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Joseph E. Magri

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# New Media - New Rules:

## *The Digital Performance Right and Streaming Media over the Internet*

- By Joseph E. Magri\*

**S**treaming music over the Internet, or what otherwise is known as webcasting or Internet radio, has the potential to become the single most revolutionary means of music transmission ever developed.<sup>1</sup> In order to appreciate the potential impact of Internet radio, it is helpful to understand that Internet radio has the ability to venture far beyond the at-home personal computer that is tethered to a wall and logged-on to the Internet. With advances in wireless broadband technologies, such as wireless fidelity or Wi-Fi,<sup>2</sup> and the growing availability of Internet content via mobile devices,<sup>3</sup> Internet radio will soon become widely available on mobile phones,<sup>4</sup> PDA's,<sup>5</sup> digital audio receivers<sup>6</sup> and other electronic accessories.<sup>7</sup> Simply put, Internet radio is a new medium that is global by nature, easily accessible and positioned to play a significant role in the future of music.<sup>8</sup>

The steady emergence of Internet radio benefits consumers as well as the overall music industry.<sup>9</sup> Internet radio offers consumers the ability to listen, not only to any conventional AM/FM broadcast radio station retransmitted over the Internet, but also to thousands of Internet-only radio stations from around the world, free of charge.<sup>10</sup> The net result is that listeners gain increased choice and an alternative to the tightly programmed commercial broadcast radio station playlist. Internet radio websites further enhance the consumer experience by displaying the title of the song being played along with the title of the album and the featured recording artist. Increasingly, Internet radio sites also include a picture of the album cover artwork as well as a "click-to-buy" button, which gives listeners the ability to sample and purchase physical compact discs or legally download music. These multimedia features enhance consumer satisfaction and increase music sales.

Record labels, recording artists, music publishers, composers and songwriters also benefit from the growing popularity of Internet radio. Internet radio offers these groups a cost-efficient means to globally market, promote and distribute music, which can lead to greater exposure, creative new business opportunities and most importantly, new revenue sources. By supporting Internet radio as a legitimate means of promotion, record labels can save a portion of the estimated \$150 million a year they spend to obtain commercial broadcast radio airplay for their recording artists.<sup>11</sup> Furthermore, as a result of the newly created digital performance right,<sup>12</sup> record labels and recording artists now earn performance royalty fees when their copyrighted sound recordings are streamed over the Internet—royalties, incidentally, that neither record labels nor recording artists currently earn when their copyrighted sound recordings are played by AM/FM radio stations over the airways. Similarly, music publishers, composers and songwriters earn performance royalty fees when Internet radio stations stream their copyrighted works over the Internet. Internet radio also presents the opportunity to earn collateral revenue from the sale of downloadable music, downloadable "ringtones" and other music-related goods and services.<sup>13</sup>

Likewise, companies and advertisers benefit from the advent of Internet radio. Internet radio utilizes dynamic new media technology that is capable of efficiently advertising, marketing and promoting a variety of products and services.<sup>14</sup> Internet radio makes it possible to surgically target an upscale, technology-savvy and increasingly multicultural demographic in a quantifiable or so-called "measurable" fashion.<sup>15</sup> Also, because Internet radio is a relatively new medium, companies and advertisers can purchase advertising spots for a fraction of what it costs

to purchase traditional print, television and AM/FM radio spots.<sup>16</sup>

Notwithstanding the above-mentioned benefits, whether the truly revolutionary possibilities of Internet radio come to fruition depend largely on finding a compromise to the current controversy between the Recording Industry Association of America ("RIAA") and webcasters. This article attempts to enhance the likelihood of a compromise between the affected parties and foster the development of Internet radio by providing context to the controversy and clarifying some of the notoriously complex issues raised by streaming copyrighted sound recordings over the Internet. To this end, Section I identifies the two main parties at the center of the tension, the RIAA and webcasters, and highlights the issues at the core of the current controversy. Section II describes the distinction between musical works and sound recordings, defines the digital performance right, elaborates on the history of the digital performance right and discusses what the implications are for webcasters. Section III identifies the royalty rates and terms that webcasters are required to comply with in order to legally stream copyrighted sound recordings over the Internet. Section IV highlights some of the consequences the current royalty rate and term structure is having on the nascent webcasting industry. Lastly, Section V concludes by suggesting that legislators and the affected parties should: (a) rework the current royalty rate and term structure, (b) charge webcasters the same or less than commercial AM/FM radio stations for the right to stream copyrighted sound recordings over the Internet, (c) create a general or broadcast performance right for copyright owners of sound recordings and (d) continue to work with foreign lawmakers and organizations to harmonize intellectual property laws across national borders.

### **I. The Current Controversy**

#### **A. The Parties: The RIAA and Webcasters**

The RIAA is a trade group that represents the United States ("U.S.") recording industry. The RIAA is perceived to primarily represent the interests of the five major music conglomerates—Bertelsmann Music Group, EMI Music, Sony Music, Universal Music Group and Warner Music Group (known as the "Majors"),<sup>17</sup> as opposed to the interests of the thousands of smaller independent record labels. Consequently, it is important to observe that the current controversy is not necessarily between all record companies, recording artists and webcasters. Rather, the controversy is more accurately described as being between the Majors, represented by the RIAA, and webcasters.

Webcasters of Internet radio stations are similar to broadcasters of AM/FM radio stations, but instead of playing

music over the airways, webcasters stream music over the Internet. A webcaster is legally defined as "a Licensee, other than a Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site."<sup>18</sup> Translated, this definition means that webcasters: (1) are individuals and entities, otherwise known as services, (2) do not own and operate an AM/FM radio station, (3) operate for-profit, (4) do not allow listeners to receive a custom transmission, (5) do not require a fee in order to receive their transmission, (6) stream digital or other non-analog format, audio-only sound recordings that are transmitted and received beyond the place from which they are sent and (7) stream sound recordings for entertainment purposes and not to sell, advertise or promote particular goods or services over the Internet ("Webcaster(s)").

Webcasting is made possible by a process called "streaming." The streaming process utilizes encoding software, otherwise known as a codec,<sup>19</sup> which compresses and converts audio content into a streaming format. Next, a server makes the stream available over the Internet. Finally, decoding software, usually in the form of an audio player, retrieves, decompresses and translates the stream into the sounds heard by the listener.<sup>20</sup> Unlike downloading,<sup>21</sup> streaming merely plays music in a continuous stream and does not permanently store music files on the end user's computer or receiver.<sup>22</sup>

#### **B. The Issues**

The issues at the core of the current controversy between the RIAA and Webcasters revolve around the positions taken in response to the following two questions:

Question 1: Should Webcasters be charged a fee for the right to stream copyrighted sound recordings over the Internet when commercial AM/FM radio stations are not charged a similar fee for the right to play the same copyrighted sound recordings over the airways? Question 2: If it is concluded, as it appears to be, that Webcasters should be charged a fee for the right to stream copyrighted sound recordings over the Internet, then, how much should Webcasters be charged?

Not surprisingly, the battle lines have been drawn, generally speaking, between those that own copyrighted sound recordings and those that want to stream copyrighted sound recordings. Consequently, the RIAA, whose members create, manufacture and distribute approximately 90% of the sound recordings produced and sold in the U.S., believes that Webcasters should be charged a fee for the right to stream copyrighted sound recordings over the Internet.<sup>23</sup> At the same time, Webcasters do not believe that they should be charged a fee for the right to stream copyrighted sound recordings over the Internet when commercial AM/FM radio

stations are not charged a similar fee. Webcasters contend that this dual policy puts them at a competitive disadvantage. Notwithstanding the debate, Congress has already decided that Webcasters should be charged and that commercial AM/FM radio stations should not be charged.<sup>24</sup> As a result, the most significant issues now are: how much should Webcasters be charged and what recordkeeping requirements should they be required to satisfy?

## II. The Digital Performance Right

### A. Background: The Distinction Between Musical Works and Sound Recordings

To understand the controversy between the RIAA and Webcasters, it is important to distinguish between *musical works* and *sound recordings*. When an individual *composes* and *records* music, that individual creates two properties, each with its own set of exclusive rights and privileges.<sup>25</sup> The first property created is the actual written musical composition,

compact discs) in or to the public, such as over AM/FM radio airways or over retail store sound systems. To facilitate the licensing process, each copyright owner of a Musical Work becomes a member of one of the U.S. performing rights societies,<sup>29</sup> namely, the American Society of Composers, Authors and Publishers (“ASCAP”); Broadcast Music Inc. (“BMI”) or SESAC, Inc. (“SESAC”). These organizations issue blanket licenses and collect fees on behalf of their members for the right to publicly perform the Musical Works in their repertory.

By contrast, copyright owners of Sound Recordings do not enjoy the same broad exclusive right to publicly perform their copyrighted Sound Recordings that copyright owners of Musical Works possess.<sup>30</sup> This anomaly is attributed to the effective lobbying efforts of broadcasters when Sound Recordings first became protected by U.S. federal copyright law in 1971.<sup>31</sup> It was at this time that the U.S. Congress chose not to grant a public performance right to copyright owners of Sound Recordings. Furthermore, the U.S. has neither signed the Rome Convention,<sup>32</sup> which grants a limited *broadcast* performance right to copyright owners of Sound Recordings, nor has the U.S. signed any other international treaty that would compel U.S. AM/FM radio stations to recognize a public performance right for Sound Recordings.<sup>33</sup>

Therefore, unlike in most every other country,<sup>34</sup> anyone in the U.S. can publicly perform copyrighted Sound Recordings without having to obtain a license from, or pay a royalty fee to, the copyright owners of Sound Recordings. In other words, in the

U.S., record labels and musicians do not earn royalties when their recordings are played to the public. Most notably, AM/FM radio stations are not required to obtain licenses nor are they required to pay royalty fees in order to play copyrighted Sound Recordings over the airways. Due to certain legislative actions,<sup>35</sup> however, this is no longer the case in the digital world. Now, copyright owners of Sound Recordings have what is known as the *digital* performance right.

