

INTERNET RADIO: THE CASE FOR A TECHNOLOGY NEUTRAL
ROYALTY STANDARD

*Andrew Stockment**

INTRODUCTION.....	2130
I. OVERVIEW OF INTERNET RADIO.....	2132
A. <i>What is Internet Radio (“Webcasting”)?</i>	2132
B. <i>Who Listens to Internet Radio?</i>	2133
II. OVERVIEW OF THE CURRENT COPYRIGHT ROYALTY REGIME	2134
A. <i>Basics of Copyrights in Music</i>	2134
1. <i>Performance Rights Organizations (PROs)</i>	2137
2. <i>Section 114 Performance Royalty and Section 112</i> <i>Ephemeral Royalty</i>	2138
B. <i>Recording Industry’s Argument that Internet Radio Is a</i> <i>Threat</i>	2140
C. <i>Internet Radio Royalty Rates</i>	2144
1. <i>Copyright Royalty Board (CRB) Rate Decision for 2006-</i> <i>2010</i>	2144
2. <i>Minimum Fee Cap of \$50,000</i>	2148
3. <i>Webcaster Settlement Acts (WSA)</i>	2150
4. <i>CRB Proceedings for 2011–2015</i>	2155
III. ANALYSIS OF ROYALTY RATES AND THEIR ECONOMIC IMPACT ON INTERNET RADIO.....	2156
A. <i>Webcasters under CRB 2006–2010 Rates</i>	2156
B. <i>Comparison to Satellite Radio, Cable Radio, and Digital</i> <i>Radio via Satellite TV</i>	2159
1. <i>Satellite Radio</i>	2159
2. <i>Digital Cable Radio</i>	2161
3. <i>Digital Radio via Satellite TV</i>	2161
IV. ARGUMENT FOR TECHNOLOGY NEUTRAL ROYALTY RATES	2163
A. <i>The Problem of the Double Standard</i>	2163
1. <i>Standard #1: Section 801(b)(1)</i>	2163
2. <i>Standard #2: “Willing Buyer, Willing Seller”</i>	2165
3. <i>Comparison of Outcomes under the Two Standards</i>	2167
B. <i>Constitutional and Policy Argument</i>	2168
C. <i>Proposed Amendments to the Copyright Act</i>	2171
CONCLUSION.....	2172
APPENDIX.....	2174

INTRODUCTION

SINCE its debut in the mid-1990s, internet radio (or “webcasting”) has grown rapidly and now attracts at least 69 million American listeners every month—more than a quarter of all U.S. internet users.¹ Internet radio allows these listeners to select virtually any conceivable genre of music, from classic rock, to disco, to movie soundtracks, to classical, to jazz, to Mediterranean, to 1940s oldies, to contemporary country, to seasonal, and many more.² These listeners are exposed to artists they would not otherwise hear, providing a tremendous promotional benefit to recording artists and increased music sales. Like traditional broadcast radio, internet radio stations pay royalties for the public performance of the musical compositions they play. These royalties are paid to the performing rights organizations: the American Society of Composers, Authors, and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC, Inc. (formerly the Society of European Stage Authors and Composers).

Unlike traditional radio stations, however, digital radio providers—internet radio, digital cable radio, and satellite radio—must also pay a royalty for the public performance of the sound recording. This royalty is imposed by Sections 114 and 112 of the Copyright Act and the rate is

* J.D. 2009, University of Virginia School of Law; B.S. 2004, Florida State University. Updates and additional resources about internet radio royalties are available at: <http://www.andrewstockment.com>. I wish to thank the many people who provided assistance with the research for this Note by completing my questionnaires and discussing the music business with me, especially Mike and Joe. Your participation was essential to this project. Thank you to the webcasters whose enthusiasm, creativity, and commitment have brought internet radio to life. This paper benefited from Professor Dotan Oliar’s suggestions. I also appreciate the assistance of Katherine Worden and the other *Virginia Law Review* editors who helped shorten and edit this paper for publication. Finally, I would like to thank Martha Montague for her invaluable assistance, encouragement, and support. *Soli Deo Gloria*.

¹ Arbitron & Edison Media Research, *The Infinite Dial 2009: Radio’s Digital Platforms* (Apr. 16, 2009), http://www.arbitron.com/downloads/infinite_dial_2009_presentation.pdf, at 7–8 [hereinafter *The Infinite Dial 2009*] (reporting that 69 million Americans listened to internet radio in the past month and 42 million listened in one week in January 2009); Meg Tirrell, Yahoo, AOL May Abandon Web Radio After Royalties Rise (Update 2), *Bloomberg*, Nov. 28, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&refer=us&sid=a0pKOrcpw6yE#>.

