

NOTE

**ROYALTY RATE-SETTING FOR
WEBCASTERS: A ROYAL(TY) MESS**

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I.	INTRODUCTION	268
II.	HOW WEBCASTING WORKS	268
III.	WEBCASTING REGULATORY HISTORY.....	270
	A. <i>Digital Performance Right in Sound</i> <i>Recordings Act of 1995</i>	270
	B. <i>Digital Millennium Copyright Act</i>	272
	C. <i>The Copyright Arbitration Royalty Panel’s</i> <i>2002 Decision</i>	273
	D. <i>Overruling the 2002 CARP Decision</i>	275
	E. <i>Beethoven.com Litigation</i>	276
	F. <i>Small Webcasters Settlement Act of 2002</i>	277
	G. <i>Establishment of the Copyright Royalty Board</i>	278
	H. <i>Copyright Royalty Board Decision</i>	279
	I. <i>Reactions of Webcasters and Critics</i>	280
	J. <i>Motion for CRB Rehearing Denied</i>	282
	K. <i>Internet Radio Equality Act</i>	283
	L. <i>Ongoing Litigation</i>	284
	M. <i>Webcaster Settlement Act of 2008</i>	286
IV.	HOW SHOULD WEBCASTERS BE REGULATED?.....	287
	A. <i>Terrestrial Radio, Radio Rebroadcasts,</i> <i>and Non-Interactive Webcasts</i>	289
	B. <i>Limited Interactive Webcasting and</i> <i>Satellite Radio</i>	290
	C. <i>Subscriptions, Limited Downloads and</i> <i>Permanent Downloads</i>	293
	D. <i>Other Proposals for Change</i>	294
V.	CONCLUSION.....	295

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I. INTRODUCTION

The Internet is a haven for free expression. Not only are content-based restrictions disfavored, but “[the internet] provides relatively unlimited, low-cost capacity for communication of all kinds.”¹ Almost half of all Americans have listened to music online, whether rebroadcasts of terrestrial radio or to find niche music that terrestrial radio simply does not play, and 13 percent tune in regularly.² Webcasters provide a unique outlet for new artists; however, if royalty rates are set too high for all but the largest webcasters to stay in business, the variety of music available will be severely restricted.³ Musical diversity stimulates the generation of new music and ideas; the mass media concentration and conformity of music may have the opposite effect, by encouraging politically mainstream messages and censoring out those which are not.⁴ Increasing royalties to the point of putting most webcasters out of business would work to destroy one of the last readily accessible sources of alternative, non-mainstream music. In response to the current state of affairs regarding royalties, I suggest that a new rate-setting model is needed for webcasters and propose a new structure.

II. HOW WEBCASTING WORKS

Webcasters use a technology known as “streaming” to send music to their listeners. While the listener hears a performance that is virtually indistinguishable from terrestrial AM/FM radio, webcasters send time- and location-sensitive streams to individual recipients. The listener’s computer receives these streams, and then reassembles them back together by using a “player.”⁵ To compensate for differences in stream

1. *Reno v. ACLU*, 521 U.S. 844, 869–70 (1997).

2. Edison Research, *The Infinite Dial 2008: Radio’s Digital Platforms—AM/FM, Online, Satellite, HD Radio, and Podcasting*, Presentation of National Survey on Digital Radio Platforms (2008), available at http://www.edisonresearch.com/Infinite%20Dial%202008_Presentation.pdf.

3. See *Webcasters Unite with Artists for Live National Concert Webcast to Save Internet Radio as Fed Debate Grows*, BNET BUS. NETWORK, July 2002, http://findarticles.com/p/articles/mi_pwwi/is_200207/ai_mark03044425.

4. See generally William Osbourne, *Marketplace of Ideas: But First the Bill: A Personal Commentary on American and European Cultural Financing*, ARTSJOURNAL.COM, Mar. 11, 2004, <http://www.artsjournal.com/artswatch/20040311-11320.shtml> (“Mass media pop is thus distinguished by its ability to create a ready, packaged (and often benign) form of social criticism that raises protest only within the strictures the mass media will accept.”).

5. *In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Records*, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1& 2, at 3 n.3 (2002), available at http://www.copyright.gov/carp/webcasting_rates.pdf [hereinafter *CARP Decision*].

transmission speeds, the player collects and reconstructs the first several seconds of the song in a “buffer,” a form of temporary RAM storage. Once a sufficient number of streams have been collected by the user’s computer, the song starts to play while the computer continues to receive additional streams until they too are performed. Once the song is finished playing, the buffer is emptied and the listener’s computer generally does not retain a copy.⁶ In contrast to downloaded music, streams are designed to be used once and then discarded.⁷

The pre-1995 Copyright Act allowed an individual to hold a copyright in either a “musical work,” the notes and lyrics of a song, or a “sound recording,” a particular rendition of a song.⁸ The Copyright Act gave five rights to the owner of a copyrighted musical work: reproduction, derivative works based on the original work, distribution of copies to the public, public performance, and public display or transmission.⁹ Public performance, one of these five rights, involves the performance of a work in a public place or broadcasts to multiple locations through television, radio, or the Internet.¹⁰

The licensing of these public performance rights is one of the necessary steps to making music available over the radio or internet. “Virtually all of the licensing of performance rights in musical compositions is handled by three performing rights organizations (“PROs”): the American Society of Composers, Authors, and Publishers (“ASCAP”); Broadcast Music, Inc. (“BMI”); and the Society of European Stage Authors & Composers (“SESAC”).”¹¹ Each of these PROs controls a different proportion of the market: ASCAP (54 percent), BMI (43 percent), or SESAC (three percent).¹² PROs serve as central clearinghouses for bulk performance licensing through a “blanket license,” which “entitles a licensee to perform the entire repertoire of a PRO’s songs (or some pre-set subgroup of songs) throughout the term of the license.”¹³ Generally, radio and television stations pay about two percent of adjusted gross income for this license; for other businesses, a flat annual fee is charged.¹⁴

6. W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 860–61 (2007).

7. *CARP Decision*, *supra* note 5, at 3 n.3.

8. 17 U.S.C. § 102 (2006); *CARP Decision*, *supra* note 5, at 4–5.

9. 17 U.S.C. § 106 (2006).

10. Daniel A. Tysver, *Rights Granted Under Copyright Law*, BITLAW, <http://www.bitlaw.com/copyright/scope.html> (last visited Feb. 2, 2009).

11. Cardi, *supra* note 6, at 841.

12. *See id.* at 843–44.

13. *Id.* at 845.

14. *Id.* at 845–46.

Most copyrights to sound recordings are held by five major record labels, which own about 80 percent of the licenses: Universal Music Group, Sony Music Entertainment, Warner Brothers Music, BMG Entertainment, and EMI Group.¹⁵ The Recording Industry Association of American (RIAA) is composed of these five major labels, as well as some smaller labels.¹⁶ RIAA serves a coordinating role for the labels on enforcement actions, congressional lobbying, and assistance in intra-industry negotiations.¹⁷

Webcasters use ephemeral recordings to enable or facilitate the transmission of sound recordings. A single ephemeral copy is allowed to be made without charge, but it is often necessary to make multiple ephemeral copies to facilitate streaming at different bit-rates and codecs. The creation or use of multiple ephemeral copies is currently subject to a compulsory license.¹⁸

III. WEBCASTING REGULATORY HISTORY

A. *Digital Performance Right in Sound Recordings Act of 1995*

The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) amended the Copyright Act to grant the copyright owners of sound recordings the exclusive right to license the “perform[ance] [of] the copyrighted work publicly by means of a digital audio transmission.”¹⁹ However, two exceptions were carved out of this exclusive right: the Section 114(d)(1) limited public performance right and the Section 114(d)(2) compulsory license (also known as a statutory license).²⁰ All other services needed to individually negotiate royalty rates with the copyright holders of sound recordings. In creating these rights, Congress tried to balance the interests of copyright holders of sound recordings with the countervailing interests of the radio broadcasters, PROs, and music publishers.²¹

15. *Id.* at 848.

16. *Id.* at 848–49.

17. *See id.* at 849.

18. 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).

19. *CARP Decision*, *supra* note 5, at 6 (citing 17 U.S.C. § 106(6) (2006)).

20. 17 U.S.C. §§ 114(d)(1), (d)(2) (2006). The statutory license is compulsory because the user of the copyrighted work need not get individual permission from the copyright holder; their permission is automatically given if the user complies the requirements of the statute. *See* CONG. RESEARCH SERV. REP. FOR CONG., H.R. 1417: THE COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2004 (Dec. 16, 2004).

21. *See* Cardi, *supra* note 6, at 849–50.