### B. The Digital Performance Right Defined

Section 106(6) of the U.S. Copyright Act grants copyright owners of Sound Recordings the *exclusive* right to publicly perform their copyrighted Sound Recordings by means of a *digital audio transmission* (“Digital Performance Right”).<sup>36</sup> A digital audio transmission is a digital or other non-analog format, audio-only Sound Recording that is transmitted and received beyond the place from which it is

It is important to keep in mind that the concept of “performance” includes both live performances and the playing of recorded performances that are fixed in records, videotapes, films and other tangible mediums of expression.

which includes both written lyrics and instrumental arrangements (“Musical Work(s)”). The second property created is the actual recorded performance of the Musical Work (“Sound Recording(s)”).<sup>26</sup> Music publishing companies, composers and songwriters typically own the copyrights to the Musical Works and record companies and musicians typically own the copyrights to the Sound Recordings.

In the U.S., copyright owners of Musical Works have the *exclusive* right to publicly perform their copyrighted Musical Works.<sup>27</sup> Therefore, anyone wanting to legally perform a copyrighted Musical Work in or to the public must obtain permission, in the form of a license and pay the associated fees. It is important to keep in mind that the concept of “performance” includes both live performances and the playing of recorded performances that are fixed in records, videotapes, films and other tangible mediums of expression.<sup>28</sup> Consequently, a license is required in order to legally perform a copyrighted Musical Work at a live concert or to play recorded performances of Musical Works (e.g.,

sent (“Digital Audio Transmission”).<sup>37</sup> Consequently, services that stream copyrighted Sound Recordings over the Internet, satellite networks or digital cable systems must obtain permission from the appropriate copyright owners. Furthermore, because the Digital Performance Right is exclusive, copyright owners are free to license their Sound Recordings on their own terms. This exclusive performance right, however, is subject to certain statutory limitations. These limitations include two new compulsory licenses that, once obtained, allow Webcasters to perform copyrighted Sound Recording in exchange for a fixed royalty fee.<sup>38</sup>

### C. History of the Digital Performance Right

Copyright owners of Sound Recordings obtained the current Digital Performance Right as a result of two amendments to the U.S. Copyright Act,<sup>39</sup> which are known as the Digital Performance Right in Sound Recordings Act of 1995 (“DPRSRA”)<sup>40</sup> and the Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>41</sup>

The DPRSRA, among other things, granted the first ever Digital Performance Right to copyright owners of Sound Recordings by adding Section 106(6) to Title 17 of the U.S. Copyright Act.<sup>42</sup> In addition to establishing the Digital Performance Right, the DPRSRA exempted certain transmissions, including the *nonsubscription* transmission of Sound Recordings.<sup>43</sup> A nonsubscription transmission is a transmission that does not require the listener to pay a fee in order to receive the transmission.<sup>44</sup> The majority of Webcasters do not charge a fee in order to receive their transmission. Therefore, the DPRSRA apparently exempted most Webcasters from complying with the DPRSRA.<sup>45</sup> As a result, Webcasters began to operate under what they believed was an exemption from the DPRSRA, which meant an exemption from having to obtain a license and pay royalty fees for the right to stream copyrighted Sound Recordings over the Internet.<sup>46</sup> The RIAA, however, hotly contested

DMCA.

The DMCA, among other things, resolved the dispute concerning the proper treatment of Webcasters by doing two things. First, the DMCA eliminated the DPRSRA exemption for nonsubscription transmissions.<sup>48</sup> Second, the DMCA expanded the compulsory licensing scheme to include “eligible nonsubscription transmissions.”<sup>49</sup> Eligible nonsubscription transmissions are non-interactive, digital audio transmissions, which do not require a subscription and exist for entertainment purposes and not to sell, advertise or promote a particular good or service.<sup>50</sup> Note that Webcasters fall within this definition. Therefore, since Webcasters fall within the definition of eligible nonsubscription transmissions, Webcasters can qualify for a compulsory license and stream copyrighted Sound Recordings in exchange for paying a set royalty fee. The primary benefits of obtaining a compulsory license are that copyright owners of Sound Recordings cannot stop Webcasters from streaming their copyrighted works, and Webcasters know in advance how much it will cost them to stream copyrighted Sound Recordings over the Internet.

### D. Implications for Webcasters: The Compulsory License Requirement

The current Digital Performance Right has two primary implications for Webcasters. First, Webcasters are now, without question, subject to the U.S. Copyright Act and any subsequent implementing regulations and agreements. Second, Webcasters are now required to either voluntarily negotiate individual licenses for each and every copyrighted Sound Recording streamed over the Internet or to comply with the compulsory licensing scheme established in the DMCA. As a practical matter, however, most Webcasters will comply with the compulsory licensing scheme because it is inefficient to voluntarily negotiate individual licenses.

The DMCA compulsory licensing scheme includes two new licenses. The first new compulsory license is a Sound Recording performance license (known as a “Section 114” license).<sup>51</sup> The Section 114 license gives Webcasters the legal right to perform or transmit copyrighted Sound Recordings over the Internet in exchange for a set fee. The second new compulsory license is an ephemeral recording license (known as a “Section 112”

**UNLIKE** in most every other country, anyone in the U.S. can publicly perform copyrighted Sound Recordings without having to obtain a license from, or pay a royalty fee to, the copyright owners of Sound Recordings.

this position and argued that Webcasters were not exempt from the DPRSRA and were required to obtain a license and pay royalty fees.<sup>47</sup> Notwithstanding the positions taken, the dispute was ultimately resolved with the passage of the

license).<sup>52</sup> The Section 112 license gives Webcasters the legal right to make ephemeral or non-permanent reproductions of copyrighted Sound Recordings for the sole purpose of facilitating the transmission of Sound Recordings in exchange

for a set fee.<sup>53</sup> Therefore, if Webcasters want to stream copyrighted Sound Recordings over the Internet without obtaining individual licenses for each copyrighted Sound Recording streamed, they must obtain both a Section 114 and a Section 112 license and pay the associated fixed fees.

Furthermore, in order to qualify for the Section 114 and Section 112 compulsory licenses, Webcasters must satisfy a series of technical prerequisites that are outlined in the DMCA.<sup>54</sup> The technical prerequisites include the following:

1. Sound Recording Performance Complement. A Webcaster must comply with the “sound recording performance complement,” which prohibits a Webcaster from transmitting within any given three-hour period: (A) more than three different songs from the same *album* if more than two such songs are transmitted consecutively or (B) four different songs by the same *artist* (or four different songs from the same *compilation*) if more than three such songs are transmitted consecutively.<sup>55</sup>

2. No Prior Announcements. A Webcaster must not publish an advance program schedule that discloses: (i) the titles of specific *songs*, (ii) the names of the *albums* or (iii) the names of the *artists* to be transmitted (with exception).

3. Programming Rules. A Webcasters’ programming must also comport with the following rules:

(a). Archived Programming. An archived program must be at least five-hours long and cannot be made available for more than two weeks,<sup>56</sup>

(b). Looped Programming. A continuously looped program must be at least three-hours long.<sup>57</sup>

(c). Rebroadcast Programming. A rebroadcast of an identifiable program that contains songs, which are played in a predetermined order (other than an archived or continuous program) and is less than one-hour in length, can be transmitted no more than three times in any two-week period when the program has been publicly announced in advance (with exception) and no more than four times in any two-week period when the program is one-hour or more in length (with exception).

4. Prohibition of False Affiliation. The Webcaster must not knowingly contemporaneously play or synchronize a song to visual images in a manner that is likely to cause confusion as to the affiliation of the copyright owner of the Sound Recording or the artist with the Webcaster or a particular product or service.

5. Cooperate to Defeat Scanning. The Webcaster must cooperate to prevent (to the extent feasible) listeners from automatically scanning the Webcasters transmissions in order to select a particular song to be transmitted (with exception).

6. Limit Duplication by Recipient. The Webcaster cannot affirmatively cause or encourage the duplication

of songs and if the Webcaster uses technology that allows them to limit the ability to duplicate songs directly in a digital format, the Webcaster must set such technology to limit the ability to duplicate songs to the extent permitted by the technology.

7. No Transmission of Bootleg Copies. The Webcaster must use Sound Recordings that are legally sold to the public or authorized for performance by the copyright owner of the Sound Recording and that are legally manufactured (with exception).

8. Accommodate Technical Protection Measures. The Webcaster must accommodate and cannot interfere with the transmission of technical measures that are widely used by copyright owners of Sound Recording to identify or protect copyrighted works if such measures can be transmitted without imposing substantial costs on the Webcaster or result in perceptible aural or visual degradation of the digital signal (with exception).

9. Transmission of Information. The Webcaster must display the title of the *song*, the title of the *album* and the featured recording *artist* to the listener as the song is being played (with exception).<sup>58</sup>

Once Webcasters determine that they satisfy the above threshold criteria and qualify for the Section 114 and Section 112 compulsory licenses, they must then comply with the appropriate royalty rate and term schedule.

## III. Current Royalty Rates and Terms Webcasters Must Satisfy

### A. General Royalty Rate and Term Structure

Webcasters are required to comply with the royalty rates and terms published in the Federal Register by the U.S. Librarian of Congress (“Librarian”) or any otherwise privately negotiated agreement fashioned with SoundExchange<sup>59</sup> or individual copyright owners of Sound Recordings. To date, the Librarian has separately negotiated and published four different regulations that include various royalty rate and term schedules for each of seven categories of services that publicly perform copyrighted Sound Recordings by means of a Digital Audio Transmission. In addition, both the Corporation for Public Broadcasting and satellite radio providers have independently negotiated and entered into separate agreements with copyright owners of Sound Recordings via SoundExchange. The terms of these agreements, however, are not available to the public.

As of this writing, there are royalty rate and term schedules for nine categories of services. Consequently, in order to establish what rates and terms apply to a particular service, each service must be classified as either a: (I) small

Internet-only Webcaster, (2) large Internet-only Webcaster, (3) commercial AM/FM radio station that retransmits programming over the Internet, (4) noncommercial AM/FM radio station that retransmits programming over the Internet, (5) Webcaster that is funded by the Corporation for Public Broadcasting or is a member of National Public Radio, (6) preexisting subscription service, (7) new subscription service, (8) satellite radio provider or a (9) business establishment.