² See, e.g., Live365 Internet Radio, Complete Genre List, <http://www.live365.com/listen/browse.live> (last visited Sept. 16, 2009).

determined by the Copyright Royalty Board (“CRB”). In 2007, the CRB issued a rate determination that threatens to shut down internet radio by requiring internet radio operators to pay royalty rates that often approach or even exceed 100% of revenue. Meanwhile, for the other forms of digital radio—cable radio and satellite radio—the CRB adopted rates of 6–15% of revenue. Thus, the current copyright regime has a strong bias in favor of satellite and cable radio and against internet radio. As a result, the disproportionately high royalty rates for internet radio may silence the music for internet radio’s 42 million weekly listeners.³ While a variety of agreements between webcasters and SoundExchange adopted under the Webcaster Settlement Acts of 2008 and 2009 (WSA) have delayed the onset of industry-crushing royalties, the threat continues to loom in internet radio’s future. The rates contained in the WSA Agreements, though less than the CRB rates, are still substantially higher than the rates for other forms of digital radio. Moreover, SoundExchange considers the rates in the WSA Agreements to be a “discount” and has described them as “experimental.”⁴

Parts I and II of this Note will provide background information about internet radio and an overview of the current copyright royalty regime. Section II.B will present and critique the recording industry’s argument that internet radio is a threat. Part III will analyze the economic impact of the current royalty rates on internet radio. Part III will also analyze the disparate impact that has resulted from the two royalty rate-setting standards. Section IV.A will analyze the two standards for determining digital radio royalties—“Section 801(b)(1)” versus “willing buyer, willing seller”—and will show how the latter led to dramatically higher royalties for internet radio. Finally, Section IV.B, will make constitutional and policy arguments for having a single, technology neutral standard for determining the royalties for digital radio. This Note will conclude by demonstrating that the standard that should be adopted is the Section 801(b)(1) standard, and will propose amendments to the Copyright Act to effectuate the change.

³ The Infinite Dial 2009, *supra* note 1 (reporting that 42 million Americans listened to internet radio in one week in January 2009).

⁴ Press Release, SoundExchange, SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement (July 7, 2009), <http://www.soundexchangeblog.com/?p=91>.

I. OVERVIEW OF INTERNET RADIO

A. What is Internet Radio (“Webcasting”)?

“Internet radio” refers to non-interactive audio webcasts. A webcast is the internet equivalent of a broadcast—the transmission of a digital audio or video file via the internet to one or more persons who view or listen to the file without downloading (permanently saving) it. Thus, internet radio is the non-interactive streaming of music or other audio programming.⁵ It functions like traditional broadcast radio: the webcaster selects which songs the listener hears and listeners are not able to select the songs that are played.⁶ Internet radio stations may be either internet-only stations⁷ or “simulcasts” of broadcast⁸ or satellite⁹ radio stations. Some webcasters have a single channel (like a typical radio station). Others have multiple channels, such as a classical channel, a channel for music from the 1980s, as well as others. For the majority of internet radio stations, listeners tune in to a channel that is already playing, so all listeners to that channel hear the same programming. An individual who begins listening to such a station will hear whatever content is playing at that moment in time.¹⁰ Other internet radio stations, however, have separate streams or channels for each listener, so each listener hears different songs and the songs begin playing only when an individual begins listening.¹¹ Some internet radio services have advanced features, such as the ability to pause or skip songs.¹² While most internet radio stations have pre-designed stations based on genres, some allow

⁵ Unless otherwise indicated, “internet radio” and “webcasting” as used herein will refer to non-interactive, non-subscription streaming of audio programming over the internet, whereby the listener plays but does not download the audio content.

⁶ William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* 17–18 (2004).

⁷ See, e.g., StreamingSoundtracks.com, <http://www.streamingtracks.com> (last visited Sept. 16, 2009).

⁸ A “simulcast” is a simultaneous webcast of a broadcast radio transmission—broadcast radio streamed over the internet with the same content as would be heard on an AM or FM tuner. For example, Kansas City’s Greatest Hits is simulcast on 94.9 KCMO and <http://www.949kcmo.com> (last visited Sept. 16, 2009).

⁹ SIRIUS Satellite Radio, SIRIUS Internet Radio, <http://www.sirius.com/siriusinternetradio> (last visited Sept. 16, 2009); XM Radio Online, <http://xmro.xmradio.com/xstream/index.jsp> (last visited Sept. 16, 2009).

