

## Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure

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### INTRODUCTION

When Radiohead released the album “In Rainbows” in 2007, they provided a downloadable version on the band’s website for which buyers could pay whatever price they wanted, even zero.<sup>1</sup> Commentators noted, “[f]or the beleaguered recording business Radiohead has put in motion the most audacious experiment in years.”<sup>2</sup> Although some fans downloaded the album for free, many paid money for it,<sup>3</sup> and the album made more money than the band’s two previous albums combined, which were never offered for free.<sup>4</sup> Not many musical artists could get away with the creative antics of Radiohead,<sup>5</sup> but this novel marketing

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<sup>1</sup> Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, (Arts & Leisure), at 1, available at <http://www.nytimes.com/2007/12/09/arts/music/09pare.html?ex=1354856400&en=ec2f1c29937292be&ei=5090&partner=rssuserland&emc=rss&pagewanted=all>.

<sup>2</sup> *Id.*

<sup>3</sup> About sixty-two percent of those who downloaded “In Rainbows” paid nothing; seventeen percent paid between one cent and four dollars; twelve percent paid between eight and twelve dollars; six percent paid between four dollars and eight dollars; and four percent paid between twelve and twenty dollars. Greg Sandoval, *Free beats fee for Radiohead’s ‘In Rainbows’*, CNET NEWS BLOG (Nov. 5, 2007, 11:30 AM), [http://news.cnet.com/8301-10784\\_3-9811013-7.html](http://news.cnet.com/8301-10784_3-9811013-7.html). However, Radiohead produced the album independently and was not sharing revenue with its old record label, EMI. *Id.*

<sup>4</sup> Eric Pfanner, *Radiohead Blazes a Marketing Trail*, N.Y. TIMES (Aug. 24, 2009), [http://www.nytimes.com/2009/08/24/business/media/24iht-cache24.html?\\_r=1&scp=2&sq=radiohead&st=cse](http://www.nytimes.com/2009/08/24/business/media/24iht-cache24.html?_r=1&scp=2&sq=radiohead&st=cse).

<sup>5</sup> Steven Corn noted that Radiohead already had an extremely loyal fan base when they released “In Rainbows” as a pay-what-you-want download, and that it would not be so easy for smaller, less visible music groups. Steven Corn, *The Digital Lowdown*, ROYALTY WEEK, Oct. 30, 2007, at 7, available at [http://www.aarroyalties.com/new/media/royalty\\_week\\_103007.pdf](http://www.aarroyalties.com/new/media/royalty_week_103007.pdf).

strategy demonstrates the changing nature of the recording industry and illustrates that record labels may need to change their business models in order to stay afloat in an industry driven by Internet streaming and advertising. Thom Yorke, lead singer of Radiohead, said to *Time Magazine*, “I like the people at our record company, but the time is at hand when you have to ask why anyone needs one. And, yes, it probably would give us some perverse pleasure to say ‘F\_\_\_ you’ to this decaying business model.”<sup>6</sup>

The introduction of the Internet brought new ways for music lovers to listen to their favorite artists without having to purchase full albums. New methods of broadcasting music, such as Internet<sup>7</sup> and satellite radio,<sup>8</sup> changed the face of radio and broadcast licensing.<sup>9</sup> Musical recordings began to stream online “by transmissions that are akin to radio broadcasts over the Internet, whether to the public at large or directly to individuals upon request, called webcasting.”<sup>10</sup> Many record companies and other musical copyright holders became concerned that copyright laws could not sufficiently protect their copyrighted content<sup>11</sup> and that such entities and individuals would lose large percentages of revenue due to Internet radio and piracy.<sup>12</sup> Indeed, the recording industry has suffered financially due to the digital age.<sup>13</sup> It has been noted, however, that if properly managed, Internet radio

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<sup>6</sup> Josh Tyrangiel, *Radiohead Says: Pay What You Want*, TIME (Oct. 1, 2007), <http://www.time.com/time/arts/article/0,8599,1666973,00.html>.

<sup>7</sup> Simply defined, Internet radio is the “continuous transmission of streaming audio over the Internet.” ERIC LEE, HOW INTERNET RADIO CAN CHANGE THE WORLD 11 (2005).

<sup>8</sup> Satellite radio stations, like Sirius and XM Radio, broadcast crystal clear music from satellites in space and are often offered on a subscription basis. *See generally What is XM*, XM RADIO, <http://www.xmradio.com/whatisxm/index.xmc> (last visited Sept. 29, 2010). This Comment is solely focused, however, on the legal issues pertaining to Internet radio, and does not provide legal insight into the realm of satellite radio.

<sup>9</sup> *See generally* MICHAEL C. KEITH, THE RADIO STATION (8th ed. 2010).

<sup>10</sup> Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4, 4 (1998). “Webcasting” and “Internet radio” are used interchangeably throughout this paper. Internet radio is one type of webcasting. Some webcasters are companies that operate Federal Communications Commission-licensed radio stations and stream their programming over both the Internet and traditional AM/FM stations, and others broadcast solely over the Internet. Cydney A. Tune & Christopher R. Lockard, *Navigating the Tangled Web of Webcasting Royalties*, 27 ENT. & SPORTS LAW., no. 3, 2009 at 20.

<sup>11</sup> Kohn, *supra* note 10.

<sup>12</sup> Andrey Spektor, *How “Choruss” Can Turn Into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, 16 RICH. J. L. & TECH. 1, 6–8 (2009), <http://law.richmond.edu/jolt/v16i1/article3.pdf>.

<sup>13</sup> The recording industry brought in forty billion dollars in annual sales ten years ago, and now it only brings in half of that. Brad Stone & Claire Cain Miller, *Music Forecast: In a Cloud*, N.Y. TIMES, Dec. 16, 2009, at B1, *available at* <http://www.nytimes.com/2009/12/16/technology/internet/16tune.html?dbk>.

may also be a significant way for record companies to *increase* record sales.<sup>14</sup> Kurt Hanson, founder and CEO of AccuRadio (a small online radio site),<sup>15</sup> explained, “Internet radio is one of the few bright spots in the music industry, giving airplay to dozens of genres and thousands of artists that never received airplay before.”<sup>16</sup> Although not a perfect substitute for purchasing music, webcasting makes it easier for listeners to buy music from artists they like than other forms of radio do.<sup>17</sup>

The major issue in the statutory regulation of Internet radio has been the performance right: who has one, who should get one and how much it should cost.<sup>18</sup> Those who own a “performance right” are entitled to receive royalties whenever someone else—like a webcaster—broadcasts the copyrighted material.<sup>19</sup> Throughout recent history, copyright law related to performance rights has changed dramatically.<sup>20</sup> Although the current system has continued to achieve significant improvements, is still unfair to webcasters. While terrestrial broadcast radio stations pay minimal royalties for the music they play,<sup>21</sup> webcasters often must pay at least twenty-five percent of their yearly revenue in royalties.<sup>22</sup> This Comment advocates for a more balanced

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<sup>14</sup> “Online listening has become an increasingly valuable outlet for music companies and artists. Internet radio services can appeal to niche audiences by tailoring individual streams, and they feature independent artists who might never get played on broadcast stations.” Claire Cain Miller, *Music Labels Reach Deal With Internet Radio Sites*, N.Y. TIMES, July 8, 2009, at B2. See also David Oxenford, *Copyright Royalty Board Releases Music Royalties for Internet Radio Streaming for 2006–2010*, DAVIS WRIGHT TREMAINE LLP (Apr. 12, 2007), <http://www.dwt.com/LearningCenter/Advisories?find=24816>.

<sup>15</sup> AccuRadio purports to currently reach approximately four-hundred thousand listeners per month, compared to forty million Pandora users reported for 2009. *Compare The AccuRadio Story*, ACCURADIO, <http://www accuradio.com/aboutaccuradio/> (last visited Oct. 1, 2010), with Alexandra Osorio, *Has Pandora Finally Arrived? Latest Stats Looking Quite Impressive*, DIGITAL MUSIC NEWS (Jan. 4, 2010), <http://www.digitalmusicnews.com/stories/121609pandora>.

<sup>16</sup> Miller, *supra* note 14.

<sup>17</sup> Webcasting is not a complete substitute for purchasing music, although it has certainly posed a threat to the recording industry. In most cases, webcasting services do not allow a user to choose a particular song at a particular time. The user may choose a specific genre, or a type of music preferred, but is left with a playlist of music chosen at random by the programming of the webcasting service. See, e.g., PANDORA RADIO, <http://www.pandora.com> (last visited Oct. 1, 2010). For a very detailed account of how a webcasting service akin to Pandora scientifically works, see *Arista Records LLC v. Launch Media, Inc.*, 578 F.3d 148, 162–64 (2nd Cir. 2009).

<sup>18</sup> Robert Ashton, *Artists vs Radio: America’s Battle Royal for Royalties*, MUSIC WEEK, Jan. 19, 2008, at 14. See also Part I, *infra*, which discusses the difference between a musical work and a sound recording, and the statutory process of granting both copyrights a performance right.

<sup>19</sup> See *infra* Part I.

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See *infra* note 174 and accompanying text.

<sup>22</sup> See *infra* Part II.

structure, where Internet radio is less-heavily burdened, especially considering the significant advertisement advantages it has over other forms of broadcast radio.

In order to fully understand the problems associated with the current structure of broadcast copyright laws, particularly as applied to Internet radio, one must appreciate the history of the law and its evolution over time. Part I of this Comment provides an overview of current copyright law applicable to webcasting and Internet radio.<sup>23</sup> Part II discusses current royalty rate structures that apply to different webcasting business models. Part III notes the unfairness of the current rate structure and discusses new issues it must face because of the continued advancement of technology. Finally, Part IV proposes that to create a more balanced system, Congress should pass the Performance Rights Act, which would amend current copyright law to require terrestrial broadcast stations to compensate artists, just like all other mediums of radio broadcasting.<sup>24</sup> The Act should require that SoundExchange<sup>25</sup> create an opt-out database where artists can waive royalty payments.<sup>26</sup> Hence, while actually raising royalty revenue coming to artists with the Performance Rights Act, broadcasters could enjoy an efficient way to reduce royalty payments.

