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Just Asking for a Little "Respect": Radio, Webcasting & the Sound Recording Performance Right

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JUST ASKING FOR A LITTLE "RESPECT":
RADIO, WEBCASTING & THE SOUND RECORDING PERFORMANCE
RIGHT

ERIC BLOUW[†]

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I. INTRODUCTION

In April 1967, Aretha Franklin released what would become her signature song—the timeless classic, “Respect.”¹ This emotionally evocative track—with its fervent vocal delivery, wailing horns, and funky guitar—was Franklin’s “first Number One hit and the single that established her as the Queen of Soul.”² By all standards, it was a massive success for the legendary American singer—an artistic triumph that she would not be able to top during the remaining years of her bright career. In addition to being Franklin’s crowning musical achievement, her impassioned plea for respect also served as inspiration for the feminist movement of the 1960s. The song resonated as an “assertion of selfhood in the women’s movement,” and, in the process, solidified its place as an “enduring milestone” in popular music.³ To this day, its influence remains as strong as ever, having been selected by *Rolling Stone* as the fifth greatest song of all time.⁴

Although “Respect” is most commonly associated with Aretha Franklin, it was in fact written and first recorded by the late Otis Redding in 1965.⁵ Redding’s version—which differed significantly from Franklin’s later interpretation—was well received, peaking at number thirty-five on the Billboard charts.⁶ However, it was not until Franklin lent her powerful and soulful voice to the composition—and significantly reworked the style and

¹ PETER GURALNICK, *SWEET SOUL MUSIC: RHYTHM AND BLUES AND THE SOUTHERN DREAM OF FREEDOM* 332 (1986).

² *500 Greatest Songs of all Time, Aretha Franklin, ‘Respect’*, ROLLING STONE, <http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/aretha-franklin-respect-20110516> (last visited July 14, 2013).

³ *Aretha Franklin Biography*, THE ROCK & ROLL HALL OF FAME MUSEUM, <http://rockhall.com/inductees/aretha-franklin/bio> (last visited July 14, 2013).

⁴ *Aretha Franklin Biography*, *supra* note 3.

⁵ GURALNICK, *supra* note 1, at 150-51.

⁶ *Otis Redding Chart History*, BILLBOARD, <http://www.billboard.com/artist/320562/otis-redding/chart?page=1&f=379> (last visited Feb. 18, 2014).

arrangement—that the song became the classic that it is today.⁷ The enormous success of Franklin’s version completely eclipsed that of the original—so much so that even Redding himself playfully commented that she “stole that song from” him.⁸ Yet, despite Franklin’s invaluable contributions to Redding’s composition, the U.S. Copyright Act does not grant her full public performance⁹ rights in her recording.¹⁰ The Copyright Act grants a full public performance right to authors of “musical works,”¹¹ but only a partial performance right to authors of “sound recordings.”¹² Specifically, “[t]he exclusive rights of the owner of copyright in a sound recording are limited”¹³ to public performances “by means of a digital audio transmission.”¹⁴ In other words, Franklin does not have the exclusive right to perform her sound recording publicly, and, as such, is not entitled to receive any royalties when her recording is played on terrestrial radio stations (also known as

⁷ *500 Greatest Songs of all Time*, *supra* note 2.

⁸ *Aretha Franklin, Respect, Composed by Otis Redding*, ALLMUSIC, <http://www.allmusic.com/song/respect-mt0008606729> (last visited Feb. 20, 2014).

⁹ 17 U.S.C. § 101 (2012) (“To perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance or display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”).

¹⁰ David Byrne, *Performance Royalties on Commercial Radio*, THE VLOGGERHEADS ZONE (Jan. 28, 2014, 8:26 PM), <http://www.vloggerheads.com/profiles/blogs/performance-royalties-on-commercial-radio>.

¹¹ 17 U.S.C. § 106(4) (2012) (“[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . .”).

¹² *Id.* § 106(6) (“[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

¹³ *Id.* § 114(a) (“The exclusive rights of the owner of copyright in a sound recording are limited . . . and do not include any right of performance under section 106(4).”).

¹⁴ *Id.* § 106(6).

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AM/FM radio).¹⁵ Despite receiving extensive airplay on AM/FM stations since the song's release in 1967, Franklin's rendition of "Respect" has not earned the singer a dime in royalties from the terrestrial radio stations that play it. Meanwhile, Redding's estate continues to enjoy a full public performance right in his composition, and is paid a royalty every time Franklin's version of "Respect" is played on the radio.¹⁶

As the above example illustrates, copyright law subjects songwriters and performers to strikingly unequal treatment. For decades, performers have been lobbying Congress to correct this unfair imbalance in the Copyright Act.¹⁷ Their pleas, however, have thus far been ignored, with Congress refusing, time and time again, to extend the general performance right to sound recordings.¹⁸ As a result, terrestrial radio stations continue to broadcast recordings without having to compensate the performers who bring those songs to life.¹⁹ This system not only fails to recognize the great value that an engaging and talented performer can add to a composition, but also provides an additional incentive to songwriters, who enjoy the right to exclude others from publicly performing their compositions, and are paid royalties when their

¹⁵ Performers are also not entitled to receive royalties when their songs are played on television or in a public venue such as a restaurant or hotel. See John Miranda, *Music Licensing for Restaurants, Bars, and Retail Establishments*, CBA REC., Jan. 2014, at 47, 47.

¹⁶ Michael Huppe, "You Don't Know Me, but I Owe You Money": How SoundExchange is Changing the Game on Digital Royalties, ENT. & SPORTS LAW., Fall 2010, at 3, 4.

¹⁷ Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83, 91 (2009).

¹⁸ Byrne, *supra* note 10.

¹⁹ If sound recordings were subject to a full public performance right, terrestrial broadcasters would be required to pay sound recording copyright holders for the use of such works. Often the performer's record label owns the sound recording copyright in recordings that they have financed. See *infra* Part II.A.

songs are played.²⁰ Moreover, the United States is the only developed country in the world that does not grant performers full public performance rights, “placing the United States in a category with North Korea, China, and Iran in excluding these rights.”²¹ Many countries have reciprocated by withholding millions of dollars in royalties from American performers, resulting in a significant economic loss for the United States.

In the 1990s, new methods of consuming music were introduced to the world with the advent of the Internet. The new technologies brought about during the Internet revolution had a devastating effect on music sales, wreaking havoc on the tried-and-tested business model of the music industry. One such technology is “webcasting”—the non-interactive, continuous transmission of music or other audio programming on the Internet to one or more persons.²² Also known as “Internet radio,” webcasting is essentially the Internet equivalent of a terrestrial radio broadcast. Like other digital audio services such as satellite radio and cable radio, webcasting offers crisp sound quality that is arguably superior to that of analog terrestrial radio. Concerned that these new technologies had the potential to bring the music industry to its knees, the recording industry was finally able to convince Congress that those whose livelihoods depended on music sales deserved stronger rights under the Copyright Act.²³ As a result, Congress enacted the Digital Performance Right in Sound Recording Act of 1995,²⁴ which provided performers with a *limited* public performance right in their recordings. The right was limited

²⁰ 17 U.S.C. §§ 106, 114 (2012).

²¹ Noh, *supra* note 17, at 103 n.167.

²² Rebecca F. Martin, Note, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in A Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 743 (1996).

²³ *Id.* at 744.

²⁴ Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter DPRA 1995].

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in the sense that it only granted performers the exclusive right to license the performance of their copyrighted works publicly by means of a digital audio transmission. That is, terrestrial radio stations were not affected by the Act, and remain free to continue broadcasting songs without permission from—and without paying any royalties to—performers.²⁵

Today, depending on the medium used to broadcast a sound recording, the compensation paid to the performer varies considerably.²⁶ That is to say, the law is violating the core governing economic principle that laws be technologically neutral.²⁷ Whereas terrestrial broadcasters are exempt from paying performers any royalties for the use of their recordings, webcasters are required to pay exorbitant fees, which, in some cases, “often approach or even exceed 100% of revenue for many webcasters.”²⁸ Satellite radio and digital cable radio services, meanwhile, are also required to pay a royalty to performers—yet, because these services are grandfathered to a different royalty rate determination standard than that used for webcasters, they pay fees that pale in comparison to their Internet radio counterparts. As a result, terrestrial broadcasters, satellite radio, and digital cable radio services enjoy a significant advantage over webcasters, who are struggling to survive under the current royalty scheme. This is despite the fact that all of these services perform essentially the same function.

²⁵ Kamesh Nagarajan, *Public Performance Rights in Sound Recordings and the Threat of Digitalization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721, 723 (1995).

²⁶ Andrew Stockment, Note, *Internet Radio: The Case for A Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2161–62 (2009).

²⁷ Daniel Castro, *Internet Radio and Copyright Royalties: Reforming a Broken System*, INFO. TECH. & INNOVATION FOUND. (May 10, 2007), <http://www.itif.org/files/InternetRadio.pdf>.

²⁸ Stockment, *supra* note 26, at 2161.

As more and more webcasters are unable to sustain their businesses due to high royalty burdens, both consumers and artists are losing out. The fact of the matter is that Internet radio has become incredibly popular since its introduction in the 1990s, with listenership having reached a staggering 42% of adult U.S. broadband households.²⁹ Consumers have flocked to Internet radio for a number of reasons: it can be accessed anytime—from virtually anywhere—via applications on mobile devices,³⁰ and it offers musical diversity that is simply not available on terrestrial radio.³¹ For these reasons, Internet radio also serves the interests of a broad range of artists in a way that terrestrial radio cannot.³² Thus, it is crucial that the current law is changed to ensure that webcasters are able to effectively compete with other audio services. It is essential that consumers and artists be able to continue to enjoy the benefits that Internet radio provides.

In this paper, I will describe, in detail, how the Copyright Act not only provides unequal treatment to songwriters and performers, but also unfairly discriminates against webcasters by subjecting them to prohibitively high royalty rates. In Part II, I will provide an overview of music copyright law, which will include a brief historical analysis of copyright law's bias toward songwriters at the expense of performers. In Part III, I will discuss the advent of the Internet and its effect on the music business. In doing so, I

²⁹ TARGETSPOT, TARGETSPOT DIGITAL AUDIO BENCHMARK AND TREND STUDY, 2012, at 3 (2012), available at http://www.targetspot.com/wp-content/uploads/2012/05/TargetSpot-Digital-Audio-Benchmark-and-Trend-Study_2012-White-Paper-copy.pdf.

³⁰ Jessica L. Bagdanov, Comment, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14 CHAP. L. REV. 135, 154 (2010).

³¹ See Kaitlin M. Pals, Note, *Facing the Music: Webcasting, Interactivity, and a Sensible Statutory Royalty Scheme for Sound Recording Transmissions*, 36 J. CORP. L. 677, 692 (2011).

³² For example, Internet radio does not “suffer from the same geographical limitations of terrestrial stations’ analog signals.” *Id.*

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will provide an overview of the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998.³³ In Part IV, I will outline, in detail, the royalty rate determination procedures used to calculate rates for digital radio services. This will include an introduction to the two standards used to determine rates: the 801(b) Standard, which is applied to certain digital satellite and digital cable radio services; and the willing buyer/willing seller standard, which is applied to webcasters. In Part V, these two standards will be examined, in detail, in order to demonstrate why they produce drastically different royalty rates. Finally, in Part VI, I will propose several measures that can be taken to correct the problems inherent in the current public performance royalty scheme. Specifically, I will argue that the law must be amended to become technologically neutral. To achieve technological neutrality, two changes must be made. First, the public performance royalty exemption currently enjoyed by terrestrial radio stations must be brought to an end. Second, the same royalty rate standard must be applied to all radio services. In Part VI, I will also briefly discuss several pieces of recent legislation that attempt to change the current status quo, but have thus far not passed in Congress.

II. MUSIC COPYRIGHT LAW: AN OVERVIEW

A. *Musical Works and Sound Recordings*

Music copyright law “is notoriously complex.”³⁴ In order to fully appreciate the current inequity facing performers, it is important to have a general understanding of copyright law as it pertains to music. Unlike other works, such as paintings or poems,

³³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) [hereinafter DMCA 1998].

³⁴ THOMAS D. SYDNOR II, A PERFORMANCE RIGHT FOR RECORDING ARTISTS: SOUND POLICY AT HOME AND ABROAD 1 (2008), *available at* <http://www.pff.org/issues-pubs/pops/pop15.2performanceright.pdf>.

any given musical recording has two copyrightable elements: the musical composition and the sound recording.³⁵ The musical composition (also referred to as a “musical work”) is the fixed sequence of words, notes, and rhythms “which can be captured in written form and which structure the ‘generic’ sound of any given performance of a piece.”³⁶ The sound recording, on the other hand, is the recorded version of the underlying composition. The Copyright Act defines a sound recording as a “fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”³⁷ Whereas the musical works category³⁸ protects the copyright owner’s interest in the fixed sequence of words, notes, and rhythms that amount to the underlying song, the sound recordings category³⁹ protects the fixed performance of those words, notes, and rhythms. Thus, there may be multiple cover versions of any given musical composition, each of which is copyrightable for the originality of its sound recording.⁴⁰ Whereas “[t]he copyright in the musical work . . . belongs to the author or composer of the song who typically assigns his or her rights to a publisher for the purposes of

³⁵ See 17 U.S.C. § 102(a)(2) (2012) (covering “musical works, including any accompanying words”); *Id.* § 102(a)(7) (covering “sound recordings”).

³⁶ Thomas P. Wolf, Note, *Toward a “New School” Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, 2011 STAN. TECH. L. REV. N1 6 ¶ 12.

³⁷ 17 U.S.C. § 101 (2012).

³⁸ *Id.* § 102(a)(2).

³⁹ *Id.* § 102(a)(7).

⁴⁰ Brian Day, Note, *The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 MICH. TELECOMM. & TECH. L. REV. 179, 183 (2009). Note that when a copy of a literary or pictorial work is made, there are not necessarily any accompanying changes made to the original work. However, the performance of a musical work necessarily involves changes being made to the original work.

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representation, . . . sound recording copyrights . . . are normally owned by the artist or record label.”⁴¹

Together, these two separate elements create a dual layer of copyright protection in a single recorded musical work. Because the Copyright Act establishes these distinct interests in each song, it is possible for multiple parties—both legal and natural persons—to have a copyright ownership in any given musical recording.⁴² The simplest possible ownership scenario would involve a songwriter who has written, and subsequently recorded, his or her own song. So long as that performer-songwriter does not assign ownership of the song to a third party via a publishing or recording deal, the performer-songwriter will retain full copyright in both the underlying composition and sound recording. Whenever that song is then played or purchased, the performer-songwriter is entitled to collect all of the royalties generated.⁴³ However, the situation is rarely this straightforward, as demonstrated by the example involving Aretha Franklin’s version of “Respect,” and the royalty payments generated therefrom.

⁴¹ *Id.* at 182–83.

⁴² David M. Jenkins, *The Singer/Songwriter Wears Two Hats: An Introduction to Music Copyrights and the Singer/Songwriter's Sources of Income*, DCBA BRIEF, Feb. 2006, at 22, 24. Note that the two-tier structure of music copyright is universal in nature. In most jurisdictions, including Japan, Canada and other signatories of the Rome Convention, the rights that attach to sound recordings are known as “neighboring rights.” Whereas the structure under such systems is different than the structure under U.S. copyright law, the substance is essentially the same. In the Japanese Copyright Act, for example, performers—including actors, musicians and dancers—are granted certain economic and moral rights.

⁴³ *See id.* at 25–26.

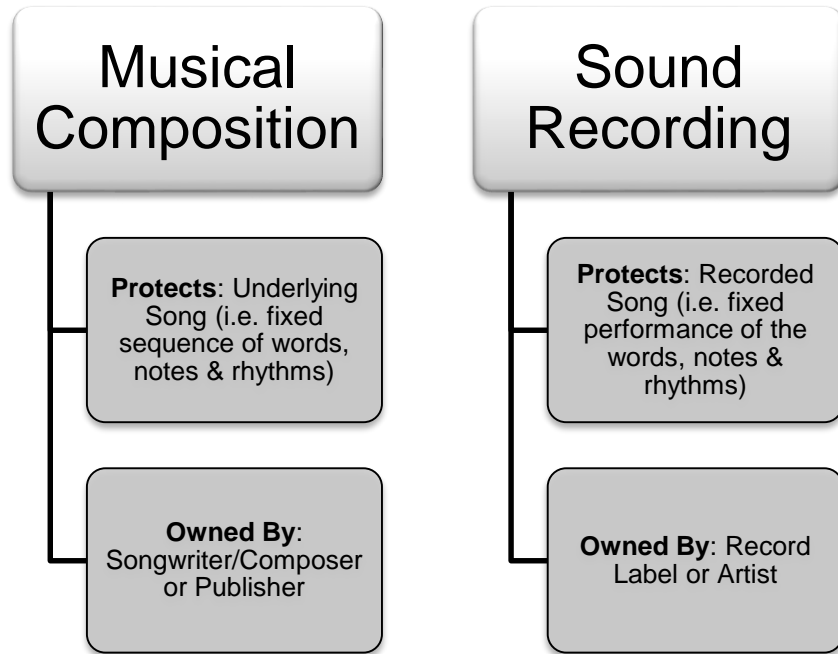


Figure 1: Music Copyright Structure⁴⁴

B. Copyright's Exclusive Rights Prior to The DPRA

U.S. copyright law grants a number of exclusive rights to the owner of a protected work. Prior to 1995, there were five such exclusive rights enumerated in § 106 of the Copyright Act, all of which continue in effect today. These rights include: (1) the right to reproduce copies of the work, (2) the right to create derivative works, (3) the right to distribute copies of the work to the public, (4) the right to perform the work publicly, and (5) the right to

⁴⁴ Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 69 (2011).