¹⁰ See, e.g., Live365, <http://www.live365.com> (last visited Sept. 16, 2009).

¹¹ See, e.g., Pandora, <http://www.pandora.com> (last visited Sept. 16, 2009).

¹² *Id.*

the listener to create custom channels. For example, Pandora creates a custom channel by identifying and playing music with properties similar to those of a song or artist entered by the listener. The listener may further customize the channel as songs play by voting on whether he liked or disliked the song that was played or by adding additional artists or songs to the channel.¹³

B. Who Listens to Internet Radio?

More than 69 million Americans listen to internet radio every month, including at least 42 million weekly listeners, which is more than a quarter of all U.S. internet users.¹⁴ According to a January 2009 study by Arbitron and Edison Media Research, 49% of Americans have listened to internet radio at some point and 27% of the U.S. population aged twelve or older (approximately 69 million people) listened to internet radio in the past month.¹⁵ These listeners hear music on thousands of internet radio stations. The precise number of stations is impossible to determine because no central directory or database exists. In 2003, approximately 25,000 webcasters operated in the United States, including approximately 10,000 “small commercial webcasters” (webcasters with at least fifty concurrent listeners, operated for profit, with less than \$1 million in annual revenue from webcasting).¹⁶ As discussed below, however, the high cost of performance royalties has since forced most of those webcasters to shut down or operate in secret.¹⁷

¹³ Pandora, *supra* note 11. These features do not render the webcast “interactive.” 17 U.S.C. § 114(j)(7) (2006).

¹⁴ The Infinite Dial 2009, *supra* note 1 (reporting that 69 million Americans listened to internet radio in January 2009); Motion of Appellants Digital Media Association (“DiMA”), et. al. For a Stay Pending Appeal, at 2, *Digital Media Ass’n v. Copyright Royalty Bd.*, 2007 WL 1724183 (D.C. Cir. June 4, 2007), <http://somafm.com/pdf/Appeal.pdf> [hereinafter DiMA Motion for Stay] (claiming monthly listeners of 50–70 million as of May 2007); Tirrell, *supra* note 1.

¹⁵ The Infinite Dial 2009, *supra* note 1, at 7.

¹⁶ Letter from Perry J. Narancic, Webcaster Alliance, Inc., to Steven M. Marks, Esq., Vice President, Business and Legal Affairs, Recording Industry Association of America (RIAA) (July 8, 2003), <http://www.mp3newswire.net/stories/2003/webcaster.html> (last visited Sept. 16, 2009).

¹⁷ E-mail from Ann Gabriel, President, Webcaster Alliance, to author (Dec. 30, 2008, 12:40 EST) (on file with author).

When internet radio first began, listeners could only play the stations through their computers.¹⁸ Internet radio has since been freed from the confines of the computer and may now be heard on a wide variety of devices: stereo receivers,¹⁹ standalone players,²⁰ cell phones²¹ and other mobile devices,²² and car stereos.²³

II. OVERVIEW OF THE CURRENT COPYRIGHT ROYALTY REGIME

A. Basics of Copyrights in Music

To understand the current royalty rate dispute, it is necessary to understand the basics of copyright law as it pertains to music. Every musical recording consists of two separate copyrightable works: a musical composition and a sound recording.²⁴ The musical composition is the arrangement of notes and/or lyrics put together by the composer or songwriter.²⁵ The sound recording is the fixation of sounds, including a recording of someone playing or singing a musical composition.²⁶ In most cases, a publisher owns the copyright for a musical composition and a record label owns the copyright for a sound recording.²⁷ The transmission of a sound recording over the internet involves the perfor-

¹⁸ For a discussion of the basics of webcasting, see U.S. Gen. Accounting Office, GAO 04-700, *Intellectual Property: Economic Arrangements Among Small Webcasters and Third Parties and Their Effect on Royalties 5-9* (2004). For a discussion of the basic technology of webcasting, see Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 *J. Marshall J. Computer & Info. L.* 409, 430-32 (2008).

¹⁹ See, e.g., Slim Devices, *Discover Squeezebox*, http://www.slimdevices.com/pi_overview.html (last visited Sept. 16, 2009).

²⁰ See, e.g., Squeezebox Boom All-in-One Network Music Player, http://www.slimdevices.com/pi_boom.html (last visited Sept. 16, 2009).

²¹ See, e.g., Pandora.com, *Pandora for BlackBerry*, <http://www.pandora.com/blackberry> (last visited Sept. 16, 2009).