These three categories of DPRSRA broadcasters are each subject to different licensing requirements. First, non-subscription broadcasters, which included FCC-licensed terrestrial radio stations (AM/FM), are subject to the Section 114(d)(1) limited public performance right.²² These broadcasters are completely exempt from paying royalties to the owners of sound recordings for the performance of their works.²³

Second, under the Section 114(d)(2) compulsory license, non-interactive subscription transmissions²⁴ must comply with the statutory conditions set by a Copyright Arbitration Royalty Panel (CARP) and adopted by the Librarian of Congress and to avoid the need to individually negotiate royalties with individual copyright holders.²⁵ The statutory licenses included restrictions on the number of songs by a single artist or on a single album that could be played per hour and a prohibition on publishing an advance playlist of specific songs.²⁶

Third, interactive services enable a listener to receive, on request, a particular sound recording. While call-in radio stations are not covered by this definition, a website which provides a list of songs available to be played immediately at the request of the user would be deemed interactive.²⁷ These services must pay individually-negotiated royalties to owners of both sound recording and musical work copyrights.²⁸

Section 115 provides a “compulsory license to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission”²⁹ However, this Section 115 compulsory license applies only to the musical work; separate permission is required to obtain the Section 114 license.³⁰ This initial division of the two rights appears inefficient and influenced much more by the actual copyright holders than the copyright users.

22. See 17 U.S.C. § 114(j)(6) (2006) (defining an “eligible non-subscription transmission”).

23. 17 U.S.C. § 114(d)(1) (2006).

24. This was the group into which webcasters, like Pandora, were eventually placed. See *infra* Part III.B.

25. CARP Decision, *supra* note 5, at 7.

26. Digital Performance Right in Sound Recordings Act, 109 Stat. 336, 337, 17 U.S.C. § 114(d)(2) (1995).

27. See Cardi, *supra* note 6, at 851.

28. U.S. COPYRIGHT OFFICE, SUMMARY, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 at 16 (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>.

29. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336; see also 17 U.S.C. § 115(a)(1) (“any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work”).

30. See Jenna Hentoff, *Compulsory Licensing of Musical Works in the Digital Age: Why the Current Process is Ineffective & How Congress is Attempting to Fix It*, 8 J. HIGH TECH. L. 113, 120 (2008). This note is addressing only the section 114 consequences of musical copyright; not section 115.

Because webcasters were not specifically included in the DRPSRA revisions, 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 thus be required to individually negotiate royalties with owners of copyrights in sound recordings.³¹ Congress resolved this dispute when it enacted the Digital Millennium Copyright Act.

B. *Digital Millennium Copyright Act*

The Digital Millennium Copyright Act (DMCA) addressed royalty payments for webcasters under Section 114.³² The DMCA adopted the statutory license for two types of webcasting: “preexisting subscription services” and “eligible non-subscription services.”³³ These two categories included terrestrial radio stations’ online rebroadcasts as well as pure webcasters, but excluded providers who allowed users to download or select music of their choice.³⁴ To set royalty rates, the DMCA provided for voluntary negotiations between parties.³⁵ However, if voluntary negotiations failed to succeed within the 60-day statutory period, the DMCA adopted DPRSA’s CARP procedures to set rates and terms for the compulsory license. After the CARP’s three ad-hoc professional arbitrators made their decision, it was submitted to the Librarian of Congress, and subject to appeal in the D.C. Circuit Court of Appeals.³⁶ The rates and terms set by the CARP were to distinguish among the different types of services and the degree to which the use of the service increased or decreased the purchases of physical phonorecords (CDs, tapes) by consumers. CARP was to “establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”³⁷

Under the DMCA, compulsory license holders were allowed to make no more than one ephemeral record, which was only for non-

31. *CARP Decision*, *supra* note 5, at 8.

32. Digital Millennium Copyright Act, Pub. L. No. 105-304, tit. IV, 112 Stat. 2860, 2887–2906 (1998).

33. CONG. RESEARCH SERV. REPORT FOR CONG., STATUTORY ROYALTY RATES FOR DIGITAL PERFORMANCE OF SOUND RECORDINGS: DECISION OF THE COPYRIGHT ROYALTY BOARD, 110TH CONG. (2007) (statement of Robin Jeweler, Legislative Attorney, American Law Division).

34. See Kimberly L. Craft, *The Webcasting 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, 15–16 (2001).

35. Digital Millennium Copyright Act, § 405(2), 112 Stat. at 2895–96.

36. See CONG. RESEARCH SERV. REPORT FOR CONG., H.R. 1417: THE COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2004 at 2 (Mar. 18, 2004).

37. Digital Millennium Copyright Act, § 405(2), 112 Stat. at 2895–96.

commercial use and needed to be destroyed within six months.³⁸ However, most webcasters must have several ephemeral copies of each song in order to facilitate streaming at different speeds.³⁹ The rates and terms for the creation and use of multiple ephemeral copies were to be negotiated through voluntary negotiations and agreements, or under terms set by a CARP under the same procedures as webcasting rate-setting.⁴⁰

C. *The Copyright Arbitration Royalty Panel's 2002 Decision*

The February 2002 Copyright Arbitration Royalty Panel (CARP) recommendation set retroactive royalty rates for webcasters for the October 1998 through December 2000 period, and rates for the January 2001 through December 2002 period.⁴¹ Following the guidelines set by the DMCA, CARP acted because voluntary negotiations between the copyright holders and the webcasters had failed.

After it considered the various models suggested for calculating royalties, CARP adopted RIAA's proposal for a per performance royalty model (as opposed to the webcaster-supported percentage-of-revenue model) for three reasons. First, a per performance model represented what was actually being licensed (as well as accounting for partially played songs resulting from a "skip song" feature), while a revenue model merely worked as a proxy for the music actually played.⁴² Second, it was very complex to identify revenue attributed to music streaming, particularly when webcasters offer features other than music.⁴³ Third, since many webcasters generate little revenue, a revenue model would force copyright owners "to allow extensive use of their property with little or no compensation," which was contrary to Congress' intent when enacting the DMCA.⁴⁴

To determine the rates that would have been negotiated in the marketplace under the per performance model, CARP reviewed actual royalty agreements to comply with its statutory obligations under the DMCA.⁴⁵ It found that the RIAA/Yahoo! agreement provided an appropriate benchmark for the rate-setting because it was the only RIAA-negotiated agreement "to reflect a truly arms-length bargaining process

38. *Id.* at 2899–2900.

39. *CARP Decision*, *supra* note 5, at 96.

40. Digital Millennium Copyright Act, § 405(2), 112 Stat. at 2900.

41. *CARP Decision*, *supra* note 5, at 2.

42. *Id.* at 37.

43. *Id.*

44. *Id.*

45. Digital Millennium Copyright Act, § 405(2), 112 Stat. at 2896.

on a level playing field between two major players of comparable skill, size, and economic power.⁴⁶

The Yahoo! agreement was negotiated under the shadow of a compulsory license and CARP proceedings, which the RIAA had wished to avoid.⁴⁷ Instead, the RIAA had hoped that its negotiations with Yahoo! would motivate other webcasters to sign agreements with it and skip CARP proceedings as well.⁴⁸ The Yahoo! agreement set a rate of 0.2 cents per song for Internet-only streaming, while retransmissions of radio broadcasts were set at a lower rate of 0.05 cents per song.⁴⁹ However, CARP found that this Internet-only rate was inflated due to the lower radio retransmission rate, but was offset somewhat by lower future arbitration costs for Yahoo!.⁵⁰ This differentiated cost structure was designed so that the RIAA could maintain a high benchmark for Internet-only streaming rates and so that Yahoo! could get the lowest overall rate possible.⁵¹

Weighing the evidence, CARP found that streaming music had, at best, a minimally positive effect on sales of phonorecords; thus discounting promotional effects as a significant factor in rate-setting.⁵² However, it held that radio and radio retransmissions had a “tremendous promotional impact” on sales.⁵³ Thus, the panel upwardly adjusted Yahoo!’s Internet-only streaming music rate to 0.14 cents per performance and downwardly adjusted radio retransmissions to 0.07 cents per performance.⁵⁴ “Listener-influenced stations,” those which allowed users some control over which songs they listen (through ratings of artists, albums, or songs, or a skip feature), were eligible for the compulsory license, as were syndicated programs.⁵⁵ CARP realized that many webcasters did not have the software and technical expertise to track individual performances; thus, webcasters were allowed to temporarily calculate royalties through aggregate tuning hours (ATH) instead.⁵⁶

CARP set the rate for ephemeral copies at nine percent of the performance royalties paid by a licensee. This number was based on a range of 8.8 to 10 percent of the performance rate, with Yahoo! at 8.8 percent

46. *CARP Decision*, *supra* note 5, at 60–61.

47. *Id.* at 45, 64.

48. *Id.* at 64.

49. Library of Congress Copyright Office, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 F.R. 45,240, 45,251, 2002 WL 1446448 (2002).

50. *CARP Decision*, *supra* note 5, at 67–69.

51. *Id.* at 65.

