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Is Internet Radio "Livin' on a Prayer"? With New Legislation, It "Will Make It, I Swear"

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IS INTERNET RADIO "LIVIN' ON A PRAYER"? WITH NEW LEGISLATION, IT "WILL MAKE IT, I SWEAR"[1]

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[1] BON JOVI, LIVIN' ON A PRAYER (Mercury Records 1986).

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I. INTRODUCTION

You will probably never walk into a store and shoplift a CD,[2] but the chances of you stealing an album on the Internet are astronomical.[3] In fact, four out of five digital music downloads are made illegally.[4] Music is the number one "[t]hing[] [p]eople [d]on't [p]ay for [a]nymore."[5] The explanation for this phenomenon is actually quite simple, "[i]t is a law of commerce: you cannot sell something if there is no perceived value in it."[6] Since music access has been available for free for so long, and since free access has become more available than ever since the advent of the Internet, the value in music has depleted.[7]

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[2] National Learning & Resource Center, *Shoplifting Statistics*, NATIONAL ASSOCIATION FOR SHOPLIFTING PREVENTION, (Jan. 20, 2014) http://www.shopliftingprevention.org/whatnaspoffers/nrc/PublicEducStats.htm. Only one in eleven people (0.091% of people) will shoplift, so a large majority of the public would not shoplift a music album or any other item. *Id.*

[3] M. Joy Hayes, *The High Price of Free Music: How Illegal Downloads Are Silencing Artists*, DAILYFINANCE (July 5, 2012 12:02 PM), http://www.dailyfinance.com/2012/07/05/the-high-price-of-free-music-how-illegal-downloads-are-silencin/.

[4] *Id.* (citing the Recording Industry Association of America as the source for this statistic).

[5] Ryan Thomas, *Top 10 Things People Don't Pay For Anymore*, LISTVERSE (Jan. 2, 2012), http://listverse.com/2012/01/02/top-10-things-people-dont-pay-for-anymore/.

[6] Moses Avalon, *Why We Steal Music*, MOSES AVALON.COM, http://www.mosesavalon.com/why-we-seal-music/ (last visited Jan. 20, 2014).

[7] *Id.* For sixty years, music has been available to the public for free through traditional AM/FM radio, and sixty years of entitlement is difficult to reverse. *Id.* That entitlement has only grown stronger, as downloading and sharing music for free has become easy and commonplace thanks to the Internet. *Id.* In explaining the public sense of entitlement to free music, Moses compares and contrasts the record industry with the movie industry. *Id.* "You don't have to scratch your head too much to recall that Jim Carrey or Schwarzenegger got about $25 million to perform in their movies, or to remember the $280 million dollars it cost to make *Titanic* . . . . [W]hy in the hell do you know these facts?" *Id.* After all, most do not know how much it cost a musical artist like rapper, Eminem, to make his last four albums or how much it cost U2 to market and promote the band's integrations into the iPod. *Id.* The reason why people know so much more about cost expenditures in the movie industry is that:

> [i]t's not a fact that was uncovered by hard-nosed investigative journalism. It's in a press release. The film industry wants everyone to know that it's costing them a truckload of cash to entertain you, the public. Over the last 60 years, while the movie industry has been investing millions a year in

Though convenient for the consumer, for each illegal download, royalty payments are lost and the music industry suffers.[8]

In steps Internet radio.[9] Internet radio streaming services, otherwise known as webcasters, provide on-demand music that is generally free for the listener[10] but still generates royalties for the copyright holders each time a song

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> educating us about their costs, the record companies have not invested dime-one on this area. They have not taught us music's cash value. . . . Instead, they produce music videos about the high life style the artists enjoy, and they give away the music for free in various venues such as radio and TV, hoping we'll get hooked on their new prodigy. . . . So when a technology comes along that allows anyone with a computer to pilfer a record company's inventory, who would think twice about using it? Music already *feels free* and many feel as though they have a right to it.

Id.

[8] Amy Adkins, *How Does Illegally Downloading Music Impact the Music Industry?,* HOUSTON CHRONICLE, http://smallbusiness.chron.com/illegally-downloading-music-impact-music-industry-27748.html (last visited Jan. 20, 2014). Though some studies have shown music pirates may be keeping the music industry alive, purchasing 30% more music than legal listeners, some argue that without illegal file sharing networks, pirates would have purchased even more music. Betsy Isaacson, *Music Pirates Buy 30 Percent More Songs than Non-Filesharers: Study*, HUFFINGTON POST (Jan. 22, 2013, 3:13 PM), http://www.huffingtonpost.com/2013/01/22/music-pirates-study_n_2526417.html. Whether or not music pirates help or hurt the music business overall, illegal downloads inhibit the industry's full potential when royalties are not paid. *Id*.

[9] "Internet radio is the continuous transmission of streaming audio over the Internet." ERIC LEE, HOW INTERNET RADIO CAN CHANGE THE WORLD: AN ACTIVIST'S HANDBOOK 10 (iUniverse 2005). The University of North Carolina at Chapel Hill and the Georgia Tech University established the first Internet radio stations in 1994 called WXYC and WREK respectively. Jennifer Waits, *The Decade's Most Important Radio Trends: #2 The Growth of Internet Radio*, RADIO SURVIVOR (Dec. 31, 2009), http://radiosurvivor.com/2009/12/31/the-decades-most-important-radio-trends-2-the-growth-of-internet-radio/. Internet radio took off around 2000, at which point 20% of Americans were listening to online radio. *Id.* By 2003, 40% of Americans had listened to online music. *Id.* In 2009 "42 million Americans listened to online radio weekly . . . ." *Id.*

[10] *Internet Radio: New Business Models Will Define Growth*, FUTURESOURCE CONSULTING (Aug. 16, 2011), http://www.ceatec.com/report_analysis/en/ra_0816.html. "Most pure-play Internet radio and music streaming business models are built around free-with-ads and some low-priced premium subscriptions . . . . Other streamed music services charge up to 15 dollars a month and allow unlimited on-demand streams, though subscriber bases are currently small." *Id.*

Tim Westergren, Pandora Founder and Chief Strategy Officer, has claimed, "Internet radio has been shown to help decrease music piracy and increase music sales. When the digital music sector is allowed to grow and innovate, everybody wins." *Internet Radio Fairness Coalition Launches to Help Accelerate Growth and Innovation in Internet Radio to Benefit Artists, Consumers and the Recording Industry*, PR NEWSWIRE (Oct. 25, 2012), http://www.prnewswire.com/news-releases/internet-radio-fairness-coalition-launches-to-help-accelerate-growth-and-innovation-in-internet-radio-to-benefit-artists-consumers-and-the-recording-industry-175775071.html. Further,

> [i]t has been noted by several researchers that many consumers now use the Internet as their primary tool for discovering new music . . . the key is discovery of new music, and that this factor of discovery can be turned into revenue by whichever means are the most successful for that particular artist or type of content . . . [I]t is in fact the ability to access the content and the

is streamed and may even increase music purchases.[11] Top streaming sites include: Pandora,[12] iHeartRadio,[13] Spotify,[14] TuneIn Radio,[15] and Slacker

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> distribution which may actually drive the revenue of the model; the model not being monetized itself. . . . [It] [is] lowering of the price of sampling that encourage[s] more purchasing online.

Richard Warr & Mark M.H. Goode, *Is the Music Industry Stuck Between Rock and a Hard Place? The Role of the Internet and Three Possible Scenarios*, 18.2 J. RETAIL & CONSUMER SERVS. 1, 127 (2011). Internet radio allows for music enthusiasts to sample music *legally*, allowing artists to retain royalties on each sampling, which is likely to lead to a purchase. *Id.* Without webcasters, listeners will revert to sampling via file sharing and other illegal methods, through which there is no return for the artists and record labels, and which may be less likely to lead to a legal purchase. *Id.* Not only does Internet radio increase music sales, but also, it provides other revenue streams for artists. *Id.*

[11] *Id.* Advertising is the key revenue stream for most Internet radio businesses, which allows them to pay the required royalty fees. *Id.*

[12] "Pandora is the leader in [I]nternet radio in the United States . . . that uses intrinsic qualities of music to initially create stations and then adapts playlists in real-time based on the individual feedback of each listener." Pandora Media, Inc., Annual Report (Form 10-K) at 7 (Mar. 13, 2013), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTgxNzIxfENoaWxkSUQ9LTF8VHlwZT0z&t=1 [hereinafter Annual Report].

[13] "iHeartRadio is a free, all-in-one digital radio service that lets you find more than 1,500 Live Stations or create commercial-free, all-music Custom Stations featuring songs from the artist you select and similar music." *Welcome to iHeartRadio*, IHEARTRADIO, http://www.iheart.com/about/ (last visited Jan. 20, 2014).

[14] "Spotify gives you access to millions of songs across your mobile devices for free." *Music for Everyone – Spotify Now Free on Mobile and Tablet*, SPOTIFY, (Dec. 11, 2013) http://press.spotify.com/us/2013/12/11/music-for-everyone-spotify-now-free-on-mobile-and-tablet/.

> The main difference between Spotify and Pandora is that Pandora is an online-radio where music experts and amateurs try to classify songs to about 400 attributes. They suggest songs according to your pattern of music taste and you can say if you like it or not. But a significant disadvantage of Pandora is that it's not possible to rewind or to repeat songs. And you can just skip one song within one hour and can't choose a certain artist or music band, you are dependent on the choice Pandora makes for you. Spotify, on the other hand, is a music streaming service where you can decide yourself what kind of music you're listening [to], you just get suggestions, see playlists of friends or popular playlists of strangers. You can create [your] own playlists and you see new published songs and albums.

Julia St, *Pandora or Spotify: Which One Will Top the Social Streaming Music Industry?*, POLICYMIC (June, 2 2012), http://www.policymic.com/articles/9054/pandora-or-spotify-which-one-will-top-the-social-streaming-music-industry.

[15] TuneIn is a unique online radio service that lets users experience sounds from all over the globe. The site offers anything the user could want to hear, from sports to music and news. There are no geographic restrictions so the user can listen no matter where they live. Top live radio stations are highlighted on the homepage with a list for local radio, music, talk and sports. A built in search tool is available so users can seek out audio content by keyword or using the categories found at the very top of the page.

Shel Gatto, *TuneIn,* APPAPPEAL (Feb. 15, 2013), http://tunein.appappeal.com.

Radio.[16] Though streaming sites aid in countering music piracy, Internet radio executives, founders, and entrepreneurs contemplate their chance of survival under modern copyright laws and legislation, which continue to push royalty rates higher and higher.[17] "[G]raveyards are riddled with the bones of Internet radio companies that could not survive the existing vampire rates."[18] The constitutional purpose for copyright law is "[t]o promote the Progress of Science and useful Arts[19], by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[20] Though the Copyright Clause requires Congress to construe the Copyright Act to promote "broad public availability of . . . music . . . ,"[21] the current laws work to inhibit music's natural progression toward Internet radio.[22]

Under the modern copyright laws, most songs have two distinct copyrights: there is one right for the musical composition, which is held by the songwriter and music publisher, and there is one right for the sound recording, which is typically held by the record label or the artist.[23] The copyright holder in the musical composition and the copyright holder in the sound recording both have a public performance right, which entitles them to a royalty when the song

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[16] Slacker Radio is an interesting hybrid music service. On the one hand, the free version—like Pandora—lets you listen to pre-made stations or create stations of your own based on artists, albums, or tracks you choose. . . . If you purchase a Slacker Premium Radio subscription . . . you additionally have the ability to play songs, albums, and single-artist stations on demand. . . .

Christopher Breen, *First Look: Slacker Radio*, MACWORLD (Jan. 19, 2012, 5:30 AM), http://www.macworld.com/article/1164812/first_look_slacker_radio.html.

[17] Ed Black, *Congress Listens to Complaints of Out of Tune Royalty Rates for Internet Radio*, FORBES (Sept. 27, 2012 9:42 AM), http://www.forbes.com/sites/edblack/2012/09/27/congress-listens-to-complains-of-out-of-tune-royalty-rates-for-internet-radio/. *See infra* text accompanying notes 32–33 (describing the content acquisition costs experienced by Internet radio).

[18] *Id.*

[19] At the time the Constitution was written, "science" was not used to describe the physical, earth, or biological type sciences. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power,* 43 IDEA 1, n.42 (2002). Rather, the term carried the broader meaning of "knowledge" and "learning." *Id.* "Promoting the progress of science and promoting the progress of the useful arts are facets of the same thing, namely the advancement of knowledge and learning." *Id.* at 1.

[20] U.S. CONST. art. I, § 8, cl. 8.

[21] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (adopting a strict interpretation of the Copyright Clause, limiting Congress's application of the Copyright Act. "The immediate effect of copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

[22] Black, *supra* note 17.