Since this article focuses on Webcasters, the following section will discuss only the published and agreed upon rates and terms that affect Webcasters. Thus, this section will focus on the *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings* published on July 8, 2002 ("Order"),<sup>60</sup> which sets the rates and terms for Webcasters, among other services, and the *Notice of Agreement Under the Small Webcaster Settlement Act of 2002* ("Agreement"),<sup>61</sup> which sets the rates and terms for so called eligible small Webcasters.

### **B. Royalty Rates and Terms for Webcasters**

#### **(1) The Royalty Rate and Term Setting Process**

Under current law, the process for establishing the royalty rates and terms is the same for both the Section 114 and Section 112 compulsory license.<sup>62</sup> The royalty rates and terms are determined, if possible, by a voluntary agreement among the affected parties,<sup>63</sup> and if necessary, through a compulsory arbitration process conducted pursuant to Chapter 8 of the U.S. Copyright Act.<sup>64</sup> During the initial rate setting process for Webcasters, the interested parties were not able to negotiate an agreement so a copyright arbitration royalty panel ("CARP") was convened to determine a schedule of rates and terms.<sup>65</sup> The first CARP process began on November 27, 1998, and ended on February 20, 2002, when the CARP made its controversial report to the U.S. Copyright Office.<sup>66</sup> On May 21, 2002, the Librarian, based upon a recommendation from the U.S. Register of Copyrights, issued an order rejecting the CARP report.<sup>67</sup> The rate and term setting process ultimately ended when the Librarian published the Order on July 8, 2002.<sup>68</sup> The Order established rates and terms for the retroactive period beginning October 28, 1998, and ending December 31, 2002.<sup>69</sup>

On May 20, 2003, the Librarian published a notice that contained proposed rates and terms for the period beginning January 1, 2003, and ending December 31, 2004.<sup>70</sup> The Librarian accepted public comment to the proposed rates and terms until June 19, 2003.<sup>71</sup> Unless there is an objection from a service with a significant interest in the proceedings that is prepared and eligible to participate in another CARP proceeding, the Librarian is authorized to adopt the proposed rates and terms without convening a second CARP.<sup>72</sup> At the time of this writing, the Librarian has

received objections,<sup>73</sup> but has not yet determined whether to convene a second CARP proceeding or to adopt the proposed rates and terms. In the interim, and until new rates and terms are established, SoundExchange takes the position that Webcasters are required to comply with the rates and terms announced in the Order.<sup>74</sup> SoundExchange further holds that any retroactive adjustments, credits or additional payments will be made once new royalty rates and terms are published.<sup>75</sup> Therefore, since the first CARP proceeding was controversial, took over three years to complete and because SoundExchange is requiring compliance with the Order until new rates and terms are published or agreed upon between the affected parties, this article will discuss the royalty rates and terms under the existing Order.

It is worth noting that virtually every interest group that participated in the first CARP proceeding or had a stake in the outcome openly complained about the process and the resulting recommendation.<sup>76</sup> In fact, the CARP process and the CARP recommendation were so controversial that Congressional hearings were held to examine the copyright royalty and rate setting process.<sup>77</sup> At present, most predict that the 1993 legislation that empowered the Librarian of Congress to assemble a CARP will be revised in favor of an alternative rate setting approach.<sup>78</sup> Foreshadowing this event, on April 1, 2003, Rep. Lamar Smith (R-TX), chairman of the House Subcommittee on Courts, the Internet and Intellectual Property, heard testimony on the Copyright Royalty and Distribution Reform Act (H.R. 1417).<sup>79</sup> H.R. 1417 is a bill introduced by Rep. Lamar Smith along with Reps. Howard Berman (D-CA) and John Conyers, Jr. (D-MI), the ranking Democrat of the House Judiciary Committee.<sup>80</sup> The bill would replace the CARP process with a permanent Copyright Judge and two staffers knowledgeable in copyright law.<sup>81</sup>

#### **(2) Royalty Rates for Webcasters Under the Order**

Until the Librarian publishes a revised Order in the Federal Register, Webcasters must pay the license royalty rates outlined in the Order. The current Section 114 license royalty is fixed at 7/100 of a cent<sup>82</sup> per performance of each Sound Recording for the retroactive period beginning October 28, 1998, and ending December 31, 2002.<sup>83</sup> Furthermore, the Order allows Webcasters to estimate their total number of performances if the actual number is not available.<sup>84</sup> The Order, however, requires that the estimate be calculated by multiplying the total number of aggregate tuning hours ("ATH")<sup>85</sup> by an assumed fifteen performances per hour. Therefore, an estimate of the Section 114 License fee is calculated by multiplying the Webcaster's last ATH (x) by the assumed number of performances per hour (15) and then multiplying the resulting figure by the Section 114 License royalty (\$0.0007), which will result in identifying the total monthly Section 114 License fee ("Section 114 License

Fee"). In addition, the Section 112 License royalty is 8.8% of the total monthly Section 114 License Fee<sup>86</sup> ("Section 112 License Fee"). Thus, Webcasters must combine both the Section 114 License Fee and the Section 112 License Fee in order to identify how much it will cost to stream copyrighted Sound Recordings under the Order.

### **(3) Recordkeeping and Notice Requirements for Webcasters Under the Order**

As of this writing, no final decision has been made as to the records that Webcasters are required to collect, maintain and report to copyright owners of Sound Recordings. On February 7, 2002, the U.S. Copyright Office proposed recordkeeping and notice requirements designed to give copyright owners of Sound Recording reasonable notice of the use of their copyrighted works.<sup>87</sup> The U.S. Copyright Office received comments and reply comments to the proposed requirements until April 5, 2002, and April 26, 2002, respectively.<sup>88</sup> Upon review of the comments, the U.S. Copyright Office recognized the contentious nature of the positions taken in response to the proposed regulations and issued a notice announcing a public roundtable discussion on the matter.<sup>89</sup> The U.S. Copyright Office is currently in the process of evaluating the merits of the various positions taken on the issue and is drafting comprehensive final recordkeeping and notice requirements. In the meantime, however, the U.S. Copyright Office is preparing to release interim regulations that are likely to require Webcasters to maintain and report the following information for a certain period of time during each calendar quarter:

1. The name of the service submitting the report;
2. The transmission category of the service;<sup>90</sup> and
3. For each Sound Recording transmitted by the service during the relevant period:
  - a. the featured recording artist;
  - b. the Sound Recording title;
  - c. the name of the record album containing the sound recording, if in the possession of the service, or supplied to the service, at or before the time of the performance;
  - d. the marketing label of the Sound Recording, if in the possession of the service, or supplied to the service, at or before the time of the performance; and
  - e. the total number of performances of the Sound Recording during the relevant reporting period.<sup>91</sup>

Note that the recordkeeping and notice requirements are another significant source of controversy

between the RIAA and Webcasters. Recordkeeping and notice requirements are important because excessive requirements will have a negative impact on the development of the overall webcasting industry. In fact, due to the time commitment and various costs associated with data collection, maintenance and reporting, excessive requirements can effectively cripple the webcasting industry.<sup>92</sup> Therefore, recordkeeping and notice requirements are not tertiary issues that can be ignored.

## **C. Royalty Rates and Terms for Eligible Small Webcasters**

### **(1) The Royalty Rate and Term Setting Process**

In response to the apparent inability of "small" Webcasters to pay the excessive royalty rates established in the Order, Congress passed legislation that led to a voluntarily negotiated agreement by and between SoundExchange and the Voice of Webcasters.<sup>93</sup> This Agreement was the culmination of a lengthy process that started on September 26, 2002, when Rep. James Sensenbrenner (R-WI), Chairman of the Committee on the Judiciary introduced the initial version of H.R. 5469, known as Relief for Small-Business Webcasters.<sup>94</sup> This bill attempted to impose a six-month moratorium on the webcasting royalty fees set out in the Order.<sup>95</sup> Reportedly, however, the bill was pulled from a scheduled vote and shelved because it was opposed by Rep. John Conyers (D-MI) and was assured defeat.<sup>96</sup>

Following this event and at the behest of Rep. Sensenbrenner, the RIAA and representatives from the webcasting industry embarked on a mission to negotiate a settlement that could be brought to the floor of the U.S. House of Representatives ("House") for a vote before the first webcasting royalty fees became due on October 20, 2002. After seven days of negotiating, the parties involved

**WEBCASTERS** must combine both the Section 114 License Fee and the Section 112 License Fee in order to identify how much it will cost to stream copyrighted Sound Recordings under the Order.

reached a compromise and presented a second version of H.R. 5469 to Rep. Sensenbrenner. This new version of H.R. 5469 was entitled Small Webcasters Amendments Act of 2002 ("SWAA").<sup>97</sup> On October 7, 2002, the SWAA was passed



## New Media - New Rules

by the House in a suspension vote, enabling the House to bypass the usual committee process and immediately forward the bill to the U.S. Senate ("Senate"). Despite these efforts to expedite the process, the SWAA did not reach the Senate floor before the November 2002 election recess because of a last-minute hold placed on the bill by U.S. Senator Jesse Helms (R-NC).<sup>98</sup> This, however, was not the end of H.R. 5469.