52. *See id.* at 33–34.

53. *Id.* at 74–75.

54. *Id.* at 77.

55. *Id.* at 78–81.

56. *Id.* at 109–10.

and smaller webcasters having previously negotiated rates closer to 10 percent. Since Yahoo! was the largest and most powerful webcaster who had negotiated with the RIAA, CARP took the Yahoo! rate and rounded it up to nine percent, based on the higher rates that the RIAA had negotiated for other voluntary license agreements.⁵⁷ Additionally, CARP set a \$500 minimum fee to cover the administrative costs of the copyright owners and access to the sound recordings, and for the use of multiple ephemeral sound recording copies.⁵⁸

D. Overruling the 2002 CARP Decision

Reactions to CARP's decision were negative, particularly from the Internet and technology community. Many webcasters staged a "Day of Silence" to protest the new fees and accounting procedures.⁵⁹ A typical response was this: "CARP will kill internet radio. It's that simple. The Day of Silence is practice for the grave."⁶⁰ It was believed that the new costs would eliminate many webcasters and significantly decrease the variety of music available on the Internet. This rationale was in fact one of the bases for CARP's decision: it found that the current webcasting community had too many marginal or insignificant entities. Market consolidation through increased royalty rates was believed to be a positive force, thus allowing the remaining webcasters could operate at sustainable rates.⁶¹

CARP decisions are reviewable by the Librarian of Congress or by the Court of Appeals for the D.C. Circuit.⁶² "If the Librarian rejects it, he must substitute his own determination 'after full examination of the record created in the arbitration proceeding.' If the Librarian accepts it, the determination of the CARP becomes the determination of the Librarian."⁶³ In this case, the Librarian accepted CARP's decision that the RIAA/Yahoo! agreement was the best evidence for an agreement that would have been negotiated in a marketplace between willing buyers and sellers.⁶⁴ However, the Librarian disagreed with CARP and found that there was no basis for differentiating between royalty rates for

57. *Id.* at 100-04.

58. *Id.* at 95.

59. Doc Searls, *Silent Mayday*, LINUX J., May 1, 2002, <http://www.linuxjournal.com/article/6044>.

60. *Id.*

61. *CARP Decision*, *supra* note 5, at 52.

62. Library of Congress Copyright Office, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 F.R. 45,240, 45,242 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261).

63. *Id.* (citations omitted). "In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals." *Id.*

64. *See id.* at 45,247-48.

Internet-only webcasters and webcasters who retransmitted radio broadcasts and that CARP's decision to distinguish between them was arbitrary.

The Librarian recalculated the range of acceptable rates for webcasters (and radio retransmissions) and determined that an acceptable rate was between 0.065 cents per performance⁶⁵ and 0.083 cents per performance.⁶⁶ Since the Register had recommended a rate of 0.07 cents per performance (the same rate charged for radio retransmissions under CARP's decision), which was within the "zone of reasonableness," the Librarian accepted the Register's recommendation.⁶⁷

The Librarian also upheld CARP's decision to charge webcasters a per performance rate for ephemeral records.⁶⁸ However, the Librarian found that CARP should not have relied on the rates set in other voluntary agreements with the RIAA.⁶⁹ Thus, the Librarian set the ephemeral rate at 8.8 percent, the same rate as the Yahoo! agreement.⁷⁰ The minimum fee of \$500 for the compulsory license and the right to create ephemeral copies was deemed to be acceptable as well, since it was held not to be arbitrary.⁷¹

E. Beethoven.com *Litigation*

In response to the Librarian's decision, the RIAA, participant webcasters, and non-participant webcasters sued for review.⁷² The court found that the non-participant webcasters lacked standing because they were not parties in the original rate-setting, and were not allowed to intervene because the issues they raised were not sufficiently related to those issues brought before the court by the other parties.⁷³

65. *Id.* at 45,255. Since the rates set in the Yahoo!/RIAA agreement were based on radio retransmissions (90 percent of the total), and the remainder as internet-only transmissions, the Librarian calculated the new rate as follows: $(0.9 \times 0.05 \text{ cents}) + (0.1 \times 0.2 \text{ cents}) = 0.065 \text{ cents per performance}$. *Id.*

66. *Id.* This was the blended rate which Yahoo! actually paid for its first 1.5 billion performances.

67. *Id.*

68. *Id.* at 45,261–62.

69. Yahoo! was chosen as the example for the hypothetical marketplace because "Yahoo! was a DMCA-compliant Service; RIAA represented the interests of five independent record companies, and the license granted the same rights as those offered under the webcasting and the ephemeral recording licenses." *Id.* at 45,245. All the other agreements failed to meet these requirements, or lacked Yahoo!'s ability to negotiate on equal footing with RIAA based on resources, sophistication, and market power. *Id.*

70. *Id.* at 45,262.

71. *Id.* at 45,262–63 (the rate-setting was held not to be arbitrary).

72. *Beethoven.com LLC v. Librarian of Cong.*, 394 F.3d 939, 941–42 (D.C. Cir. 2005).

73. *Id.* at 945–46.

Given that the standard of review for the Librarian's decision was "exceptionally deferential," the Court found that the Librarian's choice to give the RIAA/Yahoo! agreement significant weight in the rate-settings was not arbitrary, nor was the determination of the minimum fee.⁷⁴ The challenge to the Librarian's decision not to differentiate between webcasters and radio rebroadcasters was not held to be arbitrary either.⁷⁵ Formal legal challenges were unsuccessful for all parties involved in royalty rate-setting.

F. *Small Webcasters Settlement Act of 2002*

Congress passed H.R. 5469, the Small Webcaster Settlement Act, in 2002, which suspended the Librarian's decision for six months.⁷⁶ The Librarian's decision was suspended in order to let the *Beethoven.com* litigation run its course, which Congress hoped would spur voluntary negotiations between the webcasters and RIAA.⁷⁷ It did not.

The Small Webcasters' Settlement Act set a fee schedule based on percentage of revenue, as opposed to a per performance rate.⁷⁸ As the webcasters felt that the royalty rates set by the Librarian did not represent a rate that would have been negotiated between a willing buyer and seller, and also believed that the Librarian-set rates would have put them out of business, this legislative compromise satisfied the webcasters' objections.⁷⁹ The act also satisfied the recording industry because it provided a percentage of the royalty fees to be sent directly to the recording artists.⁸⁰

74. *Id.* at 946–49, 951–52.

75. *Id.* at 953–54.

76. Small Webcaster Amendments Act of 2002, 148 CONG. REC. H7047 (2002) (statement of Rep. Sensenbrenner).

77. *Id.* (statement of Rep. Sensenbrenner). Referring to the *Beethoven.com* litigation, Representative Sensenbrenner argued the following in favor of H.R. 5469:

Although a resolution to this dispute is legally in play, implementation of the decision by the Librarian takes effect on October 20 and is retroactive to 1998. Unless Congress acts, some webcasters will shut down. This explains the point of H.R. 5469 as originally drafted: to suspend the implementation of the Librarian's decision for 6 months, effective October 20. This delay would ensure that all parties would receive all of the judicial process to which they are entitled under the law before the rate took effect.

Id.

78. Small Webcaster Settlement Act of 2002, § 2, Pub. L. No. 107-321, 116 Stat. 2780, 2780 (2002).

79. *See id.*; *see also* 148 CONG. REC. H7047 (2002) (statement of Rep. Berman).

80. *Id.* (statement of Rep. Berman). Under the Small Webcaster Settlement Act, the royalty fees are divided in the following way: 50 percent to the copyright owner, 2.5 percent to the non-featured musicians, 2.5 percent to the non-featured vocalists, and 45 percent to the feature recording artist(s). Small Webcaster Settlement Act § 5(c), 116 Stat. at 2784.

The terms of the act provided redress for both non-commercial webcasters and small commercial webcasters. Royalty payments for non-commercial webcasters were suspended through June 2003, and receiving agents for small webcasters were allowed to delay payment obligations through December 2002.⁸¹ Despite the initial enthusiasm of the House to set specific rates,⁸² specific terms were not set and it was the intent of the Congress that this act would not be precedential.⁸³ Congress delegated the ability to set an industry-wide rate to the collecting agent (SoundExchange) for copyright holders and recording artists.⁸⁴

G. Establishment of the Copyright Royalty Board

After Congress' intervention into rate-setting under CARP, the rate-setting process itself was reexamined and redesigned with the passage of the Copyright Royalty and Distribution Reform Act (CRDRA) in 2004. The statute replaced the three-person ad-hoc CARP adjudicators with three full-time Copyright Royalty Judges who would make decisions concerning "reasonable terms and rates of royalty payments" for compulsory licenses.⁸⁵

In determining the marketplace rate between a willing buyer and seller, CRDRA's objectives were to "maximize the availability of creative works to the public," balance the interests of the copyright owner in a fair return and the copyright user in a fair income, reflect the contributions of the copyright owner and user in the product available to the public, and to minimize disruptions on the industry practices and structure.⁸⁶ All rates were to be established prospectively, rather than retrospectively as under the DMCA-regime.⁸⁷ The CRDRA also established streamlined procedures for small claims (under \$10,000) which required a written statement, one response per opposing party, and no filing fee.⁸⁸ Appeals for all rulings go directly to the D.C. Circuit Court,⁸⁹ skipping the Librarian of Congress.

