

## STUDENT WORK

# A BROKEN RECORD: THE DIGITAL MILLENNIUM COPYRIGHT ACT'S STATUTORY ROYALTY RATE-SETTING PROCESS DOES NOT WORK FOR INTERNET RADIO

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*In the Beginning, the Internet was without form, and void; and darkness was upon the face of the frightened recording industry, which viewed the new technology as a "giant copying machine."<sup>1</sup> And the recording industry called upon Congress, saying "let there be regulation, let there be regulation"; and Congress saw their fears, and divided the digital from the terrestrial—but it was not good.<sup>2</sup>*

### I. INTRODUCTION

"And so the broken circle go[es], over and over again."<sup>3</sup> Like a broken record playing the same song clip over and over again, the

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1. Jessica Litman, *Digital Copyright* 25 (Prometheus Books 2001).
2. *Genesis* 1:1–4 (significantly altered).
3. Neil Young, MP3, *Over and Over*, in *Ragged Glory* (Reprise Recs. 1990).

predominant parties in the Internet radio industry<sup>4</sup> have been hearing the same sound bite repeat since Congress passed the Digital Millennium Copyright Act (DMCA)<sup>5</sup> in 1998. Despite arguing for more than a decade, no viable solution to the problem of setting statutory royalty rates for Internet radio under the DMCA exists. The result thus far is a slew of statutory rates, temporary settlement agreements, congressional acts, and court decisions with which none of the parties agree. It is time for the Internet radio industry and those who license the music that industry brings to the public to convene and perform a complete overhaul of the DMCA's webcasting provisions. As it stands, with respect to Internet radio the DMCA is inefficient, and serves only to waste time and money by sending the webcasting industry into an infinite loop of fruitless negotiations, hearings, lawsuits, emergency acts of Congress, and overall public uncertainty about the long-term viability of America's favorite new music medium.

It all began in 1995, when a performance right in sound recordings was granted to copyright holders<sup>6</sup>—but only for digital performances of recorded music.<sup>7</sup> Before then, a performance

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4. The primary parties affected by the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified throughout 17 U.S.C.), as it applies to Internet radio are: (1) the “big four” recording companies (Universal, Sony BMG, Warner, and EMI). Steve Jobs, *Thoughts on Music*, <http://www.apple.com/hotnews/thoughtsonmusic/> (Feb. 6, 2007) (stating, “[t]hese four companies control the distribution of over 70% of the world’s music.”); (2) SoundExchange, which is “the sole entity in the United States to collect and distribute these digital performance royalties on behalf of featured recording artists, master rights owners (like record labels), and independent artists who record and own their masters.” SoundExchange, *SoundExchange Is an Independent, Nonprofit Performance Rights Organization*, <http://soundexchange.com/> (accessed Nov. 29, 2010); (3) The Recording Industry Association of America (RIAA), which “is the trade organization that supports and promotes the creative and financial vitality of the major music companies.” RIAA, *Who We Are*, <http://riaa.com/aboutus.php> (accessed Nov. 29, 2010); (4) The American Society of Composers, Authors, and Publishers (ASCAP), which “is a membership association of more than 390,000 United States composers, songwriters, lyricists, and music publishers of every kind of music.” ASCAP, *About ASCAP*, <http://www.ascap.com/about/> (accessed Nov. 29, 2010) [hereinafter *About ASCAP*]; (5) Broadcast Music, Inc. (BMI), which “collects license fees on behalf of songwriters, composers and music publishers and distributes them as royalties to those members whose works have been performed.” BMI, *About BMI*, <http://www.bmi.com/about/?link=navbar> (accessed Nov. 29, 2010) [hereinafter *About BMI*]; and (6) all music webcasters.

5. 112 Stat. 2860.

6. Marshall Leaffer, *Understanding Copyright Law* 13–14 (4th ed., Matthew Bender 2005). Musical compositions first became federally protected copyrightable subject matter in 1831. *Id.* at 7 n. 23.

7. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 336 (1995). The compulsory license for digital audio transmissions is codi-

right in sound recordings was absent from the United States' 220-year statutory history of federal copyright law.<sup>8</sup> The Digital Performance Right in Sound Recordings Act of 1995 (DPRA)<sup>9</sup> also excluded traditional radio broadcasters<sup>10</sup> from having to pay the royalties that arose out of the new right granted to music copyright holders by the DPRA.<sup>11</sup> Under this new law, only subscription services that “webcasted”<sup>12</sup> music were obligated to compensate copyright holders.<sup>13</sup> The DMCA amended the DPRA in 1998 to require, among other things, that some nonsubscription webcasting services pay a statutory performance royalty as well.<sup>14</sup> Congress enacted both the DPRA and DMCA without substantial input from the webcasting industry, whose lobbying arm—the Digital Media Association—formed just three months before the DMCA became law.<sup>15</sup>

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fied at 17 U.S.C. § 114(d) (2006).

8. The first federal copyright statute was the Copyright Act of 1790. Leaffer *supra* n. 6, at 6.

9. 109 Stat. 336.

10. Traditional over-the-air radio broadcasters are often called “terrestrial” broadcasters. See 17 U.S.C. § 114(d)(1)(i)(I) (referring to a traditional, AM/FM radio station as a “terrestrial broadcast station”).

11. “Congress ‘grandfathered’ traditional radio, so that radio stations will continue to perform copyrighted sound recordings free of charge. However, if stations simulcast their signal over the Internet or via satellite, the [United States] Copyright Office has ruled that they must pay performance royalties.” SoundExchange, *FAQ, General Questions*, <http://soundexchange.com/category/faq/#question-446> (accessed Nov. 29, 2010).

12. Webcasting is the “real-time transmission of sound recordings over the Internet.” *Bonneville Intl. Corp. v. Peters*, 347 F.3d 485, 489 (3d Cir. 2003). A subscription-based webcasting service describes a webcasting service that charges its customers a fee in exchange for offering content that otherwise would not be available, sometimes including some extra control over the songs played. See *e.g. Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 154, 157–160 (2d Cir. 2009) (examining the process by which LAUNCHcast, a subscription-based webcasting service, operates to allow users to select what type of music they wish to listen to), *cert. denied*, 130 S. Ct. 1290 (2010). A “nonsubscription” webcasting service broadcasts its music free of charge. *Arista*, 578 F.3d at 155.

13. Now, nonsubscription digital broadcast transmissions are also subject to a statutory license. 17 U.S.C. § 114(d)(1)(A).

14. 112 Stat. at 2890–2891; 17 U.S.C. § 114(d)(2)(C) (providing that eligible nonsubscription transmissions are subject to statutory licensing). If a nonsubscription entity is considered “noninteractive,” then that webcaster must pay a statutory royalty rate determined by the process detailed *infra* Part III(B); if the entity is considered “interactive,” then it must negotiate royalty rates directly with copyright holders. *Arista*, 578 F.3d at 150.

15. See Digital Music Forum, *Keynote Remarks of Jonathan Potter, Executive Director, Digital Media Association*, [http://www.digmedia.org/index.php?option=com\\_docman&task=doc\\_download&gid=55&Itemid](http://www.digmedia.org/index.php?option=com_docman&task=doc_download&gid=55&Itemid) (March 1, 2004) [hereinafter *2004 DiMA Speech*] (noting that “[i]n June it will be six years since the Digital Media Association was created”).

Under the DMCA, all affected parties are directed to convene and propose a blanket statutory royalty rate for the digital performance of sound recordings.<sup>16</sup> After six years, two reported court cases,<sup>17</sup> and an emergency act of Congress,<sup>18</sup> the statute was amended once more to form the Copyright Royalty Board (CRB).<sup>19</sup> The CRB consists of three Copyright Royalty Judges who conduct hearings on the parties' concerns, then set the statutory royalty rates that webcasters are obligated to pay.<sup>20</sup> After five more years, two more reported court cases,<sup>21</sup> two more emergency acts of Congress,<sup>22</sup> and two pending pieces of legislation,<sup>23</sup> a mutually agreeable statutory scheme has yet to be reached, and the CRB also faces a constitutional challenge.<sup>24</sup> Meanwhile, the Internet radio industry and SoundExchange<sup>25</sup> have begun the same process yet again to attempt to set rates for the next five years.<sup>26</sup>

As it stands, the statutory royalty rate-setting system for the digital performance of sound recordings does not work. But before embarking on the history, process, issues, and potential solutions for this area of law, a brief overview of the terminology used in

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16. 112 Stat. at 2895–2896.

17. *Bonneville*, 347 F.3d 485; *Beethoven.com, LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005).

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

19. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004). The amendment was effective May 31, 2005. *Id.* at 2369.

20. *Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 29 (D.D.C. 2010).

21. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009); *Live365*, 698 F. Supp. 2d 25.

22. Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008); Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009) (codified at 17 U.S.C. § 114(f)(5)(F)).

23. Performance Rights Act, H.R. 848, 111th Cong. (Feb. 4, 2009) (available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-848>); Supporting the Local Radio Freedom Act, H.R. Con. Res. 49, 111th Cong. (Feb. 12, 2009) (available at <http://www.govtrack.us/congress/billtext.xpd?bill=hc111-49>).

24. *Live365*, 698 F. Supp. 2d at 28. Suit was brought under the Appointments Clause of the Constitution. *Id.*

25. See SoundExchange, *supra* n. 4 (explaining that SoundExchange is the receiving agent and negotiating party for royalty payments made by webcasters to copyright holders under the DMCA).

26. Brian T. Yeh, *Statutory Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board* 13 (Cong. Research Serv. Mar. 23, 2009) (available at [http://ipmall.info/hosted\\_resources/crs/RL34020\\_090323.pdf](http://ipmall.info/hosted_resources/crs/RL34020_090323.pdf)). Members of the Congressional Research Service “analyze current policies and present the impact of proposed policy alternatives” to Congress. CRS, *About CRS*, <http://www.loc.gov/crsinfo/about/> (accessed Nov. 29, 2010).

this Article is appropriate. The terms “traditional broadcasters” and “terrestrial broadcasters” are used interchangeably to describe the AM/FM radio industry. “Recording industry” generally refers to music copyright holders, other than the singers and songwriters themselves, whose funds and equipment are used to record music—most often, record companies. The terms “webcasting industry” and “Internet radio industry” are used interchangeably to describe entities that broadcast (webcast) copyrighted music over the Internet. An “interactive” webcaster is a webcaster that is often, but not always, a subscription service; “interactive” webcasters allow a user enough influence over and predictability with respect to the songs played that the DMCA requires that service to negotiate royalty rates directly with copyright holders. Finally, a “noninteractive” webcaster is a webcaster that allows a user minimal influence over the actual songs played, and pays only the statutory licensing rate determined by the inefficient process detailed in Part III(B).

Part II of this Article details the evolution of United States music copyright law leading up to, and including, the DMCA. Part III chronicles the negotiations, hearings, lawsuits, reform attempts, emergency acts of Congress, and proposed legislation arising out of the industry’s endeavor to set the statutory webcasting royalty rates under the current law. Part III also examines the DPRA and DMCA’s legislative histories, emphasizing the now-outdated reasoning that supported those statutes’ enactments.

Part IV(A) proposes that the existing law is inadequate and in need of comprehensive reform with respect to its webcasting provisions. Revision is needed primarily because the webcasting industry was vastly underrepresented during the DMCA’s drafting stages. As a result, the DMCA’s legislative history contains outdated reasoning based largely upon the recording industry’s fear of the Internet, rather than a balanced consideration of all affected industries’ concerns. Part IV(B) proposes that the time for a statutory overhaul is ripe because the Internet radio industry has become one of the country’s most popular media outlets; is endorsed by both the RIAA and the musicians who make the webcasted music; and is finally in a position to lobby meaningfully for a viable statutory licensing process. Part IV(B) offers further support for revision by arguing that piracy and poor business practices unrelated to Internet radio are the primary reason for

the recording industry's recent losses, and that Internet radio actually prevents piracy, rather than promoting it as the DMCA's legislative history suggests. Part IV(B) further argues that the twelve-year-old DMCA encourages the recording and traditional broadcasting industries' inefficient business practices, while simultaneously placing then-nascent industries like Internet radio at a disadvantage.

Part IV(B) also suggests that, at a minimum, Congress should pass the pending Performance Rights Act,<sup>27</sup> which seeks to eliminate the distinction between Internet and AM/FM radio for music licensing purposes, over the Local Radio Freedom Act,<sup>28</sup> which advocates the opposite approach. Finally, Part V concludes that Internet radio, and the public's access to the broad variety of music it has cultivated, will languish indefinitely under the current legislative framework.

## II. "YOU MAY ASK YOURSELF, WELL, HOW DID WE GET HERE?"<sup>29</sup>: STATUTORY BACKGROUND, 1710–2004

Modern copyright law evolved from the 1710 Statute of Anne in England,<sup>30</sup> which granted authors the right to profit from their works for the first time.<sup>31</sup> The Statute of Anne limited that right to a fixed number of years to ensure the work would "enhance public welfare by encouraging the dissemination of knowledge."<sup>32</sup> The debate surrounding the statute's enactment primarily centered upon whether the statute's predominant purpose was to foster public enrichment or protect the economic interests of the copyright holder—an argument that remains unresolved to this day.<sup>33</sup> United States copyright law was modeled after this statute.<sup>34</sup>

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27. H.R. 848, 111th Cong.

28. H.R. Con. Res. 49, 111th Cong.

29. Talking Heads, MP3, *Once in a Lifetime*, in *Remain in Light* (Warner Bros. 1980) (lyrics slightly altered).

30. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

31. Leaffer, *supra* n. 6, at 4.

32. *Id.* at 5.

33. *Id.* at 5–6; see e.g. Chris Johnstone, Student Author, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. Cal. L. Rev. 397, 416–419 (2004) (noting the ongoing academic debate surrounding the true purpose of copyright law); see generally Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283 (1996)

Part II(A) explains the evolution of music copyright law in the United States, including this country's first music copyright statute and the beginning of Congress' use of a negotiation-based method of statute-drafting. Part II(A) also explores the lobbying efforts of the motion picture industry in the early to mid-1900s, when that industry was underrepresented during the initial statutory negotiations due to its nascency, and how perceived prejudice against that industry was one of the factors that ultimately led to Congress' statutory overhaul of United States copyright law in the 1970s. Part II(B) discusses the Copyright Act of 1976, and how some of the changes made by that Act affected the music and radio industries. Part II(B) further examines that Act's shortcomings, and the subsequent amendments enacted to modernize it in light of technological advances.

Part II(C) outlines digital-era copyright law. Part II(C)(1) details how the recording and traditional broadcasting industries drafted the DPRA without input from the webcasting segment.<sup>35</sup> Part II(C)(1) also recounts the legislative history surrounding the DPRA's passage to show that the reasoning relied upon when that Act was passed in 1995 is both outdated and biased in favor of the recording and traditional broadcasting industries. Part II(C)(2) details the circumstances surrounding the DPRA's update, the DMCA, and the webcasting segment's limited input into the DMCA's statutory language. Part II(C)(2) concludes by discussing the reasons Congress amended the DPRA, and the effect some of the DMCA revisions had upon then-existing law.

#### A. Music and Early United States Copyright Law

The Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts” by providing artists and inventors with copyright and patent protection.<sup>36</sup> Congress seeks to achieve this constitutional mandate by providing an economic incentive

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(discussing how the advent of the digital age may affect the purpose of United States copyright law).

34. Leaffer, *supra* n. 6, at 6.

35. For additional information on the industry's lack of input in the DPRA's drafting, see *infra* note 107 and accompanying text.

36. U.S. Const. art. I, § 8, cl. 8. Patent protection is beyond the scope of this Article. For an extensive overview of patent law, see generally Robert Patrick Merger & John Fitzgerald Duffy, *Patent Law and Policy: Cases and Materials* (4th ed., LexisNexis 2007).

for the creation of intellectual property. For authors and composers, this incentive exists in the form of a statutory compensation scheme designed to encourage them to continue creating works that enhance society.<sup>37</sup> At its core, the “ultimate goal of copyright is to enhance public welfare.”<sup>38</sup> Congress first recognized musical compositions as protectable intellectual property in 1831,<sup>39</sup> and a public performance right for musical compositions was established in 1897.<sup>40</sup> But the first major federal copyright statute did not exist until 1909.<sup>41</sup>

The origin of the Copyright Act of 1909 (1909 Act)<sup>42</sup> can be traced to 1905, when the Librarian of Congress “invited representatives of authors, dramatists, painters, sculptors, architects, composers, photographers, publishers . . . , and printers’ unions to a series of meetings” to overhaul then-existing copyright law.<sup>43</sup> But the Librarian did not invite representatives from the piano

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37. Leaffer, *supra* n. 6, at 6. The vague wording of this constitutional provision is attributable to the fact that the underlying purposes of copyright law are somewhat conflicting because a tension exists between the desire to economically compensate a work’s creator while simultaneously allowing society as a whole to benefit from the work. *Id.*; see also Barbara Ringer, *Two Hundred Years of American Copyright Law*, in *Two Hundred Years of English and American Patent, Trademark, and Copyright Law* 117, 118 (ABA 1977) (symposium) (noting that “[o]ne of the aims of American civilization has been to test the extent to which government can allow individual liberties to flourish while still maintaining a cooperative, growing, society”).