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display the work publicly.⁴⁵ However, not all protected works enjoy the benefit of each of the five exclusive rights. Namely, with respect to musical works and sound recordings, the law grants significantly different rights to songwriters and recording artists. That is, whereas songwriters enjoy the exclusive right to perform their works publicly, recording artists do not.

As per § 106 of the Copyright Act, both the compositional copyright holder and the sound recording copyright holder have the exclusive rights to reproduce their works, make derivative works, and distribute their works. The holder of the copyright in a musical composition, however, has an additional right—the public performance right—which does not belong to the holder of a copyright in a sound recording.⁴⁶ The public performance right gives the compositional copyright owner the power to prevent their work from being performed publicly, such as by way of broadcast over any type of radio.⁴⁷ This means that, before a song is played on analog AM/FM radio stations, the broadcaster must obtain permission from the owner of the copyright in the underlying work.⁴⁸ Moreover, whereas the compositional copyright owner is

⁴⁵ 17 U.S.C. § 106(1)–(5) (2012). Note that the Japanese Copyright Act (Act No. 48 of 1970) has a similar structure with respect to exclusive rights. *See* Arts. 21–28.

⁴⁶ As mentioned in Part I, and to be discussed in detail below in Part III.C, sound recording copyright owners, in 1995, were granted a limited public performance right—namely, the exclusive right to license the performance of their copyrighted works publicly by means of a digital audio transmission.

⁴⁷ 17 U.S.C. § 106(4) (2012).

⁴⁸ This is typically done by way of a blanket license issued by one of the three Performing Rights Organizations (PRO) in the United States: ASCAP, BMI and SESAC. Each of the three PROs issues blanket performance licenses to radio stations, restaurants, bars, and other establishments that play music publicly. Such establishments typically pay a single fee to the PRO in exchange for the blanket license, which enables them to play any song in that PRO's catalog. The PRO will then distribute the license fees as royalties to its members (i.e. songwriters, composers and music publishers) whose works have been performed. Broadcast radio stations typically pay a percentage of their gross

paid a royalty for the use of their song on terrestrial radio,⁴⁹ the owner of the sound recording copyright is not. Throughout the history of terrestrial radio, stations have been—and continue to be—free to transmit over the airwaves any sound recording, without obtaining the permission of sound recording copyright owners, and without paying them a dime in royalties.⁵⁰

C. A History of Unequal Treatment of Songwriters and Performers

Songwriters and recording artists have always been granted significantly different rights under U.S. copyright law. In 1831, U.S. copyright law granted, for the first time, protection to authors of musical compositions for reproductions in print form.⁵¹ Years later, in 1897, songwriters saw their rights further enhanced when they were granted a public performance right for their works.⁵² “During the early years, such rights were difficult to enforce.”⁵³ Not until the enactment of the Copyright Act of 1909⁵⁴ did the situation improve.⁵⁵ The 1909 Act “overhauled many preceding copyright laws, and created a clear property interest in performance rights for musical compositions and dramatic

revenue (roughly 2% each) to both ASCAP and BMI, and slightly less to SESAC. Stockment, *supra* note 26, at 2161–62.

⁴⁹ A compositional copyright holder will collect royalties from whichever PRO they have joined as a member. Each PRO uses a complicated formula to determine how the pool of money that they have collected from copyright users should be distributed.

⁵⁰ Pals, *supra* note 31, at 679; *see also* Bonneville Int’l Corp. v. Peters, 347 F.3d 485, 487 (3d Cir. 2003).

⁵¹ Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

⁵² Act of Jan. 6, 1897, ch. 4, 29 Stat. 481. The story of how this Act was passed is recounted in Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1200–16 (2007).

⁵³ Noh, *supra* note 17, at 89.

⁵⁴ Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075.

⁵⁵ Noh, *supra* note 17, at 89.

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works.”⁵⁶ Nevertheless, these rights were limited to public performances that were engaged in for profit.⁵⁷

By the late 1700s, “printed copies of musical works (i.e., sheet music) became an important source of income for music publishers.”⁵⁸ Because the use of sheet music offered a “commercially viable means of fixing, copying and publicly performing musical compositions,” the bolstering of federal copyright protection for musical compositions under the Copyright Act of 1909 became an important issue.⁵⁹ A commercially viable means of fixing and replaying sound recordings, on the other hand, did not yet exist at the time of the enactment of the Copyright Act of 1909.⁶⁰ Consequently, the justification for extending copyright to sound recordings had not yet arisen, and no protection was offered for recordings under the 1909 Act.

In the years following the passage of the Copyright Act of 1909, two parallel technological developments spurred the debate over the issue of granting copyright to sound recordings.⁶¹ On the one hand, advancements in the development of radio transmissions facilitated the widespread dissemination of public performances of musical compositions.⁶² This was followed by advancements in

⁵⁶ *Id.*

⁵⁷ Act of Mar. 4, 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075.

⁵⁸ Graeme W. Austin, *Radio: Early Battles Over the Public Performance Right*, in *COPYRIGHT AND THE CHALLENGE OF THE NEW* § 5.03 115, 123 (Brad Sherman & Leanne Wiseman eds., 2012).

⁵⁹ SYDNOR, *supra* note 34, at 2.

⁶⁰ Although “Thomas Edison had invented a means of recording and replaying sounds in 1877,” the technologies for reproducing sound recordings did not become commercially viable or widely adopted by consumers for years to come. *Id.*

⁶¹ *Id.*

⁶² Austin, *supra* note 58, at 117; *see also* Stan J. Liebowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 93, 107 (2004) (noting that by 1923, there were more than 500 commercial radio stations operating in the United States).

sound-recording technologies, to the point where “record players became sufficiently convenient and inexpensive to become standard consumer goods.”⁶³ These developments, in turn, gave rise to the modern recording industry, as consumers began purchasing pre-recorded music for private enjoyment.⁶⁴ Because sound recordings were not protected under the Copyright Act of 1909, recording artists and record labels were forced to rely on state common law to protect their recordings from unwanted radio play and duplication.⁶⁵ However, these laws varied from one state to another, resulting in a patchwork of legislation and judicial rulings.⁶⁶ Any rights granted to musicians had to be enforced on a state-to-state basis, and were thus largely ineffective in the fight against the unauthorized distribution and airplay of records.⁶⁷ Relying on the protection of state common law became even more

⁶³ SYDNOR, *supra* note 34, at 2.

⁶⁴ *Id.*; see also Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233, 247 (2007) (noting that, by 1946, independent record labels were producing fifty million records per year).

⁶⁵ See Sen, *supra* note 64, at 238 (noting that, under a strict reading of the Copyright Act of 1909, a person could legally make copies of a recording, so long as they compensated the composer of the underlying musical composition). In practice, however, performers were given limited protection in a number of U.S. states.

⁶⁶ See, e.g., *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (holding that the sale of sound recordings did not extinguish the common law copyright and that the recordings are protectable under state law); *RCA Manufacturing Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (deciding not to protect sound recordings, finding that printing “Not Licensed for Radio Broadcast” on records was not sufficient to prevent radio stations from broadcasting a record that they had bought, and that performers retained their common law copyright only if the sound recordings were not distributed or sold); *Waring v. WDAS Broadcasting Station, Inc.*, 194 A. 631 (Pa. 1937) (holding that there was a protectable state right in sound recordings that were deemed “novel and artistic”); see also Jonathan Franklin, *Pay To Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 89–90 (1993).

⁶⁷ Franklin, *supra* note 66, at 89–90.

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problematic as the cost of sound recordings declined, and advancements were made with respect to duplicating technologies.⁶⁸ In response, recording artists and record labels lobbied for “the sort of federal copyright protection long enjoyed by songwriters.”⁶⁹

D. Limited Protection Granted to Performers Under The Sound Recordings Act of 1971

Not until 1971 did Congress finally respond to the increasing prevalence of recording piracy. They did so by enacting the Sound Recordings Act (SRA), which extended, for the first time, copyright protection to sound recordings.⁷⁰ The SRA, which came into effect in 1972, gave limited protection to sound recording copyright owners by granting statutory protection against the duplication of recordings.⁷¹ Following this enactment, sound recording copyright owners held the exclusive rights to reproduce, distribute, and adapt their work.⁷² Importantly, however, the public performance right was specifically withheld.⁷³ As such, radio stations were allowed to continue broadcasting records without providing any compensation to sound recording copyright owners. Artists and labels thus continued to miss out on the compensation being realized by compositional copyright

⁶⁸ SYDNOR, *supra* note 34, at 2.

⁶⁹ *Id.*

⁷⁰ Pub. L. No. 92-140, 85 Stat. 391 (1971) [hereinafter *Sound Recording Act of 1971*].

⁷¹ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003) (maintaining that “with the Sound Recording Amendment of 1971...a limited copyright in the reproduction of sound recordings was established in an effort to combat recording piracy”); *see also* Sen, *supra* note 64, at 238.

⁷² *Sound Recording Act of 1971*, *supra* note 70, at § 1(a).

⁷³ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003).

owners, who had long been paid by broadcasters for the public performance of their songs.⁷⁴

The absence of a full performance right for sound recording copyright owners reflects the political influence of two groups: broadcasters,⁷⁵ and music composers and publishers.⁷⁶ Throughout the history of radio, broadcasters have been a dominant force in the fight against granting performance rights in sound recordings.⁷⁷ Concerned about the financial implications of having to pay royalties to sound recording copyright owners—on top of what they already pay to songwriters—traditional radio broadcasters have, for decades,⁷⁸ lobbied strongly to maintain the status quo. Traditional radio broadcasters have thus far succeeded in preventing sound recording owners from gaining full, exclusive performance rights in copyrighted works.⁷⁹

Owners of compositional copyrights, meanwhile, have also been particularly vocal in their opposition to a full public performance right for sound recordings. Songwriters and publishers—and the Performance Rights Organizations (PROs)⁸⁰ who represent them—believe that there would be little to gain, and much to lose, if the United States were to grant full public performance rights to sound recordings. Their chief concern is that,

⁷⁴ Noh, *supra* note 17, at 88.

⁷⁵ Sen, *supra* note 64, at 237.

⁷⁶ Mary La France, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 HARV. J. SPORTS & ENT. L. 221, 222 (2011).

⁷⁷ Noh, *supra* note 17, at 89.

⁷⁸ *Id.* (noting that “broadcasters . . . have proven to be a formidable opponent [to the implementation of a full public performance right for sound recordings] over the decades.”).

⁷⁹ Andrey Spektor, *How “Choruss” Can Turn Into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, 16 RICH. J.L. & TECH. 3, ¶9 (2009), available at <http://jolt.richmond.edu/v16i1/article3.pdf>.

⁸⁰ For an explanation of PROs, see *supra* note 48.

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should such a right be granted, the enforcement efforts of sound recording copyright owners would interfere with their own ability to commercially exploit their copyrighted compositions to the full extent possible.⁸¹ That is, composers fear that the sound recording copyright owners would “act as gatekeepers, potentially vetoing exploitation opportunities for the copyright compositions embodied in their sound recordings.”⁸² Moreover, composition copyright owners fear that any royalties paid by users to the sound recording copyright owners would reduce their own revenue stream.⁸³ Why share the pie, when you can eat it all yourself?

The heavy resistance put forward by the alliance between broadcasters and PROs successfully blocked the imposition of a sound recording performance right—not only under the SRA in 1971, but also under the subsequent Copyright Act of 1976.⁸⁴ Despite strong lobbying by performing artists, who wanted the same performance rights as those granted to musical works, Congress could not be swayed.⁸⁵ During the legislative processes leading up to the passage of these Acts, it became clear that the alleged positive impact that radio play has on record sales was the main justification for denying a public performance right for sound recordings.⁸⁶

⁸¹ La France, *supra* note 76, at 222.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Day, *Super Brawl*, *supra* note 40, at 184.

⁸⁵ Noh, *supra* note 17, at 91. Note also that the Copyright Office, as far back as 1978, has publicly recognized the need for a public performance right in sound recordings. *See also*, Performance Rights in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary, 95th Cong. 117 (1978).

⁸⁶ Noh, *supra* note 17, at 91.

E. The Relationship Between the Radio Industry and Record Sales

The argument put forward by broadcasters in their opposition to a full public performance right for sound recordings has remained unchanged for years. Led by the powerful lobby group, the National Association of Broadcasters (NAB), they have continually convinced Congress that radio airplay amounts to free advertising for sound recordings.⁸⁷ According to this argument, if a consumer hears a new song on the radio, the likelihood of that individual later purchasing that music increases.⁸⁸ That is, a symbiotic relationship is said to exist between record labels and broadcasters.⁸⁹ In exchange for the free use of sound recordings, broadcasters provide record labels and performers with free promotion.⁹⁰ Any additional payment to sound recording copyright owners, broadcasters argue, would represent an unwarranted handout.⁹¹ Some have gone as far as to suggest that record labels and performers should pay broadcasters for their advertising services.⁹² The validity of this argument, as will be explained below in Part VI, is questionable. Nonetheless, it has proven to be persuasive. “[T]he 1971 Sound Recording Act would remain the

⁸⁷ Day, *Super Brawl*, *supra* note 40, at 194.

⁸⁸ See U.S. Congress, Senate Committee on the Judiciary, Copyright Law Revision: S. Rept 93-983 on S. 1361, 93d Cong., 2d Sess., 1974 at 225–26 (1974) (noting that “for years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn depends in great measure on the promotion efforts of broadcasters”).

⁸⁹ Vanessa Van Cleaf, *A Broken Record: The Digital Millennium Copyright Act’s Statutory Royalty Rate-Setting Process Does Not Work For Internet Radio*, 40 STETSON L. REV. 341, 355 (2010).

⁹⁰ Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board’s March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 264–65 (2008).

⁹¹ Sen, *supra* note 64, at 237.

⁹² *Id.*

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sole legislation protecting sound recordings for the next twenty-five years.”⁹³

III. THE RISE OF THE INTERNET & WEBCASTING

A. *The Internet Turns the Music Industry on its Head*

The advent of the Internet in the 1990s drastically changed the way that consumers listen to music. By introducing consumers to a myriad of new ways to access music, the Internet has shifted the balance of powers among music industry players, greatly affecting the once almighty record labels.⁹⁴ Music lovers can now listen to and obtain their favorite songs online, without having to purchase full albums.⁹⁵ Moreover, as advancements in high speed Internet access are made, Internet users are increasingly able to access digital content instantaneously. With the click of a button, users can listen to music whenever, and from wherever, they choose.⁹⁶ The ability to instantly access a vast and constantly growing catalogue of music from distant locations has been referred to as the “celestial jukebox.”⁹⁷

Internet radio is the non-interactive, continuous transmission

⁹³ Rick Marshall, *The Quest For “Parity”: An Examination of the Internet Radio Fairness Act*, 60 J. COPYRIGHT SOC’Y U.S.A. 445, 450 (2013).

⁹⁴ Rights holders, such as record labels, typically make a great effort to combat the unauthorized distribution of their works. However, as the Internet changes the way that people listen to music, record labels have increasingly been embracing websites such as YouTube, which, despite hosting large amounts of copyright infringing content, can help to advance the interests of the record labels and artists. Jay Patel, *Viral Videos: Medicine for Record Labels in the Fight Against Copyright Termination?*, 32 LOY. L.A. ENT. L. REV. 47, 52 (2012).

⁹⁵ Bagdanov, *supra* note 30, at 136.

⁹⁶ Michael P. Kella, *Arista Records v. Launch Media: An Analysis of the Second Circuit’s Ruling on Webcast Interactivity and a Look at the Current and Future State of Interactive Webcasting Technology*, 30 ST. LOUIS U. PUB. L. REV. 199, 200 (2010).

⁹⁷ *Id.*

of music or other audio programming on the Internet. In essence, a webcast is the Internet equivalent of a broadcast. It is “the transmission of a digital audio or video file via the Internet to one or more persons who view or listen to the file without downloading (permanently saving) it.”⁹⁸ To send music to listeners, webcasters use a technology known as “streaming.” This process involves dividing a streamed song into small packets of information, each of which is likely to take a different route from the servers of the streaming service to the user’s computer.⁹⁹ Because the travel time needed for each song fragment may vary, the user’s computer will collect and reconstruct the first several seconds of the song in a form of temporary RAM storage known as a “buffer.”¹⁰⁰ Once a user’s computer has collected and reconstructed the first several seconds of a song, the computer begins to play the music. Meanwhile, the computer continues to receive additional streams of song fragments, thus keeping the buffer full, and the song playing.¹⁰¹ The process is repeated until the entire song has played.

The key difference between downloading and streaming a song is what occurs when the transmission reaches the user’s computer.¹⁰² When a user downloads a song, a copy of that song will remain on the user’s computer until the user chooses to erase it. Streams, on the other hand, are designed to be used once and then discarded.¹⁰³ Unlike when music is downloaded, when a song

⁹⁸ Stockment, *supra* note 26, at 2132.

⁹⁹ W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 861 (2007).

¹⁰⁰ *Id.*

¹⁰¹ Amy Duvall, *Royalty Rate-Setting For Webcasters: A Royal(ty) Mess*, 15 MICH. TELECOMM. & TECH. L. REV. 267, 268 (2008).