#### I. CURRENT COPYRIGHT LAW APPLICABLE TO WEBCASTING AND INTERNET RADIO

Regulation of Internet radio, like other copyright issues, derives from the Copyright Act of 1976 (Copyright Act).<sup>27</sup> Two amendments to the Copyright Act significantly determined the future of Internet radio and webcasting: the Digital Performance Right in Sound Recordings Act of 1995<sup>28</sup> and the Digital Millennium Copyright Act of 1998.<sup>29</sup> This statutory framework,

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<sup>23</sup> This Comment does not purport to provide an exhaustive account of copyright law or even a complete explanation of all copyright issues pertaining to the Internet. Rather, the sole purpose of this Comment is to explore the law surrounding and governing Internet radio.

<sup>24</sup> See *infra* Part IV.A.

<sup>25</sup> SoundExchange is "an independent, nonprofit performance rights organization" that acts as the sole collection agency of statutory royalties on behalf of featured artists and the owners of sound recording copyrights. The Copyright Royalty Board (CRB) appointed SoundExchange to collect and distribute these digital performance royalties. SOUNDEXCHANGE, <http://soundexchange.com> (last visited Oct. 1, 2010).

<sup>26</sup> See *infra* Part IV.B.

<sup>27</sup> The Copyright Act of 1976 was enacted as Pub. L. No. 94-553, 90 Stat. 2541 on Oct. 19, 1976, and is codified in Title 17 of the United States Code.

<sup>28</sup> See *infra* Part I.B.

<sup>29</sup> See *infra* Part I.C.

set in place long before webcasting existed, determines the methods used to calculate royalty rates and licensing schemes for the new business models of the twenty-first century.

#### A. The Copyright Act of 1976

Section 102 of the Copyright Act grants copyright protection to works that are categorized as, among other things,<sup>30</sup> “musical works”<sup>31</sup> and “sound recordings.”<sup>32</sup> A “musical work” refers to the notes and lyrics of a song,<sup>33</sup> whereas a “sound recording” results from “the fixation of a series of musical, spoken, or other sounds.”<sup>34</sup> A song that is sung and performed by an artist constitutes a sound recording, whereas the person who wrote the song is the creator of a musical work.<sup>35</sup> While the holder of a musical work copyright retains a right of performance—meaning the person will be paid in royalties whenever that composition is performed—the holder of a sound recording right will not.<sup>36</sup> As a consequence of this lack of protection, other artists may perform their own versions of a musical work and thereby produce their own sound recording.<sup>37</sup> Often a record label owns the copyright in a sound recording,<sup>38</sup> and the composer of the piece assigns his

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<sup>30</sup> Section 102 also affords copyright protection to literary works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures, and other audiovisual works and architectural works. 17 U.S.C. §§ 102(a)(1), (3)–(6), (8) (2006).

<sup>31</sup> § 102(a)(2).

<sup>32</sup> § 102(a)(7) (2010).

<sup>33</sup> Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

<sup>34</sup> 17 U.S.C. § 101.

<sup>35</sup> “For example, in the piece ‘Let It Be’ recorded by the Beatles, only John Lennon and Paul McCartney originally held a ‘musical work’ copyright as the song’s composers, while John, Paul, Ringo Starr and George Harrison all originally held a ‘sound recording’ copyright as performers of the recorded work.” Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure for Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 LOY. L. & TECH. ANN. 1, 5 (2009).

<sup>36</sup> Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. at 24,086.

<sup>37</sup> *Id.* For a practical example of the relationship between a musical work and a sound recording, and the impact of the distinction on performance rights, see Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L. J. 259, 272–73 (2007).

<sup>38</sup> Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. at 24,086. Sound recording copyright owners are typically record labels, and they have the right to license the public performance of a sound recording by means of a digital audio transmission. *What is a Sound Recording Copyright Owner*, SOUNDEXCHANGE, <http://soundexchange.com/category/faq/general-questions/#question-454> (last visited Oct. 1, 2009). The “Big Four” music companies—Universal, Sony/BMG, Warner, and Electric & Musical Industries Ltd. (EMI)—have both record label and music publishing arms. *About EMI*, <http://www.emi.com/page/emi/AboutEMI> (last visited Nov. 6, 2009). For example, EMI Group’s record labels include Capitol and Virgin, and its New Music department “finds and develops new, exciting and successful music.” *Id.* Its music

interest in the musical work to a music publisher in exchange for a continued interest in royalties drawn from it.<sup>39</sup>

Under section 102 today, licensing revenues for both musical works and sound recordings flow whenever such items are sold as compact discs (CDs) or Internet downloads, or when they are used in television and Internet commercials.<sup>40</sup> Revenues also accrue for a musical work when it is “performed publicly through radio, television, and Internet broadcasting . . . and venues of every kind where music is played.”<sup>41</sup> However, no similar performance right generated licensing revenues for holders of sound recording rights under the Copyright Act until 1995.<sup>42</sup> Essentially, if a song was broadcasted over the radio, the composer enjoyed copyright compensation, but the artist performing the song and the record label did not.<sup>43</sup> The commencement of the digital age, specifically the ability to stream music over the Internet, posed a serious financial threat to record labels by offering consumers a replacement for purchasing compact discs.<sup>44</sup> In response, copyright holders—specifically artists holding sound recording rights—looked to Congress for more protection of their ownership rights.

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publishing arm “is in the business of acquiring, protecting, administering and exploiting the rights in musical compositions.” *Id.* Active songwriters under EMI Music Publishing include Amy Winehouse, Kanye West and Jay-Z. *Id.*

<sup>39</sup> AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 408 (3d ed. 2002). According to the Music Publishers Association, a music publisher seeks out new and talented songwriters and composers and supports them as they develop their talents. A music publisher is also responsible for distributing copyright royalties to its supported songwriters and composers. See *What is Music Publishing?*, MUSIC PUBLISHERS ASS’N ONLINE, <http://www.mpaonline.org.uk/FAQ> (click “What is Music Publishing?”) (last visited Oct. 1, 2010).

<sup>40</sup> Kevin C. Parks, *Black Hole or Celestial Jukebox? Section 114 and the Future of Music*, 1 LANDSLIDE, no. 2, 2008 at 46, 47.

<sup>41</sup> *Id.*

<sup>42</sup> See *infra* Part I.B. Historically, radio broadcasters opposed the recognition of a performance right in sound recording copyrights. See Musser, *supra* note 35, at 5–6.

<sup>43</sup> Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 310 (2000). Historically, this inequity between the musical work and sound recording copyrights “was maintained by virtue of the powerful lobbying efforts of the broadcasting industry . . . which successfully resisted legislation that would have cost its members much in the way of additional operating costs by imposing a requirement that performance royalties be paid to labels and recording artists.” Parks, *supra* note 40, at 48. See also Musser, *supra* note 35, at 5.

<sup>44</sup> See Parks, *supra* note 40, at 48.

### B. The Digital Performance Right in Sound Recordings Act<sup>45</sup>

In 1995, Congress granted sound recording copyright owners a limited right of public performance in the Digital Performance Right in Sound Recordings Act (DPRA).<sup>46</sup> Congress finally recognized that the then-current state of the Copyright Act did not sufficiently protect such copyright holders from commercial exploitation.<sup>47</sup> The congressional committee in charge intended to “control the distribution of [copyright holders’] product by digital transmissions . . . without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.”<sup>48</sup> The statute provides in pertinent part:

Subject to sections 107 through 122, the owner of a copyright under [Title 17 of the United States Code] has the exclusive rights to do and to authorize any of the following . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>49</sup>

The purpose of the DPRA was to ensure that performing artists, record companies and others “whose livelihood depends upon effective copyright protection for sound recordings, [would] be protected as new technologies affect the ways in which their creative works are used.”<sup>50</sup>

The DPRA created a *limited* right, rather than an exclusive right, to transmissions<sup>51</sup> in order to balance various “industry interests.”<sup>52</sup> It also created a compulsory license for certain

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<sup>45</sup> Digital Performance Right in Sound Recording Act of 1995 (DPRA), Pub. L. No. 104-39, 109 Stat. 336 (codified in scattered sections of 17 U.S.C.).

<sup>46</sup> See Kohn, *supra* note 10, at 6; Musser, *supra* note 35, at 6.

<sup>47</sup> S. REP. NO. 104-128, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 362. The “copyright holders” referred to by the DPRA are holders of sound recording copyrights, rather than musical work rights, which have enjoyed significant protection since the original Copyright Act of 1976. See *supra* Part I.A.

<sup>48</sup> S. REP. NO. 104-128, at 15.

<sup>49</sup> DPRA § 2; 17 U.S.C. § 106(6) (2006).

<sup>50</sup> S. REP. NO. 104-128, at 10.

<sup>51</sup> Congress created a “limited public performance right exclusive to the digital medium.” Musser, *supra* note 35, at 6. It shied away from creating an exclusive right of public performance because Congress wanted to ensure that the new act would not unnecessarily infringe on the performance of musical works. *Id.* See also S. REP. NO. 104-128, at 16.

<sup>52</sup> W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 850 (2007). The DPRA attempted to balance the interests of the Copyright Office, record producers, performers, music composers, publishers, and broadcasters “without upsetting the longstanding business and contractual relationships” between these entities. S. REP. NO. 104-128, at 13.

transmissions, depending on the type of service provided.<sup>53</sup> Although it gave the exclusive right of performance to sound recording copyright holders, the DPRA created a complex “three-tiered system,”<sup>54</sup> categorizing license requirements into separate rates for: (1) interactive services, (2) non-interactive subscription transmissions, and (3) non-subscription digital audio transmissions of sound recordings.<sup>55</sup> The DPRA tailored licensing requirements to these different types of service providers, depending on the likelihood of an effect on record sales<sup>56</sup> or on the likelihood that “infringing reproductions” would be created.<sup>57</sup>

Owners of interactive services<sup>58</sup> are responsible for the most stringent level of copyright licensing requirements and cannot receive a compulsory license.<sup>59</sup> The DPRA defined an interactive service as “one that enables a member of the public to receive . . . on request . . . a transmission of a particular sound recording . . . selected by or on behalf of the recipient.”<sup>60</sup> Interactive services do not qualify for the simple statutory license structure “because of the ability of listeners to select specific music that will be included in the stream . . . .”<sup>61</sup> Instead, they must negotiate performance licenses with both the owners of the copyrights in the transmitted musical compositions and also the owners of the sound recordings.<sup>62</sup>

Non-interactive transmissions<sup>63</sup> are subject to compulsory licensing<sup>64</sup> only if they conform to specific statutory require-

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<sup>53</sup> A “compulsory license” means that if a webcaster meets specific statutory requirements, it may use a particular sound recording without having to obtain permission directly from the copyright holder, so long as it pays a statutory rate. Tune & Lockard, *supra* note 10, at 21.