Shortly after the November elections but before the newly elected members started their term, the Senate began a so-called, "lame duck" session to address immediate matters of U.S. national security. During this period, Senators Patrick Leahy (D-VT) and Jesse Helms co-sponsored a third version of H.R. 5469, which was renamed the Small Webcaster Settlement Act of 2002 ("SWSA").<sup>99</sup> The SWSA was unanimously passed by the Congress on November 15, 2002,<sup>100</sup> and was signed into law by President George W. Bush on December 4, 2002.<sup>101</sup> The SWSA, among other things, authorized SoundExchange to enter into an agreement on behalf of all copyright owners of Sound Recordings to set royalty rates and terms for "small" Webcasters, provided that the agreement was submitted to the U.S. Copyright Office by December 15, 2002.<sup>102</sup> On December 13, 2002, SoundExchange and the Voice of Webcasters submitted a signed Notification of Agreement Under the Small Webcasters Settlement Act of 2002 to the Copyright Office,<sup>103</sup> which was ultimately published in the Federal Register on December 24, 2002.<sup>104</sup>

### **(2) Royalty Rates for Eligible Small Webcasters Under the Agreement**

Webcasters who fall within the definition of an "eligible small webcaster" may choose to operate in accordance with the royalty rates and terms set forth in the Agreement rather than the royalty rates and terms set forth in the Order. An eligible small webcaster is defined as a Webcaster that: (1) for the retroactive period beginning October 28, 1998, and ending December 31, 2002, has gross revenues during the period beginning November 1, 1998, and ending June 30, 2002, of not more than \$1,000,000; (2) for 2003, together with its affiliates, has gross revenues during 2003 of not more than \$500,000 and (3) for 2004, together with all affiliates, has gross revenues plus third party participation revenues from the operation of new subscription services during 2004 of not more than \$1,250,000 ("Eligible Small Webcaster(s)").<sup>105</sup>

Eligible Small Webcasters must pay the following royalty rates: (1) for the retroactive period beginning on October 28, 1998, and ending December 31, 2002, the royalty rate shall be eight percent of the Eligible Small Webcaster's gross revenues during such period, or five percent of the Eligible Small Webcaster's expenses during such period, whichever is greater; (2) for 2003 and 2004, the royalty rate shall be ten percent of the Eligible Small Webcaster's first

\$250,000 in gross revenues and twelve percent of any gross revenues in excess of \$250,000 during the applicable year, or seven percent of the Eligible Small Webcaster's expenses during the applicable year, whichever is greater.<sup>106</sup> In addition, it is important to note that the royalty rate payable under the Section 112 license for any ephemeral reproductions are deemed included within and to comprise nine percent of such royalty payments and that royalty payments from December, 2002 forward are required to be paid on a monthly basis.<sup>107</sup>

Notwithstanding the obligation to make the royalty payments discussed above, Eligible Small Webcasters are required to pay certain predetermined minimum fees regardless of their revenue or lack thereof.<sup>108</sup> The predetermined minimum royalty fees are as follows: (1) for the period beginning October 28, 1998, and ending December 31, 1998, the minimum fee is \$500; (2) for the calendar years 1999 through 2002, the minimum fee is \$2,000 for each year transmissions are made; (3) for the calendar years 2003 and 2004, the minimum fee is \$2,000 if the Eligible Small Webcaster had gross revenues during the immediately preceding year of not more than \$50,000 and expects to have gross revenues during the applicable year of not more than \$50,000 and (4) for the calendar years 2003 and 2004, the minimum fee is \$5,000 for each year transmissions are made if the Eligible Small Webcaster had gross revenues during the immediately preceding year of more than \$50,000 or expects to have gross revenues during the applicable year of more than \$50,000.<sup>109</sup>

### **(3) Recordkeeping and Notice Requirements for Eligible Small Webcasters Under the Agreement**

Webcasters that qualify as an Eligible Small Webcaster and elect treatment under the Agreement must also comply with the recordkeeping and notice requirements outlined in the Agreement. The Agreement requires that Eligible Small Webcasters maintain records for each channel they operate and submit reports of use on a monthly basis.<sup>110</sup> The reports of use must include the following information for each copyrighted Sound Recording streamed:

1. The featured recording artist, group or orchestra;
2. The Sound Recording title;
3. The title of the retail album or other product (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Eligible Small Webcaster for purchase of the Sound Recording);
4. The marketing label of the commercially available album or other product on which the Sound Recording is found—
  - (a) for all albums or other products commercially released after 2002; and
  - (b) in the case of albums or other products

commercially released before 2003, for sixty-seven percent of the Digital Audio Transmissions of such pre-2003 releases during 2003 and all of the Digital Audio Transmissions during 2004;

5. The International Standard Recording Code ("ISRC") embedded in the Sound Recording, if available—

(a) for all the albums or other products commercially released after 2002; and

(b) in the case of albums or other products commercially released before 2003, for fifty percent of the Eligible Small Webcaster's Digital Audio Transmissions of such pre-2003 releases during 2003 and for seventy-five percent of such pre-2003 releases during 2004, to the extent that such information concerning such pre-2003 releases can be provided using commercially reasonable efforts;

6. The copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P) (the letter P in a circle) or, in case of compilation albums created for commercial purposes, in the copyright notice for the individual track)—

(a) for all albums or other products commercially released after 2002; and

(b) in the case of albums or other products commercially released before 2003, for fifty percent of Eligible Small Webcaster's transmission of such pre-2003 releases during 2003 and for seventy-five percent of an Eligible Small Webcaster's transmissions of such pre-2003 releases during 2004, to the extent that such information concerning such pre-2003 releases can be provided using commercially reasonable efforts;

7. The ATH on a monthly basis, for each channel provided by the Eligible Small Webcaster as computed by a recognized industry ratings service or as computed by the Eligible Small Webcaster from its server logs;

8. The channel for each transmission of each Sound Recording; and

9. The start date and time of each transmission of each Sound Recording.<sup>111</sup>

#### **IV. The Consequences the Current Royalty Rate and Term Structure is Having on the Webcasting Industry**

Most reports predicted that the Order would cause many Webcasters to go bankrupt or cease streaming and that there would be a surge of market consolidation.<sup>112</sup> A

report by Jupiter Research noted that the royalty fees established in the Order could bankrupt Webcasters by forcing them to pay more to perform songs than they could recoup in advertising revenue.<sup>113</sup> This prediction was supported by a BRS Media report showing that the copyright crises had a direct impact on the number of stations webcasting and that for the first time since 1995, when BRS Media began tracking Internet radio, U.S. based stations represented less than fifty percent of the stations webcasting.<sup>114</sup> BRS Media also reported that well over one thousand U.S. stations ceased streaming due to the current copyright issues.<sup>115</sup> Thus, although difficult to quantify, it appears that the widespread speculation was correct.

There is also a growing trend of market consolidation. For example, KPIG, the first commercial FM radio station to stream its programming over the Internet, announced in July, 2002, that it was going to suspend its Internet simulcasts because it could not afford to pay the webcasting royalty fees.<sup>116</sup> Following this announcement, in September, 2002, KPIG returned to the Internet, not as a free Internet radio station, but rather as part of Real Networks' subscription service.<sup>117</sup> Now, subscribers to RadioOne RadioPass can listen to KPIG and over fifty other Internet radio channels for \$5.95 per month.<sup>118</sup> Likewise, in what is seen as another example of the rapid changes and consolidation occurring in the digital radio space, Vivendi Universal Net USA ("VUNet USA") and Radio Free Virgin ("RFV") announced a partnership to launch customized radio channels on several of VUNet USA's online music properties, which include RollingStone.com, Emusic.com, TruSonic.com, GetMusic.com and MP3.com. One reporter remarked that "[i]t was only a matter of time before congressionally imposed royalty fees for Internet radio webcasters flushed out the little guys and paved the way for big media conglomerates."<sup>119</sup> The article predicted that "droves of small Internet radio stations will be wiped off the cyber map in coming months ... and only the wealthy, conglomerate-backed music providers like Microsoft's Windowsmedia.com, Clear Channel, AOL's Netscape radio site, MusicMatch and Yahoo!'s Launchcast will dominate the playing field."<sup>120</sup>

Furthermore, the passage of the SWSA and subsequent publication of the Agreement only delay the fact that, if successful, Eligible Small Webcasters will eventually have to comply with the Order. Webcasters can only take advantage of the lower royalty rates set forth in the Agreement if their revenues are less than \$500,000 during 2003 and less than \$1,250,000 during 2004. Therefore, once Eligible Small Webcasters begin to generate more than \$500,000 in gross revenues during 2003 or more than \$1,250,000 in gross revenues during 2004, they will have to pay the royalty rates outlined in the Order. This means that successful Eligible Small Webcasters will ultimately have to generate a sufficient amount of revenue to enable them to cover the elevated costs of doing business and still earn a

competitive rate of return on their investment. This does not appear possible in the current advertising and economic environment.<sup>121</sup>

The net result is that the current royalty rate and term structure hampers the overall development of the webcasting industry by diminishing competition and ensuring that the industry will only include two classes of Webcasters—(1) Webcasters that make a business decision to maintain their status as an Eligible Small Webcaster so that they do not have to pay excessive royalty fees that would almost certainly bankrupt them and (2) large media conglomerates that are able to sustain hundreds of thousands of dollars in startup losses before building a profitable business model.<sup>122</sup>

### V. Conclusion

Streaming music over the Internet offers a promising, revenue-generating opportunity for the recording industry and the recording industry should encourage its development.<sup>123</sup> Just like FM radio before it, webcasting is positioned to revolutionize the way music is transmitted, experienced, enjoyed and, yes, even impact the way music is purchased.<sup>124</sup> Unfortunately, an uncertain legal environment, excessive royalty fees and over-regulation have stifled investment in the medium and hindered the overall impact of the product.<sup>125</sup>

Going forward, if the webcasting industry is to achieve its potential, a competitive

environment must be created that attracts investment, encourages innovation and allows the overall music industry to benefit. To this end, legislators and the affected parties should: (a) rework the current royalty rate and term structure, (b) charge Webcasters the same or less than commercial AM/FM radio stations for the right to stream copyrighted Sound Recordings over the Internet, (c) create a general or broadcast performance right for copyright owners of Sound Recordings and (d) continue to work with foreign lawmakers and organizations to harmonize intellectual property laws across national borders.

