cited in Kidd, *supra* note 81, at 366.

162. Daren Fonda, *The Revolution in Radio: Online Stations are Starting to Chip Away at the Dominance of the AM/FM Dial*, TIME, Apr. 19, 2004, at 55, available at LEXIS, TIME File ("For now the AM/FM industry doesn't seem too concerned. Arbitron estimates that 228 million Americans ages 12 and up still listen to broadcast radio weekly, and radio remains the top broadcast medium after TV for advertisers who want to reach a mass market.").

163. Schneider, *supra* note 154.

164. *Id.*



For these reasons, it is imperative that Congress reexamine the language of the DMCA. Exempting all nonsubscription, noninteractive transmissions from statutory licensing requirements will protect a group of webcasters who may have been unable to pay additional fees. Congress needs to remember that Internet radio has the potential to promote music and products in the same way that broadcast radio has done for so many years; Congress was willing to protect broadcast radio while still in its infancy and should be willing to do the same thing for webcasting.

Finally, the record industry must remember that its relationship with all stations, regardless of the medium through which they are transmitted, is a symbiotic one. When a song from an album reaches the buying public's ears, either through radio waves or through streaming audio, the chance that an individual will purchase that album is much higher than if the song had never been heard. Increased cooperation by everyone involved will increase the chances of Internet radio's success and allow its sound to be heard by more and more listeners.