81. Small Webcaster Settlement Act § 3, 116 Stat. at 2781.

82. See 148 CONG. REC. H7047 (daily ed. Oct. 7, 2002) (statement of Rep. Berman).

83. See 148 CONG. REC. H8996 (daily ed. Nov. 14, 2002) (statement of Rep. Berman).

84. *Id.*

85. Copyright Royalty and Distribution Reform Act of 2004 § 3, 17 U.S.C. §§ 801(a)-(b) (2004); ROBIN JEWELER, H.R. 1417: THE COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2004 at 3-4 (Cong. Research Serv. Rep.) (2004).

86. Copyright Royalty and Distribution Reform Act § 3.

87. 150 CONG. REC. H771 (2004) (statement of Rep. Berman).

88. Copyright Royalty and Distribution Reform Act § 3.

89. *Id.* § 3.

H. Copyright Royalty Board Decision

The Copyright Royalty Board (CRB) issued its first post-CRDRA decision in March 2007, effective May 1, 2007. The CRB determined that the appropriate metric for the Section 114(f)(2) compulsory license was a per performance rate for commercial webcasters and an annual flat per-station rate for non-commercial webcasters up through a certain cap, with a per performance rate for each additional hour. Ephemeral license charges were included in the applicable compulsory license rates.⁹⁰ The CRB decided to use the per performance rate rather than the revenue-based rates for reasons similar to those of CARP: (1) per 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.⁹¹

The CRB set the per performance rates per year for commercial webcasters at: 0.08 cents (2006), 0.11 cents (2007), 0.14 cents (2008), 0.18 cents (2009), and 0.19 cents (2010).⁹² These rates were based on a benchmark market rate for interactive services, adjusted for differences in interactivity.⁹³ CRB chose to use the interactive service rate for web-casting because:

Both the markets have similar buyers and sellers and a similar set for rights to be licensed (a blanket license in sound recordings). Both markets are input markets and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use.⁹⁴

The minimum fee of \$500 per channel per year is based on SoundExchange's expected costs for administering the sound recording rights.⁹⁵

90. Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. 24,084, 24,088 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

91. *Id.* at 24,087–90.

92. *Id.* at 24,096.

93. *Id.* at 24,092.

94. *Id.*

95. *Id.* at 24,096–97. SoundExchange was originally an unincorporated, non-profit division of the RIAA. In negotiations between parties, SoundExchange was designated as the receiving agent for all royalty payments and was also tasked with distributing royalties to copyright holders. *Id.* at 24,102. This arrangement was recognized by the CRB in a later decision. *Id.* at 24,105 (“In sum, the Copyright Royalty Judges determine that SoundExchange will best serve the interests of all copyright owners and performers whose works are subject to the statutory licenses and, therefore, shall be the Collective for the 2006–2010 royalty period.”) SoundExchange continues as the sole collective agent today. See SoundExchange, About, <http://www.soundexchange.com/> (last visited Feb. 9, 2009).

Non-commercial webcasters are non-profit organizations, which provide educational, cultural, religious program not generally available from commercial webcasters, and tend to have different sources of funding than commercial webcasters—listener donations, corporate underwriting or sponsorships, or university funding.⁹⁶ Non-commercial webcaster royalty rates were distinguished by size—webcasters with an average of fewer than 159,140 Aggregate Tuning Hours per month were subject only to a \$500 minimum fee per channel per year to pay for SoundExchange administrative costs.⁹⁷ Larger non-commercial webcasters were subject to the same rate structure as commercial webcasters.⁹⁸ The CRB found that music programming on larger non-commercial stations competes with similar music program on commercial stations; thus it should be subject to the same rate structure.⁹⁹

Unlike the huge dispute over the value of ephemeral copies in the CARP decision, the CRB found that the record indicated that ephemeral copies had no value separate from the performance of the sound recording itself. Since the expiration of the CARP decision, no voluntary negotiations had managed to secure a separate rate for the Section 112 license. Thus, the CRB ascribed no particular percentage of the sound recording royalty rate to ephemeral licenses.¹⁰⁰

The ruling provoked objections from webcasters. However, the CRB denied all requests for a rehearing, holding that the determination was not erroneous, without evidentiary support, or contrary to law.¹⁰¹ However, the CRB did grant a transitional two-year stay (for 2006–2007) for webcasters to use aggregate tuning hours to determine rates instead of the per performance metric. Like the SWSA, this was merely a temporary relief and not to be used indefinitely in the future.

I. *Reactions of Webcasters and Critics*

In the aftermath of the CRB decision, many webcasters expressed anger and despair. There was a widespread belief that most webcasters would be unable to continue at a sustainable rate, since these royalties represented at ten-fold increase in payments. Smaller webcasters, like Bill Goldsmith from Radio Paradise, were facing bills of up to 125 per-

96. Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. at 24,098.

97. *Id.* at 24,100.

98. *Id.* at 24,099–24,100.

99. *Id.* at 24,098–24,100.

100. *Id.* at 24,102.

101. *In re* Digital Performance Right in Sound Recordings and Ephemeral Recordings, CRB DTRA No. 2005-1 (U.S. Copyright Royalty Judges Apr. 16, 2007) (issuing order denying motion rehearing).

cent of their yearly income, an unsustainable cost.¹⁰² Hypothetically, larger webcasters like Pandora, a webcaster which offers thousands of channels without subscription fees, could have a royalty bill of \$2 billion just for one year.¹⁰³

The reason why most webcasters will be unlikely to meet their royalty burdens is as follows: based 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 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.¹⁰⁴ While webcasters have the option of turning to subscription-based systems, this could make them uncompetitive since most webcasters stream for free.¹⁰⁵ Alternatively, webcasters could significantly change their format, thereby justifying subscriptions, but would then run the not insignificant chance of losing their audience.

While weeding out unsustainable webcasters might comport with the rationale for CARP's decision,¹⁰⁶ because more sustainable webcasters will be able to pay the increased royalty rates set by the CRB, it is unlikely to occur. Instead, some industry experts warn that if regulated webcasters are driven off the web, listeners are likely to turn to illegal services, which pay no royalties, or those which operate from overseas.¹⁰⁷ In either case, copyright owners and musicians will be worse off. The CEO of AccuRadio speculated that, "the people actually running the music labels [don't want] to see internet radio shut down . . . [but the SoundExchange lawyers] were more successful than they expected to be."¹⁰⁸

In protest to the CRB rate hikes, webcasters launched a National Day of Silence on June 26, 2006. The event included everyone from

102. See Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIREd, Mar. 6, 2007, <http://www.wired.com/entertainment/music/news/2007/03/72879>.

103. *Id.*

104. See Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RAIN: RADIO AND INTERNET NEWSLETTER, Mar. 2, 2007, <http://www.kurthanson.com/archive/news/030207/index.shtml>.

105. See, e.g., Pandora, www.pandora.com (last visited Feb. 28, 2009).

106. *CARP Decision*, *supra* note 5, at 52. See also *supra* Part III.D.

107. See Buskirk, *supra* note 102. Although overseas webcasters can block US-based IP addresses, they are unlikely to be able to bar all American users. For example, when Pandora banned all non-US users from its site in order to comply with CRB rules, users found a way to get around it. See, e.g., OpenPandora, <http://openpandora.blogspot.com> (last visited Feb. 28, 2009).

108. See Buskirk, *supra* note 102.

small webcasters to major webcasters in an attempt to draw national attention to the royalty mess, similar to the 2002 Day of Silence protesting the CARP decision.¹⁰⁹

J. Motion for CRB Rehearing Denied

For the section 114(f)(2) compulsory license, things remain unsettled. On March 26, 2007, a group of webcasters filed a motion for a CRB rehearing. Challenged issues included the \$500 minimum fee per stream, the ability of webcasters to calculate per performance fees, and the decision not exempt a class of very small broadcasters which would pay royalties on an percentage-of-revenue basis.¹¹⁰ On April 16, 2007, the CRB denied the motion for a rehearing.¹¹¹ The CRB held that, as there was no new evidence available, and no arguments had been made to correct a clear error or prevent manifest injustice, a rehearing was denied.¹¹² Additionally, a stay pending administrative appeals and judicial review was denied.¹¹³ However, the CRB made a clarification to its March 2007 decision by permitting royalties to be paid on an aggregate tuning hours (ATH) option to 2006 and 2007, with rates of 1.23 cents and 1.69 cents for music webcasters in those years.¹¹⁴

On April 23, 2007, CRB filed its Final Determination of Rates and Terms.¹¹⁵ The Board adopted the two-year ATH option for 2006 and 2007, and delayed payment due dates of “45 days after the last day of the month in which Copyright Royalty Judges issue their final determi-

109. Kurt Hanson et al., *A Guide to Preparing for Tomorrow's "Day of Silence"*, RAIN: RADIO AND INTERNET NEWSLETTER, June 25, 2007, <http://kurthanson.com/archive/news/062507/index.shtml>. For a full list of participating webcasters, see Press Release, *The Sounds of Silence Will Be Heard by Millions: National Day of Silence for U.S. Webcasters to Be Held in Protest of Fee Hikes*, SAVE NET RADIO.COM, June 25, 2007, http://www.savenetradio.org/press_room/press_releases/070625-snr_dos.pdf.