¹⁰² Cardi, *supra* note 99, at 860.

¹⁰³ Duvall, *supra* note 101, at 269. Note that downloading a song clearly implicates the reproduction right of both layers of the song’s copyright, but does not implicate the public performance right unless simultaneous streaming occurs while downloading (i.e. listening to the song via streaming while downloading it). Streaming transmissions, on the other hand, implicate the public

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is streamed, the user's computer does not retain a copy of the sound recording. Once a streamed song fragment has been played, it is erased and replaced in the buffer by a yet-unperformed fragment.¹⁰⁴ When the song has finished playing, the buffer is left empty. In order to hear the song again, the user would have to initiate another transmission and performance from the streaming service's website.¹⁰⁵

B. Digital Audio Technology Strikes Fear Into the Hearts of the Recording Industry

The rapid growth in digital audio technology became a major concern for the recording industry. By 1995, digital transmissions of musical recordings were being offered to subscribers on the Internet.¹⁰⁶ The recording industry feared that, as Internet data transmission speeds increased over time, this technological development would drastically undermine their business model. The labels believed that if consumers could eventually get music on-demand through an interactive, digital service, they would stop purchasing traditional records.¹⁰⁷ Specifically, the alternative market offered by the Internet was thought to have the potential to cut out the recording industry's products and erode their profits, ultimately inhibiting the creation of new music.¹⁰⁸ A reduction in the amount of music produced

performance right of both layers of the song, but not the reproduction right. *See* Spektor, *supra* note 79, at 30.

¹⁰⁴ Cardi, *supra* note 99, at 860.

¹⁰⁵ *Id.*

¹⁰⁶ H.R. REP. NO. 104-274, at 12 (1995); *see also* Arista Records, L.L.C. v. Launch Media, Inc., 578 F.3d 148, 153 (2d Cir. 2009) (noting that data transmission over the Internet at this time was very slow (downloading a song took an average of twenty minutes in 1994), but the recording industry foresaw the potential of the Internet to threaten its business model as bandwidth increased).

¹⁰⁷ H.R. REP. NO. 104-274, at 13 (1995).

¹⁰⁸ Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 488 (3d Cir. 2003).

would in turn harm consumers, who would be left with less variety to choose from.

In addition to offering a convenient, legal market to purchase and listen to music, the Internet also greatly increased the likelihood that copyrighted works would be used unlawfully.¹⁰⁹ Not only did early online digital transmissions offer sound quality far superior to that of analog recordings broadcast over terrestrial radio, they were also much more convenient to bootleg. As such, the recording industry foresaw that the risk of unauthorized copying of songs streamed over the Internet would be far more dangerous than the risk of recordings made from terrestrial radio.¹¹⁰ Because one could record a streamed song that had sound quality as good as—or substantially similar to—CD quality,¹¹¹ the Recording Industry Association of America (RIAA)¹¹² “viewed on-demand radio as a potential market replacement for album sales.”¹¹³

The advent of digital music transmissions brought the issue of performance rights to the forefront, drawing “attention to the disparity in the royalties received by performers who wrote their material and those who did not.”¹¹⁴ Historically, performers—

¹⁰⁹ See Lauren E. Kilgore, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 562 (2010) (noting that, as early as 1994, the issue of online music piracy began to make national headlines).

¹¹⁰ *Id.* at 563.

¹¹¹ Gregory F. Donahue, *The Sky Is Not Falling: The Effect of a Performance Right on the Radio Market*, 87 IND. L.J. 1287, 1291 (2012).

¹¹² The RIAA is “the trade organization that supports and promotes the creative and financial vitality of the major music companies.” *Who We Are*, RIAA, http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (last visited Apr. 13, 2014).

¹¹³ Kilgore, *supra* note 109, at 562.

¹¹⁴ Sen, *supra* note 64, at 265.

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although not possessing a public performance right¹¹⁵—have been paid a royalty by their record label when their physical records are purchased at record stores.¹¹⁶ With the arrival of digital audio technology and illegal bootlegging, however, the public gained “on-demand access to a performer’s material without having to purchase a hardcopy.”¹¹⁷ The possibility thus arose that, as sales decreased, record labels—and, consequently, performers—would be left entirely uncompensated. This was due in part to the fact that digital transmissions were seen as being “legally equivalent to a public performance rather than to the purchase of a physical album.”¹¹⁸ In other words, digital technology created a loophole that enabled consumers to access music without any compensation landing in the pockets of the labels and artists. Record labels, represented by the RIAA, made compelling arguments before Congress that, in light of these technological developments, the traditional licensing structure failed to adequately protect and compensate artists.¹¹⁹ Under pressure from the recording industry,

¹¹⁵ See Spektor, *supra* note 79, at 24.

¹¹⁶ Royalties paid to artists typically range between 8% and 25% of the suggested retail price of the recording. As there is no statutorily imposed fee that labels must pay artists, the royalty that the artist and label ultimately agree on in the recording contract depends on the clout of the artist. Moreover, record labels are notorious for using various sly accounting methods to reduce the amount of money that they must pay the artist. For example, labels typically make deductions for such things as packaging, breakage, giveaways, and returns. Lastly, labels generally withhold the royalties owed to the artist until all advances and costs incurred by the label are recouped. It is estimated that, after all is said and done, the royalty paid to the artist yields significantly less than 10% of the wholesale record price. See generally Spektor, *supra* note 79.

¹¹⁷ Sen, *supra* note 64, at 265.

¹¹⁸ *Id.*

¹¹⁹ Day, *Super Brawl*, *supra* note 40, at 184. Note that, in 1995, the NAB joined the RIAA to lobby for a limited performance right for sound recording owners. They did so in an effort to handicap webcasters (who the NAB saw as potential new competitors) with an additional licensing requirement and cost. The NAB argued that the right should be limited to digital transmissions,

Congress decided to reevaluate whether a performance right for sound recordings should be granted.

C. *The DPRA*

In 1995, Congress enacted the Digital Performance Right in Sound Recording Act of 1995 (DPRA).¹²⁰ The DPRA benefitted sound recording copyright owners by adding them to the list of protectable rights found in 17 U.S.C. § 106.¹²¹ Specifically, it granted sound recording copyright owners the exclusive right to license the performance of their copyrighted works publicly by means of a digital audio transmission. The DPRA was meant to address the record industry's concerns that "the advance of digital recording technology and the prospect of digital transmission capabilities created the possibility that consumers would soon have access to services whereby they could pay for high quality digital audio transmissions (subscription services) or even pay for specific songs to be played on demand (interactive services)."¹²² Congress wanted to ensure that those whose livelihoods depended on effective copyright protection for sound recordings would "be protected as new technologies affect the ways in which their creative works are used."¹²³

Although the DPRA established an exclusive digital transmission right for sound recording copyright holders, the right was narrow in scope, and riddled with exceptions. The two important exceptions carved out were the § 114(d)(1) limited

thereby continuing the exemption enjoyed by traditional broadcasters. *See* Carey, *supra* note 90, at 266.

¹²⁰ DPRA 1995, *supra* note 24.

¹²¹ *See* 17 U.S.C. § 106(6) (2012) ("The owner of copyright under this title has the exclusive rights to do and to authorize any of the following In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

¹²² *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003).

¹²³ S. REP. NO. 104-128, at 10 (1995).

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public performance right¹²⁴ and the § 114(d)(2) compulsory (or ‘statutory’) license.¹²⁵ These exceptions reflected compromises worked out among the competing stakeholders; namely, sound recording copyright holders, radio broadcasters, PROs, and music publishers.¹²⁶ The right was thus limited to:

“(1) transmissions, as opposed to live performances (thereby exempting concerts, restaurants, dances, amusement parks, etc.); (2) of audio works, as opposed to audiovisual works (thereby exempting transmissions of movies); (3) that occur in digital format, as opposed to analog (thereby exempting contemporaneous AM and FM radio stations, and contemporaneous TV stations as well).”¹²⁷

¹²⁴ 17 U.S.C. § 114(d)(1) (2012) (exempting certain non-interactive transmissions and retransmissions, such as non-subscription broadcast transmissions and certain retransmissions of non-subscription broadcast transmissions); *see also* DPRA 1995, *supra* note 24. In its original wording, the DPRA stated that “the performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of § 106(6) if the performance is part of (A)(i) a non-subscription transmission other than a retransmission; (ii) an initial non-subscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or (iii) a non-subscription broadcast transmission.” *Id.* This was later amended by the DMCA. *See infra* Part III.D.

¹²⁵ 17 U.S.C. § 114(d)(2) (2012); *see* Duvall, *supra* note 101, at 270 (asserting that a statutory license is compulsory because it is automatically granted to the user of the copyright work so long as the user complies with certain requirements stipulated under the statute). Individual permission is not required from the copyright holder. Note that all services that did not fall within these two exceptions were required to “individually negotiate royalty rates with sound recording copyright holders.” *Id.*

¹²⁶ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21[B] (Matthew Bender, Rev. Ed.); *see also* Duvall, *supra* note 101, at 270.

¹²⁷ NIMMER & NIMMER, *supra* note 126, § 8.21[B].

The DPRA created a complex, three-tiered system for categorizing license requirements into separate rates for: (1) non-subscription broadcasters, (2) non-interactive subscription transmissions, and (3) interactive services.¹²⁸ The licensing requirements for each of the three categories differed, with each being based on the extent to which the service would have an effect on record sales and the likelihood that infringing reproductions would be made.¹²⁹

First, non-subscription broadcasters are those not controlled or limited to certain recipients.¹³⁰ Broadcasters falling into this category—including terrestrial radio stations—are subject to the § 114(d)(1) limited public performance right. This is said to be the “most important exemption in the DPRA,”¹³¹ in that it completely exempts qualifying entities from “paying royalties to sound recording copyright owners for the performance of their works.”¹³² That is, with the passage of the DPRA, terrestrial radio broadcasters were given the green light to continue playing records without having to compensate performers and record labels. Congress chose to uphold the royalty exemption for terrestrial radio stations, as it did not want to impose “new and unreasonable burdens on radio . . . broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.”¹³³ Moreover, Congress did not specifically address

¹²⁸ DPRA 1995, *supra* note 24.

¹²⁹ Bagdanov, *supra* note 30, at 142; *see generally*, Cardi, *supra* note 99.

¹³⁰ S. REP. NO. 104-128, at 16 (1995).

¹³¹ Bagdanov, *supra* note 30, at 143.

¹³² Duvall, *supra* note 101, at 271.

¹³³ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003) (quoting H.R. REP. NO. 104-274, at 14 (1995)). Congress also noted that it would be best to avoid “upsetting the longstanding business and contractual relationships among record producers and performers, music composers and

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Internet radio technology in the DPRA, as webcasting was still an emerging technology at the time—its potential was severely restricted by slow Internet speeds.¹³⁴ By failing to differentiate between terrestrial radio and Internet radio, webcasting and other non-subscription based music services offered online fell into this first category, and were thus exempt from the requirement to pay a royalty to sound recording copyright owners.¹³⁵

Second, non-interactive subscription transmissions (e.g. digital cable and satellite radio¹³⁶) are subject to the compulsory license found in § 114(d)(2).¹³⁷ In order to provide subscription-based music services, such entities are required to obtain the statutory license created under the DPRA.¹³⁸ To do so, non-interactive subscription services must comply with certain statutory conditions, which are set by an arbitration panel known as the Copyright Arbitration Royalty Panel (CARP), and adopted by the Librarian of Congress.¹³⁹ For instance, the service cannot be

publishers and broadcasters that have served all of these industries well for decades.” H.R. REP. NO. 104-274, at 12 (1995).

¹³⁴ Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L.J. 431, 439 (2009) (noting that, when the DPRA was passed, the RIAA and Congress were most concerned about “audio on-demand” and “pay-per-listen” interactive services online, rather than webcasting or peer-to-peer services such as Napster).

¹³⁵ Susan A. Russell, *The Struggle Over Webcasting—Where is the Stream Carrying Us?*, 1 OKLA. J.L. & TECH. 13, 13 (2004) (“The Act calls for royalty payment on digital audio transmissions offered through subscription services such as cable and satellite . . . DPRA does not address the “issue of webcasting or other nonsubscription based song services offered on the Internet.”).

¹³⁶ Cable radio, which is similar in nature to cable television, delivers radio signals via coaxial cable. Satellite radio, on the other hand, involves the broadcast of signals from satellites in space.

¹³⁷ 17 U.S.C. § 114(d)(2) (2012).

¹³⁸ Castro, *supra* note 27, at 3.

¹³⁹ Duvall, *supra* note 101, at 271; *see also Copyright Arbitration Royalty Panels (CARP)*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/carp/> (last

interactive, cannot pre-announce the broadcast of a particular song, must include information about the recording being broadcast, and is restricted in terms of the number of songs by a single artist and the number of songs on a single album that they can play per hour.¹⁴⁰ If a non-interactive service provider fails to meet these requirements, they have the arduous task of negotiating privately with the sound recording copyright holder of each individual recording that they wish to play.¹⁴¹ Importantly, the DPRA stipulated that the compulsory license royalty rate would be set according to a four-part standard found in 17 U.S.C. § 801(b)(1),¹⁴² and thus known as the 801(b) Standard. As will be seen below, the 801(b) Standard plays a key role in the debate over sound recording public performance royalty rates.

Third, interactive services are those that enable users to hear a particular song on-demand.¹⁴³ Services that fall into this category include websites such as Rhapsody and Grooveshark,¹⁴⁴

visited Apr. 13, 2014) (stating “[t]he CARP system consisted of ad hoc arbitration panels that recommended the royalty rates and distribution of royalty fees collected under certain statutory licenses and set some of the terms and conditions of some of the statutory licenses. Each CARP was selected for a particular proceeding . . . and had up to 180 days to deliver its recommendation for the rate adjustment or distribution, as the case may be. With the enactment of the Copyright Royalty and Distribution Reform Act of 2004 (P.L. 108-419) on Nov. 30, 2004, the Copyright Arbitration Royalty Panel (CARP) system that had been part of the Copyright Office since 1993 was phased out. The Act replaced CARP with a system of the Copyright Royalty Board (CRB).”).

¹⁴⁰ 17 U.S.C. § 114(d)(2) (2012); DPRA 1995, *supra* note 24, § 3.

¹⁴¹ Bagdanov, *supra* note 30, at 143.

¹⁴² 17 U.S.C. § 801(b)(1)(A)–(D) (2012).

¹⁴³ La France, *supra* note 76, at 230.

¹⁴⁴ Rhapsody is an online music store, launched in 2001, and available only in the United States. The service provides you with “the power to play exactly the songs you want, wherever you are.” *What is Rhapsody?*, RHAPSODY.COM, <http://www.rhapsody.com/what-is-rhapsody/what-is-rhapsody.html> (last visited Apr. 13, 2014). Grooveshark is an online music service that lets users choose particular songs to hear on request and create personalized song playlists. *See* GROOVESHARK, <http://grooveshark.com/> (last visited Apr. 13, 2014).

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which provide a list of available songs to be played immediately at the request of the user.¹⁴⁵ Because these providers have the greatest potential for displacing record sales, Congress felt it necessary to tip the balance in favor of copyright holders. Consequently, “interactive services are responsible for the most stringent level of copyright licensing requirements.”¹⁴⁶ Interactive services do not qualify for a compulsory license. Rather, the DPRA subjects them to an exclusive right, meaning that they must negotiate licenses with sound recording copyright holders for the on-demand transmission of copyrighted sound recordings.¹⁴⁷ Copyright holders have the right to refuse to license their sound recordings to interactive music providers, thus keeping their works from appearing on such websites.

¹⁴⁵ Duvall, *supra* note 101, at 271 (noting that terrestrial radio stations that allow listeners to call in and request particular songs are not covered by this definition); *see also* Castro, *supra* note 27, at 3.

¹⁴⁶ Bagdanov, *supra* note 30, at 142.

¹⁴⁷ Castro, *supra* note 27, at 3–4.

