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Copyright Arbitration Royalty Panels and the Webcasting Controversy: The Antithesis of Good Alternative Dispute Resolution

*Jeremy Delibero*¹

I. INTRODUCTION

Popular music, especially rock and roll, is traditionally a sign of rebellion, youth, and creative expression. Recently, however, music is becoming increasingly synonymous with big business and corporate influence. The advent of Internet radio and streaming webcasts are simply one example of this shift. Organizations such as the Radio Industry Association of America (“RIAA”) have discovered a new way to receive royalties from the performance of musical works, and have fought vigorously to obtain favorable rates to achieve the maximum profit.² On the other hand, small webcasters have fought equally hard to avoid these large rates. Although arguments for each side are equally persuasive, neither is persuasive enough to force a compromise.

In attempting to solve these disputes, all involved parties utilized nearly every existing form of dispute resolution. Negotiation, arbitration, litigation, and even legislation have all been attempted to solve the problem, yet none has offered more than a temporary solution.³ This article will analyze the back-

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2. See RECORDING INDUS. ASS’N OF AM., *About Us*, RIAA Homepage, available at <http://www.riaa.com/about/default.asp> (last visited Sept. 24, 2004).

The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members’ creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.”

Id.

3. See generally, Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J. L. & TECH. 339, 339-42 (2003).

ground concerning two issues: (1) the correct amount for webcasting royalties,⁴ and; (2) the shortcomings of each proposed solution.⁵

II. THE PROBLEM

A. Copyright Act⁶

Whenever a song is assembled, two distinct types of works are created under the Copyright Act.⁷ The first is called the “musical work.”⁸ While the Copyright Act does not specifically define the term “musical work,” it is generally understood to include the “actual musical composition, consisting of the written notes and lyrics.”⁹ The “sound recording” is the second work created.¹⁰ The “sound recording” can be viewed as a derivative work as it is the actual audio interpretation of the “musical work.”¹¹ The sound recording often includes “creative efforts and interpretations of the producer, engineer, background musicians, and, of course, the performer.”¹² To make matters more complex, separate rules regarding performance royalties govern each type of work.

4. See *infra* notes 58 to 103 and accompanying text.

5. See *infra* notes 136 to 194 and accompanying text.

6. Copyright Act of 1976. 17 U.S.C. §§ 101-1329. (2000).

7. See 17 U.S.C. §§ 102(a)(2), (7) (2000). Often times, different people might own the copyright to the musical work and the copyright to the sound recordings. The recording company usually owns the sound recordings as works for hire under their sound recording agreement, while the author of the musical work may be the artist himself, or a third party. MARK HALLORAN, *THE MUSICIAN'S BUSINESS & LEGAL GUIDE* 339-40 (3rd ed. 2001). While the royalty in the musical work from online performances has been a debated issue, this article shall be limited to the public performance royalties in sound recordings only.

8. 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, 4 (2001).

9. *Id.* While § 101 does not specifically define a musical work, such work is taken to include “both the instrumental component of the work and any accompanying words” and is normally “satisfied through melody, harmony or rhythm, individually or in combination.” CRAIG JOYCE ET AL., *COPYRIGHT LAW* 172 (6th ed. 2003).

10. See 17 U.S.C. § 101 (2000) (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).

11. *Id.* “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, *sound recording*, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2004) (emphasis added).

12. Craft, *supra* note 8, at 5.

Within the Copyright Act, copyright owners enjoy an exclusive right of public performance.¹³ The copyright owner may recover royalties anytime a third party publicly performs the work.¹⁴ A public performance includes both the musical work and the sound recording.¹⁵ Royalties in musical works are fairly simple; payments are always required.¹⁶ Because performances of musical works are commonplace, composers and publishers allow performing rights organizations (PROs) to regulate, collect, and distribute the royalties due.¹⁷

The rules regarding performance royalties for sound recordings are significantly more convoluted. Unlike musical works, the owner of a sound recording (usually the record label) is not automatically entitled to performance royalties under the Copyright Act.¹⁸ Traditionally, radio broadcasts are exempt from paying this additional royalty, while still paying the performance royalty for the

13. The Copyright Act allows for six exclusive rights to copyright:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. §§ 106(1)-(6) (2000); *see also* Craft, *supra* note 8, at 6.

14. Under certain conditions, a third party who uses a work without the prior permission of the author, the third party may be granted a compulsory license. The royalty rate for this license, also called a statutory license, is set either by private negotiations or by a Copyright Arbitration Royalty Panel. *See generally* 17 U.S.C. § 115 (2000). Conditions for obtaining this type of license are hotly debated in the webcasting community. However, that is not the concern of this paper, which assumes that a compulsory license has been granted and a CARP has been convened.

15. Craft, *supra* note 8, at 4-5; “[W]hen a radio station plays a popular song, only the copyright owner of the musical work may claim royalties for the performance of the musical composition.” Joyce, *supra* note 9, at 563.

16. *Id.* at 4 (“If a performance of the musical work happens to be broadcast over the airwaves such as by a radio station, each play is also worth money, in the form of royalties, to the songwriter and publisher.”); *see also*, Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 354-56 (2002).

17. *Id.* at 4-5. PRO’s include entities such as Broadcast Music, Inc. (BMI), Society of European Stage Authors and Composers (SESAC), American Society of Composers, Authors and Publishers (ASCAP). *See generally*, BROAD. MUSIC, INC., *About BMI*, BMI Homepage, at <http://www.bmi.com/about/>; *see generally*, SESAC, *About SESAC*, SESAC Homepage, at www.sesac.com/aboutsesac/aboutmain.asp; Am. Soc’y of Composers, Authors and Publishers, *About ASCAP*, ASCAP Homepage, available at www.ascap.com/about/.

18. *Id.* at 5; *see also* 17 U.S.C. § 114(a) (2000).

musical work.¹⁹ One theory for this disparity is that the broadcasting lobbyists yielded great strength on Capitol Hill when the 1976 Act passed.²⁰ Another theory is the RIAA conceded this royalty because radio was the best advertising medium for their product.²¹ However, with the advent of new technology in the mid-1990s, the changes that evolved would make this dichotomy seem simplistic.

B. Digital Acts of 1995 and 1998

As the popularity of the Internet grew during the 1990s, broadcasters saw great potential in transmitting their programs over the Internet.²² They could provide clearer, higher quality performances, increase their transmission range, and also make advertising on their station more profitable.²³ However, this new transmission medium posed problems under the current copyright law. Past laws only addressed terrestrial radio transmissions regarding royalties, because none could foresee this leap in technology.²⁴

19. *Id.* at 6; see also Joseph E. Magri, *New Media – New Rules: The Digital Performance Right and Streaming Music Over the Internet*, 6 VAND. J. ENT. L. & PRAC. 55, 65 (2003).

Over the years, conventional radio broadcasters have built a \$19 billion a year industry based on the creative works of artists and record companies without having to obtain a Sound Recording performance license, pay Sound Recording performance royalty fees or meet any Sound Recording recordkeeping requirements.

Id.

20. “Radio broadcasters were able to exclude payments for sound recordings from the Copyright Act because the broadcasting industry has a powerful lobby on Capitol Hill through the National Association of Broadcasters.” Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 402 n.15 (2003) (citing MERGES ET. AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*, 480 (2d ed. 2000)).

21. Craft, *supra* note 8, at 6. Record labels have long understood the great promotional value of radio. Radio allowed the record companies to reach their target audiences with samples of their product, and the audience in turn purchased much of what they heard on the radio. Douglas Abell, *Music Pay-for-Play; An Old Tactic in a New Environment*, 2 VAND. J. ENT. L. & PRAC. 52, 53 (2000).

22. *Id.* at 7. At the time, the Internet was completely unregulated, as opposed to terrestrial radio which was heavily regulated by the FCC. The cost to set up and maintain an Internet radio station was about \$10,000, as opposed to terrestrial radio stations, which cost about \$250,000. The marketing appeal of Internet radio revolved around its ability to reach specific niche audiences, at low costs, and without the traditional barriers of terrestrial radio stations. See COMM 3353: *Information, Internet, and the World Wide Web: Chapter 3; Internet Radio*, available at <http://www.hfac.uh.edu>.

23. Matt Jackson, *From Broadcast to Webcast: Copyright Law & Streaming Media*, 11 TEX. INTELL. PROP. L. J. 447, 471 (2003); see also Michael Thicke, *Media on the Internet*, at www.mala.bc.ca/~SOULES/MEDIA112/zine2000/thicke.

24. Craft, *supra* note 8, at 11-12; see Daniel Osman, *Oh What Tangled Web We Stream: A History and Analysis of Webcasting Royalty Rates*, 21 NO. 4 INTELL. PROP. L. NEWSL. 45, 45 (2003).

Internet radio evolved in two distinct ways.²⁵ First, operators of terrestrial radio stations wanted to re-broadcast the same program over the Internet.²⁶ This form involved no interaction from the listener, who merely tuned in on the Internet the same way he or she would tune the dial in his or her car or home stereo.²⁷ The listener would pick up the broadcast in mid-program and hear exactly what he or she would normally hear when they would tune the dial in their car or home stereo.²⁸ Second, some broadcasters wished to transmit an Internet-only program available exclusively through the Internet.²⁹ This format allowed almost anyone to broadcast a program, from big broadcasting corporations, to small, home-based hobbyists.³⁰ The ease, quality, and danger of devaluation to copyrighted materials sparked the RIAA to lobby Congress to update the laws regarding royalties, and Congress responded.³¹

In 1995, Congress passed the Digital Performance Right in Sound Recording Act ("DPRSRA or DPRA").³² This act addressed subscription digital audio transmissions, what we have come to know today as "XM Satellite Radio" and "Sirius."³³ The DPRA gave sound recordings a limited public performance

25. Jackson, *supra* note 23, at 450 (referring to the major business models of streaming webcasts as opposed to downloading, a completely different concept).

26. This form of transmission is also called a radio retransmission. *Id.* These types of retransmissions are exempt from sound recording royalties provided "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter." 17 U.S.C. § 114(d)(1)(B)(i) (Supp. 2004).

27. Craft, *supra* note 8, at 15. This type of Internet programming involves an FCC licensed, terrestrial radio station simulcasting its programming over the air waves as well as the Internet. Jackson, *supra* note 23, at 450.

28. *Id.*; This type of Internet programming involves an FCC licensed, terrestrial radio station simulcasting its programming over the air waves as well as the Internet. *See* Jackson, *supra* note 23, at 450.

29. This type of transmission is known as an IO, or Internet-only transmission. Instead of a terrestrial radio station simulcasting their programming, these Internet-only transmissions are not based from an FCC licensed station. Thousands of these "radio stations" exist because of the low cost to operate. Still, the number of Internet-only broadcasts has dwindled in the midst of the disputes described in this article. Kidd, *supra* note 3, at 340, n.11; Jackson, *supra* note 23, at 450.