First, the current royalty rate and term structure should be fundamentally reworked. The current system includes a patchwork of fee schedules covering several classes of services that perform copyrighted Sound Recordings by means of a Digital Audio Transmission. This system creates

excessive and inconsistent royalty fees with terms that are unnecessarily complicated and burdensome.<sup>126</sup> Furthermore, the royalty rates recommended by the first CARP were based largely on the Yahoo!/RIAA license agreement,<sup>127</sup> which was reportedly structured to shut out small Webcasters and stifle competition.<sup>128</sup> Although the royalty rates published in the Order and Agreement are less than the rates proposed by the initial CARP, the resulting royalty rates were based on the CARP's recommendation and still create a significant barrier for small Webcasters. Moreover, the current royalty rate and fee schedules create a unique problem for small Webcasters that become successful. As stated in Section VI, once small Webcasters grow beyond a certain point, they will be required to pay royalty fees that will almost certainly cause them to either go bankrupt or make a business decision to remain small. In the end, there is no common sense rationale to create or defend a legal structure that makes it difficult for small business to compete and that delivers a potentially decapitating blow to small businesses that actually reach a measurable level of success.

Additionally, there should be transparency among the various royalty rate and term schedules governing services that perform copyrighted Sound Recording by means of a Digital Audio Transmission. Currently, some of the schedules, such as the schedule that governs satellite radio services, are not available to the public and they should be

made available. There is no apparent reason why the royalty rates and terms for Internet radio and commercial AM/FM radio services should be a matter of

**STREAMING** music over the Internet offers a promising, revenue-generating opportunity for the recording industry, and the recording industry should encourage its development.

public record while the rates and terms for satellite radio services are not. Internet, AM/FM and satellite radio services all exploit Sound Recordings as the cornerstone of their business model and indirectly compete for consumers. Another point to consider is that Internet radio stations are moving closer to making their streams available in automobiles while satellite radio stations are currently making their streams available through personal computers and in the home entertainment environment. As a result, Internet, AM/FM and satellite radio services could soon find themselves directly competing for the same consumers. Considering this possibility, lawmakers should take deliberate steps to ensure they do not unintentionally create a competitive advantage for one technology over the other. In other words, the marketplace and not legal favoritism, should determine which technology enjoys support and ultimate success. Thus,

to avoid the appearance of special treatment and to benefit the development of a healthy and competitive marketplace for the transmission of digital music, there should be transparency among the various rate and term schedules.

Second, Webcasters should be charged the same or less than commercial AM/FM radio stations for the right to stream copyrighted Sound Recordings over the Internet. This is because, when it comes to webcasting, both Webcasters and commercial AM/FM radio stations do the same thing—they stream music over the Internet. Although the Order charges Webcasters the same as commercial AM/FM radio stations,<sup>129</sup> the proposed order published on May 20, 2003, charges Webcasters more than commercial AM/FM radio stations.<sup>130</sup> In other words, under the proposed order, commercial AM/FM radio stations will pay a lower royalty rate than Webcasters for the privilege of streaming the same copyrighted Sound Recordings over the Internet. Hence, AM/FM radio stations will obtain a competitive advantage when entering the Internet radio business. The proposed order essentially subsidizes well-funded and established media conglomerates such as Clear Channel and unfairly taxes struggling Webcasters.<sup>131</sup> Consequently, the proposed order will further handicap the development of the nascent webcasting industry. Instead of maintaining a system that benefits one group over another, Webcasters and commercial AM/FM radio stations should be charged the same fee for the right to stream the same copyrighted Sound Recordings over the Internet. If, however, one service is charged less than the other, it seems lawmakers can justify charging Webcasters less than commercial AM/FM radio stations in order to nurture the development of a new industry.

Third, the RIAA should focus its political efforts on creating a long-awaited *general or broadcast* performance right for copyright owners of Sound Recordings. This action will both level the competitive playing field between Webcasters and commercial AM/FM radio stations and help to establish an additional revenue source for copyright owners of Sound Recordings. Logic and equity dictate that if Webcasters are required to pay performance royalty fees for the right to perform copyrighted Sound Recordings over the Internet, then commercial AM/FM radio stations should likewise be required to pay performance royalty fees for the right to perform copyrighted Sound Recordings over the airways. Over the years, conventional radio broadcasters have built a \$19 billion a year industry based on the creative works of artists and record companies without having to obtain a Sound Recording performance license, pay Sound Recording

performance royalty fees or meet any Sound Recording recordkeeping requirements.<sup>132</sup> The time has come for commercial AM/FM radio stations to pay for the right to play copyrighted Sound Recordings over the airways.

Creating a general or broadcast performance right for copyright owners of Sound Recordings will also generate a significant amount of revenue for copyright owners of Sound Recordings from both domestic and foreign AM/FM radio stations. For example, it is estimated that because the U.S. has not signed the Rome Convention,<sup>133</sup> which requires its signatories to adhere to a broadcast performance right, other signatories to the treaty generally do not pay U.S. copyright owners of Sound Recordings their share of the collected Sound Recording royalty fees. The total value of these unpaid fees is estimated at approximately \$600 million over the past several years.<sup>134</sup> Keep in mind that this figure does not

**WEBCASTERS** should be charged the same or less than commercial AM/FM radio stations for the right to stream copyrighted Sound Recordings over the Internet.

consider Sound Recording performance royalty fees that could have been collected from U.S. commercial AM/FM radio stations during the same period. Clearly, copyright owners of Sound Recordings could earn a significant amount of revenue if they became entitled to collect performance royalty fees from AM/FM radio stations that exploit their creative works, which could offset some of the losses that the recording industry has recently endured.<sup>135</sup>

Fourth, although the U.S. is struggling with establishing a single coherent rule of law that governs copyrighted works in the digital age within its own borders, the U.S. must continue to develop its laws in harmony with the laws of other nations.<sup>136</sup> There must be a sustained effort to harmonize the laws of nations in order to create a global legal framework that fosters competition in the broader marketplace, establishes transparency among disparate legal systems and optimizes revenue for copyright owners of Sound Recordings. The greater harmony that is achieved, the easier it will be to govern trans-border streaming of media and ultimately manage the novel legal issues that are sure to challenge the courts in this digital age. Harmony between legal regimes will also allow services to compete on a more level playing field and hedge against services forum shopping for the country with the most favorable laws in which to establish their business. Moreover, greater harmony

## New Media - New Rules

will make it easier for services to satisfy the various laws of nations and make it more likely that royalty fees will be collected and distributed to the rightful copyright owners.

The most direct approach to ensure the development of the webcasting industry is for the RIAA and SoundExchange to acknowledge that the current legal framework is dysfunctional and take proactive steps to remedy the situation. The RIAA and SoundExchange should use their collective position to voluntarily enter into negotiations with Webcasters and fashion a true marketplace agreement that is based on current market realities, not unrealistic future assumptions that may or may not materialize. This approach will take less time, less money and will be more efficient than initiating another CARP proceeding, pursuing litigation or engaging the legislative process. Under the leadership of the RIAA and SoundExchange, the nascent webcasting industry can begin to flourish and copyright owners of Sound Recordings can begin to earn more royalty fees in the process. After all, the more services that stream copyrighted Sound Recordings over the Internet, the more copyright owners will earn. It is a win-win solution for Webcasters and copyright owners of Sound Recordings that will have a broader impact on the future of music and the public at large.

### ENDNOTES

\* Joseph E. Magri is the Director of Business and Legal Affairs at Flavored Entertainment, LLC. Flavored Entertainment is a full-service music group based in Los Angeles, California, which includes a recording, music publishing, talent management and consulting division. Mr. Magri started his legal career at the law firm of Arnold & Porter in Los Angeles and is a member of the California and District of Columbia bars. Mr. Magri received his B.A. in Political Science from the University of California Irvine and his J.D. from American University, Washington College of Law in Washington, DC. Questions or comments may be e-mailed to [jmagri@flavoredentertainment.com](mailto:jmagri@flavoredentertainment.com).

<sup>1</sup> See generally Kurt Hanson, *First Law of Technology Explains Current Internet Radio Skepticism*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/012703/index.asp> (Jan. 27, 2003) (highlighting points from a keynote speech suggesting that Internet radio will replace AM/FM broadcast radio)).

<sup>2</sup> Wireless fidelity or Wi-Fi is a low-cost wireless broadband network that lets computer users access the Internet from just about anywhere, including parks (e.g., Bryant Park in Manhattan, New York), book stores (e.g., Borders), coffee shops (e.g., Starbucks), airports (e.g., San Jose, California), food chains (e.g., McDonald's) and hotels (e.g., Marriott). See EZGoalHotspots, at <http://www.ezgoal.com/hotspots/> (last visited Sept. 22, 2003) (listing worldwide wireless access

hotspots); High-Tech Dictionary, ComputerUser.com at <http://computeruser.com/resources/dictionary> (last visited Sept. 23, 2003) (defining the term "WiFi" as "abbreviated from the term wireless fidelity and is another name for IEEE802.11b. It refers to an over-the-air connection with a wireless client and a base station or between two wireless clients."). See generally Leslie Walker, *Wi-Fi, Heading for Air Supremacy*, WashingtonPost.com, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A20152-2002Nov6&notFound=true> (last visited Sept. 23, 2003) (discussing the spread of Wi-Fi).

<sup>3</sup> BMI, *BMI Answers Mobile Markets' Call For M-Content Licensing*, at <http://www.bmi.com/news/200203/20020314b.asp> (March 14, 2002) (citing McKinsey that the "mobile entertainment market is still in its infancy but is expected to grow rapidly with m-entertainment revenues exceeding \$12.6 billion by 2005").

<sup>4</sup> See Mobile Broadcast Network at <http://www.mymbn.com/mbnservices.jsp> (last visited Sept. 23, 2003) (stating that the company allows customers to listen to live and on-demand audio using the wireless Internet on mobile phones).

<sup>5</sup> See RAIN: Radio and Internet Newsletter, *Net Radio a Reality in Affordable Network-Connected PDA*, at <http://www.kurthanson.com/archive/news/010803/index.asp> (Jan. 8, 2003) (discussing Internet radio becoming a reality in affordable network-connected PDA manufactured by Dell Computer).

<sup>6</sup> See Alfred Hermida, *Portable Player Unlocks Net Radio*, BBC News Worldwide Edition, at <http://news.bbc.co.uk/2/hi/technology/2652239.stm> (Jan. 8, 2003) (discussing a wireless portable radio that lets consumers listen to Internet radio stations, including audio CD's, MP3's, WMA's, etc. as well as news and talk shows from around the world).