38. Leaffer, *supra* n. 6, at 3.

39. An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, 4 Stat. 436, 436 (Feb. 3, 1831). The “addition of musical compositions as copyrightable subject matter” was one of the “more important changes” in United States copyright law between 1790 and 1909. Leaffer, *supra* n. 6, at 7. Before Congress passed the 1831 legislation, authors could seek copyright protection only for maps, books, and charts. An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, ch. 15, 1 Stat. 124, 124 (May 31, 1790).

40. An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes, Relating to Copyrights, ch. 4, 29 Stat. 481 (Jan. 6, 1897). The 1897 statute granted protection to music copyright holders by providing that “[a]ny person publicly performing or representing any . . . musical composition for which a copyright has been obtained, without the consent of the proprietor of said . . . musical composition . . . shall be liable for damages . . .” *Id.* at 481–482; see also Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 Buff. Intell. Prop. L.J. 83, 89 (2009) (discussing the history of copyright holders’ performance right in sound recordings).

41. An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (Mar. 4, 1909). The 1909 Act was superseded by the Copyright Act of 1976. An Act for the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976) (codified at 17 U.S.C. 106 (1982)).

42. 35 Stat. 1075.

43. Litman, *supra* n. 1, at 39.



roll,<sup>44</sup> phonograph, and motion picture industries because those industries' economic viability was not widely recognized at the time.<sup>45</sup> The resulting draft legislation afforded music copyright owners the "exclusive right to make or sell any mechanical device that reproduced [a given] work in sounds."<sup>46</sup> The proposed bill rendered unlicensed piano roll and phonograph manufacturing illegal, which threatened those industries' livelihood.<sup>47</sup>

The piano roll and phonograph industries countered the draft bill by introducing separate bills that reflected their respective interests, but all failed to reach a vote.<sup>48</sup> After the hearings, the songwriters' representative suggested that the parties negotiate separately, which ultimately led to the 1909 Act.<sup>49</sup> The 1909 Act was the first instance of Congress' reliance upon "meetings and negotiations among interested parties" to revise then-existing copyright law.<sup>50</sup> Those "interested parties" agreed that the 1909 Act should exempt the performance right for musical compositions on mechanical devices in exchange for granting artists a "compulsory license for mechanical reproductions of music."<sup>51</sup> But another new, potentially lucrative business was absent from the negotiation table—the motion picture industry.

As motion pictures' popularity and moneymaking ability became apparent, the new medium's proponents realized they could be found liable for music copyright infringement under the 1909 Act.<sup>52</sup> This fear prompted the motion picture industry to

44. A piano roll, also known as a "music roll," is "a roll, usually of perforated paper, used in a pianola or player-piano or similar instrument." *Oxford English Dictionary* vol. 10, 127 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Clarendon Press 1989).

45. Litman, *supra* n. 1, at 39.

46. *Id.*

47. *Id.*

48. *Id.* at 40.

49. *Id.*

50. *Id.* at 36. But although the 1909 Act was the product of four years of debate and revision, it was "hardly a model of clarity, coherence, or precision." Leaffer, *supra* n. 6, at 7. One of the 1909 Act's major problems was that it did not specifically preempt common law, an issue remedied by the Copyright Act of 1976. *Id.* at 9 (citing 17 U.S.C. § 301).

51. Litman, *supra* n. 1, at 40. Now, "[t]he 'compulsory mechanical license' provision of the Copyright Act . . . has the effect of preventing songwriters and music publishers from granting *exclusive* licenses to recording artists or record companies, at any price." Donald E. Biederman, Edward P. Pierson, Martin E. Silfen, Janna Glasser, Charles J. Biederman, Kenneth J. Abdo & Scott D. Sanders, *Law and Business of the Entertainment Industries* 365 (Praeger Publishers, 5th ed., 2007) (emphasis in original).

52. Litman, *supra* n. 1, at 41.

draft its own proposed copyright bill.<sup>53</sup> Again, the affected industries could not agree during congressional hearings and negotiated new terms separately, ultimately yielding the Townsend Copyright Amendment of 1912.<sup>54</sup> Because the 1909 Act as a whole was drafted without input from motion picture representatives, however, the movie industry remained unsatisfied with the legislation.<sup>55</sup>

In response to the new laws, the American Society of Composers, Authors, and Publishers (ASCAP) formed in 1914 to protect composers' rights in both musical works and public performances.<sup>56</sup> ASCAP was the first collective rights organization in the United States and is still active today, representing "hundreds of thousands of music creators worldwide."<sup>57</sup> ASCAP also succeeded in its first major music copyright law appearance: in *Herbert v. Shanley Co.*,<sup>58</sup> the Supreme Court determined music could not be played in restaurants unless the restaurant owner paid a royalty to the songs' respective copyright holders.<sup>59</sup> Specifically, the Court held that when a business operating for profit

53. *Id.*

54. *Id.*; see An Act to Amend Sections Five, Eleven, and Twenty-Five of an Act Entitled "An Act to Amend and Consolidate the Acts Respecting Copyrights," Pub. L. No. 62-303, ch. 356, sec. 5(1)-(m), 37 Stat. 488 (Aug. 24, 1912) (adding copyright protection for "[m]otion picture photoplays" and "[m]otion pictures other than photoplays"). This act was known as the "Townsend Copyright Amendment" due to Edward W. Townsend's fervent testimony before the House of Representatives' Committee on Patents in favor of the amendment. H.R. Comm. on Patents, *Townsend Copyright Amendment: Second Hearing*, H.R. Rpt. 62-15263 (Feb. 21, 1912).

55. Litman, *supra* n. 1, at 47-48. Those industries were unhappy with the final product for the following reasons:

The infant industries found the 1909 act ambiguous and its application to their activities uncertain until the courts issued an authoritative ruling. Courts, in turn, struggled to apply the 1909 act's language to facts that its drafters never envisioned. As case[[law developed, the application of copyright law to new technology depended more on linguistic fortuity than anything else.

*Id.* at 48.

56. Noh, *supra* n. 40, at 89-90.

57. *About ASCAP*, *supra* n. 4. Today, ASCAP boasts an impressive array of both popular and emerging musicians as members of its organization:

ASCAP is home to the greatest names in American music, past and present—from Duke Ellington to Dave Matthews, from George Gershwin to Stevie Wonder, from Leonard Bernstein to Beyoncé, from Marc Anthony to Alan Jackson, from Henry Mancini to Howard Shore—as well as many thousands of writers in the earlier stages of their careers.

*Id.*

58. 242 U.S. 591 (1917).

59. *Id.* at 594-595.

plays a songwriter's musical work, that performance constitutes a public performance of the copyright holder's work for profit, so the business owner must compensate the copyright holder for that performance.<sup>60</sup>

The issue of whether playing a musical work constitutes a "public performance" resurfaced in the 1920s as radio broadcasting gained popularity.<sup>61</sup> In 1923, the United States District Court for the District of New Jersey held that songs broadcast over the radio were played for profit, and that broadcasters must obtain licenses from songwriters to comply with the 1909 Act.<sup>62</sup> Inter-industry negotiations continued, and in 1939 several industry groups formed the National Committee on International Intellectual Cooperation in a failed attempt to draft a bill that satisfied all parties.<sup>63</sup> That same year, Broadcast Music, Inc. (BMI), representing several major radio networks and independent radio stations, formed to advance broadcasters' interests in negotiations with ASCAP.<sup>64</sup> But due to World War II, inter-industry negotiations would not actively resume until the 1950s.<sup>65</sup>

The Recording Industry Association of America (RIAA) formed in 1952 to represent recording companies' interests in copyright law negotiations.<sup>66</sup> At this time, the Copyright Office

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60. *Id.*; see Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 John Marshall J. Computer & Info. L. 409, 416 (2008) (stating: "Chief Justice Oliver Wendell Holmes held that when the service in question is offered for profit, such as a restaurant, then the playing of a song by the service provider constitutes a public performance"). In 1998, Congress passed the Fairness in Music Licensing Act, Pub. L. No. 105-298, 112 Stat. 2827, 2830 (Oct. 27, 1998) (codified at 17 U.S.C. § 110(5)(B) (2000)), which relaxed this requirement to allow some retail store and restaurant owners to play background music without acquiring a license, so long as those establishments meet certain conditions. *Id.* at 2830–2831. For more details on the history and evolution of music copyright law with respect to publicly performing background music, see Leaffer, *supra* n. 6, at 341–345.

61. The first radio broadcasts occurred around 1910. Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 20 Colum. J.L. & Arts 1, 8 (2004). Dr. Cronin also states that the first broadcasted performance was "Caruso singing *Pagliacci* at the Metropolitan Opera." *Id.*

62. *Whitmark & Sons v. Bamberger & Co.*, 291 F. 776, 780 (D.N.J. 1923).

63. Litman, *supra* n. 1, at 45.

64. Conley, *supra* n. 60, at 416–417; *About BMI*, *supra* n. 4. "BMI was the first to offer representation to songwriters of blues, country, jazz, r&b, gospel, folk, Latin[,] and, ultimately, rock & roll." *Id.*

65. See Litman, *supra* n. 1, at 45 (explaining that the "Second World War intervened," and halted attempts to negotiate an acceptable statute).

66. Jonathan Lamy, Cara Duckworth & Liz Kennedy, *RIAA Celebrates 50 Years of Gold Records*, <http://www.riaa.com/newsitem.php?id=7b0d4a07-0d23-a750-0be1>

attempted to abandon the informal negotiation method of statute-drafting, instead opting to appoint a panel of copyright experts to revise the 1909 Act.<sup>67</sup> That effort failed after the affected parties summarily rejected a 1961 proposal, causing it ultimately to be abandoned.<sup>68</sup> The result was a return to the convention method, which continues to the present.<sup>69</sup>

Sound recordings, as distinguished from musical compositions themselves, were first afforded federal protection by the Sound Recording Act of 1971 (1971 Act).<sup>70</sup> The 1971 Act amended the 1909 Act to clarify that phonorecords are “copies” within the statutory definition, thus subjecting phonorecords to copyright protection.<sup>71</sup> Even today, no federal protection is afforded to sound recordings made before 1972.<sup>72</sup> The 1971 Act was primarily a response to piracy of recorded works, and full federal copyright protection for sound recordings did not exist until 1976.<sup>73</sup>

### B. Copyright Act of 1976

After operating under the 1909 Act for nearly seventy years, industry interest groups finally negotiated a bill upon which all represented groups agreed: the Copyright Act of 1976 (1976 Act).<sup>74</sup> The 1976 Act modernized United States copyright law to account for and incorporate the major technological advances

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-22882c5c2f13 (Aug. 11, 2008).

67. Litman, *supra* n. 1, at 50.

68. *Id.* (noting that “[t]he substance of the . . . Report had been poorly received by the Bar, a number of whose members insisted that they would prefer the current outmoded statute to one following the Register’s recommendations”).

69. *Id.* at 51.

70. Sound Recording Amendment, Pub. L. No. 92-140, 85 Stat. 391 (1971). The musical composition itself consists of musical notes and, when applicable, lyrics. Leaffer, *supra* n. 6, at 159. The Sound Recording Amendment defined “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture.” 85 Stat. at 391.

71. Leaffer, *supra* n. 6, at 159. Before 1971, recordings were made and distributed absent copyright registration because the Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), held that recording a musical composition mechanically was not a “copy.” *Id.* at 17. The case was about piano rolls, but *White-Smith’s* reasoning was later extended to include phonorecords. Cronin, *supra* n. 61, at 9–11.

72. Leaffer, *supra* n. 6, at 140. There was, however, “a patchwork of state laws conferring common law protection for sound recordings before 1972.” *Id.*

73. *Id.*

74. 90 Stat. 2541 (codified at 17 U.S.C. § 106 (1982)); see Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275, 314–315 (1989) (explaining that Congress essentially agreed to codify a consensus between industry representatives).

made during the first three quarters of the twentieth century, and was seen as a nearly complete overhaul of United States Copyright Law.<sup>75</sup> The 1976 Act granted copyright holders five distinct rights: reproduction, distribution, derivative works, public performance of the work itself (as distinguished from public performances of a work's sound recording), and public display.<sup>76</sup>

Another major facet of the 1976 Act was its creation of the Copyright Royalty Tribunal, which was an independent administrative agency charged with setting compulsory statutory licensing rates for the five rights enumerated in the 1976 Act.<sup>77</sup> The Tribunal was also responsible for adjudicating disputes arising out of those licenses, and Tribunal members were appointed by the President.<sup>78</sup> The affected industries frowned upon the Tribunal, arguing the entity's power to determine statutory royalty fees, with little to no congressional direction or oversight, was too broad.<sup>79</sup> The Tribunal was also criticized for being "pro-copyright owner in its rate-making activities rather than balancing the rights of creators and users."<sup>80</sup> Tribunal critics also berated Congress for not requiring that Tribunal members have any previous copyright law experience.<sup>81</sup>

The public performance right granted by the 1976 Act granted the right only with respect to the underlying compositions themselves, not the public performance of sound recordings.<sup>82</sup> The absence of a public performance right in sound recordings meant that sound recording copyright holders, which

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75. *WGN Contl. Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 627 (7th Cir. 1982). "The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress' [ ] satisfaction." *Id.*

76. 17 U.S.C. § 106.

77. 90 Stat. at 2594 (codified at 17 U.S.C. § 801 (1982), superseded by 118 Stat. 2341). Specifically, the Tribunal was charged with making "determinations concerning the adjustment of reasonable copyright royalty rates . . . and to make determinations as to reasonable terms and rates of royalty payments . . ." *Id.* at 2594.

78. Leaffer, *supra* n. 6, at 294 (citing 17 U.S.C. § 802 (1982)).

79. *Id.*

80. *Id.* at 294 n. 21, 295.

81. *Id.* at 294 n. 19; *see* 90 Stat. at 2596 (requiring only that the Tribunal "be composed of five commissioners appointed by the President with the advice and consent of the Senate").

82. Under the 1976 Act, "holders of sound recording copyrights . . . ha[ve] no right to extract licensing fees from radio stations and other broadcasters of recorded music." *Arista*, 578 F.3d at 152.

are often recording companies, were not separately compensated when sound recordings themselves were performed publicly.<sup>83</sup> For example, when Tom Petty's "Refugee"<sup>84</sup> is broadcasted via AM/FM radio, the radio station pays Petty a royalty for the public performance of only his musical *composition*, but neither Petty nor his recording company receive payment for the public performance of Petty's *sound recording*.<sup>85</sup>

The 1976 Act did not grant sound recording copyright holders a performance right due to opposition from the broadcasting industry, which argued that radio broadcasters should not be charged twice for playing a song once.<sup>86</sup> Songwriters and some organizations that oversaw musical performance rights at the time also argued against a public performance right in sound recordings because they "fear[ed] that if rights holders of sound recordings [were] given a public performance right, then the royalties paid to the songwriters and publishers for their right of public performance would decrease."<sup>87</sup> But one of the major reasons Congress agreed to codify the industries' 1976 submission absent a performance right in sound recordings was because radio stations argued that sound recording copyright holders were compensated through record sales, concerts, and promotional revenue such as t-shirt and poster sales.<sup>88</sup> Basically, radio broadcasters

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83. *Id.*

84. "Refugee" appeared on Tom Petty's album *Damn the Torpedoes*. Tom Petty, CD, *Refugee*, in *Damn the Torpedoes* (MCA Recs., Inc. 1979). Artist-recording company relations are beyond the scope of this Article. But interestingly, *Damn the Torpedoes* was recorded during Petty's struggle to free himself from a recording company. Rock and Roll Hall of Fame + Museum, *Tom Petty and the Heartbreakers*, <http://www.rockhall.com/inductees/tom-petty-and-the-heartbreakers/bio/> (accessed Nov. 29, 2010). Petty personally bore the costs of delaying the album's release so he could devote time to a legal battle against being "bought and sold like a [piece] of meat." *Id.* The battle bankrupted him. *Id.*

85. Unless, of course, Petty's recording company is still recouping the funds that company initially advanced to Petty to record the track—this hypothetical assumes that Petty's initial debt to his recording company was satisfied before the hypothetical AM/FM broadcast. For an explanation of the implications of the 1976 Act on sound recording copyright holders, see *supra* note 82.