30. Kidd, *supra* note 3, at 343-34 ("[M]ost most Internet radio stations are established and promoted by "small businesses, community and college broadcasters, and hobbyists.").

31. B.J. Richards, *The Times They are A-Changin': A Legal Perspective on How the Internet is Changing the Way We Buy, Sell, and Steal Music*, 7 J. INTELL. PROP. L. 421, 428-30 (2000) (stating that the expectancy, especially among college students, for music to be free inherently devalues music).

32. Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, available at <http://www.copyright.gov/legislation/pl104-39.html> (1995) [hereinafter DPRA]; *see also*, Jackson, *supra* note 23, at 454-55.

33. Jackson, *supra* note 23, at 455. Broadcasts, such as the two described here, must be digital and qualify as a transmission. *Id.* "A 'digital transmission' is a transmission in whole or in

right, requiring broadcasters offering these services to pay the traditional musical work royalty, as well as the elusive sound recording royalty.³⁴ An important aspect of the DPRA was that all non-subscription, non-interactive transmissions (primarily radio retransmissions) were exempt from this performance royalty.³⁵

part in a digital or other non-analog format . . . To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101 (Supp. 2004).

34. Prior to the DPRA, sound recordings were not accorded a public performance right. With the passage of the DPRA, Congress created §106(6) which allowed for a limited public performance right in digital audio transmissions. This meant that sound recordings retained a public performance right, limited to those performances via a DAT. *Id.* at 455.

35. "(1) Exempt transmissions and retransmissions.--The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of--

(A)(i) a nonsubscription transmission other than a retransmission;

(ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or

(iii) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: Provided, That, in the case of a retransmission of a radio station's broadcast transmission--

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however--

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are--

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: Provided, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories--

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: Provided, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

88

This loophole exists primarily because lawmakers were too shortsighted in creating the DPRA. At the time Congress drafted the DPRA, "webcasting was a nascent technology and Internet connection speeds were too slow to fully utilize the technology."³⁶ Within the coming years, however, technology would advance so quickly that by 1998, hundreds of radio webcasts and retransmissions were available to millions of consumers.³⁷ The RIAA, realizing these services were taking advantage of a highly profitable loophole, petitioned and lobbied Congress to have it closed.³⁸

The 1998 Digital Millennium Copyright Act ("DMCA") added non-subscription digital audio broadcasters to the DPRA's royalty scheme.³⁹ This required even non-subscription services, such as radio retransmissions, to pay this dual royalty.⁴⁰ The DMCA, in clear, simple language, set forth the exact criteria for services eligible for compulsory licenses and the exact performance limitations.⁴¹ The key area neither Act addressed, which consequently shall

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii)." DPRA, *supra* note 32, at § 3.

36. Jackson, *supra* note 23, at 457.

37. *Id.*

38. This action by Congress took the form of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) [hereinafter DMCA].

39. *Id.* The DMCA inserts additional language into § 114(a) of the 1976 Copyright Act to include "broadcast transmission[s] of a performance of a sound recording in a digital format on a nonsubscription basis." *Id.*

40. Jackson, *supra* note 23, at 459-60. Whereas under the DPRA a public performance of a sound recording by a non-subscription service was a non-infringing use of the work, the DMCA now requires a license. See *supra* note 33 and accompanying text. While this requirement reflects a change in the law, the DMCA does allow for certain non-subscription services to obtain a compulsory license. An:

'eligible nonsubscription transmission' is a noninteractive nonsubscription digital audio transmission . . . made as part of a service that provides audio programming consisting . . . 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 . . . not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

17 U.S.C. § 114(j)(6) (2004).

41. *Id.* at 458. The DMCA allows a service to obtain a compulsory/statutory license if:

make up the focus of this note, was to specify a proper rate or fee for these royalties.

The DMCA required the appropriate parties gather to negotiate a royalty rate.⁴² In the event a compromise could not be reached, the Registrar of Copyrights would convene a Copyright Arbitration Royalty Panel to determine the proper rate.⁴³ Debates ensued for approximately two years from the passing of the DMCA to adopt definitions, qualifications, and other intricacies of the new law.⁴⁴ During these arguments alone, multiple interest groups gathered to ensure favorable rates for those they represented.

The RIAA, with their numerous resources and adequate funding, led the charge for favorable webcasting rates.⁴⁵ Representing major recording labels, their goal is to ensure the highest royalty rates the market will bear.⁴⁶ Directly opposed to the RIAA are the National Association of Broadcasters ("NAB") and the Digital Media Association ("DiMA"), whose presence arose out of necessity.⁴⁷ Previously, the NAB represented all broadcasters. With the new rules set

(i) the transmission is not part of an interactive service; (ii) . . . the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and (iii) . . . the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording . . . and related information, including information concerning the underlying musical work and its writer.

17 U.S.C. § 114(d)(2)(A)(i)-(iii). A service is also restricted in that it:

(1) cannot exceed the performance complement unless it is a third-party retransmission of a broadcast transmission . . . ; (2) cannot announce or publish song titles in advance . . . ; (3) cannot repeat programs of less than three hours in length, archive programs less than five hours in length, or maintain archived programs of more than five hours in length for more than two weeks; or (4) transmit the same sound recording repeatedly with the same visual information.

Id.

42. The Copyright Act specifies that any copyright owner in a sound recording or those performing the sound recording retains the authority to negotiate public performance royalties, as well as accompanying conditions and terms. 17 U.S.C. § 114(e)(1).

43. See, e.g., 17 U.S.C. § 801(a) (2004); see also *infra* note 61 and accompanying text.

44. While the qualifications for a compulsory license were heated and greatly contested, the analysis of definitions and qualifications are not the focus of this paper. However, debates over what royalties are owed could be the topic of several analyses. See generally, Craft, *supra* note 8.

45. See *supra* note 2 and accompanying text.

46. Although the CARP chose to disregard many of the RIAA's private agreements, those agreements, taken individually, show that the RIAA hopes to use its great bargaining position in order to secure high royalty rates. The fact that the CARPs refused to acknowledge these agreements based on this disparity in bargaining position evidences the RIAA's intent. "As a result, CARP disregarded most of these voluntarily negotiated agreements because 'they establish[ed], at best, the high end of the rate range that some services (with special circumstances) might pay.'" Fessler, *supra* note 20, at 420.

47. Digital Media Association:

was founded in June 1998 by seven leading webcentric companies that agreed on a common principle - that consumers' desire to enjoy digital entertainment should not be ham-

forth by the digital acts of the 1990's, the NAB abandoned digital broadcasters and sought to represent only the rights and interests of traditional, terrestrial broadcasters.⁴⁸ Hence, the DiMA was formed to represent the digital broadcasters.⁴⁹ The RIAA, historically a very strong private interest group, remained the most influential lobbyist during these negotiations. Their strength, though, was slightly questioned when the individual record labels realized the amazing profit potential in broadcasting their catalogs online.⁵⁰ It would be almost pure profit, except for the royalty to the publishers of the musical work.⁵¹ The RIAA then made another formidable opponent in publishing groups such as the National Music Publishers Association ("NMPA") and the Songwriters Guild of America ("SGA").⁵²

pered by outdated laws, regulations and business models... [Since its founding DiMA has sought] to ensure that new media companies are not disadvantaged - legally or as a matter of industry practice - merely because they deliver content digitally rather than via print, film, terrestrial broadcast or other traditional media.

DiMA - The Digital Media Association, *available at* <http://www.digmedia.org/aboutus/faq.cfm> (last visited Sept. 25, 2004) [hereinafter DiMA]. The National Association of Broadcasters, NAB, "is a full-service trade association which represents the interests of free, over-the-air radio and television broadcasters." About NAB Home Page, *available at* <http://www.nab.org/about/> (last visited Sept. 25, 2004) [hereinafter NAB].

48. Craft, *supra* note 8, at 7. "Webcasters were hoping that the NAB would throw their weight in on the side of DiMA in setting the fee, but NAB has chosen to keep quiet in the current deliberations." Catherine Bacon, *Webcaster and RIAA Battle over Compulsory Fee*, STREAMINGMEDIA.COM NEWSL., Apr. 12, 2001, *available at* <http://www.streamingmedia.com/newsletter/041701.html>.

49. See DiMA, *supra* note 47.

50. If the individual record companies could find a way to stream/sell their music online, they would reap all the benefits of national promotion and revenue, without having to pay the royalties imposed by the compulsory licenses. The record companies would merely have to pay a royalty to the author of the musical composition. The second the record company attempted to find a way around paying this royalty, thus paying no royalties and having virtually no costs, they created formidable negotiation opponents in the National Association of Broadcasters and the Digital Media Association. See *infra* note 52.

51. Craft, *supra* note 8, at 7, 25-26. The RIAA and the record companies it represents attempts to receive the highest possible rate from the webcasters for performing the song, while paying the lowest possible rate to the publishers. *Id.* at 26 (quoting Jay Kumar, *RIAA Wants Government to Determine Royalty Rates?*, *available at* www.au.knac.com/servlet/Article_Page?articleID=8471).

52. The National Music Publisher's Association, NMPA, exists to protect music publishers in the copyright registration and licensing process. Since 1917, the NMPA has "worked to interpret copyright law, educate the public about licensing, and safeguard the interests of its members." About NMPA, *available at* <http://nmpa.org/nmpa.html> (last visited Sept. 25, 2004) [hereinafter NMPA]. With the RIAA attempting to enter the webcasting game, the NMPA worked to ensure that the RIAA did not circumvent royalties owed to music publishers. The Songwriters Guild of America, SGA, represents the interests of songwriters nationwide. "Since the enactment of the Copyright Act, the Guild has continued to take a stand on every issue of importance to songwriters and the music industry in general, including home taping, source licensing, derivative rights, author's moral

Stalemates emerged between all groups involved. Each group contested decisions between two groups and no compromise seemed forthcoming. Groups appealed to the Copyright Office for direction.⁵³ In December of 2000, the Copyright Office made a series of rulings, the most substantial of which blurred the lines between NAB and DiMA.⁵⁴ The ruling stated that terrestrial radio stations wishing to retransmit their programs over the Internet would be required to pay sound recording royalties as required of Internet Only transmissions.⁵⁵ Another significant ruling stated that some level of consumer influenced (i.e., interactive) transmission would not bar a service from obtaining a statutory license.⁵⁶ After these rulings, the Library of Congress finally stepped in and convened a Copyright Arbitration Royalty Panel (“CARP”) to settle these disputes.⁵⁷

rights, the deductibility of business expenses, compulsory license, and copyright registration fees.” The Songwriters Guild of America, *Who We Are: A Short History of the Guild*, available at <http://www.songwritersguild.com/history.html> [hereinafter SGA].

53. The NAB was the first to file an appeal in November of 1998, followed by DiMA in April of 2000, and finally the RIAA in November of 2000. While each of these appeals included their own specific grievances, each also included requests to rule on interpretations of definitions and qualifications regarding compulsory licenses. Craft, *supra* note 8, at 20-26.