<sup>54</sup> *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 767 (E.D. Pa. 2001); Cardi, *supra* note 52, at 850.

<sup>55</sup> Cardi, *supra* note 52, at 850–52.

<sup>56</sup> *Bonneville Int’l Corp.*, 153 F. Supp. 2d at 767.

<sup>57</sup> Cardi, *supra* note 52, at 850.

<sup>58</sup> Grooveshark is a good example of an interactive service. It lets a user choose a particular song to hear on request, and the user may personalize song playlists. See *Grooveshark*, <http://www.grooveshark.com> (last visited Oct. 1, 2010).

<sup>59</sup> Musser, *supra* note 35, at 8.

<sup>60</sup> Marks, *supra* note 43, at 313 (quoting 17 U.S.C. § 114(d)(1) (Supp. III 1997) (codified as amended at 17 U.S.C. § 114(j)(7))).

<sup>61</sup> Oxenford, *supra* note 14.

<sup>62</sup> Cardi, *supra* note 52, at 851. See also Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L. J. 431, 440 (2009).

<sup>63</sup> In a non-interactive service, a user may not choose a specific song and have it played immediately, but rather a user can choose a genre of music one prefers. Spektor, *supra* note 12, at 29. Pandora is a good example of a non-interactive transmission because, although it allows limited control over which artists and songs a user hears, it does not allow users to choose “more than three tracks from the same album or more than

ments;<sup>65</sup> otherwise, they must negotiate privately with sound recording copyright holders just like interactive services are required to do.<sup>66</sup> If private negotiations fail between these entities, an arbitration panel organized by the Copyright Office<sup>67</sup> determines the royalty rate for the compulsory license.<sup>68</sup> It is this compulsory license that allows Internet services to use legally recorded sound recordings in their webcasts<sup>69</sup> without seeking permission directly from the copyright owners.<sup>70</sup>

Non-subscription digital audio transmissions<sup>71</sup> of sound recordings are those not controlled or limited to certain recipients<sup>72</sup> and are totally exempt from the sound recording performance right.<sup>73</sup> This third type of transmission constitutes the most important exemption in the DPRA<sup>74</sup> and includes radio and television broadcasts that are “available free of charge”<sup>75</sup> to

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four tracks by one recording artist.” Myers, *supra* note 62, at 440. See also *Arista Records LLC v. Launch Media, Inc.*, 578 F.3d 148, 154 (2d. Cir. 2009). This case dealt with the webcasting service LAUNCHcast which is similar to Pandora, and the Second Circuit held that, as a matter of law, LAUNCHcast was not an interactive service within the meaning of 17 U.S.C. § 114. *Id.* at 164.

<sup>64</sup> See *supra* note 53 for an explanation of “compulsory licensing.”

<sup>65</sup> Such requirements include that the service not be interactive, not pre-announce the broadcast of a particular song, and must include information about the recording broadcasted. 17 U.S.C. § 114(d)(2)(C); Tune and Lockard, *supra* note 10, at 21–22.

<sup>66</sup> See Allison Kidd, Recent Development, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 348 (2003).

<sup>67</sup> Arbitrations of this kind were completed through a Copyright Arbitration Royalty Panel (CARP) when Congress enacted the DPRA. See Amy Duvall, Note, *Royalty Rate-Setting for Webcasters: A Royal(ty) Mess*, 15 MICH. TELECOMM. & TECH. L. REV. 267, 271 (2008). However, the rate-setting process was reexamined in 2004, and Congress passed the Copyright Royalty and Distribution Reform Act (CRDRA), which replaced the CARP adjudicators with a full-time, three-judge panel, now known as the Copyright Royalty Board (CRB), which currently sets royalty rates. *Id.* at 278.

<sup>68</sup> Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,294 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

<sup>69</sup> David Oxenford, *SoundExchange to Audit Internet Radio Royalty Payments of Last.FM—What is the Value of Music?*, BROADCAST LAW BLOG (Mar. 28, 2008) <http://www.broadcastlawblog.com/2008/03/articles/internet-radio/soundexchange-to-audit-internet-radio-royalty-payments-of-lastfm-what-is-the-value-of-music/>.

<sup>70</sup> Cydney Tune, *Webcaster Music Royalty Rates—in Flux and on the Rise*, 1401 CLIENT ALERT 1, 1 (June 15, 2007), <http://www.pillsburylaw.com/siteFiles/Publications/5EA3137178E2E2204487E5B973E75B47.pdf>.

<sup>71</sup> Examples include local AM/FM radio stations, some Internet radio stations, and television broadcasts. Emily D. Harwood, Note, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L. J. 673, 680 (2004).

<sup>72</sup> S. REP. NO. 104-128, at 16 (1995), reprinted in 1995 U.S.C.C.A.N. 356; Kohn, *supra* note 10, at 12.

<sup>73</sup> 17 U.S.C. § 114(d)(1)(A)–(B) (2006).

<sup>74</sup> H. R. REP. NO. 104-274, at 14 (1995); S. REP. NO. 104-128, at 16.

<sup>75</sup> Harwood, *supra* note 71, at 680.

the public. Non-subscription transmissions include “any transmission that is not a subscription transmission.”<sup>76</sup>

This complex method for determining licensing requirements and royalty rates became even more difficult for new companies to navigate after the rising popularity and sophistication of the Internet in and after 1998,<sup>77</sup> and copyright holders again called for greater copyright protection—as well as clarification—from Congress.

### C. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) was enacted in October of 1998<sup>78</sup> in response to claims that the DPRA did not adequately respond to the application of royalty rates to Internet radio.<sup>79</sup> Record companies and the Recording Industry of America Association (RIAA) expressed concerns that labels were not sufficiently protected from Internet piracy under the DPRA.<sup>80</sup> Since webcasters were not included in the DPRA provisions, “webcasters and the recording industry fought over whether webcasters should qualify for the limited public performance right or be treated as an interactive service” and be required to negotiate privately with copyright holders.<sup>81</sup> Specifically, the recording industry and the RIAA complained that webcasting services of the non-subscription nature diminished record sales, cut into profits, and hindered growth of the recording industry.<sup>82</sup> Convinced, Congress enacted the DMCA in line with its historical

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<sup>76</sup> 17 U.S.C. § 114(j)(9) (2006).

<sup>77</sup> The late 1990s saw a rapid growth and improvement in webcasting and streaming technologies. Myers, *supra* note 62, at 438.

<sup>78</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), *codified in part in* 17 U.S.C. § 114 (2006).

<sup>79</sup> Kidd, *supra* note 66, at 349.

<sup>80</sup> *Arista Records LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d. Cir. 2009). This recent case constitutes one of the more in-depth judicial analyses of the DMCA, relating it to a specific non-subscription webcasting service, LAUNCHcast. After the ruling, P2P defense lawyer Ray Beckerman “thanked” Sony BMG music for appealing the trial court decision, claiming that the Second Circuit’s determination that, as a matter of law, LAUNCHcast was not interactive, created a “safe harbor for a whole industry and business model.” Ray Beckerman, *RIAA Loses Its Case Against Yahoo’s Launch Media Internet Radio Station Provider*, RECORDING INDUSTRY VS THE PEOPLE BLOG (Aug. 22, 2009), <http://recordingindustryvspeople.blogspot.com/2009/08/riaa-loses-its-case-against-yahoos.html>.

<sup>81</sup> Duvall, *supra* note 67, at 272.

<sup>82</sup> *Arista Records*, 578 F.3d at 154. See also Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War With Itself*, 24 HASTINGS COMM. & ENT. L. J. 1, 12 (2001). With the DMCA, Congress targeted services like Napster, which provide users with “a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.” *Arista Records*, 578 F.3d at 161.

policy of “preventing the diminution in record sales through outright piracy of music or *new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records.*”<sup>83</sup> The DMCA expanded the class of transmissions that are subject to compulsory licenses, namely the non-interactive subscription services.<sup>84</sup> Although “Congress did not alter the section 114(d)(1)(A) exemption for ‘nonsubscription broadcast transmission[s],’”<sup>85</sup> the newly expanded category subject to compulsory licenses included services previously categorized as non-subscription broadcasts.<sup>86</sup> Some webcasts were no longer considered part of the third category exempt from statutory licenses.<sup>87</sup> With this expansion, Congress was merely trying to “clarify that webcasters are subject to the sound recording performance right.”<sup>88</sup> Indeed, the DMCA left webcasters “clearly subject to royalty payments.”<sup>89</sup>

The DMCA amended the Copyright Act to broaden the sound performance right to include a more expansive definition of an “interactive service” as it pertains to individual licensing.<sup>90</sup> As webcasting continued to gain popularity, the DPRA’s definition of “interactive service” began to break down.<sup>91</sup> Section 114 of the

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<sup>83</sup> *Arista Records*, 578 F.3d at 157 (emphasis added).

<sup>84</sup> *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 769 (E. D. Pa. 2001); Brian Flavin, Recent Development, *A Digital Cry for Help: Internet Radio’s Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard*, 27 ST. LOUIS U. PUB. L. REV. 427, 436 (2008).

<sup>85</sup> *Bonneville Int’l. Corp.*, 153 F. Supp. 2d at 769 (citing 17 U.S.C. § 114(d)(1)(A)).

<sup>86</sup> *Id.* An eligible non-subscription transmission is defined in the DMCA as follows:

A noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, or performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

17 U.S.C. § 114(j)(6) (2006). This definition is synonymous with the definition of “commercial webcaster” provided by SoundExchange. See *Commercial Webcaster*, SOUNDEXCHANGE, <http://soundexchange.com/service-provider/service-category/im-not-sure-help-me-figure-it-out/quiz-commercial-webcaster/> (last visited Oct. 1, 2010).

<sup>87</sup> *Bonneville Int’l. Corp.*, 153 F. Supp. 2d at 769. Webcasters had begun offering custom genre channels of sound recordings while still maintaining a non-subscription relationship with users. *Id.*

<sup>88</sup> Marks, *supra* note 43, at 327.