110. See David Oxenford, *Motions for Rehearing of Copyright Royalty Decision Filed—And the Foundation of that Decision Is Challenged*, BROADCAST LAW BLOG, Mar. 20, 2007, <http://www.broadcastlawblog.com/archives/internet-radio-motions-for-rehearing-of-copyright-royalty-decision-filed-and-the-foundation-of-that-decision-is-challenged.html>.

111. See *In re* Digital Performance Right in Sound Recordings and Ephemeral Recordings, No. 2005-1 CRB DTRA, Apr. 16, 2007, available at http://www.loc.gov/crb/fedreg/2007/order_denying_motions_rehearing.pdf.

112. *Id.* at *1–2.

113. *Id.* at *3.

114. *Id.* at *4. Per ATH rebroadcasts of terrestrial broadcasters was set as 0.0092 cents (2006) and 0.0127 cents (2007), and for non-music programming at 0.11 cents (2006) and 0.14 cents (2007). *Id.*

115. *In re* Digital Performance Right in Sound Recordings and Ephemeral Records, Final Determination of Rates and Terms, No. 2005-1 CRB DTRA (Apr. 23, 2007), available at <http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>.

nation adopting these rates and terms.”¹¹⁶ This delayed the date of first payment until July 15, 2007.¹¹⁷

K. Internet Radio Equality Act

In response to the CRB decision, webcasting fans sent thousands of emails and faxes and made phone calls to their representatives and senators. Senator Diane Feinstein received 25,000 emails, while the office of Representative Jay Inslee received correspondence equal to that on the Iraq War.¹¹⁸ In response to their constituents’ concerns, Representatives Inslee and Don Manzullo drafted H.R. 2060 and Senators Sam Brownback and Ron Wyden sponsored companion legislation in the Senate, S. 1353.¹¹⁹

The House bill, introduced on April 26, 2007, would nullify the CRB rate-setting decision.¹²⁰ Instead of determining the rates for the compulsory license through a hypothetical marketplace, the bill would adopt rate-setting based on the provisions in 17 U.S.C. § 801(b)(1).¹²¹ Section 801(b) has the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return on 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 communications.
- (D) To minimize any disruptive effect on the structure of the industries involved and on generally prevailing industry practices.¹²²

116. *Id.* at *114.

117. David Oxenfeld, *Final Decision of the CRB Issued—and Royalty Due Date Is Postponed*, BROADCAST LAW BLOG, May 1, 2007, available at <http://www.broadcastlawblog.com/archives/cat-internet-radio.html>.

118. Stephanie Clifford, *Pandora’s Long Strange Trip: Online Radio That’s Cool, Addictive, Free, and—Just Maybe—a Lasting Business*, INC.COM, Oct. 2007, <http://www.inc.com/magazine/20071001/pandoras-long-strange-trip.html>.

119. See H.R. 2060, 110th Cong. (2007); S. 1353, 110th Cong. (2007).

120. *Id.* § 2.

121. *Id.* § 3(a).

122. 17 U.S.C. § 801(b)(1) (2006).

The House bill also establishes a transitional statutory rate for webcasters; they may choose to pay either 0.33 cents per hour of sound recordings per listener or 7.5 percent of their total revenues to SoundExchange.¹²³ The bill also calls for informational reports from various entities about the state of the Internet radio market.¹²⁴

The Senate bill, introduced two weeks later, is very similar. However, it does not require informational reports, and declares that any royalty rates already paid under the current CRB rates should be credited towards the webcaster's royalty bill.¹²⁵

L. Ongoing Litigation

On May 31, 2007, a coalition of webcasters filed for a stay of the CRB decision pending its appeal by webcasters in the D.C. Circuit.¹²⁶ Webcasters claimed that the \$500 minimum fee per channel was excessive and unnecessary; CRB's rationale for the minimum fee was to cover the administrative costs of SoundExchange.¹²⁷ The implementation of the \$500 minimum fee would result in over \$1 billion for SoundExchange; however, it would only collect \$18 million in royalty payments for 2006.¹²⁸ Additionally, almost all parties appealed the CRB decision.¹²⁹ On July 12, 2007, the D.C. Circuit denied the webcasters' emergency stay, seeking to prevent the July 15th implementation of the CRB royalty rates.¹³⁰

In August 2007, the Digital Media Association, representing the largest webcasters, came to a settlement agreement with SoundExchange to cap the \$500 minimum per channel at \$50,000 per webcaster.¹³¹ This settlement allowed broadcasters like Pandora, for whom each user has at

123. H.R. 2060, 110th Cong. § 3(b) (2007).

124. *See id.* §§ 5–7.

125. S. 1353, 110th Cong. § 5 (2007).

126. *See* Motion of Appellants Digital Media Ass'n ("DiMA"), Nat'l Public Radio, Inc., Accuradio, LLC, Digitally Imported, Inc., Radioio.com LLC, and Radio Paradise, Inc., for a Stay Pending Appeal, *Digital Media Ass'n v. Copyright Royalty Bd.* (D.C. Cir. May 31, 2007), available at <http://www.savenetradio.org/20070531175931.pdf>.

127. *Id.* at *11.

128. *Id.*

129. David Oxenfeld, *NAB Joins the Fray on Internet Radio—Appeals and a Request for Stay Are Filed, And a Settlement Offer is Made to Noncommercial Webcasters*, BROADCAST LAW BLOG, June 4, 2007, <http://www.broadcastlawblog.com/archives/internet-radio-nab-joins-the-fray-on-internet-radio-appeals-and-a-request-for-stay-are-filed-and-a-settlement-offer-is-made-to-noncommercial-webcasters.html>.

130. David Oxenfeld, *Court Denies Webcaster Stay*, BROADCAST LAW BLOG, July 12, 2007, <http://www.broadcastlawblog.com/archives/internet-radio-court-denies-webcaster-stay.html>.

131. David Oxenfeld, *Congress to Return—Will Internet Royalties Be on Its Agenda*, BROADCAST LAW BLOG, Aug. 29, 2007, <http://www.broadcastlawblog.com/archives/internet-radio-congress-to-return-will-internet-radio-royalties-be-on-its-agenda.html>.

least one, if not several, separate streams of music, from going bankrupt due to minimum fees alone.¹³²

In late 2007, a settlement was reached for preexisting subscription services, which are fee-based and transmitting on or before July 31, 1998.¹³³ Currently, there is only one service still in existence from that time: Music Choice.¹³⁴ Music Choice and SoundExchange settled on royalty rates of 7.25 percent of revenue for 2008 to 2011, and 7.5 percent for 2012 with a minimum payment of \$100,000 due at the beginning of each year.¹³⁵

On March 10, 2008, four separate appeals briefs were submitted to the D.C. Circuit Court. The brief of the large and small webcasters, represented by the Digital Media Association (DiMA), urged the court to adopt the \$50,000 cap on the \$500 minimum fee per channel that had been agreed upon in a settlement between DiMA and SoundExchange.¹³⁶ DiMA argued for the court to overturn CRB's per-performance royalty standard, and found that the "willing buyer, willing seller" rates were ruinously high, and would never have been agreed to by a willing buyer.¹³⁷ DiMA claimed that the CRB adoption of a per-performance royalty for small webcasters was "arbitrary and capricious" and conflicted with CRB's use of a percentage-of-revenue approach used for satellite digital audio radio services.¹³⁸

Simulcasters, commercial broadcasters who simultaneously stream, filed a brief arguing that the per-performance, per-listener royalty was unlawful as applied to them.¹³⁹ The simulcasters had four main arguments for this claim: (1) interactive services are not comparable to non-interactive services, and so even if a per-performance royalty was appropriate for interactive services, it was not appropriate for non-interactive services; (2) the CRB's decision was arbitrary and failed to consider relevant evidence; (3) an inappropriate mathematical model was

132. See *id.*; see also Pandora, *supra* note 105.

133. Digital Millennium Copyright Act, § 405(a)(4), 17 U.S.C. § 114(j)(11) (1998).

134. David Oxenford, *Copyright Royalty Board Asks for Comment on Music Choice Royalty—Satellite Radio Is Next*, BROADCAST LAW BLOG, Nov. 8, 2007, <http://www.broadcastlawblog.com/archives/intellectual-property-copyright-royalty-board-asks-for-comment-on-music-choice-royalty-satellite-radio-is-next.html>.