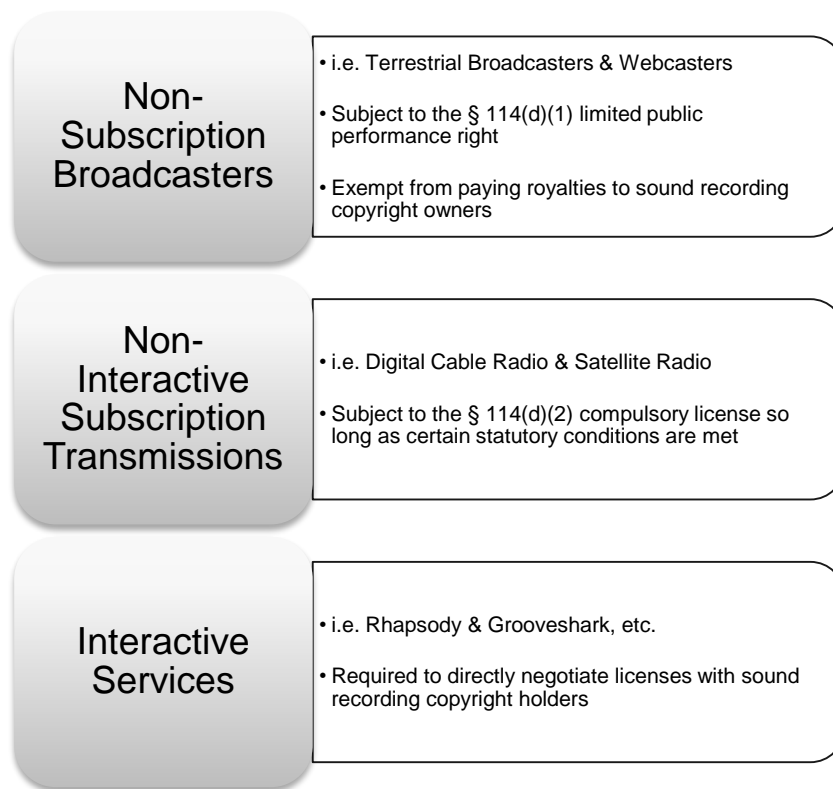


Figure 2: The DPRA's Three-Tiered Licensing Requirement System

D. The DMCA

Although the DPRA represented significant progress in the effort to protect the interests of sound recording copyright owners, it certainly had its shortcomings. As noted above, webcasters were not specifically included in the DPRA, leaving them exempt from paying public performance royalties. This omission did not sit well with those in the recording industry. In the years following the enactment of the DPRA, as streaming technologies continued to improve, the record industry grew increasingly concerned about

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the DPRA's inability to protect their interests.¹⁴⁸ The RIAA complained that non-subscription webcasting services "diminished record sales, cut into profits, and hindered growth of the recording industry."¹⁴⁹ They battled with webcasters over whether such services should qualify for the limited public performance right or be labeled as an interactive service, thus requiring them to individually negotiate royalties with owners of copyrights in sound recordings.¹⁵⁰ Ultimately, Congress sided—at least in part—with the recording industry, resulting in a series of amendments as part of the Digital Millennium Copyright Act of 1998 (DMCA).¹⁵¹

The DMCA addressed the issue of royalties to be paid by webcasters for the public performance of sound recordings via digital audio transmissions.¹⁵² Importantly, it modified § 114(d)(1) of the Copyright Act by removing the royalty exemption for "a non-subscription transmission other than a retransmission," under which non-interactive, non-subscription webcasts fell.¹⁵³ By doing so, the DMCA expanded the class of transmissions that are subject to compulsory licenses.¹⁵⁴ Namely, non-interactive, non-subscription webcasters were shifted by Congress into the same

¹⁴⁸ Day, *Super Brawl*, *supra* note 40, at 185.

¹⁴⁹ Bagdanov, *supra* note 30, at 144.

¹⁵⁰ Duvall, *supra* note 101, at 272.

¹⁵¹ DMCA 1998, *supra* note 33.

¹⁵² *Id.* at 2890. Note that, while not a focus of this paper, one of the effects of the DMCA was to expand the § 112 exemption (which allows broadcasters to make "ephemeral recordings" in order to facilitate transmissions) to include ephemeral recordings that are made during the digital transmission of sound recordings. The § 112 compulsory license royalty, which is determined using the "willing buyer/willing seller" standard" (explained in Part IV.C of this paper), is insignificant in comparison to the § 114 performance royalty. The royalties for both licenses are typically determined together in a single rate. *See* Stockment, *supra* note 26, at 2139; *see also* 17 U.S.C. § 112(e) (2012).

¹⁵³ Myers, *supra* note 134, at 441.

¹⁵⁴ Bagdanov, *supra* note 30, at 145; *see* 17 U.S.C. § 114(j)(6), (7), (8), (11) (2012) (non-interactive services are divided into several categories under the DMCA, as explained in Part IV.D of this paper).

category as non-interactive subscription services,¹⁵⁵ thus making it clear that “the compulsory license applied to all commercial, non-interactive webcasting services, regardless of their revenue models.”¹⁵⁶ Such webcasters became eligible for the statutory license, so long as they met certain criteria.¹⁵⁷ Both terrestrial radio stations’ online rebroadcasts and “pure webcasters” thus clearly became subject to royalty payments for the music that they played.¹⁵⁸ If a webcaster fails to comply with or qualify for the statutory license, it is required to obtain a license from the copyright holder for each song that it wishes to play.¹⁵⁹ Congress did not give an explanation as to why it believed non-interactive, non-subscription services best fit into the newly expanded category.¹⁶⁰ Nonetheless, the compulsory license arrangement alleviated the concerns of songwriters and music publishers, in that it prevented record companies from refusing to license their catalogues to non-interactive services.¹⁶¹ Interactive services, meanwhile, which present the highest risk for sale displacement,¹⁶² remained ineligible for the statutory license.¹⁶³

¹⁵⁵ Pals, *supra* note 31, at 683.

¹⁵⁶ Marshall, *supra* note 93, at 452.

¹⁵⁷ 17 U.S.C. § 114(d)(2) (2012); *see also* *Webcasting FAQ*, RIAA, <http://web.archive.org/web/20021015121959/http://www.riaa.com/Licensing-Licen-3a.cfm> (last visited Apr. 13, 2014). The conditions that a webcaster must meet in order to qualify for a statutory license include such things as: limiting the number of songs from a single album or artist that can be played within a three-hour period (known as the “sound recording performance complement”); identifying the sound recording, album and featured artist of a song currently being played; employing available measures to ensure that the listener does not copy the music being broadcast over the Internet; and, refraining from announcing songs or playlists in advance.

¹⁵⁸ 17 U.S.C. § 114(d)(2) (2012); Spektor, *supra* note 79, at 10.

¹⁵⁹ Russell, *supra* note 135, at 11.

¹⁶⁰ Pals, *supra* note 31, at 683.

¹⁶¹ La France, *supra* note 76, at 231; *see supra* Part II.D.

¹⁶² *See* *Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148, 154 (2d Cir. 2009) (citing Jane C. Ginsburg, *Copyright Legislation for the “Digital*

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An additional important aspect of the DMCA was that it amended the Copyright Act by broadening the definition of an “interactive service.”¹⁶⁴ As webcasting technology improved, it became increasingly clear that the DPRA’s definition of “interactive service” was insufficient.¹⁶⁵ Under the DPRA, interactive services were simply those that allowed a listener to request a specific sound recording.¹⁶⁶ In some cases, however, users were able to select and rate particular artists, thus creating personalized programs in ways that were not anticipated by Congress when they defined “interactive” in the DPRA.¹⁶⁷

To close this loophole, the DMCA re-defined an interactive service as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”¹⁶⁸ Under this new definition, it is no longer required that the user personally choose what songs are played by the webcaster. As long as the user can influence the program in such a way that she might identify certain artists that then become the basis of her personal program, the service would be considered

Millennium, 23 COLUM. J.L. & ARTS 137, 167 (2009)). The court noted that the more advanced information a user has about the digital transmission, the more prepared they will be to make digital copies of the performances. Even if the user does not make an illegal copy of the performance, by listening to the interactive services, they are less likely to purchase copies of the sound recordings. *See id.*

¹⁶³ Duvall, *supra* note 101, at 272.

¹⁶⁴ Bagdanov, *supra* note 30, at 145.

¹⁶⁵ *Id.*

¹⁶⁶ Kella, *supra* note 96, at 213.

¹⁶⁷ Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 314 (2000).

¹⁶⁸ 17 U.S.C. § 114(j)(D)(7) (2012).

interactive under the statute.¹⁶⁹ In other words, under the DMCA, “interactive services were deemed not only to be those that allowed users to request specific songs, but also those that provided a program of play created especially for the listener.”¹⁷⁰

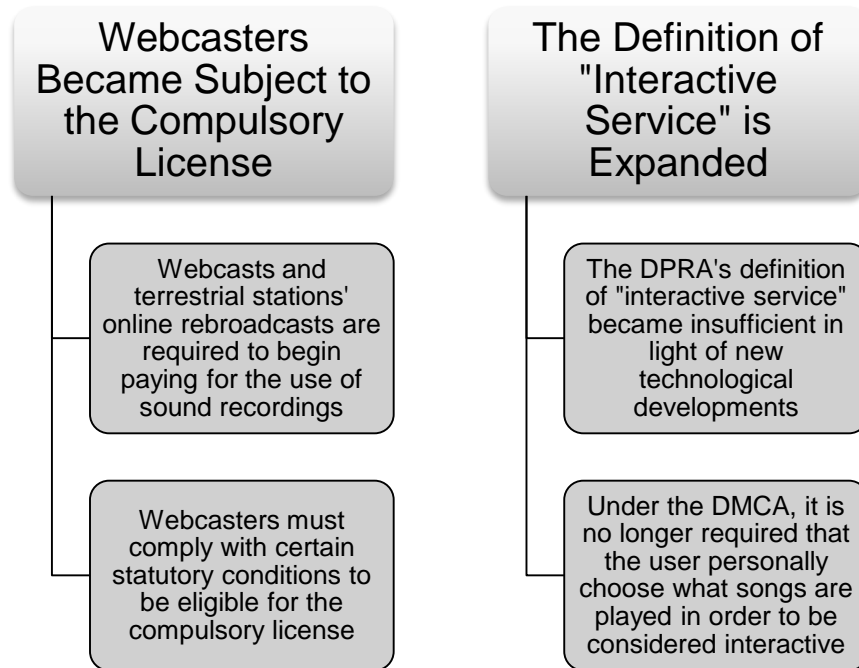


Figure 3: Important Changes Under the DMCA

IV. THE RATE DETERMINATION PROCEDURES

The statutory rate determination procedures for providers of digital audio transmissions are both complex and controversial. In this Part, I will discuss these procedures in detail. This will

¹⁶⁹ Bagdanov, *supra* note 30, at 146.

¹⁷⁰ Kella, *supra* note 96, at 213.

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include an examination of how the rate determination methods have evolved over the past few years, and an analysis of the form that they take today.

A. *The Role of SoundExchange*

Statutory sound recording royalties from satellite radio, Internet radio, and digital cable music channels are paid to SoundExchange, a non-profit PRO designated as the sole entity in the United States authorized to collectively manage and distribute compulsory digital performance royalties.¹⁷¹ It does so on behalf of all sound recording copyright owners who join the organization. In addition, SoundExchange is responsible for negotiating on behalf of copyright owners in royalty rate setting proceedings.¹⁷² The money collected by SoundExchange is distributed to featured and non-featured recording artists, sound recording copyright owners (typically the record labels), and independent artists who own their own sound recording copyright.¹⁷³ SoundExchange's authority extends only to those digital music performances that qualify for statutory licensing; the organization does not have authority to negotiate or collect performance royalties on behalf of interactive services.¹⁷⁴ Interestingly, SoundExchange is the brainchild of the

¹⁷¹ 17 U.S.C. § 114(g)(2)–(3) (2012); *see About, SOUNDEXCHANGE*, <http://www.soundexchange.com/about/> (last visited Apr. 13, 2014); *see also* Bagdanov, *supra* note 30, at 147.

¹⁷² Stockment, *supra* note 26, at 2140.

¹⁷³ Spektor, *supra* note 79, at 23 (SoundExchange divides payments according to a consistent formula whereby the record company receives 50%, the featured artist receives 45%, and the remaining 5% is paid to the unions representing the non-featured musicians and non-featured vocalists); *see* La France, *supra* note 76, at 232 (noting that, in order to make accurate disbursements, SoundExchange must identify the specific recordings that have been played by each music service, and how often they have been played). To facilitate this requirement, 17 U.S.C. § 114(d)(2)(A)(iii) (2012) sets out that, if technologically feasible, each sound recording should be encoded with certain information, including the names of the featured performers.

¹⁷⁴ Day, *Super Brawl*, *supra* note 40, at 205.

recording industry,¹⁷⁵ having been created as an internal division of the RIAA in 2000, before being established as an independent non-profit organization in September 2003.¹⁷⁶

B. The 801(b) Standard

As noted above in Part III, the DPRA stipulated that the compulsory license royalty rate would be set according to the 801(b) Standard.¹⁷⁷ This standard seeks to balance the interests of all three parties to the copyright system: the public, copyright owners, and copyright users.¹⁷⁸ It directs CARP¹⁷⁹ to set royalties so as to achieve four objectives:

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

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

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution,

¹⁷⁵ Russell, *supra* note 135, at 13.

¹⁷⁶ Stockment, *supra* note 26, at 2140.

¹⁷⁷ The § 801(b) Standard was adopted as part of the Copyright Act of 1976. In addition to being used to determine the rates for some digital audio broadcasts, as discussed above, the 801(b) Standard is also used to determine: (i) performance royalties for jukeboxes (17 U.S.C. § 116); and (ii) mechanical license royalties for making and distributing phonorecords of musical compositions (17 U.S.C. § 115). *See, e.g.,* Spektor, *supra* note 79, at 15; Stockment, *supra* note 26, at 2164.

¹⁷⁸ Stockment, *supra* note 26, at 2164.

¹⁷⁹ In the DPRA, Congress stipulated that arbitrations of this kind are to be carried out by CARP. However, in 2004, the rate-setting process was re-examined by Congress, and CARP was replaced by the Copyright Royalty Board (CRB), which currently sets royalty rates. *See infra* Part IV.G.

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capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.¹⁸⁰

The first and second policy objectives are fairly self-explanatory. They reflect the overriding purpose of copyright law; that is, to incentivize the production of creative works.¹⁸¹ The third policy objective, however, is slightly more complex. Because it requires consideration of “the relative roles of the copyright owner and the copyright user” with respect to such things as “capital investment, cost, risk, and contribution to the opening of new markets,” it has the ability to exert downward pressure on rates.¹⁸² This is due to the fact that copyright users (i.e. the digital audio services) often make larger investments, relative to the copyright owners.¹⁸³ The fourth policy objective, meanwhile, is the most important of the four. It directs the arbitration panel to avoid setting rates that would threaten to disrupt the “prevailing industry

¹⁸⁰ 17 U.S.C. § 801(b)(1) (2012).

¹⁸¹ See U.S. CONST. art. I, § 8, cl. 8 (providing Congress with 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”). Note that the willing buyer/willing seller standard does not take this overriding goal of copyright law into consideration. See *infra* Part IV.C.

¹⁸² John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field*, BROOKINGS INST. (Aug. 7, 2012), http://www.brookings.edu/~media/Research/Files/Papers/2012/8/07%20music%20royalties%20technology%20villasenor/CTI_19_Villasenor.pdf.

¹⁸³ *Id.* For example, the cost of establishing and maintaining satellite technology may warrant a discount from the market rate.

practices” of those using the copyrighted works. This final factor has the greatest potential to influence royalty rates.¹⁸⁴

C. Going From the 801(b) Standard to the Willing Buyer/Willing Seller Standard

Importantly, when the DMCA was enacted, Congress opted to dispense with the 801(b) Standard for determining the compulsory royalty rate. In its place, the DMCA introduced what is known as the “willing buyer/willing seller” standard.¹⁸⁵ The DMCA mandates that, when webcasters and copyright owners are unable to agree on a negotiated royalty rate, CARP is to use this standard to “establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”¹⁸⁶ When deciding the rates and terms, CARP is directed to:

base [its] decision on economic, competitive and programming information presented by the parties, including—

(i) 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 owner’s other streams of revenue from its sound recordings; and

(ii) 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

¹⁸⁴ *Id.*

¹⁸⁵ Stockment, *supra* note 79, at 2166 (also noting that the legislative history does not provide any explanation as to why Congress adopted this new standard for Internet radio).

¹⁸⁶ 17 U.S.C. § 114(f)(2)(B) (2012); DMCA 1998, *supra* note 33, at 2895–96.

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to relative creative contribution, technological contribution, capital investment, cost, and risk.¹⁸⁷

Replacing the 801(b) Standard with the willing buyer/willing seller standard threatened to drastically increase the royalty rates paid by digital broadcasters. This is because the willing buyer/willing seller standard, unlike the 801(b) Standard, lacks broad underlying policy considerations that have the potential to produce below-market rates. Naturally, digital satellite and digital cable services, fearing that a market-based rate would cause a major disruption to their business models, lobbied against any changes to the rates. By the time deliberations leading up to the DMCA took place, digital satellite and digital cable services “had amassed enough political support to oppose total adoption of the willing buyer/willing seller standard.”¹⁸⁸ Much to the detriment of sound recording copyright holders, a two-tier royalty rate structure was thus born.¹⁸⁹

D. The Double Standard

The two-tier royalty rate structure stems from the fact that, under the DMCA, services that provide non-interactive digital audio transmissions are divided into four categories, and are subject to two different rates. Companies that fall under the definition of “preexisting satellite digital audio radio service”¹⁹⁰

¹⁸⁷ 17 U.S.C. § 114(f)(2)(B)(i)–(ii) (2012).

¹⁸⁸ Marshall, *supra* note 93, at 452.

¹⁸⁹ *Id.*

¹⁹⁰ 17 U.S.C. § 114(j)(10) (2012). A “preexisting satellite digital audio radio service” is defined under the DMCA as follows: “a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels

(e.g. Sirius XM) and those which provide a “preexisting subscription service”¹⁹¹ (e.g. digital cable radio services Music Choice and Muzak), are grandfathered to the 801(b) Standard. Meanwhile, services classified as “new subscription services,”¹⁹² and those that broadcast “eligible non-subscription transmissions”¹⁹³ (i.e. Internet radio) have their rates set according

representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.” *Id.*

¹⁹¹ 17 U.S.C. § 114(j)(11) (2012). A “preexisting subscription service” is defined under the DMCA as follows: “a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.” *Id.*

¹⁹² 17 U.S.C. § 114(j)(8) (2012). A “new subscription service” is defined under the DMCA as follows: “a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.” *Id.* Note that these services perform exactly the same function as “preexisting subscription services,” yet are subject to a less favorable royalty rate determination standard for the sole reason that they did not exist prior to 1998. See David Oxenford, *Another Proposed Settlement of Another Copyright Royalty Board Proceeding—New Subscription Services*, BROADCAST L. BLOG (Nov. 9, 2007), <http://www.broadcastlawblog.com/2007/11/articles/intellectual-property/another-proposed-settlement-of-another-copyright-royalty-board-proceeding-new-subscription-services/> (“The covered “new subscription services” have agreed to pay the greater of 15% of revenue or a per subscriber fee that will escalate over the 5 years that the agreement is in effect.”).