86. Conley, *supra* n. 60, at 417–418.

87. *Id.* at 418 (citing H.R. Subcomm. on Cts., the Internet and Intell. Prop. of the Comm. on Jud., *The Digital Millennium Copyright Act of 1998*, 108th Cong. 4 (July 15, 2004)) (statement of David O. Carson, General Counsel of the United States Copyright Office) (available at <http://www.copyright.gov/docs/carson071504.pdf>). For a chart detailing which entities administered and oversaw which licenses in the pre-Internet copyright era, see Joshua Keesan, *Let it Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 Berkeley Tech. L.J. 353, 357 (2008).

88. Sen. Jud. Comm., *Digital Performance Right in Sound Recordings Act of 1995*,

cited the fact that at the time “[t]he recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings”<sup>89</sup> as support for not granting a performance right in the sound recordings underlying musical works.

The 1976 Act is another example of how those most prominent in the music industry draft music copyright legislation through a series of negotiations and cross-party compromises.<sup>90</sup> The 1976 Act was amended several times before 1995 to address advancing home recording technology<sup>91</sup> and industry dissatisfaction with the Tribunal,<sup>92</sup> but this Article focuses only on the

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104th Cong. 10 (Aug. 4, 1995) [hereinafter *1995 Senate Report*] (reiterating the 1976 justification for not requiring terrestrial broadcasters to pay compulsory statutory licensing fees). This debate continues today, and is discussed *infra* Part III(C)(2) in connection with the pending Performance Rights Act.

89. *Bonneville*, 347 F.3d at 487–488.

90. The benefits of this method of drafting statutes have been debated for many years. For instance, shortly after the 1976 Act was passed, Barbara Ringer, former Register of Copyrights, strongly criticized the way copyright laws are drafted: “Extra-legal agreements in the copyright field always break down as soon as someone’s selfish interests become strong enough, and while they are operating they victimize the author, exploit the public, and corrupt all of the industries and enterprises and individuals involved.” Ringer, *supra* n. 37, at 130. Ringer’s argument is beyond the scope of this Article, but it does shed some light on why the current law requires redrafting. As Leaffer notes, the “complexity in copyright law reflects the increasingly regulatory nature of copyright, a visible by-product of compromises struck between representatives of industry groups who have direct financial stakes in the outcome.” Leaffer, *supra* n. 6, at 16. Leaffer also contemplates a statutory overhaul in light of the law’s increasing complexity, “beginning from first principles.” *Id.* at 17.

91. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (exempting noncommercial copying of copyrighted media in digital or analog format from copyright infringement, and instead imposing royalties on recording devices and requiring manufacturers to incorporate copy management systems into home recording devices to prevent serial recording); see Tia Hall, *Music Piracy and the Audio Home Recording Act*, 2002 Duke L. & Tech. Rev. 23, ¶¶ 11–14 (available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0023.html>) (proposing that amending the Audio Home Recording Act would solve a lot of the music industry’s compensation issues); see also No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (Dec. 16, 1997) (providing “greater copyright protection by amending criminal copyright infringement provisions”); Fairness in Music Licensing Act of 1998, 112 Stat. 2827 discussed *supra* note 60.

92. The Copyright Royalty Tribunal was replaced in 1994 by a new system of ratemaking through use of Copyright Arbitration Royalty Panels (CARPs). Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (Nov. 30, 2004). And in 2004, CARPs were replaced by the Copyright Royalty Board, created by the Copyright Royalty Judges Program Technical Corrections Act, Pub. L. No. 109-303, 120 Stat. 1478 (Oct. 6, 2006) (codified throughout 17 U.S.C. § 801, et. seq.).

provision added in 1995—the digital performance right for sound recordings—and that right’s subsequent fine-tuning in 1998.<sup>93</sup>

### C. Digital Era Music Copyright Law

#### 1. *Digital Performance Right in Sound Recordings Act of 1995*

The DPRA granted a public performance right in sound recordings for *digital* audio transmissions only.<sup>94</sup> The recording industry initially lobbied for a full public performance right in sound recordings, but traditional radio broadcasters strongly opposed that proposal.<sup>95</sup> So the resulting compromise retained terrestrial broadcasters’ exemption from paying the extra royalty for publicly performing sound recordings.<sup>96</sup> The Senate Committee on the Judiciary justified terrestrial radio’s exemption partially because it did not want to impede terrestrial broadcasting’s economic viability,<sup>97</sup> stating:

[T]he sale of many sound recordings and the careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. . . . [T]he radio industry has grown and prospered with the availability and use of prerecorded music. [The DPRA does not] change or jeopardize the mutually beneficial economic

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93. 109 Stat. 336; 112 Stat. 2860.

94. 109 Stat. at 336; see also Jason Turner, Op-Ed, *Working Together to Save the Music: Internet Services Present a Challenge—And an Opportunity—For Radio*, *Billboard Mag.* 4 (Oct. 17, 2009) (explaining that concerns resulting from the popularization of the Internet during the 1990s led Congress to enact the DPRA, “which was the first time that the owners of sound recordings were afforded the exclusive right to perform sound recordings (albeit an extremely narrow exclusive right pertaining only to paid subscription and interactive services) by way of a digital audio transmission”).

95. One commentator noted:

The stations['] representatives assert, “Enough is Enough!” The stations make records popular and spur sales. They already pay hundreds of millions of dollars in performance royalties. Why should they pay any more? To make the issue more palatable, the recording industry . . . proposed a half-step, namely, the coverage of digital sound recordings only.

Arnold P. Lutzker, *Copyrights and Trademarks for Media Professionals* 115 (Focal Press 1997).

96. 109 Stat. at 336–337, 343.

97. See *1995 Senate Report*, *supra* n. 88 at 16 (stating that granting a full performance right in sound recordings “would make it economically infeasible for some transmitters to continue certain current uses of sound recordings”).



relationship between the recording and traditional broadcasting industries.

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It is the . . . intent [of this legislation] to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, *and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.*<sup>98</sup>

The italicized language above appears to indicate that Congress adopted the recording and terrestrial broadcasting industries' reasoning that the new technologies emerging at the time may have "posed a threat" to the distribution of sound recordings. So in essence, Congress agreed to grant a limited performance right as opposed to a broad performance right in sound recordings in part because representatives of the recording industry were hesitant to upset the traditional balance struck with AM/FM radio broadcasters, at the expense of emerging alternative distribution routes such as webcasting. Industry representatives also feared that "new, alternative paths for consumers to purchase recorded music (in ways that cut out the recording industry's products) would erode sales of recorded music."<sup>99</sup> The recording industry also felt threatened by the notion that consumers could easily copy recorded music in digital format, and claimed digital airplay would destroy the industry by obviating the need to purchase music.<sup>100</sup> Based on that logic, Congress justified granting the new performance right by reasoning that the public would be harmed if the digital environment discouraged artists from creating new musical works absent the extra protection provided by the DPRA.<sup>101</sup>

Webcasters and satellite broadcasters were the only parties directly affected by copyright holders' new performance right.<sup>102</sup>

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98. *Id.* at 14–15 (emphasis added).

99. *Bonneville*, 347 F.3d at 488.

100. Lutzker, *supra* n. 95, at 115.

101. *1995 Senate Report*, *supra* n. 88, at 14.

102. Satellite broadcasting is beyond the scope of this Article.

But the DPRA, which was added to the 1976 Act as section 106(6),<sup>103</sup> only required that subscription webcasting services and interactive webcasting services pay the additional licensing fee.<sup>104</sup> The DPRA also divided subscription webcasting services into two categories: interactive and noninteractive.<sup>105</sup> Noninteractive subscription services were exempted from paying royalties, but interactive subscription services were required to negotiate webcasting licenses directly with copyright holders.<sup>106</sup>

The DPRA's legislative history shows that Congress did not account for the webcasting industry's potential future value to the music industry as a whole because webcasting was not a commercially profitable business at the time—nor were representatives of that industry present during the congressional hearings on the DPRA.<sup>107</sup> And due to the recording and terrestrial broadcasting industries' heightened concerns about nonsubscription webcasters' exemption from the DPRA,<sup>108</sup> Congress amended the statute in 1998 to require those services to pay a webcasting royalty as well.<sup>109</sup>

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103. 109 Stat. at 336.

104. Turner, *supra* n. 94; see also *Arista*, 578 F.3d at 155 (stating that “webcasting services, which provide free—i.e., nonsubscription—services that do not provide particular sound recording[s] on request . . . at that time fell outside the sound recording copyright holder's right of control”). For further clarification on the difference between subscription and nonsubscription webcasting services, see *supra* note 12.

105. 109 Stat. at 338.

106. 109 Stat. at 338; *Arista*, 578 F.3d at 154. A modern example of a noninteractive webcasting service is Pandora Internet Radio. For a thorough analysis of a webcasting service's interactivity level regarding statutory licensing requirements under the current law, see *id.*; see also Camalla Kimbrough, Student Author, *LAUNCH Away: Second Circuit Rules That Degree of User Influence Determines Whether a Webcasting Service Must Obtain Individual Licenses for Performing Sound Recordings*, 12 Tul. J. Tech. & Intell. Prop. 293, 293–294 (2009) (explaining the facts and holding of the *Arista* decision).

107. *Bonneville*, 347 F.3d at 488 n. 4; see 141 Cong. Rec. H10102 (daily ed. Oct. 17, 1995) (statement of Rep. Carlos J. Moorhead) (concluding that all testimony and all interested parties supported passage of the DPRA). Rep. Moorhead stated: “I am not aware of any opposition to this legislation. It has the support of the American Federation of Musicians, the American Federation of Television and Radio Artists, the record industries, the songwriters, the radio and TV broadcast industry, and the administration.” *Id.*

108. *Arista*, 578 F.3d at 155.

109. 112 Stat. at 2860.

## 2. *Digital Millennium Copyright Act of 1998*

By 1997, copyright infringement was rampant due to illegal music downloading services like Napster,<sup>110</sup> and music piracy cost the recording industry approximately one million dollars per day.<sup>111</sup> In addition to combating piracy, the industry also turned its attention toward nonsubscription webcasters. The recording industry claimed that nonsubscription webcasters threatened its business model because: (1) consumers would listen to webcasted sound recordings free of charge instead of purchasing music; and (2) nonsubscription services increased the risk of music piracy by allowing users to copy digitally transmitted music without payment.<sup>112</sup> In June 1998, webcasters responded by forming the Digital Media Association (DiMA), a lobbying and trade organization, to represent Internet radio's interests before Congress.<sup>113</sup> But in essence, the statute was amended because the recording industry successfully advanced its hypothesis that music webcasters were largely responsible for the recording industry's vastly decreasing revenue.<sup>114</sup>

To draft the DMCA, inter-industry negotiations and lobbying for congressional amendment of the DPRA resumed, with the "traditional" music industries advocating that nonsubscription webcasters also pay the extra licensing fee already imposed on subscription services by the DPRA in 1995.<sup>115</sup> Three months after DiMA was formed, the DMCA, which required some (but not all) nonsubscription services to pay for digital broadcasts of sound

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110. Napster allowed its users to share music files through a free "peer-to-peer" network. *A&M Recs., Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901–902 (N.D. Cal. 2000). The RIAA filed suit for copyright infringement against Napster in 1999, and the debate over peer-to-peer software's contribution to music piracy lasted until the 2005 Supreme Court decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). The Court found Grokster liable for copyright infringement because evidence showed that its file-sharing software was used for actual infringement on a "gigantic scale." *Id.* at 940.

111. *Arista*, 578 F.3d at 155.

112. *Id.* at 153, 155.

113. *2004 DiMA Speech*, *supra* n. 15.

114. *See Arista*, 578 F.3d at 155 (highlighting the concerns of record companies' apprehension that webcasting "would cut into profits and stunt development of the recording industry").

115. 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 Commun. & Ent. L.J.* 1, 11–13 (2001).

recordings, became law.<sup>116</sup> At its core, the DMCA's "net effect, not surprisingly, [was] to benefit those companies that have the business profile of members of the trade group that lobbied for this provision."<sup>117</sup> The DMCA responded primarily to the larger industries' piracy and sales concerns by expanding copyright holders' performance right in sound recordings to include recordings broadcast by some nonsubscription webcasters.<sup>118</sup> Terrestrial radio broadcasters retained their exemption from paying royalties for traditional broadcasts, but the court in *Bonneville International Corp. v. Peters*<sup>119</sup> held that traditional broadcasters must also pay the digital broadcasting fee when those entities' broadcasts are simultaneously webcasted, or "simulcasted."<sup>120</sup> The DMCA also retained the distinction between interactive and non-interactive services, whereby the former negotiates rates directly

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116. The statute provided that eligible nonsubscription transmissions (i.e., noninteractive nonsubscription transmissions) must pay a statutory license in exchange for webcasting music. 112 Stat. at 2891. The DMCA also provided that:

No later than [thirty] days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions . . . .

*Id.* at 2895. The Act also mandated CARP proceedings if no consensus was reached:

In the absence of license agreements negotiated under subparagraph (A), during the [sixty]-day period commencing [six] months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter [eight], convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph.

*Id.* at 2896.

117. David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA Ent. L. Rev. 189, 239 (2000).

118. *Id.* at 238–239. "Congress enacted copyright legislation [(the DMCA),] directed at preventing the diminution in record sales through outright piracy of music or new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records." *Arista*, 578 F.3d at 157.

119. 347 F.3d 485.

120. *Id.* at 495 (upholding the legality of statutory licensing fees for simulcasters). A simulcast occurs when "[p]erformances of sound recordings [are] made on simultaneous webcasts of over-the-air broadcasts . . ." Michael A. Einhorn, *Media, Technology and Copyright* 105 (Edward Elgar Publ., Inc. 2004). For a detailed analysis of *Bonneville* and terrestrial broadcasters' statutory requirements regarding webcasted programming, see Azine Farzami, *Bonneville v. Register of Copyrights: Broadcasters' Upstream Battle over Streaming Rights*, 11 CommLaw 203 (2003) (examining the effect of the *Bonneville* decision on the terrestrial broadcasting industry).

with copyright holders and the latter pays statutorily mandated royalty rates, which are determined by engaging in voluntary negotiations with the copyright holders' statutorily designated representative.<sup>121</sup>

Under the DMCA, the copyright holders' statutory representative is a nonprofit performance rights organization designated by the United States Copyright Office.<sup>122</sup> Once negotiations with those seeking to pay the statutory rates instead of negotiating directly with copyright holders commence, the nonprofit organization then determines the statutory rate.<sup>123</sup> The statutory licensing representative is also the receiving agent for royalty payments made by webcasters under the DMCA.<sup>124</sup> The current statutory licensing representative is SoundExchange.<sup>125</sup> SoundExchange sets the statutory rates according to a "willing buyer-willing seller" standard<sup>126</sup>—basically, "what . . . would have been negotiated in the marketplace between a willing buyer and a willing seller."<sup>127</sup> SoundExchange is also urged to consider whether, at that point in time, webcasting has had a positive or negative effect on music sales when determining the appropriate statutory royalty

121. 112 Stat. at 2900–2901; *see also Arista*, 578 F.3d at 155–156 (concluding that due to the difficulty in classifying a service as interactive or not interactive, the determination must be left to a case-by-case assessment). The primary distinction between interactive and noninteractive services is that interactive services are viewed as more likely to substitute record sales. Einhorn, *supra* n. 120, at 105. "[I]nteractive streaming enables digital users to choose music tracks in 'jukebox' play that involves personal choice without storage." *Id.* at 106.

122. 112 Stat. at 2901. The independent organization "collect[s] and distribute[s] digital performance royalties' for all digital audio transmissions of sound recordings . . . [and] participate[s] in [the] rate-setting proceedings." Erich Carey, Student Author, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?* 19 *Fordham Intell. Prop. Media & Ent. L.J.* 257, 268 (2008) (quoting SoundExchange, *supra* n. 4). Initially, the rates were determined by a convened Copyright Arbitration Royalty Panel (CARP) that was overseen by the Librarian of Congress. For more a more detailed explanation of CARPs, *see supra* Part III(A), at note 132. Now, those who wish to pay the statutory royalty rate negotiate directly with SoundExchange, and seek review by official Copyright Royalty Judges that were appointed in 2004 when the Copyright Royalty Board (CRB) replaced the CARP system. 118 Stat. 2341; *see* M. Roger Milgrim & Susan R. Gordon, *Milgrim on Licensing: Copyright and the Internet*, ch. 2, § 6C.04, 29 n. 61 (Matthew Bender 2010) (cataloging the historical timeline of the statutory license rate-setting bodies, CARPs, and the CRB).