135. *Id.*

136. DiMA brief at *14, *Intercollegiate Broadcast Sys. v. Copyright Royalty Board*, Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179 (D.C. Cir. Mar. 10, 2008), available at <http://www.ibsradio.org/6DiMAOpeningbrief.pdf>.

137. *Id.* at *14–15.

138. *Id.* at *16.

139. Brief at *2, *Intercollegiate Broadcast Sys. v. Copyright Royalty Board*, Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179 (D.C. Cir. Mar. 10, 2008), available at <http://www.ibsradio.org/6-Bonneville.NRBMLC.NABbrief.pdf>.

used to calculate rates; and (4) the CRB failed to consider the simulcasters' arguments for an aggregate tuning hours (ATH) model.¹⁴⁰

Noncommercial webcasters, which include college broadcasters, NPR, and noncommercial religious broadcasters,¹⁴¹ are protesting the CRB's rate structure as well.¹⁴² While Congress encouraged the CRB to consider voluntary agreements, the CRB rejected the agreement proffered by the noncommercial broadcasters.¹⁴³ While the noncommercial broadcasters claim that the evidence demonstrates that only a flat fee arrangement is appropriate for noncommercial broadcasters, they claim that the "Board arbitrarily assumed noncommercial services compete against commercial services, based on audience size alone, and assigned the same rates to them."¹⁴⁴ They also claim that it is disproportionately burdensome for noncommercial webcasters to face the same recordkeeping requirements as other services.¹⁴⁵

Royalty Logic also submitted a brief to the D.C. Circuit. It challenges the choice of SoundExchange as the sole common agent for royalties, and seeks to become an alternative agent.¹⁴⁶

M. *Webcaster Settlement Act of 2008*

The Webcaster Settlement Act of 2008, sponsored by Representative Jay Inslee (D-WA), was approved by the House on September 28, 2008 and by the Senate on September 30, 2008, and was signed into law on October 16, 2008.¹⁴⁷ The bill amends the Small Webcasters Settlement Act of 2002,¹⁴⁸ and seeks to adopt a simplified process for settlements between commercial and noncommercial webcasters with SoundExchange.¹⁴⁹ The

140. *Id.* at *3.

141. See David Oxenfeld, *A Year After the Webcasting Royalty Decision—No Settlement, Appeals Briefs Filed*, BROADCAST LAW BLOG, Mar. 15, 2008, <http://www.broadcastlawblog.com/archives/internet-radio-a-year-after-the-webcasting-royalty-decision-no-settlement-appeal-briefs-filed.html>.

142. See Brief, *Intercollegiate Broadcasting Sys. v. Copyright Royalty Board*, Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179 (D.C. Cir. Mar. 10, 2008), available at <http://www.ibsradio.org/6-Joint-NoncommBriefMarch2008.pdf>

143. *Id.* at *11–12.

144. *Id.* at *12.

145. *Id.*

146. See Brief, *Intercollegiate Broadcast Sys. v. Copyright Royalty Board*, Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179 (D.C. Cir. Mar. 10, 2008), available at <http://www.ibsradio.org/6-RoyaltyLogicBriefMarch2008.pdf>.

147. Library of Congress, H.R. 7084, "Major Congressional Actions" (Oct. 16, 2008), <http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR07084:@@R> (last visited Feb. 28, 2009).

148. Webcaster Settlement Act of 2008, 110th Cong., Pub. L. 110-435, § 2(4) (2008).

149. See David Oxenford, *Analysis: Webcaster Settlement Act—What Does It Mean?*, DIGITAL MEDIA WIRE, Oct. 3, 2008, <http://www.dmwmedia.com/news/2008/10/03/analysis:-webcaster-settlement-act-what-does-it-mean%3F>.

law appears to allow settlements to overcome the March 2007 CRB decision.¹⁵⁰

While “this legislation is not the final answer . . . it is an essential step toward a lasting and much-needed solution.”¹⁵¹ However, it could potentially alleviate disputes until 2015.¹⁵² On November 16, 2008, the Webcaster Settlement Act was signed into law.¹⁵³ This means that the parties have until early 2009 to enter into a settlement agreement without any further government approvals.¹⁵⁴ As of the writing of this Note, February 4, 2009 has been set as the date for interested parties to file a Petition to Participate in the proceedings.¹⁵⁵

IV. HOW SHOULD WEBCASTERS BE REGULATED?

Royalty rate-setting is currently a royal(ly) mess. Congress reacts incrementally to changes in technology and the nature of the music industry, rather than setting out firm, flexible guidelines for the longer term. However, that is not to say that the entire system must be thrown out. Using the existing framework, webcasting should be regulated under three different metrics: first, non-interactive webcasting should qualify for a limited public performance right; second, limited interactive webcasting should have a limited statutory license;¹⁵⁶ and third, fully interactive and limited and permanent downloading sites should not qualify for either a limited public performance right or a compulsory license. By regulating in accordance with the amount of interactivity and downloading available, this model can adapt to new technologies and changes in the music industry, while preserving the interests of webcasters

150. *Id.*

151. *Senate Approves Webcaster Settlement Act: Solution for Webcasters May Be Nearing*, SAVE NET RADIO, Oct. 1, 2008, available at http://www.savenetradio.org/latest_news/08-10-01.html.

152. *Id.*

153. 154 CONG. REC. D1275 (daily ed. Nov. 17, 2008) (H.R. 7084 signed into law).

154. See David Oxenford, *Is a Settlement on Internet Radio Royalties Near? Will All Webcasters Be Included and Will They Be Able to Afford It?*, BROADCAST LAW BLOG, Nov. 17, 2008, <http://www.broadcastlawblog.com/archives/internet-radio-is-a-settlement-on-internet-radio-royalties-near-will-all-webcasters-be-included-and-will-they-be-able-to-afford-it.html>.

155. Digital Performance in Sound Recordings and Ephemeral Recordings, 74 Fed. Reg. 318–19 (Jan. 5, 2009).

156. For an understanding of how individual webcasters qualify for a statutory license under the current system, see Cydney A. Tune, *Communications Broadcast Advisory: Licensing and Royalty Basics for “Broadcasting” Music Over the Internet*, PRACTICING LAW INST. 115, 117–20 (Dec. 2006).

and other music providers, as well as the interests of the copyright holders.¹⁵⁷

The music industry's main argument for maintaining a separate system of royalties for webcasters is that webcasting has decreased record sales.¹⁵⁸ However, changing consumer habits are a more likely culprit—record sales have been decreasing for years.¹⁵⁹ Additionally, rampant illegal downloading continues despite the prevalence of legal downloading sites like iTunes and MP3.com.¹⁶⁰ Compared to illegal downloading, webcasting represents a way for copyright holders to be paid at least some royalty fees. Thus, instead of trying to raise copyright royalties to the point that most webcasters are pushed out of business, the music industry should change its own model. This battle between webcasters and the RIAA mirrors the battles in the 1920s and 1930s between the major record labels and radio, the 1950s disputes between the movie industry and television, and the conflicts between cable and

157. Six factors which may be considered include:

To make this determination, the CRB should consider: (1) the revenue derived from the use of copyrighted works; (2) webcasters' individual business models, including their commercial motives; (3) the level at which individual webcasters reach the public; and (4) the volume of use of copyrighted works. Additionally, the two statutory factors set forth in § 114(f)(2)(B)—whether the use of the copyrighted work stimulates or hinders sale of the work, and the relative roles of the copyright owner and user in terms of risk, creative and technological contribution, and investment—should be analyzed in conjunction with the previous four factors. These six factors certainly will overlap, and none should be determinative. The CRB should analyze each factor in the context of the others and weight the factors on a case-by-case basis as the CRB deems appropriate.

Mark D. Robertson, *Sparing Internet Radio from the Real Threat of the Marketplace*, 10 VAND. J. ENT. & TECH. L. 543, 548–49 (2008).

158. See *CARP Decision*, *supra* note 5 at 33–34, 74–75; see also DANIEL CASTRO, ITIF, INTERNET RADIO AND COPYRIGHT ROYALTIES: REFORMING A BROKEN SYSTEM 7 (May 2007), <http://www.itif.org/files/InternetRadio.pdf>.