¹⁹³ 17 U.S.C. § 114(j)(6) (2012). An “eligible nonsubscription transmission” is defined under the DMCA as follows: “a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.” *Id.*

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to the willing buyer/willing seller standard.¹⁹⁴ By modifying the categories in this way, the DMCA's impact on royalty rates has been profound.¹⁹⁵ Because of the substantially different policy objectives underlying the two standards, they naturally lead to drastically different royalty rates. In fact, the application of the two different standards to different services is "the single biggest factor in explaining the wide variations in rates paid today."¹⁹⁶

The categorization of digital audio transmissions created under the DMCA limits access to the more favorable 801(b) Standard to digital broadcasters that were "preexisting" on July 31, 1998. There is currently only a very small number of digital music broadcasting services that qualify under this standard: namely, Sirius XM, Music Choice, and Muzak.¹⁹⁷ These services benefit greatly from having their royalty rate determined according to the flexible 801(b) Standard, rather than by the strict marketplace test of the willing buyer/willing seller standard.¹⁹⁸ As will be shown below, the royalty rate that they pay is substantially lower than that which webcasters are subject to.

¹⁹⁴ Marshall, *supra* note 93, at 453; *see* Stockment, *supra* note 26, at 2164.

¹⁹⁵ Villasenor, *supra* note 182, at 4–5.

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 6; *see* Marshall, *supra* note 93, at 457.

¹⁹⁸ *See* Carey, *supra* note 90, at 302.

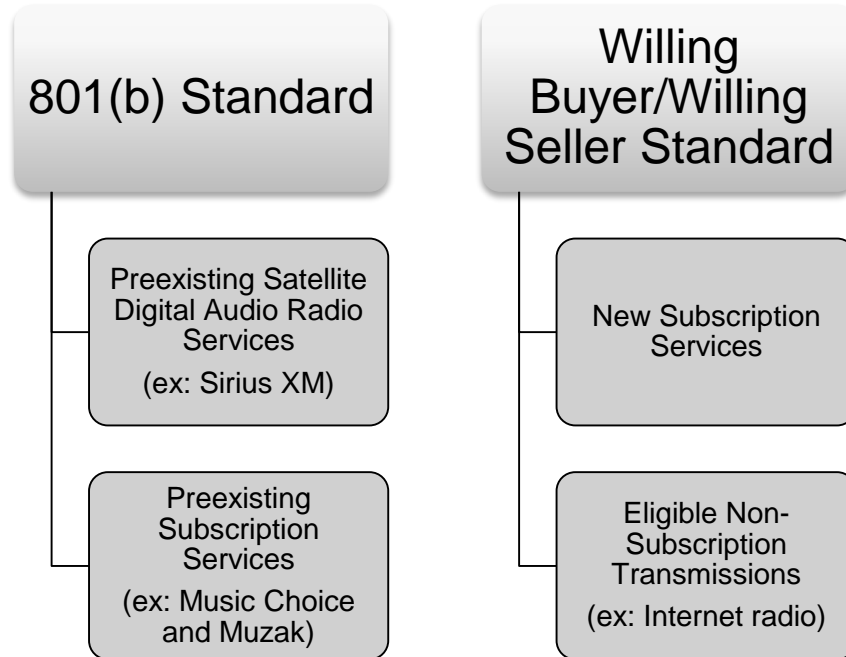


Figure 4: The Two-Tier Royalty Rate Structure

E. The CARP Procedures: Webcaster I

Internet radio webcasts generally do not fall under the DMCA’s definition of “interactive service.”¹⁹⁹ Rather, as noted above, they generally fall within the non-interactive category, thus making them eligible for the statutory license.²⁰⁰ To set the

¹⁹⁹ This precedent was established by the Second Circuit Court of Appeals in *Arista*, which determined how the “interactivity” provision of the DMCA applies to webcasting companies. Interactivity is gauged by the level of control the audience has in selecting or re-listening to specific tracks. *See Arista Records, L.L.C. v. Launch Media, Inc.*, 578 F.3d 148, 164 (2d Cir. 2009); Bagdanov, *supra* note 30, at 146.

²⁰⁰ *Spektor*, *supra* note 79, at 18, 30; *see Bagdanov*, *supra* note 30, at 147 (noting that the DMCA requires that Internet webcasters obtain licenses and pay royalties to the PROs (who represent the compositional copyright owners) and

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statutory royalty rate, the DMCA provides for voluntary negotiations between sound recording owners and digital music services.²⁰¹ However, if voluntary negotiations fail to result in an agreement after a 60-day statutory period, the DMCA mandates that the DPRA's CARP procedures should be used to set rates and terms for the compulsory license.²⁰² Thus, it is only when industry-wide negotiations fail to result in agreement that the parties are forced to litigate the rate before a government-appointed panel.²⁰³

Following the enactment of the DMCA, a small number of webcasters reached voluntary licensing agreements with the RIAA. In order to determine an industry-wide rate for the remaining webcasters with whom negotiations had broken down, the RIAA, in 1999, petitioned the Librarian of Congress to convene CARP.²⁰⁴ Several years later, in February 2002, CARP's royalty rate determination (Webcaster I) was released.²⁰⁵ In Webcaster I, CARP adopted the RIAA's proposal for a per-performance royalty model (i.e. every time a sound recording is streamed to a listener), rather than the webcaster-supported percentage-of-revenue

to SoundExchange, which represents the owners of the sound recording copyrights).

²⁰¹ DMCA 1998, *supra* note 33, at 2895–96; *see* Marshall, *supra* note 93, at 453.

²⁰² Duvall, *supra* note 101, at 272.

²⁰³ Marshall, *supra* note 93, at 453.

²⁰⁴ Carey, *supra* note 90, at 276–77.

²⁰⁵ Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (Copyright Arb. Royalty Panel Feb. 20, 2002) [hereinafter Webcaster 1 CARP Report], *available at* http://www.copyright.gov/carp/webcasting_rates.pdf. CARP's report recommended rates and terms for two compulsory licenses: (i) for eligible non-subscription services to perform sound recordings publicly by means of digital audio transmissions (i.e. webcasting) under 17 U.S.C. § 114; and (ii) to make ephemeral recordings of sound recordings under the statutory license set forth in 17 U.S.C. § 112. *Id.* at 1–2. The CARP recommendation set royalty rates for webcasters retroactively from October 1998 through until December 2002. *Id.* at 2.

model.²⁰⁶ However, because some services at the time did not possess the requisite software or technical expertise to accurately calculate the number of individual performances, CARP adopted the RIAA's recommendation to temporarily allow statutory licensees to reasonably estimate their usage of sound recordings.²⁰⁷ As such, all commercial webcasters (who did not qualify as "small commercial webcasters") were permitted to calculate royalties using an aggregate tuning hours (ATH) method, "whereby one listener who listens for one hour would constitute one aggregate tuning hour, two listeners who each listen for a half an hour would also be one aggregate tuning hour, and so on."²⁰⁸

The CARP royalty rate recommendations were as follows: 0.07 cents per performance per listener for radio retransmissions by commercial webcasters,²⁰⁹ 0.14 cents for Internet-only transmissions,²¹⁰ and 0.02 cents per performance for non-commercial webcasters.²¹¹ To arrive at its determination, CARP used a willing buyer/willing seller model based largely on a voluntary agreement reached between the RIAA and Yahoo!, Inc., which involved a lump sum payment of \$1.25 million dollars for the first one and a half billion transmissions (including Internet-only transmissions and radio retransmissions).²¹² CARP was fully

²⁰⁶ Duvall, *supra* note 101, at 273.

²⁰⁷ Webcaster 1 CARP Report, *supra* note 205, at 109.

²⁰⁸ Cydney A. Tune, *Webcaster Music Royalty Rates—In Flux and on the Rise*, PILLSBURY WINTHROP SHAW PITTMAN LLP (June 15, 2007), <http://www.pillsburylaw.com/siteFiles/Publications/5EA3137178E2E2204487E5B973E75B47.pdf>.

²⁰⁹ Webcaster 1 CARP Report, *supra* note 205, at 84.

²¹⁰ *Id.* at 88. CARP based the disparate price treatment between radio retransmissions and Internet-only transmissions on the conclusion that over-the-air radio play has a "tremendous promotional impact on phonorecord sales" that Internet-only transmissions do not provide. *See id.* at 75.

²¹¹ *Id.* at 94.

²¹² Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 376 (2004).

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aware that implementing such high rates would eliminate many small and medium sized webcasters. In fact, the Panel stated that the webcasting community at the time had an over-abundance of “marginal and insignificant entities”²¹³ and that increasing the rates was desirable in that it would bring about market consolidation. This in turn would result in a far smaller number of viable webcasters, all of which would be able to endure and prosper, and afford significantly higher royalty payments to copyright owners.²¹⁴

Not surprisingly, Webcaster I was “met with fierce opposition from small webcasters, who argued that the willing buyer/willing seller model used by CARP was far too broad to adequately differentiate between larger commercial webcasters such as Yahoo! and smaller mom-and-pop commercial webcasters.”²¹⁵ To protest the new fees and accounting procedures, which small webcasters saw as having the potential to kill Internet radio, a “Day of Silence” was staged.²¹⁶ The Librarian of Congress, who, at the time, was authorized to review CARP decisions, subsequently intervened in the matter, but largely adopted the Panel’s determinations. For instance, he agreed that the RIAA/Yahoo! deal served as the best model for an agreement that would have been negotiated in the marketplace between a willing buyer and willing seller.²¹⁷ He disagreed, however, with CARP’s finding that royalty rates for Internet-only webcasters and webcasters who retransmitted radio broadcasts should be set differently.²¹⁸ Consequently, he set a rate of 0.07 cents per

²¹³ Webcaster 1 CARP Report, *supra* note 205, at 52.

²¹⁴ *Id.*

²¹⁵ Day, *Super Brawl*, *supra* note 40, at 188.

²¹⁶ Duvall, *supra* note 101, at 275.

²¹⁷ Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,259 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

²¹⁸ *Id.* at 45,255.

performance, per listener for all eligible non-subscription transmissions by commercial webcasters,²¹⁹ and kept the rate for non-commercial webcasters at 0.02 cents per performance.²²⁰

F. The Small Webcaster Settlement Act of 2002

As expected, the high compulsory royalty rates imposed by Webcaster I forced many small commercial webcasters out of business.²²¹ Others, desperate for change, petitioned Congress for help. In response to their pleas, Congress enacted the Small Webcaster Settlement Act of 2002 (SWSA).²²² The SWSA provided non-commercial and small commercial webcasters²²³ additional time to negotiate with sound recording copyright owners (represented by SoundExchange). This resulted in a compromise being reached in 2002, whereby commercial webcasters would pay rates based on a percentage of their gross revenue, while non-commercial webcasters were to pay a flat annual fee, subject to a number of restrictions.²²⁴ The SWSA garnered general approval

²¹⁹ *Id.*

²²⁰ *Id.* at 45,259.

²²¹ Carey, *supra* note 90, at 278.

²²² Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

²²³ Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510, 78,513 (Dec. 24, 2002) (an “eligible small webcaster” is defined based on a revenue scale that is graduated by calendar year and, under the 2004 definition, a small webcaster is one whose revenues do not exceed \$1.25 million per year); *see* Carey, *supra* note 90, at 280.

²²⁴ Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,010 (June 11, 2003); *see* Day, *Super Brawl*, *supra* note 40, at 189. The SWSA created a special royalty option for small commercial entities (i.e. webcasters with less than \$1.2 million in revenue), allowing them to pay the higher of (1) 10% of their revenue on the first \$250,000 and 12% thereafter, or (2) 7% of their expenses. In addition, under the SWSA, other categories of webcasters, such as non-commercial and non-music webcasters, were subject to different rates than commercial webcasters. On the one hand, non-commercial webcasters were to pay a minimum rate of \$500 a year, which allowed them to stream to an average of 200 simultaneous listeners

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from both sides of the debate.²²⁵ Small webcasters and non-commercial groups, in particular, felt that the Webcaster I rates would have put them out of business had it not been for the agreement reached under the SWSA.²²⁶ Finally, “after four years of negotiation, arbitration, and Congressional intervention, a temporary peace [had fallen] over the digital performance right battlefield.”²²⁷ However, in 2005, when the negotiated license terms came to an end, so did the period of relative calm. The brawl was set to begin anew.²²⁸

G. The 2007 CRB Decision – Webcaster II

Following the highly controversial rate setting procedure in Webcaster I, various parties complained to Congress about the CARP arbitration system.²²⁹ In order to appease webcasters’ requests to modify the statutory rate-setting process, Congress enacted the Copyright Royalty and Distribution Reform Act of 2004.²³⁰ This Act replaced CARP with the Copyright Royalty

or 146,000 aggregate monthly tuning hours (ATH). Once those limits are met, the non-commercial webcaster would pay royalties on any excess streaming, either on a per-performance basis (.0002176 cents per performance) or on the basis of aggregate tuning hours (.00251 cents per ATH). Non-music webcasters (i.e. those who primarily broadcast news, talk and/or sports), on the other hand, were to pay a reduced rate of .000762 cents per performance or per ATH. Tune, *supra* note 208, at 2.

²²⁵ Carey, *supra* note 90, at 279.

²²⁶ David D. Oxenford, *Copyright Royalty Board Releases Music Royalties for Internet Radio Streaming for 2006-2010—Clarifying the Confusion*, ALA. BROADCASTERS ASS’N, (Apr. 12, 2007), www.al-ba.com/crb.doc [hereinafter Oxenford April 2007].

²²⁷ Day, *Super Brawl*, *supra* note 40, at 189.

²²⁸ *Id.*

²²⁹ Carey, *supra* note 90, at 283 (the CARP was criticized for being made up of inexperienced decision-makers, and that the decisions were “unpredictable and inconsistent”).

²³⁰ 17 U.S.C. § 801 (2012); *see* Marshall, *supra* note 93, at 454.

Board (CRB), a panel consisting of three full-time Copyright Royalty Judges.²³¹

On February 16, 2005, the newly formed CRB commenced proceedings to determine new rates and terms for the § 114 statutory license of sound recordings for webcasters.²³² Just over two years later, on March 2, 2007, the Board released its first ruling (Webcaster II). The decision, which was to cover the licensing period from January 1, 2006 through December 31, 2010, proved to be highly controversial, resulting in significant backlash from webcasters.²³³ Despite Congress' attempts to reform the royalty rate setting system by replacing CARP with the CRB, the result of Webcaster II “was eerily reminiscent” to that of Webcaster I.²³⁴ Whereas Webcaster I faced its strongest opposition

²³¹ Castro, *supra* note 27, at 4. The Copyright Royalty Board (CRB) determines rates and terms for the copyright statutory licenses and makes determinations on distribution of statutory license royalties collected by the Copyright Office. *See* U.S. COPYRIGHT OFFICE, *supra* note 139. The Copyright Royalty Judges (CRJs) are full-time employees in the Library, and are appointed for six-year terms, with an opportunity for reappointment. *Id.* The first three judges serve two-, four- and six-year terms in order to avoid a situation where all three judges are replaced at the same time. *Id.*

²³² In addition to setting rates and terms for the § 114 webcaster performance license, the CRB also set rates and terms for the § 112 ephemeral license. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,085 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²³³ Bagdanov, *supra* note 30, at 147.

²³⁴ Oxenford April 2007, *supra* note 226, at 2–3. Under the CARP system, decisions regarding royalties were made by a panel of arbitrators. *Id.* The arbitration system was highly criticized by those who believed that the Panel—whose members could change after each royalty proceeding—lacked institutional knowledge. *Id.* Moreover, the process was very costly for participants, who were required to pay the costs of the arbitrators in the proceeding. *Id.* Whereas the CRB system allowed for continuity among the Judges sitting on the Board, and eliminated the costs of the arbitrators, it added discovery (document production, interrogatories and depositions) to the process.

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from small webcasters and non-commercial groups, Webcaster II was met with vehement disapproval from virtually *all* webcasters involved in the proceedings.²³⁵ It was believed that the high royalties imposed by the CRB would quickly put many Internet radio stations—large and small, commercial and non-commercial—out of business.²³⁶

As noted above, the SWSA spared webcasters from having to pay according to the per-performance royalty scheme recommended by CARP in Webcaster I. However, to the detriment of webcasters, the Webcaster II decision re-implemented a per-performance royalty calculation system, drastically changing the methodology that was used to calculate royalty rates under the SWSA.²³⁷ The decision mandated that *all* commercial webcasters²³⁸—including those previously categorized as small commercial webcasters²³⁹ or non-music webcasters—would be required to calculate royalties at the same per-performance rate.²⁴⁰ The new rates for all commercial webcasters were set as follows: .0008 cents per performance in 2006 (applied retroactively), .0011 cents per performance in 2007, .0014 cents per performance in 2008, .0018 cents per performance in 2009, and .0019 cents per performance in 2010.²⁴¹ Moreover, the

Id. Despite these changes, the CRB's 2007 decision was very similar in result to CARP's 2002 decision, and was thus highly criticized. *Id.*

²³⁵ *Id.*

²³⁶ Carey, *supra* note 90, at 284.