123. 112 Stat. at 2901.

124. *See supra* nn. 4, 25 (explaining SoundExchange's role as the receiving agent for royalty payments under the DMCA).

125. 37 C.F.R. § 262.4(b)(1) (2009); SoundExchange, *supra* n. 4.

126. Karen Fessler, *Webcasting Royalty Rates*, 18 *Berkeley Tech. L.J.* 399, 417 (2003).

127. *Id.* at 418 n. 118.

rate.<sup>128</sup> If the parties are not satisfied with SoundExchange's proposed statutory rates, then the rates are reviewed administratively by the Copyright Royalty Board, and can be appealed to the Librarian of Congress, then the Court of Appeals for the District of Columbia Circuit.<sup>129</sup> The system as it currently stands has yet to produce a mutually agreeable set of statutory licensing rates for the digital performance of sound recordings.

*III. "HOW MANY MORE TIMES?"<sup>130</sup>: THE INDUSTRIES'  
DECADE-LONG STRUGGLE TO ACCOMMODATE  
THE INTERESTS OF ALL PARTIES BY REACHING  
AGREEABLE STATUTORY LICENSING RATES*

Despite being in place for the past twelve years, the current method of determining statutory licensing rates for webcasters has yet to yield a mutually agreeable rate for any period of time. The process by which statutory licensing rates for the digital performance of sound recordings are set under the DMCA is complicated and tedious. This Part will illustrate how the rate-setting process has not yet yielded a workable statutory royalty rate. A detailed analysis of how rates are set, and how this method has affected Internet radio over the past decade, is crucial to understanding the method's overall inefficiency, costliness, and propensity to foster both public and inter-industry uncertainty.

Part III(A) introduces the process by which the first round of statutory royalty rates for Internet radio were set (2002 Rates). Part III(A) then details the webcasting industry's dissatisfaction with those rates and the litigation, public outcry, emergency acts of Congress, and proposed legislation those rates prompted.

Part III(B) explains the process by which the second round of statutory royalty rates for Internet radio were set (2007 Rates). Part III(B) further explores how the reaction to the 2007 Rates essentially mirrored the reaction to the 2002 Rates, in that the 2007 Rates again prompted litigation, public outcry, emergency acts of Congress, and proposed reform legislation.

Finally, Part III(C) outlines the recent developments in this area of law. Part III(C)(1) discusses three important appellate

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128. 72 Fed. Reg. 24084, 24088 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

129. *Live365*, 698 F. Supp. 2d at 29–30.

130. Led Zeppelin, MP3, *How Many More Times*, in *Led Zeppelin* (Atlantic Recs. 1969).

opinions published in late 2009 and early 2010. Part III(C)(2) details two proposed bills Congress is currently considering that stand in opposition to each other, and how that legislation—if either passes—will affect the webcasting and traditional broadcasting industries. Part III(C)(3) summarily explains the next round of negotiations and hearings to set royalty rates in 2010, positing that the same, inefficient cycle is repeating itself.

#### A. The First Attempt at Setting Statutory Royalty Rates under the DMCA: The 2002 Rates

In accordance with the DMCA, SoundExchange, representing recording companies and other copyright holders' interests,<sup>131</sup> began independent negotiations with webcasters in 1998.<sup>132</sup> Although twenty-six private settlements were reached, no standard, industry-wide statutory rate was set.<sup>133</sup> A Copyright Arbitration Royalty Panel (CARP) then formed to review proposals submitted by the parties and set a statutory royalty rate.<sup>134</sup> The RIAA submitted the twenty-six agreements as a benchmark statutory royalty rate, and the webcasters submitted a separate proposed licensing scheme.<sup>135</sup> The CARP rejected all proposals except for one of the private settlement agreements made between the RIAA and Yahoo!, an interactive subscription-based webcaster, upon which the CARP largely based its determination.<sup>136</sup> The Librarian of Congress, who oversees rate

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131. 67 Fed. Reg. 45240, 45267 (July 8, 2002) (codified at 37 C.F.R. pt. 261) (describing SoundExchange as a designated agent between copyright owners and performers, and licensees).

132. See 63 Fed. Reg. 65555, 65556 (Nov. 27, 1998) (stating that a voluntary six-month period for determining rates and terms of public performance licenses began on November 27, 1998).

133. Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 Tex. Intell. Prop. L.J. 447, 463–464 (2003).

134. CARPs were first established to administer compulsory statutory licenses in 1993. Leaffer, *supra* n. 6, at 11. In 2004, CARPs were replaced by a Copyright Royalty Board consisting of three full time judges appointed by the Librarian of Congress. *Id.* at 15. This process is known in administrative law as “formal” rulemaking. Peter L. Strauss, Todd D. Rakoff & Cynthia R. Farina, *Administrative Law: Cases and Comments* 485 (10th rev. ed., Found. Press 2003). The formal rulemaking process requires “individualized oral hearings” when an agency sets “firm-specific rates” for an industry. *Id.* at 486. Hearings under this process are governed by 5 U.S.C. §§ 556–557, and instructions for reviewing courts are found in Section 706. *Id.* at 485, 1347.

135. Jackson, *supra* n. 133, at 463.

136. *Id.* at 464.

determinations, then reviewed and amended the CARP's decision.<sup>137</sup>

When reviewing and setting rates, the Librarian must examine two factors: (1) the nature of a hypothetical marketplace in which no statutory rates exist; and (2) what rates most clearly represent rates upon which a willing buyer and seller in that hypothetical marketplace would most likely agree.<sup>138</sup> The Librarian's rate determination became the official statutory standard (2002 Rates).<sup>139</sup> The 2002 Rates required payment for the royalty period from the DMCA's enactment to the date those rates were set.<sup>140</sup> The 2002 Rates expired in 2005, when a new set of statutory royalty rates was determined for the following five years.<sup>141</sup>

As set, the 2002 Rates outraged the RIAA, terrestrial broadcasters, webcasters, and the public.<sup>142</sup> All of the affected industries challenged the Librarian's rate determination in *Beeethoven.com, LLC v. Librarian of Congress*.<sup>143</sup> The parties' respective positions failed to surprise: the RIAA sought a determination that the 2002 Rates were arbitrarily low, and the webcasters sought a determination that the 2002 Rates were arbitrarily high and "not based on real market factors."<sup>144</sup> Smaller webcasters were dismissed from the lawsuit as not "sufficiently related" to the issue before the court because they did not participate in the initial statutory negotiations.<sup>145</sup>

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137. 67 Fed. Reg. at 45272 (explaining that "part 261 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. [§] 114[, the DMCA]").

138. 72 Fed. Reg. at 24087.

139. 67 Fed. Reg. at 45272. For details and criticism of the Librarian's amendments, see Jackson, *supra* n. 133, at 470–478.

140. 67 Fed. Reg. at 45273.

141. 72 Fed. Reg. at 24084. For a discussion of the proceedings to determine rates for 2006–2010, see *infra* Part III(B).

142. Jackson, *supra* n. 133, at 448.

"Curtain Call for Webcasts?" "Royalty Fees Killing Most Internet Radio Stations," "Webcasters Head to Washington in Royalty Protest," "Webcast Royalty Proposal Draws Fire From All Sides." These were just a few of the headlines written in 2002 as the Library of Congress sought to establish license fees for digital performances of sound recordings.

*Id.* (footnote omitted).

143. 394 F.3d 939.

144. *Id.* at 942.

145. *Id.* The nonparticipating webcasters also argued the CARP process violated their due process rights because it excluded small webcasters that could not afford the required



Those smaller webcasters also faced extinction due to an inability to afford the 2002 Rates.<sup>146</sup> While *Beethoven.com* was pending, Congress passed the Small Webcasters Settlement Act of 2002 (SWSA) to address the dismissed parties' disdain for the 2002 Rates.<sup>147</sup> The SWSA suspended payment of the 2002 Rates for small webcasters,<sup>148</sup> giving them until 2004 to engage in independent settlement negotiations with the United States Copyright Office for more agreeable licensing fees that would replace their obligations under the 2002 Rates.<sup>149</sup> The SWSA may have saved the webcasting industry, because on January 14, 2005 the *Beethoven.com* court upheld the 2002 Rates as "facially plausible."<sup>150</sup> But the *Beethoven.com* court did not comment on whether the rates were reasonable or correct, and held only that the Librarian "acted within his prerogative to find the RIAA's arguments more persuasive than the Broadcasters'."<sup>151</sup>

This first failed attempt at DMCA compliance prompted congressional reform of the initial administrative process. The Copyright Royalty and Distribution Reform Act of 2004 (Reform Act)<sup>152</sup> provided for, among other things, a Copyright Royalty Board (CRB) consisting of three full time copyright judges appointed by the Librarian of Congress.<sup>153</sup> CRB decisions are

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arbitration fees. *Id.* The court dismissed all of those parties' claims as attempts to "impermissibly raise new issues." *Id.*

146. See Benny Evangelista, *Web Radio Royalty Rate for Songs Criticized*, [http://articles.sfgate.com/2002-06-21/business/17549635\\_1\\_internet-radio-stations-webcasters-royalty-rates](http://articles.sfgate.com/2002-06-21/business/17549635_1_internet-radio-stations-webcasters-royalty-rates) (June 21, 2002) ("[T]he decision could force thousands of Internet radio stations to shut down.").

147. 116 Stat. 2780. But the SWSA did not specifically define "small webcaster"—it only categorized small webcasters as those who petitioned for relief, stating:

Some small webcasters who did not participate in the copyright arbitration royalty panel proceeding leading to the July 8, 2002 order of the Librarian of Congress establishing rates and terms for certain digital performances . . . (referred to in this section as 'small webcasters'), have expressed reservations about the fee structure set forth in [the 2002 Rates], and have expressed their desire for a fee based on a percentage of revenue.

*Id.*

148. *Id.* at 2781.

149. *Id.* at 2781–2782.

150. *Beethoven.com*, 394 F.3d at 953.

151. *Id.* at 954.

152. 118 Stat. 2341.

153. 72 Fed. Reg. at 24087. The CRB consists of "three judges who serve staggered, six-year terms, and once appointed they may be removed only for 'misconduct, neglect of duty, or any disqualifying physical or mental disability.'" *Live365*, 698 F. Supp. 2d at 29 (citing 17 U.S.C. §§ 802(c), (i) (2006)).

reviewed by the United States Court of Appeals for the District of Columbia Circuit,<sup>154</sup> which, according to the Administrative Procedure Act, will overturn a decision only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law.”<sup>155</sup> The “willing buyer-willing seller” standard remained unchanged.<sup>156</sup>

The CRB, like the CARPs that came before it, must also consider evidence that is based, for example, on “(1) whether the use of the webcasting services may substitute for or promote the sale of phonorecords[;] and (2) whether the copyright owner or the service provider make relatively larger contributions to the service ultimately provided to the consuming public with respect to creativity, technology, capital investment, cost[,] and risk,”<sup>157</sup> but the Copyright Royalty Judges’ current stance is that “such considerations ‘would have already been factored into the negotiated price’ in the benchmark agreements.”<sup>158</sup> The Librarian of Congress also reviews the CRB’s decisions, and is thus responsible for final rate determinations.<sup>159</sup>

#### B. The Second Attempt at Setting Statutory Royalty Rates under the DMCA: The 2007 Rates

One month after *Beethoven.com* was decided,<sup>160</sup> the Librarian of Congress published notice in the Federal Register directing any interested parties to file petitions to participate in another round of voluntary statutory readjustment negotiations with the newly formed CRB.<sup>161</sup> The Librarian also mandated a three-month window within which the parties were to agree, and if they could not, all were directed to file written statements to the CRB for review and hearing.<sup>162</sup> Representatives of the recording, terrestrial simulcasting, and Internet radio industries filed forty-two peti-

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154. *Live365*, 698 F. Supp. 2d at 30.

155. Leaffer, *supra* n. 6, at 298 (citing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

156. 72 Fed. Reg. at 24087.

157. *Id.* at 24088 (citing 17 U.S.C. § 112(e)(4); 17 U.S.C. § 114(f)(2)(B)).

158. *Id.* at 24092 (citing 67 Fed. Reg. at 45244).

159. *Live365*, 698 F. Supp. 2d at 30.

160. *Beethoven.com* was decided on January 14, 2005. *Beethoven.com*, 394 F.3d at 939.

161. 70 Fed. Reg. 7970, 7970–7971 (Feb. 16, 2005).

162. *Id.* at 7971.

tions.<sup>163</sup> As expected, the parties failed to formulate a mutually-agreed-upon statutory rate on their own, and twenty-eight of the original parties filed written pre-hearing statements with the CRB.<sup>164</sup>

The Librarian of Congress appointed new, full-time Copyright Royalty Judges on January 9, 2006.<sup>165</sup> SoundExchange, DiMA,<sup>166</sup> smaller commercial webcasters,<sup>167</sup> and radio broadcasters all submitted proposed rate schemes for CRB consideration. The most noteworthy disparity in the submitted rates was that between SoundExchange and DiMA: SoundExchange proposed the greater of 30% gross revenues or a rate of \$.0008 per performance in 2006, increasing annually to \$.0019 by 2010,<sup>168</sup> while DiMA proposed permitting webcasters to “elect a fee equal to either \$.00025 per performance or \$.0038 per Aggregate Tuning Hour . . . or 5.5% of [webcasting] revenue.”<sup>169</sup> The simulcasters proposed an annual flat rate tied to usage based upon each simulcaster’s webcasting format.<sup>170</sup>

The primary focus during the hearings was on the SoundExchange, DiMA, and simulcaster proposals. The CRB essentially dismissed smaller webcasters’ annual rate proposals, stating:

To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners. Furthermore, it would involve the Copyright Royalty Judges in making a pol-

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163. 72 Fed. Reg. at 24084.

164. *Id.*

165. *Id.* at 24087.

166. DiMA has historically represented larger webcasters. Current webcasting members include Slacker, Live365, MySpace Music, RealNetworks, MTV Networks, and Microsoft. DiMA, *Members*, [http://digimedia.org/index.php?option=com\\_content&view=article&id=49&Itemid=69](http://digimedia.org/index.php?option=com_content&view=article&id=49&Itemid=69) (accessed Nov. 29, 2010).

167. The “self-styled” Small Commercial Webcasters were only concerned with the “amount of the fee, rather than how it should be structured,” while the other three entities proposed different fee structures for different types of digital uses of sound recordings. 72 Fed. Reg. at 24088.

168. *Id.*

169. *Id.* For graphical depictions of the royalties that webcasters paid before and after the CRB hearing, see Kurt Hanson, *‘Day of Silence’ Event to Draw Attention to Royalty Crisis*, <http://www.kurthanson.com/dos/> (June 2007).

170. 72 Fed. Reg. at 24088.

icy decision rather than applying the willing buyer/willing seller standard of the Copyright Act.<sup>171</sup>

By categorizing small webcasters as “inefficient market participants,” the CRB perhaps indicated that it felt that smaller webcasters should modify their business models rather than petition for a lower annual statutory rate if they wish to remain competitive in the Internet radio market.

The CRB ultimately decided on a per-performance rate rather than a revenue-based rate.<sup>172</sup> The CRB then found in favor of SoundExchange: namely, that the most appropriate benchmark statutory rates were those rates negotiated between interactive webcasters and copyright holders,<sup>173</sup> rather than the rates noninteractive web- and simulcasters reached with ASCAP and BMI as benchmarks.<sup>174</sup> Any assertions that either Internet radio or simulcasting’s promotional value increased the recording industry’s sales revenues were dismissed as speculative “puffing.”<sup>175</sup> These rates (2007 Rates) were published on May 1, 2007,<sup>176</sup> and included a gradual rate increase until December 31, 2010,<sup>177</sup> after which a new set of statutory royalty rates will govern.

171. *Id.* at 24088 n. 8.

172. *Id.* at 24091. For the Judges’ technical reasoning based on several economists’ reports, see *id.* at 24089–24094.

173. *Id.* at 24090. As previously noted, *supra* note 14, interactive webcasters negotiate royalty rates directly with copyright holders, while noninteractive webcasters pay the statutory rate. *Arista*, 578 F.3d at 150–151.