[23] John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field,* 19 ISSUES IN TECH. INNOVATION 1, 2 (Aug. 2012), http://www.brookings.edu/~/media/Research/Files/Papers/2012/8/07%20music%20royalties%20technology%20villasenor/CTI_19_Villasenor.pdf.

is broadcast over traditional AM/FM radio or performed publicly through Internet broadcasts, digital cable, or satellite radio.[24] All distributors are required to pay royalties for the musical composition public performance right, and the rate for each distributor is determined using a universal standard.[25] However, traditional AM/FM radio is not required to pay royalties for the sound recording public performance rights, while Internet broadcasts, digital cable, and satellite radio must pay royalties for those rights.[26]

The Digital Millennium Copyright Act of 1998 applies two different standards for setting royalty rates for sound recording public performance rights.[27] The 801(b) calculation applies to preexisting satellite digital audio radio service[28] and preexisting subscription services,[29] while the willing buyer/willing seller standard applies to eligible non-subscription transmissions (i.e. Internet radio).[30] This law has had problematic implications for those subject to the willing buyer/willing seller standard.[31] While 8% of Sirius XM's

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[24] *Id.*

[25] *Id.*

[26] Cassondra C. Anderson, *"We Can Work it Out:" A Chance to Level the Playing Field for Radio Broadcasters,* 11 N.C. J.L. & TECH. 72, 75–76 (2009). Though many in the music industry protest the fact that traditional AM/FM radio does not pay for sound recording public performance rights, this exception is a key reason Congress granted a sound recording public performance right to copyright owners. Villasenor, *supra* note 23, at 13. When the legislative branch contemplated the addition of this right, the powerful AM/FM radio industry lobbied Congress for this exception. *Id*. Strong opposition from terrestrial broadcasters has hushed every single attempt that has been made to eliminate this exemption. *Id.*

[27] Villasenor, *supra* note 23, at 4.

[28] Preexisting satellite digital audio radio service includes Sirius XM satellite radio. *Id*.

> Sirius XM Holdings Inc. is the largest radio broadcaster measured by revenue and has 25.6 million subscribers. SiriusXM creates and broadcasts commercial-free music; premier sports and live events; news and comedy; exclusive talk and entertainment; and the most comprehensive lineup of Latin commercial-free music, sports, and talk programming in radio. . . . SiriusXM is also one of the world's largest pure-play audio entertainment companies and is among the largest subscription media companies in the United States . . . .

Corporate Overview, SIRIUSXM SATELLITE RADIO, http://www.siriusxm.com/corporate (last visited Jan. 20, 2014). SiriusXM is available through subscription only. *Our Most Popular Packages*, SIRIUSXM SATELLITE RADIO, http://www.siriusxm.com/ourmostpopularpackages-sirius (last visited Jan. 20, 2014). Popular subscription prices range from $14.49 per month to $18.99 per month; right now, SiriusXM's "best deal" is a $199.00 annual plan. *Id.*

[29] Preexisting subscription services include cable radio such as Music Choice. Villasenor, *supra* note 23, at 4. Music Choice allows you to listen to music and watch videos on your television if you subscribe, as part of your cable subscription, to stations such as SWRV, Music Choice On Demand, Music Choice Music Channels, and ShowOff. *About Music Choice,* MUSIC CHOICE, http://corporate.musicchoice.com/about-us/ (last visited Jan. 20, 2014).

[30] Villasenor, *supra* note 23, at 4. *See infra* Sections II.B–C.

[31] Villasenor, *supra* note 23, at 10.

revenues are withdrawn to cover content acquisition costs (costs paid out in the form of royalties),[32] Internet radio companies are forced to pay 50% or more of their revenues to the copyright holders. [33]

Since rates are inconsistent across different delivery mechanisms, some business models are favored while others are hindered, which impairs a free market system.[34] So, "what are the best rates for the long-term health of the digital music business that allow[] for innovation while ensuring rights owners and performing artists are compensated for their investments and efforts[?]"[35] On September 21, 2012, two congressmen introduced identical bills before the Senate and the House,[36] collectively referred to as the Internet Radio Fairness Act of 2012 ("IRFA"), which attempted to answer the preceding question. The bill proposed "fair standards and procedures," adopting the 801(b) standard for all digital music distributors.[37]

This Comment discusses whether the IRFA would be the appropriate solution to the inequities in current copyright law as it pertains to digital music.[38] Part I of this Comment will provide a more in-depth discussion of the

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[32] *Id.* at 1.

[33] Annual Report, *supra* note 12, at 57 (stating that Pandora's content acquisition costs amounted to 61% of total revenues).

[34] Villasenor, *supra* note 23, at 1.

[35] Glenn Peoples, *Business Matters: Internet Radio Bill is About Fairness and Money*, BILLBOARD.BIZ (Nov. 2, 2012 8:56 PM), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-internet-radio-bill-is-1008001082.story.

[36] Representative Jason Chaffetz sponsored the bill in the House and Senator Ron Wyden sponsored the bill in the Senate. Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. (2012). Jared Polis, Zoe Lofgren, and Darrell Issa joined them in introducing the IRFA. Black, *supra* note 17.

[37] H.R. 6480. The bill came before the House Judiciary Subcommittee on Intellectual Property, Competition and the Internet for a hearing in November, but has gone into "hibernation" as the 112th Congress did not vote to either pass or dismiss the action. *See* Dave Seyler, *IRFA Hearing Testimony Summarized,* RBR.COM (Nov. 28, 2012), http://rbr.com/irfa-hearing-testimony-summarized/; *see also* Glenn Peoples, *Internet Radio Fairness Act Slips Into Hibernation*, BILLBOARD.BIZ (Jan. 3, 2013, 3:11 PM), http://www.billboard.com/biz/articles/news/1510514/internet-radio-fairness-act-slips-into-hibernation (discussing that though the IRFA is dead for now, the bill's status is more comparable to a "hibernation," in that the year ended without the bill going into markup and receiving a vote in committee, but "the bill seems like a good bet to be introduced in 2013 . . . . Insiders tell Billboard.biz the new bill could be re-introduced under a different name and could have different language than the one seen last year." The bill certainly has stirred up quite the political discussion that is unlikely to dissipate anytime soon.). A version of the bill was expected to come before the 113th Congress, and was expected to receive a vote within the year if it passed through the subcommittee. *Radio Broadcasters Get an Earful at Internet Radio Fairness Hearing*, BILLBOARD.BIZ (Nov. 28, 2012; 4:52 PM), http://www.billboard.com/biz/articles/news/1082903/radio-broadcasters-get-an-earful-at-internet-radio-fairness-hearing. *But see infra* note 323.

[38] Though the IRFA is in "hibernation," it is likely that an identical bill could be introduced. *See supra* note 37; *infra* note 323. This Comment determines whether such an identical bill should be

history of copyright law and music distribution. It will examine the implications of the 1971 Sound Recording Act, the 1976 Copyright Act, and the Digital Performance Right in Sound Recordings Act of 1995. Part II will provide a critique of the current state of the law, including a look at the Digital Millennium Copyright Act of 1998 and its effects on the respective categories of digital music distributors. This section will analyze the distinctions and applications of the 801(b) standard versus the willing buyer/willing seller standard. Part III will introduce the Webcaster Settlement Acts of 2008 and 2009, which have been serving as temporary solutions to the disparity created by the two royalty rate standards. This discussion will lead into Part IV, which will analyze and contemplate the IRFA as a possible solution that will save Internet radio and, potentially, the music industry. The Comment will conclude by validating a blanket 801(b) approach, as adopted by the IRFA, as a solution to the problem posed by the inequities in digital music copyright royalties.

II. "THE TIMES THEY ARE A-CHANGIN'"[39]: AMERICAN HISTORY OF THE MUSIC COPYRIGHT

A. A Royal Foundation

Copyright law in the United States is derived from English law, the Statute of Anne of 1710, which was the first significant measure to grant authors, booksellers, and publishers the rights to control the attribution, reproduction, and transferability of a particular work.[40] Preceding the Statute of Anne, licensing acts had been imposed by the Crown, spurred by the invention of the printing press.[41] Before the printing press, it was difficult to produce works on a large scale, and so works of propaganda against the Church of England and the Crown did not pose a threat.[42] Upon invention of the printing press, the Crown "shuddered at the thought of widespread dissemination of works advocating religious heresy and political dissent."[43] Consequently, the Crown granted publishing licenses to the Stationers' Company ("Company"),[44] establishing a

introduced and adopted.

[39] BOB DYLAN, TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

[40] Adam Deutsch, *A Historical Perspective of Music Distribution and Copyright Law: How Internet Radio is the Next Frontier* 6 (2010), http://www.scribd.com/doc/37780490/A-Historical-Perspective-of-Music-Distribution-and-Copyright-Law-How-Internet-Radio-is-the-Next-Frontier.

[41] CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI, & TYLER OCHOA, COPYRIGHT LAW 16 (Lexis Nexis, 8th ed. 2010).

[42] *Id.*

[43] *Id.*

[44] The Stationers' Company was a select group of London printers and booksellers. *Id.*

publishing monopoly.[45]

When the licenses expired in 1694, the Company petitioned Parliament for law that would protect authors; through advocating for the protection of authors' creative contributions, the publishers were, in effect, protecting their own rights.[46] Though the Statute of Anne provided lesser rights than the publishers had under the licenses, it protected all of the works they had previously printed.[47] Moreover, "[p]ublishers began purchasing copyrights from authors, entitling publishers to be the sole beneficiary of profits obtained through the exploitation and sale of an author's work."[48]

Ever since the times of the Statute of Anne, there have been divergent theories as to the purpose of copyright.[49] "On the one hand, copyright was viewed as an instrument in the service of the public interest. On the other hand, it could be considered the natural due of those who engage in artistic creation."[50] In the beginning, the new American states implemented statutes that largely were centered on protecting the artistic creation of authors.[51] The Framers of the Constitution realized the need for a uniform, federal copyright law and composed the Copyright Clause.[52] The application of the Copyright Clause by the courts over time[53] has emphasized the two conflicting bodies of thought as to what the Copyright Clause is intended to protect.[54] Finally, the Supreme Court

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[45] *Id.*

[46] *Id.* at 16–17.

[47] *Id.* at 17.

[48] Deutsch, *supra* note 40, at 7.

[49] JOYCE ET AL., *supra* note 41, at 19.

[50] *Id.*

[51] *Id.*

[52] *Id.*; *see supra* text accompanying notes 19–21 (introducing the Copyright Clause and explaining the implications of the Copyright Clause as interpreted by the Supreme Court).

[53] The "application" of the Copyright Clause generally involves the application of the Copyright Act. The Copyright Act was first established in 1790, when Congress exercised the copyright power and created a renewable fourteen-year copyright. *A Brief History of Copyright,* AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, http://asmp.org/tutorials/brief-history-copyright.html (last visited Jan. 20, 2014). This copyright gave "authors the right to print, reprint or publish their own work" during that fourteen year period. *Id.* The Copyright Act has been revised throughout its history, in 1831, 1870, 1909, and 1976. *Id.* The most recent revision eliminated the requirement that a copyright must be registered to be valid, determining that a copyright was created upon the point of fixation in a "tangible medium of expression." *Id.* Works created before 1978 are governed according to the 1909 version of the Act, and works published after January 1, 1978 are governed by the 1976 Act. *Id.* "The scope of copyright protection [now] generally grants the copyright holder exclusive rights for a limited period to reproduce the work, create derivative works based on the work, transfer the work, display the work, and sell or lease the work." Jonathan Lee, *Piracy by Plastic: Why the Ninth Circuit Should Have Held Credit Cards Liable for Secondary Copyright Infringement*, 2 J. BUS. ENTREPRENEURSHIP & L. 211, 213–14 (2008).

[54] *See supra* text accompanying notes 19–21.

decided *Twentieth Century Music Corp. v. Aiken*, accepting the purpose of copyright as promoting the creation and dissemination of knowledge in order to enhance the general public good.[55]

B. The Development of Copyrights for Music

"Musical compositions have been the subject of copyright protection since the statute of February 3, 1831 (4 Stat. at L. 436, chap. 16), and laws have been passed including them since that time."[56] The songwriter and music publisher holds a musical composition copyright, which protects the musical composition and the lyrics of a work.[57] The public performance right,[58] entitling copyright holders to a royalty whenever their music is performed publicly, has long been part of the bundle of rights for a musical composition copyright.[59] Quite some

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[55] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[56] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 15 (1908) (noting the statute of February 3, 1831 refers to the 1831 revision of the Copyright Act).

[57] Villasenor, *supra* note 23, at 2.

[58] 17 U.S.C. § 101 describes public performance as follows:

> To perform or display a work 'publicly' means—
>
> > (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
> >
> > (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id.

[59] Since the remainder of the Comment will focus on the development of copyright law as it pertains to sound recording rights, it is appropriate to, at this point, briefly explain royalties for musical composition copyrights. Compulsory licenses require owners of musical composition to license their performance rights in exchange for a royalty. Deutsch, *supra* note 40, at 9. The scope of said licenses is codified under § 115 and § 801 of the Copyright Code. 17 U.S.C. §§ 115, 801 (2012). Generally, the publisher and the artist split the mechanical license royalties 50/50. Deutsch, *supra* note 40, at 9.