²³⁷ Tune, *supra* note 208, at 2.

²³⁸ See Bagdanov, *supra* note 30, at 148 n.108. "Commercial webcaster" is synonymous with "eligible nonsubscription transmission"; see also *supra* Part IV.D.

²³⁹ Tune, *supra* note 208, at 2 (Small commercial webcasters are those with less than \$1.2 million in annual revenue).

²⁴⁰ *Id.* at 4.

²⁴¹ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,096 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

decision set a minimum annual fee of \$500 per “channel” or “station” for commercial broadcasters.²⁴² The terms “channel” and “station,” however, were not clearly defined, creating some confusion with respect to services that create individualized playlists for listeners. If each stream were to be treated as a unique “channel,” those webcasters who produce a unique stream every time a listener logs into their site faced massive costs.²⁴³

Year	Fee Per Performance (U.S. dollars)	Percent Increase Over Prior Year
2006	.0008	-
2007	.0011	38%
2008	.0014	27%
2009	.0018	29%
2010	.0019	6%

Figure 5: Webcaster II Performance Royalty Fee Schedule for Commercial Webcasters²⁴⁴

Perhaps the most striking feature of Webcaster II was its treatment of small commercial webcasters. By eliminating the option under the SWSA that allowed small webcasters “to pay a percentage of their revenue in lieu of a per-performance royalty fee,”²⁴⁵ Webcaster II forced small webcasters to pay the same royalty rates as larger companies with deeper pockets.²⁴⁶ Non-

²⁴² *Id.* at 24,097.

²⁴³ Oxenford April 2007, *supra* note 226, at 2.

²⁴⁴ Castro, *supra* note 27, at 5.

²⁴⁵ *Id.* at 6.

²⁴⁶ The CRB opted to eliminate the separate status for small webcasters under Webcaster I using the rationale that allowing “inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners.” Moreover, the CRB noted that it “cannot guarantee a profitable business to every market entrant” and that “the normal free market processes

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commercial webcasters,²⁴⁷ meanwhile, continued to be treated as a separate category under the CRB scheme. However, the basis on which they were to pay royalties changed. Webcaster II mandated that non-commercial webcasters would pay a minimum annual fee of \$500 per channel or station, which allowed them to conduct digital audio transmissions of up to 159,140 ATH per month. Should a non-commercial webcaster exceed the limit in any given month, it would be required to pay additional royalties for digital audio transmissions in excess of the cap at the same rate as that paid by commercial webcasters.²⁴⁸

To arrive at their royalty rate determination, the CRB, as directed by statute, applied the willing buyer/willing seller standard.²⁴⁹ First, they constructed the hypothetical marketplace in which the “buyers” and “sellers” negotiated a price for the “product.” The CRB defined “sellers” as record companies, the “buyers” as webcasters in a market where no compulsory license exists, and the “product” as a blanket license permitting the buyers’ to make digital audio transmissions of the record companies’

typically weed out those entities that have poor business models or are inefficient.” See *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA (Copyright Royalty Board), available at <http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>.

²⁴⁷ *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. at 24,098 (Non-commercial webcasters are non-profit entities with the mission of providing “educational, cultural, religious and social programming not generally available on commercial venues.” Moreover, they “have different sources of funding than ad-supported commercial webcasters—such as listener donations, corporate underwriting or sponsorships, and university funds.”); see Duvall, *supra* note 101, at 280; Bagdanov, *supra* note 30, at 148.

²⁴⁸ *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. at 24,100.

²⁴⁹ 17 U.S.C. § 114(f)(2)(B) (2012).

complete repertoire of sound recordings.²⁵⁰ As a benchmark for setting the new rates, the CRB looked to an analysis of seventeen contracts between *interactive* webcasters and the recording industry.²⁵¹ This evidence, which was presented by one of SoundExchange's expert witnesses, was accepted despite the fact that it was based on services that are inherently different.²⁵² As noted above, interactive services, which allow audiences to choose which songs will be played in a stream, do not qualify for statutory licensing, and must negotiate privately with record labels for the right to use their sound recordings. Whereas virtually all of the interactive services used to formulate the benchmark are subscription-based services, most of the non-interactive webcasters subject to the statutory rate are free, advertising-supported companies.²⁵³ Nonetheless, the CRB rejected arguments that interactive services were too dissimilar to be used as an appropriate benchmark, finding that the expert witness had appropriately adjusted for differences in interactivity.²⁵⁴ Namely, rates were adjusted to take into account the fact that non-interactive services offer less value to consumers, in that consumers are unable to select songs when using such a service.²⁵⁵

²⁵⁰ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. at 24,087; see Mark D. Robertson, *Sparing Internet Radio from the Real Threat of the Hypothetical Marketplace*, 10 VAND. J. ENT. & TECH. L. 543, 545 (2008).

²⁵¹ Castro, *supra* note 27, at 5. Note, however, that the CRB rejected proposals by webcasters to use as a benchmark the rates webcasters pay to PROs such as ASCAP and BMI for the digital performance of the musical compositions underlying sound recordings. The proposal was rejected on the basis that "evidence shows that sound recording rights are paid multiple times the amounts paid for musical works." See 72 Fed. Reg. 24,084, *supra* note 232, at 24,094.

²⁵² Carey, *supra* note 90, at 287–88.

²⁵³ Oxenford April 2007, *supra* note 226, at 3.

²⁵⁴ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. at 24,092.

²⁵⁵ Oxenford April 2007, *supra* note 226, at 3.

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Not surprisingly, Webcaster II was met with immediate and fierce opposition. The rate increases were so dramatic that even the largest commercial webcasters, such as Yahoo! and Pandora, expressed intentions to shut down their businesses if the rates remained in effect.²⁵⁶ Pandora, for instance, which offers thousands of channels without subscription fees, faced the prospect of skyrocketing royalty bills under the new CRB rules. The company estimated that, in 2008 alone, it would be required to pay \$18 million in royalties, out of its expected \$25 million in revenue—not including separate royalties to be paid to songwriters.²⁵⁷ This figure would be enough to force the webcaster out of business.²⁵⁸

Although large webcasters faced potential rate increases estimated at between 40% and 70% of revenues, it was small webcasters who were most affected by the CRB decision.²⁵⁹ It was estimated that small webcasters would face royalty increases equivalent to as much as 1200% of revenues, forcing most—if not all—out of business.²⁶⁰ Rather than account for the “disparate, nuanced financial realities of the evolving [webcasting] industry,” the CRB decision “subjected all webcasters to the same performance royalty metric,” thus threatening to bury many of them “under the weight of the rate increase.”²⁶¹ Webcasters argued that, during the two years of litigation leading up to Webcaster II, the significant rate increases advocated for by SoundExchange, and subsequently adopted by the CRB, were nothing more than a

²⁵⁶ Meg Tirrell, *Yahoo, AOL May Abandon Web Radio After Royalties Rise (Update2)*, BLOOMBERG (Nov. 28, 2007), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0pKOrcpw6yE>.

²⁵⁷ Tim Bjarin, *Saving Internet Radio*, PC MAGAZINE (Oct. 3, 2008), <http://www.pcmag.com/article2/0,2817,2331595,00.asp>.

²⁵⁸ *Id.*

²⁵⁹ Tune, *supra* note 208, at 4.

²⁶⁰ *Id.*

²⁶¹ Robertson, *supra* note 250, at 546.

“major label money grab—an attempt to revive a dying business model through exorbitant fee increases at the expense of technological developments and consumer interests.”²⁶²

H. The Webcaster Settlement Act of 2008 and The Pureplay Agreement

Despite the swift and vehement objections to Webcaster II, the CRB, on April 16, 2007, issued an Order denying all requests for a rehearing.²⁶³ Several weeks later, on May 1, 2007, the Board issued its final determination, at which point the rates became immediately effective.²⁶⁴ In response to the rallying cries of webcasters, Congress, as it did following CARP’s controversial Webcaster I decision in 2002, opted to intervene. They did so by passing the Webcaster Settlement Act of 2008 (WSA 2008),²⁶⁵ which sent the Digital Media Association (DiMA) (the national trade organization representing webcasters) into negotiations with SoundExchange.²⁶⁶ Under the WSA 2008, the parties were given until February 15, 2009, to negotiate royalty rates to replace the compulsory license rates determined by the CRB in Webcaster II.²⁶⁷ The WSA 2008 permitted parties to agree on royalty rates for

²⁶² Kevin C. Parks, *Black Hole or Celestial Jukebox? Section 114 and the Future of Music*, LANDSLIDE, Nov.–Dec. 2008, at 46, 49; Bagdanov, *supra* note 30, at 149.

²⁶³ Tune, *supra* note 208, at 2–3. In the same Order, however, the CRB amended its initial decision, allowing for a transitional option for the years 2006 and 2007, during which time webcasters could continue to use ATH as a basis for calculation of the royalties owed. *Id.* The CRB also set a July 15th, 2007, payment deadline for retroactive royalties for 2006, and refused to stay implementation of the new rates and terms until all administrative appeals and judicial review were complete. *Id.*

²⁶⁴ Stockment, *supra* note 26, at 2144.

²⁶⁵ Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008) (codified as amended at 17 U.S.C. § 114) [hereinafter WSA of 2008].

²⁶⁶ Day, *Super Brawl*, *supra* note 40, at 191.

²⁶⁷ Bagdanov, *supra* note 30, at 151–52.

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a period of up to eleven years, beginning on January 1, 2005.²⁶⁸ Negotiations, however, failed to produce an agreement by the February 15, 2009, deadline,²⁶⁹ prompting Congress to issue the Webcaster Settlement Act of 2009 (WSA 2009),²⁷⁰ which amended the WSA 2008, and gave the parties thirty additional days to negotiate.²⁷¹ The extension granted under the WSA 2009 provided enough time for SoundExchange and many webcasters, including Pandora, to successfully reach an agreement (Pureplay Agreement).²⁷²

The Pureplay Agreement was concluded between SoundExchange and a group of webcasters on July 7, 2009.²⁷³ It set rates for the period beginning on January 1, 2006, and ending on December 31, 2015,²⁷⁴ and is available as an alternative to the Webcaster II rates to any commercial webcaster who meets the eligibility conditions of the agreement and chooses to opt-in.²⁷⁵ Namely, eligible webcasters must qualify as “pureplay webcasters”—that is, “those that are willing to include their entire gross revenue in a percentage of revenue calculation to determine

²⁶⁸ WSA of 2008, *supra* note 265, at § 2.

²⁶⁹ Bagdanov, *supra* note 30, at 152.

²⁷⁰ Webcaster Settlement Agreement of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (codified as amended in 17 U.S.C. § 114) [hereinafter WSA 2009].

²⁷¹ *Id.* at § 2.

²⁷² Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 17, 2009) [hereinafter Pureplay Agreement]; see Day, *Super Brawl*, *supra* note 40, at 191; David Oxenford, *Pureplay Webcasters and SoundExchange Enter Into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006-2015*, BROADCAST L. BLOG (July 7, 2009), <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-2006-2015> [hereinafter Oxenford July 7].

²⁷³ Pureplay Agreement, *supra* note 272, at 34,797.

²⁷⁴ *Id.* at 34,798.

²⁷⁵ *Id.* at 34,797.

their royalties”²⁷⁶ and “whose primary business is to transmit sound recordings under the statutory license, and not to sell or promote any other service or product.”²⁷⁷ The Pureplay Agreement creates royalty rates for three separate categories: (1) “commercial webcasters” (those with annual revenues of \$1.25 million or more), (2) “small pureplay webcasters” (commercial webcasters with \$1.25 million or less in revenue), and (3) “subscription services” (webcasters that charge a subscription fee for access).²⁷⁸

For commercial webcasters, the rates under the Pureplay Agreement are far preferable to those under Webcaster II.²⁷⁹ Under the new deal, these large webcasters must pay SoundExchange the greater of 25% of gross revenue or a per performance royalty rate starting at .0008 cents per play in 2006 and increasing to .0014 cents per play in 2015.²⁸⁰ Despite being a better deal than Webcaster II, commercial webcasters that opt-in to the Pureplay Agreement are still subject to extremely high royalty burdens. For example, during the first fiscal quarter of 2013, which ended on April 30, 2012, Pandora’s total content acquisition costs were \$55.8 million, corresponding to 69% of their reported revenues of \$80.78 million.²⁸¹ It is estimated that, of the \$55.8 million in royalty fees, \$52.2 million constitutes sound recording performance royalty payments to SoundExchange.²⁸² Small

²⁷⁶ Oxenford July 7, *supra* note 272.

²⁷⁷ *Rising Tides*, FUTURE OF MUSIC COAL., <http://www.futureofmusic.org/issues/campaigns/rising-tides> (last visited Apr. 30, 2014).

²⁷⁸ Pureplay Agreement, *supra* note 272, at 34,797; Stockment, *supra* note 26, at 2151.

²⁷⁹ Oxenford July 7, *supra* note 272.

²⁸⁰ Villasenor, *supra* note 182, at 11.

²⁸¹ Press Release, Pandora Media, Inc., Pandora Reports 1Q13 Financial Results (May 23, 2012), *available at* <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1699251&highlight=>.

²⁸² Villasenor, *supra* note 182, at 11–12. As a comparison, if Pandora were paying royalties according to the Webcaster II rates, their sound recording

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pureplay webcasters, meanwhile, must pay the greater of either: (1) a percentage of gross revenues, ranging from 10% to 14%; or, (2) 7% of expenses during the applicable year.²⁸³ The small pureplay option, however, is only available for the period from 2006 to 2014.²⁸⁴ Finally, subscription services are required to pay on a per-performance basis, at a rate ranging from .0008 cents in 2006 to .0025 cents in 2015.²⁸⁵ Pureplay webcasters that did not opt into the Pureplay Agreements remain subject to the CRB's royalty rates.²⁸⁶

The Pureplay Agreement was widely hailed as having saved Internet radio.²⁸⁷ Although it allowed Pandora and other webcasters to continue streaming, it is far from a perfect solution, with at least one webcaster noting that it will prevent the Internet radio industry from prospering, "to a nearly fatal degree."²⁸⁸

performance licenses in 2012 would be tens of millions of dollars higher than under the Pureplay Agreement, thus approaching or exceeding their revenue for the year. *Id.* Whereas, under the Pureplay Agreement, the non-subscription 2012 rate for large pureplay commercial webcasters is .0011 cents per performance, the corresponding 2012 rate under Webcaster II is .0021 cents. *Id.*

²⁸³ Pureplay Agreement, *supra* note 272, at 34,799–800.

²⁸⁴ Bagdanov, *supra* note 30, at 153; *see* Oxenford July 7, *supra* note 272. Small webcasters who elect to join the deal must do so on a yearly basis. Because the deal does not offer a small pureplay webcaster percentage of revenue option for 2015, the ability to opt out is important for the smaller webcaster who has not reached the \$1.25 million cap by that time. In 2015, such a webcaster may choose to opt-in to what is known as the "Microcaster Deal" – a deal reached between SoundExchange and a number of very small webcasters whereby webcasters pay 12% on the first \$250,000 of revenue.

²⁸⁵ Pureplay Agreement, *supra* note 272, at 34,799.

²⁸⁶ Pals, *supra* note 31, at 688. Note that, in 2011, the CRB set out its proposed webcast royalty rates for the period beginning in 2011 and ending in 2015. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 75 Fed. Reg. 16,377 (April 1, 2010).

²⁸⁷ Stockment, *supra* note 26, at 2153.

²⁸⁸ Rob Pegoraro, *Web Radio Royalties Resolved**, THE WASHINGTON POST (July 8, 2009), http://voices.washingtonpost.com/fasterforward/2009/07/web_radio_royalties_resolved_1.html.

Moreover, it is not a permanent solution to the problem. SoundExchange itself has stated that it views the Pureplay Agreement “as an experimental structure,” and that it “does not consider [the] terms indicative of fair market rates.”²⁸⁹ It goes without saying that the future of Internet radio is thus highly uncertain.

V. A COMPARISON OF THE TWO STANDARDS

As noted above, application of the two standards leads to drastically different royalty rate determinations. Whereas Internet radio companies—which are subject to the willing buyer/willing seller standard—are required to pay § 114 performance license royalties that approach or even exceed 100% of revenues,²⁹⁰ those grandfathered to the 801(b) Standard pay far less. These “pre-existing” satellite radio and digital cable radio services—namely, Sirius XM, Music Choice and Muzak—pay a revenue-based sound recording performance royalty that amounts to only 6% to 8% of revenues.²⁹¹

These vastly different rates stem from the fact that the two standards have strikingly different underlying policy objectives. On the one hand, the 801(b) Standard: (i) seeks to balance the interests of the public, copyright owners and copyright users; (ii) takes into consideration the goal of copyright policy in fostering the availability of creative works to the public; (iii) takes into consideration the value provided by the copyright user in bringing the copyrighted works to the public; and, (iv) directs the CRB to avoid setting royalty rates that would have a disruptive impact on

²⁸⁹ *SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement*, SOUNDEXCHANGE (July 7, 2009), <http://www.soundexchange.com/pr/soundexchange-and-pureplay-webcasters-reach-unprecedented-experimental-rate-agreement/>.

²⁹⁰ Stockment, *supra* note 26, at 2160.

²⁹¹ *Id.* at 2158; *see* Carey, *supra* note 90, at 302.