54. *Id.* at 26. While these rulings focused mainly on the DiMA’s petition, the decisions here also addressed the issues raised by the NAB and RIAA petitions. See Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77330 (2000). Originally, the NAB felt it was on a different plane than DiMA because the NAB felt its broadcasters were immune from the public performance royalty. The Copyright Office’s rulings stated that the NAB, like the DiMA, would be required to pay a public performance royalty for sound recordings, creating a common plight.

55. *Id.* at 26-27.

In a ruling issued earlier this month, the copyright office clarified the Digital Millennium Copyright Act, which passed Congress in October 1998, and ordered radio stations that simulcast programming on the Internet to start paying artists and record labels for the privilege. Web-only broadcasters were already required to pay the royalties under the legislation.

Steve Carney, *Around the Digital Copyright Ruling Alarms Webcasters Decree Requires Radio Stations to Pay Royalties on Music Simulcasts, Which Could Drive Smaller Outfits off the Net*, L.A. TIMES, Dec. 22, 2000, at F42.

56. 65 Fed. Reg. 77330, 77332.

The Copyright Office has considered DiMA’s request to initiate a rulemaking to clarify that a service does not become interactive merely because consumers may have some influence on the music programming offered by the service and finds that this concept is not in dispute. RIAA readily acknowledges that consumers may express preferences for certain music genres, artists, or even sound recordings without the service necessarily becoming interactive.

Id. This primarily effects § 114(d)(2)(A)(i) of the DMCA, stating that a transmission which is part of an interactive service is not eligible for a compulsory license. See *supra* note 41.

57. Craft, *supra* note 8, at 27-28. While completely evident from almost two years of controversy, the Copyright Office officially recognized the conflict between the recording industry and the broadcast industry on July 23, 2001. Digital Performance Rights in Sound Recordings and Ephemeral Recordings, 66 Fed. Reg. 38324-02 (Jul. 23, 2001), available at <http://www.copyright.gov/fedreg/2001/66fr38324.html> (last visited Sept. 25, 2004). Opening statements were scheduled for July 30, 2001. *Id.*

92

III. COPYRIGHT ARBITRATION ROYALTY PANEL

At the time the CARP convened, three questions became the focus of the decision.⁵⁸ First, the NMPA and SGA asked the Panel to determine what royalty rate and terms should be instituted for payments retroactive to the effective date of the DMCA.⁵⁹ Second, a royalty rate for the next two years needed to be determined.⁶⁰ Third, the Panel needed to decide what to do about ephemeral copies made in order to assist in Internet webcasting.⁶¹ Little did the Panel know this decision would set in motion a litany of legislation to amend, disband, and overturn the CARP process.

In that no compromise emerged between any of the parties involved, sections 112 and 114 of the Copyright Act required the Copyright Office to form a CARP.⁶² During this process, section 801(b)(1) sets forth goals the CARP decision should strive to complete.⁶³ These goals include:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his 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;

58. See Craft, *supra* note 8, at 28.

59. *Id.* In essence, a single rate would apply all royalties compounded from Oct. 28, 1998, the effective date of the DMCA, until the 20th day of the month following the CARP decision's enactment, and would be due in a lump sum payment. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45239, 45240-41, 45271 (July 8, 2002) (codified at 37 C.F.R. pt. 26.)

60. *Id.* at 27-28; see *infra* note 135 and accompanying text.

61. *Id.* at 28. During the course of webcasting/streaming, the webcaster must make a temporary copy of the song on the user's computer. These temporary copies are called ephemeral copies. Steven J. Pena, *Licensing Music for Use on the Internet*, 662 PLI/Pat 525, 529 (2001). Copyright law has traditionally allowed for these copies to be made to facilitate broadcasting, so long as they follow certain rules and are purely temporary. While this element of the webcasting debates is significant, this article will focus only on the public performance royalty.

62. Jackson, *supra* note 23, at 461.

63. Cf. 17 U.S.C. § 801(b)(1) (2000) with § 114(f)(2)(B) (2000 & West Supp. 2004) (instructing the CARP to establish rates that would most accurately reflect what a willing buyer and willing seller would negotiate in a free market).

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.⁶⁴

In addition to these goals, section 114 permits the CARPs to “consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements”⁶⁵ The rates set should “clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁶⁶

With all the background set, the CARP went to work in July, 2001.⁶⁷ Each side, primarily the RIAA and the DiMA, submitted proposed rates and terms for consideration.⁶⁸ DiMA’s plan included royalties of \$0.0015 per listener hour.⁶⁹ The RIAA proposed its own rate of \$0.004 for each song streamed.⁷⁰ The RIAA based the rate on 25 separate agreements previously initiated with individual webcasters.⁷¹ The RIAA’s scheme would work out to be approximately 15 percent of a service’s gross revenues.⁷²

At first blush, these rates do not seem so different, but when they are actually calculated out, they show their true differences. To start, imagine one hour of music, which equates to roughly ten songs.⁷³ Under the DiMA plan, that amount of air play would cost a webcaster \$0.0015 per listener.⁷⁴ Under the RIAA’s plan, each song would cost \$0.004, which would total \$0.04 per listener

64. *Id.* at 801(b)(1)(A)-(D).

65. *Id.* at 114(f)(2)(B); *see* Jackson, *supra* note 23, at 462.

66. Jackson, *supra* note 23, at 462.

67. *See supra* note 57 and accompanying text.

68. DiMA and RIAA submitted proposals for CARP consideration on Apr. 11, 2001. Joanna Glasner, *Webcasters Propose Royalty Plan*, WIRED NEWS (Apr. 11, 2001), available at <http://www.wired.com/news/business/0,1367,42994,00.html>.

69. *Id.* According to economist Adam Jaffe, this plan was comparable to what terrestrial radio stations paid to ASCAP and other PROs for underlying musical work royalties. The rate for musical compositions for terrestrial radio is \$.0022 per listener hour. Craft, *supra* note 8, at 32-33.

70. Glasner, *supra* note 68.

71. *Id.* These agreements “involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate.” Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,239, 45, 241 (Jul. 8, 2002) (citations omitted).

72. *Id.*; *see also* Craft, *supra* note 8, at 33.

73. The webcasters, “then raised this amount slightly because webcasters play an average of fifteen songs per hour compared to an average of eleven songs per hour on the radio.” Jackson, *supra* note 23, at 463. Using ten songs per hour allows for the reader to see the difference between the sound recording royalty paid by traditionally terrestrial broadcasters (\$0) and the same program broadcast over the Internet. *See infra*, notes 72-77 and accompanying text.

74. Craft, *supra* note 8, at 33. Under the plan proposed by DiMA, the webcasters would have to pay royalties per listener per hour, no matter how many songs are played within that hour. *Id.* This means that after ten songs with one listener, a webcaster would pay a mere 0.0015 cents.

hour for the same number of songs.⁷⁵ To continue this illustration, imagine a webcast reaches 10,000 listeners per hour.⁷⁶ Now, the DiMA plan equates to \$15 per hour, while the RIAA plan equals \$400 per hour.⁷⁷ In a study conducted of a successful radio station, research data provided numbers tending to show that under the DiMA, a station would pay roughly \$192,000 per year.⁷⁸ If the RIAA plan were to be adopted, however, the same station would have to pay over \$5.5 million.⁷⁹

Controversy surrounded these proposed rates. In attempting to find a compromise, the CARP looked to the individual agreements offered by the RIAA as examples of “the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁸⁰ Many of these agreements were between the RIAA and smaller webcasters, ones without any sort of equal bargaining power.⁸¹ Because of this huge disparity, the Panel discarded all but

75. *Id.* Under the RIAA-proposed plan, webcasters would have to pay royalties per song per hour. Therefore, after the same 10 songs are played to one listener, a webcaster would pay four cents.

76. Surveys show that there were 13,685 radio stations in 2002, with most Americans listening, on average, twenty hours per week. Arbitron, *Radio Today: How America Listens to Radio* 3-4, available at <http://www.arbitron.com/downloads/radiotoday03.pdf>. In 2003, more than fifty million Americans received broadcasting content over the Internet. Over 45% of Americans have tried Internet broadcasting, while the estimated weekly usage is thirty million people, or 13% of all Americans. Arbitron & Edison Media Research, *Internet and Multimedia 11: New Media Enters the Mainstream* 3 (2003), available at http://www.arbitron.com/downloads/Internet_Multimedia_11.pdf.

77. Under the DiMA plan, this figure can be arrived at by the following formula: .0015 (cents per listener per hour) x 1 (number of hours) x 10,000 (number of listeners) = \$15. For the same hour, the RIAA would calculate the royalties differently: .004 (cents per listener per song) x 10 (number of songs) x 10,000 (number of listeners) = \$400. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, See 67 Fed. Reg. 45239, *supra* note 71.

78. See Craft, *supra* note 8, at 33; see also Dave Rahn, *Webcasters Royalty Update – Custom Channels’ observations on the recent CARP filings*, available at www.customchannels.net/subpages/Newsletter/WebcastersRoyaltyUpdate.htm. The purpose of this article is to show that an established, successful radio station would be nearly driven out of business by the proposed rates. If the rates can bankrupt an already successful station, how does the CARP expect an upstart webcast to pay these fees?

79. See *supra* note 81 and accompanying text.

80. See *infra* notes 189-194 and accompanying text.

81. Fessler, *supra* note 20, at 409. “CARP determined that these agreements should be ignored, in part, because the RIAA was in a superior bargaining position. Also, CARP felt the RIAA was able to extract super-competitive rates based upon its market power and sophistication in negotiation and the urgent need of some licensees to enter into agreements.” *Id.* CARP “felt that the RIAA had manipulated those agreements - and squelched others it could not manipulate—in an effort to establish an artificially high ‘sweet spot’ of 0.4 cents per performance that could be trumpeted as precedent in the CARP proceeding.” *Copyright Law - Congress Responds to Copyright* 95

one of these agreements.⁸² The one agreement the Panel thought was representative of two equal parties was between Yahoo!™ and the RIAA.⁸³

Even this agreement, though, proved to be tainted by corporate negotiations.⁸⁴ As shown above, a major difference between the RIAA and DiMA proposed rates is per-hour versus per-song.⁸⁵ Obviously, a per-hour fee favors webcasters, while a per-song fee favors the RIAA.⁸⁶ After the Panel considered the Yahoo!™/RIAA deal, Mark Cuban, former president of Broadcast.com,⁸⁷ offered a statement about the agreement:

I, as Broadcast.com, didn't want percent-of-revenue pricing. Why? Because it meant every "Tom, Dick, and Harry" webcaster could come in and undercut our pricing because we had revenue and they didn't . . . As an extension of that, I also wanted there to be an advantage to aggregators. If there was a charge per song, it's obvious lots of webcasters couldn't afford to stay in business on their own. THEREFORE, they would have to come to Broadcast.com to use our service.⁸⁸

In short, Yahoo!™ and the RIAA negotiated rates such that Yahoo!™ would pay a high per-song fee for Internet only transmissions, but would pay a lower rate for radio retransmissions (which made up 90% of its business).⁸⁹

Arbitration Royalty Panel's Webcasting Rates - Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 116. HARV. L. REV. 1920, 1923 (2003) [hereinafter Harvard].