²² See generally Sarah McBride, *Internet Radio Races to Break Free of the PC*, *Wall St. J.*, June 18, 2007, at A1.

²³ Audio4cast, *Car Stereo Makers Racing to be First with Internet Radios*, <http://audio4cast.com/2009/01/06/car-stereo-makers-racing-to-be-first-with-internet-radios/> (Jan. 6, 2009); see also Posting of Chris Tutor to Autoblog, *CES 2009 Preview: Internet Radio in the Car*, <http://www.autoblog.com/2009/01/04/ces-2009-preview-internet-radio-in-the-car> (Jan. 4, 2009, 16:16 EST).

²⁴ 17 U.S.C. § 102(a)(2), (7) (2006).

²⁵ Fisher, *supra* note 6, at 39.

²⁶ 17 U.S.C. § 101 (2006).

²⁷ DiMA Motion for Stay, *supra* note 14, at 6.

2009]

Internet Radio

2135

mance of both the sound recording and the underlying musical composition.²⁸

Section 106 of the Copyright Act grants to the holder of each of these copyrights the exclusive right to do three things (subject to important exceptions discussed below):²⁹

(1) Reproduce the Work. No one may record, publish, or otherwise copy the song without the copyright holder's permission. This includes making a photocopy of sheet music, copying lyrics, or making a "substantially similar" musical composition. The exclusive right of reproduction also means that no one may make a "mechanical" copy of the song, such as an audio recording of a performance of the song, without permission.³⁰

(2) Make Derivative Works. A derivative work is a creative work based upon another work (for example, setting the original lyrics to a new tune or combining new lyrics with the original music).³¹

(3) Distribution. No one may distribute copies or "phonorecords" (sound recordings of a musical work)³² to the public "by sale or other transfer of ownership, or by rental, lease, or lending" without permission.³³ This right, however, is limited by the "first-sale" doctrine, which says that once a person has lawfully acquired a copy of a song (including a sound recording) he may dispose of the copy as he pleases.³⁴ The owner of a phonorecord, however, may not rent it to the pub-

²⁸ 17 U.S.C. §§ 101, 106(4), (6) (2006).

²⁹ *Id.* § 106(1)–(3).

³⁰ Fisher, *supra* note 6, at 39.

³¹ *Id.* at 39–40.

³² A "phonorecord" is a

material object[] in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (2006). Phonorecords include digital copies of sound recordings (for example, MP3 files).

³³ 17 U.S.C. § 106(3) (2006).

³⁴ Fisher, *supra* note 6, at 40.

lic for “commercial advantage” without permission of the holder of the copyright in the musical composition.³⁵

The holder of the copyright in a musical composition, but *not* the holder of a copyright in a sound recording,³⁶ has the following additional right:

(4) Public Performance. No one may publicly perform a musical composition without permission. This right includes performances such as concerts and publicly playing a recording of the song, including playing the song over any type of radio.³⁷

It is significant that the holder of a sound recording copyright does not have the exclusive right of public performance because that means that the recording artist (or record label, which typically holds the copyright) does not receive royalties when songs are played over broadcast radio. The Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”)³⁸, however, added the following right for the owner of the copyright in a sound recording:

(5) Digital Audio Transmission. Nobody may “perform [a] copyrighted work publicly by means of a digital audio transmission” without permission.³⁹

The result of this new right is that the holders of the copyright in sound recordings are entitled to royalties when their music is played via internet, satellite, or cable radio.

The list of exclusive rights discussed above is limited by a long list of exceptions.⁴⁰ One important category of exceptions takes the form of “compulsory licenses.” A compulsory license permits people to engage in an activity that would otherwise violate one of the exclusive rights. To obtain such licenses, people must pay a licensing fee determined by a government agency.⁴¹

³⁵ 17 U.S.C. § 109 (2006); Fisher, *supra* note 6, at 40.

³⁶ 17 U.S.C. § 114(a) (2006).

³⁷ *Id.* § 106(4); Fisher, *supra* note 6, at 40–41.

³⁸ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.).

³⁹ 17 U.S.C. § 106(6) (2006).

⁴⁰ See 17 U.S.C. § 110 (2006); Fisher, *supra* note 6, at 41, 43–46 (discussing various exceptions, including the fair use doctrine).

⁴¹ See generally Fisher, *supra* note 6, at 41–43 (discussing various compulsory licenses).