<sup>89</sup> Spektor, *supra* note 12, at 10.

<sup>90</sup> Stephen Kramarsky, *Second Circuit Finds Internet Radio Not Interactive Service*, N.Y. L.J., Sept. 15, 2009, at 5.

<sup>91</sup> Marks, *supra* note 43, at 314. For example, some services “allowed users to create their own programs by selecting and rating particular artists,” and hence could create personalized programs in ways that were not anticipated by the intent of “interactive” when Congress enacted the DPRA. *Id.*

DMCA addressed the perceived deficiency in the DPRA, providing:

An ‘interactive service’ is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.<sup>92</sup>

This definition altered what the DPRA considered “interactive” because it no longer required a user to have a personal choice in what songs are played throughout a webcast. As long as “the user has influenced the program in such way that the ‘recipient might identify certain artists that become the basis of the personal program,’”<sup>93</sup> the service would be considered interactive within the meaning of the statute.<sup>94</sup> Internet radio webcasts, however, do not typically fall under the DMCA definition of “interactive service”<sup>95</sup> and are either subject to the compulsory licensing scheme determined by the Copyright Arbitration Royalty Panel (CARP),<sup>96</sup> or must privately negotiate with copyright holders. CARP was supposed to “establish rates and terms that most clearly represent[ed] the rates and terms that would have been negotiated in the marketplace between a

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<sup>92</sup> 17 U.S.C. § 114(j)(D)(7) (2006).

<sup>93</sup> Michael Lang, Comment, *The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting*, 14 COMMLAW CONSPECTUS 463, 481 (2006) (quoting H. R. Rep. No. 105-796, at 87 (1998) (Conf. Rep.)).

<sup>94</sup> A service would be interactive if it

allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service’s transmissions a program consisting of sound recordings requested by a small number of those listeners.

H.R. Conf. Rep. 105-796, at 87–88, *reprinted in* 1998 U.S.C.C.A.N. 639 (1998). Compare this explanation with that of the U.S. Court of Appeals for the Second Circuit in *Arista Records*, 578 F.3d at 162–64.

<sup>95</sup> The definition of “interactive service” states:

The ability of individuals to request that particular sound recordings be performed for reception by the public at large . . . does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request.

17 U.S.C. § 114(j)(7). *See also* Duvall, *supra* note 67, at n.182. Pandora, for example, does not allow a user to choose the next song on his current channel, but the user may skip songs or approve of songs to “shape future listening.” *Id.*

<sup>96</sup> CARP was established to facilitate arbitration between broadcasters and sound recording copyright holders. Recall that the CRB currently oversees such negotiations and sets royalty rates. *See supra* note 67 and accompanying text.

willing buyer and a willing seller.”<sup>97</sup> The DMCA requires Internet webcasters to obtain licenses and pay royalties to both the performance rights organizations<sup>98</sup> as well as to the owners of the copyrights of sound recordings and musical works, because each of these entities has an ownership right in a given song or other musical work.<sup>99</sup>

## II. CURRENT ROYALTY RATE STRUCTURE

As we have seen, Internet webcasters—just like other broadcasters—must pay royalties for the musical recordings performed on their online stations or channels. This section considers the most current protections afforded to performance rights holders by the federal government and explores what webcasters must pay in royalties to keep their businesses running. The Copyright Royalty Board (CRB)<sup>100</sup> set highly controversial royalty rates in 2007, and experienced intense backlash from webcasters as a result.<sup>101</sup> More recent attempts to balance the rate structure for webcasting companies have been seen as an improvement over the 2007 rates, but are still questionable and continue to favor other forms of broadcast radio, such as terrestrial broadcasting stations.<sup>102</sup>

### A. The 2007 Royalty Rates Set by the Copyright Royalty Board

When the DPRA was enacted in 1995, CARP—and subsequently the CRB<sup>103</sup>—designated SoundExchange<sup>104</sup> as the administrative agency responsible for collecting and distributing compulsory performance royalties for sound recording copyright

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<sup>97</sup> Duvall, *supra* note 67, at 272 (quoting Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2895–96 (1998)).

<sup>98</sup> Tune & Lockard, *supra* note 10, at 20. The performance rights organizations (PROs) consist of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc., and SESAC. *Id.* These organizations represent all “songwriters, composers, and music publishers in the United States for purposes of licensing and collecting royalties from any public performance of a song.” *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> The Copyright Royalty Board (CRB) was established by the U.S. Copyright Office and consists of three full-time copyright royalty judges, whose responsibility it is to “make determinations and adjustments of reasonable terms and rates of royalty payments as provided in [17 U.S.C. § 114].” 17 U.S.C. § 801(b)(1) (2006). For more information on the CRB and governing laws, see COPYRIGHT ROYALTY BOARD, <http://www.loc.gov/crb> (last visited Oct. 1, 2010).

<sup>101</sup> See *infra* Part II.A.

<sup>102</sup> See *infra* Part II.B.

<sup>103</sup> See *supra* notes 67 and 100 for information on the CRB and its predecessors.

<sup>104</sup> For information on SoundExchange, see *supra* note 25.

holders.<sup>105</sup> In March 2007, the CRB, together with SoundExchange, established a new royalty rate system under the authority of section 114 based on a “per performance” calculation.<sup>106</sup> The system set forth royalty rates<sup>107</sup> for commercial webcasters,<sup>108</sup> small commercial webcasters (less than \$1.2 million in revenue per year),<sup>109</sup> and noncommercial webcasters.<sup>110</sup> The new rates for commercial webcasters and small commercial webcasters were set as follows: \$0.0008 per performance for 2006, \$0.0011 per performance for 2007, \$0.0014 per performance for 2008, \$0.0018 per performance for 2009, and \$0.0019 per performance for 2010.<sup>111</sup> The CRB also set a \$500 minimum fee per channel for broadcasters.<sup>112</sup> Under this structure, small webcasters did not pay different royalty rates than larger companies.<sup>113</sup> In contrast, noncommercial webcasters were subject to a minimum annual fee of \$500 per channel or station.<sup>114</sup> The high rates established for commercial and small commercial webcasters upset many and resulted in numerous attempts to negotiate different agreements with Sound-

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<sup>105</sup> See Susan Butler, *CRB Appoints SoundExchange Sole ‘Collective,’* ALLBUSINESS (Mar. 8, 2007), <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4394859-1.html>; Oxenford, *supra* note 14.

<sup>106</sup> This means that webcasters must pay royalties based on how many times a given recording is performed (or played over the stream). For example, if a given recording is played a total of one hundred times in one year, the webcaster responsible for those performances would have to pay the given royalty rate times one hundred. See generally Tune, *supra* note 70.

<sup>107</sup> SoundExchange participates in the royalty rate setting process, either through voluntary settlements between parties or proceedings before the CRB. See *The Law, SOUNDEXCHANGE*, <http://soundexchange.com/about/the-law> (last visited Oct. 1, 2010). For more about different types of negotiations between private parties, see *supra* Part II.B.

<sup>108</sup> “Commercial broadcaster” is synonymous with “eligible nonsubscription transmission.” See *supra* note 86.

<sup>109</sup> Tune, *supra* note 70, at 2.

<sup>110</sup> A noncommercial webcaster is one that is exempt from taxation under section 501 of the Internal Revenue Code, or that is operated by a governmental entity, meaning it is a non-profit organization. Duvall, *supra* note 67, at 280; Steve Gordon, *Update on Webcasting Royalty Rates: Part Two of Two*, ENT. L. & FIN., Sept. 2004, at 3, 3–4, available at [http://www.stevegordonlaw.com/update\\_webcast\\_royalty\\_rates2.htm](http://www.stevegordonlaw.com/update_webcast_royalty_rates2.htm). Non-commercial webcasters also tend to have different sources of funding, such as listener donations, corporate sponsorships and university funding. Duvall, *supra* note 67, at 280.

<sup>111</sup> Tune, *supra* note 70, at 2.

<sup>112</sup> Daniel Castro, *Internet Radio and Copyright Royalties: Reforming a Broken System*, INFO. TECH. & INNOVATION FOUND. 5 (May 10, 2007), <http://www.itif.org/files/InternetRadio.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> Tune, *supra* note 70, at 2.

Exchange.<sup>115</sup> Complaints were not heard, however, because the CRB quickly rejected all rehearing proposals in April 2007.<sup>116</sup>

The rate schedule established in 2007 was the product of two years of litigation between SoundExchange and parties representing all types of webcasting and broadcasting services, where the parties appeared and argued before the CRB in order to determine a fair royalty structure. The CRB adopted significant rate increases on the advice of SoundExchange,<sup>117</sup> over opposition by numerous digital broadcasters who argued that the proper structure should calculate royalties due based on a percentage of revenue, rather than the “per performance” structure advocated by SoundExchange.<sup>118</sup> Webcasters argued that this effort by SoundExchange was nothing more than a “major label money grab—an attempt to revive a dying business model through exorbitant fee increases at the expense of technological developments and consumer interests.”<sup>119</sup> The fees set by SoundExchange would exceed the total annual revenues for many Internet radio stations,<sup>120</sup> and although large

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<sup>115</sup> Many webcasting sites argued these unreasonable rates would eat up most of their revenue and would put Internet radio out of business. Miller, *supra* note 14. See also Oxenford, *supra* note 14.

<sup>116</sup> Tune, *supra* note 70, at 2; Oxenford, *supra* note 14.

<sup>117</sup> SoundExchange argued to the CRB that the per-performance rate for sound recording copyrights should be calculated based on the willing buyer/willing seller standards set forth concerning interactive services, whereas webcasters argued the benchmark should more look like the amount at issue in agreements between performance rights organizations. The CRB chose SoundExchange’s benchmark, which constituted a significant jump in per-performance rates. The CRB justified its decision based on, among other things, its understanding that the interactive webcasting market was similar in many ways to the non-interactive market. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,095–96 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

<sup>118</sup> Parks, *supra* note 40, at 49. The CRB adopted SoundExchange’s position for these reasons:

- (1) [P]er performance rates are directly tied to what is being licensed,
- (2) ease of measurement,
- (3) difficulties in tying revenue fees to the value of the licensed rights,
- (4) complexities in determining revenue from mixed format webcasters, and
- (5) the basic notion that the more that licensed rights are used, the more payments should increase in relation to use.

Duvall, *supra* note 67, at 279.