82. *Id.* See *supra* note 81 and accompanying text.

83. *Id.* "Because Yahoo!™ is a large company with significant resources, the panel felt it would be on equal footing with the RIAA during negotiations." Jackson, *supra* note 23, at 464; see also Harvard, *supra* note 81, at 1923 (stating that the RIAA-Yahoo!™ agreement was "the only one to reflect a truly arms-length bargaining process . . . between two major players of comparable skill, size, and economic power"). Yet, even in examining this agreement, the CARP recognized that the interests of Yahoo!™ was not representatives of all webcasters. Jackson, *supra* note 23, at 464; see also *infra* notes 84-88 and accompanying text.

84. Jackson, *supra* note 23, at 471. Yahoo!™ agreed to pay \$1.25 million for the first 1.5 billion performances and a negotiated fee per performance after this. For radio retransmissions, Yahoo! would pay \$.005 per performance, while Internet-only transmissions would be paid at \$.02 per performance. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 FED. REG. 45252. (See notes in footnote 75.) This agreement pleased both parties because Yahoo!™, when all fees were combined, paid a reasonable rate (as 90% of their broadcasts are radio retransmissions), while the RIAA obtained an deceptively high Internet-only rate to use as evidence in CARP hearings. *Id.*

85. See *supra* notes 69-71 and accompanying text.

86. See *supra* notes 74-78 and accompanying text.

87. In 1999, Yahoo!™ put up \$5.7 billion for a stock buy out Dallas-based Broadcast.com from its then-owner Mark Cuban, owner of the Dallas Mavericks. The deal added streaming technology to Yahoo!™'s Internet broadcasting repertoire. Ashley Dunn & Joseph Menn, *Yahoo, Broadcast.com Merging in a \$5.7-Billion Stock Deal Internet: Huge Transaction Underscores Feverish Buying Spree by Web Firms Seeking to Dominate in Cyberspace*, L.A. TIMES, Apr. 1, 1999, at C1.

88. Jackson, *supra* note 23, at 471-72.

89. Harvard, *supra* note 81, at 1923. Basically, the concept works as follows: Assume Company X needs to purchase two products, A and B, from Company Y. A reasonable rate for both

This scheme works out for both companies in that Yahoo!™ ends up paying a reasonable rate overall, but the RIAA appears to be getting high rates for performance royalties for CARP purposes.⁹⁰ “The problem is that the individual parts of Yahoo!™ are the entire business of other companies.”⁹¹ How can the Panel use this agreement as an example of a willing buyer and a willing seller without taking into account the full effects of the deal?⁹²

Without any real evidence to go on, the CARP issued its decision in February of 2002.⁹³ It finally settled on rates of \$0.0014 per-song, per-listener for Internet-only transmissions and \$0.0007 per-song, per-listener for radio retransmissions.⁹⁴ Of course, this sort of mid-point rationale made neither side happy. The Librarian of Congress ultimately rejected the Internet-only rate, reducing it to \$0.0007 per song, per listener, and equal to that of radio retransmissions.⁹⁵ The Librarian realized the Yahoo!™ agreement was riddled with falsities.⁹⁶ First, the deal did not represent the differences in value between Internet Only and radio retransmission broadcasts.⁹⁷ Second, no evidence was presented to

products is \$1.50. However, Company Y wants a very high rate for product B because it knows that this sale will set the industry standard for the price of product B. Company X simply wants a reasonable rate, as it has to buy 9 units of product A and only 1 of product B. The companies come to a compromise where Company Y will charge \$1.00 for product A, and \$4.00 for product B. This allows Company Y to charge a high rate in future deals, while Company Y's average cost per unit is only \$1.30, a reasonable price. This is exactly what the RIAA-Yahoo!™ deal did.

90. *Id.*

91. Osman, *supra* note 24, at 52.

92. Does a “willing buyer/willing seller” standard actually exist, or is it just a theoretical model? *See infra* note 190.

93. The CARP submitted its recommendation to the Librarian of Congress on February 20, 2002. *Rates and Terms for Statutory License For Eligible Nonsubscription Services*, U.S. COPYRIGHT OFFICE, available at http://www.copyright.gov/carp/webcasting_rates.html. The CARP differentiated between the three major types of webcasts: “(1) simultaneous retransmissions of over-the-air radio broadcasts; (2) all other Internet transmissions; (3) and transmissions by non-CPB affiliated noncommercial broadcasters.” Jackson, *supra* note 23, at 462.

94. Kidd, *supra* note 3, at 352-53. The third category of webcasters, transmissions by non-CPB noncommercial webcasters, was asked to pay \$.0002. These webcasters included college radio stations. *Id.*

95. 67 Fed. Reg. 45239, *supra* note 71, at 45272. The Librarian ultimately concludes that there is no evidence to support a difference in promotional and/or substantive value between radio retransmissions and Internet Only webcasts. *Id.*

96. *Id.* at 45252.

97. *Id.* The Librarian stated that reliance on the Yahoo!™ agreement as a starting point was reasonable, in light of the information given to the CARP. *Id.* However, the Panel's flaw came in finding different rates for radio retransmissions and Internet-only transmissions. *Id.* “The Panel reached this conclusion in spite of the fact that nothing in the record indicates that the parties considered the promotional value of radio retransmissions over the Internet when they negotiated these rates.” *Id.* “After considering the two studies offered into evidence by the Services, the Panel categorically stated that it ‘could not conclude with any confidence whether any webcasting service

show that the promotional value of radio retransmissions was higher than Internet Only broadcasts, warranting a lower rate.⁹⁸ In essence, the Yahoo!™ deal was “developed to effectuate particular objectives of the parties, distinct and apart from establishing an actual valuation of the performances.”⁹⁹ Although this rate seems to be a compromise, no one is happy.¹⁰⁰

Each side has attacked both the CARP process and the Librarian of Congress, filed lawsuits, and lobbied for controlling legislation on the issue.¹⁰¹ Not only would the high rates eventually put webcasters out of business, but most would declare bankruptcy almost immediately because the rates apply retroactively, causing four years of back-royalties to be paid in one lump sum.¹⁰² The post-CARP decisions appear to keep each side happy, for now.¹⁰³ The question becomes: why couldn't the CARP, the medium presumed best equipped for disposing royalty disputes, find a compromise between these organizations?

causes a net substitution or net promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams.” *Id.* The Panel went so far as to assume that promotional value was a “likely influence” on Yahoo!™’s RR rate, even though neither Yahoo!™ nor the RIAA ever argued such. *Id.*

98. Kenneth Kaufman, Note, *Content and Entertainment License Agreements*, 736 PLI/Pat 425, 473 (March 10-11, 2003).

One of the most significant errors by the CARP was its conclusion that the parties must have agreed that radio retransmissions have a tremendous positive promotional impact on sales of phonorecords - an impact that it did not find Internet-only transmissions have - and that this promotional impact explained the decision of RIAA and Yahoo!™ to set a higher rate for Internet-only transmissions. In fact, both the broadcasters (who [benefited] from the CARP's conclusion regarding promotional value) and RIAA agree that there was no evidence in the record to support the conclusion that RIAA and Yahoo!™ considered and made adjustments for promotional value for radio retransmissions. The Librarian agreed with the Register of Copyrights that the CARP's conclusion about promotional value was arbitrary and was not supported by the evidence in the record, which provided no basis for concluding that radio retransmissions provide a promotional value that Internet-only transmissions do not provide.”

Id.

99. Jackson, *supra* note 23, at 467 (citing Report of the Copyright Arbitration Royalty Panel, In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Dkt. No. 2000-9 (Feb. 20, 2002)).

100. *See generally* 67 Fed. Reg. 45239, *supra* note 71 at 45241 (as evidenced by the slew of petitions served upon the Librarian of Congress to alter and reject the recommendations of the CARP).

101. *See generally id.*; *see also* Jackson, *supra* note 23 at 467.

102. *See infra* notes 108, 135.

103. *See infra* note 115. The Small Webcasters Settlement Act of 2002 allowed an extended period of negotiations between record companies and broadcasters. *Id.* Pursuant to this Act, the two sides came to an agreement to supplant the CARP and Librarian of Congress mandates rates. *Id.*

98

IV. LEGISLATIVE FIXES FOR WEBCASTING

A. *Internet Radio Fairness Act*¹⁰⁴

After the Librarian of Congress set the rates, Congress soon realized the disorganization in the industry could not go unregulated, and thus endeavored to fix the condition through legislation.¹⁰⁵ The first measure initiated by Congress was introduced by Senator Jay Inslee. It attempted to protect smaller webcasters—those in danger of being completely destroyed by the CARP rates.¹⁰⁶ The Internet Radio Freedom Act sought to create a process for music royalties that was “fair but not free.”¹⁰⁷

Co-sponsor, George Nethercutt of Washington, stated that, “no one wins under the current CARP standard—webcasters will close shop, consumers lose access to a wide selection of programming, and copyright holders collect nothing.”¹⁰⁸ Senator Rick Boucher added that the flawed law in this area “harms not only the hundreds of webcasters that have already shut down operations, but also Internet users seeking innovative music programming and artists seeking alternative avenues through which to promote their music.”¹⁰⁹

The IRFA features a break for smaller webcasters, those reporting less than six million dollars in gross revenue.¹¹⁰ These webcasters would be exempt from

104. Internet Radio Fairness Act, H.R. 5285, 107th Cong. (2002) [hereinafter H.R. 5285], available at http://www.house.gov/inslee/images/Internet_radio_text.PDF.

105. *Id.* In addition to the IRFA, Congress also entertained many other proposals such as the Small Webcasters Settlement Act of 2002 and the Copyright Royalty and Distribution Act of 2003. *Id.*; see also *Internet Radio Fairness Act to Save Small Webcasters?*, Afterdawn.com (July 26, 2002), available at <http://www.afterdawn.com/news/archive/3174.cfm>.

106. See generally *Inslee Introduces “Internet Radio Fairness Act”* Royalties Paid by Web Radio Stations Should be “Fair But Not Free” (July 26, 2002) [hereinafter *Inslee*], available at www.house.gov/inslee/tech_Internetradio.htm.

107. *Id.* Neither Inslee nor any of his co-sponsors believe the record companies should not be compensated for their product, but the rates should not drive out of business those wishing to use the product. *Id.*

108. *Id.* (indicating that the legislation will protect webcasters, ensure access for the public, and grant a new, continuous revenue stream for record companies). Mark Cuban, the former owner of broadcast.com, described the best business in the webcasting industry as “[p]repackaged bankruptcies to avoid RIAA fees.” Craft, *supra* note 8, at 24.