174. The CRB found that the interactive market represented appropriate benchmark prices without adjustment for substitution or promotion factors or copyright owners’ and webcasting services’ relative contributions toward making the copyrighted works and services available to the public. 72 Fed. Reg. at 24095.

175. *Id.* at 24095 n. 30. Specifically, the CRB stated:

[T]he Radio Broadcasters strenuously assert that over-the-air-radio is promotional and therefore that simulcasting must be promotional. But they present no persuasive evidence that would be useful for quantifying the magnitude of this asserted effect either for over-the-air-radio or for non-interactive webcasting and deriving a method for translating such magnitudes into a rate adjustment. Indeed, the quality of evidence presented by the Services on this issue consisted largely of assertions, recollections of conversations clearly evidencing common “puffing” in a business context, or anecdotes recounting subjective opinions.

*Id.* The CRB’s statement departs from the traditional view that radio broadcasting’s promotional value outweighs the need to compensate copyright holders, which might become significant as Congress considers the Performance Rights Act, discussed *infra* Part III(C).

176. 72 Fed. Reg. at 24096–24114.

177. *Intercollegiate*, 574 F.3d at 754.

The webcasting industry reeled. Webcasters' monthly royalty payments skyrocketed from approximately \$120 to \$6,500.<sup>178</sup> As in 2002, the public expressed concern that the 2007 Rates sounded the proverbial death knell for Internet radio,<sup>179</sup> which was significantly more popular at this time than it was during the 2002 Rate disputes.<sup>180</sup> Campaigns to save Internet radio<sup>181</sup> could not prevent webcasters from (again) shutting down<sup>182</sup> because they could no longer afford to remain in business.<sup>183</sup> Some major Internet radio webcasters, including Yahoo!, Rhapsody, and Pandora Internet Radio (Pandora), even held a day of silence to increase public awareness.<sup>184</sup> Meanwhile, fearing loss of an important medium for discovering new music, Internet radio users flooded Congress with emails, faxes, and phone calls.<sup>185</sup> The webcasting industry knew it must take immediate action to prevent Internet radio's extinction, leading webcasters to introduce the Internet Radio Equality Act (IREA) on April 26, 2007.<sup>186</sup> Propo-

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178. Keesan, *supra* n. 87, at 367.

179. Michael Robertson, *The Death of Pandora and the Rebirth of Webcasting*, <http://voices.allthingsd.com/20070516/michael-robertson/> (May 16, 2007) ("The bell is tolling for [w]ebcasting in the [United States] after the Copyright Review Board refused to alter the new proposed royalty rates, which represent an enormous hike in the money online radio stations must pay.")

180. See Olga Kharif, *The Last Days of Internet Radio? A Decision by the Copyright Royalty Board to Raise Royalty Fees Could Put Some Small Online Radio Stations out of Business*, [http://www.businessweek.com/technology/content/mar2007/tc20070307\\_534338.htm](http://www.businessweek.com/technology/content/mar2007/tc20070307_534338.htm) (Mar. 7, 2007) (highlighting the rise in Internet radio's popularity, stating "[m]ore people listen to online radio than to satellite radio, high-definition radio, podcasts, or cell-phone-based radio combined").

181. See Matt Buchanan, *Internet Radio Rebellion Crushed: CRB Upholds Royalty Rate Hike*, <http://gizmodo.com/gadgets/internet-radio/internet-radio-rebellion-crushed-crb-upholds-royalty-rate-hike-252823.php> (Apr. 17, 2007) (warning Internet radio users: "listen hard to your favorite Internet radio stations, since you may not be able to listen long").

182. See Mike Masnick, *RIAA Pushes Through Internet Royalty Rates Designed to Kill Webcasters*, <http://www.techdirt.com/articles/20070304/223155.shtml> (Mar. 5, 2007, 3:14 a.m. ET) (explaining that the CRB's adoption of the RIAA's proposal for performance royalty rates to apply retroactively will cause many small independent broadcasters to go bankrupt).

183. Robertson, *supra* n. 179.

184. Hanson, *supra* n. 169.

185. Amy Duvall, Student Author, *Royalty Rate-Setting for Webcasters: A Royal(ty) Mess*, 15 Mich. Telecommun. & Tech. L. Rev. 267, 283 (2008) (stating: "In response to the [2007] CRB decision, webcasting fans sent thousands of emails . . . and made phone calls to their representatives and senators. Senator Diane Feinstein received 25,000 emails [regarding the 2007 Rates], while the office of Representative Jay Inslee received correspondence equal to that on the Iraq War").

186. H.R. 2060, 110th Cong. (Apr. 26, 2007) (available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2060>).

nents of the IREA petitioned Congress to nullify the 2007 Rates and instead charge webcasters the same fees as satellite radio stations.<sup>187</sup> The bill was referred to a House Committee for consideration, but the Committee never reported on it, and Congress never took further action on the bill.<sup>188</sup>

While the IREA was pending, DiMA and the other unsatisfied webcasters filed suit, as they had after the 2002 Rates were released,<sup>189</sup> claiming the CRB's decision was unreasonable, "crushing[,] and disproportionate."<sup>190</sup> In *Intercollegiate Broadcast Systems, Inc. v. Copyright Royalty Board*,<sup>191</sup> the webcasters primarily argued that the 2007 Rates overcompensated copyright holders by requiring that webcasters pay rates similar to those in the interactive marketplace, which are generally higher than the copyright holders would have earned in the noninteractive marketplace, and is one of the primary reasons for the DMCA's distinction between rates paid by interactive and noninteractive services in the first place.<sup>192</sup> The simulcasters filed a brief in the case as well, claiming, as the webcasters did, that the rates were inappropriate for noninteractive services.<sup>193</sup> The simulcasters also

187. *Id.* (seeking a percentage of revenue model instead of the 2007 Rates). Webcasters argued that "[i]n a later determination, setting rates and terms for satellite radio . . . services, the [Copyright Royalty] Judges credited a study with an interactivity adjustment much greater than [the economist's adjustment in the report the Judges relied upon to set the 2007 Rates]." *Intercollegiate*, 574 F.3d at 759. The webcasters also asserted that the Copyright Royalty Judges should have used a similar rate-setting scheme, which would result in rates two-thirds below the 2007 Rates. *Id.* Senators Ron Wyden (D-OR) and Sam Brownback (R-KS), who introduced the Senate version of the IREA, also released a joint statement regarding the 2007 Rates: "July 15, [2007,] when collection begins on the new royalty fees, literally will be the day the music died." Nate Anderson, *Senate Hears the Internet Radio Blues, Takes Action*, <http://arstechnica.com/tech-policy/news/2007/05/senate-hears-the-internet-radio-blues-takes-action.ars> (updated May 10, 2007).

188. Library of Congress, *H.R. 2060*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02060:@@L&summ2=m&> (accessed Nov. 29, 2010); see *H.R. 2060*, 110th Cong. (declaring, "This bill never became law. This bill was proposed in a previous session of Congress. Sessions of Congress last two years, and at the end of each session all proposed bills and resolutions that have[ not] passed are cleared from the books." (emphasis omitted)). When bills like the IREA are proposed, they are usually considered by a designated congressional committee, which then reports the bill to Congress before it is considered. *H.R. 2060: Internet Radio Equality Act: Committee Assignments*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2060&tab=committees> (accessed Nov. 29, 2010).

189. See *supra* pt. III(A) (detailing the events that occurred in the aftermath of the 2002 Rates' issuance).

190. *Intercollegiate*, 574 F.3d at 752, 760 (citing *Comm. Op. Br. 38*).

191. 574 F.3d 748 (D.C. Cir. 2009).

192. *Id.* at 758.

193. *Id.* at 764–765.

argued that the CRB arbitrarily failed to consider relevant evidence with respect to those simulcasters' proposed alternative royalty rate-setting schemes.<sup>194</sup>

Congress was forced to intervene yet again, and passed the Webcaster Settlement Act of 2008 (WSA-I) in response to the webcasting industry's intense lobbying.<sup>195</sup> The WSA-I amended the DMCA to allow webcasters and SoundExchange to engage in further negotiations for the purpose of setting royalty amounts lower than the 2007 Rates.<sup>196</sup> The initial settlement deadline was February 2009, but due to promising negotiations the Webcaster Settlement Act of 2009 (WSA-II) extended that deadline to July 2009.<sup>197</sup>

Agreements made under WSA-I or II were published in the Federal Register, and imposed a deadline by which webcasters were required to notify SoundExchange if they wished to pay the agreement-based rates instead of the highly contested 2007 Rates.<sup>198</sup> The agreement-based rates will remain in effect until 2015, when yet another round of "negotiations"<sup>199</sup> will begin for any webcasters that elected to pay agreement-based rates instead of statutory rates.<sup>200</sup> Proceedings to generate a third set of statutory licensing rates for those webcasters that did not sign onto one of the previous agreements began on January 1, 2009 and are ongoing; the scheduled completion date is December 16, 2010.<sup>201</sup>

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194. *Id.* at 769.

195. 122 Stat. 4974; see Greg Sandoval, *Pandora, Webcasting Appear Headed for Senate Victory*, [http://news.cnet.com/8301-1023\\_3-10053014-93.html](http://news.cnet.com/8301-1023_3-10053014-93.html) (Sept. 27, 2008) (recounting that "this weekend saw Pandora, a struggling music service, whip up enough support among fans of Web radio to help persuade the House of Representatives to unanimously pass the Webcaster Settlement Act").

196. 122 Stat. at 4974.

197. 123 Stat. at 1926.

198. 74 Fed. Reg. 34796, 34798 (July 17, 2009).

199. In his blog, Rusty Hodge, general manager of webcaster Soma FM, stated: "This has[ not] been a negotiation. This has been a series of [unilateral] offers that gets worse each time. . . . There has been no compromise. Every counter-offer webcasters make is met with a less-desirable offer from SoundExchange." Rusty Hodge, *Rusty on Radio Blog, SoundExchange Offers Settlement to Webcasters*, [http://somafm.com/blogs/rusty/2009\\_02\\_01\\_archive.html](http://somafm.com/blogs/rusty/2009_02_01_archive.html) (Feb. 9, 2009).

200. 74 Fed. Reg. at 34799. The agreements reached under WSA-I and II reflect steadily increasing rates that apply retroactively from 2006, and proactively to 2015. *Id.* at 34798. These rates are significantly lower than those resulting from the 2007 rate determination. *Id.*

201. The current proceeding is underway "in order for the [Copyright Royalty] Board judges to designate the royalty rates for the next five-year statutory period for parties unable to reach . . . voluntary agreement[s], and the next rate designations will be in effect

## C. Recent Developments

## 1. Judicial Developments

On July 10, 2009, the *Intercollegiate* court affirmed the Copyright Royalty Judges' 2007 Rate scheme, but remanded for a new determination of the minimum fee to be paid by smaller webcasters.<sup>202</sup> In accordance with the *Intercollegiate* decision, the CRB published a new fee structure in the Federal Register on February 8, 2010.<sup>203</sup> One week after the *Intercollegiate* decision, SoundExchange and pureplay webcasters<sup>204</sup> reached one of the most highly publicized agreements under WSA-I and II.<sup>205</sup> Industry and public reactions to the news were mixed. For example, Tim Westergren, founder of Pandora Internet Radio, began his post-agreement statement with "the royalty crisis is over!" but ended by calling the current system "fundamentally unfair," stating that "[t]he revised royalties are quite high—higher in fact than any other form of radio."<sup>206</sup> Conversely, SoundExchange maintained its position that the 2007 Rates were and remain fair, and stressed that the new agreement-based strategy is "experimental."<sup>207</sup>

In a related proceeding, on August 21, 2009, the United States Court of Appeals for the Second Circuit decided *Arista Records, LLC v. Launch Media, Inc.*<sup>208</sup> At issue in *Arista*, a case of first impression, was how much user influence renders a web-

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from 2011 through 2015." *Live365*, 698 F. Supp. 2d at 30.

202. *Intercollegiate*, 574 F.3d at 771–772.

203. 75 Fed. Reg. 6097, 6097 (Feb. 8, 2010) (to be codified at 37 C.F.R. pt. 380). This minimum statutory licensing fee is retroactively effective for the period from January 1, 2006 to December 31, 2010. *Id.*

204. A pureplay webcaster generates "an overwhelming portion of [its] revenue from the streaming of sound recordings." Bryan Calhoun, *SoundExchange and "PurePlay" Webcasters Reach Unprecedented Experimental Rate Agreement*, <http://soundexchange.com/2009/07/07/soundexchange-and-pureplay-webcasters-reach-unprecedented-experimental-rate-agreement/> (July 7, 2009). Pandora Internet Radio is one of the best-known pureplay webcasters. RBR.com, *Internet Radio Increasingly Competitive in 2010*, <http://www.rbr.com/radio/23942.html> (May 5, 2010).

205. See 74 Fed. Reg. at 34796 (discussing the agreements, published by the United States Copyright Office); see generally Calhoun, *supra* n. 204 (discussing the unprecedented nature of the agreement between SoundExchange and Pureplay).

206. Tim Westergren, *Important Update on Royalties*, [http://blog.pandora.com/pandora/archives/2009/07/important\\_updat\\_1.html](http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html) (July 7, 2009).

207. Calhoun, *supra* n. 204.

208. 578 F.3d 148, *cert. denied*, 130 S. Ct. 1290 (2010).



caster “interactive” under the DMCA.<sup>209</sup> The *Arista* court engaged in an extensive analysis of how the Internet radio service LAUNCHcast chooses songs for its listeners and of the amount of influence a listener can exert over the songs played.<sup>210</sup> The court found that LAUNCHcast is not interactive because the “only thing a user can predict with certainty . . . is that by rating a song at zero the user will not hear that song on that station again.”<sup>211</sup> The opinion was a relief to many webcasters in that it created a sort of “safe harbor” for self-proclaimed noninteractive webcasters such as Pandora Internet Radio<sup>212</sup>—had *Arista* been decided differently, a litany of lawsuits against self-proclaimed noninteractive webcasters currently paying the statutory royalty rate, as opposed to negotiating rates individually with copyright holders, would likely ensue.<sup>213</sup> Additionally, had the *Arista* court come to the opposite conclusion, any suit in which a recording company prevailed over a webcaster paying agreement-based royalty rates would effectively nullify any agreements that webcaster may have reached with SoundExchange under WSA-I or II. The Supreme Court likely denied certiorari on January 25, 2010 for these reasons.<sup>214</sup>

While most webcasters were essentially rejoicing at the temporary fixes brought by the summer of 2009, Live365, Inc. (Live365),<sup>215</sup> which declined to elect to the agreement-based rate schemes, took a different approach to the situation by challenging the CRB’s constitutionality.<sup>216</sup> *Live365, Inc. v. Copyright Royalty*

209. *Id.* at 149–150.

210. *Id.* at 157–164. LAUNCHcast is currently owned by Yahoo!, Inc. *Id.* at 150 n. 2.

211. *Id.* at 164.

212. See Todd E. Saucedo, *The Quandary of Being Interactive: The Impact of Arista Records v. Launch Media on the Viability of Webcasting Services*, 6 Okla. J. L. & Tech. 50, 23–24 (2010), <http://www.okjolt.org/images/pdf/2010okjoltrev50.pdf> (noting that the *Arista* decision has allowed webcasters like Pandora to avoid hardships such as “negotiating separate copyright clearance deals with each copyright holder”).

213. For obvious reasons, recording labels view the *Arista* decision differently—namely, as “another shot to the gut” because “one more potentially significant source of revenue has been dashed.” Turner, *supra* n. 94. But Professor Turner, in whose Entertainment Law class the Author is currently enrolled, does note that the “ruling is well-reasoned despite the labels’ sensible displeasure with it.” *Id.*

214. *Arista Records, LLC v. Launch Media, Inc.*, 130 S. Ct. 1290 (2010).

215. Live365 is one of the commercial webcasters that originally founded DiMA. *About Live365*, <http://www.live365.com/web/index.live?curl=/web/components/content/info/index.live> (accessed Nov. 29, 2010). Live365 also sits on DiMA’s board of directors. *Id.*

216. Johnie Floater, *Constitutional Flaw Threatens Copyright Royalty Board*, <http://www.live365.com/info/press/pdfs/CRB-Constitutionality-issue.pdf> (Aug. 31, 2009).