<sup>7</sup> See RAIN: Radio and Internet Newsletter, *Listen Works With New Tech to Link Digital Music to Home Stereo*, at <http://www.kurthanson.com/archive/news/010903/index.asp> (last visited Sept. 23, 2003) (reporting from a Listen.com press release that Listen.com is working with a number of the world's leading consumer electronics companies to bring its subscription service into the home).

<sup>8</sup> Introduction adapted from the opening of a short essay written by author. See Joseph Magri, *Internet Radio & The Future of Music*, 26 LOS ANGELES LAWYER 60 (2003).

<sup>9</sup> Notwithstanding the fact that the webcasting industry has struggled with an uncertain legal and economic environment, the number of Americans that have ever listened to Internet radio has surged from 11% in January 2000 to 34% in January

## MUSIC

2003, regular listeners have grown from 5% to 17% and the current amount of people who listen for an average of 5<sup>1/2</sup> hours per week is estimated at about 20 million, which is an Average Quarter-Hour audience of approximately 655,000 people. Arbitron Inc./Edison Media Research, *Internet and Multimedia 10: The Emerging Digital Consumer* 13-15, available at [http://arbitron.com/downloads/Internet10\\_Summary.pdf](http://arbitron.com/downloads/Internet10_Summary.pdf) (Feb. 25, 2003).

<sup>10</sup> See e.g., Live 365.com at <http://www.live365.com> (streaming thousands of Internet radio stations in a variety of genres for free) (last visited Sept. 23, 2003).

<sup>11</sup> Eric Boehlert, *Will Congress Tackle Pay-for-Play?*, Salon.com, at [http://www.salon.com/ent/feature/2002/06/25/pfp\\_congress/print.html](http://www.salon.com/ent/feature/2002/06/25/pfp_congress/print.html) (June 25, 2002); see Press Release, Future of Music Coalition, Artist Groups Deliver "Joint Statement on Current Issues in Radio" to FCC and Congress (May 24, 2002), available at <http://www.futureofmusic.org/news/PRradioissues.cfm> (last visited Sept. 23, 2003).

<sup>12</sup> See discussion *infra* Section IV.

<sup>13</sup> BMI, *supra* note 3 (citing CNET and Strand Consulting reports, which state that in 2002, ringtone sales reached \$1.5 billion in Europe, \$300 million in Japan and are rapidly growing in the United States).

<sup>14</sup> See, e.g., Arbitron Inc./Edison Media Research, *supra* note 9, at 23 (noting that "active Internet broadcast consumers are far more likely to show high interest in a variety of consumer electronics" and that "[a]dvertisers marketing consumer electronics would be smart to consider Internet broadcasting as a powerful advertising medium to influence those who are very interested in digital devices.").

<sup>15</sup> *Id.* at 5, 17.

<sup>16</sup> See generally *id.* at 15-16.

<sup>17</sup> As of this writing, Vivendi Universal was entertaining bids for the acquisition of its entertainment assets, which includes Universal Music Group. See Richard Verrier, *Vivendi Said to Peg Assets at \$14 Billion*, L.A. TIMES, July 24, 2003, at C1 available at <http://www.latimes.com/business/la-fi-vivendi24jul24,1,22943.story> (last visited Sept. 23, 2003).

<sup>18</sup> See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,273 (July 8, 2002) (to be codified at 37 C.F.R. § 261.2) (defining the term "Webcaster"), available at <http://www.copyright.gov/fedreg/2002/67fr45239.html> [hereinafter Order].

<sup>19</sup> Codec stands for coding/decoding. See High-Tech Dictionary, ComputerUser.com, at <http://computeruser.com/resources/dictionary/noframes/nf.definition.html?bG9va3VwPTk5Mw==> (last visited Sept. 23, 2003).

<sup>20</sup> See Debra Beller, *How Internet Radio Works*, at <http://computer.howstuffworks.com/internet-radio.htm> (last visited Sept. 23, 2003).

<sup>21</sup> See High-Tech Dictionary, ComputerUser.com, at <http://computeruser.com/resources/dictionary/noframes/nf.definition.html?bG9va3VwPTU0Ng==> (last visited Sept. 23, 2003).

<sup>22</sup> See High-Tech Dictionary, ComputerUser.com, at <http://computeruser.com/resources/dictionary/noframes/nf.definition.html?bG9va3VwPTQ5Nzk=> (last visited Sept. 23, 2003).

<sup>23</sup> See Recording Industry Association of America, About Us, at <http://www.riaa.com/about/default.asp> (last visited Sept. 23, 2003).

<sup>24</sup> David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 191 n.12 (2000) (stating that the U.S. Congress "immunized [conventional AM/FM] broadcasters" from the newly created performance right in sound recordings).

<sup>25</sup> See 17 U.S.C. § 106 (2003) (listing the exclusive rights in copyrighted works).

<sup>26</sup> See 17 U.S.C. § 101 (2003) (defining the term "sound recordings").

<sup>27</sup> See 17 U.S.C. § 106(4) (2003) (granting an exclusive public performance right to the copyright owners of Musical Works).

<sup>28</sup> See 17 U.S.C. § 101 (2003) (defining both the term "perform" and the phrase "to perform a work publicly").

<sup>29</sup> 17 U.S.C. § 101 (2003) (defining the term "performing rights society").

<sup>30</sup> See 17 U.S.C. § 106(4) (2003). Notice that the broad "public performance right" granted in 17 U.S.C. § 106(4) only applies to the several kinds of works *specifically* listed and that Sound Recordings are not listed.

<sup>31</sup> See MARK HALLORAN, *THE MUSICIAN'S BUSINESS & LEGAL GUIDE* 100 (3d ed. 2001) (stating that the current situation is a result of an effective lobbying effort by the broadcast

## New Media - New Rules

industry); The Recording Industry Association of America, Licensing and Royalties, Webcasting FAQ, Q.10, at [http://www.riaa.com/issues/licensing/webcasting\\_faq.asp#terr](http://www.riaa.com/issues/licensing/webcasting_faq.asp#terr) (last visited Sept. 23, 2003); see generally Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

<sup>32</sup> Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, available at <http://www.wipo.int/clea/docs/en/wo/wo024en.htm> (last visited Sept. 23, 2003).

<sup>33</sup> Note that “[f]oreign—largely European—receipts number in the hundreds of millions of U.S. dollars. Yet because of a lack of reciprocity under longstanding U.S. law, those nations have turned over almost none of the revenue thereby earned to U.S. performers, notwithstanding the large volume of American music heard on European (and other foreign) radio.” Nimmer, *supra* note 24, at 190 n.11.

<sup>34</sup> The Recording Industry Association of America, Licensing and Royalties, Webcasting FAQ, Q.10, at [http://www.riaa.com/issues/licensing/webcasting\\_faq.asp#terr](http://www.riaa.com/issues/licensing/webcasting_faq.asp#terr) (last visited Sept. 23, 2003).

<sup>35</sup> See *infra* Section IV. B. for a discussion of the Legislative action that led to the creation of the current digital performance right.

<sup>36</sup> See 17 U.S.C. § 106(6) (2003) (granting sound recording copyright owners the exclusive right to perform their copyrighted work publicly by means of a digital audio transmission). See generally Nimmer, *supra* note 24.

<sup>37</sup> 17 U.S.C. § 114(j)(5) (2003) (defining a “digital audio transmission”). See AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1302-03 (3d ed. 2002). Examples of performing digital audio transmissions include Webcasters that stream Sound Recordings over the Internet and certain digital audio services that transmit Sound Recordings over digital cable television and satellite networks.

<sup>38</sup> See *infra* Section III.D for a discussion on the new compulsory licenses.

<sup>39</sup> United States copyright law is contained in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code. The U.S. Copyright Act of 1976, which provides the basic framework for the current copyright law, was enacted on October 19, 1976, as Pub. L. No. 94-553, 90 Stat. 2541.

<sup>40</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 112, 114 and in scattered sections of 17

U.S.C.) [hereinafter DPRSRA].

<sup>41</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 112, 114 and in scattered sections of 17 U.S.C.) [hereinafter DMCA].

<sup>42</sup> DPRSRA, *supra* note 40, at § 2(3) (codified at 17 U.S.C. § 106(6)).

<sup>43</sup> DPRSRA, *supra* note 40, at § 3(3)(d) (codified at 17 U.S.C. § 114(d)).

<sup>44</sup> 17 U.S.C. § 114(j)(9) (defining the term “nonsubscription” transmission); 17 U.S.C. § 114(j)(14) (defining the term “subscription” transmission).

<sup>45</sup> See Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4 (1998) (arguing that nonsubscription-based webcasters are exempt under the DPRSRA).

<sup>46</sup> See generally Kohn, *supra* note 37, at 1300-01.

<sup>47</sup> See Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, at <http://www.kohnmusic.com/articles/newprimer.html> (last visited Sept. 23, 2003) (analyzing the RIAA’s position that nonsubscription-based webcasters are not exempt from the DPRSRA).

<sup>48</sup> DMCA, *supra* note 41, at § 405(a)(1) (striking the exemption for nonsubscription transmissions).

<sup>49</sup> DMCA, *supra* note 41, at § 405(a)(4)(D) (codified at 17 U.S.C. § 114(j)(6)) (adding the term “eligible nonsubscription transmissions”).

<sup>50</sup> See also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings 67 Fed. Reg. 45,240 n.1 (July 8, 2002).

<sup>51</sup> DMCA, *supra* note 41, at § 405(a)(2)(C) (codified at 17 U.S.C. § 114(f)).

<sup>52</sup> DMCA, *supra* note 41, at § 405(b)(2) (codified at 17 U.S.C. § 112(e)).

<sup>53</sup> See Order, *supra* note 18, at 45, 273 (defining the term “ephemeral recording”).

<sup>54</sup> DMCA, *supra* note 41, at § 405(a)(1) (codified at 17 U.S.C. § 114(d)(2)).

<sup>55</sup> See DMCA, *supra* note 41, at § 405(a)(1) (codified at 17

## MUSIC

U.S.C. § 114(j)(13)) (defining the term “sound recording performance complement”).<sup>65</sup> *Id.*

<sup>56</sup> DMCA, *supra* note 41, at § 405(a)(4)(B) (codified at 17 U.S.C. § 114(j)(2)) (defining the term “archived program” as “a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.”)