1. Performance Rights Organizations (PROs)

The compulsory mechanical license does not cover the right to publicly perform a musical composition.⁴² Every public performance of a musical work requires a license from the copyright owner. To facilitate the licensing and collection of royalties for the public performance of musical compositions, three private performance rights organizations (“PROs”) were founded in the United States: (1) ASCAP, (2) BMI, and (3) SESAC.⁴³ The primary function of the PROs is “to issue ‘blanket’ performance licenses for all of the songs in their catalogues to radio and television stations,” which are obtained by paying a single fee to each organization.⁴⁴ Broadcast radio stations typically pay a flat percentage of their gross revenue—about 2% each—for ASCAP and BMI and less for SESAC.⁴⁵ The PROs have also established rates for the performance of musical compositions via digital transmissions over the internet. ASCAP requires licensees to pay the greater of (a) 1.85% of revenue and (b) $\$0.0006 \times$ the number of “sessions,” with a \$288 minimum fee.⁴⁶ For three large webcasters, Yahoo!, AOL, and Real Networks, the ASCAP rate is 2.5% of revenues.⁴⁷ BMI has two licensing options: (1) Gross Revenue Calculation: License Fee = 1.75% of Gross Revenue; (2) Music Revenue Calculation: License Fee = the greater of (a) Music Revenue \times 2.5% and (b) (Music Page Impressions / 1,000) \times \$0.12.⁴⁸ Both options carry a \$299 minimum annual fee (indexed to the Consumer Price Index after 2007).⁴⁹ The SESAC license rate is \$0.000666 per aggregate tuning hour, with a \$116 minimum semi-annual fee.⁵⁰ As will be demonstrated

⁴² 17 U.S.C. §§ 101, 115(a)(1), (c)(3)(J)(i) (2006).

⁴³ Fisher, *supra* note 6, at 50.

⁴⁴ *Id.* Licensees need not obtain blanket licenses from all three PROs, but typically do so. *Id.*

⁴⁵ *Id.*

⁴⁶ ASCAP Experimental License Agreement for Internet Sites & Services – Release 5.1, http://www.ascap.org/weblicense/reports/pdfs/NonInteractiveLicenseAgreementR5_1.pdf (last visited Sept. 16, 2009).

⁴⁷ Posting of David Oxenford to Broadcast Law Blog, Rate Court Determines ASCAP Fees for Large Webcasters - Some Interesting Contrasts with The Copyright Royalty Board Decision, <http://www.broadcastlawblog.com/archives/internet-radio-rate-court-determines-ascap-fees-for-large-webcasters-some-interesting-contrasts-with-the-copyright-royalty-board-decision.html> (May 1, 2008).

⁴⁸ BMI Web Site Music Performance Agreement, at 2, <http://www.bmi.com/forms/licensing/newmedia/internet.pdf> (last visited Sept. 16, 2009).

⁴⁹ *Id.* at 3.

⁵⁰ SESAC Internet License Agreement, http://www.sesac.com/pdf/internet_ATH_2009.pdf (last visited Aug 4., 2009).

below, the rates that internet radio stations must pay for the public performance of musical compositions are substantially lower than the rates they must pay for the public performance of sound recordings.⁵¹

2. Section 114 Performance Royalty and Section 112 Ephemeral Royalty

The DPRA⁵² and the Digital Millennium Copyright Act of 1998 (“DMCA”)⁵³ created a compulsory license regime for digital audio transmissions. The performance of a song via a digital audio transmission requires three licenses: (1) a license for the public performance of the musical composition (typically obtained from one of the PROs),⁵⁴ (2) a license for the public performance of the sound recording via digital audio transmissions,⁵⁵ and (3) a license for the creation of so-called ephemeral copies of the sound recording used in the transmission process.⁵⁶

Section 114 creates a compulsory license for the public performance of sound recordings via digital audio transmissions.⁵⁷ Section 114 divides digital radio services into four categories: (1) “preexisting subscription services” (digital cable radio), (2) “preexisting satellite digital audio radio services” (satellite radio), (3) “eligible nonsubscription transmissions” (internet radio), and (4) “new subscription services” (that is, subscription internet radio, digital radio by satellite TV).⁵⁸ The CRB uses two standards to determine Section 114 performance royalties: (1) the Section 801(b)(1) standard for digital cable radio and satellite radio, and (2) the “willing buyer, willing seller” standard for internet radio.⁵⁹ The royalties determined under the “willing buyer, willing seller” standard have given rise to vastly higher royalties for internet radio than for all other forms of digital radio. In fact, royalties for internet radio approach or even exceed 100% of revenue for many webcasters and

⁵¹ See *infra* Sections II.C and III.A.