*Board*<sup>217</sup> commenced when Live365 filed suit on August 31, 2009, seeking a declaratory judgment that the CRB violates the Appointments Clause of the United States Constitution.<sup>218</sup> Live365 argued that the three full-time Copyright Royalty Judges should be appointed by the President rather than the Librarian of Congress.<sup>219</sup> On September 28, 2009, Live365 unsuccessfully petitioned the trial court for a preliminary injunction against all CRB proceedings until the constitutional issue was decided.<sup>220</sup> The court denied both Live365's Motion for Preliminary Injunction and the CRB's Motion to Dismiss for Lack of Jurisdiction on February 23, 2010.<sup>221</sup> The *Live365* court declined to grant a preliminary injunction to Live365 primarily because the court did not find a "substantial likelihood" of success on the merits of Live365's case.<sup>222</sup> While the *Live365* court's finding severely weak-

217. 698 F. Supp. 2d 25 (D.C. Cir. 2010).

218. *Id.* at 28–29. The Appointments Clause states:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

U.S. Const. art. II, § 2, cl. 2.

219. *Live365*, 698 F. Supp. 2d at 35–36, 40–41. Specifically, Live365's constitutional claim was premised upon the fact that the Judges are not "subject to oversight . . . or removal by . . . the Executive branch; however, they function in all respects as Principal Officers who must be so appointed." Compl. for Declaratory and Injunctive Relief, *Live365, Inc. v. Copyright Royalty Board*, 2009 WL 2875834 at ¶ 1 (D.D.C. Aug. 31, 2009) (No. 1:09-cv-01662). Live365's argument rested heavily on Circuit Judge Brett M. Kavanaugh's concurrence in *SoundExchange v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (upholding the CRB's determination of statutory royalty rates for satellite radio stations) (Kavanaugh, J., concurring). Judge Kavanaugh stated:

[B]illions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions. The Board thus exercises expansive executive authority analogous to that of . . . FERC, the FCC, the NLRB, and the SEC. But unlike the members of those similarly powerful agencies, since 2004 Copyright Royalty Board members have not been nominated by the President and confirmed by the Senate. . . . The new statutory structure raises a serious constitutional issue . . . [u]nder the Appointments Clause.

*Id.*

220. Or. Denying Live365's Mot. Prelim. Inj. (D.D.C. Sept. 28, 2009) (No. 09-01662).

221. *Live365*, 698 F. Supp. 2d at 29.

222. *Id.* at 35; cf. Lauren Lynch Flick & Cydney A. Tune, *Client Alert: Court Says Copyright Royalty Board Can Legally Set Webcasters' Royalty Payments*, <http://www.pillsburylaw.com/siteFiles/Publications/F7E9C3EE05E78DC2A0D238EFF688574A.pdf> (Feb. 25, 2010) ("The [United States] District Court for the District of Columbia has ruled that the Copyright Royalty Board is constitutional."). For analysis of the constitutionality argument, see John P. Strohm, *The Constitutionality of the Appointment of Copyright Royalty Judges by the Librarian of Congress under the Appointments Clause*, 17 J. Intell. Prop. L. 89 (2009) (discussing the merits of Judge Kavanaugh's statement in *SoundEx-*

ens Live365's constitutionality claim, its holding is not definitive because Live365 still has the opportunity to present further evidence at trial, and possibly pursue an appeal if the court finds the CRB is not unconstitutional.

## 2. Pending Legislation

Congress is currently considering the Performance Rights Act (PRA), one of the goals of which is to eliminate terrestrial radio's statutory exemption from sound recording performance royalties.<sup>223</sup> Among other things, the PRA's proponents propose to amend the DMCA by removing the distinction between digital and analog audio transmissions "to provide parity in radio performance rights"<sup>224</sup> and "fair compensation to artists for use of their sound recordings."<sup>225</sup> The Senate Judiciary Committee approved the PRA in October 2009, but it is "far from becoming law."<sup>226</sup> A similar bill was proposed and rejected in 2007 on the ground that expanding the performance right to include analog transmissions would harm existing businesses.<sup>227</sup> The CRB's statement regarding terrestrial broadcasters' arguments as "puff-

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*change*, 571 F.3d at 1226).

223. H.R. 848, 111th Cong. at § 2.

224. *Id.*

225. Sen. 379, 111th Cong. (Feb. 4, 2009) (available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-379>).

226. Fawn Johnson, *US Senate Panel Approves Radio Royalties for Performers*, <http://www.nasdaq.com/aspx/stockmarketnewsstoryprint.aspx?storyid=200910151131dowjonesdjournal000679> (Oct. 15, 2009). For history and analysis of the PRA's potential legal impacts, see Noh, *supra* n. 40, at 98 (arguing the PRA should be adopted because it is consistent with congressional intent and comports with the basic copyright law notion that compensation should both "provide an incentive for the creation of intellectual property," and "benefit [ ] the greater good of society"); see also Brian Flavin, *A Digital Cry for Help: Internet Radio's Struggle to Survive a Second Royalty Rate Determination under the Willing Buyer/Willing Seller Standard*, 27 St. Louis U. Pub. L. Rev. 427, 465 (2008) (stating: "[T]he fact that a bill like the Performance Rights Act has actually been proposed demonstrates that Congress is at least aware of the potential unfairness of subjecting non-terrestrial radio stations to performance royalties simply because their broadcast media differs from that employed by terrestrial radio stations").

227. The House of Representatives stated: "[T]he hardship that would result from a new performance fee would hurt American businesses . . . and such a performance fee is not justified when the current system has produced the most prolific and innovative broadcasting, music, and sound recording industries in the world." H.R. Con. Res. 49, 111th Cong. The Senate concurred. *Id.*

ing” indicates that the bill might have a better chance of passing this time.<sup>228</sup>

Standing in opposition to the PRA is the Local Radio Freedom Act (LRFA).<sup>229</sup> This bill’s sponsors propose that Congress should not expand the performance right in sound recordings to include analog radio broadcasts.<sup>230</sup> Traditional radio echoes the same arguments from last century—that the DMCA should not be expanded due to “the symbiotic relationship that has existed [between the broadcasting and sound recording] industries for many decades.”<sup>231</sup> As in the past, the LRFA also cites to traditional radio’s promotional value,<sup>232</sup> and repeats the argument that AM/FM radio should not pay the statutory fee that Internet radio pays because paying royalties would cause economic hardship to the terrestrial broadcasting industry.<sup>233</sup>

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228. See *supra* n. 175 (quoting 72 Fed. Reg. at 24095 n. 30, and noting that the CRB’s comment may indicate a shift away from the notion of a traditional “symbiotic” relationship between recording and broadcasting companies that prevented Congress from granting a full performance right in the past). The Performance Rights Act is also widely supported by the artists who currently receive no compensation when terrestrial radio stations broadcast, or “perform,” their music, including Pink Floyd’s Roger Waters, Fleetwood Mac’s Stevie Nicks, and Bruce Springsteen. The musicFIRST Coalition, *Musicians, Recording Artists, Music Businesses and Supporters United for Fair Pay, Coalition*, <http://www.musicfirstcoalition.org/supporters/coalition> (accessed Nov. 29, 2010). And for two recent law review articles released while this Article was undergoing the publication process, both of which advocate passage of the PRA or similar legislation, see Lauren E. Kilgore, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 Vand. J. Ent. & Tech. L. 549 (2010); Brandon H. Nemeck, *No More Rockin’ in the Free World: Removing the Radio Broadcast Exemption*, 9 J. Marshall Rev. Intell. Prop. L. 935 (2010).

229. H.R. Con. Res. 49, 111th Cong. As of September 12, 2010, the Local Radio Freedom Act was undergoing evaluation by the House Committee on the Judiciary.

230. *Id.*

231. *Id.*

232. “[Traditional] radio stations provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos[,] and associated merchandise . . .” *Id.*

233. *Id.* The LRFA gained initial support due to the lobbying efforts of the National Association of Broadcasters, which warns that the PRA “will impose a devastating new fee” on radio stations. Natl. Assn. of Broadcasters, *The Performance Rights Act Puts Local Jobs at Risk*, <http://www.nab.org/advocacy/issue.asp?id=1889&issueid=1002> (accessed Nov. 29, 2010); see also RBR.com, *Four More Reps Oppose PRA*, <http://www.rbr.com/radio/21527.html> (Feb. 22, 2010) (quoting Dennis Wharton of the National Association of Broadcasters as stating: “We[ are] pleased that the bipartisan [c]ongressional opposition to an RIAA tax on free radio continues to grow”). RBR.com also notes that as of February 22, 2010, congressional support for the LRFA reached 256. *Id.*

The PRA passed in the House Committee on the Judiciary in May 2009, and in October 2009 the Senate Committee on the Judiciary also recommended its passage.<sup>234</sup> As of September 12, 2010, the PRA and LFRA remain pending; the LRFA was referred to the House Committee on the Judiciary on February 12, 2009,<sup>235</sup> and the PRA awaits floor votes in both Houses of Congress.<sup>236</sup> Both bills also recently gained widespread public attention.<sup>237</sup> Additionally, on April 1, 2010, the Obama Administration, via the United States Department of Commerce, wrote to Congress to endorse passage of the PRA over the LRFA.<sup>238</sup>

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234. See Cassondra C. Anderson, Student Author, “We Can Work It Out:” *A Chance to Level the Playing Field for Radio Broadcasters*, 11 N.C. J.L. & Tech. On. 72, 86–87 (2009) (“The passage of the bill in the House Committee in May, 2009 and in the Senate Judiciary Committee on October 15, 2009[,] proves that the time is right to establish parity in performance rights for radio broadcasters. This is the furthest this bill has ever gone, and it is the first time in eighty years that legislation to establish parity in performance rights for radio broadcasters has been approved by a full Congressional Committee.” (footnotes omitted)).

235. H.R. Con. Res. 49, 111th Cong.

236. H.R. 848, 111th Cong.; Sen. 379, 111th Cong.

237. The National Association of Broadcasters has been supporting organizations that call statutory royalty rates a “tax,” and broadcasting public service-type opposition to the PRA. See e.g. *No Performance Tax: Oppose the Record Label-Led Performance Tax on Radio*, <http://www.noperformancetax.org/> (accessed Nov. 29, 2010) (characterizing the PRA as an attempt to create “a performance tax that would financially hurt local radio stations, stifle new artists[,] and harm the listening public who rely on free local radio”). The traditional broadcasting industry is also voicing its opposition to the Performance Rights Act by holding public rallies. See Kim Hart, Hillicon Valley, *Radio Rally Strikes Back over Royalty Bill*, <http://thehill.com/blogs/hillicon-valley/technology/85109-radio-rally-strikes-back-over-royalty-bill> (Mar. 5, 2010, 8:46 a.m. ET) (discussing a rally held in Washington, District of Columbia on Mar. 4, 2010); see also Brian Wingfield, *Radio Royalties Fight Heats up in Washington*, <http://www.forbes.com/2010/01/08/radio-internet-royalties-business-beltway-radio.html> (Jan. 8, 2010) (“One of the biggest lobbying fights in the nation’s capital this year could involve a traditionally non-Washington subject: rock and roll.”). And the PRA’s most recent publicity involves a prospective compromise between the National Association of Broadcasters and PRA advocates that would require all cell phones to contain FM radio receivers. RBR.com, *FM in Cell Phone Battle Goes Mainstream*, <http://www.rbr.com/radio/26863.html> (posted Aug. 19, 2010 at 2:06:00).

238. Music First Coalition, *Obama Administration Endorses Performance Rights Act*, <http://www.musicfirstcoalition.org/node/787> (posted Apr. 2, 2010 at 9:08 a.m.) (stating: “Hailing [the PRA] as ‘a matter of fundamental fairness to performers,’ the Obama administration strongly endorsed passage of the Performance Rights Act . . . , which will end the big corporate radio loophole that denies musicians fair compensation when their songs are played over AM/FM radio”). As expected, the National Association of Broadcasters was not pleased with this endorsement. See e.g. Ed Christman, *Publishing Briefs: Performance Rights Act, RightsFlow, Downtown Music Publishing*, [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i5aa07fe16321f43932d2e5ea65fe36c7](http://www.billboard.biz/bbbiz/content_display/industry/e3i5aa07fe16321f43932d2e5ea65fe36c7) (Apr. 1, 2010) (quoting Dennis Wharton, Vice President of the National Association of Broadcasters, as stating: “We’re disappointed the Commerce Department would embrace legislation that would kill

### 3. *The 2010 Rates*

The same day the Department of Commerce endorsed the PRA, April 1, 2010, the CRB published a proposed set of rates for comment in the Federal Register.<sup>239</sup> Rates set during these proceedings will be effective from January 1, 2011, to December 31, 2015.<sup>240</sup> Comments and objections were due by April 22, 2010,<sup>241</sup> after which the CRB will conduct another full hearing before finalizing its determination.<sup>242</sup> If the cycle continues, the CRB can probably expect a lawsuit expressing dissatisfaction with the finalized rates, possibly followed by further congressional intervention.

#### IV. "WHAT BETTER TIME THAN NOW?"<sup>243</sup>: THE DMCA DID NOT PROVIDE THE DIGITAL MILLENNIUM WITH A VIABLE COPYRIGHT ACT

As in the 1970s, the DMCA in general should be revised to adapt to technological change. Part IV(A) argues that the DMCA's webcasting provisions should be revised because the Internet radio industry, like the motion picture industry in the early 1900s, had virtually no input into the statutory language due to that industry's nascency. Part IV(A) further argues that the DMCA's legislative history is outdated, which forces the CRB and the courts to rely on policies that no longer apply in today's society. Part IV(A) concludes by arguing that, at a minimum, the DMCA should be amended to allow consideration of webcasting royalty rates set using "experimental" processes, such as the method utilized under WSA-I and II,<sup>244</sup> because those negotiations

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jobs in the United States and send hundreds of millions of dollars to foreign record labels that have historically exploited artists whose careers were nurtured by American radio stations").

239. 75 Fed. Reg. 16377, 16377 (proposed Apr. 1, 2010) (to be codified at 37 C.F.R. pt. 380).

240. *Id.*

241. *Id.*

242. *Id.* at 16378 n. 2.

243. Rage Against the Machine, CD, *Guerilla Radio*, in *The Battle of Los Angeles* (Epic Recs. 1999).

244. For more information regarding the royalty rate-setting process from WSA-I and II, see *supra* Part III(B).

are the best indicator of the sort of rates willing buyers and sellers in the Internet radio marketplace actually find fair.

Part IV(B) asserts that piracy and poor business practices, not the Internet radio revolution, are the recording and traditional broadcasting industries' primary foes. The DMCA's outdated legislative history indicates that the primary reason webcasters are currently charged the additional statutory licensing fee is because, at the time the statutes were adopted, the recording industry feared that Internet radio would increase piracy.<sup>245</sup> Part IV(B)(1) contends that, to the contrary, Internet radio assists in preventing piracy rather than promoting it. Part IV(B)(1) also introduces evidence showing that many recording artists and their representatives agree with this assertion, and argues that the DMCA's webcasting provisions should be revised to reflect the webcasting industry's positive contribution to the recording industry.

Part IV(B)(2) proposes that Congress should revise the DMCA's webcasting provisions because the Internet radio industry should not be penalized for the failure of the recording and traditional broadcasting industries to adapt their business models to reflect changes in technology. Part IV(B)(2) argues that the recording industry's primary problem was its decision to fear and lash out against the Internet instead of viewing it as a means by which to employ innovative, new distribution channels. This deficiency has caused many recording artists to break away from their record labels and pursue alternate distribution channels, including Internet radio. Part IV(B)(2) further posits that traditional broadcasting is suffering due to a lack of variety in its programming, and that the statutory rates that the Internet radio industry pays essentially act as a tax on the traditional broadcasting industry's willingness to provide the public with diverse music content, rather than a tax on "free radio." Part IV(B)(2) concludes with the testimony of several songwriters who agree with this proposition, and advocates passage of the PRA over the LRFA as an alternative to completely overhauling the DMCA's webcasting provisions.

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245. See *supra* pt. II(C)(2) (detailing the DMCA's legislative history).