<sup>57</sup> DMCA, *supra* note 41, at § 405(a)(4)(C) (codified at 17 U.S.C. § 114(j)(4)) (defining the term “continuous program” as “a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.”)

<sup>58</sup> DMCA, *supra* note 41, at § 405(a)(1) (codified at 17 U.S.C. § 114(d)(2)(C)) (setting forth a series of technical requirements applicable to webcasters); The Recording Industry Association of America, Licensing and Royalties, Webcasting FAQ, Q.6, at [http://www.riaa.com/issues/licensing/webcasting\\_faq.asp#conditions](http://www.riaa.com/issues/licensing/webcasting_faq.asp#conditions) (last visited Sept. 23, 2003) (outlining some of the requirements in plain language).

<sup>59</sup> SoundExchange is an organization formed and designated as the receiving agent for the collection of the Section 112 and 114 License royalty fees. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,274 (July 8, 2002) (to be codified at 37 C.F.R. § 261.4(b)).

<sup>60</sup> Order, *supra* note 18, at 45,240 (to be codified at 37 C.F.R. §§ 261.1-261.8).

<sup>61</sup> Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78, 510 (Dec. 24, 2002) (published version of the Notification of Agreement Under the Small Webcaster Settlement Act of 2002) [hereinafter Agreement], available at <http://www.copyright.gov/fedreg/2002/67fr78510.html> (last visited Sept. 23, 2003).

<sup>62</sup> Compare 17 U.S.C. § 114(f)(2)(A)-(C), with 17 U.S.C. § 112(e)(3)-(4).

<sup>63</sup> Order, *supra* note 18, at 45,241 (identifying the parties that participated in the original CARP proceeding).

<sup>64</sup> *Id.* at 45, 240.

<sup>66</sup> *In re* Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, No. 2000-9 CARP DTRA 1&2 (Copyright Arbitration Royalty Panel Feb. 20, 2002) (Report of the Copyright Arbitration Royalty Panel), available at [http://www.copyright.gov/carp/webcasting\\_rates.pdf](http://www.copyright.gov/carp/webcasting_rates.pdf) (last visited Sept. 23, 2003) [hereinafter CARP Report]. Note that the CARP recommendation was so controversial that a Congressional hearing was held on the rate setting process.

<sup>67</sup> *In re* Digital Performance Right in Sound Recordings and Ephemeral Recordings, No. 2000-9 CARP DTRA 1&2 (Register of Copyrights May 21, 2002), available at <http://www.copyright.gov/carp/webcasting-rates-order.html> (last visited Sept. 23, 2003).

<sup>68</sup> See Order, *supra* note 18.

<sup>69</sup> *Id.* at 45,273 (to be codified at 37 C.F.R. § 261.3).

<sup>70</sup> Digital Performance Right in Sound Recordings and Ephemeral Recordings, 68 Fed. Reg. 27, 506 (May 20, 2003).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> SRN Broadcasting has filed an objection to currently proposed webcasting royalty deals crafted by webcasters, broadcasters and the music industry. InternetFM.com, CARP Objection, at <http://internetfm.com/acid/carpobject.htm> (last visited Sept. 23, 2003). Note also that that the Webcaster Alliance sent a letter to the RIAA threatening to sue the group for violations of the Sherman Antitrust Act unless they agree to reopen negotiations over the royalty rates webcasters are required to pay. David McGuire, *Net Radio Group Threatens to Sue RIAA*, [Washingtonpost.com](http://www.washingtonpost.com/ac2/wp-dyn/A31245-2003Jul9?language=printer), July 9, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A31245-2003Jul9?language=printer> (last visited Sept. 23, 2003).

<sup>74</sup> E-mail response from Susan C. Munsat, Associate Counsel of Legal and Business Affairs, SoundExchange, to Joseph E. Magri, Director of Business & Legal Affairs, Flavored Entertainment, LLC (Mar. 5, 2003) (on file with author).

<sup>75</sup> *Id.*

<sup>76</sup> Bill Holland, *Smith Wants Judge to Replace CARP*, [BILLBOARD](http://www.billboard.com), Apr. 12, 2003 (Quoting Rep. Lamar Smith’s litany of collected complaints about the CARP, including that the process was unpredictable, the arbitrators lacked appropriate expertise,



## New Media - New Rules

the CARP process was expensive and that the CARP arbitrators' salaries amounted to \$1000 an hour, according to the Copyright Office records).

<sup>77</sup> See generally *Copyright Royalties: Where is the Right Spot On The Dial For Webcasting: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (hearing testimony to examine copyright royalties, focusing on webcasting), available at <http://judiciary.senate.gov/hearing.cfm?id=258> (last visited Sept. 23, 2003); *Copyright Arbitration Royalty Panel (CARP) Structure and Process: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) (hearing testimony to investigate the problems with the CARP system), available at <http://www.house.gov/judiciary/80194.pdf> (last visited Sept. 23, 2003).

<sup>78</sup> *Id.*

<sup>79</sup> *The CARP (Copyright Arbitration Royalty Panel) Structure and Process: Hearing Before Subcomm. on Courts, the Internet and Intellectual Prop. of the House Comm. on the Judiciary*, 108th Cong. (2003) (hearing testimony on H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003), available at [http://commdocs.house.gov/committees/judiciary/hju86183.000/hju86183\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju86183.000/hju86183_of.htm) (last visited Sept. 23, 2003).

<sup>80</sup> Copyright Royalty and Distribution Reform Act of 2003, H.R. 1417, 108th Cong. (2003) (drafted to replace copyright arbitration royalty panels with a Copyright Royalty Judge and for other purposes), available at <http://thomas.loc.gov/bss/d108/d108laws.html> (last visited Sept. 23, 2003).

<sup>81</sup> *Id.*

<sup>82</sup> This is also represented as 0.07¢ and \$0.0007. See generally Kurt Hanson, *What the CARP Panel Ignored: Royalty Rates Around the World!*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/052802/index.asp> (May 28, 2002) (analyzing the expert testimony given at the Copyright Arbitration Royalty Panel ("CARP") proceeding that shows the "prevailing headline royalty rates in a number of jurisdictions ... are generally set lower than royalty rates for the musical composition. While the differential ranges from country to country, there is [a] consistent pattern of lower sound recording royalty rates throughout the territories analyzed." By comparison, "the CARP recommended a sound recording royalty rate in the US of 14/100 of a cent per performance, which in the current advertising environment, works out to about 200% of revenues—as compared to a musical composition royalty rate in the U.S. of around 3% of revenues").

<sup>83</sup> Order, *supra* note 18, at 45,273 (to be codified at 37 C.F.R. § 261.3(a)).

<sup>84</sup> *Id.* at 45,273 (to be codified at 37 C.F.R. § 261.3(b)).

<sup>85</sup> *Id.* at 45,272 (to be codified at 37 C.F.R. § 261.2) (defining the term "aggregate tuning hours" ("ATH") as "the total hours of programming that a Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's ATH would equal 10. Likewise, if one listener listened to a webcast for 10 hours, the service's ATH would equal 10.").

<sup>86</sup> *Id.* at 45,273 (to be codified at 37 C.F.R. § 261.3(c)).

<sup>87</sup> Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (proposed Feb. 7, 2002) (requiring Webcasters to provide *eighteen* points of information for each Sound Recording streamed over the Internet).

<sup>88</sup> U.S. Copyright Office, Webcasting Notice: Initial Comments, Jan. 8, 2003, available at <http://www.copyright.gov/carp/114/comments.html> (last visited Sept. 23, 2003); U.S. Copyright Office, Webcasting Notice: Reply Comments, April 11, 2003, available at <http://www.copyright.gov/carp/114/reply/comments.html> (last visited Sept. 23, 2003).

<sup>89</sup> Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 18,148 (Apr. 15, 2002) (announcing a public roundtable discussion).

<sup>90</sup> See U.S. Copyright Office, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Apr. 15, 2003) (citing the following explanation, "a single letter code identifying the nature of the service transmitting the performance, e.g., eligible nonsubscription transmission by webcaster of over-the-air AM or FM radio broadcast, other Eligible nonsubscription transmission by a webcaster, eligible nonsubscription transmission by commercial broadcaster of over-the-air AM or FM radio broadcast, eligible nonsubscription transmission by non-CPB, noncommercial broadcaster, etc."), available at <http://www.copyright.gov/carp/114> (last visited Sept. 23, 2003).

<sup>91</sup> *Id.*

<sup>92</sup> Paul Maloney, *Rain Analysis*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/022002/index.asp> (Feb. 20, 2002) (commenting in reference to the original proposed recordkeeping and notice requirements, the commentator stated that "[s]hould these requirements survive legal appeal, it's not an overstatement

## MUSIC

to say that this may signal the death of webcasting (independent of the major labels, of course)).

<sup>93</sup> The Voice of Webcasters is a coalition of small commercial webcasters that includes IO Media Partners; 3WK LLC; Discombobulated, LLC; Radio Paradise; WebMedia Consulting, Inc.; WOLF FM, Inc.; Montpelier Communications LLC and Classical Music Detroit. *In re* Notification of Agreement Under the Small Webcaster Settlement Act of 2002 (U.S. Copyright Office Dec. 13, 2002) available at <http://www.kurthanson.com/documents/swaa-settlement.pdf> (last visited Sept. 23, 2003).

<sup>94</sup> H.R. 5469, 107th Cong. (2002) (amended two additional times before resulting in what ultimately became known as the Small Webcaster Settlement Act of 2002).

<sup>95</sup> See Letter from Rep. James Sensenbrenner, Chairman, Comm. on the Judiciary to the Judiciary Comm. (Sept. 27, 2002).

<sup>96</sup> See Letter from Rep. John Conyers, Member, Comm. on the Judiciary to his colleagues urging them not to vote for H.R. 5469 (Oct. 1, 2002).