⁵² Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.).

⁵³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

⁵⁴ 17 U.S.C. §§ 101, 115(a)(1), (c)(3)(J)(i) (2006).

⁵⁵ *Id.* § 114.

⁵⁶ *Id.* § 112.

⁵⁷ *Id.* § 114.

⁵⁸ *Id.* § 114(d), (f), (j).

⁵⁹ *Id.* § 114(f)(1)(B), (2)(B); *id.* § 801(b)(1).

threaten to shut down the industry.⁶⁰ This disparity and the problems with the “willing buyer, willing seller” standard are the focus of this Note.

Section 112 creates a compulsory license for the creation of ephemeral (temporary) copies of sound recordings used in digital audio transmissions.⁶¹ The CRB determines the Section 112 royalties using the “willing buyer, willing seller” standard.⁶² The Section 112 royalty has always been insignificant in comparison to the Section 114 performance royalty and the royalties for both licenses are usually determined together in a single rate.

Sections 114 and 112 provide for the CRB to determine the performance and ephemeral license royalties.⁶³ The CRB is a permanent body that consists of three Copyright Royalty Judges, appointed for staggered six-year terms by the Librarian of Congress.⁶⁴ The CRB holds hearings every five years to set the rates for five-year periods.⁶⁵

The Copyright Office designated SoundExchange to be the receiving agent, responsible for collecting and distributing sound recording performance royalties and negotiating on behalf of copyright owners in royalty rate setting proceedings.⁶⁶ The Recording Industry Association of America (RIAA) created SoundExchange as an internal division in 2000, but established SoundExchange as an independent non-profit or-

⁶⁰ See *infra* Part III.

⁶¹ 17 U.S.C. § 112(e) (2006).

⁶² *Id.* § 112(e)(4); see also Subsection IV.A.2.

⁶³ 17 U.S.C. §§ 112(e)(4), 114(f) (2006). The CRB, consisting of Copyright Royalty Judges, was created by the Copyright Royalty and Distribution Reform Act of 2004 (“CRDRA”), Pub. L. No. 108-419, 118 Stat. 2341 (2004) (codified as amended in scattered sections of 17 U.S.C.).

⁶⁴ 17 U.S.C. §§ 801(a), 802(c) (2006). The constitutionality of the CRB has been questioned as potentially violating the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, but no court has yet ruled on the issue. See *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226–27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (noting that the manner in which copyright royalty judges are appointed “raises a serious constitutional issue”); *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 75 (D.C. Cir. 2009) (declining to rule on the Appointments Clause challenge because the issue was not timely raised); Complaint for Declaratory and Injunctive Relief at 9, *Live365 v. Copyright Royalty Board*, No. 1:09-cv-01662-RBW, (D.D.C. filed Aug. 31, 2009) (challenging the constitutionality of the statute providing for the appointment of the Copyright Royalty Judges).

⁶⁵ 17 U.S.C. § 804(b)(1) (2006).

⁶⁶ See Notice of Designation as Collective under Statutory License, <http://www.copyright.gov/carp/notice-designation-collective.pdf> (last visited Jan. 18, 2009).

ganization in September 2003.⁶⁷ SoundExchange reports representing more than 3,500 record labels, over 31,000 artists,⁶⁸ and having distributed “over \$90 million (as of 3rd quarter 2007)” in performance royalties.⁶⁹ Under the Copyright Act, sound recording performance royalties collected under the statutory license are distributed as follows: 50% to the holder of the copyright in the sound recording (usually the record label), 45% to the featured recording artist, and 5% to any non-featured artists (2.5% each to non-featured musicians and vocalists).⁷⁰

B. Recording Industry’s Argument that Internet Radio Is a Threat

Record companies have argued that internet radio poses a unique threat to the recording industry because it reduces music sales.⁷¹ The recording industry’s argument is based on two claims: (1) that internet radio listeners will save digital copies of the streamed songs (a process known as “stream-ripping”), and (2) that internet radio serves as a substitute for the purchase of music.⁷² Webcasters have an incentive to prevent stream-ripping because they want repeat listeners, not visitors who download their webcasts and never return. For this reason, many webcasters have implemented technological mechanisms to make stream-ripping too difficult for the average consumer. As a result, only a relatively small number of listeners possess the technical proficiency to save copies of songs played via internet radio, and such “stream-ripping” has not developed into the problem feared by the recording industry. It remains far easier for consumers intent on obtaining music illegally to do so via file sharing networks than to record songs played on internet radio.⁷³

⁶⁷ SoundExchange, <http://www.soundexchange.com> (click on “FAQ”; then click on “When was SoundExchange founded?”) (last visited Jan. 18, 2009).