109. *Inslee, supra* note 106. RAIN, a website dedicated to issues relating to radio and the Internet, keeps a growing list of webcasters who have chosen to stop broadcasting in order to avoid the royalty fees they regard as unpayable. RAIN: Radio and Internet Newsletter, available at <http://www.kurthanson.com/archive/news/092702/index.asp> (last modified Sept. 27, 2004) (indicating a list of over 135 and growing).

110. H.R. 5285, *supra* note 104; see also, Jonathan E. Allen, *Of Royalties and Rancor: Recent Webcasting Developments*, 7 NO. 6 CYBERSPACE LAW. 15 (Sept. 2002).

the CARP and Librarian of Congress' decision, and would be represented at the next CARP session.¹¹¹ The IRFA required the CARP to abandon the "willing buyer/willing seller" standard and reinstitute the "traditional" standards and goals mandated by section 801 of the 1976 Copyright Act.¹¹² This act also required future CARP's to eliminate fees for ephemeral recordings that were made in the process of streaming or broadcasting songs.¹¹³

While the idea expressed in the IRFA constituted a vast improvement on the current system, the bill was tabled; and the Small Webcasters Amendments Act supplanted it.¹¹⁴ This act originally placed a simple six-month moratorium on the Librarian of Congress' rate decision to give small webcasters time to further negotiate rates and to give Congress time to come up with ways to protect the work and the public's access to it.¹¹⁵ Yet, consistent with everything else involved in the webcasting disputes, the bill could not remain this simple.

B. Small Webcasters Amendments Act & Small Webcasters Settlement Act

A few days after the introduction of the SWAA, James Sensenbrenner, the bill's sponsor, conducted a meeting in his office with the RIAA and thirteen webcasters.¹¹⁶ This meeting eventually produced terms favorable for both par-

111. *Inslee, supra* note 106; *see also* Gretchen McCord Hoffmann, *Recent Developments in Copyright Law*, 12 TEX. INTELL. PROP. L.J. 111, 214 (Fall 2003) ("The significance of this provision is evidenced in the next section of the bill, which would have exempted small entities from the requirement to bear the cost of participating in a CARP.")

112. H.R. 5285 § 3; *Inslee, supra* note 106.

113. *Inslee, supra* note 106. "The Registrar of Copyrights has determined that these temporary recordings have no independent economic value, and should not be subject to a separate royalty payment. Broadcasters should not be charged for temporary storage files that listeners never hear and which are not saved." *Id.*

114. *Bill Summary and Status for 107th Congress: H.R. 5285, available at* <http://thomas.loc.gov> (last visited September 28, 2004) (showing that the IRFA was left in a House subcommittee). In September of 2002, despite overwhelming support for IRFA, Representative James Sensenbrenner proposed the Small Webcaster Amendments Act of 2002. Kidd, *supra* note 3, at 355. The SWAA would eventually morph into the Small Webcaster Settlement Act of 2002. *Id.* at 360; *see* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 [hereinafter SWSA].

115. Kidd, *supra* note 3, at 355.

116. *Id.* On September 30, 2002, a group of 13 people, who attempted to negotiate with the RIAA to come to an independent agreement, met in Representative Sensenbrenner's office and emerged with a compromise. *Id.* at 355-56. These individuals came to be known as the "Sensenbrenner 13." *Id.* at 355; Ann Gabriel, *American Injustice Series Part 2: Setting the Stage*, Webcaster Alliance, at <http://www.webcasteralliance.com/modules/sections/index.php?op=viewarticle&artid=2> (last visited September 25, 2004). Members included Kevin Shively of www.Beethoven.com, Wanda and Jim Atkinson of www.3wk.com, Mike Hays of www.Twangcast.com, Ron Rubin of www.BoomerRadio.com, Mary McCann of www.iMNetworks.com, Dave Landis of www.Ultimate-80s.com, Steve Wolf of www.Wolffm.com, Mike Roe of www.radioio.com, Gary Dobek of www.DigitallyImported.com, Bill Goldsmith of www.RadioParadise.com, Bob Ottoway of www.ClassicalMusicDetroit.com, and a representative from www.OnionRiverRadio.com. Kidd, *supra* note 4, at 355 n.107; Gabriel, *supra*.

ties, causing Sensenbrenner to rewrite the bill to reflect these changes.¹¹⁷ The SWAA allowed for percentage of revenue payments, rather than payments based on the “per song, per listener” scale imposed by the Librarian.¹¹⁸

Although everyone involved seemed pleased with the act, Senator Jesse Helms introduced a way to improve, as well as complicate, the bill.¹¹⁹ Helms reintroduced the idea of private negotiations.¹²⁰ His amendment allowed for SoundExchange, the arm of the RIAA responsible for collecting royalties, the authority to negotiate royalty rates with small webcasters.¹²¹ With this ability to negotiate, the amendment imposed deadlines for different types of small web-

117. *Id.* at 355-56. The bill that was once a simple one-paragraph moratorium became thirty pages of imposed royalty rates. *Id.* at 356.

118. *Id.* at 356. The SWSA, in addition to granting a six-month grace period to allow for negotiations by noncommercial webcasters, also indicated that the new agreements shall include an option for a percentage of revenue based payment. SWSA §§ 3(a), 4 (“Any such agreement for small commercial webcasters shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee.”).

119. *Id.* at 357-60. Senator Helms, reportedly lobbying on behalf of religious broadcasters, argued that Representative Sensenbrenner’s inclusion of the “Sensenbrenner 13” agreement was insufficient; he hoped that the new amendment would give broadcasters more time to negotiate a fair agreement that would benefit all webcasters. *See id.* at 358 n.118.

120. *Id.* at 358. This amendment allowed SoundExchange, the royalty collecting arm of the RIAA, to negotiate private agreements with small or noncommercial webcasters. *Id.* at 358-59. The senatorial amendment allowed a grace period from royalty payments to negotiate these agreements and provided that the agreements would be effective as of the date that they were published in the Federal Register. *Congress Approves Legislation Granting Relief to Small Webcasters*, 64 PAT. TRADEMARK & COPYRIGHT J. 1598 (2002), available at <http://ipcenter.bna.com/pic2/ip.nsf/id/-BNAP-5G5QGB>.

121. Kidd, *supra* note 3, at 358. “SoundExchange® is a dynamic nonprofit performance rights organization embodying hundreds of recording companies and thousands of artists united in receiving fair compensation for the licensing of their music in the new and ever-expanding digital world.” *SoundExchange Background*, available at <http://www.soundexchange.com/about/about.html> (last visited Sept. 25, 2004). Since the inception of the SWSA, SoundExchange has successfully negotiated royalty terms with the Corporation for Public Broadcasting/National Public Radio, DiMA, small webcasters, XM and Sirius Satellite Radio, and DMX, Muzak and Music Choice have all settled their royalty rates through SoundExchange. *Id.* SoundExchange also:

issues licenses to those users who qualify for the statutory licenses; collects performance royalties from the statutory licensees; collects and processes all data associated with the performance of the sound recordings; allocates royalties for the performance of the sound recording based on all of the data collected and processed; makes distribution of the featured artist's share directly to the artist; makes distribution of the SRCO's share directly to the copyright owner; makes distribution of the nonfeatured artist's share to AFTRA and AFM's Intellectual Property Rights Distribution Fund; and provides detailed reports summarizing the titles, featured artists and royalty amounts for each of the sound recordings performed by the statutory licensees.

Id.

101

casters.¹²² Non-commercial webcasters, such as public and college Internet radio stations, were given until June 20, 2003 to negotiate a rate.¹²³ But small commercial webcasters and traditional Internet radio stations were only given until December 15, 2002.¹²⁴ If parties were unable to reach an agreement, the webcasters were forced to pay the Librarian's rates.¹²⁵

Congress passed the bill, and President George W. Bush signed it in December 2002; and negotiations ensued almost immediately.¹²⁶ SoundExchange and the Voice of Webcasters reached an agreement a little over a week after the passage of the bill, thereby nearly negating any decision made by the CARP or the Librarian of Congress.¹²⁷ The terms of this most recent agreement allowed webcasters to pay 8% of gross revenues or 5% of expenses, whichever was greater, from 1998 to 2002.¹²⁸ For the years 2003 and 2004, a webcaster must pay 10% of the first \$250,000 in revenue and 12% of gross revenue for any

122. Kidd, *supra* note 3, at 358-59.

123. SWSA § 3(a)(1).

124. *Id.* § 3(b)(1).

125. Kidd, *supra* note 3, at 359-60 ("Should negotiations fail, the Helms Amendment provided that webcasters would make the royalty payments outlined by the Librarian of Congress in his July decision."). This fall back serves two functions. First, it allows for a contingency, so that everyone involved knows exactly what will happen if negotiations fail. Second, it provides an incentive to come to an agreement. One's incentive to negotiate is only as strong as their best alternative to a negotiated agreement or BATNA. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97-106 (2d ed. 1991). By providing a mandatory BATNA which neither side desires, the SWSA forces negotiators to agree in order to avoid the negatives of the Librarian set rates.

126. Kidd, *supra* note 3, at 360. The SWSA passed both houses unanimously on November 15, 2002. *In this Issue: News from Sound Recording Department*, American Federation of Television and Radio Artists, available at <http://www.rachelrifat.com/Email/database%20frame.htm> (Nov. 2002). President Bush signed the SWSA into law on December 4, 2002. *Id.*

127. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78510, 78510 (Dec. 24, 2002), available at <http://www.copyright.gov/fedreg/2002/67fr78510.html>. SoundExchange and the Voice of Webcasters reached an agreement on December 13, 2002; the agreement was then published in the *Federal Register*, pursuant to federal law. *Id.* The Voice of Webcasters is a coalition of fifteen of the largest small commercial webcasters. Eric Olsen, *Small Webcasters Threaten RIAA*, available at <http://blogcritics.org/archives/2003/07/10/131902.php> (July 10, 2003).

128. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. at 78511.

[A]n eligible small webcaster that is a natural person shall exclude from expenses those expenses not incurred in connection with the operation of a service that makes eligible nonsubscription transmissions, and an eligible small webcaster that is a natural person shall exclude from gross revenues his or her income during such period, other than income derived from-- (1) A media or entertainment related business that provides audio or other entertainment programming, or (2) A business that primarily operates an Internet or wireless service, that is in either case directly or indirectly controlled by such natural person, or of which such natural person beneficially owns 5 percent or more of the outstanding voting or non-voting stock.

Id.

102

amount over that or 7% of expenses.¹²⁹ Regardless, all webcasters must pay a minimum of \$500 per year from 1998 to 2002.¹³⁰ For 2003 and 2004, webcasters with gross revenue less than \$50,000 must pay at least \$2,000 per year, and those with greater revenue must pay at least \$5,000 per year.¹³¹

Any small webcaster can opt-in to this agreement by filing a form on the SoundExchange website and those that do are guaranteed these rates until the expiration of the agreement in December of 2004. Those that do not opt in must pay the rates set by the Librarian of Congress.¹³²

If the previous analysis does not prove the process needs fixing, the smallest webcasters are still left without any significant help. Some hobbyists pay just "\$4.95 per month to air their radio shows, which would cost only \$282 for seven years of broadcasting."¹³³ However, under the current scheme, seven years would cost the same hobbyist over \$14,000 according to the RIAA/VoW agreement.¹³⁴ The problem is the Voice of Webcasters, for the most part, does not represent educational webcasters, non-profit webcasters, or hobbyists, therefore their interests are not sufficiently represented.¹³⁵

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*; see *supra* note 124 and accompanying text.