<sup>97</sup> Small Webcaster Amendments Act of 2002, H.R. 5469, 107th Cong., (2002) (amended second version of H.R. 5469, ultimately enacted as the Small Webcaster Settlement Act of 2002).

<sup>98</sup> Paul Maloney, *SWAA Dead in Senate*, RAIN: Radio And Internet Newsletter, at <http://www.kurthanson.com/archive/news/101802/index.asp> (Oct. 18, 2002).

<sup>99</sup> Small Webcasters Amendments Act of 2002, H.R. 5469, 107th Cong., (2002) (amended third version).

<sup>100</sup> Small Webcaster Amendments Act of 2002, H.R. 5469, 107th Cong., (2002) (signed version of the H.R. 5469), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=f:h5469enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5469enr.txt.pdf) (last visited Sept. 23, 2003).

<sup>101</sup> See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002) (noting that President Bush signed the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, into law on Wednesday, December 4, 2002).

<sup>102</sup> H.R. 5469, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=f:h5469enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5469enr.txt.pdf) (last visited Sept. 23, 2003).

<sup>103</sup> *In re* Notification of Agreement Under the Small

Webcaster Settlement Act of 2002 (U.S. Copyright Office, Dec. 13, 2002) (signed version of H.R. 5469 that was submitted to the Copyright Office, Librarian of Congress), available at <http://www.kurthanson.com/documents/swaa-settlement.pdf> (last visited Sept. 23, 2003).

<sup>104</sup> Agreement, *supra* note 61.

<sup>105</sup> *Id.* at 78,513 (defining the term “eligible small webcaster”).

<sup>106</sup> *Id.* at 78,511.

<sup>107</sup> *Id.* at 78,511.

<sup>108</sup> *Id.* at 78,512.

<sup>109</sup> *Id.* at 78,513.

<sup>110</sup> *Id.* at 78,512.

<sup>111</sup> *Id.*

<sup>112</sup> See Jefferson Graham, *Mourning the End of Small Net Radio Sites*, USA TODAY, July 21, 2002 (quoting Peter Csathy, the president of MusicMatch, a media software company that runs the subscription RadioMX service, as saying, “Any company doing ad-supported radio will cease to exist . . . the only ones who’ll be able to continue are the conglomerates. For the consumer, that means less choice and (less) exposure to new acts. It’s bad for consumers, bad for artists and bad for the labels”), available at [http://www.usatoday.com/life/music/news/2002-07-21-net-radio\\_x.htm](http://www.usatoday.com/life/music/news/2002-07-21-net-radio_x.htm) (last visited Sept. 23, 2003). See also *Is Internet Radio Dying?* Knowledge@Wharton, July 17, 2002 (noting that Wharton public policy and management professor Gerald Faulhaber isn’t sure that Internet radio business model will survive . . . “[i]f it’s not sustainable, there will be wholesale bankruptcies in the Net radio space.”), at <http://knowledge.wharton.upenn.edu/articles.cfm?catid=14&articleid=590&homepage=yes> (last visited Sept. 23, 2003).

<sup>113</sup> Lisa M. Bowman, *Death Knell Sounded for Web Radio?*, CNET News.com, at <http://news.com.com/2100-1023-956730.html> (Sept. 5, 2002).

<sup>114</sup> *BRS Media’s Web-Radio Reports a Steep Decline in the Number of Stations Webcasting*, BusinessWire, at [http://www.businesswire.com/cgi-bin/f\\_headline.cgi?bw.091202/222550201](http://www.businesswire.com/cgi-bin/f_headline.cgi?bw.091202/222550201) (Sept. 12, 2002).

<sup>115</sup> *Id.*

<sup>116</sup> Dawn C. Chmielewski, *KPIG Snuffs Web’s 1<sup>st</sup> Online Radio Simulcast*, THE MERCURY NEWS, July 18, 2002, available at <http://>

## New Media - New Rules

/www.bayarea.com/mld/mercurynews/3691861.htm (last visited Sept. 23, 2003).

<sup>117</sup> Kurt Hanson and Paul Maloney, *Radio@Netscape Plus Debuts; 175 Channels, Including KPIG!*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/090402/index.asp> (Sept. 4, 2002).

<sup>118</sup> See KPIG, Listen to KPIG Live, at <http://www.kpig.com/listen/> (last visited Sept. 23, 2003).

<sup>119</sup> Gretchen Hyman, *Vivendi Net USA Launches Internet Radio Initiative*, SiliconValley.Internet.com, at <http://siliconvalley.internet.com/news/article.php/1464291> (Sept. 16, 2002).

<sup>120</sup> *Id.* View most recent Arbitron ratings at [http://www.arbitron.com/webcast\\_ratings/freestudies.htm](http://www.arbitron.com/webcast_ratings/freestudies.htm) (last visited Sept. 23, 2003).

<sup>121</sup> Bob Bellin, *Net Radio Won't Grow, Fetch VC, Under Laws Like DMCA and SWSA*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/013003/index.asp> (Jan. 30, 2003) (arguing that H.R. 5469 will serve to keep webcasting down rather than advance it because once webcasters develop enough audience to generate real revenue, webcasters have to pay too much in royalty fees to turn a decent profit.).

<sup>122</sup> See Kurt Hanson, *Copyright Owners, Webcasters need to Craft Two More Licenses*, RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/060503/index.asp> (June 5, 2003) (arguing that the current royalty rate structure does not allow for the proliferation of midsized Webcasters and that the current set of licenses ensures that there can be only two classes of Webcasters, media conglomerates and small Webcasters. Note that Mr. Hanson based his evaluation on the rates and terms that were proposed on May 20, 2003).

<sup>123</sup> See generally Jane Black, *Web Radio's Personal Edge*, BusinessWeek Online, at [http://www.businessweek.com/technology/content/dec2002/tc20021210\\_4342.htm](http://www.businessweek.com/technology/content/dec2002/tc20021210_4342.htm) (Dec. 10, 2002) (discussing some of the benefits of Internet radio, suggesting that Internet radio could be a partial salvation for the ailing recording industry and that Internet radio can encourage listeners to buy more music).

<sup>124</sup> Note that most Internet radio websites display the title of the song, the name of the album and the featured recording artist while each song is being played. Many Internet radio websites also provide a picture of the album cover artwork and include a Click-to-Buy button from which a listener can sample and purchase the album being played. These features

make it easy for consumers to instantly pursue an informed purchase, which can lead to greater consumer satisfaction and increased purchases. Magri, *supra* note 8.

<sup>125</sup> See Small Webcaster Amendments Act of 2002, H.R. 5469, 107th Cong. (2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=fh5469enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=fh5469enr.txt.pdf) (last visited Sept. 23, 2003).

<sup>126</sup> The notion that the new laws governing the digital transmission of music are complex, convoluted and even incomprehensible can be found in the text of statements from Congressmen, scholars, practitioners and businesses alike. See generally Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3 (1995); Nimmer, *supra* note 28.

<sup>127</sup> CARP Report, *supra* note 66, at 70.

<sup>128</sup> Paul Maloney and Kurt Hanson, *Cuban Says Yahoo!'s RIAA Deal was Designed to Stifle Competition!* RAIN: Radio and Internet Newsletter, at <http://www.kurthanson.com/archive/news/062402/index.asp> (June 24, 2002) (stating "[T]he voluntary royalty deal between Yahoo! and the RIAA that the Librarian of Congress announced as his template for the entire industry last week was a deal crafted by Yahoo! to shut out small webcasters and decrease competition, Broadcast.com founder and Dallas Mavericks owner Mark Cuban revealed to RAIN on Friday.").

<sup>129</sup> Note that the broadcast radio industry is claiming an exemption from paying Sound Recording performance right royalty fees when they retransmit their music programming over the Internet. See *Bonneville Int'l Corp. v. Peters*, No. 01-CV-408 (E.D. Pa. Aug. 1, 2001), appeal docketed, No. 01-3720 (3<sup>rd</sup> Cir. Oct. 1, 2001).

<sup>130</sup> The proposed order charges Webcasters a Sound Recording performance fee of 1.17¢ per aggregate tuning hour and commercial AM/FM radio stations 0.88¢ per aggregate tuning hour. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 68 Fed. Reg. 27,506, 27,509 (May 20, 2003). Note also that the first CARP recommended Webcasters pay a Sound Recording performance fee of 0.14¢ per performance and commercial AM/FM radio stations pay 0.07¢ per performance. Webcasting Determination, Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, available at [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html) (Feb. 23, 2003) (summarizing the CARP proposed and Librarian of Congress adopted rates and terms).

<sup>131</sup> Clear Channel operates approximately 1,125 radio and

39 television stations in the U.S, has equity interests in 240 stations internationally, operates approximately 776,000 outdoor advertising displays and owns entertainment venues in 66 countries around the world. Clear Channel, Company Information, at <http://www.clearchannel.com/company.php> (last visited Sept. 23, 2003).

<sup>132</sup> Paula Parisi, *Spin Factor*, The Hollywood Reporter.com, at <http://www.kurthanson.com/archive/news/062703/index.asp> (June 27, 2003) (stating that 2002 saw a 6% increase on 2001 figures, with revenue estimated at \$19 billion by analysts Miller, Kaplan, Arase & Co., and that the first quarter of 2003 reflected a 2% improvement over a comparable 2002 period).

<sup>133</sup> See Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, available at <http://www.wipo.int/clea/docs/en/wo/wo024en.htm> (last visited Sept. 23, 2003).

<sup>134</sup> See M.WILLIAM KRASILOVSKY AND SIDNEY SHEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 73 (8<sup>th</sup> ed. 2000).

<sup>135</sup> Jefferson Graham, *RIAA Targets the Little Guys*, USA TODAY, June 25, 2003, at D1 (stating that record labels have suffered a drop of 20% in album sales since 2000 according to unreleased Nielsen SoundScan figures).

<sup>136</sup> In the international copyright arena, harmony “refers to the global harmonization of national copyright and related rights laws. The goal is to ensure that similar protections and enforcement mechanisms exist globally for copyrighted works.” MARK HALLORAN, THE MUSICIAN’S BUSINESS & LEGAL GUIDE 117 (3d ed. 2001).

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