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the industry using the copyrighted works.²⁹² When the CRB sets a rate according to the 801(b) Standard, it will first establish a benchmark “marketplace” royalty rate, and then proceed to consider what influence—if any—each of the 801(b) factors should have in altering that starting point rate.²⁹³ For example, in the CRB’s December 2007 determination of the royalty rates to be paid by Sirius XM,²⁹⁴ the Board began by establishing a reasonable estimate of what would be paid in the marketplace, finding that 13% of subscriber revenues should serve as the “upper boundary for a zone of reasonableness.”²⁹⁵ The Board then proceeded to chip away at that upper limit, ultimately concluding that the rates should start at 6% of gross revenue for 2006, and increase gradually to 8% in 2012.²⁹⁶ The 801(b) Standard’s fourth objective, in particular, played a key role in exerting downward pressure on the 13% upper limit.²⁹⁷ Specifically, by taking into consideration the harmful effects that a high royalty rate might have on the satellite radio industry, the CRB eventually decided on fees which pale in comparison to those paid by webcasters.

In contrast, the two factors enumerated in the willing buyer/willing seller standard are “explicitly not to be used as a basis for adjusting rates.”²⁹⁸ CARP, in 2002, stated that the two factors—namely, (i) the service’s effect on phonorecord sales and other streams of revenue of the copyright owner; and, (ii) the relative roles of the copyright owner and the transmitting entity—

²⁹² Stockment, *supra* note 26, at 2164.

²⁹³ Villasenor, *supra* note 182, at 8.

²⁹⁴ At the time of the proceedings, Sirius and XM were separate entities. They later merged in July 2008, and the new entity retained its status as a “preexisting service.” *See id.* at 7.

²⁹⁵ Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4094 (Jan. 24, 2008).

²⁹⁶ *Id.* at 4098.

²⁹⁷ Villasenor, *supra* note 182, at 8.

²⁹⁸ *Id.* at 9.

are “merely factors to be considered, along with any other relevant factors, in determining rates under the willing buyer/willing seller standard.”²⁹⁹ In other words, the correct rates under the willing buyer/willing seller standard are simply those on which, “absent special circumstances, most willing buyers and willing sellers would agree.”³⁰⁰ The two factors are not justifications for deviating from a market-based rate.³⁰¹ As such, the willing buyer/willing seller standard is extremely limited in scope. Not only does it completely disregard the public interest in the availability of creative works,³⁰² it also fails to take into consideration the disruptive impact that high royalty rates will have on the industries involved. Unlike the 801(b) Standard, which directs the CRB to settle on a rate that affords both the copyright owner and the copyright user a fair revenue, the willing buyer/willing seller standard gives no regard to the income of the copyright user. At its core, the standard seems to focus on the recording industry’s “sales of phonorecords” and “streams of revenue,” thus “reflecting the recording industry’s argument that Internet radio is a threat.”³⁰³

Although setting rates that would be acceptable to both willing buyers and willing sellers seems, on its face, to be a reasonable approach, it is clear that the standard has failed to produce appropriate results. After all, why, in a free market transaction, would any webcaster agree to rates that amount to as much as 100% or more of their revenues? One of the willing buyer/willing seller standard’s main deficiencies is that it fails to adequately account for individualized financial realities in the marketplace.³⁰⁴ For example, the CRB, in Webcaster II, set one rate for all webcasters, based on rates negotiated between major

²⁹⁹ Webcaster 1 CARP Report, *supra* note 205, at 21.

³⁰⁰ *Id.* at 25.

³⁰¹ Marshall, *supra* note 93, at 457.

³⁰² Stockment, *supra* note 26, at 2166.

³⁰³ *Id.*

³⁰⁴ Roberston, *supra* note 250, at 548.

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labels and large *interactive* webcasters. This approach ignores the unique circumstances that could justify a special status for small webcasters, who might be able to negotiate lower fees with record labels.³⁰⁵ Furthermore, the approach also ignores the fact that independent record labels would likely be willing to offer their music at a lower rate than major labels as an incentive for webcasters to broadcast their songs.³⁰⁶ By corralling all webcasters into a single, under-representative marketplace, rather than constructing a hypothetical marketplace for each actual market, the willing buyer/willing seller standard produced royalty rates that are far higher than what many webcasters would have negotiated in reality and which very few can afford.³⁰⁷

VI. PROPOSED SOLUTIONS

The sound recording performance right structure in the United States is in clear need of reform. In this Part, I will put forward several proposals, which, if implemented, would help to rectify the current state of affairs.

A. Achieving Platform Parity

Depending on the medium used to broadcast a sound recording, the compensation paid to the copyright owner varies considerably. On the one hand, terrestrial broadcasters—despite being required to pay songwriters for the use of their works—are completely exempt from paying royalties to performers and record

³⁰⁵ Castro, *supra* note 27, at 6. The Small Webcaster Settlement Act, which created a special royalty option for small commercial entities, is evidence of the fact that small webcasters may require special treatment (*see supra* Part IV.F); moreover, Castro notes that discriminatory pricing, whereby a given product will be offered at different prices to different buyers, is common in many industries, including software development, the airline industry, and pharmaceutical companies. This practice can benefit both the producer and consumer.

³⁰⁶ *Id.*

³⁰⁷ Robertson, *supra* note 250, at 548.

labels. Satellite radio, digital cable radio, and Internet webcasting services, meanwhile, must pay sound recording copyright holders for the use of their copyrighted works—yet the royalty rates imposed by the CRB for these three types of digital radio range considerably, anywhere from 6% to more than 100% of a service’s annual revenue. This is despite the fact that all of these services perform essentially the same function.³⁰⁸ In other words, “whether and how much an [artist] is paid depends on how a user chooses to listen to music.”³⁰⁹ There is no logical reason for the vast differentiation in royalty rates.³¹⁰

The unequal treatment of the different technological platforms violates a core governing economic principle; that is, whenever possible, laws should be technologically neutral.³¹¹ The overarching goal of copyright law in the United States, as set out in the Constitution, is “to promote the progress of science and useful arts.”³¹² The law has a utilitarian purpose in that it is meant to incentivize authors to create works. This, in turn, enriches the public domain.³¹³ Thus, copyright protection is granted with the purpose of promoting the progress of knowledge and learning for the good of society. The overall goals of copyright law cannot be achieved when copyright policy discriminates on the basis of technology, as is the case with sound recordings.³¹⁴ When services that perform essentially the same function are subject to drastically different royalty rate determination standards, allowing some of

³⁰⁸ Stockment, *supra* note 26, at 2161.

³⁰⁹ Spektor, *supra* note 79, at 15.

³¹⁰ Pals, *supra* note 31, at 694.

³¹¹ Castro, *supra* note 27, at 1; *see* SYDNOR, *supra* note 34, at 11; *see also* Chris Reed, *Taking Sides on Technology Neutrality*, SCRIPTED, (2007) 4:3 263 at 264, <http://www2.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.asp> (noting that, “technology neutrality has long been held up as a guiding principle for the proper regulation of technology”).

³¹² U.S. CONST. art. I, § 8, cl. 8.

³¹³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

³¹⁴ Stockment, *supra* note 26, at 2167.

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those services to flourish while others fold, the public will not benefit to the full extent possible from a dissemination of knowledge and learning.

Platform parity is the notion that “all music services subject to the sound recording performance royalty should pay a royalty determined by the same standard.”³¹⁵ This does not necessarily mean that all technologies should pay the same royalty rate. It may very well be necessary that different royalty rates be applied to the different technological platforms, based on their promotional value, level of interactivity, and ability to displace sales.³¹⁶ However, it *is* crucial that the different technologies be subject to the same rate-setting standard. Thus, Congress should amend the current laws so as to direct the CRB to apply the same standard to all services for which it currently determines royalty rates. Which of the two standards ought to be applied, however, is the subject of fierce debate.

On one side of the argument, a group of webcasters, led by Pandora,³¹⁷ has come together to urge Congress to adopt the Internet Radio Fairness Act (IRFA),³¹⁸ which proposes to replace the market-oriented willing buyer/willing seller standard with the four-part 801(b) Standard for setting webcasting royalty rates. Meanwhile, the RIAA has come out in support of a competing bill

³¹⁵ David Oxenford, *Senate Judiciary Committee Hearing on Radio Performance Royalty and Platform Parity for Webcaster Royalties*, BROADCAST L. BLOG (August 6, 2009), <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/senate-judiciary-committee-hearing-on-radio-performance-royalty-and-platform-parity-for-webcaster-royalties/>.

³¹⁶ Stockment, *supra* note 26, at 2167.

³¹⁷ Glenn Peoples, *Internet Radio Fairness Act Slips Into Hibernation*, BILLBOARD (Jan. 3, 2013, 3:11 AM), <http://www.billboard.com/biz/articles/news/1510514/internet-radio-fairness-act-slips-into-hibernation>.

³¹⁸ Internet Radio Fairness Act, H.R. 6480, S. 3609, 112th Cong. (2012).

in draft form, called the Interim FIRST Act,³¹⁹ which would direct the CRB to apply the willing buyer/willing seller standard when setting rates for all services, including those currently grandfathered to the 801(b) Standard. Unfortunately, the 112th Congress wrapped up prior to IRFA being passed, and before the Interim FIRST Act could be introduced. However, it is expected that both bills will be put forward during the 113th Congress, thus setting the stage for a political fight that is expected to carry on for years.³²⁰

As discussed above in Part V, the willing buyer/willing seller standard suffers from various flaws; namely, it disregards the public interest in the availability of creative works, and fails to consider the impact that high royalty rates will have on the services involved. Application of this standard has led to “onerous rates that, absent congressional intervention, have risked driving innovative companies out of business.”³²¹ Despite its noble intentions, the standard fails to produce rates that would willingly be agreed to by market participants. On the other hand, the broad nature of the 801(b) Standard allows the CRB to factor in an array of policy considerations when setting rates. As such, the 801(b) Standard better captures the constitutional purpose of copyright law.³²² It properly balances the interests of copyright holders,

³¹⁹ Interim Fairness in Radio Starts Today (FIRST) Act of 2012, Discussion Draft (Aug. 7, 2012 3:36 PM), http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf. Note that the bill also proposes to end the royalty exemption currently enjoyed by terrestrial broadcasters, subjecting them instead to the willing buyer/willing seller standard.

³²⁰ Glenn Peoples, *Business Matters: Let's Get Ready To Rumble! 2013's Dueling Internet Radio Royalty Bills*, BILLBOARD (Sept. 27, 2012), <http://www.billboard.com/biz/articles/news/1083626/business-matters-lets-get-ready-to-rumble-2013s-dueling-internet-radio>.

³²¹ Villasenor, *supra* note 182, at 13.

³²² Stockment, *supra* note 26, at 2168.

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broadcasters, and the public, thus leading to more equitable royalty rate determinations for all parties involved.³²³

Although IRFA has been highly criticized by its opponents,³²⁴ it is clearly a better alternative than the Interim FIRST Act. Extending the 801(b) Standard to webcasters is the best approach for achieving platform parity among digital audio broadcasters. However, when applying the 801(b) Standard, the CRB must ensure that all services pay a fair rate to sound recording copyright owners. The CRB, in other words, must strive to set rates that will allow webcasters to maintain a viable business, yet not at the expense of copyright owners.³²⁵ It is expected that tensions between sound recording copyright owners and webcasters will continue to intensify as the 2015 expiration date of the Pureplay Agreement approaches.³²⁶ Thus, it is crucial that IRFA be reintroduced and passed in the 113th Congress in order to bring some closure to this contentious issue.

B. Ending the Terrestrial Radio Exemption: The Performance Rights Act

Although applying the 801(b) Standard to all digital radio providers will level the playing field among those services, more needs to be done in order to achieve full platform parity. Namely, the sound recording public performance royalty exemption currently enjoyed by terrestrial radio must be brought to an end.

³²³ Pals, *supra* note 31, at 694.

³²⁴ See, e.g., Testimony of Jeffrey A. Eisenach, PH.D. Before the Subcommittee on Intellectual Property, Competition and the Internet Committee (Nov. 28, 2012), <http://judiciary.house.gov/hearings/Hearings%202012/Eisenach%2011282012.pdf>; see also Marshall, *supra* note 93, at 463.

³²⁵ Whereas webcasters currently pay royalty rates that are prohibitively high, the services grandfathered to the 801(b) Standard arguably pay unjustifiably low fees. The CRB must strive to find a better balance between compensating copyright owners, and not disrupting the copyright user's business model.

³²⁶ Marshall, *supra* note 93, at 463.

Despite AM/FM broadcasters earning upwards of \$20 billion per year in advertising revenue, they do not pay a cent to the artists and musicians who bring life to the songs that they broadcast.³²⁷ This issue, for more than three-quarters of a century, has been the subject of heated debate, with Congress rejecting at least thirty bills that sought to create a general performance right in sound recordings.³²⁸

On February 4, 2009, the Performance Rights Act (PRA)³²⁹ was introduced in slightly different versions in the House of Representatives and in the Senate, becoming the latest attempt to rectify the current inequity in royalty payment obligations. Unfortunately, neither version of the bill advanced to a floor vote during the 111th Congress. Despite having the full support of the Obama Administration,³³⁰ the PRA was not reintroduced in the 112th Congress. At present, its future remains uncertain.

The PRA aims to expand the scope of § 106(6) exclusive public performance rights by including all performances made publicly “by means of an audio transmission,” thereby encompassing terrestrial broadcasts.³³¹ In essence, the PRA seeks to end the royalty exemption that AM/FM radio has long enjoyed. Under the PRA, terrestrial radio stations, like non-interactive

³²⁷ See Noh, *supra* note 17, at 95 (“In 2006, radio earned an estimated \$20 billion in ad revenue. From those earnings, songwriters were paid roughly \$600 million. Recording artists were paid nothing.”).

³²⁸ Sen, *supra* note 64, at 234–35.

³²⁹ Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009). Note that the bill was first introduced in 2007, but “failed to garner sufficient votes to pass in the House in 2008.” Day, *Super Brawl*, *supra* note 40, at 192.

³³⁰ La France, *supra* note 76, at 233.

³³¹ H.R. 848 § 2(a); S. 379 § 2(a). The PRA would strike the word “digital” from 17 U.S.C. § 106(6). Note that while the amended statute would give rights to performances by means of an audio transmission, the right will not extend to other public performances of sound recordings, such as those in music venues, restaurants, or other business establishments. See La France, *supra* note 76, at 233.

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webcasters, would become subject to statutorily prescribed rates as set out in § 114 of the Copyright Act and as determined by the CRB.³³² Smaller commercial broadcast stations, however, would be subject to a flat rate royalty fee ranging from \$100 to \$5000 annually.³³³ It is estimated that “nearly 80% of radio stations operating in the United States today would qualify for a flat, annual rate.”³³⁴ Non-profit broadcasters and college radio stations, meanwhile, would also be subject to discounted annual fees,³³⁵ while religious stations and stations that use sound recordings only incidentally would be completely exempt under the Act.³³⁶

For all parties involved, the PRA offers an equitable solution to the current royalty dispute. As such, it is essential that the PRA be reintroduced in the 113th Congress and the royalty exemption for terrestrial broadcasters brought to an end. As discussed below, there are several compelling reasons why terrestrial broadcasters should begin paying sound recording copyright holders for the use of their performances.

1. The Promotional-Value Argument is Flawed and Outdated

Time and time again, Congress’s justification for declining to extend public performance rights to sound recording copyright

³³² H.R. 848 § 2(c); S. 379 § 2(b). Note that 17 U.S.C. § 114(f)(2)(B) (2012) currently directs the CRB to use the willing buyer/willing seller standard when determining rates. However, if IRFA is passed in the 113th Congress, § 114 would be amended to replace the willing buyer/willing seller standard with the 801(b) Standard.

³³³ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1). Under the House bill, smaller commercial broadcast stations (those whose annual gross revenues do not exceed \$1.25 million) would pay an annual fee ranging from \$500 to \$5000, depending on their annual revenue. Under the Senate Judiciary Committee’s version of the bill, on the other hand, smaller commercial broadcast stations would pay an annual fee ranging from \$100 to \$5000.

³³⁴ Day, *Super Brawl*, *supra* note 40, at 193.

³³⁵ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

³³⁶ H.R. 848 § 3(b); S. 379 § 3(b).

owners has been the need to maintain “an alleged economic balance between” the radio industry and recording artists.³³⁷ Namely, the belief that radio play spurs record sales has justified the long-standing imbalance in copyright law as it pertains to music.³³⁸ This “promotional-value” argument claims that recording artists do not need a general performance right for terrestrial radio because the promotional value of radio airplay adequately compensates them for the use of their copyrighted works.³³⁹ This argument is both “invalid and outdated.”³⁴⁰

Whether or not radio airplay indeed provides a promotional value for recording artists has long been hotly debated.³⁴¹ Although it is likely true that terrestrial radio provides some degree of promotional value to sound recording copyright owners, it is unquestionable that the extent of that value has been in decline. With the advent of the Internet and other alternative platforms for listening to music, terrestrial radio is no longer the force that it

³³⁷ Noh, *supra* note 17, at 97.

³³⁸ *See supra* Part II.E.

³³⁹ SYDNOR, *supra* note 34, at 6.