133. Kidd, *supra* note 3, at 362.

While the SoundExchange payments are lower for small webcasters, they are still too high for the smallest webcaster to afford . . . Small webcasters paying the minimum allowable rates under the SoundExchange agreement will owe over \$10,000 for those same seven years, with just over \$9,000 of that amount due on June 20, 2003.

Id. at 362-63

134. Royalties from 1998 to 2002 were required to be paid on January 15, 2003. 67 Fed. Reg. 78510, *supra* note 127, at 78511. For the period from October 28, 1998 to December 31, 1998, webcasters must pay, at minimum, \$500.67 Fed. Reg. 78510 *supra* note 127, at 78512. For the years 1999-2002, webcasters are required to pay a minimum of \$2,000 per year. *Id.* For the years 2003-2004, two categories were created by the agreement. See *id.* For those webcasters with revenues of \$50,000 or less for the previous year and anticipated revenues of less than \$50,000 for each of the two years, a minimum fee of \$2,000 was required. *Id.* For those webcasters with more than \$50,000 for the previous years and anticipated revenues of more than \$50,000 for each of the two years, a minimum fee of \$5,000 was required. *Id.*

135. Kidd, *supra* note 3, at 363-64.

One webcaster explains, "[t]he people at the negotiating table did not represent the broad spectrum of webcasters that are operating today. There were no educational webcasters, no non-profit webcasters, and no hobbyist webcasters at the negotiating table, nor did these groups have any significant input into the negotiating agenda . . . [S]ome critics point to the fact that the International Webcasters Association (IWA), to which many of the commercial webcaster members of the 'Sensenbrenner Thirteen' belong, has not endorsed the SoundExchange agreement.

V. SPECIFIC PROBLEMS

Reforming the CARP process is generally hit or miss, and thus far they have missed. In short, the process typically follows a given pattern. The Librarian of Congress chooses two arbitrators from a list of professional arbitrators, usually between thirty and seventy five.¹³⁶ The two arbitrators then choose a third to act as the chairman of the CARP.¹³⁷ Each CARP is governed by the Copyright Arbitration Royalty Panel Rules of Procedure.¹³⁸ Once a conclusion is reached, the Panel gives their findings to the Librarian of Congress, who then may accept or reject the findings based on another series of criteria.¹³⁹ This process, though logical in theory, is riddled with holes and problems in application.

First, a major appeal of arbitration involves the reduced costs, as opposed to litigation.¹⁴⁰ This reduced cost usually allows those who could normally not afford to file a complaint to enforce their rights and interests in a productive forum. Yet, absent in the webcasting CARP were the smallest of webcasters.¹⁴¹ The costs to participate in this process were estimated at ten million dollars per interest group.¹⁴² While the RIAA and large webcasters could afford the fees,

Id. at 364. It seems odd that an industry applauds an agreement that is not even recommended by one of their largest organizations. See IWA-About Us, available at <http://www.webcasters.org/about.htm>.

136. Kidd, *supra* note 3, at 369-70; 17 U.S.C. §§ 802(a)-(b) (2002). A complete list of currently approved arbitrators can be found on the U.S. Copyright Office Website. Copyright Arbitration Royalty Panels; List of Arbitrators, 67 Fed. Reg. 5000 (2002), available at <http://www.copyright.gov/fedreg/2002/67fr5000.html>. The three arbitrators chosen for this CARP proceeding were Eric Van Loon (JAMS), Jeffrey Gulin (JAMS), and Curtis von Kann (JAMS). 66 Fed. Reg. 38324, *supra* note 56, at 38325.

137. *Id.* at 370; 17 U.S.C. § 802(a) (2002). For this CARP hearing, Gulin and von Kann chose Van Loon as the chairperson. 66 Fed. Reg. 38324 at 38325.

138. *Id.* at 370 n.184 (citing NIMMER ON COPYRIGHT § 251.41-48 (LEXIS through 2003) (detailing the procedure for formal hearings, suspension or waiver of rules, filing and service of written cases and pleadings, discovery and prehearing motions, etc)).

139. *Id.*; 17 U.S.C. § 802(f) (2002). Following a CARP recommendation, the Librarian of Congress has sixty days in which to accept or reject the recommendation. "The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." 17 U.S.C. § 802(f) (2002).

140. "Mediation is an inexpensive way to settle disputes as compared to litigation." Gerald F. Phillips & Vanessa A. Ignacio, *Entertainment Industry Recognizing Benefits of Mediation*, 17 ENT. & SPORTS LAW. 29, 29-30 (2000); Toni L. Wotherly, *There's No Business Like Show Business: Alternative Dispute Resolution in the Entertainment Industry*, 2 VA. SPORTS & ENT. L. J. 162, 170 (2002).

141. Stuart M. Maxey, *That CARP Is No Keeper: Copyright Arbitration Royalty Panels – Change is Needed, Here is Why, and How*, 10 J. INTELL. PROP. L. 385, 396 (2003). "They must either 'rely upon the records developed by the participating parties [parties to the CARP proceedings] or resort to voluntary negotiations with the copyright owners on terms they may otherwise find objectionable.'" *Id.*

142. Kidd, *supra* note 3, at 371.

the smaller webcasters did not have the funds or the rallying force to form and finance an interest group.¹⁴³ Excluding this large group of interested parties does not allow for a fair and all-encompassing rate.¹⁴⁴ Small entities need a way to voice their opinion on equal footing with larger entities to ensure fair competition in the marketplace, as well as the disbursement of ideas.¹⁴⁵ For example, with employment contracts, arbitration proceedings are primarily funded by the employer to enable employees to file claims.¹⁴⁶ Any reform of the CARP process needs to ameliorate costs and allow participation for all involved.¹⁴⁷

Second, the CARP process lacks complete continuity from one panel to the next.¹⁴⁸ The CARP process is to be repeated every two years to adjust the rates from previous years.¹⁴⁹ However, there is no guarantee that the same panel will be employed. In fact, you could almost guarantee that parties will face an entirely new group of arbitrators.¹⁵⁰ As a result, a CARP could set favorable rates for the webcasters one year, while the next panel raises the rates based on their own evaluation, giving the RIAA the benefit of the doubt.¹⁵¹ Although safe-

143. See generally Maxey, *supra* note 141 and accompanying text.

144. Kidd, *supra* note 3, at 371. The IRFA is attempting to alleviate this problem by exempting the smallest webcasters from bearing the financial burden of the CARP proceedings while still including them in the arbitration. See Hoffmann, *supra* note 111 and accompanying text.

145. "The CARP process must include an opportunity for the smallest webcasters, including hobbyists, to participate in rate setting." *Id.*

146. See e.g., Melissa G. Lamm, *Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams*, 24 CAMPBELL L. REV. 93, 113 (2001).

While some courts contend that the splitting of arbitration fees is lawful, many employees will be prevented from bringing claims due to prohibitively high forum costs. Consequently, the employment contract should require the employer to pay all fees and costs associated with arbitration to ensure that no meritorious claim is deterred. The employment contract is, after all, customarily solely an employer creation, with the employer precluding employee access to a judicial forum.

Id.

147. See Maxey, *supra* note 141, at 400-01.

148. Kidd, *supra* note 3, at 371. "The Copyright Office should establish a permanent, independent entity or division of the Copyright Office to make royalty rate decisions, giving arbitrators the time necessary to gain expertise in the issues they hear." *Id.* (footnote omitted).

149. "Once a rate is established, the DMCA requires that a CARP meet every two years to re-evaluate royalty fees for broadcasters." Hoffmann, *supra* note 111, at 213.

150. See Kidd, *supra* note 3, at 371; Maxey, *supra* note 141, at 397. "However, because CARP members only serve for two years, and are unlikely to return to serve again, requiring the Copyright Office to report CARP costs would still have little effect on any given CARP's financial decisions." Sara J. O'Connell, *Counting Down Another Music Marathon: Copyright Arbitration Royalty Panels and the Case of Internet Radio*, 8 MARQ. INTELL. PROP. L. REV. 161, 180-81 (2004).

151. See e.g., Maxey, *supra* note 141, at 397 ("[R]ates made by these ad hoc panels are often too narrow to establish precedent. This results from the fact that the decision is often rendered on a basis that 'focus[es] on reaching a bottom-line result in the given proceeding rather than one explicating a thorough and complete analysis of the relevant standards" (alteration in original)).

guards are in place to prevent a drastic swing, no rate is safe for more than two years.¹⁵² Also, a new panel forces the parties to re-explain the issues of the previous panel, as well as introduce changes in the market.¹⁵³ To ensure continuity between panels, changes in the process should allow for one panel to handle an issue every time it arises.¹⁵⁴ This ensures a continuity of knowledge and judgment.¹⁵⁵ Alternatively, subsequent panels should be bound by the opinions of previous panels, meaning that they should weigh equally those facts and figures the previous CARP felt were important.¹⁵⁶

A third problem with the current CARP structure is the lack of expertise of the panelists.¹⁵⁷ Each panelist, while an expert in arbitration, is not necessarily a specialized attorney in the fields of copyright and technology law, or in the music industry.¹⁵⁸ Especially with technology increasing at its current rate, it is essential that those chosen for the panel realize what is at stake, how viable the arguments are for each side, and the possibilities for profit and promotion.¹⁵⁹ For example, the RIAA introduced arguments stating that the streaming media runs a significant risk of piracy and will replace CD's because of its digital qual-

152. Terms are renegotiated and reconsidered every two years starting in January of 2000. 17 U.S.C. § 112(e)(6). See *supra* note 148-49 and accompanying text.

153. This is because "[a]ny expertise developed during the process (e.g., in rate-setting or subject matter) will not likely benefit future proceedings." Maxey, *supra* note 141, at 397.

154. See *supra* note 148 and accompanying text.

155. See *supra* note 153 and accompanying text.

156. It would not be unreasonable to apply the doctrine of stare decisis to CARP decisions. *But see supra* note 151 and accompanying text.