<sup>119</sup> Parks, *supra* note 40, at 49.

<sup>120</sup> Marc Fisher, *Day of Silence: Internet Radio Goes Dark*, RAW FISHER BLOG (June 26, 2007, 7:05 AM), [http://voices.washingtonpost.com/rawfisher/2007/06/day\\_of\\_silence\\_internet\\_radio.html](http://voices.washingtonpost.com/rawfisher/2007/06/day_of_silence_internet_radio.html). The reasoning behind the determination that many webcasters would have gone out of business under these rates goes as follows:

[B]ased on a webcaster playing an average of 16 songs per hour, royalties are 1.28 cents per listener-hour (based on 2006 rates). A well-run webcaster might have sold two radio advertising spots at a profit of 0.6 cents per listener-hour. In addition to video gateway ads, banner ads, and other web-based advertising, the total revenue for a well-run webcaster is still only between 1.0 and 1.2

companies “like AOL may [have been] able to afford the new rates, many smaller Internet radio stations [would have had] to shut down. The new rates could [have] actually reduce[d] the flow of royalties to musicians.”<sup>121</sup> For example, after the adoption of these rates, Radio Paradise,<sup>122</sup> a smaller Internet radio site, faced royalty costs of over 125% of its yearly revenue.<sup>123</sup> Even Pandora—considered to be an Internet radio giant—was on the verge of shutting down, with royalty fees constituting seventy percent of its projected revenue of twenty-five million dollars for 2008.<sup>124</sup> The uproar over the royalty rates set by SoundExchange even sparked a “day of silence”<sup>125</sup> for Internet radio stations and channels on June 26, 2007, which was designed to draw attention to what webcasters envisioned to be the government’s attempt to kill Internet radio.<sup>126</sup>

In the ensuing months, webcasters united behind various legislative proposals to curb the effects of the SoundExchange rates. These efforts included the Internet Radio Equality Act<sup>127</sup> and the Performance Rights Act,<sup>128</sup> both of which, however,

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cents per listener-hour. Thus, if a webcaster (and this is a well-run webcaster) must pay 1.28 cents per listener-hour, it is likely to go out of business.

Duvall, *supra* note 67, at 281; Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RADIO AND INTERNET NEWSL. (Mar. 2, 2007), <http://www.kurthanson.com/archive/news/030207/index.shtml>.

<sup>121</sup> Hiawatha Bray, *Royalty Hike Could Mute Internet Radio: Smaller Stations Say Rise Will Be Too Much*, BOSTON GLOBE, Mar. 14, 2007, at F1, available at [http://www.boston.com/business/technology/articles/2007/03/14/royalty\\_hike\\_could\\_mute\\_internet\\_radio/](http://www.boston.com/business/technology/articles/2007/03/14/royalty_hike_could_mute_internet_radio/).

<sup>122</sup> RADIO PARADISE, <http://www.radioparadise.com> (last visited Oct. 1, 2010).

<sup>123</sup> Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED (Mar. 6, 2007), <http://www.wired.com/entertainment/music/news/2007/03/72879>.

<sup>124</sup> Tim Bjarin, *Saving Internet Radio*, PC MAG. (Oct. 3, 2008), <http://www.pcmag.com/article2/0,2817,2331594,00.asp>; Peter Whoriskey, *Giant of Internet Radio Nears Its 'Last Stand': Pandora, Other Webcasters Struggle Under High Song Fees*, WASH. POST, Aug. 16, 2008, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503367.html>.

<sup>125</sup> On June 26, 2007, Internet radio stations including Yahoo!, Pandora and Rhapsody stopped broadcasting for twenty-four hours. Kurt Hanson, *A Guide to Preparing for Tomorrow's "Day of Silence"*, RADIO AND INTERNET NEWSL., June 25, 2007, <http://www.kurthanson.com/archive/news/062507/index.shtml#Saga>.

<sup>126</sup> *Id.*

<sup>127</sup> Internet Radio Equality Act, H. R. 2060, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2060>. The bill intended to nullify the rate determinations set by the CRB in 2007 and replace them with the same revenue-based royalty balancing test found in section 801(b)(1) of the Copyright Act, currently used for satellite radio royalty determinations. Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 302 (2008).

<sup>128</sup> Performance Rights Act, H. R. 4789, 100th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-4789>. This bill intended to provide platform parity in radio performance rights, establishing a flat annual fee for royalties and requiring terrestrial broadcasters to pay performance royalties just like

currently seem to have been abandoned somewhere in the dusty corners of Congress.<sup>129</sup> However, the idea behind the Performance Rights Act—that terrestrial radio should also be responsible for royalty payments to copyright holders—is still being considered in Congress and may become a reality in the months to come.<sup>130</sup> Webcasters have not given up, and since 2007, SoundExchange has continued to entertain other proposals and negotiations.<sup>131</sup> One such negotiation, the Webcaster Settlement Acts of 2008 and 2009, provided certain webcasters relief from the exorbitant rates set by the CRB in 2007.

#### B. SoundExchange 2006–2015 Royalty Agreement Under the Webcaster Settlement Act

Near the end of 2008, webcasters enjoyed renewed hope that royalty conflicts would soon dissipate, or at least come to a reasonable compromise. Congress passed the Webcaster Settlement Act in October 2008,<sup>132</sup> which gave SoundExchange and webcasters the opportunity to establish royalty rates for the performance of sound recordings over the Internet in lieu of compulsory license rates determined by the CRB.<sup>133</sup> Under this Act, SoundExchange had until February 15, 2009 to reach

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satellite and Internet radio sites. *Id.*; Ashton, *supra* note 19; Parks, *supra* note 37, at 51. Under section 114, broadcast radio is exempt from paying performance royalties. *See supra* Part I.C.

<sup>129</sup> David Oxenford, *Webcaster Settlement Act—What Does it Mean?*, BROADCAST LAW BLOG (Oct. 1, 2008), <http://www.broadcastlawblog.com/2008/10/articles/internet-radio/webcaster-settlement-act-what-does-it-mean/>. However, the Performance Rights Act enjoys significantly more support than the Internet Radio Equality Act. *See infra* Part IV.A.

<sup>130</sup> *See infra* Part IV.A.; David Oxenford, *The Broadcast Performance Royalty—Not Dead Yet, as Senate Judiciary Committee to Hold Hearing on Tuesday*, BROADCAST LAW BLOG (Aug. 2, 2009), <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/the-broadcast-performance-royalty-not-dead-yet-as-senate-judiciary-committee-to-hold-hearing-on-tuesday/>.

<sup>131</sup> For example, in August 2007, SoundExchange entered into a settlement agreement with the Digital Media Association (DiMA) that capped the minimum annual fee at fifty thousand dollars. Flavin, *supra* note 79, at 465. Under the 2007 CRB rates, webcasters had to pay a minimum of five-hundred dollars per year per channel offered, plus royalties on top of that minimum fee. *Id.* For many webcasters like Pandora which offer hundreds of custom channels, this minimum fee would likely be more expensive than the royalty rates. *Id.*

<sup>132</sup> Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008). The original Webcaster Settlement Act amended the Small Webcaster Settlement Act of 2002, which allowed a settlement to bypass a CARP proceeding to set royalty rates between private parties. Carey, *supra* note 127, at 308; Oxenford, *supra* note 129. The Webcaster Settlement Act adopts the same procedure, except that now, the group settling must submit the settlement to the CRB to publish it in the Federal Register. Carey, *supra* note 127, at 308; Oxenford, *supra* note 129.

<sup>133</sup> *See supra* Part II.A. *See also* Parks, *supra* note 40, at 53.

agreements with webcasters or groups of webcasters,<sup>134</sup> and webcasters were required to expressly opt out of the CRB royalty rates set in 2007.<sup>135</sup> Although questions arose as to the likelihood of such settlements actually happening,<sup>136</sup> webcasters were mostly optimistic about this progress. However, SoundExchange encountered logistical problems in meeting the February 15 deadline,<sup>137</sup> and webcasters quickly appealed to Congress for an extension. The Webcaster Settlement Act of 2009<sup>138</sup> amended the Webcaster Settlement Act of 2008 and gave SoundExchange thirty additional days to “enter into settlement agreements with webcasters that would be legally binding on all sound recording copyright owners.”<sup>139</sup>

The thirty-day extension seemed to provide just enough time for successful negotiations to take place. Under the Webcaster Settlement Act of 2009, SoundExchange and certain “pureplay”<sup>140</sup> webcasters reached an alternative agreement for royalty rates in July 2009, for the period of 2006–2015 (2014 for small pureplay webcasters).<sup>141</sup> Webcasters that run online music for larger providers are not included.<sup>142</sup> This agreement splits pureplay webcasters into three categories: (1) large, (2) small (defined as

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<sup>134</sup> Pub. L. No. 110-435.

<sup>135</sup> *Id.* See also *supra* Part II.A.

<sup>136</sup> Webcasters were concerned that negotiations with SoundExchange were unlikely, because they had not entered into successful negotiations in years and voluntary settlements may have become difficult to obtain. See Oxenford, *supra* note 129.

<sup>137</sup> For example, negotiations between SoundExchange and DiMA fell through in February 2009 and did not meet the deadline set by the Webcaster Settlement Act of 2008. Staci D. Kramer, *Streaming Music Sites and SoundExchange Fail to Reach Royalty Deal*, PAID CONTENT (Feb. 18, 2009), <http://paidcontent.org/article/419-streaming-music-sites-soundexchange-fail-to-reach-royalty-deal>. Members of DiMA included Pandora, RealNetworks, and MTV. *Id.* The main disagreement between the parties centered around paying royalties for streaming music *only*, versus paying for streaming music as well as game and software revenue. *Id.*

<sup>138</sup> Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009).

<sup>139</sup> Tune & Lockard, *supra* note 10, at 23.

<sup>140</sup> “Pureplay” webcasters are those “that are willing to include their entire gross revenue in a percentage of revenue calculation to determine their royalties.” David Oxenford, *Pureplay Webcasters and SoundExchange Enter Into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006–2015*, BROADCAST LAW BLOG (July 7, 2009), <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-20062015/>.