⁶⁸ *Id.* (click on “About”) (last visited Aug. 4, 2009).

⁶⁹ *Id.* (click on “About”; then click on “SoundExchange By the Numbers”) (last visited Aug. 4, 2009).

⁷⁰ 17 U.S.C. § 114(g)(2) (2006).

⁷¹ Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 *Tex. Intell. Prop. L.J.* 447, 450–51 (2003). Although individual recording artists have argued in favor of higher internet radio royalties, the argument is primarily advanced by the record companies, which own the majority of sound recording copyrights.

⁷² *Id.*; Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 *N.C. J.L. & Tech.* 339, 365 (2003).

⁷³ See Dan Costa, *The Internet Radio Death Watch*, *supra* note 14.

The second claim, that internet radio serves as a substitute for the purchase of music, requires a more careful analysis. In the realm of traditional broadcast radio, the scarcity of radio frequencies limits the number and variety of songs played. In contrast, the number of internet radio stations is unlimited, allowing consumers to listen to “very specific programs that feature a narrow range of artists and recordings.”⁷⁴ The recording industry argues that this makes internet radio more likely to serve as a substitute for purchasing music, especially as the availability of internet radio on cell phones and in automobiles increases.⁷⁵ “From the perspective of the copyright owners, the risk of substitution increases as the user gains more influence over the choice of songs performed.”⁷⁶ John Simson, Executive Director of SoundExchange, rejects “the idea that the people playing this music on the Web are somehow doing artists a favor.”⁷⁷ In a recent *Business Week* article Douglas MacMillan made a similar claim, stating that “[r]esearchers and industry consultants say on-line music sites are being used by a growing number of listeners as a substitute for purchasing music, rather than serving as a catalyst for more purchases.”⁷⁸ MacMillan neglected to cite any specific studies or sources, and he supports his claim by equating illegal file-sharing with internet radio and by citing declining music sales since 2000.⁷⁹

Listening to internet radio, however, is no more the same as illegally downloading music than listening to broadcast radio is the same as plundering the local CD store. Moreover, no evidence has been put forth to show a causal connection between internet radio and declining music sales. A variety of factors may have contributed to consumers spending their entertainment dollars in ways other than on music, and absent a study showing internet radio listeners purchase less music than other consumers, declining music sales cannot be blamed on internet radio.

For some listeners, internet radio probably does serve as a substitute for purchasing music, much as broadcast radio provides a substitute. Just

⁷⁴ Jackson, *supra* note 71, at 451.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Mark Fisher, *Webcasters and Rising Royalty Fees: Paying the Price for Innovation?*, *Wash. Post*, Mar. 18, 2007, at N2.

⁷⁸ Douglas MacMillan, *The Music Industry’s New Internet Problem*, *BusinessWeek*, Mar. 6, 2009, http://www.businessweek.com/print/technology/content/mar2009/tc2009035_000194.htm.

⁷⁹ *Id.*

as the recording industry has long recognized for broadcast radio,⁸⁰ internet radio also has promotional value. The recording industry and the radio industry have had a symbiotic relationship for the past seventy years.⁸¹ In the same way, the emerging internet radio industry has a symbiotic relationship with the recording industry.⁸²

Internet radio listeners are more likely than the average American to buy digital music.⁸³ An August 2007 study by Nielsen/NetRatings “concluded that Pandora listeners are three to five times more likely to have purchased music in the last 90 days than the average American.”⁸⁴ According to a September 2007 survey by the Pew Internet & American Life Project, 25% of internet users who purchased music in the past year have made their purchase decision by listening to an internet radio sta-

⁸⁰ Perhaps the greatest illustration of the recording industry’s acknowledgement of the promotional value of broadcast radio is the now-illegal practice of “payola”—paying broadcasters to play particular recordings. See Fisher, *supra* note 6, at 58–59 (discussing payola). In 2005–2007, several record companies paid multi-million dollar settlements in cases where they were charged with engaging in payola. M. William Krasilovsky & Sidney Shemel, *This Business of Music* 380–85 (Robert Nirkind & Sylvia Warren eds., 10th ed. 2007). Record label executives have been quoted as saying “they pay independent contractors (promoters) between \$200 and \$300,000 per song and sometimes up to \$1 million . . . [which] breaks down to \$500 to \$2,000 each time a station adds a song to its playlist for the week.” *Id.* at 385.