> Historically, it was impractical for songwriters to track all of the public performances of their songs. This led to the creation in [the] first half of the 20th century of the three major American performing rights organizations (PROs), ASCAP, BMI, and SESAC that issue licenses, track performances, and distribute a portion of licensing revenue to songwriters and music publishers. Today, most broadcasters purchase a "blanket license" from each of the PROs "that provides the rights to use all the music in the catalog of the PRO." Royalties paid by most audio broadcasters for music composition copyrights typically total in the range of 2 to 5% of gross revenue, providing ASCAP, BMI, and SESAC with aggregate annual royalty payments totaling approximately $2 billion.

time and many developments in music copyright law would pass before the second music copyright protecting the fixed version of a series of musical sounds, called the "sound recording copyright," would be developed.[60]

One of the first steps toward developing a sound recording right was a discussion on the right to reproduce audio renditions of sheet music. It was only after the birth of the player piano in the 1880s, revolutionizing the way in which music was reproduced, that the rights of music owners were implicated, giving rise to this conversation.[61] In *White-Smith Music Publishing Co. v. Apollo Co.* the Supreme Court was faced with the novel question: whether the right to print music in the form of perforated rolls to play music on a player piano was a right protectable by copyright law.[62]

In order for a player piano to play certain musical compositions on its own, a piano roll—a mechanical component containing depressions unique to each musical composition—is contained within the instrument.[63] Using air pressure, the piano can play its keys as dictated by the depressions on the piano roll, resulting in the performance of a composition that is virtually identical each time it is played.[64] The Court in *White-Smith* held that the copyright laws granted composers the exclusive right to reproduce the printed sheet music itself, but that this right was distinguishable from the act of reproducing an audio rendition.[65] According to *White-Smith,* the copyright to reproduce did not protect audio reproductions.[66] However, Congress was quick to create legislation to overrule the *White-Smith* decision, explicitly granting musical composition copyright owners the exclusive right to audio reproduction of their works.[67]

Though this was significant to musical composition copyright owners and did not create a separate copyright for those who sang and recorded versions of the music, this law laid the foundation for creation of a sound-recording right;

Villasenor, *supra* note 23, at 2.

[60] Sound Recordings Act of 1971, Pub. L. 92-140, 85 Stat. 391 (1971).

[61] Deutsch, *supra* note 40, at 7.

[62] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 9 (1908).

[63] Deutsch, *supra* note 40, at 7.

[64] *Id.*

[65] 209 U.S. at 19 (Holmes, J., concurring specially). This was the first time the Court recognized that there are two separate rights in a musical work: a right in the musical composition and the right of the fixed version of the actual sounds. *Id.*

[66] *Id.* Quickly after determining that there was a separate right in the fixation of the musical sounds, the Court in *White-Smith* dismissed the possibility of affording that right protection through copyright. *Id.*

[67] The Copyright Act of 1909 § 1(e) created the first exclusive right to audio reproduction of works.

the *White-Smith* case and the story of the player piano demonstrates how technology can drive change in business models and legislation.[68] With the advent of new technology, allowing music to be reproduced audibly without the aid of a human performer, came the dawn of a new market: a second group of artists who would use the original musical composition to create their own audible reproduction, a sound recording, to which they would want to claim a right.[69] But, for most of the twentieth century, federal copyright did not afford any protection for these recordings.[70]

In 1971 Congress enacted the Sound Recording Act, which granted sound recording copyright owners a reproduction right.[71] However, a performance right was still withheld.[72] Shortly thereafter, the Copyright Act of 1976 was passed, making the most significant changes to copyright law since the Copyright Act of 1909 and enumerating five exclusive rights in copyrighted works in § 106: the rights to (1) reproduce, (2) adapt, (3) distribute, (4) perform, and (5) display the work.[73] However, the fourth right, to perform the work, was explicitly excluded from sound recording rights by § 114(a) of the act.[74]

In the mid-1990s, technology took charge, forcing legislation to adapt and adjust, just as it had with the player piano at the beginning of the century.[75] As the digital age came upon us, new business models for providing music sprang up.[76] It was now possible for music to be delivered across interactive[77] and non-

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[68] Deutsch, *supra* note 40, at 9.

[69] Villasenor, *supra* note 23, at 3.

[70] *Id.*

[71] Sound Recordings Act of 1971, Pub. L. 92-140, 85 Stat. 391 (1971); Villasenor, *supra* note 23, at 3 (stating Congress created a right in sound recordings to address piracy in vinyl records and cassette tapes).

[72] Villasenor, *supra* note 23, at 3 (explaining "[t]his gave sound recording copyright owners increased legal authority to prevent unauthorized reproduction and sales of their records, but still left them without a royalty when their songs were broadcast.").

[73] Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976).

[74] Copyright Act of 1976, Pub. L. 94-553, § 114(a), 90 Stat. 2541, 2560 (1976) states the following:

"(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106 (4)"

Id.

[75] Villasenor, *supra* note 23, at 3.

[76] *Id.* Prior to the growth of the Internet, digital storage costs were steep, requiring listeners to take physical possession of a storage medium like a CD, and before that a cassette, and before that a vinyl record. *Id.* Since the growth of the Internet, storage costs of digital music have been dropping, as it has become practical to deliver digital music absent the storage mediums previously implemented. *Id.* Distribution of music has become that much simpler, and so it has become possible to stream music over the Internet. *Id.*

interactive[78] streaming services like satellite, digital cable, and the Internet.[79] The ease of digital music distribution quickly became a serious threat to copyright holders, including traditional broadcasters and the recording industry: their sound recordings could be digitally performed much easier, as their music would spread more rapidly across digital platforms.[80] Thus, Congress enacted the Digital Performance Right in Sound Recording Act of 1995 ("DPRA"), the first legislation to grant the fifth exclusive right of performance to copyright holders in sound recordings.[81]

There was one significant catch to DPRA: it limited the long-sought sound recording performance right to subscription-based digital services.[82] In other words, the Act enabled AM/FM terrestrial broadcasters to continue to broadcast music without paying royalties to the owners of the sound recording copyright.[83] The idea of this was:

> to keep the powerful record company lobby happy by finally allowing them their

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[77] Interactive webcasters provide listeners the opportunity to exert more control over the music they are listening to. Specifically, the Digital Millennium Copyright Act defines an interactive service as 'one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient' . . . Users of these stations can select specific songs and artists to listen to. One can listen to an entire album, build a specific playlist of songs by one or multiple artists, and may be able to utilize a personalized streaming radio function.

Deutsch, *supra* note 40, at 19.

[78] There are two main types of non-interactive services. First are those that operate like traditional terrestrial radio stations (including terrestrial stations that simulcast their analog broadcast digitally on the [I]nternet). These stations broadcast a steady stream of music to all listeners tuning in . . . . Listeners select a station to stream but have no control over what music will be heard.

The second group of non-interactive services is more difficult to define because the webcasters allow listeners to have some influence over the music they can hear . . . . [They] do not fit the description of an interactive station, and the determination is made on a case by case determination.

Id. at 19–20. One Second Circuit Court of Appeals has defined such non-interactive services as those providing users with "individualized [I]nternet radio stations – the content of which can be affected by users' ratings of songs, artists, and albums." Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 149 (2d. Cir. 2009).

[79] Deutsch, *supra* note 40, at 19–20.

[80] *Id.*

[81] Villasenor, *supra* note 23, at 3.

[82] Brian Day, *The Super Brawl: The History and Future of the Sound Recording Performance Right,* 16 MICH. TELECOMM. & TECH. L. REV. 179, 186 (2009).

[83] *Id.*

> desire to profit from the licensing of their sound recording copyrights. That would be accomplished by tacking fees onto the streaming of sound recordings. Traditional broadcasters would be soothed by the knowledge that their over-the-air fees wouldn't increase . . . . Those bearing the brunt of the cost would be the new Internet companies, who had not yet taken the time to build relationships in Congress and yielded very little political power.[84]

However, new technology spread quicker than Congress could have predicted, and it was not long before Internet webcasters were popping up and evading sound recording performance royalties.[85] Webcasters were streaming music across the Internet on a non-subscription basis.[86] Their business model was to provide content for free and create revenue streams through paid advertisements, similar to the model of traditional AM/FM radio.[87]

The DPRA was clearly a botched attempt to make newly crafted sound recording performance rights an effective means of protection for sound recording copyright holders.[88]

Shortly after "the ink was dry on the DPRA," the Recording Industry Association of America ("RIAA") began lobbying Congress for more expansive legislation regarding sound recording performance royalties.[89] To counter the RIAA's efforts in Washington, webcasters developed the Digital Media Association ("DiMA").[90] Other groups involved in the discussion included the National Association of Broadcasters, and the Songwriter's Guild of America.[91] The record industry won this battle, and the Digital Millennium Copyright Act ("DMCA") was passed in 1998, applying sound recording performance rights to all digital audio services.[92]

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[84] 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, 11 (2001).

[85] *Id.* at 12.

[86] *Id.* at 13. Recall the DPRA limited sound recording performance rights to *subscription-based* digital services. Villasenor, *supra* note 23, at 4.

[87] Villasenor, *supra* note 23, at 4. Pandora, as mentioned in the introduction, operates partially on a non-subscription basis, and under DPRA, Pandora could function without paying a single cent in sound recording performance royalties. *Id.*

[88] *Id.*

[89] *Id.* (noting that the RIAA was after legislation requiring non-subscription Internet radio stations to obtain sound performance licenses).

[90] *Id.*

[91] *Id.*

[92] Deutsch, *supra* note 40 at 26–27. The DMCA also "addressed issues well beyond sound recording copyrights. For example, it provided harmonization with two international copyright treaties that had recently been adopted by the World Intellectual Property Organization and also addressed limitations on copyright infringement liability for online content." Villasenor, *supra* note

II. "WHOLE LOTTA SHAKIN' GOING ON"[93]: CURRENT STATE OF COPYRIGHT LAW IN SOUND RECORDINGS

A. Implications of the Digital Millennium Copyright Act

The DPRA and DMCA amended § 114 of the Copyright Code, classifying digital broadcast mediums into three distinct groups: (1) digital broadcasts exempt from paying performance royalties, (2) digital broadcasts subject to paying royalties for compulsory licenses, and (3) digital broadcasts subject to paying royalties for negotiated licenses.[94] Digital broadcasts transmitted over non-Internet driven airways, such as Hybrid Digital radio broadcasts ("HD radio"), fall into the first group and are completely exempt from paying performance royalties.[95] Digital broadcasts that are either free or charge a subscription and are non-interactive are subject to paying royalties for compulsory licenses.[96] A digital broadcast falls into this category if the end-

23, at 4.

[93] JERRY LEE LEWIS, WHOLE LOTTA SHAKIN' GOING ON (Sun Records).

[94] 17 U.S.C. § 114(d)(1) (2012); Deutsch, *supra* note 40, at 26.

[95] Deutsch, *supra* note 40, at 26. The radio receiver for HD radio plays data transmitted in digital signals as well as that transmitted in analog signals. *Id.* As opposed to pure analog radio, HD radio allows audio for more stations to be broadcasted and played in a higher audio quality. *Id.*

[96] *Id.* Broadcasters within this classification must comply with the following thirteen requirements:

> (1) . . . may not play in any three-hour period . . . more than three songs from a particular album, including no more than two consecutively, or . . . four songs by a featured artist or from a boxed set, including no more than three consecutively. (2) . . . Programs that are posted on a web site for listeners to hear repeatedly on-demand should be at least five hours long, and should not be available for more than two weeks at a time . . . (3) . . . Programs that automatically start over when finished should be at least three hours long. (4) . . . Rebroadcasts . . . can be performed at scheduled times three times in a two-week period for programs of less than one hour, and four times in a two-week period for programs of an hour or more. (5) . . . Advance song or artist playlists generally may not be published . . . (6) . . . must identify the sound recording, the album and the featured artist . . . (7) . . . may not perform a sound recording in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service. (8) . . . must disable copying . . . if in possession of the technology to do so, and must also take care not to induce or encourage copying . . . (9) . . . A webcaster must accommodate . . . measures widely used by sound recording copyright owners to identify or protect copyrighted works. To the extent it is technically feasible, transmissions must be set so that receiving software will inhibit the end user from direct digital copying of the transmitted data. (10) . . . A webcaster must cooperate with copyright owners to prevent recipients from using devices that scan transmissions for particular recordings or artists. (11) . . . The . . . license is limited to transmissions made from lawful copies of sound recordings . . . [and] does not cover . . . bootlegs . . . (12) . . . must not

users have very little or no control over the music they are listening to.[97] This group includes webcasters, satellite radio broadcasters, and terrestrial radio station digital simulcasts.[98] Lastly, any digital broadcast that is interactive, yielding most control over the music played to the listener, falls into the third category and is required to negotiate directly with sound recording copyright holders in order to obtain a digital broadcast license.[99]

The DMCA further sub-categorized the second group, those subject to obtaining and paying royalties for compulsory licenses.[100] In the first sub-category, non-interactive digital audio services providing a preexisting satellite digital audio radio service[101] or providing a preexisting subscription service[102]

> automatically and intentionally cause a . . . switch from one program channel to another . . . [and] (13) . . . If technically feasible, transmissions . . . must be accompanied by the information encoded in the sound recording by the copyright owner . . . .

Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 350 n.69 (2003) (citing Richard Rose, *Connecting the Dots: Navigating Requirements of the Internet Music Revolution*, 42 IDEA 313, 333–34 (2002)).

[97] Deutsch, *supra* note 40, at 26.

[98] *Id.*

[99] *Id.* at 27. One currently popular example of an interactive broadcast is Spotify. *Id.* at 19.

> Spotify's content comes via the cloud, which essentially means it functions as though its entire library were readily accessible to users, allowing users to search through and organize over eight million songs into playlists. People can access music from any computer, playlists can be shared easily via a link, and people can collaborate on playlists.

Jessica Wang, *A Brave New Step: Why the Music Industry Should Follow the Hulu Model,* 51 IDEA 511, 549–50 (2011). Spotify is interactive since the listener can select the specific song and artist he or she wants to listen to and can personalize playlists to play only the specific selected songs. *Id.* The user has a high degree of control, and so Spotify is required to negotiate each license individually. *Id.*

[100] Villasenor, *supra* note 23, at 4.

[101] 17 U.S.C. § 114(j)(10) defines a preexisting satellite digital audio radio service as:

> a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

Id. See supra note 28.

[102] 17 U.S.C. § 114(j)(11) defines a preexisting subscription service as:

> a service that performs sound recording by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in

are subject to royalties calculated using what is called the 801(b) standard and is established by 17 U.S.C. § 801(b).[103] All new subscription services[104] and eligible non-subscription transmissions,[105] such as Internet radio, are subject to royalties calculated by the willing buyer/willing seller standard which is codified in 17 U.S.C. § 114(f)(2)(B).[106] The Copyright Royalty Board ("CRB"), consisting of three Copyright Royalty Judges ("CRJ"),[107] determines these rates and applies these standards through specific rate-setting proceedings.[108]

> order to promote the subscription service.

Id. *See supra* note 29.

[103] Villasenor, *supra* note 23, at 4; *see infra* Sections II.B–C.

[104] 17 U.S.C. § 114(j)(8) defines a new subscription service as "a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service." *Id.*

[105] 17 U.S.C. § 114(j)(6) eligible nonsubscription transmission as:

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

Id.

[106] Villasenor, *supra* note 23, at 4; *see infra* Sections II.B–C.

[107] [A] failed attempt at DMCA compliance prompted congressional reform of the initial administrative process. The Copyright Royalty and Distribution Reform Act of 2004 (Reform Act) provided for, among other things, a Copyright Royalty Board (CRB) consisting of three full time copyright judges appointed by the Librarian of Congress. CRB decisions are reviewed by the United States Court of Appeals for the District of Columbia Circuit, which, according to the Administrative Procedure Act, will overturn a decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law."

Id.

Vanessa Van Cleaf, *A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 365–66 (2010).

[108] Rate determination proceedings include the copyright users, copyright holders, and trade or other groups, and involve "an initial three-month period during which the parties are asked to engage in voluntary negotiations. In the absence of a settlement, participants then submit written statements, conduct discovery, and then again attempt to arrive at a negotiated settlement." Villasenor, *supra* note 23, at 5. If the parties are able to arrive at an agreed settlement rate, then they submit the proposed rates the CRB. *Id.* The CRB has discretion to adopt or deny the proposal. *Id.* If the parties fail to reach a settlement, then the CRB "hears live testimony at an evidentiary hearing, and then issues a determination that is published in the Federal Register." *Id.* at 5–6.

Typically, negotiations take place between the copyright user and SoundExchange, an intermediary non-profit performance rights organization, to which sound recording performance royalties are paid and by which royalties are distributed to the copyright holders. *Id.* at 6.

The distinction between the two calculation standards applied by the CRB gives rise to the problem for which this Comment seeks to find a remedy; these standards have different policy objectives, which lead to vastly different royalty rates between the two types of digital audio services, encumbering Internet radio's survival and growth.[109]

B. The 801(b) Standard

In determining royalty rates for preexisting satellite digital audio radio services and preexisting subscription services (i.e. satellite and cable radio), the CRB first establishes a benchmark "marketplace" royalty rate for the particular service, which is "a reasonable estimate of a marketplace derived benchmark."[110] The CRB also establishes "the upper boundary for a zone of reasonableness," which can be the benchmark rate or a higher value.[111] Then, 17 U.S.C. § 801(b)(1) instructs the CRB to apply the following objectives, adding or subtracting value to or from the benchmark rate after consideration of each objective:

> (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.[112]

Combined, these objectives achieve the constitutional and economic goals of copyright law.

> As an alternative to paying the CRB rates under statutory licenses created by Congress, digital music services providers can, in theory, negotiate rates directly with record companies and pay the royalties directly to the record companies, bypassing SoundExchange.

Id.

[109] Villasenor, *supra* note 23, at 5.

[110] *Id.*

[111] *Id.*

[112] 17 U.S.C. § 801(b)(1) (2012).

Recall, the Copyright Clause provides Congressional power to "promote the progress of science and useful arts."[113] Objective (A) and (B) assure the promotion of creative works: (A) explicitly requiring maximization of creative works for the public good, and (B) incentivizing creative production of works through compensation for creative efforts.[114] Objective (B) also incentivizes the distribution of such works, affording copyright *users,* like Sirius XM, adequate compensation.[115] Objective (C) focuses on the economic contributions of the different players in getting the works to market.[116] "In the context of digital music broadcasting, this can exert downward pressure on rates, as it is the copyright users (i.e. the digital broadcasters) that will generally be making the larger investments."[117] Finally, objective (D) protects the market players, "requir[ing] . . . a royalty rate that will stave off volatility as a result of a broadcaster's current economic condition."[118] This prevents the CRB from adopting rates that will kill off business models of broadcasters who are subject to the 801(b) standard.[119] This objective is particularly important; absent the requirement to "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices,"[120] royalty rates can become so disruptively high that certain players will be driven out of the market altogether.[121]

The functions of each objective were evident during the CRB proceedings of 2006 and 2007, which set the royalty rates for XM and Sirius satellite radio[122] through 2012.[123] In that particular proceeding, based on the submissions of the parties, the CRB determined that the benchmark marketplace royalty rate was 13% of subscriber revenues, and that 13% "mark[ed] the upper boundary for a zone of reasonableness for potential marketplace benchmarks from which to identify a rate that satisfies any 801(b) policy considerations not adequately

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[113] U.S. CONST. art. I §, 8; *see also supra* notes 19–21 and accompanying text.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Villasenor, *supra* note 23, at 7.

[118] Anderson, *supra* note 26, at 92.

[119] *Id.*

[120] 17 U.S.C. § 801(b)(1)(D) (2012).

[121] Anderson, *supra* note 26, at 96–97.

[122] These two companies have since merged, forming SiriusXM, and the company is still classified as a preexisting satellite digital audio radio service subject to the 801(b) standard. Villasenor, *supra* note 23, at 7–8.

[123] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 37 C.F.R. § 382 (2013).

addressed in the market."[124] The CRB also determined the lower boundary to be 2.35% of gross revenues, as that equaled the musical works rate for satellite digital audio radio services, but the judges emphasized that the final rate under 801(b) should be closer to the benchmark marketplace rate of 13%.[125]

The CRB then proceeded to apply the four objectives of the 801(b) standard to the benchmark marketplace rate.[126] Objectives (A)[127] and (B)[128] did not adjust the benchmark rate. With respect to objective (C), the CRB found the benchmark marketplace rate might be discounted, since "the primary type of . . . expenditure incurred by the [satellite digital audio radio services] that does distinguish them from other digital distributors of music is their expenditure for satellite technology."[129]

Finally, the CRB's evaluation under objective (D) was significant in discounting the 13% upper marketplace benchmark. The judges pointed out that increasing the current rate of 2.5% of revenue to 13% would constitute the type of disruption (D) protects against.[130] Further, the CRB considered undue constraints on the satellite digital audio radio services' ability to make investments in satellite technology during the license period.[131] Thus, the CRB ultimately decided the royalty rates for satellite digital audio radio services would start at 6% of gross revenue in 2006, gradually increasing to 8% of gross

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[124] *Id.*

[125] *Id.*

[126] *Id.* at 4094–96.

[127] In considering objective (A), the CRB determined that "an effective market determines the maximum amount of product availability consistent with the efficient use of resources," and "in the instant case, the policy goal of maximizing the availability of creative works to the public is reflected in the market solution embodied in the benchmark market rates." *Id.* at 4094–95.

[128] Evaluating objective (B), that the rate achieves a fair return to copyright owner and fair income to the copyright user, the satellite digital audio radio services argued that fair income to the copyright user is that which generates "a competitive risk-adjusted return on past and future investments." *Id.* at 4095. SoundExchange put forth that a fair income to the copyright owner will not result if the four policy objectives produce a below-market rate, because in that case, the record industry will not earn enough royalties to compensate for the substitution effect that satellite digital audio radio services have on revenues from sales of music across other platforms. *Id.* at 4096.

[129] *Id.* Further, the CRB affirmed that:

> [n]othing in the record of evidence before us indicates that the [satellite digital audio radio services] can continue to make their current product available to the public in the license period at issue in this proceeding without making new expenditures related to their satellite technology. Clearly, new satellite investment, unlike other costs, cannot be postponed without a serious threat of disruption to the service the [satellite digital audio radio services] provide.

Id. at 4097.

[130] *Id.*

[131] *Id.*

revenue by 2012.[132] This is illustrative of the importance of objective (D) and the significance of the 801(b) considerations, which take into account not only protection of the copyright owners but also protection of the copyright users in determining royalty rates.

C. Willing Buyer/Willing Seller Standard

In calculating royalty rates for new subscription services and eligible non-subscription transmissions (i.e. Internet radio), 17 U.S.C. § 114(f)(2)(B) instructs the CRB to apply what is commonly referred to as the willing buyer/willing seller standard as follows:

> In establishing rates and terms for transmission by eligible nonsubscription and new subscription services, the Copyright Royalty Judges shall 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. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including—
>
> > (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
> >
> > (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).[133]

This standard does not consider maximizing the availability of creative works to the public or affording the copyright owner a fair return, disregarding the constitutional objectives of copyright law.[134] The most important objective

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[132] *Id.*

[133] 17 U.S.C. § 114(f)(2)(B) (2012).

[134] Andrew Stockment, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2165 (2009). The willing buyer/willing seller standard does not focus on the willing buyer, but is concerned primarily with the willing seller. *Id.* This standard does not consider factor (B) of the 801(b) standard, which makes affording cable and satellite copyright users a "fair income under existing economic conditions" a key objective in royalty rate setting. 17 U.S.C. § 801(b)(1) (2012). For Internet radio copyright users, the CRB only needs to consider whether Internet radio substitutes for or promotes the sales of phonorecords and whether Internet radio

of 801(b) is objective (D), which requires the CRJs to "minimize any disruptive impact on the structure of the industries involved,"[135] is irrelevant in applying the willing buyer/willing seller standard.[136] Moreover, the two considerations of the willing buyer/willing seller standard are "explicitly not to be used as a basis for adjusting [the benchmark marketplace] rates," though that is the sole purpose of the 801(b) factors.[137]

In calculating royalty rates under the willing buyer/willing seller standard, the CRJs are only to consider what most willing buyers and willing sellers would agree to.[138] This sole consideration is fundamentally flawed, in that it attempts to determine what willing buyers and willing sellers would agree to in a free-market when there is *no competitive market* for sound recording performance royalties.[139] The key instance in which the willing buyer/willing seller standard did not pan out is known as "Webcaster II," a CRB proceeding in which rates were set so high that Congress was required to step in and do something before webcasters would have to shut down completely.[140]

Webcaster II involved the CRB proceedings held to determine royalty

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interferes with the willing-seller's stream of revenue for its sound recording. 17 U.S.C. § 114(f)(2)(B).

[135] 17 U.S.C. § 801(b)(1)(D).

[136] 17 U.S.C. § 114(f)(2)(B).

[137] The two factors enumerated in the statute do *not* constitute additional standards or policy considerations. Nor are these factors to be used *after* determining the willing buyer/willing seller rate as bases to adjust that determination upward or downward. The statutory factors are merely factors to be considered, along with any other relevant factors, in *determining* rates under the willing buyer/willing seller standard.

Report of the Copyright Arbitration Royalty Panel, No. 2000-9 1, 21(2002) (Van Loon, Gulin & von Kann, Arb.).

[138] *Id.*

[139] Villasenor, *supra* note 23, at 10.

> First, there is no market for licensing these rights other than under the statutory license itself. The sound recording performance right came into existence at the same time as the statutory license. Today, the statutory license is essentially the sole means for licensing non-interactive services. The only "market" for these rights is the compulsory license market.
>
> Second, there is no history of "fair market" licensing for the rights. To the contrary, all licensing negotiations are conducted under an antitrust exemption by a single seller (SoundExchange), and are carefully calculated by the seller to set precedent for future arbitration, rather than to reflect a fair market price.

Villasenor, *supra* note 23, at 10 (citing DiMA).