<sup>141</sup> Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,799 (July 17, 2009). Pureplay webcasters privy to this agreement included AccuRadio, Digitally Imported, and radioIO. Michael Schmitt, *SoundExchange and “Pureplay” Webcasters Announce 2006–2015 Royalty Agreement*, RADIO AND INTERNET NEWSL. (July 7, 2009, 12:17 PM), <http://textpattern.kurthanson.com/articles/719/rain-77-soundexchange-and-pure-play-webcasters-reach-royalty-agreement>. However, other Internet webcasters like Pandora are eligible to elect the substitute license arrangement. *Id.*

<sup>142</sup> For example, CBS Radio runs online music services for both AOL and Yahoo! and therefore is not subject to this agreement. Miller, *supra* note 14.

those that earn \$1.25 million or less), and (3) others that offer bundled, syndicated, or subscription services.<sup>143</sup>

Large webcasters are required to pay either a per-performance rate or twenty-five percent of their total revenue, whichever is higher.<sup>144</sup> However, larger webcasters are more likely to pay royalties on a per-performance basis than a percentage of revenue, since large webcasters have significantly higher numbers of users than smaller webcasters.<sup>145</sup> Also, large webcasters must pay a minimum royalty per year of \$25,000.<sup>146</sup> The deal offers a discounted royalty rate—a nearly fifty percent discount—compared with the CRB rates of 2007, with the maximum per-performance rate reaching only \$0.0014 by 2015.<sup>147</sup> In exchange for this discounted rate, the agreement requires more stringent reporting requirements<sup>148</sup> as well as revenue sharing.<sup>149</sup>

Small pureplay webcasters pay the greater of either a percentage of revenues or a percentage of expenses, ranging between ten and fourteen percent for the period from 2006 to 2014,<sup>150</sup> and “in certain circumstances have less stringent play list reporting requirements in return for payment of an additional ‘proxy fee.’”<sup>151</sup> Although the Executive Director of SoundExchange, John Simson, still considers the CRB royalty rates fair and reasonable,<sup>152</sup> he expressed hope that this experimental revenue sharing model would benefit artists, rights holders, and webcasters simultaneously.<sup>153</sup> Pureplay webcasters seem satisfied as well and consider this royalty agreement to be a significant milestone as the first “reasonably viable [deal

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<sup>143</sup> Schmitt, *supra* note 141.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 74 Fed. Reg. 34,796, 34,799.

<sup>147</sup> *Id.* This works out to be a dramatic difference in cost compared to the maximum for the CRB royalty rates, reaching \$0.0019 per performance by 2010. *See supra* Part II.A.

<sup>148</sup> The new deal requires webcasters to “provide SoundExchange with census reports (actual recordings played and total listenership) and retain server logs for at least [four] years.” Schmitt, *supra* note 141.

<sup>149</sup> This agreement helps pureplay webcasters “grow their businesses and develop business models while allowing artists and labels to share in the upside potential of webcasting that is driven by their recordings.” Brian Calhoun, *SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement*, SOUND EXCHANGE (July 7, 2009), <http://soundexchange.com/2009/07/07/soundexchange-and-pureplay-webcasters-reach-unprecedented-experimental-rate-agreement/>.

<sup>150</sup> Schmitt, *supra* note 141.

<sup>151</sup> Calhoun, *supra* note 149.

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

<sup>153</sup> *Id.*

which] . . . extends for a reasonably-long period of time.”<sup>154</sup> However, the new system still contains elements of fundamental unfairness toward Internet radio that must be addressed before Internet radio will be able to flourish.

### III. DIFFERENT STANDARDS FOR DIFFERENT MEDIUMS: A CONTINUING PROBLEM

Although the Webcaster Settlement Act of 2009 gave relief to many webcasters and represents one of the first positive settlements between SoundExchange and pureplay webcasters, terrestrial radio still pays nothing in sound recording performance royalties.<sup>155</sup> Internet radio continues to rise in popularity and will soon infiltrate every aspect of everyday life, including vehicles and homes. An exemption in royalty payments for terrestrial radio is unfair when one considers the current state of Internet radio and its future.<sup>156</sup> Because terrestrial radio is a continued presence in the transmission of performances, it should not be treated more favorably than Internet transmissions.

#### A. Looking Into the Future

According to Bridge Ratings,<sup>157</sup> the number of Internet radio listeners accessing wirelessly—using a personal computer or cell phone—will increase to seventy-seven million by 2010.<sup>158</sup> Pandora claims to already have thirty percent of its users connected via broadband cell phones, and the number of broadband subscribers continues to grow.<sup>159</sup> Pandora and other

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<sup>154</sup> Paul Resnikoff, *Pure-Play Webcasters, SoundExchange Work it Out*, DIGITAL MUSIC NEWS (July 7, 2009), <http://www.digitalmusicnews.com/stories/070709webcaster/?searchterm=webcaster%20settlement%20act> (quoting Kurt Hanson, founder of RAIN and rate negotiator for AccuRadio). However, everyone was satisfied. See, e.g., Bob Bellin, *Webcasters—Don't Be Fooled by the New Deal for Performance Royalty*, RADIO-INFO.COM (July 14, 2009), <http://www.radio-info.com/sections/1-features/columns/13-on-the-mic/essays/493-webcasters-dont-be-fooled-by-the-new-deal-for-performance-royalty>.

<sup>155</sup> See *infra* Part III.B.

<sup>156</sup> This section does not discuss the accompanying issues of satellite radio, which pays much less in royalties than Internet radio. The debate, in this author's view, centers on Internet and terrestrial radio because they are both non-subscription services offered to the public for free.

<sup>157</sup> Bridge Ratings is a media research company that tracks consumer behavior relating specifically to all types of radio, MP3 players, and even Podcasting. *Bridging the Gap*, BRIDGE RATINGS, <http://www.bridgeratings.com/about.htm> (last visited Oct. 6, 2010).

<sup>158</sup> *The Bridge Ratings Report—The Impact of Wireless Internet*, BRIDGE RATINGS (Mar. 21, 2007), [http://www.bridgeratings.com/press\\_03.21.07-WiFi%20Impact.htm](http://www.bridgeratings.com/press_03.21.07-WiFi%20Impact.htm) [hereinafter *Impact of Wireless Internet*].

<sup>159</sup> Stone & Miller, *supra* note 13, at B1.

webcasters<sup>160</sup> provide Internet radio applications (apps) for broadband phones that are so advanced that they replace listening to customized radio stations at a computer.<sup>161</sup> The Apple iPad also provides a free, downloadable Pandora app, which provides extensive information and advertising for a musical artist with the touch of a finger.<sup>162</sup>

Similarly, new vehicles will soon be equipped with digital and HD radio, which will include Internet radio options.<sup>163</sup> New cars will have Pandora—or other webcasting companies—built into the car and “bundled with either the price of the car or services associated with the car.”<sup>164</sup> Even if a vehicle does not have digital or HD radio, an iPhone or other broadband phone with Internet radio apps can hook into the vehicle’s stereo system, and the user can listen to Pandora while driving.<sup>165</sup> The adoption of in-car Internet radio seemingly would threaten traditional, terrestrial radio as well as satellite radio as stable competition in the years to come.<sup>166</sup>

However, statistics also show that terrestrial radio listening has actually *increased* since 2008, and according to Bridge Ratings, such growth will continue into 2012.<sup>167</sup> Since 2006,

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<sup>160</sup> Webcasters like Slacker, Imeem, and Last.fm also have similarly advanced cell phone apps. See, e.g., Paul Bonanos, *Imeem’s iPhone App Cometes with Apple on its Own Hardware*, GIGAOM (May 14, 2009, 11:53 AM), <http://gigaom.com/2009/05/14/imeem-iphone-app-competes-with-apple-on-its-own-hardware/> (discussing Imeem’s new app that offers its users radio streaming as well as a “My Music” section that offers access to a user’s own library of uploaded songs).

<sup>161</sup> Eliot Van Buskirk, *5 Ways the Cellphone Will Change How You Listen to Music*, WIRED (Jan. 16, 2009), <http://www.wired.com/epicenter/2009/01/six-ways-cellph/>.

<sup>162</sup> The iPad has a large High Definition viewing screen, on which a user can read a large amount of biographical or stylistic information about an artist. It goes further than other mobile devices have in the past—it provides “more real estate for display advertising.” Emily Bryson York, *Pandora: The iPad is Going to be Better than the iPhone for Ads*, BUS. INSIDER (June 14, 2010, 9:47 AM), <http://www.businessinsider.com/pandora-ipad-2010-6>.

<sup>163</sup> W. David Gardner, *Ford Vehicles to Get iTunes Tagging*, INFORMATIONWEEK (Dec. 29, 2009, 12:18 PM), <http://www.informationweek.com/news/services/data/showArticle.jhtml?articleID=222100216>; Antuan Goodwin, *2010 Car Tech and GPS Preview*, CNET.COM (Dec. 14, 2009, 10:30 AM), [http://ces.cnet.com/8301-31045\\_1-10414355-269.html?tag=mncol%3bmlt\\_related](http://ces.cnet.com/8301-31045_1-10414355-269.html?tag=mncol%3bmlt_related).

<sup>164</sup> Stephen Williams, *Pandora by the Dashboard Light*, WHEELS BLOG (Dec. 11, 2009, 4:05 PM), <http://wheels.blogs.nytimes.com/2009/12/11/pandora-by-the-dashboard-light/>.

<sup>165</sup> The iPhone has allowed personalized Internet radio to become “fully mobile.” Jennifer Maerz, *The Decade in Ideas: Local Artists, DJs, Studio Heads, and Tech Geeks Discuss the Past and Present in Music*, S. F. WEEKLY (Dec. 23, 2009), <http://www.sfweekly.com/2009-12-23/music/the-decade-in-ideas-local-artists-djs-studio-heads-and-tech-geeks-discuss-the-past-and-present-in-music/>.

<sup>166</sup> *Impact of Wireless Internet*, *supra* note 158.

<sup>167</sup> *The Bridge Ratings First Look: The Future of Radio 2010*, BRIDGE RATINGS (Nov. 20, 2009), <http://www.bridgeratings.com/press.11.20.09.2012%20Listening%20Trends.htm>.

traditional terrestrial radio has been considered the most influential media source for consumers.<sup>168</sup> It is clear that Internet radio is driving the future of the radio broadcasting industry, and although terrestrial radio will face new challenges in competitive technology, it is certainly surviving as an industry. If the purpose of copyright regulation is to encourage innovation and “promote the Progress of Science and useful Arts,”<sup>169</sup> Internet radio is disproportionately burdened with royalty payments, and other broadcasting forms pay minimal royalties for the music they play. Traditional terrestrial radio has never and will never, in this author’s view, be sophisticated enough to provide musical artists with any advertising perks able to compete with the advanced advertising capabilities of webcasting, and yet Internet radio continues to pay astronomical royalty rates that are completely disproportionate to what terrestrial broadcasters pay.