### A. The Webcasting Industry Is Entitled to Be Governed by Legislation it Helped Draft

Historically, the industries regulated by United States music copyright law draft those laws themselves.<sup>246</sup> Given this history, it follows that webcasters should have a meaningful opportunity to participate in drafting the legislation that ultimately dictates Internet radio's future viability. But the DPRA was enacted without any notable input from the webcasting industry,<sup>247</sup> and the current law went into effect just three months after DiMA, webcasters' first lobbying arm, formed to represent the industry's interests in drafting the DMCA, which acted to update the DPRA.<sup>248</sup> Due to the webcasting industry's nascency, the legislation that currently governs that industry only favors those who meaningfully participated in its enactment—namely, musicians, recording companies, and terrestrial broadcasters.<sup>249</sup> The current state of the law is analogous to that of the 1970s, when the first major revision to the Copyright Act since 1909 occurred.<sup>250</sup> Internet radio, like the motion picture industry in 1909, was underrepresented and incapable of properly advancing its interests when the original statute, with which the webcasting industry must comply, went into effect.<sup>251</sup> Internet radio's present bargaining position is similar to that of the motion picture industry just before Congress passed the 1976 Act, in that Internet radio is now powerful enough to effect change. As in both 1909 and 1976, a number of new industries that have emerged over the

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246. For a discussion of how copyright law has been drafted for the past century, see *supra* Part II.

247. For more on Internet radio's lack of involvement in drafting the DPRA, see *supra* Part II(C)(1).

248. *2004 DiMA Speech*, *supra* n. 13.

249. For further discussion of the parties that primarily benefitted from DMCA, see the text accompanying *supra* note 117.

250. See *supra* pt. II(B) (explaining how the Copyright Act of 1976 was the first overhaul of United States copyright law since 1909).

251. Due to its weak bargaining position during the DMCA's drafting stage, DiMA sought to avoid costly lawsuits and the need to negotiate licenses with each individual copyright holder by agreeing to pay its royalties to a single entity. See Carey, *supra* n. 122, at 272 (explaining the "difficult position" in which DiMA found itself before Congress passed DMCA). "Rather than applying this copyright to all transmissions, Congress opted to apply it to Internet radio, a nascent technology with little representation in Washington." Daniel Castro, *Internet Radio and Copyright Royalties: Reforming a Broken System* 4, <http://www.itif.org/files/InternetRadio.pdf> (May 2007).



past eleven or twelve years have significantly altered the way music and videos are shared and transmitted. Internet radio, MP3 players, and mobile phones with Internet access are quickly becoming the norm in today's fast-paced society<sup>252</sup>—and the law should reflect that fact.

Over the past decade, the two attempts to set statutory licensing rates resulted in no rates actually being set at all. And in all likelihood, this new round of licensing wars will yield the same result.<sup>253</sup> The issue need not be reiterated—Part III of this Article illustrates that the current statutory royalty rate-setting framework has served only to waste the affected parties' time and money, without producing a tangible result.<sup>254</sup> And the United States now has a better idea of how the Internet affects copyright law and how ineffective the DMCA is at adapting to accommodate technological advancement.<sup>255</sup> It is time for Congress to encourage

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252. *Bridge Ratings: Internet Radio's Still Growing*, <http://audio4cast.com/2009/12/16/bridge-ratings-internet-radios-still-growing/> (Dec. 16, 2009) (graphically depicting the percentage of the population using radio, MP3 players, satellite radio, Internet radio, podcasting, and social networking from 2006 to the present, as well as the predicted growth in those technologies' use through 2012). The *Bridge* study respondents also indicated that Internet radio was second only to mobile phone use as respondents' primary daily device. *Id.*; see also Sarah Perez, *Mobile Web Use Growing Faster than Ever*, [http://www.readwriteweb.com/archives/mobile\\_web\\_use\\_growing\\_faster\\_than\\_ever.php](http://www.readwriteweb.com/archives/mobile_web_use_growing_faster_than_ever.php) (Mar. 11, 2008) (“[C]ell phone internet users include groups that had, before now, lagged in internet adoption, like some minorities and senior citizens. For example, as of December 2007, [fifty percent] of Americans age [sixty-five] and over had cell phones [and] [thirty-six percent] . . . used the [I]nternet.”).

253. See David Oxenford, Broad. L. Blog, *Pureplay Webcasters and SoundExchange Enter into Deal under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006–2015*, <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-20062015/> (July 7, 2009) (“[N]o doubt the fight will continue over the standards that should be used to determine royalties in future proceedings, so that parties don't need to enter into these after-the-fact settlements when one party has a substantial bargaining advantage with a favorable decision already in hand . . .”).

254. See *supra* pts. III(B)–(C) (postulating that, while it could be argued that the rates set under WSA-I and II are a “tangible result,” the process by which those rates were set was only the result of a temporary DMCA amendment, and SoundExchange's position that the 2007 rates were “fair” and that the process utilized during the summer of 2009 was “experimental” suggests that the issue of how to set rates will resurface when the agreement-based statutory royalty rates expire in 2015). Additionally, “DiMA and the Radio Broadcasters claim that SoundExchange is championing a marketplace characterized by monopoly power on the seller's side.” 72 Fed. Reg. at 24091.

255. Putting aside the subject matter of and arguments put forth in this Article, even RIAA President Cary Sherman was recently quoted as stating that the DMCA “isn't working,” albeit for other reasons. Declan McCullagh, cnet news, *Politics and Law: RIAA: U.S. Copyright Law 'Isn't Working'*, [http://news.cnet.com/8301-13578\\_3-20014468-38.html](http://news.cnet.com/8301-13578_3-20014468-38.html)

the recording, terrestrial broadcasting, songwriting, and webcasting industries to convene and update the statute's webcasting provisions to ensure that the public's right to enrichment from musical works is not eclipsed by the old fears underlying the DMCA.

The current patchwork legislation that governs the statutory licensing rates paid by webcasters needs a complete overhaul. Congress should initiate a DMCA reform convention to address the pressing issues presented by what the DMCA has actually caused: seemingly endless debates between webcasters and copyright holders, with nowhere for courts to seek guidance save for old principles and a legislative history filled with outdated reasoning that no longer applies.<sup>256</sup> Absent legislation that reflects congressional findings with respect to how the digital millennium is actually progressing, the judicial branch remains powerless to effectively resolve disputes arising out of the DMCA—leaving those affected by the current law's shortcomings doomed to repeat the cycle detailed in Part III of this Article once again.

Meanwhile, one potential vehicle for temporary reform is for Congress to patch the statute again. As noted in Part III, the recording and webcasting industries both concur that statutory licensing rates should be set according to what a hypothetical "willing buyer and . . . willing seller" would reasonably agree upon in a hypothetical marketplace.<sup>257</sup> In the past, the parties also agreed that "the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as 'benchmarks' indicative of the prices to which willing buyers and willing sellers in this marketplace

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(posted Aug. 23, 2010 at 2:48 p.m. EDT; updated 6:20 p.m. PT to clarify that the RIAA is calling for congressional action only in the event that the organization is unable to reach an independent agreement with broadband and content providers regarding updated Internet piracy policies).

256. See e.g. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* vol. 2, § 8.21[B] 8-294.1 (Rev. ed., Matthew Bender 2010) (commenting on the DPRA, the DMCA's predecessor, Nimmer noted: "[I]t is riddled with exceptions and benefits reflecting compromises worked out among the competing interests. As such, this law [currently] stands at the opposite extreme from a legislative enunciation of general principles designed to guide the courts in their task of confronting concrete factual situations." (footnote omitted)).

257. 72 Fed. Reg. at 24091.

would agree.”<sup>258</sup> But the only meaningful benchmark rates exist in the form of the settlement agreements reached under WSA-I and II—these same laws paradoxically prohibit the CRB and appellate courts from consulting or considering those agreement-based rates during either the statutory rate-setting process or appellate review.<sup>259</sup> But are those agreements not indicative of what a willing buyer and seller would actually agree upon in the real marketplace? If Congress wishes to help alleviate the current stalemate, then it should, at a minimum, correct this glaring inconsistency by amending the DMCA to allow adjudicative consideration of the agreement-based rates reached under WSA-I and II.

## B. Piracy and Poor Business Strategies Are the Recording and Terrestrial Broadcasting Industries’ Real Problems, Not Internet Radio

### *1. Internet Radio Helps Prevent Piracy, Not Foster It, as the DMCA’s Legislative History Indicates*

The DPRA was enacted to soothe the recording industry’s fears about the potential threat the Internet posed to its business model.<sup>260</sup> Today, piracy still stands as record sales’ most costly rival.<sup>261</sup> Conversely, Internet radio has actually helped the record-

258. *Id.*

259. 122 Stat. at 4974–4975; 123 Stat. at 1926. Both WSA-I and II state:

It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, [et cetera reached under either WSA-I or II] . . . shall be considered as a *compromise* motivated by the unique business, economic[,] and political circumstances of webcasters, copyright owners, and performers *rather than* as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller . . . .

74 Fed. Reg. at 34796 (emphasis added).

260. *See supra* pt. II(C)(1) (discussing the DPRA in relation to the recording industry’s concerns about Internet radio).

261. *See* Recording Indus. Assoc. of Am., *Piracy: Online and on the Street*, <http://www.riaa.com/physicalpiracy.php> (accessed Nov. 29, 2010) [hereinafter RIAA, *Piracy*] (“[M]usic piracy causes \$12.5 billion of economic losses every year, 71,060 [United States] jobs lost, a loss of \$2.7 billion in workers’ earnings, and a loss of \$422 million in tax revenues[:] \$291 million in personal income tax and \$131 million in lost corporate income and production taxes.” (citing Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, 188 Inst. for Policy Innovation: Policy Report i, i (Aug.2007) (available at [http://ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf?OpenElement](http://ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement)))).

ing industry prevent piracy, in part because many online radio listeners are more likely to purchase digital audio online than those who do not use webcasting services.<sup>262</sup> DiMA, Internet radio's lobbying arm, is committed to reducing piracy by promoting and protecting a service that facilitates the legitimate purchase of music.<sup>263</sup> In today's music economy, organizations like the RIAA also seem optimistic about webcasting's piracy-combating prospects, and endorse Internet radio in an effort to "give legal online services a chance to flourish."<sup>264</sup> The RIAA also takes the position that "[d]evices and technology are not the problem," and only takes issue "when people use technology to break the law . . . ."<sup>265</sup> Most Internet radio stations provide a hyperlink to a legal online digital media retailer, such as Amazon.com or iTunes, where a listener can purchase the webcasted song or album.<sup>266</sup> The simplicity of clicking a hyperlink to download a legal copy of a song versus the risky process required to pirate webcasted music further supports the argument that those who listen to online radio will likely purchase music instead of stealing it.<sup>267</sup>

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262. See e.g. Arbitron, Inc. & Edison Research, *The Infinite Dial 2009: Radio's Digital Platforms, AM/FM, Online, Satellite, HD Radio and Podcasting* 27, [http://www.arbitron.com/downloads/infinite\\_dial\\_2009\\_presentation.pdf](http://www.arbitron.com/downloads/infinite_dial_2009_presentation.pdf) (Apr. 2009) [hereinafter *2009 Arbitron Report*] (documenting recent statistical trends in radio's digital platforms, including Internet radio, HD radio, satellite radio, AM/FM radio, social networking, podcasting, MP3 players, and cell phones, and the implications of these technologies for users in the digital world).

263. *2004 DiMA Speech*, *supra* n. 15, at 3. DiMA's former Executive Director Jonathan Potter stated: "At DiMA we have long believed that the most effective, least costly and most profitable anti-piracy solution is *consumer choice*. Legal, royalty-paying choices that offer quality music, flexible usage rules, great personalization[,] and first-class customer service, all for a fair price." *Id.* (emphasis in original).

264. RIAA, *Piracy*, *supra* n. 261. "In response [to piracy], the music industry has employed a multi-faceted approach to combat this piracy, combining education, innovation, and enforcement . . . [partially by] licens[ing] hundreds of digital partners that offer a range of legal models to fans . . . [including] Internet radio webcasting . . ." *Id.*

265. Recording Indus. Assoc. Am., *For Students Doing Reports*, <http://www.riaa.com/faq.php> (accessed Nov. 29, 2010).

266. As the *Arista* court noted: "[R]ecently webcasting services have been credited with 'becom[ing] a massive driver of [sic] digital [music] sales' by exposing users to new music and providing an easy link to sites where users can purchase this music." *Arista*, 578 F.3d at 161 n. 19 (quoting Jeb Gottlieb, *Pandora Lifts Lid on Personalizing Online Radio*, Boston Herald (Feb. 26, 2008) (available at 2008 WLNR 3773491) (first alteration added, second and fourth alterations in original).

267. See e.g. Jason K, *How to Download Music from Deezer, Pandora and More*, <http://www.makeuseof.com/tag/download-music-from-deezer-pandora-and-more/> (Jan. 27, 2009) (stating that "all actions [the potential user] undertake[s] using this tutorial are [the

In sum, Internet radio actually helps the recording industry prevent piracy by providing its listeners with easy access to legal downloading platforms in a way that does not easily lend itself to illegal copying. Given that the CRB is charged with reviewing whether webcasting has a positive effect on the recording industry,<sup>268</sup> and that the RIAA itself encourages consumers to use Internet radio,<sup>269</sup> the law should not continue to overlook Internet radio's positive contribution to the music industry's war on piracy.

*2. Internet Radio Should Not Be Penalized for the  
Recording and Terrestrial Broadcasting  
Industries' Poor Business Practices*

This Article posits that the DPRA and DMCA were preliminary measures enacted to ensure the continued success of the recording and terrestrial broadcasting industries in the digital age.<sup>270</sup> But rather than attacking webcasting for fear of losing revenue, the recording industry should have focused on more proactive measures designed to harness the Internet's promotional and distributional attributes.<sup>271</sup> The industry instead stood on the virtual sidelines, fighting change at each turn.<sup>272</sup> As

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user[s] alone[,] and MakeUseOf cannot be held liable for any damages incurred"). Despite liability disclaimers, websites that offer ways to make copies of webcasted music by circumventing copy control measures also likely violate 17 U.S.C. § 1201(a), "which prohibits conduct that circumvents 'access' controls." Leaffer, *supra* n. 6, at 399. Specifically, Section 1201(a)(2)(A) provides: "No person shall . . . offer to the public, provide[,] or otherwise traffic in any technology . . . that . . . is primarily designed . . . [to circumvent] a technological measure that effectively controls access to a work protected under this title . . ." 17 U.S.C. § 1201(a)(2)(A).

268. For a discussion of the factors that the CRB considers when setting webcasters' royalty rates, see *supra* Part III(A).

269. RIAA, *Piracy*, *supra* n. 261.

270. For a discussion of the DMCA's legislative history, see *supra* Part II(C)(1)–(2).

271. Internet radio's promotional value exists in that many Internet radio stations provide extra information such as news about the artist playing, and by suggesting other songs or albums the user might be interested in listening to or purchasing. Many Internet radio stations also promote distribution value by providing links that a user can click to, for example, buy concert tickets, merchandise, and music by the artist whose music is currently being webcasted. See Paul Gil, *The Best Internet Radio Stations 2010*, [http://netforbeginners.about.com/od/guidesfavorites/tp/best\\_internet\\_radio.htm](http://netforbeginners.about.com/od/guidesfavorites/tp/best_internet_radio.htm) (accessed Nov. 29, 2010) (discussing the features and music selection of seventeen different Internet radio providers).

272. For example, in a recent interview with CNET, Jac Holzman, who discovered The Doors and founded Elektra records, recounted a lunch meeting he had with a friend in the record business, stating: "We met right around the time when Napster came together, and I said, 'There are opportunities and there are potholes. How are you preparing for a digital

another student author recently observed: “Rather than formulating platforms to sell their music digitally, labels waited for an outsider, namely, Steve Jobs, to create the most significant legitimate [music] market[, i.e., iTunes]; yet labels still remain [wary] of cooperating with such creators of legitimate music sites.”<sup>273</sup> Another example of the recording industry’s failure to adapt to a changing marketplace is evinced by the fact that, as traditional sales declined,<sup>274</sup> some former label artists even left their record labels to begin independently experimenting with innovative new ways to promote and sell their music.

For instance, Radiohead recorded 2007’s *In Rainbows* on its own budget, then promoted the album by making it available as a free download for a limited time period, telling fans to pay any price for the album the fans felt was warranted, and only if they wanted to.<sup>275</sup> Radiohead’s “experiment” resulted in higher profits for the band—before the physical version of the album was even released—than its previous album, *Hail to the Thief*.<sup>276</sup> Other

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future?” He said to me, ‘Jac, I just want it to go away.’ Well, you can’t continue that conversation.” Interview by Greg Sandoval with Jac Holzman excerpts in Greg Sandoval, cnet: Media Maverick, *Music Tech Guru Says Web Is Not the Enemy*, [http://news.cnet.com/8301-31001\\_3-20014752-261.html](http://news.cnet.com/8301-31001_3-20014752-261.html) (posted Aug. 26, 2010, 4:00 a.m. PDT).