[140] Villasenor, *supra* note 23, at 10. Congress's solution included the Webcaster Settlement Acts of 2008 and 2009. *See infra* Section III.

rates for Webcasters for the 2006 to 2010 period.[141] In the proceedings, the Court considered the motions of twenty-eight participants.[142] The participants included copyright holders, who were represented by SoundExchange,[143] and copyright users, who were represented by DiMA[144] and The Corporation for Public Broadcasting ("CPB").[145] After a failed voluntary negotiation period, the board heard testimony and rebuttal testimony, which lasted over a year, from May 2005 through November 2006.[146] After filing the Proposed Finding of Fact and Conclusions of Law, participants failed to submit stipulated terms, which had been requested by the CRB.[147] The final determination, which was issued on May 1, 2007, imposed rates starting at $0.0008 per play in 2006 and increasing to $0.0019 by 2010.[148] The ruling applied a $500 minimum fee to cover SoundExchange's administrative costs, which would be based on Aggregate Tuning Hours[149] for noncommercial and commercial webcasters.[150]

The determination was a death knell for webcasters; though the rates seem like a tiny fraction of a penny for each play, in the aggregate, the royalty rates were likely to exceed their revenues.[151] The CEO of Pandora said he was unaware "of any Internet radio service that believe[d] they c[ould] sustain a business at the rates set by this decision."[152] So they appealed, asserting that the CRB's determination was arbitrary.[153] The Court of Appeals found that the

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[141] Villasenor, *supra* note 23, at 10.

[142] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 37 C.F.R. § 380 (2011) [hereinafter Final Rule].

[143] *See supra* note 108 (defining SoundExchange).

[144] *See supra* text accompanying note 90 (defining DiMA).

[145] Final Rule, *supra* note 142. The CPB "has been the steward of the federal government's investment in public broadcasting and the largest single source of funding for public radio, television, and related online and mobile services" since 1968. *About CPB*, CPB, http://www.cpb.org/aboutcpb/ (last visited Jan. 20, 2014).

[146] Final Rule, *supra* note 142 at 24,085. The testimony took forty-eight days spread out over a year's time, and involved 13,288 pages of transcript and 192 exhibits. *Id.*

[147] *Id.* It appears that in requesting stipulated terms, the CRB was trying to give the participants a last chance to reach agreement on some issues, allowing for the market principles of the willing buyer, willing seller standard to be reflected in the final determination. The fact that the parties were unwilling to submit such terms shows the deadlock between them, and reiterates the absence of a true "market" in sound recording performance rights. *Id.*

[148] *Id.*

[149] Aggregate Tuning Hours are the total number of hours of programming multiplied by the number of listeners per hour. *Id.* at 24,086.

[150] *Id.*

[151] Villasenor, *supra* note 23, at 10.

[152] Louis Hau, *Will Web Radio Get Turned Off?*, FORBES.COM (Mar. 7, 2007, 6:00 AM), http://www.forbes.com/2007/03/06/radio-internet-ruling-tech-cx_lh_0307radio.html.

[153] Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748 (D.C. Cir. 2009).

$500 minimum was in fact arbitrary and affirmed other parts of the determination, but remanded the whole determination for the CRB to reconsider.[154] During this intermediary period, "webcasters and the general public using webcasting services voiced strong feelings about the fairness of the Copyright Royalty Board determination and provoked a legislative response."[155] The legislative branch denounced the rates, devising an escape plan: The Webcaster Settlement Acts of 2008 and 2009.[156]

III. "I STILL HAVEN'T FOUND WHAT I'M LOOKING FOR"[157]: THE WEBCASTER SETTLEMENT ACTS OF 2008 AND 2009—A TEMPORARY SOLUTION

Congress was quick to act after the Webcaster II proceeding, providing a last minute opportunity that would save the Internet Radio business.[158] The Webcaster Settlement Act of 2008 gave webcasters an additional negotiating period, allowing them the chance to work directly with SoundExchange[159] to achieve a lower rate alternative to the CRB decision by February 15, 2009.[160] During this period, the National Association of Broadcasters, the CPB, and some smaller webcasters were able to achieve agreements with SoundExchange.[161]

Many of the larger commercial webcasters did not reach agreements before the deadline.[162] Congress extended the negotiation period to July 30, 2009 in the Webcaster Settlement Act of 2009.[163] Finally, these larger webcasters, with revenues at or in excess of $1.25 million, reached a settlement with SoundExchange.[164] The webcasters, which included Pandora, agreed to pay the greater of 25% of revenue or a per play rate of $0.0008 in 2006, which would increase each year, rising to $0.0015 per play in 2015.[165]

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[154] *Id.* at 755, 766–67.

[155] Andrew D. Stephenson, *Webcaster II: A Case Study of Business to Business Rate Setting by Formal Rulemaking,* 7 HASTINGS BUS. L.J. 393, 404 (2011).

[156] Villasenor, *supra* note 23, at 11.

[157] U2, I STILL HAVEN'T FOUND WHAT I'M LOOKING FOR (Island Records 1987).

[158] H.R. Res. 7084, 110th Cong. (2008).

[159] *See supra* note 108 (defining SoundExchange).

[160] *Id.*

[161] Villasenor, *supra* note 23, at 11.

[162] *Id.*

[163] Webcaster Settlement Act of 2009, PL 111-36, 123 Stat. 1926 (2009).

[164] David Oxenford, *Pureplay Webcasters and SoundExchange Enter Into Deal Under Webcaster Settlement Act to Offer Internet Internet Radio Royalty Rate Alternative for 2006-2015*, BROADCAST LAW BLOG (July 7, 2009), http://www.broadcastlawblog.com/2009/07/articles/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-2006-2015/.

[165] *Id.*

Since Webcaster II, the CRB has continued applying the willing buyer/ willing seller standard to set rates for those webcasters who are not subject to the Webcaster Settlement Act agreements for 2011 to 2015.[166] Those rates are even more exorbitant than the Webcaster II rates; they started at $0.0019 per play in 2011 and will rise to $0.0023 per play in 2015.[167] Comparatively, under the 2009 Webcaster agreement for those webcasters making $1.25 million or more in revenues, the rates started at $0.00102 per play in 2011 and are rising to $0.00140 in 2015.[168]

There is a clear and substantial disparity between the rates reached in the Webcaster Settlement Act agreements and the rates determined by the CRB; looking at how the CRB rates would have impacted Pandora is particularly illustrative.[169] In 2012, Pandora paid $0.0011 per performance under its 2009 agreement with SoundExchange, resulting in content acquisition costs equaling 69% of revenue in the company's first fiscal quarter of the year.[170] If the company had been paying $0.0021 under the CRB rates, content acquisition costs would have risen dramatically, and it is likely they would have exceeded Pandora's revenues.[171]

Though the Webcaster Settlement Acts have kept most webcasters, like Pandora, up and running, the solution is temporary and far from perfect.[172] For one, the agreements are set to expire in 2015, the same year the current CRB royalty rates will expire.[173] Secondly, the Webcaster Settlement agreements are still extraordinarily high, crushing webcasters' abilities to profit at their full potential; Pandora's loss of 69% of revenues is not ideal.[174] This is why webcasters, with Pandora at the forefront of the battle, have been waging war against the CRB royalty rate setting standards and SoundExchange, pleading with the public for a more "fair" standard.[175]

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[166] 37 C.F.R. § 380 (2011).

[167] *Id.*

[168] Oxenford, *supra* note 164.

[169] Villasenor, *supra* note 23, at 11.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Support the Internet Radio Fairness Act*, PANDORA, (Sept. 24, 2012) http://web.archive.org/web/20120924022340/http://www.pandora.com/static/ads/irfa/irfa.html.

> The issue is long-standing royalty rate discrimination against internet radio. As each new form of radio was invented (including cable and satellite radio), new legislation was passed but only addressed the new form. The result is dramatically different royalty rates: satellite pays about 7.5% for

IV. "PAPA'S GOT A BRAND NEW BAG"[176]: THE INTERNET RADIO FAIRNESS ACT OF 2012

A. What is the Internet Radio Fairness Act?

On September 21, 2012, Representatives Jason Chaffetz[177] and Jared Polis[178] introduced a bill that sought to level the playing field, offering a bi-partisan solution to the royalty rate setting discrimination that is posing a threat to the Internet Radio industry.[179] Senator Ron Wyden introduced an identical bill in the Senate.[180] The bill would do away with the willing buyer/willing seller standard, providing for Internet radio royalty rates to be calculated using the same 801(b) standard that is currently used to calculate satellite and cable royalty rates.[181]

> revenues and cable pays about 15%, while Pandora pays more than 50% of revenue in royalties. The inequity in how different digital radio formats are treated under the law when it comes to setting royalties is a clear case of legislation falling behind advances in technology. The current law penalizes new media and is astonishingly unfair to internet radio.
>
> We are asking for our listeners' support to help end the discrimination against internet radio. It's time for Congress to stop picking winners, level the playing field and establish a technology-neutral standard.

Id. To be clear, since the IRFA has gone into hibernation, Pandora is no longer campaigning for the IRFA or any like bill to be introduced, but rather has shifted its focus to addressing the upcoming copyright royalty period. Brad Hill, *Pandora Shifts Focus Away from Internet Radio Fairness Act*, RAIN NEWS (Nov. 26, 2013), http://rainnews.com/pandora-shifts-royalty-focus-away-from-internet-radio-fairness-act/. Remember, this is not necessarily an issue of whether 50% of revenues is too much for any webcaster to pay in royalties. Though this Comment takes the position that 50% is substantial, whether or not it is appropriate is the topic of an entirely different comment. Rather, the question addressed here is whether this is *unfair* solely based on the fact that other companies providing the same product are paying significantly less for it, not because of free-market bargaining, but because of statutory royalty rate standards.

[176] JAMES BROWN, PAPA'S GOT A BRAND NEW BAG (King Records 1965)

[177] *Reps. Chaffetz and Polis Introduce Bi-Partisan Internet Radio Act*, UNITED STATES CONGRESSMAN JASON CHAFFETZ, (Sept. 21, 2012), https://chaffetz.house.gov/press-release/reps-chaffetz-and-polis-introduce-bi-partisan-internet-radio-act. Jason Chaffetz is a republican representative for the state of Utah. *Id.*

[178] *Id.* Jared Polis is a democratic representative for the state of Colorado. *Id.*

[179] *Id.*

[180] *Id.* Senator Ron Wyden, democratic senator for the state of Oregon, introduced companion legislation in the Senate. *Id.*

[181] H.R. 6480, 112th Cong. § 3 (2012); S. 3609, 112th Cong. § 3 (2012). Recall, the 801(b) standard requires the CRB to consider the following objectives: (1) maximize the availability of works to the public, (2) give copyright owners and online services a fair return, (3) reflect the relative roles of the copyright owner and online service, and (4) minimize disruptive impact on the structure of the industries involved and general industry practices. *See supra* Section II.B.

1. Calculating Royalties Under the Internet Radio Fairness Act

Though the 801(b) standard does not cap royalty rates or guarantee a better rate, the standard does eliminate the disparity causing Internet radio providers to pay substantially higher amounts relative to the rates paid by other digital music broadcasters.[182] Moreover, in addition to considering the 801(b) factors, the CRB would be required to take into account "the public's interest in both the creation of new sound recordings of musical works and in fostering online and other digital performances of sound recordings" as well as "the income necessary to provide a reasonable return on all relevant investments, including investments in prior periods for which returns have not been earned" under the IRFA.[183] The proposed Act provided additional guidelines in the CRB's application of 801(b):

> In applying the objectives set forth in section 801(b)(1), the Copyright Royalty Judges—
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> (i) shall not disfavor percentage of revenue-based fees;
>
> (ii) shall establish license fee structures that foster competition among the licensors of sound recording performances and other programming, including per-use or per-program fees, or percentage of revenue or other fees that include carve-outs on a pro-rata basis for sound recordings the performance of which have been licensed either directly with the copyright owner or at the source, or for which a license is not necessary;
>
> (iii) shall give full consideration for the value of any promotional benefit or other non-monetary benefit conferred on the copyright owner by the performance;
>
> (iv) shall give full consideration to the contributions made by the digital audio transmission service to the content and value of its programming; and
>
> (v) shall not take into account either the rates and terms provided in licenses for interactive services or the determinations rendered by the Copyright Royalty Judges prior to the enactment of the Internet Radio Fairness Act of 2012.[184]

In applying the 801(b) standard, before the CRB considers the 801(b) objectives, the Judges establish a benchmark marketplace royalty rate.[185] Then,

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[182] *Reps. Chaffetz and Polis Introduce Bi-Partisan Internet Radio Act*, *supra* note 177.

[183] Internet Radio Fairness Act, H.R. 6480, 112th Cong. §§ 3(a)(2)(C)(i)(I)–(II) (2012); Internet Radio Fairness Act, S. 3609, 112th Cong. §§ 3(a)(2)(C)(i)(I)–(II) (2012).

[184] H.R. 6480 §§ 3(a)(2)(D)(i)–(v); S. 3609 §§ 3(a)(2)(D)(i)–(v).