157. Worthierly, *supra* note 140, at 170-71. The main organizations for resolving entertainment disputes are the American Film Marketing Association (AFMA), American Arbitration Association (AAA), and Judicial Arbitration and Mediation Services (JAMS). *Id.* While each of these organizations hires arbitrators with great experience in alternative dispute resolution and even experience in entertainment law, there is no guarantee that any arbitrator possesses an expertise in copyright law. *Id.*

158. *Id.* ("Like AFMA, AAA are typically experienced entertainment attorneys. In contrast, JAMS/Endispute arbitrators are mostly retired judges."). The three arbitrators chosen for the CARP deciding public performance royalties, Eric E. Van Loon, Jeffrey S. Gulin, and Curtis E. von Kann, were all members of JAMS. Van Loon is an attorney and has more than 16,000 hours of arbitration experience, but only partially in the field of copyright. While entertainment/intellectual property is listed as an expertise, most of his major cases involved major software system arbitrations, numerous environmental and tort actions, as well as numerous municipality disputes. JAMS - The Resolution Experts, available at <http://www.jamsadr.com/ neutrals/bio.asp? neutralsid=1775>. Curtis E. von Kann is a retired judge and he too, like Van Loon, has a tremendous arbitration background, but his experience in entertainment/intellectual property seems limited. According to the JAMS website, the CARP arbitration is his only experience with copyright royalties and/or Internet technology. *Id.*, available at <http://www.jamsadr.com/ neutrals/bio.asp? neutralsid=1778>. Jeffrey S. Gulin is a former Maryland Administrative Law judge dealing exclusively with administrative law issues. Lawyer Profile, FINDLAW.COM, available at http://pview.findlaw.com/view/1015084_1.

159. The idea of compulsory licenses for digital transmissions requires full knowledge of how the technology behind the disputes works, the history of technology and copyright law, and the alternative business models and profit/promotion potential related to the dispute in question.

ity.¹⁶⁰ Realistically, recording directly from streaming media is difficult and courts have enjoined the creation and distribution of the recording software.¹⁶¹ Also, due to the restrictions imposed by the DMCA, users are unable to anticipate what songs will be played by the service and therefore cannot accurately find the songs they want to record.¹⁶² These limits on the frequency and predictability of songs would discourage users from scrolling through songs and playing any given song on demand. The point being that most arbitrators involved in the CARP process have little or no experience in copyright law, though unarguably experts in arbitration.¹⁶³ Future reforms to the CARP process must include a requirement of expertise or experience in the field of copyright, in order to properly weigh critical evidence.

At least one Congressman recognizes this problem and has introduced legislation to eliminate the CARP process and replace the Panel with a Copyright Royalty Judge (CRJ).¹⁶⁴ This CRJ would be appointed to a salaried position for a period of five years.¹⁶⁵ The CRJ standards would require “an attorney with ten

160. “The concern is two-fold: (1) some users possess the technological skill to make copies of streaming songs, and (2) the webcasts may serve as substitutes for owning copies of particular songs.” Jackson, *supra* note 23, at 450 (footnote omitted).

161. “[I]t is not easy to make retention copies of streamed files.” Sara Steetle, UMG Recordings, Inc. v. MP3.com, Inc.: *Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings*, 21 LOY. L.A. ENT. L. REV. 31, 56 (2000). The U.S. District Court for the Western District of Washington recently ruled on a similar issue in *RealNetworks, Inc. v. Streambox, Inc.* 2000 WL 127311 (W.D. Wash. 2000). Streambox offered three products that allowed the user to download and retain copies of streaming media, which was previously too difficult and time consuming. *Id.* The court likened the Streambox VCR to a “black box,” unscrambling RealNetworks signal to allow for downloading a clear copy of the streaming audio. *Id.* Streambox Ripper allowed users to transform audio file formats to be compatible with other formats. Streambox Ferret allowed the user to search RealNetworks using Streambox’s own search engine. Utilizing these three technologies, a user can search for the songs or genre he or she wishes, download the streaming audio, and then convert the file to whatever format he or she wishes. The court granted a preliminary injunction against Streambox’s use, manufacture, or distribution of VCR or Ferret, but denied an injunction on Ripper, presumably because there are significant non-infringing uses (unlikely to prevail on a suit against Ripper). *Id.*

162. *See supra* note 40 and accompanying text.

163. *See Fessler, supra* note 20, n. 108, 109. The lack of expertise of potential arbitrators in copyright law has led the Librarian to overturn seven of the last ten CARP reports and has prevented the Librarian and the Copyright Office from finding effective and knowledgeable arbitrators. CARP hearing report, *available at* www.house.gov/judiciary/80194.pdf [hereinafter CARP hearing].

164. Maxey, *supra* note 141, at 404-05. Texas Representative Lamar Smith has introduced a bill entitled the Copyright Royalty and Distribution Reform Act of 2003. Copyright Royalty and Distribution Reform Act of 2003, *available at* www.theorator.com/bills108/hr1417.html [hereinafter CRDRA]. Under the CRDRA, the proposed § 801 eliminates the CARP process altogether and grants Congress the authority to appoint an individual to oversee all proceedings previously handled by the CARP.

165. *Id.*; CRDRA, *supra* note 164.

or more years of legal practice with demonstrated experience in administrative hearings or court trials and demonstrated knowledge of copyright law.”¹⁶⁶ In addition, the CRJ would have a two member support staff with “expertise in copyright law and in the business and economics of industries affected by the actions taken by the Copyright Royalty Judge.”¹⁶⁷ Not only does this bill address the lack of expertise of the current CARP system, it also allows for continuity between evaluations by having the same person(s) oversee the proceedings.

Another complaint about the CARP process is the ease by which the decision may be cast aside or overruled.¹⁶⁸ The DMCA allows for the Librarian of Congress to accept or reject the recommendation of the Panel.¹⁶⁹ Under § 802(f), the Librarian of Congress has ninety days to accept or reject the determination of the CARP, but must accept the findings unless “arbitrary or contrary to the applicable provisions of this title.”¹⁷⁰ The Librarian claimed that significant portions of the CARP’s findings were arbitrary and contrary to law.¹⁷¹ The Librarian, however, seemed to overstep his boundaries in overruling the recommendation based on the law in general, and not as contrary to “*this title*.”¹⁷² The

166. Maxey, *supra* note 141, at 404-05.; CRDRA, *supra* note 164.

167. Maxey, *supra* note 141, at 404-05.; CRDRA, *supra* note 164.

168. Speed and efficiency is generally an important factor for entertainment companies in deciding to utilize alternative dispute resolution. Worthery, *supra* note 140, at 140. The CARP proceeding offered neither. The Copyright Office and the CARP, combined, drew out the process for almost five years. In addition, the decisions made left the parties so dissatisfied that they were forced to lobby and file petitions for further change. In addition, only a limited number of parties could partake in the CARP proceedings, and so the solution proposed by the CARP did not reach a conclusive determination.

169. See *supra* note 140 and accompanying text.

170. *Id.*

171. See Barry I. Slotnick, *Copyright in the Digital Age*, 128 PLI/NY 793, 809 (2002). “[W]e [presumably the federal government] will set aside a royalty award only if we determine that the evidence before the Librarian compels a substantially different award. We will uphold a royalty award if the Librarian has offered a facially plausible explanation for it in terms of the record evidence.” Marilyn J. Kretsinger, *Copyright Office Practice and Procedures*, 567 PLI/Pat 151, 185 (1999).

172. According to the Copyright Act, the Librarian is required to uphold the CARP’s ruling unless it is arbitrary or contrary to “this title,” referring to itself. Osman, *supra* note 24, at 52. The CARP’s decision was based off what it considered what a “willing buyer/willing seller” would have negotiated. The CARP analyzed the content it had in front of it and made a decision. The CARP rejected 25 of 26 private RIAA agreements, indicating that it felt these agreements did not represent the “actual market value.” The CARP also accepted the RIAA/Yahoo!™ agreement as a fair evaluation of equal bargaining power and relative value. By doing this, the CARP satisfied the requirements demanded of it under § 114 and § 801 of the Copyright Act. Therefore, the Librarian of Congress, in fact, overruled a decision that was not contrary to “this title,” Title 17, but contrary to a more general law. *Id.* While no one was happy with the decisions, no one challenged the Librarian’s authority. “Why create a Panel at all when its decisions can be ignored so easily?” *Id.* The fact that no one has challenged this, and that the Librarian himself believed he had the power to

CARP followed the standards set up under § 802 in using the “willing buyer/willing seller” standard, and so their decision was not, in fact, contrary to the Copyright Act.¹⁷³ Therefore, the Librarian of Congress had no place interfering with the decision. It is surprising that neither side, though both thoroughly unhappy with the Librarian’s decision, challenged it. And, if the Librarian’s action is not in violation of his role and the decision could be made without violation, why does a CARP even exist?¹⁷⁴ Interested parties may appeal the decision of the Librarian and the CARP to the US Court of Appeals.¹⁷⁵ The whole purpose of arbitration is to avoid the courtroom and all the negatives that follow, and yet it seems that the process provides little more than a prerequisite for filing appeals and lobbying efforts.

Next, as evidenced by the above discussion, future CARP proceedings must find a way to regulate and incorporate the smallest webcasters in their decision.¹⁷⁶ While the costs border on unpayable, the miniscule reward for smaller claims makes pursuing a CARP decision unworthy of the effort. For example, the inefficiencies of the 1992-1994 Digital Audio Recording Technology proceedings cost the parties more than \$12,000, whereas the award amounted to a mere \$11.03.¹⁷⁷ Furthermore, the decision was then appealed, dramatically in-

overrule the CARP, indicates that the guidance given the process by federal statute is inadequate at best.

173. “Applying [the aforementioned] principles, the Librarian accepted the CARP’s conclusion that the RIAA/Yahoo!™ agreement represented the best evidence of what rates would have been negotiated in the marketplace between a willing buyer and a willing seller for a license to engage in webcasting of radio retransmissions and Internet-only transmissions.” Kenneth M. Kaufman, *Content and Entertainment License Agreements*, 736 PLI/Pat 425, 473 (2003). By recognizing that the CARP’s conclusion was not arbitrary, the Librarian did not have the authority to overturn the CARP decision.

174. The Copyright Royalty and Distribution Reform Act would render the Copyright Office to merely an administrative and advisory capacity only, giving the Librarian of Congress no ability to overrule the decision offered by the CARP.

175. Kidd, *supra* note 3, at 370. Any aggrieved party may appeal the determination of the Librarian of Congress to the U.S. District Court of Appeals for the District of Columbia. *Nat’l Ass’n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 913 (C.A.D.C. 1998). An appeal must be brought within 30 days of the Librarian’s decision, or else the decision is deemed final. If an appeal is brought by an appropriate party, “The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner.” *Id.*

176. *See supra* notes 141-46, 201.