273. Sara Karubian, Student Author, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. Cal. Interdisc. L.J. 395, 398 (2009). Steve Jobs launched the iTunes music platform in 2003 as an experimental solution to the piracy problem. Miles O’Brien, *CNN Talks to Steve Jobs about iTunes*, <http://www.cnn.com/2003/TECH/industry/04/29/jobs.interview/> (Nov. 27, 2003). Karubian makes another astute observation about the recording industry’s loss of creative marketing strategies, noting that in today’s music economy, “a band could create about as much interest using a free Facebook profile as could a campaign run by a record company.” Karubian, *supra* n. 273, at 396; *see also* Turner, *supra* n. 94 (noting that recording companies made a “mistake . . . in the late [19]90s when they ignored the rise of the MP3 format,” and suggesting that if terrestrial radio stations do not take advantage of social media outlets, or perhaps “implement Pandora-like programs on their station Web sites,” that industry will suffer the same fate—namely, near-extinction).

274. *See e.g.* N.Y. Times, *Industry Reshaped: Full-Length Album Sales Have Declined, but Sales of Singles and Royalties from Online Radio Have Risen*, <http://www.nytimes.com/imagepages/2010/08/30/business/30hits-graphic.html?ref=media> (Aug. 30, 2010) (graphically depicting music sales made for full-length album and singles sales worldwide between 1996 and 2009, and digital performance royalties received by copyright holders in the United States between 2002 and 2009, and indicating that while full-length album sales generally declined, singles sales and digital performance royalties have trended sharply upward since 2005).

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

276. Eric Garland, NPR Music, Blog, *The ‘In Rainbows’ Experiment: Did it Work?*, [http://www.npr.org/blogs/monitormix/2009/11/the\\_in\\_rainbows\\_experiment\\_did.html](http://www.npr.org/blogs/monitormix/2009/11/the_in_rainbows_experiment_did.html) (posted Nov. 16, 2009 at 10:00 p.m.) (noting that the high return Radiohead received on

examples of artists independently experimenting with innovative distribution tactics include Nine Inch Nails' 2008 album *The Slip*,<sup>277</sup> and Coldplay's 2009 live album *LeftRightLeftRightLeft*,<sup>278</sup> both of which were released promotionally as free downloads. Additionally, despite the recording industry's revenue losses over the past decade and a half, Jac Holzman, who discovered The Doors and founded Elektra Records, was quoted in August 2010 as stating, "I think the music industry has a bright future," and views the Internet as it should be viewed—as an opportunity, not a threat.<sup>279</sup>

Terrestrial radio broadcasters' reaction to the rise of Internet radio has been similar to that of the recording industry, but unlike the recording industry, which advocates passage of the PRA,<sup>280</sup> terrestrial broadcasters argue Congress should pass the LRFA over the PRA.<sup>281</sup> Terrestrial radio's exemption from the performance right was supposedly due to AM/FM radio's promotional value.<sup>282</sup> But this Article posits that the initial exemption was implemented to give terrestrial radio a chance to adjust itself for the digital age as well. Yet terrestrial broadcasters still fear that Internet radio will ruin their business, as evinced, for example, by

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this album occurred despite the fact that some critics thought Radiohead's experimental distribution tactic "backfired").

277. Nine Inch Nails' Trent Reznor is credited with having started this trend, and is still offering his band's 2008 album *The Slip* for free "as a thank you to [his] fans for [their] continued support." Nine Inch Nails, *Nine Inch Nails The Slip*, <http://dl.nin.com/theslip/signup> (accessed Nov. 29, 2010).

278. Coldplay's *LeftRightLeftRightLeft* was released as a free MP3 download to promote the band's 2008 album *Viva la Vida or Death and All His Friends*. David J. Prince, *Coldplay Releases Album as Free Download*, <http://www.billboard.com/news/coldplay-releases-live-album-as-free-download-1003973518.story#/news/coldplay-releases-live-album-as-free-download-1003973518.story> (May 15, 2009). But unlike Radiohead's *In Rainbows*, Coldplay's *LeftRightLeftRightLeft* is still available for free. Coldplay.com, *Download LeftRightLeftRightLeft Now*, <http://www.coldplay.com/newsdetail.php?id=395> (posted May 15, 2009 at 9:00 a.m.).

279. Sandoval, *supra* n. 272.

280. See e.g. Turner, *supra* n. 94 (noting that the *Arista* decision, "coupled with the continuing failure of Congress to pass a Performance Rights Act, . . . makes it more important than ever for everyone in the music industry to work together to keep [music] a viable, profitable business").

281. But see *supra* n. 237 (discussing terrestrial radio's recent attempts to effect a compromise whereby the National Association of Broadcasters may agree to cease its attempts to block the PRA in exchange for cell phone providers agreeing to install FM radio receivers on all cell phones). For a general discussion of the recent developments surrounding the Performance Rights Act, see *supra* Part II(C)(2).

282. For a discussion of the legislative history surrounding the DMCA's enactment, consult *supra* Part II(C)(1)–(2).

terrestrial broadcasters' opposition to WSA-I even though the legislation had nothing to do with that particular industry.<sup>283</sup> And statistics show that most radio listeners "say they will continue to listen to AM/FM radio as much as they do now despite increasing advancements in technology."<sup>284</sup> So like other music power-houses such as the RIAA have been doing in recent years, terrestrial broadcasters should also be finding ways to coexist with and take advantage of advancing technology to prevent further loss of listenership by working with emerging industries instead of aligning themselves against this inevitable change.

Further, recent decreased listenership for terrestrial broadcasters probably arose primarily out of AM/FM radio's lack of variety,<sup>285</sup> which may be attributed to the fact that a handful of large conglomerates own most analog airwaves.<sup>286</sup> A statutory exemption from paying royalties for a performance right in all

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283. Greg Sandoval, *NAB Tries to Block Fee Reduction for Web Radio*, [http://news.cnet.com/8301-1023\\_3-10052221-93.html?tag=mncol;txt](http://news.cnet.com/8301-1023_3-10052221-93.html?tag=mncol;txt) (Sept. 26, 2008). Tim Westergren of Pandora Internet Radio commented: "This bill does[ not a]ffect the NAB at all . . . . This bill is designed to give us the time to resolve what it looks [we are] close to getting resolved. The NAB is trying to suffocate the first viable alternative to broadcast radio and is reaching out of their industry to kill another." *Id.*

284. *2009 Arbitron Report*, *supra* n. 262, at 57.

285. Pejorative statements made in this Sub-Part alleging a lack of variety in terrestrial radio refer generally to corporately owned radio broadcasters, such as those stations owned by Clear Channel. *See e.g.* Clear Channel Radio Sales, *Station List* (available at [http://www.katz-media.com/uploadedFiles/OUR\\_COMPANIES/CCRS/Stations/CCRS%20stationlist.pdf](http://www.katz-media.com/uploadedFiles/OUR_COMPANIES/CCRS/Stations/CCRS%20stationlist.pdf)). As such, this Sub-Part is not meant to reflect negatively upon local, publicly owned community and college radio stations, such as Tampa Bay, Florida's WMNF and Tallahassee, Florida's WVFS, which generally provide a more diverse array of programming that appeals to listeners of all types and age groups. *See e.g.* WMNF 88.5 FM Community Radio, <http://www.wmnf.org/music>; *scroll* halfway through the page (accessed Nov. 29, 2010) (indicating that this particular station includes a variety of programs reaching many genres, including: rock; folk and acoustic; blues and R&B; jazz; bluegrass & country; reggae; world music; electronic; gospel; hip hop; polka; experimental; and Jewish and Native American music—the station also plays NPR and BBC news broadcasts); WVFS Tallahassee, *Program Guide*, [http://wvfs.fsu.edu/programming-guide.php?menu\\_id=programming\\_guide](http://wvfs.fsu.edu/programming-guide.php?menu_id=programming_guide) (accessed Nov. 29, 2010) (indicating that this particular station also includes a variety of programs that encompass many different genres, including: news; world music; reggae; blues; punk; indie; R&B; gospel; jazz; singer/songwriters; new- and old-school hip-hop; experimental; country; rockabilly; comedy; dance; and others).

286. "The Telecommunications Act of 1996 eliminated restrictions on the number of terrestrial radio stations that a company could own nationally. As a result, listeners have witnessed a vast consolidation in radio station ownership. . . . Consolidation has resulted in programming with less variety." Castro, *supra* n. 251, at 2. Unlike its terrestrial counterpart, "Internet radio thrives on diversity as reflected in the radio play time given to independent labels. . . . Internet radio takes advantage of the digital economy to provide listeners mass customization, instead of the mass production of terrestrial radio." *Id.* (footnote omitted).



sound recordings will not save terrestrial radio from decreased listenership because today's consumers are generally attracted to media like Internet radio over AM/FM radio for the former's more diverse programming.<sup>287</sup> Today, the arguably more dispersed and diverse webcasting market most likely entices an increasingly larger audience away from traditional broadcast radio listeners by offering a wider and more desirable music selection. If the terrestrial radio industry wishes to remain competitive, it should proactively adapt to technological developments and market trends.<sup>288</sup> But terrestrial broadcasters currently appear to be trending toward becoming the sort of "inefficient market participants" the Copyright Royalty Board contemplated when it dismissed small webcasters' concerns regarding per-performance royalty fees.<sup>289</sup> So if the traditional broadcasting industry wishes to remain competitive in today's marketplace, then it should follow Internet radio's lead by offering listeners more diverse programming instead of restricting itself to a small selection of "hits" with which many listeners have grown tired.

Also, one of the primary goals of even offering copyright protection is to give those who create intellectual property an economic incentive to continue creating.<sup>290</sup> But many musicians' livelihoods are enhanced by Internet radio and not traditional AM/FM radio, so exempting traditional radio from paying statutory fees does not benefit those who create much of the music consumers prefer hearing today. For instance, singer-songwriter

287. See e.g. Turner, *supra* n. 94 (noting: "There's no doubt college students and younger children these days are listening less to terrestrial radio. With the advent of social networking sites and noninteractive Internet radio sites like Pandora and iLike, the millennials are finding ways of exploring new music without the involvement of traditional radio.").

288. For example, Professor Turner suggests that terrestrial radio can achieve this "[p]erhaps . . . [by] implement[ing] Pandora-like programs on their station websites, which will generate revenue while helping introduce young listeners to the new music being marketed by labels." *Id.* But many corporately owned terrestrial broadcasters already simulcast their programs. See e.g. Big 105.9 Miami's Classic Rock, *Home Page*, <http://www.big1059.com/main.html#>; select "Music on Demand," select "Listen Live" (accessed Nov. 29, 2010). Big 105.9 is owned by Clear Channel. *Id.*; select "Contact Us," select "Work for Us." So this Article maintains that programming content, not access, is one of terrestrial radio's largest barriers to increased listenership in light of the variety offered to users by Internet radio.

289. 72 Fed. Reg. at 24088 n. 8. For a discussion of the CRB's rejection of smaller webcasters' claims that imposing a per-performance royalty fee would bankrupt them, see *supra* Part III(B).

290. For more information about the purposes of copyright law, see *supra* Part II(A).

Matt Nathanson testified in support of the promotional and financial value of Internet radio over traditional radio, at least for his own musical style, before the Senate Committee on the Judiciary in 2008:

[W]hen a song that I *perform* is played, broadcast radio pays me nothing; . . . but Internet radio services pay me and other artists a per-song fee that is unrelated to the revenue of the service, which[,] when combined with other artist[s'] payments[,] effectively equals [thirty] or [forty] or [seventy] percent of their revenue or more. . . . [T]he smallest industry, which plays the most music by independent artists and labels, pays disproportionately high royalties, while [traditional radio] broadcasters pay nothing. I like that Internet radio pays me, but if the royalties are disproportionate to the medium, [then] that will . . . cut off a crucial avenue for independent artists and their success. . . . Internet radio has helped me to broaden my fan base immensely. They have helped me spread the word and continue to find an audience that supports me.<sup>291</sup>

Other artists are similarly aligned. For example, Billy Corgan, founder and lead singer of the commercially successful Smashing Pumpkins, testified in support of the PRA before the House Committee on the Judiciary on March 10, 2009, stating:

[I]f you . . . happen to be a performer [of a song broadcasted terrestrially], by law, terrestrial radio owes you no form of compensation at all. The decision behind this long-held inequity stems back to 1909 when radio was in its infancy, and since sound recordings had only recently come onto the market, they were not included. The old-fashioned radio business has held onto this exemption for over [eighty] years—a law made in a bygone era for a set of reasons long past.<sup>292</sup>

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291. Sen. Jud. Comm., *Hearing on Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms*, 110th Cong., 2d Sess. (July 29, 2008) (testimony of Matt Nathanson) (available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3501&wit\\_id=7353](http://judiciary.senate.gov/hearings/testimony.cfm?id=3501&wit_id=7353)) (emphasis added).

292. H.R. Jud. Comm., *Hearing Regarding H.R. 848, the Performance Rights Act*, 111th Cong., 1st Sess. (Mar. 10, 2009) (testimony of Billy Corgan, Founder, Smashing Pumpkins) (available at <http://judiciary.house.gov/hearings/pdf/Corgan090310.pdf>).

Terrestrial radio stations currently receive an advantage over Internet radio stations through their exemption from paying statutory royalty fees for essentially no reason. Internet radio, a music delivery method that serves as a substitute for terrestrial radio, helps keep the music business alive by providing users with diverse content—and AM/FM radio’s refusal to adapt to technological change is not a legally sufficient reason to, using that industry’s own words, “tax” Internet radio over terrestrial radio. As one scholar notes: “[A]n economically efficient licensing scheme should ensure that the copyright system favors no one delivery method over a substitute . . . .”<sup>293</sup> And as demonstrated throughout this Article, the current system does just that.

### V. CONCLUSION

Copyright law exists “[t]o promote the *Progress of Science and useful Arts* . . . .”<sup>294</sup> But like a broken record, the DMCA’s backward-looking, fear-inspired, piecemeal approach to music licensing for webcasting has hindered that objective by sending the Internet radio industry into a seemingly endless process: (1) negotiate; (2) propose rates; (3) hold a hearing on those rates before a board of questionable constitutionality; (4) board rejects and redrafts that rate proposal; (5) parties file suit; (6) court upholds said rates because neither existing law nor congressional intent support reversal; (7) repeat steps (1) through (6). The current system has accomplished nothing with respect to the Internet radio revolution, and has kept the general public in a state of constant uncertainty as to the longevity of an artist-supported medium it has come to rely upon for the discovery of new, innovative music. Further, the industries affected by this inefficient process have wasted billions of dollars to no avail, which has raised the question of whether this system even conforms with the Constitution.

The DMCA was enacted in response to the recording industry’s fear that the Internet would destroy its profitability. But instead of adapting and changing with the times, the recording industry has clung to this faulty statutory framework as an

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293. Einhorn, *supra* n. 120, at 100–101.

294. U.S. Const. art. I, § 8, cl. 8 (emphasis added).

excuse to exercise control over the public's ability to access the sound recordings it produces. The DMCA's webcasting provisions also enable the recording industry's control over the new, innovative industries that have made it possible to discover artists not played over traditional broadcasting media. The DMCA's webcasting provisions are rooted in the recording and terrestrial radio industries' fear of the Internet—but Internet radio actually seeks to protect against piracy rather than promote it, and the artists whose creativity underlies the constitutional policies behind affording copyright protection in the first place agree.

The public has a right to access sound recordings; those who contributed to creating those recordings have a right to be compensated for their use; and history dictates that those who provide the public with a channel through which to access those recordings deserve to be governed by legislation drafted with their input.<sup>295</sup> During the last decade, Internet radio has become a viable competitor in the broadcasting marketplace and has also garnered an impressive amount of public support. In light of the fact that Internet radio has changed the dynamic of the music industry while having virtually no input on the text of the legislation governing that industry, it is time for Congress to encourage the music industry to convene to draft a functional Copyright Act that promotes progress in this “digital millennium” rather than hindering it.

At a minimum, Congress should pass the PRA instead of the LFRA, and amend the DMCA to allow adjudicative consideration of agreement-based royalty rates when reviewing and setting statutory royalty rates. But if Congress really does intend to promote the “Science”<sup>296</sup> of the Internet, and the creation, accretion, and public dissemination of the “Useful Arts,”<sup>297</sup> then it should recognize that, as in the 1970s, United States copyright law is in desperate need of a complete overhaul to adapt to the technological advances made over the last thirty-four years.

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295. See *supra* pt. II (detailing how United States copyright law is drafted by the industries the law seeks to regulate).

296. U.S. Const. art. I, § 8, cl. 8.

297. *Id.*