[185] *See supra* Section II.B.

the judges consider the 801(b) objectives and chip away at the marketplace royalty rate, eventually achieving the final rate determination.[186] Since establishing a benchmark marketplace royalty rate requires the Judges to consider the market value of sound recording public performance rights, it is important the parties involved have the best market information.[187] The IRFA would take steps to ensure the CRB, rights holders, and copyright users have the same market information and data on what types of royalty rates are negotiated in private contracts.[188]

2. Other Elements Of The Internet Radio Fairness Act

The IRFA would also establish new qualifications that judges must meet to sit on the CRB.[189] Currently, under 17 U.S.C. § 801(a), the Librarian of Congress appoints the three full-time CRJs and chooses one of the three to serve as the Chief Copyright Royalty Judge.[190] The Librarian needs only consult with the Register of Copyrights in making these appointments.[191] The IRFA would require the President, with the advice and consent of the Senate, to nominate the judges.[192] The bill also proposed new qualifications for the judges, requiring each of them to have ten plus years of legal experience as an attorney as well as significant experience adjudicating arbitrations or court trials.[193] The Chief

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[186] *See supra* Section II.B.

[187] Ron Wyden, *The Internet Radio Fairness Act of 2012*, RON WYDEN SENATOR FOR OREGON, (Sept. 21,2012), http://www.wyden.senate.gov/download/summary-of-internet-radio-fairness-act-of-2012.

[188] *Id.*

[189] *Id.*

[190] 17 U.S.C. § 801(a) (2012).

[191] *Id.*

[192] H.R. 6480 § 2(1)(A); S. 3609 § 2(1)(A). The new appointment method would more clearly affirm that the CRB appointments satisfy the constitutional requirements of the Appointments Clause, a topic that has been hotly contested. Recently, the court in *Intercollegiate Broadcast System v. Copyright Royalty Board* did determine that the Copyright Royalty Judges are appointed constitutionally, but only through invalidating certain other parts of the CRJ appointment statute. 574 F.3d 748, 755–56 (2009). "[T]he changes in IRFA would make the analysis much more straightforward." Jodie Griffin, *The Internet Radio Fairness Act: Revamping the Online Radio Marketplace*, PUBLIC KNOWLEDGE (Nov. 2, 2012), http://publicknowledge.org/blog/overview-internet-radio-fairness-act.

[193] H.R. 6480 § 2(2)(A); S. 3609 § 2(2)(A). Currently, the only qualification is that one Judge must have economic experience and one Judge must have copyright experience. Griffin, *supra* note 192.

> Removing the requirements for knowledge of economics or copyright could cut both ways . . . . [T]his may mean that the CRJs are more likely to have a learning curve in the position. On the other hand, this may ensure that the judges arrive at the topic objectively, without established inclinations to agree

Copyright Royalty Judge would be required to have seven or more years of experience adjudicating court trials in civil cases.[194]

In its proceedings, the CRB currently applies its own procedures laid out in the Code of Federal Regulations.[195] This has caused many regulators to question the fairness of the process used in establishing royalty rates.[196] The IRFA provisions would require the CRB to follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence, designed to give more credibility to CRB decisions.[197]

Other provisions of the IRFA would allow webcasters to make digital copies of the music they own, which can be used for the sole purpose of facilitating webcasting.[198] As the current law stands, webcasters face the risk of litigation every time they back up their catalogue to their servers.[199] This creates additional costs and risks for webcasters, further inhibiting their maintenance and growth.[200] Permitting these copies would make webcasters more efficient and less vulnerable to litigation.[201]

In order to make artist compensation easier and to combat infringement, the IRFA included provisions that would help establish a global music rights database.[202] "Such registry should, to the extent practicable, include all known or copyrighted musical works, the writers of the work, the owners of the rights, the entity on behalf of those owners who can license such rights on a territory-by-territory basis, and all known sound recording data."[203] The database would allow those wishing to broadcast music to easily obtain the public performance rights to do so and for the copyright owners to hold the broadcasters accountable for payment.[204]

The purpose of the Copyright Clause of the United States Constitution is to promote the creation and dissemination of knowledge in order to enhance the

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with one party over others.

Id.

[194] H.R. 6480 § 2(2)(A); S. 3609 § 2(2)(A).

[195] 37 C.F.R. § 350–354 (2013).

[196] Griffin, *supra* note 192.

[197] H.R. 6480 § 6(a)(1); S. 3609 § 6(a)(1).

[198] H.R. 6480 §§ 4(a)(A)–(B); S. 3609 §§ 4(a)(A)–(B); Wyden, *supra* note 182.

[199] Wyden, *supra* note 187.

[200] Wyden, *supra* note 187.

[201] Wyden, *supra* note 187.

[202] Wyden, *supra* note 187.

[203] H.R. 6480 § 7; S. 3609 § 7.

[204] Wyden, *supra* note 187.

general public good.[205] Applying the same ideals, the IRFA aimed "to remove the barriers to innovation in digital broadcasting, enabl[ing] new webcasters to start up and create jobs and increase competition in the music marketplace."[206]

3. Where is the Internet Radio Fairness Act Now?

Hearings regarding the Internet Radio Fairness Act of 2012 were held before the House Judiciary Subcommittee on Intellectual Property, Competition and the Internet in November 2012.[207] However, the bill was not voted on before the end of the 112th Congress. Hopefuls do not consider the bill dead, as "insiders" have assured that the bill has simply slipped into a "hibernation" from which it will awaken before the 113th Congress.[208] The Webcaster Settlement Act agreements are set to expire in 2015 at the same time the current webcasting CRB royalty rates will expire.[209] In order to avoid responsive Congressional action similar to that required in the previous CRB decision, it is essential that Congress act proactively in reintroducing legislation identical to the IRFA before the upcoming decision gets underway.

B. The Sides of the Battle

1. Those For New Legislation

"Internet radio should be a boon to the entire audio market—from the creators, to the distributors, and of course to the consumers—but instead it is barely hanging on."[210] For webcasters, listeners, and many artists, the IRFA is a glimmer of hope; a hand reaching out to pull Internet radio out of harm's way.

a. Webcasters

Webcasters are simply being crushed under the current royalty rate-setting scheme.[211] The willing buyer/willing seller standard is hindering the webcasting industry, which is arguably the future of music business.[212] The CRB's

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[205] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[206] Wyden, *supra* note 187.

[207] Seyler, *supra* note 37.

[208] Peoples, *supra* note 35. However, at the date of this publication, we are within the term of the 113th Congress, and the bill has yet to be reintroduced. *See infra* note 323.

[209] *See supra* note 165-66 and accompanying text.

[210] Peter Reap, *COPYRIGHT NEWS: Text of Bipartisan Internet Radio Bill would Reduce Royalty Rates*, INTELL. PROP. L. DAILY (CHH) (Sept. 24, 2012).

[211] Black, *supra* note 17.

[212] Peoples, *supra* note 35.

application of the willing buyer/willing seller standard is resulting in rates that leave businesses like Pandora paying more than 60% of revenue in royalties,[213] while cable companies and satellite radio, like Sirius XM, are paying 8% of gross revenue.[214] Rates that are too high limit market entry in the Internet radio industry, and businesses like Imeem and Lala have swiftly gone under due to the continuously rising costs of royalties.[215] Rates that are set fairly using a technology-neutral standard, which would be achieved by enactment of the IRFA, will stimulate entry, investment, and innovation in the webcasting market.[216]

Webcasters' primary argument involves the unfairness in the CRB applying the 801(b) standard to cable and satellite radio providers, while applying the willing buyer/willing seller standard to Internet radio providers.[217] This royalty-rate setting scheme was established about fifteen years ago.[218] The system, as it stands, is outdated and the IRFA would not set specific royalty rates for Internet radio, but it would allow the CRB to consider the same information it does when it sets royalty rates for cable and satellite radio.

b. Listeners

Listeners also stand to lose if the IRFA is not reintroduced and enacted.[219] Right now, a Pandora user has access to songs of more than 100,000 artists, providing a significant amount of music choices at absolutely no cost.[220] TuneIn gives the listener access to music, sports, and the news, allowing "[t]he user [to] search by keyword and listen to local stations or see what the rest of the world has to offer."[221] Through Internet radio, listeners can select their own

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[213] *Support the Internet Radio Fairness Act*, *supra* note 175; Annual report, *supra* note 12, at 57.

[214] Villasenor, *supra* note 23, at 1.

[215] Villasenor, *supra* note 23, at 1. David Pakman, a venture capitalist, is staying out of the Internet radio field, all because of the current royalty scheme. Randy Lewis, *Internet Radio Fairness Act Debate Opens in Washington,* LOS ANGELES TIMES (Nov. 30, 2012), http://articles.latimes.com/2012/nov/30/entertainment/la-et-ms-internet-radio-fairness-act-pandora-congress-hearings-20121129. At the November hearings concerning the IRFA, he testified that these royalties "virtually prevent[] success." *Id. "*The failure rate of digital music companies is among the highest of all fields . . . making them non-investable businesses." *Id.* Bruce Reese, the President and CEO of Hubbard Radio also testified. *Id.* "The Internet presents an opportunity to expand, but streaming is impeded by high, unaffordable royalty rates. There simply is not enough revenue to cover costs." *Id.*

[216] *Id.*

[217] Villasenor, *supra* note 23, at 1–2.

[218] *See* Villasenor, *supra* note 23.

[219] *Support the Internet Radio Fairness Act*, *supra* note 175.

[220] *Id.*

[221] Gatto, *supra* note 15.

channels and music, which they can carry across platforms including their computers, cellphones, and tablets wherever they have an Internet connection.[222] These free services are what the consumer stands to lose if webcasting businesses succumb to royalty rates.

Moreover, the listeners come in large numbers.[223] Pandora alone reached 100 million listeners in 2011, with 36 million actively listening each month.[224] As of January 2013, the number of active listeners had jumped to 65.6 million.[225] Some of these listeners have spoken out on the unfairness Internet radio faces and think it makes sense to level the playing field, questioning why some distributors have to pay more purely because of the technology they use to disseminate the same product.[226] In one listener's words, "[t]his [the IRFA] is important to me because I am an avid listener of Internet radio and I don't believe they [Internet radio providers] should be at a disadvantage. . . . Internet is the way of the world and I think creating legal equality between Internet-based services and traditional services reflects the new reality."[227]

c. Artists

Helping artists is a key objective of the IRFA, as a broadened digital market will allow artists to obtain extensive exposure and increased compensation for their works.[228] Though there are artists and copyright holders that strongly believe the IRFA will hurt them and their profitability,[229] many artists agree that the IRFA is important to not only the survival of webcasting, but also to the survival of their careers.[230] "Through Internet radio, musicians find additional listeners who love their style of music, purchase their songs and

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[222] Jerry Low, *The Ultimate Guide: What Is Online Radio and How Does It Work*, THE DAILY EGG, (Oct. 1, 2013), http://blog.crazyegg.com/2013/10/01/ultimate-guide-online-radio-work/.

[223] Ali Elkin, *Pandora Reaches 100 Million Listeners*, CNN TECH (July 12, 2011), http://articles.cnn.com/2011-07-12/tech/pandora.users_1_listeners-redesign-users?_s=PM:TECH.

[224] *Id.*

[225] *Pandora Announces January 2013 Audience Metrics,* Financial Information, PANDORA INVESTOR RELATIONS (Feb. 6, 2013), http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&id=1782073.

[226] Aaron Weir, *Support the Internet Radio Fairness Act,* CHANGE.ORG (Feb. 20, 2013), http://www.change.org/petitions/support-the-internet-radio-fairness-act, (featuring reasons listeners support the, including this comment from Armando Saliba of San Antonio, Texas.)

[227] *Id.*

[228] Wyden, *supra* note 187.

[229] *See infra* Section IV.B.2.

[230] *The Internet Radio Fairness Act of 2012: Good for Musicians, Good for Listeners, Good for Innovation*, INTERNET RADIO FAIRNESS COALITION (Feb. 20, 2013), http://web.archive.org/web/20130204011246/http://internetradiofairness.com/wp-content/uploads/2012/11/Artists-Quote-Sheet-V8.pdf.

albums, and buy tickets to their shows."[231]

In fact, according to a Nielsen/NetRatings research study, those who listened to Pandora were "three to five times more likely to have purchased music in the last ninety days than the average American."[232] That study took place in 2007;[233] now, users are even more likely to purchase the music they listen to on Pandora.[234] An NPD Group Music Acquisition Monitor study found that, on average, Pandora listeners purchased 29% more music during the second quarter of 2012 compared with 2011.[235] Patrick Laird, a musician in an independent, instrumental rock band called Break of Reality, explains how Internet radio has been key to his band's success in a letter he wrote to Congress:

> Break of Reality has been performing for almost a decade now, and next to performing live, [I]nternet radio has proved to be the greatest asset to the growth of our group. Our exposure on Pandora and Spotify has led directly to a huge increase in music sales through digital music stores such as iTunes and Amazon.com, and has created great performance opportunities by exposing our music to concert presenters around the county who hire us to perform. . . . To be more precise, in the first twelve months of being included in Pandora's music library, our digital album sales increased by 290 percent from the year prior. In the subsequent 12 months, sales rose 406 percent from our pre-Pandora days. . . . Break of Reality asked its Facebook fans, in an objective manner, how they discovered our music for the first time. With an overwhelming response from our fans, the results were staggering: 44 percent of fans polled discovered our music through internet radio, 31 percent through live performance, 15 percent from a friend, and 9 percent from Youtube and other internet outlets. It is clear that the effectiveness of [I]nternet radio with regard to both product sales and promotional power is overwhelming, and the success and expansion of these companies are of the utmost importance for the future of our group.[236]

Many other artists agree that Internet radio is crucial to their careers.[237] Another band, Loquat, has achieved phenomenal success through Internet radio and recognizes it "has opened up these big windows of opportunity that [the band has not] had before for new audiences to discover [the band], people who

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[231] *Id.*

[232] Bruce Houghton, *Pandora Westergren Speaks for DiMA Before Congress,* HYPEBOT.COM (Feb. 20, 2013), http://www.hypebot.com/hypebot/2007/10/pandora-westerg.html.