159. While record sales may be decreasing, “[o]verall purchases of music in the US increased 10.5 percent year-over-year since 2007 . . .” Jacqui Cheng, *Music Sales up 10% in 2008, Thanks to Downloads (and Vinyl): Music Sales in the US Grew 10.5 Percent Overall During 2008, with Online Single-Track Sales Growing by 27 Percent*, ARS TECHNICA, Jan. 2, 2009, <http://arstechnica.com/media/news/2009/01/music-sales-up-10-in-2008-thanks-to-downloads-and-vinyl.ars>. However, “the trends toward digital singles continues to hurt full CD album sales [which include LPs, CDs, and online albums] . . .” *Id.*

160. See Rajiv K. Sinha & Naomi Mandel, *Preventing Music Piracy: The Carrot or the Stick?*, 72 J. MARKETING 1 (2008) (“However, the success of iTunes and other legal file-sharing Web sites seems to indicate that though many consumers pirate their music, a portion of music consumers are willing to pay a positive amount to download music legally.”). See also *Legal Downloads Swamped by Piracy: Ninety-Five Per Cent of Music Downloaded Online is Illegal, a Report by the International Federation of the Phonographic Industry (IFPI) Has Said*, BBC NEWS, Jan. 16, 2009, <http://news.bbc.co.uk/2/hi/technology/7832396.stm> (“The IFPI, which represents 1,400 companies in 72 countries, estimated more than 40 billion music files were illegally shared in 2008.”).

broadcasts television from the 1960s through the 1980s.¹⁶¹ Just as the entertainment industry has been forced to adapt due to technological changes, so too should the music industry adjust to webcasting. In fact, data indicate that webcast listeners are more likely to purchase music online than satellite radio subscribers.¹⁶² This is a further sign that the music industry's fears maybe overblown.

It has been suggested that the music industry is punishing webcasters with higher royalty rates because it is less able to control them than terrestrial radio broadcasters.¹⁶³ Terrestrial radio is a powerful and programmable medium that can be used to create hits by playing songs frequently enough and with enough promotion.¹⁶⁴ However, because fans can control music selections at most online radio websites to a far greater degree than with terrestrial radio, industry marketing campaigns are less successful.¹⁶⁵ However, online radio provides a unique way to enhance customer satisfaction because it allows listeners to hear the songs, in full, before linking to a site to purchase that song.¹⁶⁶

A. Terrestrial Radio, Radio Rebroadcasts, and Non-Interactive Webcasts

Terrestrial radio, radio retransmissions, and non-interactive webcasts¹⁶⁷ are all competing technologies. To listen to music, a person either spins the dial on a radio or types in a web address. The result is the same—a person tunes into the station in the middle of a song and cannot

161. See Louisa Ha & Richard Ganahl, *Lessons From Leading Webcasters Around the World and the Outlook of Webcasting as an Emerging Global Medium*, in *WEBCASTING WORLDWIDE: BUSINESS MODELS OF AN EMERGING GLOBAL MEDIUM* 409 (Louisa Ha & Richard Ganahl, eds., 2006).

162. See Edison Research, *supra* note 2. And since most music sales are made online, see Cheng, *supra* note 159 (out of the more than 1.5 billion songs sold in 2008, “[o]ne billion digital tracks were sold online”), this represents a significant amount of royalty payments.

163. See, e.g., Paul Maloney, *RAIN 11/17: Music Industry Punishing Potential Partner, Says Hanson*, RAIN: RADIO & INTERNET NEWSLETTER, <http://textpattern.kurthanson.com/articles/535/rain-1117-music-industry-punishing-potential-partner-says-hanson> (“Yet, as webcasters insist, the punishing sound recording royalty rate the music industry supports will kill the Internet music industry . . .”); Elliot Van Buskirk, *Webcasting Royalties: A Modest Proposal*, WIRED.COM, July 7, 2007, http://www.wired.com/entertainment/music/commentary/listeningpost/2007/07/listeningpost_0723 (“So it is proposed to punish net radio with unique and exorbitantly high royalties.”); Robertson, *supra* note 157, at 547–548 (“[u]nfortunately, the willing buyer/willing seller standard yielded royalty rates that will punish successful webcasters, limit industry growth, and stifle new-media innovation”) (internal citations omitted).

164. See *supra* Part II.

165. For example, at Pandora, listeners can switch between stations an indefinite number of times, and may skip a song up to six times per hour. See Posting of Tom Conrad, Chief Technology Officer, Pandora, to http://blog.pandora.com/pandora/archives/2006/06/pandora_server.html (June 10, 2006, 10:00 AM).

166. See, e.g., *id.*

167. E.g., Radio Paradise, www.radioparadise.com (last visited Feb. 28, 2009).

pause, rewind, or skip songs. Both allow for listener requests, but not to the extent of more interactive webcasters.¹⁶⁸ All of these formats pay the industry groups (ASCAP, BMI, and SESAC) royalties for sound recordings; however, only the Internet-based formats must also pay performance rights to SoundExchange.¹⁶⁹

By treating these technologies differently, the Copyright Act violates the new economy principle that policies be technology-neutral.¹⁷⁰ Since these different formats have equivalent designs and restrictions, they should all be subject to the same royalty rates so that they can compete with each other on the same terms. Although they fill different niches (terrestrial radio tends to play more mainstream music, whereas webcasters tend to play more independent music), these are merely different parts of the same market. Since their broadcasting formats follow the same restrictions, they should be treated as equivalents by Congress.

B. Limited Interactive Webcasting and Satellite Radio

The DMCA includes both preexisting satellite digital audio services and eligible non-subscription services under the statutory license scheme.¹⁷¹ While most webcasters are included under the latter category, preexisting subscription services are fee-based and were transmitting on or before July 31, 1998.¹⁷² Currently, there is only one service still in existence from that time: Music Choice.¹⁷³ Music Choice and SoundExchange settled in late 2007 on royalty rates of 7.25 percent of revenue for 2008–2011 and 7.5 percent for 2012 with a minimum payment of \$100,000 due at the beginning of each year.¹⁷⁴

Satellite radio stations pay between six and eight percent of revenue in royalties.¹⁷⁵ In the CRB satellite rate-setting procedure, SoundExchange's main goal was to remedy the lack of proportionality between

168. See, e.g., Why Doesn't RP Play my Request?, Radio Paradise, <http://www.radioparadise.com/content.php?name=FAQ> (last visited Feb. 29, 2009).

169. See, e.g., How Do Artists You Play Get Paid?, Radio Paradise, <http://www.radioparadise.com/content.php?name=FAQ> (last visited Feb. 28, 2009).

170. See CASTRO, *supra* note 158, at 1.

171. Digital Millennium Copyright Act, § 405(a)(1), 112 Stat. 2860, 2890–95.

172. *Id.* at 2899.

173. David Oxenford, *Copyright Royalty Board Asks for Comment on Music Choice Royalty—Satellite Radio Is Next*, BROADCAST LAW BLOG, Nov. 8, 2007, <http://www.broadcastlawblog.com/archives/intellectual-property-copyright-royalty-board-asks-for-comment-on-music-choice-royalty-satellite-radio-is-next.html>.

174. *Id.*

175. *In re* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Report of the Copyright Royalty Board, No. 2006-1 CRB DSTR, at 70, Dec. 3, 2007, available at <http://www.loc.gov/crb/proceedings/2006-1/rates-terms-2006-1.pdf>.

total listening audience and the number of broadcasts.¹⁷⁶ SoundExchange recognized that a per-broadcast mechanism did not have the same benefits as the per performance mechanism does for webcasting, and found that a revenue-based metric was preferable for satellite radio.¹⁷⁷ However, the CRB's decision to implement a revenue-based structure was due to the lack of evidence before it on the feasibility of a per broadcast mechanism; it was not based on any specific benefit of the per revenue model for satellite radio or the higher administrative costs of a per broadcast system.¹⁷⁸ Despite revenue serving a proxy for the actual value of the rights used, a critical basis for the CRB's decision to reject a revenue model for webcasters, the CRB approved this model for satellite radio.¹⁷⁹ The reason given for this distinction is the difficulty of determining actual revenue for non-subscription webcasters, as compared to the relative ease for subscription-based satellite radio calculations.¹⁸⁰

While difficulties in calculating revenue are certainly a valid concern, this should not be the dominant reason why satellite radio stations pay royalties according to a revenue-based model and webcasters must pay according to a performance-based model. The revenue-based model presumes that most services will survive; the current per performance rates do not.¹⁸¹ While most webcasters do not charge subscription fees, many webcasters make sufficient revenue through advertising, donations, and commissions from online music stores who are directed from the webcaster's site to overcome the fear that webcasters will benefit from royalties without paying (enough) for them.

Due to the similar royalty structures of Music Choice and satellite radio, a revenue model should be applied to webcasters who provide limited interactivity as well.¹⁸² Since all three media use CRB-set compulsory licenses or negotiate directly with SoundExchange, they should be treated the same. Given that SoundExchange, the representative of the copyright

176. *Id.* at 21.

177. *Id.*

178. *Id.* at 26.

179. *Compare id.* at 22, with Part III.H.

180. *Id.* at 27.