#### B. Terrestrial Radio Exemption: Unfair and Illogical

The current royalty rate system favors satellite and terrestrial radio to the detriment of Internet radio. Although in theory the structure is efficient and fair when considering the differing levels of user interaction, “the standards used to derive the royalties differ among classes of broadcasters, creating ongoing controversy.”<sup>170</sup> Webcasters pay royalties set according to the willing buyer/willing seller standard,<sup>171</sup> while satellite radio services pay rates determined under a multifactor test set forth in section 801(b) of the Copyright Act,<sup>172</sup> and terrestrial

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<sup>168</sup> *Id.*

<sup>169</sup> U. S. CONST. art. I, § 8, cl. 8.

<sup>170</sup> Parks, *supra* note 40, at 49.

<sup>171</sup> See Duvall, *supra* note 67.

<sup>172</sup> For satellite radio determinations, Copyright Royalty Judges must consider the following objectives:

- (A) To maximize the availability of creative works to the public;
- (B) to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions;
- (C) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
- (D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

<sup>17</sup> U.S.C. § 801(b)(1) (2006). Additionally, the rates set may be adjusted to reflect monetary inflation and other rate changes. § 801(b)(2).

radio stations pay no sound recording performance right at all.<sup>173</sup> In fact, terrestrial broadcasters only pay about 3.5% of revenue to the American Society of Composers, Authors and Publishers.<sup>174</sup> And, as of 2008, terrestrial radio still constituted a sixteen billion dollar market.<sup>175</sup> Scholars and webcasters have supported platform parity,<sup>176</sup> which is the notion that “all music services subject to the sound recording performance royalty should pay a royalty determined by the same standard, or perhaps even the same royalty.”<sup>177</sup> SoundExchange established the musicFIRST Coalition in 2007,<sup>178</sup> which has strongly advocated for broader performance rights in the form of platform parity.<sup>179</sup> Both the House of Representatives and the Senate are considering current versions of the original Performance Rights Act to establish platform parity between radio broadcasters.<sup>180</sup>

An exemption for terrestrial broadcast radio to the detriment of Internet radio no longer makes sense, especially when Internet radio advances the interests of musical artists in ways that terrestrial radio cannot. Although the exposure of new artists and public access to music should never trump proper compensation for copyright holders, “Internet radio is not the old Napster.”<sup>181</sup> File sharing constitutes the major cause for the recent decline in CD sales, not Internet radio.<sup>182</sup> In fact, Internet radio has helped to *increase* artist’s revenues from digital

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<sup>173</sup> Parks, *supra* note 40, at 49; Tim Westergren, *Important Update on Royalties*, PANDORA RADIO BLOG (July 7, 2009), [http://blog.pandora.com/pandora/archives/2009/07/important\\_updat\\_1.html](http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html); Alex Nesbitt, *Future of Internet Radio*, DIGITAL PODCAST (Oct. 8, 2009), <http://www.digitalpodcast.com/podcastnews/2009/10/08/future-of-internet-radio-dmf>.

<sup>174</sup> Ty McMahan, *Royalty Deal with Music Labels Renews Internet Radio*, VENTURE CAPITAL DISPATCH BLOG (July 7, 2009), <http://blogs.wsj.com/venturecapital/2009/07/07/royalty-deal-with-music-labels-renews-internet-radio>.

<sup>175</sup> *SNL Kagan Forecasts Advertising Revenue Recovery for TV and Radio Stations in 2010*, ALLRADIONEWS.COM (June 14, 2010), <http://allradionews.com/2010/06/14/snl-kagan-forecasts-advertising-revenue-recovery-for-tv-and-radio-stations-in-2010/>. The \$16 billion figure for 2008 represented a 17.7% drop from 2007, but radio revenue is projected to recover to \$17.1 billion in 2010. *Id.*

<sup>176</sup> Platform parity has also been described as the “full performance right” in sound recordings. *See* Parks, *supra* note 40, at 49.

<sup>177</sup> David Oxenford, *Senate Judiciary Committee Hearing on Radio Performance Royalty and Platform Parity for Webcaster Royalties*, BROADCAST LAW BLOG (Aug. 6, 2009, 8:45 PM), <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/senate-judiciary-committee-hearing-on-radio-performance-royalty-and-platform-parity-for-webcaster-royalties/>. This was the idea behind the Performance Rights Act. *See supra* note 128.

<sup>178</sup> MUSICFIRST COALITION, <http://www.musicfirstcoalition.org> (last visited Oct. 6, 2010). “FIRST” is an acronym for “Fairness in Radio Starting Today.” *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See infra* Part IV.A.

<sup>181</sup> Spektor, *supra* note 12, at 87.

<sup>182</sup> Castro, *supra* note 112, at 7.

downloads in ways that terrestrial radio cannot.<sup>183</sup> In 2006, RadioParadise<sup>184</sup> generated over \$260,000 in sales of CDs and other music through Amazon and \$28,000 in iTunes downloads.<sup>185</sup> In part, these sales can be attributed to the fact that on most webcasting stations, the artist's name, song name, and album name are displayed next to a purchase option, a feature not available on terrestrial radio stations.<sup>186</sup> In addition, Internet radio gives airtime to lesser-known artists that are not played on AM/FM radio, and therefore incentivizes artists to create more music.<sup>187</sup> With the numerous benefits Internet radio provides to both the public and to musical artists, the unbalanced royalty structure should be improved to include platform parity. To compensate broadcasters for increased royalty payments resulting from platform parity, it should be balanced with options to reduce royalty fees.

#### IV. PROPOSED SOLUTION: THE PERFORMANCE RIGHTS ACT WITH AN OPT-OUT DATABASE PROVISION

To address the unfairness of the current royalty structure, which continues to favor terrestrial and satellite radio over Internet radio, Congress should pass the new and revised Performance Rights Act.<sup>188</sup> However, the Act should be amended to include an option for artists to opt-out of royalty payments by registering with a government-run database. This way, artists will be compensated no matter how their music is broadcasted, and broadcasters can enjoy an efficient and streamlined way to reduce royalty payments owed to owners of sound recording copyrights.

##### A. The Full Performance Right Revisited

On February 4, 2009, a revived version of the original Performance Rights Act<sup>189</sup> was introduced into the Senate by Senator Patrick Leahy.<sup>190</sup> Known as "S. 379," or the

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<sup>183</sup> See *supra* notes 14 & 16 and accompanying text.

<sup>184</sup> See *supra* note 122.

<sup>185</sup> Castro, *supra* note 112, at 8.

<sup>186</sup> Devices like the iPad, which have large interactive screens, have been revolutionary for music advertising. See *supra* note 162 and accompanying text.

<sup>187</sup> Spektor, *supra* note 12, at 81.

<sup>188</sup> Performance Rights Act of 2009, S. 379, 111th Cong. (Feb. 4, 2009), 2009 CONG US S 379 (Westlaw).

<sup>189</sup> See *supra* note 128.

<sup>190</sup> S. 379. There is also a version in the House of Representatives, introduced by Representative Conyers. See H.R. 848, 111th Cong. (Feb. 4, 2009), 2009 CONG US HR 848 (Westlaw). As of October 2010, the Act is still pending before Congress. S. 379:

“Performance Rights Act,” it would amend the Copyright Act to grant performers of sound recordings rights to compensation from terrestrial broadcasters, but would establish a flat annual fee in lieu of royalty payments for terrestrial broadcast stations making less than \$1.25 million in yearly revenue, a similar standard to the Webcaster Settlement Act of 2009.<sup>191</sup> Because the economy is currently in a downturn, the legislation will not impose royalty payments until three years after enactment.<sup>192</sup> On May 13, 2009, the House of Representatives Judiciary Committee approved the bill,<sup>193</sup> and the Senate Judiciary Committee approved the same legislation in October of 2009.<sup>194</sup> Next, the Senate must consider and vote on the legislation.

This new Performance Rights Act enjoys a considerable amount of support,<sup>195</sup> and should be adopted into law by Congress. Although both Internet radio and terrestrial radio are free to the consumer, Internet radio compensates performing artists in the form of advertising in ways terrestrial radio does not. These individuals should be compensated for their work, regardless of the medium in which it is performed.<sup>196</sup> Not surprisingly, the National Association of Broadcasters (NAB)<sup>197</sup> has vehemently opposed this legislation, calling it a “tax” on local radio stations.<sup>198</sup> The NAB claims that this tax would *reduce* the variety that music radio stations play,<sup>199</sup> but when one considers

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*Performance Rights Act*, OPENCONGRESS, <http://www.opencongress.org/bill/111-s379/show> (last visited Oct. 4, 2010) [hereinafter *S. 379 Performance Rights Act*].

<sup>191</sup> See *supra* Part II.B.

<sup>192</sup> S. 379.

<sup>193</sup> David Oxenford, *Broadcast Performance Royalty Passes House Judiciary Committee—A Work in Progress*, BROADCAST LAW BLOG (May 13, 2009), <http://www.broadcastlawblog.com/2009/05/articles/broadcast-performance-royalty/broadcast-performance-royalty-passes-house-judiciary-committee-a-work-in-progress/>.

<sup>194</sup> See *S. 379: Performance Rights Act*, *supra* note 190; Juliana Gruenwald, *More Support for Royalty Bill*, NAT'L J. (Jan. 6, 2010, 10:09 AM), <http://techdailydose.nationaljournal.com/2010/01/more-support-for-royalty-bill.php>.

<sup>195</sup> Seventeen labor and civil rights organizations, including the AFL-CIO and the NAACP, urged Congress to adopt the bill. See *AFL-CIO, NAACP, Others Back Performance Rights Act*, MUSICFIRST (Dec. 7, 2009), <http://www.musicfirstcoalition.org/node/728>. Even the Intellectual Property division of the American Bar Association has come out in support of the bill. See Gruenwald, *supra* note 194. However, there is significant opposition to the bill as well, mainly from commercial television and radio stations. See *H.R. 848 – Performance Rights Act*, MAPLIGHT.ORG, <http://maplight.org/us-congress/bill/111-hr-848/358578/total-contributions> (last visited Oct. 18, 2010) (comparing the interest groups in support of and in opposition to the bill, as well as the relative financial contributions made by those groups to House members).