[233] *Id.*

[234] Tim Westergren, *Pandora and Artist Payments,* PANDORA (Oct. 9, 2012), http://blog.pandora.com/pandora/archives/2012/10/pandora-and-art.html.

[235] *Id.*

[236] Patrick Laird, *Why I Support the Internet Radio Fairness Act*, THE HILL (Nov. 28, 2012), http://thehill.com/blogs/congress-blog/technology/269837-why-i-support-the-internet-radio-fairness-act.

[237] *The Internet Radio Fairness Act of 2012*, *supra* note 230.

would never otherwise find out about Loquat."[238] Musicians like Moby, a musician and DJ who has sold over 20 million albums,[239] and Dar Williams, a successful solo artist who has written several albums including an entire album about Greek mythology,[240] also support Internet radio and the IRFA.[241]

Not only do these artists attribute increased sales, opportunities, and overall career success to Internet radio, many are realizing substantial royalties, as well.[242] Though the current royalty rate is a fraction of a penny, approximately $0.0012 per play,[243] it is more than the $0 paid when a song is illegally downloaded, and it adds up quite quickly due to the growing number of Internet radio listeners and constantly increasing number of plays.[244] "For over two thousand artists Pandora will pay over $10,000 each over the next 12 months . . . and for more than 800 [Pandora] will pay over $50,000."[245] Donnie McClurkin, French Montana, and Grupo Bryndis, "working artists who live well outside the mainstream," stood to make $100,228, $138,567, and $114,192 in royalties respectively from Pandora for the period of October 2012 to October 2013.[246] Mainstream artists, like Drake and Lil Wayne, each make almost $3 million in royalties from Pandora annually.[247] For artists, there is a profit to be made from Internet radio, and thus another reason to protect the Internet radio industry through the IRFA.[248]

2. Those Against New Legislation

Though the IRFA may save Internet radio, many copyright owners already feel threatened by low royalty prices.[249] In 2007, during the Webcaster II

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[238] *Id.*

[239] *Moby Biography*, MOBY, http://www.moby.com/biography (last visited Jan. 20, 2014).

[240] *Dar Williams Bio,* DAR WILLIAMS, http://www.darwilliams.com/bio/ (last visited Jan. 20, 2013).

[241] *The Internet Radio Fairness Act of 2012*, *supra* note 230.

[242] Westergren, *supra* note 234.

[243] Connie Guglielmo, *Pandora Plays Nice As Apple's iTunes Radio Spins Up*, FORBES (Nov. 13, 2013), http://www.forbes.com/sites/connieguglielmo/2013/11/13/pandora-media-needs-a-new-music-royalty-deal-will-it-be-the-same-one-apple-got/.

[244] Westergren, *supra* note 234.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] Westergren, *supra* note 234. Some other artists' royalty earnings include: "Rascal Flatts ($670,351), Iron & Wine ($173,152), Bon Iver ($135,223), George Winston ($85,239), Zac Brown Band ($547,064), The Four Tops ($65,173), Ellie Goulding ($609,046), Mumford & Sons ($523,902)." Westergren, *supra* note 234.

[249] One hundred and twenty-five major, superstar artists wrote a letter to Congress begging them

proceedings,[250] the CRB set rates starting at $0.0008 per play for 2006 and increasing to $0.0019 per play for 2010.[251] These royalties were already barely a fraction of a penny when Congress employed the Webcaster Settlement Acts of 2008 and 2009, which allowed SoundExchange to negotiate with webcasters to establish even lower rates of $0.0008 per play for 2006 and increasing to $0.0015 per play for 2015.[252] Though this action was taken to prevent Internet radio from paying nearly all or more than their revenues in content acquisition costs,[253] SoundExchange and the artists do not think it is fair that webcasters supporting the IRFA are "asking Congress once again to step in and gut the royalties that thousands of musicians rely upon[.]"[254]

SoundExchange states that the IRFA sets out "to reduce the royalty fees that [artists] are paid for [webcasters'] use of [artists'] sound recordings on digital radio."[255] It explains that the willing buyer/willing seller standard currently employed by the CRB calculates "the fair market value of [artists'] recordings," implying that the IRFA would impose a rate "*less* than fair market value, potentially *much less*."[256] SoundExchange and other parties opposing the

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not to implement legislation that will allow Pandora to cut their royalties, arguing "[t]hat's not fair and that's not how partners work together." *125 Artists Unite to Oppose Pandora's Subsidy: "Not Fair and Not How Partners Work Together",* SOUNDEXCHANGE (Nov. 14, 2012), http://www.soundexchange.com/pr/125-artists-unite-to-oppose-pandoras-subsidy-not-fair-and-not-how-partners-work-together/. Among those artists who signed the letter are Sheryl Crow, Billy Joel, Rihanna, Jimmy Buffett, Britney Spears, and Stevie Nicks. *Id.*

[250] *See supra* notes 140–156 and accompanying text (discussing the Webcaster II proceedings).

[251] Villasenor, *supra* note 23, at 10.

[252] *Id.* at 11.

[253] *Id.* at 10–11.

[254] *125 Artists Unite*, *supra* note 249.

[255] *Not So Fair: Internet Radio Fairness Act*, SOUNDEXCHANGE SOUNDBYTE, Dec. 12, 2012, at 2. http://www.soundexchange.com/wp-content/uploads/2013/04/SoundByte-12-21-12.pdf.

[256] *Id.* (emphasis added). Though SoundExchange is probably correct that the IRFA *would* result in lower sound recording performance royalty rates, lower rates are not the absolute outcome of the IRFA. Mitch Stoltz, *The Internet Radio Fairness Act: What It Is, Why It's Needed*, ELECTRONIC FRONTIER FOUND., (Oct. 31, 2012), https://www.eff.org/Internet-Radio-Fairness-Act-Explanation (discussing that the legislation would put all digital music streaming companies on the same legal footing by applying the same standard to cable, satellite, and Internet radio, which will *probably* result in reduced royalties, but not mentioning that this would be the definite effect of the IRFA). The IRFA simply allows the CRB to make the same considerations and focus on the same objectives as it does when setting royalty rates for cable and satellite radio providers. Ben Sisario, *Proposed Bill Could Change Royalty Rates for Internet Radio*, N.Y. TIMES, (Sept. 23, 2012), http://www.nytimes.com/2012/09/24/business/media/proposed-bill-could-change-royalty-rates-for-internet-radio.html?_r=0. In making these considerations, the CRB could arrive at the same rates that are currently being paid under the Webcaster Settlement Acts or higher rates. Since cable and satellite providers do pay so much less than Internet radio under the 801(b) standard, of course webcasters like Pandora are hopeful that the 801(b) standard will result in lower rates than the willing buyer/willing seller standard. *Id.* However, the assertion SoundExchange makes that the IRFA will result in royalty rates for webcasters that are less than fair market value is false.

IRFA do not see the Act as a way to achieve fairness in applying the same standard to all digital music distributors; rather, these opponents see the Act as *reducing* royalty rates to the 801(b) standard.[257]

These parties argue that a level playing field for music distributors, achieved through the IRFA, is not a level playing field for music providers: the copyright owners.[258] "'Their talent is necessary to make the industry work. An artist gets 70 cents per song download, but only a tenth of a penny for a Pandora stream . . . ."[259] The Executive Director of musicFIRST, a coalition of musicians, recording artists, music businesses, and supporters which aims to ensure fair pay in the music industry,[260] argues that Internet radio cannot succeed "if it tries to do so on the backs of hard working musicians and singers."[261] It is much more difficult to be a musical artist today than it was in the 1980s or early 1990s; music sales have plummeted drastically, cut in half between 1999 and 2009, and musicians have been struggling to make up for that revenue.[262] SoundExchange, record labels, and artists are concerned that the

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Villasenor, *supra* note 23, at 10. Though the objective of the willing buyer/willing seller standard was to reach royalty rates that represent the fair market value of the sound recording performance right, it is not the standard's effect. *Id.* Since there is no free market for licensing these rights, there is no willing buyer/willing seller to evaluate. *Id.* "[A]ll licensing negotiations are conducted under an antitrust exemption, by a single seller (SoundExchange), and are carefully calculated by the seller to set precedent for future arbitration, rather than to reflect a fair market price." *Id.* The compulsory license market determines the rate, so there is no fair market rate under this standard. *Id.* In short, there is no way to determine what the fair market value of a sound recording performance right is, and so the allegation that applying the 801(b) standard to digital radio universally is incorrect. Further, the 801(b) standard allows the CRB to consider "evidence both on the value of the music and on the effect the royalty rate would have on the industry overall," considerations that are not a party of the willing buyer/willing seller standard. *Id.* Though it will still not be possible to determine the absolute fair market value rate, this standard will arguably result in a rate that is generally more "fair." Sisario, *supra*.

[257] *Performance Rights and Digital Royalties Heat Up in Congress,* SOUNDEXCHANGE (Sept. 10, 2012), http://www.soundexchange.com/performance-rights-and-digital-royalties-heat-up-in-congress-2/. The language used by SoundExchange—"the legislation would reduce royalty rates for Internet radio stations to the so-called 801(b) standard"—has false implications. *See supra* Section II.B. Nothing in the 801(b) standard directly cuts, slashes or reduces royalties. *See supra* Section II.B. The 801(b) standard simply adds objectives for the CRB to consider in setting royalty rates. *See supra* Section II.B.

[258] *Not So Fair: Internet Radio Fairness Act*, *supra* note 251 (arguing that "a level playing field should not mean yet further reduced rates paid to artists and record labels.").

[259] Lewis, *supra* note 215.

[260] *Mission Statement*, MUSICFIRST, http://www.musicfirstcoalition.org/mission (last visited Mar. 7, 2014).

[261] Glenn Peoples, *From Alabama to Rihanna, Stars Fight Pandora on Royalties*, BILLBOARD (Nov. 15, 2012), http://www.billboard.com/articles/news/474153/from-alabama-to-rihanna-stars-fight-pandora-on-royalties.

[262] David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

decreasing royalty rates that could be implemented under the IRFA threaten not only the income of copyright owners, but in effect "a vibrant future for the digital music industry."[263]

C. "Gimme Shelter"[264]: The Internet Radio Fairness Act Should Be Reintroduced and Adopted To Save the Future of the Music Industry

Under the existing royalty rate setting arrangement, there are three key problems.[265] First, there are two different rate-setting standards that are applied to digital music distributors, which result in drastically different royalty rates based solely on the distributors' technology platforms; for the foregoing reasons explained in this Comment, this is simply not fair and it is causing a huge segment of the music industry to suffer.[266] Second, the system currently implemented is outdated.[267] The DMCA, which established the application of the 801(b) standard and the willing buyer/willing seller standard, was implemented "using a 1998 snapshot of the digital music broadcasting industry as a basis for deciding which companies get access to the more reasonable 801(b) standard."[268] Third, most music broadcasters can only obtain statutory rates under the willing buyer/willing seller standard, and "[t]he prospect of punitive rates [under this standard] provides a strong disincentive for investment and innovation."[269] The IRFA solves these problems by applying one rate setting standard, the 801(b) standard, to all digital broadcasters.

1. Impact of the Internet Radio Fairness Act: The Upside

There are two markets within the broader music industry that require protection.[270] On the one hand, there are artists, some who are superstar

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[263] Michael Huppe, *SoundExchange Letter*, (Oct. 2, 2012), http://memberdata.s3.amazonaws.com/mu/musicfirst/files/IRFALETTER_SoundExchange.pdf.

[264] THE ROLLING STONES, GIMME SHELTER (Decca Records/ABKCO Records 1969).

[265] Villasenor, *supra* note 23, at 12–13.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Radio Broadcasters Get An Earful At Internet Radio Fairness Hearing*, BILLBOARD, (Nov. 28, 2013), http://www.billboard.com/biz/articles/news/1082903/radio-broadcasters-get-an-earful-at-internet-radio-fairness-hearing.