177. Maxey, *supra* note 141, at 397; CARP hearing, *supra* note 163, at 12.

Abuses of the process have occurred and the Office has consistently found that it lacks authority either to prevent these abuses or to expedite decision-making. Arbitrator costs alone far exceed the amount-in-controversy. For example, the costs of the arbitrators in the 1992-94 Digital Audio Recording Technology (“DART”) distribution proceeding, which resulted in an award of \$11.03 to two individual claimants were more than \$12,000

creasing costs to include all court related expenses.¹⁷⁸ Also, because the CARP did not include the small webcasters, Congress was forced to enact legislation to fix this oversight.¹⁷⁹ However, even the SWSA did not help the smallest webcasters.¹⁸⁰ The CARP decision suggested rates that were impossible to pay, while the SWSA, representing the opposite extreme, allowed them to pay a percentage of the revenue that they did not make, thereby exempting them from any royalty.¹⁸¹ One suggestion on how to help include small webcasters, while still creating a fair system, is to create a tiered system.¹⁸² This would create a set payment that gradually increases with a webcaster's revenue.¹⁸³ Alternatively,

(more than one thousand times the amount-in-controversy); the costs of the arbitrators in the 1995–98 DART distribution proceeding, which resulted in a total award of \$6.06 to the same two individual claimants (\$5.04 to one and \$1.02 to the second) were in excess of \$21,000 (almost three thousand times the amount-in-controversy); and in the 1991 Cable Distribution Proceeding (Phase II), the arbitrators awarded \$63.74 to an individual claimant, yet the costs of the arbitrators were more than five hundred times that amount.

Copyright Arbitration Royalty Panel (CARP) Structure and Process: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary House of Reps., 107th Cong. 31 (2002), available at http://commdocs.house.gov/committees/judiciary/hju80194.000/hju80194_Of.htm [hereinafter CARP Structure].

178. Maxey, *supra* note 141, at 397; CARP hearing, *supra* note 163, at 12.

To make it worse from a cost-perspective, all of these matters, after final disposition by the Librarian of Congress, were appealed to the U.S. Court of Appeals for the District of Columbia. The appeal in the second matter was withdrawn; the appeals in the first and third matters necessitated the preparation of a record on appeal and the submission of briefs by the U.S. Department of Justice and the parties.

CARP Structure, *supra* note 177, at 31.

179. Specifically, Congress passed, and President Bush signed, the Small Webcasters Settlement Act of 2002. See *supra* note 115.

180. Kidd, *supra* note 3, at 367.

Moreover, webcasters who were not a party in the CARP proceeding were unable to submit comments to the LOC as part of that body's review of the CARP determination, on the theory that they did not have standing. This decision makes the CARP procedure problematic; since CARP proceedings are adversarial in nature, it is essential that all interested parties be represented so the panel would have a complete evidentiary record on which to base its decision.

Fessler, *supra* note 24, at 415.

181. Kidd, *supra* note 3, at 367. Under these contrasting styles, either the small webcaster is forced out of business and the public is denied a possibly new or alternative music source or, on the other hand, record companies remain uncompensated for their product. Thus, the result is either limiting expression and free speech or an inequitable taking.

182. *Id.* This tiered rate could be tied to listeners, instituting a base rate and then increasing as a broadcast's listener base increases, or even to revenues.

183. This structure may resemble the federal tax structure, using a progressive percent of revenue or a progressive flat fee to webcasters in a given revenue bracket. See Federal Tax Rates, available at <http://taxes.yahoo.com/rates.html> (charting basic federal income tax brackets).

110

the tiered system could include a set payment for those webcasters with no revenue, followed by a tiered percent of revenue system for those with revenues.¹⁸⁴

Another reason the CARP proceeding failed was because of the lump sum payment requirement.¹⁸⁵ Given that the CARP rendered a decision almost four years after the passage of the DMCA, their decision became retroactive and past royalties became all due at one time.¹⁸⁶ The CARP obviously did not have small webcasters in mind, as they did not allow for some sort of payment schedule. So, again, Congress needed to enact legislation to rectify the situation.¹⁸⁷

Last, the standards regulating the CARPs are inconsistent and offer poor guidance.¹⁸⁸ This CARP focused on the “willing buyer/willing seller standard,” a standard which at least one expert believes does not exist.¹⁸⁹ In using this standard generally, “the ‘true’ value . . . is less important than the parties’ per-

184. A mixture of tiered structures could prove the best situation. For non-profit or non-revenue-producing webcasters, a proposal could allow the broadcaster to pay a set fee per year, while those with revenues would pay a percentage, increasing based on their level of revenue.

185. See *supra* note 135.

186. *Id.*

187. Specifically, Congress passed, and President Bush signed, the Small Webcasters Settlement Act of 2002. See *supra* note 120.

188. While § 801 provides goals for the CARP to satisfy, the criteria of “willing buyer/willing seller” may be contradictory to these goals. Section 114(f)(2)(B) provides further criteria in addition to the § 801 standards as well as the “willing buyer/willing seller” standard:

(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.

17 U.S.C. § 114(f)(2)(B)(i)-(ii) (Supp. 2004). “These criteria do not add flexibility as they simply reflect the considerations that willing buyers and sellers will take into account in the normal course of their negotiations.” Jackson, *supra* note 23, at 473. Also, with regards to § 114(f)(2)(B)(i), the record companies argue that the digital quality of the transmission as well as the frequency of play will serve as a substitute for owning the CD. However, the DMCA provides detailed and extensive safeguards to prevent a user from accessing the song too easily, or playing it too frequently. See 17 U.S.C. § 114(d)(2)(A)(i)-(iii) *supra*, note 40. Therefore, the type of transmission feared by the RIAA would not even be eligible for a statutory license, and therefore the CARP should not have taken this danger into account. *Id.*

189. A willing buyer/willing seller standard creates a circular logic for the Panel to follow; “to set a fee based upon what the marketplace would have determined on its own if no statutory fee was necessary.” Jackson, *supra* note 23, at 476. This type of logic relies on a functioning market to set a fair price- however no such market exists. Fessler, *supra* note 20, at 418. This type of “one-size-fits-all” rate setting allows for one or two agreements, which may or may not represent the entire industry, to set the rates for the entire industry. *Id.* The very existence of a CARP stifles meaningful negotiation because parties know that if they do not get their way, arbitration might go their way. *Id.* at 419. Because of this fall back, neither party absolutely must come to an agreement. *Id.*

ception of that relative value.”¹⁹⁰ However, in setting an industry-wide royalty, the CARP should be focusing on the real value of the material in question. If one webcaster is willing to pay more, why is the entire industry held to that standard when the actual value of the work may be much less?¹⁹¹ For example, in the Yahoo!™ agreement, Yahoo!™ negotiated two rates, one for Internet-only and one for radio retransmissions. While Yahoo!™’s primary business was involved in radio rebroadcasts, many other webcasters were involved in Internet-only transmissions. Overall, Yahoo!™ paid a reasonable rate for both. But separately, Yahoo!™ paid much more for the Internet-only rights than for the radio retransmission rights.¹⁹² Yahoo!™ did not actually value the Internet-only rights more; in fact, the opposite was true. Yet, according to the CARP, the Yahoo!™ rate represents the best evidence of the value of the Internet-only rights.¹⁹³ By abandoning the “willing buyer/willing seller standard,” and reverting back to the §801(b)(1) guidelines, CARPs can be sure that their determinations are not subject to clever negotiating.¹⁹⁴

VI. CONCLUSION

Obviously, the CARP system cannot be allowed to stand. The system was created in order to alleviate the problems with the old Copyright Royalty Tribunal, but even this system has outlived its usefulness.¹⁹⁵ While the CARP could be reformed, some experts believe that elimination of the Panel entirely would

190. Jackson, *supra* note 23, at 476.

191. U.S. Bankruptcy Courts recognize that the “willing buyer/willing seller standard” for determining fair value is rendered useless when other business motives are furthered through position driven bargaining, as was the case between the RIAA and Yahoo!™. *In re Brentwood Lexford Partners, LLC.*, 292 B.R. 255, 269 (N.D. Tex. 2003) (“The Equity/BLP transaction was not a willing buyer, willing seller transaction. It was more in the nature of an insider transaction designed to further other business objectives. The amount of the note in 1998 therefore does not inform the fair value of BLP’s assets in March 2000.”).

192. See Jackson, *supra* note 23, at 473.

193. See *supra* note 93; see also, 67 Fed. Reg. 45239, *supra* note 59, at 45252.

194. In the field of patents, *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (D.C.N.Y. 1970), stands as the leading case in setting royalty rates. In that case, the court determined that a willing buyer/willing seller standard is more of a “statement of approach [rather] than a tool of analysis.” *Id.* at 1121. *Georgia-Pacific* sets forth fifteen individual criteria to be used to determine what a reasonable buyer would have paid, and what a reasonable seller would have accepted. *Id.* at 1120. Upon analysis, these factors roughly equate to those factors set forth in § 801 of the Copyright Act. *Cf. id.* at 1120 to 17 U.S.C. § 801.

195. Congress passed the Copyright Royalty Tribunal Reform Act of 1993, abolishing the CRT structure and replacing it with the CARP. Maxey, *supra* note 141, at 390. One reason for this change was industry-wide displeasure with the CRT’s royalty rate decision for the cable industry’s retransmission of certain copyrighted TV programs. *Id.* “Ted Turner, of Turner Broadcasting, called for the abolition of CRT and testified before Congress, ‘[t]his CRT decision puts us out of business.’” *Id.* The question now becomes who in the webcasting community, with enough power, will step up and call for the abolition of the CARP.

be most effective.¹⁹⁶ One forum for accomplishing this goal would be to eliminate the compulsory license, therefore eliminating the need for a statutorily regulated rate.¹⁹⁷ “CARP participants, both licensees and copyright owners, would have found a far more satisfactory outcome had they chosen to spend their money and effort negotiating a reasonable settlement in the marketplace rather than in a CARP.”¹⁹⁸

For now, it appears that webcasters and copyright owners have come to an agreement that circumvents the need for CARP proceedings. However, this in no way alleviates or eliminates the need for effective CARP reform. CARP proceedings are not merely instituted to determine musical royalties, but for any copyrighted work with a compulsory license. Also, if not for practical purposes, reform should be implemented for theoretical purposes. Creators and owners of copyrighted works on a whole cannot, and should not, be forced to rely on a system that is proven flawed. Under §801(b)(1), a goal of the CARP is to afford copyright owners fair return for their creative developments.¹⁹⁹ Without an effective system in place, an author may be discouraged from creating (which cannot happen). After all, the purpose of copyright is “To Promote the Progress of Science and useful Arts.”²⁰⁰ The sooner the U.S. can institute a better system, the sooner the system will work for everyone involved, buyers, sellers, and the public as a whole.

196. *Id.* at 399. During the 1980s and 1990s when the CRT was under reform, Congress entertained the notion of eliminating compulsory licenses altogether. However, they retained the compulsory license structure and simply restructured the process. *See* CARP Structure, *supra* note 177, at 47-49, n.213.

197. Maxey, *supra* note 141, at 399. Eliminating the statutory license would also eliminate the need for a CARP proceeding at all. Statutory licenses, in support of this theory, “tend to outlive their purpose and create marketplace dislocations.” *Id.* Yet, the question remains whether small webcasters would be safeguarded from anti-competitive behavior by copyright owners. *Id.*

198. *Id.* (quoting CARP Structure, *supra* note 177, at 49).

199. 17 U.S.C. § 801(b)(1) (2004); *see supra* note 63.

200. U.S. CONST. art. I, § 8, cl. 8