<sup>196</sup> Castro, *supra* note 112, at 1.

<sup>197</sup> NAT'L ASS'N OF BROADCASTERS, <http://www.nab.org> (last visited Oct. 5, 2010).

<sup>198</sup> See *No Performance Tax*, <http://www.noperformancetax.org> (last visited Oct. 5, 2010). This website is operated by the NAB. *Id.*

<sup>199</sup> *Radio at Risk*, NO PERFORMANCE TAX, <http://www.noperformancetax.com/Radio%20at%20Risk> (last visited Oct. 5, 2010).

the imminent rise of in-car Internet radio,<sup>200</sup> these concerns may not be so terrifying. Although terrestrial radio provides artists with exposure to new audiences,<sup>201</sup> this alone should not justify an exemption when Internet radio gives similar—even better—exposure.

The Performance Rights Act may have some negative impacts on musicians and record companies,<sup>202</sup> but it would at least level the playing field of who pays royalties and create a more balanced royalty structure. Moreover, “the proposed act would result in additional revenue for record companies, musicians, and performers . . . [who] would receive an additional income stream. . . . [R]ecord companies could use the additional revenue to invest more heavily in the creative process of music.<sup>203</sup> The Act itself, however, does not address the issue of high royalty rates. Therefore, the Performance Rights Act should carry with it a simple way for webcasters and radio stations alike to reduce their royalty payments.

#### B. An Opt-Out Database for SoundExchange

Since the CRB determination of royalty rates in 2007,<sup>204</sup> it has been assumed that artists could waive the collection of royalties if they felt it would be in their best interest to allow webcasters to play their music.<sup>205</sup> SoundExchange currently allows sound recording copyright owners to negotiate directly

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<sup>200</sup> See *supra* Part III.

<sup>201</sup> At a House Judiciary Committee in 2007, congressmen on either side of the issue of full performance rights agreed that terrestrial broadcasts have been positive for musical artists. David Oxenford, *House Judiciary Committee Hearing on Broadcast Performance Right—No Breaks for the Broadcasters*, BROADCAST LAW BLOG (July 31, 2007), <http://www.broadcastlawblog.com/2007/07/articles/broadcast-performance-royalty/house-judiciary-committee-hearing-on-broadcast-performance-right-no-breaks-for-the-broadcasters/#more>.

<sup>202</sup> Matthew Lasar, *Performance Rights Act Might Shut Down Some Radio Stations*, ARS TECHNICA (June 8, 2010, 11:08 AM), <http://arstechnica.com/tech-policy/news/2010/06/gao-report-performance-rights-act-might-shut-down-some-radio-stations.ars> (stating that the act “could prompt some stations to make ‘adjustments’ . . . such as reducing staff levels, switching to a nonmusic format, and ceasing operation”) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-428R, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST RADIO INDUSTRIES 12 (2010)).

<sup>203</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-428R, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST RADIO INDUSTRIES 4 (2010).

<sup>204</sup> See *supra* Part II.A.

<sup>205</sup> See David Oxenford, *Music Waivers Dropped Amid Payola Allegations—What’s the Impact for Future Waivers for Webcasters?*, BROADCAST LAW BLOG (July 22, 2007), <http://www.broadcastlawblog.com/2007/07/articles/payola-and-sponsorship-identif/music-waivers-dropped-amid-payola-allegations-whats-the-impact-for-future-waivers-for-webcasters/>.

with webcasters, provided they give proper notice to the CRB and to SoundExchange.<sup>206</sup> Also, if an artist does not collect the royalties owed to him after three years, SoundExchange keeps the money and adds it back into the general revenue pool.<sup>207</sup> SoundExchange needs its own streamlined system for efficient use of royalty payments without requiring cumbersome individual negotiations between webcasters and copyright holders.

At a recent Senate Judiciary Committee hearing concerning performance royalties for radio, Texas Senator Cornyn suggested that, “rather than compelling a performance royalty, Congress should set up a ‘Do Not Play’ list, similar to a do not call list.”<sup>208</sup> Such a list would be kept by SoundExchange—which already has a list of most copyright holders<sup>209</sup>—and would consist of those artists who do not consent to their music being played without the payment of a royalty.<sup>210</sup> If webcasters and radio stations wanted to play music from artists on the Do Not Play list, they would have to negotiate individually, but stations could play music from any other artists without a royalty.<sup>211</sup> This idea, however, was dismissed quickly during the hearing for legitimate fears that such a system would tend to force less well-known musical artists and groups into a race to the bottom—giving up their copyrights in order to be heard—and that it would simultaneously prove difficult for smaller radio stations to carry major music stars, thus infringing on smaller sites’ ability to compete with larger ones.<sup>212</sup>

However, the idea of creating a pool of royalty-free music is interesting and might prove a successful method for lowering royalty payments, which continue to cripple online radio stations. Instead of the system allowing royalty-free music by default, as Senator Comyn suggested, SoundExchange should create its own

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<sup>206</sup> Eliot Van Buskirk, *Polka Players Want to Fold SoundExchange Royalties*, WIRED (July 19, 2007, 3:37 PM), [http://www.wired.com/listening\\_post/2007/07/polka-players-w/](http://www.wired.com/listening_post/2007/07/polka-players-w/).

<sup>207</sup> Eliot Van Buskirk, *Webcasting Royalties: A Modest Proposal*, WIRED (July 23, 2007), [http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost\\_0723?currentPage=3](http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost_0723?currentPage=3). Van Buskirk suggests that, “[i]f SoundExchange is going to collect royalties without being asked to, it should make it easy to opt out of that system on a song-by-song basis.” *Id.*

<sup>208</sup> Oxenford, *supra* note 177.

<sup>209</sup> Performers and/or copyright owners must register with SoundExchange in order to “get paid when [they] get played.” *Register*, SOUNDEXCHANGE, <http://soundexchange.com/performer-owner/register-update-my-info/> (last visited Oct. 6, 2010).

<sup>210</sup> Oxenford, *supra* note 177.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

“Please Play” or “opt out” list, where artists could waive the payment of royalties and consent to webcasters and radio broadcasters playing their music for free. This opt-out provision could easily be attached to the Performance Rights Act as an amendment and simply provide a method for broadcasters to mitigate the impact of platform parity. Such a system, operated by SoundExchange, would provide more artists with more security and discretion in choosing how to market themselves, and it would also create more revenue as users are prompted with a “Purchase” option next to the song played. Instead of requiring individual negotiations, artists could simply join the opt-out list, which would allow radio stations of all types to play the music without paying royalties.

Some artist communities, like the Polka America Corporation (PAC),<sup>213</sup> have already given Internet radio stations the right to play their music without royalties.<sup>214</sup> However, PAC had to create its own artist database without the help of SoundExchange.<sup>215</sup> Requiring webcasters to negotiate individually with music and recording organizations is as inefficient as requiring them to negotiate with individual music artists. With the right governmental protections in place, a system, operated by SoundExchange, would streamline negotiations between webcasters and sound recording copyright holders, as well as create an efficient way for webcasters to play free music to lessen their royalty obligations under the Copyright Act. This, coupled with a full performance right granted to holders of sound recording copyrights in the Performance Rights Act, seems to produce a fairer and more balanced structure that equally considers the interests of all parties involved: musical artists, the recording industry, webcasters, and terrestrial broadcasters.

#### CONCLUSION

The radio industry has changed dramatically over the past decade, and continued adaptation and flexibility will be needed to address future technological advances and evolving consumer habits. As the actions of Radiohead demonstrated in 2007, the market is changing, and everyone—musicians, music publishers,

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<sup>213</sup> POLKA AMERICA CORPORATION, <http://www.polkaamericacorporation.org/> (last visited Oct. 1, 2010).

<sup>214</sup> Van Buskirk, *supra* note 206. Polka artists interested in joining the opt-out database must register with the Polka America Corporation, and then their music will be played for free on any webcaster or terrestrial radio broadcaster that plays more than fifty percent polka music. *Id.*

<sup>215</sup> *Id.*

performers, etc.—will need to get creative to stay in business. Internet radio represents the innovative forefront of the broadcasting industry. Therefore, a royalty regulation system that hinders technological advancement and ignores current consumer values is detrimental to the health of the music industry as a whole. It is not appropriate to allow terrestrial radio stations to pay nothing in royalties while webcasters must pay at least twenty-five percent in revenue. Indeed, “[c]opyright may be property, but like all property, it is also a form of regulation. It is a regulation that benefits some and harms others. When done right, it benefits creators and harms leeches. When done wrong, it is regulation the powerful use to defeat competitors.”<sup>216</sup> Congress should pass the Performance Rights Act, but should amend it slightly so that it includes an opt-out database requirement for SoundExchange in order to balance the interests of all parties.

The “great irony” of the debates among these groups—webcasters, the recording industry, musical artists, etc.—is that “most new devices only become popular because buyers really want them, which means they open whole new markets that can then be monetized by rightsholders.”<sup>217</sup> Copyright holders have been forced to accept industry-altering technology before, and have successfully met the challenge. Consider the gramophone, the VCR, and analog cassette tapes. Each time these technologies were introduced into the market, copyright holders feared that it would be the death of music.<sup>218</sup> Each time the industry survived. The recording industry will survive into the digital age, but only if it accepts change once again and adapts with new business and finance models.

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<sup>216</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 194 (2004). This book measures the effect of the Internet on various aspects of our culture, including film, performance, radio, and television. Examining the relationship between what Professor Lessig calls “piracy” and “property,” he argues that, by bowing to the demands of media conglomerates, the government has allowed the law to hamper the innovations of the Internet and thus hinder culture’s ability to respond to change as we have always done—using “common sense.” *Id.* at 13.

<sup>217</sup> Nate Anderson, *100 Years of Big Content Fearing Technology—In Its Own Words*, ARS TECHNICA (Oct. 11, 2009, 11:00 PM), <http://arstechnica.com/tech-policy/news/2009/10/100-years-of-big-content-fearing-technologyin-its-own-words.ars/2>.

<sup>218</sup> *Id.*