> "Musicians and artists need to get adequately compensated to continue to create and share their art. And services need to thrive to ensure that the music continues to be heard. There's more of a symbiotic relationship here. We just have to find the sweet spot that maximizes the ability of musicians and

millionaires and others who are living paycheck to paycheck.[271] Artists must be protected; though the Copyright Clause of the Constitution establishes the law of copyright in order to promote thriving innovation, such can only be protected if the creators themselves can thrive.[272] If income for artists becomes too low, creation will be hindered, as artists will not be able to afford to continue creating the same amount of content and will seek alternative career paths.[273]

On the other hand is music distribution, which is a market whose future is clearly the Internet. Human culture around the globe is moving towards convenient music, cheap music, and even free music.[274] For one, listeners no longer want to purchase entire albums, huge portions of which contain music consumers do not even listen to.[275] With the advent of iTunes in 2003, the purchase of single songs became possible and simple.[276] Many consumers do not even want to pay $.99 for a song, when they can get the same copy for free, just as easily through illegal file sharing.[277] Now, there is Internet radio, where anyone can listen to any song they want for free, while royalty rates are still paid

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> composers and songwriters to make the music . . . and the technologies to thrive and to play that music for the benefit of . . . the world."

Id. (quoting Representative Howard Berman).

[271] Huppe, *supra* note 263 (discussing the reasons why artists need to be protected).

[272] *See generally id.* (explaining that if artists are not protected, the future of music will be threatened).

[273] *See generally* Dave Kusek, *How Will Musicians Earn Money in the Future?*, DIGITAL COWBOYS (June 2, 2011), http://digitalcowboys.com/2011/06/02/how-will-musicians-earn-money-in-the-future/ (pointing out that lowering incomes for musicians is affecting the content that is created, stating, "Musicians . . . are being asked to make more and more compromises as they're forced to put money ahead of their art on a previously unprecedented scale.").

[274] Goldman *supra* note 262; *see also supra* Introduction.

[275] Goldman *supra* note 262.

[276] *Id.*

> The major record labels unwaveringly committed themselves to the tradition that profits in the music industry were derived primarily from album sales. . . . This . . . became the model and tradition for how major record labels primarily generated revenue. . . . [H]owever, no matter how settled and solidified this profit model appeared, it was still only a tradition. . . . Recent monumental changes in the music industry shook the very foundation of the traditional profit model and have left the major record labels at a pivotal crossroad. The major record labels can choose to follow a tradition that relies on album releases for profit, a format that is all but doomed in the current market, or they can focus primarily on releasing singles or an individual song in the digital must marketplace, a format and market that has recently flourished with profits and opportunities.

Brian P. Nestor, *Notice: Albums Are Dead–Sell Singles*, 4 J. BUS. ENTREPRENEURSHIP & L. 221, 222–23 (2010).

[277] *Id.*

to the music creators.[278] Internet radio has been the solution to monetizing an industry whose product customers often expect for free.[279] Royalty rates are already so high that market entry is severely limited, but if rates get too high the bigger market players like Pandora and iHeartRadio will not be able to survive.[280] If the Internet radio market dissolves, the music industry, as a whole, could be in grave danger.

The IRFA seeks to protect both markets. Clearly, the IRFA most directly protects Internet radio.[281] The Act imposes a common standard to be applied to all digital music distributors, that will very likely result in decreased royalty rates for Internet radio.[282] Royalty rates keep getting higher under the standard currently applied to calculate Internet radio royalty rates, and under this scheme, content acquisition costs will surpass revenues and the Internet radio business model will fail.[283] The 801(b) standard applied to cable and satellite radio distributors currently results in content acquisition costs of about 8% of their revenues,[284] whereas the willing buyer/willing seller standard applied to Internet radio distributors currently results in content acquisition costs of over 61% of their revenues.[285] Therefore, it is very likely that if 801(b) is applied to Internet radio, content acquisition costs will decrease significantly, and at least will be unlikely to increase.

The IRFA will also protect artists, many of which depend on webcasters for the survival of their careers.[286] If webcasters go under, it is likely that they will take many artists and bands, like Break of Reality, with them.[287] There will no longer be an outlet for these artists to be heard and discovered, so they will lose access to the sales and performance opportunities that come with being featured on Internet radio.[288] Moreover, the IRFA will protect a key revenue stream in an "access model" age where the "purchase model" has died and fewer

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[278] *See supra* notes 9–11 and accompanying text.

[279] Dan Rys, *Label Execs Talk "Decline of Record Business, Rise of Music Business" at New Music Seminar*, BILLBOARD (June 18, 2012), http://www.billboard.com/biz/articles/news/1093183/label-execs-talk-decline-of-record-business-rise-of-music-business-at-new.

[280] *See supra* notes 210–211 and accompanying text.

[281] *See supra* Section IV.B.1.a. (discussing the IRFA's protection of webcasters).

[282] *See supra* Section IV.A.1. (discussing the 801(b) standard's blanket application to all digital music distributors under the IRFA).

[283] *See supra* Section III (explaining how rates were set so high in the Webcaster II proceedings that Congress had to impose legislation that would allow webcasters to keep their doors open).

[284] Villasenor, *supra* note 23, at 1.

[285] Annual Report, *supra* note 12, at 57.

[286] *See supra* Section IV.B.1.c. (explaining artists' dependency on Internet radio).

[287] *Id.*

[288] *Id.*

people are buying music and more people are listening to music illegally.[289] Since Internet radio has played a role in increasing music sales, if Pandora cannot survive, artists will lose many of the music sales they are currently relying on, all of the listening royalties they receive from Internet radio, and their music will be downloaded illegally at a higher rate.[290]

2. Impact of the Internet Radio Fairness Act: The Downside

The downside of the IRFA is that there is a strong chance the $0.0012 per song rate currently received[291] per stream on Pandora will either decrease or increase at a much slower rate than it would under the current royalty rate-setting scheme.[292] In either case, artists *will* receive less than the potential revenue from Internet radio under the current scheme upon passage of the IRFA or any similar legislation.[293] But more importantly, (1) they will still have a revenue stream from digital distribution, (2) they will have increased sales for which Internet radio listeners are responsible, and (3) their popularity will be boosted, allowing them to experience growing revenue in other areas such as performance sales, product endorsements, YouTube Partner Program revenues,[294] merchandise sales, speaker fees, and so forth.[295] Without Internet radio, and potentially without the IRFA, the music industry will continue to decline, and artists stand to lose far more than extra royalties made from Internet radio streaming.

Though the royalties paid to SoundExchange and, thus, the amounts distributed to the copyright owners will probably decrease substantially, "the negative revenue impact to SoundExchange of computing webcasting rates under 801(b) would likely be mitigated . . . ."[296] This is so because under the current royalty rate system, revenue from cable and satellite distributors is "very likely" to increase.[297] Before 2007, Sirius and XM had been paying 2% to 2.5%

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[289] Goldman, *supra* note 262.

[290] *See supra* note 10 and accompanying text.

[291] Guglielmo, *supra* note 243.

[292] *See supra* notes 255–57. This is implied from the likelihood that 801(b) will decrease royalty payments for Internet radio, and so revenues to artists will consequently decrease.

[293] *Not So Fair: Internet Radio Fairness Act*, *supra* note 255.

[294] As a YouTube Partner, artists take part in shared advertising revenue when their videos are played.

[295] *42 Revenue Streams*, ARTIST REVENUE STREAMS, http://money.futureofmusic.org/40-revenue-streams/ (last visited Mar. 11, 2014).

[296] Villasenor, *supra* note 23, at 14.

[297] *Id.*

of revenue in content acquisition costs.[298] In the CRB's 2007 hearings, the Judges contemplated an increase to 13%, which they concluded would be disruptive to the market.[299] The result of the 2007 ruling was rates starting at 6% of revenue in 2006, which rose to 8% in 2012.[300]

In a decision that came out at the end of 2012, the CRB determined even higher rates for cable and satellite radio for the period of 2013 to 2017.[301] Cable radio will pay 8% of gross revenues in 2013, which will increase to 8.5% for 2014 through 2017.[302] Satellite radio will be subject to drastic increases over the next five years, paying 9% in gross revenues in 2013, 9.5% in 2014, 10% in 2015, 10.5% in 2016, and 11% in 2017.[303] These increases are gradual, but it is clear that royalty rates under the 801(b) standard are heading up, which will minimize any disruption imposed by the IRFA application of the 801(b) standard to Internet radio webcasters.

Lastly, recall that under the DMCA terrestrial AM/FM radio is not subject to *any* royalty rate for the use of sound recording performance rights.[304] Many consider this to be "the most glaring inequity of all," considering that all other radio-style music distributors are subject to substantial royalties for sound recording performance rights.[305] It is true that so long as terrestrial radio is getting these rights for free, discrimination lies. However, the Internet Radio Fairness Act or any similar legislation is best served by not seeking fairness when it comes to AM/FM radio, at least not now.[306] This royalty rate exemption is long-standing, as terrestrial radio has paid nothing to perform sound recordings since its inception over sixty years ago.[307] "[E]very one of the dozens of legislative attempts to end [this exemption] since 1926 has run up against extremely strong opposition from terrestrial broadcasters and has failed. New legislation including a provision ending the terrestrial broadcasters'

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[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] David Oxenford, *Copyright Royalty Board Releases New Rates for Sirius XM and Cable Radio—They are Going Up, Full Reasoning of the Decision to Come,* BROADCAST L. BLOG (Dec. 17, 2012), http://www.broadcastlawblog.com/2012/12/articles/music-rights/copyright-royalty-board-releases-new-rates-for-sirius-xm-and-cable-radio-they-are-going-up-full-reasoning-of-the-decision-to-come/.

[302] *Id.*

[303] *Id.*

[304] *See supra* note 26.

[305] *Not So Fair: Internet Radio Fairness Act*, *supra* note 255.

[306] Villasenor, *supra* note 23, at 13.

[307] *Id.*

exemption would be likely to fail as well."[308] Therefore, the IRFA, as it stands, excluding the abolishment of the terrestrial radio exemption, should be reintroduced and passed as a solution to the current legal disparities between digital music distributors.

V. CONCLUSION

As "the disease of free" has spread through our planet over the past couple of decades, the music industry has suffered serious decline.[309] Between 1999 and 2009 the value of the music industry was cut in half, with $14.6 billion in revenues in 1999 dropping off to $6.3 billion in revenues in 2009.[310] As use of the Internet increased, the CD disappeared and the consumer began demanding music for free.[311] In 1999, Napster was established, allowing anyone to download music for free from the Internet.[312] The only way the music industry could survive was to adapt.[313] With the birth of Internet radio stations, digital music licensing became the future of the industry.[314] Though revenues are not realized in sales as they were ten years ago, the Internet has exposed the public to more music content than ever.[315] In fact, "The last ten years we've seen the decline of the record business, and now we're seeing the rise of the music business."[316]

The only problem is that the Internet radio market is suffering too.[317] Businesses like Pandora are drowning in royalty rates that are approaching their total revenues.[318] The current royalty rate-setting standard—the willing buyer/willing seller standard—employed by the CRB is a key reason for these astronomical rates.[319] The CRB applies a different standard—the 801(b)

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[308] *Id.*

[309] Goldman, *supra* note 262.

[310] *Id.*

[311] *Id.*

[312] *Id.*

[313] Lavonne Burke, *International Media Pirates: Are They Making the Entertainment Industry Walk the Plank?*, 4 J. BUS. ENTREPRENEURSHIP & L 67, 68 (2010). "With the continued evolution of technology, the entertainment industry is now forced to respond to the use and misuse of computer-delivered digital entertainment and its uncontrolled distribution over the Internet." *Id.*

[314] *See supra* Introduction.

[315] *Id.*

[316] Rys, *supra* note 279.

[317] *See supra* Section IV.B.1.a.

[318] Annual report, *supra* note 12, at 57.

[319] *Id.*

standard—to cable and satellite providers, resulting in far lower royalty rates.[320] It has been fifteen years since the DMCA was passed implicating these disparate standards;[321] now, it is 2014 and time to level the playing field for music distributors. Now is the time to impose a technology-neutral royalty rate-setting standard, which would be achieved by legislation identical to the IRFA. Such legislation will impose the 801(b) standard to all digital music distributors, finally leveling the playing field for market participants like Pandora.[322]

In order to achieve the policy objective of the Copyright Clause in the United States Constitution—to maximize the availability of creative works to the public—the Copyright laws of this country should foster fairness among technologies. The IRFA provides a fair, technology-neutral rate-setting standard, improves application of the standard by revamping the qualifications and appointment of Copyright Royalty Judges who administer royalty rates, and protects the future of the music industry, musical artists, and listeners worldwide. [323]

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[320] *See supra* Section II.B.

[321] *See supra* text accompanying note 27.

[322] *See* Section IV.

[323] Though many parties were hopeful that the IRFA would be reintroduced to Congress in 2013, at the publication date of this comment, the bill had not yet been reintroduced. However, this article's proposal for enacting the IRFA is still relevant, as this issue will once again come to fruition around 2015, when the royalty rates under the Webcaster settlements expire and the CRB will once again be faced with determining royalty rates for Internet radio for 2016 to 2020. At least as of the publication date of this comment, it appears that Pandora "has shifted focus away from [the IRFA]" and "'will focus on other paths to resolution.' . . . That other path includes negotiations over performance royalties with the CRB." Guglielmo, *supra* note 243.