181. *See CARP Decision, supra* note 5, at 52.

182. Interactive webcasting allows users to tailor their listening experience by inputting preferences, skipping songs, and pausing music; however, listeners cannot replay music, choose to listen to specific songs, or download the streams. Thus, it does not fall into DMCA's definition of interactive services. *See* 17 U.S.C. § 114(j)(7) ("The ability of individuals to request that particular sound recordings be performed for reception of the public at large . . . does not make a service interactive, if the programming on each channel of each service does not substantially consist of sound recordings that are performed within one hour of the request . . ."). For example, Pandora allows users to input a particular song to create a channel, but the songs played afterwards are not chosen by the listener, who may skip or approve of a song to shape future listening, but may not choose the next song. *See Pandora, supra* note 105.

holders of sound recordings, agreed to a revenue-based royalty model for a service very similar to most satellite and interactive webcasters, it appears that SoundExchange may not be as inflexible as it claims to be in allowing revenue-based royalty models. Thus, the per-revenue model should be used across the board due to this previously evidenced flexibility on the part of SoundExchange and the preferences of webcasters.

This model is also analogous to that envisioned by SWSA and, despite SWSA's explicitly non-precedential language, the Act serves as a good indication of Congress' views on this issue. The Music Choice and satellite radio rate structures are equivalents, and this structure could easily be adapted to the unique features of webcasting.¹⁸³ The Webcaster Settlement Act of 2008 provides for SoundExchange to enter into a voluntary agreement with webcasters without any further governmental approvals, and this possibility is currently available under current law as an alternative to the statutory rate.¹⁸⁴

Satellite radio and services like Music Choice are regulated under 17 U.S.C. § 111, while webcasters are regulated under 17 U.S.C. § 114. While royalties for Section 114 services are regulated under the "willing buyer, willing seller" model,¹⁸⁵ rate-setting under Section 111 may consider a much broader range of factors: the fair return to the copyright holder, maximization of the availability of copyrighted works to the public, stability in the music industry by minimizing the disruptive impact of royalty charged, and the relative roles and contribution of parties in bringing copyrighted materials to the public.¹⁸⁶ However, since there are minimal differences between interactive webcasters and satellite radio, this indicates that the legislative standards should be the same for both types of media.

While SoundExchange's concerns remain about webcasters who make very little revenue, and thus would pay insufficient royalties, the Music Choice agreement marks a compromise point. A well-run webcaster brings in 1.0 to 1.2 cents per listener hour; given that 33 million Americans listen to online music each month and 46 percent of Americans have listened to music online at least once,¹⁸⁷ SoundExchange is not left without any revenue upon which to extract royalties. SoundExchange can also base royalties based on revenue from subscribers' fees

183. This structure is quite similar to the proposed "Internet Radio Equality Act." See *supra* Part III.K.

184. David Oxenford, *Is a Settlement on Internet Radio Royalties Near? Will All Webcasters Be Included and Will They Be Able to Afford It?*, BROADCAST LAW BLOG, Nov. 17, 2008, <http://www.broadcastlawblog.com/archives/internet-radio-is-a-settlement-on-internet-radio-royalties-near-will-all-webcasters-be-included-and-will-they-be-able-to-afford-it.html>.

185. See 17 U.S.C. § 114(f)(2)(B) (2006).

186. See Oxenford, *supra* note 173. See also 17 U.S.C. § 801(b)(1).

187. See Edison Research, *supra* note 2.

(if applicable). The CRB has already come up with a compromise for small webcasters, based on aggregate tuning hours.¹⁸⁸ To further assuage SoundExchange's concerns, a minimum fee, similar to that negotiated in the Music Choice agreement, could be implemented.

Lastly, the reason why Music Choice gets preferential treatment is because it is the only webcaster to survive from the early, pre-DMCA, days of webcasting.¹⁸⁹ However, the continuing rationale for giving preferential treatment to one webcaster over all others is not quite clear. The music industry is dominated by innovation—what is popular today rarely remains popular tomorrow. By treating Music Choice and other webcasters the same, much of the current discontent by other webcasters may be alleviated.

C. Subscriptions, Limited Downloads and Permanent Downloads

Currently, limited download sites (such as Rhapsody or Napster) and permanent download sites (such as iTunes, MP3.com) must individually negotiate with holders of copyrights in sound recordings.¹⁹⁰ Limited download sites allow unlimited downloading for free, but the songs are only accessible by logging into the site and only so long as the user continues to pay the subscription fee.¹⁹¹ Permanent download sites allow the user to pay per song or per album to permanently own a copy of the song.

Since permanent downloading is the equivalent of selling of physical CD and in direct competition with the record companies, it is logical that there would be no limited public performance right or compulsory license. It is clear exactly which sound recordings are bought; the individual copyright holder should be directly compensated.

While it can be argued that limited download sites should be treated more like interactive webcasters than the permanent download sites, the stronger argument goes in the opposite direction. Limited download sites allow subscribers to treat the music on those sites as if they own it, if only for a time. Subscribers may replay music and choose exactly which songs they wish to hear, the prohibition of which is the major limitation on the public performance right and compulsory license. While subscribers cannot keep the music forever (unless they continue to pay the subscription fees forever), the arguments are stronger for treating limited

188. Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. 24,084, 24,099–24,100 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380).

189. See Oxenford, *supra* note 134.

190. See 17 U.S.C. § 106 (2006).

191. See, e.g., Offer Terms, <http://rhapsody.sirris.com/b/> (last visited Feb. 28, 2009).

download sites like permanent download sites than like interactive webcasters.

D. *Other Proposals for Change*

Many webcasters play predominantly independent, or “indie,” music.¹⁹² This is music from artists who are not (yet, if ever) signed to major music labels, and music which is generally not played by terrestrial broadcasters. For example, the webcaster Pandora gives listeners access to over 39,000 performers; terrestrial radio plays fewer than three hundred different artists.¹⁹³ Many (if not most) indie artists allow their music to be played or downloaded for free in order to get the exposure;¹⁹⁴ however, SoundExchange will not allow webcasters to stream their music for free.¹⁹⁵ Instead, these indie musicians must go through the same royalty system as major label artists.¹⁹⁶ The perspective of one indie band on this system is a focus on exposure, rather than royalty payments: “I want the people to own the music and the artists to own the copyright. Why let a record company get in the way of the music?”¹⁹⁷

Some critics suggest that Congress mandate that SoundExchange and the Copyright Royalty Board create a national database of all sound recordings and allow individual copyright holders determine the compulsory license rate for each of their works at or below a statutory rate.¹⁹⁸ Since SoundExchange already has a database of all sound recordings and their copyright holders, adding a preferred royalty rate would not be a huge burden on SoundExchange.¹⁹⁹

192. See Eric Bangeman, *Indies Need Royalties Too: Webcasters Favor Indie Music Over Major Labels*, July 30, 2007, <http://arstechnica.com/news.ars/post/20070730-indies-need-royalties-too-webcasters-favor-indie-music-over-major-labels.html> (noting that fifty-six percent of the music streamed by webcasters comes from independent labels).

193. Brian K. White, *Pandora Strikes Back as Web 2.0 Demands*, GLOSSY NEWS.COM, June 16, 2007, <http://www.glossynews.com/artman/publish/pandora-1415.shtml>.

194. See, e.g., www.myspace.com (last visited Feb. 28, 2009); www.youtube.com (last visited Feb. 28, 2009).

195. While not a struggling “indie” band, the recent example of Radiohead providing their album to consumers “paying as little or as much as they chose.” This included paying nothing. *Radiohead Generation Believes Music Is Free*, TELEGRAPH, Sept. 22, 2008, available at <http://www.telegraph.co.uk/finance/markets/2817231/Radiohead-generation-believes-music-is-ree.html>.

196. See Jason Lee Miller, *Most Web Music Indie, But Stations Still Pay*, WEB PRO NEWS, July 30, 2007, <http://www.webpronews.com/topnews/2007/07/30/most-web-music-indie-but-stations-still-pay>.

197. *Radiohead Generation Believes Music Is Free*, *supra* note 195.

198. See Castro, *supra* note 158, at 9–10.

199. *Id.*

V. CONCLUSION

The current system for calculating royalties is a mess. The CRB decision is likely to put all but the strongest webcasters out of business unless judicial, legislative, or voluntary measures are successful. This elimination of so many businesses is not in the best interest of society or the music industry. Society benefits from having a wide variety of music available, stimulating the marketplace of music and ideas. The music industry can benefit as well, by taking advantage of the unique aspects of webcasting to promote their products. While this may mean lower profits for the copyright holders in the short-term (through lower royalty rates), it helps ensure the long-term existence of the music industry through the realization that music promotion and sales occur through a variety of media, including webcasting. One way to ensure the continued existence of webcasting is through accepting lower royalty rates and encouraging webcasters to stay legal and in the United States.