³⁴⁰ *Id.*

³⁴¹ The NAB, for instance, argues that the symbiotic relationship between radio and the music industry results in roughly \$1.5 to \$2.4 billion in free promotion annually for record labels. *See Day, Super Brawl, supra* note 40, at 195. Others point to “Payola,” the illegal practice of radio stations accepting money from the music industry to increase airplay of certain records, as evidence of the promotional benefit of airplay. This practice, which continues to this day, suggests that radio airplay creates significant value for the copyright owner, especially in terms of promoting new music. *See Castro, supra* note 27, at 8. On the other hand, a study in 2007 by an economics professor at the University of Texas at Dallas found that radio use is negatively correlated to the sale of sound recordings. Noh, *supra* note 17, at 100. “[T]he study found that approximately one additional hour of radio listening per person per day corresponded with a 0.75 drop in the number of albums purchased per capita in a given city over the course of a year.” *Id.* Others note that the promotional-value argument overlooks the fact that older songs are still “regularly performed on terrestrial radio but derive little to no promotional value from such radio airplay.” Day, *Super Brawl, supra* note 40, at 196.

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once was. Over the past few decades, the market share historically held by terrestrial radio has been increasingly usurped by these alternative platforms for music listening.³⁴² The growing popularity of iPods, the Internet, and subscription satellite and digital cable radio services has caused terrestrial radio to lose listeners, and, along with them, advertising revenue.³⁴³

Whereas in the past terrestrial radio was one of the only effective methods of introducing audiences to new music,³⁴⁴ today, 85% of teenagers discover new music through alternative sources, such as the Internet.³⁴⁵ The Internet provides consumers with the means to discover new music and repeatedly listen to one's favorite music to an extent not possible on terrestrial radio. A listener could spend weeks on YouTube, for example—listening to songs of their choice for free—and not even scratch the surface of available musical content. The Internet's user-friendly functionality and limitless potential puts it light-years ahead of terrestrial radio, which is a rather stale and outdated model of exposing consumers to music. The promotional-value argument, in other words, "is increasingly anachronistic. . . . [I]t presumes that the 21st Century will be like the 1960s: A world in which radio is *the* way to promote new music, and songs that become hits promote sales of entire albums."³⁴⁶ Neither of these presumptions remains true in this modern age. Although traditional radio

³⁴² Donahue, *supra* note 111, at 1301.

³⁴³ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 11 (2010), *available at* <http://www.gao.gov/assets/310/308569.pdf>.

³⁴⁴ Donahue, *supra* note 111, at 1300 (noting that "in the early days of radio, there was no better way to disseminate information quickly to a large body of the public").

³⁴⁵ Noh, *supra* note 17, at 96.

³⁴⁶ SYDNOR, *supra* note 34, at 9.

continues to be an influential media source for consumers,³⁴⁷ it is now *one of many* platforms used to introduce audiences to new artists. Moreover, it is likely that terrestrial radio's market share and promotional ability will continue to decline in the future.

Not only is terrestrial radio becoming increasingly unnecessary as a marketing tool used by the recording industry to expose audiences to new music, its ability to spur record sales is also questionable. In 2012, "sales of albums and track equivalents [were] down slightly at -1.8%" from the previous year,³⁴⁸ while total revenue stood at \$16.5 billion—less than half of the industry's pre-digital size.³⁴⁹ Regardless of whether people are tuning in to terrestrial radio, consumers are simply not purchasing music to the same extent as in the past. This is due, in large part, to rampant illegal file sharing, which has helped to create an attitude that music ought to be free.³⁵⁰ For instance, one study found that the vast majority of teens believe that file sharing is so easy to do, that it is "unrealistic to expect people not to do it."³⁵¹ Music sales

³⁴⁷ Bagdanov, *supra* note 30, at 156.

³⁴⁸ The Nielsen Company & Billboard's 2012 Music Industry Report, BUSINESS WIRE (Jan. 4, 2013, 7:13 AM), <http://www.businesswire.com/news/home/20130104005149/en/Nielsen-Company-Billboard's-2012-Music-Industry-Report> [hereinafter Nielsen].

³⁴⁹ Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES, Feb. 26, 2013, at B3, available at http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?_r=0.

³⁵⁰ Kella, *supra* note 96, at 220. The RIAA notes that since the peer-to-peer file-sharing site Napster emerged in 1999, music sales in the U.S. have dropped 53%, from \$14.6 billion to \$7 billion in 2011. See *Piracy Online: Scope of the Problem*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem&searchterms=global%20music%20production&terminclude=&termexact= (last visited June 26, 2013).

³⁵¹ Amanda Lenhart & Mary Madden, *Teen Content Creators and Consumers*, PEW RESEARCH INTERNET PROJECT (Nov. 2, 2005), <http://www.pewinternet.org/2005/11/02/part-2-teens-as-content-consumers>.

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have suffered as a result of such attitudes. Consumers increasingly expect that music be available for free, and accessible from anywhere—a service that webcasters such as Pandora can provide. Due to the current unhealthy state of the music industry, the reasons that may have once justified the exemption for terrestrial broadcasters no longer make “legal, equitable, or economic sense.”³⁵²

2. Creating a Level Playing Field for all Services

As noted above, the goals of copyright law cannot be achieved when services that perform essentially the same function are treated unequally. It is crucial that the terrestrial radio royalty exemption be brought to an end in order to establish a better balance between digital audio transmission services and terrestrial broadcasters. So long as terrestrial broadcasters remain exempt from paying sound recording performance royalties, they will have an unfair advantage over webcasters, and, to a lesser extent, satellite radio and digital cable radio services. Webcasters are simply unable to compete with terrestrial radio. As such, the exemption currently enjoyed by terrestrial radio—to the detriment of Internet radio—no longer makes sense.

The unequal treatment of the various mediums is especially unjust considering that Internet radio provides a greater promotional value for artists than terrestrial radio.³⁵³ Despite the music industry’s suffering revenues as of late, digital sales are in fact thriving. For instance, in 2012, digital albums and tracks saw year-over-year sales increases of 14.1% and 5.1%, respectively.³⁵⁴ The relatively healthy state of the digital music market is due in part to the fact that webcasters facilitate the purchase of music. For

³⁵² Noh, *supra* note 17, at 86.

³⁵³ Bagdanov, *supra* note 30, at 157.

³⁵⁴ Nielsen, *supra* note 348. Note that the increase in digital sales has not been able to make up for the massive drop in physical sales, which declined by 13% over the same period. *Id.*

instance, “on most webcasting stations, the artist’s name, song name, and album name are displayed next to a purchase option, a feature not available on terrestrial radio stations.”³⁵⁵ Moreover, Internet radio broadens the public’s access to music to an extent not possible on terrestrial radio by providing a platform for independent artists and non-mainstream genres of music.³⁵⁶ That is to say, Internet radio services advance the interests of artists in ways that terrestrial broadcasters cannot,³⁵⁷ yet pay exorbitant royalty fees. Terrestrial radio, meanwhile, continues to enjoy an exemption from paying public performance royalties to artists, despite its waning ability to hold up its end of the bargain in its supposed symbiotic relationship with the music industry. Under this scheme, the competitive landscape “is biased in favor of the old establishment players and against new start-up and innovative technologies.”³⁵⁸

3. Performers Deserve Compensation for Their Work

Without question, the performance of a song can add great value to a musical composition. As demonstrated by Aretha Franklin’s powerful rendition of “Respect,” a talented performer can bring new life to a musical work by adding unique elements that appeal to listeners. This explains why certain versions of a

³⁵⁵ Bagdanov, *supra* note 30, at 158.

³⁵⁶ Spektor, *supra* note 79, at 85. Note that terrestrial radio predominantly plays mainstream artists. *See id.*; Duvall, *supra* note 101, at 294.

³⁵⁷ Pals, *supra* note 31, at 692 (noting that: (i) webcasts do not suffer from the geographical limitations characteristic of terrestrial stations’ analog signals; (ii) unlike AM/FM radio, there is no limit to the number of webcasts that can be transmitted over the Internet, thus increasing its ability to promote more music and a greater variety of genres; (iii) webcast technology helps listeners find music that they will potentially like based on their previous listening habits; and, (iv) webcast listeners are more likely to buy music).

³⁵⁸ *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 192 (2009) (testimony of Mitch Bainwol, Chairman and CEO, RIAA), available at http://judiciary.house.gov/_files/hearings/printers/111th/111-8_47922.PDF [hereinafter *Hearing on H.R. 848*].

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composition are more popular than others, and why non-performing songwriters dream of having their songs sung by the top performers in the industry. Performers also serve as indispensable intermediaries, enabling listeners to enjoy musical works. Without such intermediaries, audiences would be left with nothing more than written musical score—something that very few of us can fully appreciate or enjoy. Non-performing songwriters, for instance, *require* performers to bring life to their compositions. Performers thus play an essential role in connecting audiences with musical compositions.

Because the performance of a song adds value to a musical composition, it also provides value to terrestrial radio broadcasters, who will broadcast what the audience wants to hear. For this reason, it is only fair that broadcasters compensate sound recording copyright owners for the use of their creative works. As the promotional-value argument becomes increasingly anachronistic and invalid, there is no reason why performers and songwriters should be treated differently when their songs are played on terrestrial radio. Both songwriters *and* performers should be paid because both are important in the creative process.

Not only is terrestrial radio's exemption from paying performance rights for sound recordings harmful to recording artists, it is also inconsistent with the legislative intent of the Copyright Act.³⁵⁹ Although allowing terrestrial radio stations to broadcast music to vast audiences without compensating the performer may increase the public's access to recorded musical works in the short-term, it fails to incentivize the artist, thus reducing the likelihood that new recordings will be produced in the future. This practice is thus contrary to the utilitarian purpose of copyright law.³⁶⁰ As music sales continue to struggle, resulting in declining income for performers, there is no reason why

³⁵⁹ Noh, *supra* note 17, at 94.

³⁶⁰ *See supra* Part VI.A.

songwriters should be incentivized to compose songs, while performers are not equally incentivized to create sound recordings. Due to the current state of the music industry, “recording artists need and deserve the . . . full complement of copyrights granted to all other creators.”³⁶¹ Terrestrial broadcasters, like any other business, should pay for the inputs that allow their industry to succeed. Any industry that profits off the labor of others should be required to pay those who provide the labor.³⁶²

The PRA would help to correct the current royalty imbalance by making “property ownership benefits for sound recordings equal to that of musical works and every other copyrightable expression.”³⁶³ Importantly, the proposed Act includes a provision that preserves performance rights for musical works. This would ensure that the gains for recording artists would not come at the expense of compositional copyright holders.³⁶⁴

4. U.S. Performers are Losing Out on Foreign Royalties

The lack of a general performance right in the United States is not simply an issue of artists losing out on compensation domestically. The ramifications of the exemption stretch far beyond America’s borders. When it comes to the production and exportation of sound recordings, the United States has long been a dominant force, standing head and shoulders above all other nations.³⁶⁵ “American music gets more radio airplay around the

³⁶¹ SYDNOR, *supra* note 34, at 10.

³⁶² Noh, *supra* note 17, at 98.

³⁶³ *Id.* at 88.

³⁶⁴ Performance Rights Act, H.R. 848 § 5; S. 379 § 5, 111th Cong. (2009).

³⁶⁵ Fernando Ferreira & Joel Waldfogel, *Pop Internationalism: Has a Half Century of World Music Trade Displaced Local Culture?* 123 *ECON. J.* 634, 641 (2013) (“Music from the US takes up the largest share of the world market but its share fell from nearly 80 percent in 1960 to a low of 40 percent in the mid-1980s. Since then, the US share has risen fairly steadily to its current level of nearly 60 percent.”).

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world than the music of any other country.”³⁶⁶ Yet, despite this impressive cultural output, the United States is one of the only industrialized nations that does not provide sound recordings with a general performance right.³⁶⁷ Because the United States does not pay a performance royalty to foreign performers when their songs are played on U.S. terrestrial radio, many foreign countries withhold performance royalties owed to American artists when their songs are played abroad—even though such countries compensate their own artists and the artists of countries other than the United States.³⁶⁸ As such, the lack of a general performance right results in a significant net loss to the U.S. economy,³⁶⁹

³⁶⁶ *Hearing on H.R. 848*, *supra* note 358, at 194 (prepared statement of Mitch Bainwol, Chairman and CEO, RIAA).

³⁶⁷ Day, *Super Brawl*, *supra* note 40, at 197–98; *see* SYDNOR, *supra* note 34, at 13 (“The U.S. is now the only OECD [Organisation For Economic Co-operation and Development] nation that fails to provide the general public-performance rights for sound recordings required by both the 1963 Rome Convention and the 1996 WIPO Performances and Phonograms Treaty [WPPT].”) The U.S. is not a party to the Rome Convention; it did accede to the WPPT, however, “the U.S. has opted out of the public performance right under [WPPT] Art. 15(3), except with respect to certain digital transmissions.” La France, *supra* note 76, at 226

³⁶⁸ *Hearing on H.R. 848*, *supra* note 358, at 194; *see* La France, *supra* note 76, at 224 (noting that foreign rights societies withhold royalties owed to U.S. performers due to the absence of material reciprocity). For example, royalties withheld from U.S. artists in France are given to the French Ministry of Culture, and are ultimately used to subsidize competing French artists, thus enriching France at the expense of U.S. sound recording copyright owners. SYDNOR, *supra* note 34, at 13–14. “The performance royalty collection practices of other countries vary widely,” with some countries opting “not [to] collect royalties arising from the broadcast of U.S. sound recordings,” some opting to “collect and impound them, and others opting to collect them and divert them toward other purposes.” *Id.* at 14 n.39.

³⁶⁹ If there was no exemption for U.S. terrestrial broadcasters, the amount in royalties paid by foreign broadcasters to U.S. artists and labels would far outweigh the amount paid by U.S. terrestrial broadcasters to foreign artists and labels, considering that U.S. artists receive the bulk of airplay around the world.

potentially to the tune of hundreds of millions of dollars.³⁷⁰ Both U.S. performers and record labels miss out on this much-needed income while their counterparts—songwriters and publishers—receive royalties from broadcasters from around the globe for the use of their compositions.

VII. CONCLUSION

The time to end the discriminatory treatment inherent in U.S. copyright law is long overdue. It is essential that Congress act swiftly to correct the current imbalances in the law by: (i) ending the royalty exemption currently enjoyed by terrestrial radio; and (ii) subjecting all services to the same royalty rate determination standard. In this paper, I have demonstrated how the current system is strikingly unfair. First, the law creates an incentive structure for songwriters that is absent for performers, thus failing to recognize the great value that performers add to a composition. Second, by subjecting webcasters to the willing buyer/willing seller standard, rather than to the more sensible 801(b) Standard, the law prevents webcasters from successfully competing with other radio technologies. Terrestrial broadcasters, in particular, are afforded an incredible advantage over their competition; they are permitted to broadcast sound recordings without having to compensate the performers who bring those songs to life. Old technology, in other words, receives favorable treatment under the law. This is done on the basis of the outdated and flawed promotional-value argument, at the expense of newer, more innovative technology. The law, in its current form, is not technologically neutral, and must be amended.

³⁷⁰ La France, *supra* note 76, at 226. Estimates of how much U.S. artists forego in foreign royalties vary widely. One expert estimates that U.S. recording artists have lost roughly \$600 million in foreign performance royalties over the last several years. *Id.* Others estimate that foreign collecting societies withhold \$70-100 million in royalties per year from U.S. performers and labels. *Id.*

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Not only do these unfair copyright policies disadvantage performers and webcasters, they also inhibit the creation of new music. Because performers do not receive compensation equal to that of their songwriting counterparts, this policy, at its extreme, has the potential to dissuade the next Aretha Franklin from choosing a career as a recording artist.³⁷¹ As a result, groundbreaking performances of pre-existing compositions may be less likely to occur, thus potentially depriving the public of culturally valuable forms of artistic expression. In this modern era of declining music sales, it is crucial that performers be granted a full public performance right in order to ensure that they are as incentivized as their songwriting counterparts to create music.

By imposing prohibitively high royalty burdens on webcasters, the law threatens to deprive the public of an excellent platform for accessing music. Despite the fact that all radio services perform essentially the same basic function, webcasting offers a number of unique advantages over its competitors. Namely, because there is no limit to the number of webcasters that can occupy the airwaves, webcasting technology delivers a wealth of musical variety to listeners.³⁷² This, in turn, provides lesser-known, independent artists with exposure to the public—an opportunity that is not often available to them on terrestrial

³⁷¹ In addition, the policy might incentivize performers to compose their own songs, thus potentially resulting in lower-quality compositions. Arguably, the best music will result when a talented songwriter pairs with a talented performer. In many cases, a songwriter can perform these two roles to great results. However, not all talented performers are capable of writing their own songs. Such performers should nonetheless be fully incentivized to record the compositions of others. *See* Sen, *supra* note 64, at 236 (arguing that the Copyright Act's current imbalanced incentive structure has had a positive effect in that it has led to the rise of the performer-songwriter movement, which has in turn substantially contributed "to the exchange of [the] political ideals that underlie our democratic institutions, while imposing only small costs on performers").

³⁷² *See* Pals, *supra* note 31, at 692.

radio.³⁷³ As a result, webcasting enriches the public domain by promoting the dissemination of unique forms of musical expression to vast audiences. By subjecting Internet radio to the flawed willing buyer/willing seller standard, the law threatens to deprive the public of a valuable resource by preventing webcasters from effectively competing with other radio services. Without this important forum for publicly performing their works, non-mainstream artists might, in turn, be dissuaded from creating new music. The current policies are thus contrary to copyright law's overarching purpose of promoting the progress of science and the useful arts, as set out in the U.S. Constitution. Performers and webcasters are just asking for a little respect. It is high time that we give it to them.

³⁷³ *Id.*