⁸¹ See Free Radio, Free Radio Alliance: Media Center, <http://www.freeradioalliance.org/mediaCenter.asp> (last visited Jan. 4, 2009). The recording industry enjoys

the free promotion of their music over the airwaves in a variety of venues, launching the careers of rising stars and ultimately increasing the profitability for the record labels.

Composers and songwriters are compensated through royalties collected by ASCAP, BMI and SESAC for the performance of their recorded music. The record labels and artists are compensated for their work in the sales of their recorded music, concert tickets and other promotional items.

Id.

⁸² See, e.g., Kurt Hanson & Jay Rosenthal, *Hype and Glory*, L.A. Times, June 14, 2007, <http://www.latimes.com/news/opinion/la-op-dustup14jun14,0,883289,full.story> (discussing the promotional value of internet radio for Frank Sinatra’s music).

⁸³ Arbitron & Edison Media Research, *The Infinite Dial 2008: Radio’s Digital Platforms* 11 (June 25, 2008), http://www.arbitron.com/downloads/digital_radio_study_2008.pdf [hereinafter *The Infinite Dial 2008*].

⁸⁴ *The Future of Radio: Hearing Before the S. Comm. on Commerce, Sci. and Transp., 110th Cong. 4* (2007) (testimony of Tim Westergren, Founder and Chief Strategy Officer, Pandora Media), http://commerce.senate.gov/public/_files/TimWestergrenFINALFINAL1022505pm.pdf.

tion.⁸⁵ In fact, Pandora listeners are buying about one million songs per month from iTunes and Amazon.com through links on Pandora, and the company's research shows that "for every song purchase Pandora drives, users are likely to buy 3 to 5 more songs on top of the one they found."⁸⁶ Thus, Pandora drives annual music sales of roughly \$48 to \$72 million.⁸⁷ Pandora's listenership is less than 1% of all radio listeners (internet, broadcast, and satellite) and the recording industry's total revenue in 2008 was only \$4.6 billion.⁸⁸ This data suggests that the promotional value of Pandora is at least proportional to its listenership.⁸⁹

Moreover, for the majority of recording artists (those who are not already famous), internet radio is even more valuable as it is one of their "few reliable outlets."⁹⁰ In 2007, "more than 650 artists, representing dozens of genres from throughout the country" wrote a letter to Congress expressing that they would suffer if internet radio were shut down by the CRB royalty rate.⁹¹ Musician Matt Nathanson testified before the U.S. Senate Committee on the Judiciary that internet radio has great

⁸⁵ John B. Horrigan, Pew Internet & American Life Project, *The Internet and Consumer Choice: Online Americans Use Different Search and Purchase Strategies for Different Goods*, May 18, (2008), http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Consumer.Decisions.pdf.pdf.

⁸⁶ Posting of MG Siegler to TechCrunch, *The iPhone Is Accelerating Music Sales For Pandora*, <http://www.techcrunch.com/2009/05/07/the-iphone-is-accelerating-music-sales-for-pandora/> (May 7, 2009). Twenty percent of those music sales are made using Pandora's iPhone application. Id.

⁸⁷ One million direct referrals plus 3–5 million additional purchases at \$1 each × 12 months.

⁸⁸ Siegler, *supra* note 86.

⁸⁹ Pandora drives sales of \$48 to \$72 million per year, which was 1.04% to 1.57% of the recording industry's entire revenue in 2008. Siegler, *supra* note 86. Because these numbers only include purchases through iTunes and Amazon.com and not purchases made elsewhere, it is likely that the true promotional impact is even greater.

⁹⁰ Opinion, *Static Over Royalties*, L.A. Times, Mar. 8, 2007, at A22, available at <http://articles.latimes.com/2007/mar/08/opinion/ed-radio08>; see also, Claire Cain Miller, *Even if Royalties for Web Radio Fall, Revenue Remains Elusive*, N.Y. Times, Oct. 27, 2008, at B4, available at <http://www.nytimes.com/2008/10/27/technology/internet/27radio.html?pagewanted=print>; Paul Maloney, *Pandora's Fight is Radio's Fight, Says Industry Research Expert*, RAIN: Radio and Internet Newsletter (Kurt Hanson), Aug. 22, 2008, <http://textpattern.kurthanson.com/articles/467/rain-822-pandoras-fight-is-radios-fight-says-industry-research-expert>; SaveNetRadio.org, *Musicians – Pass the Mic*, http://web.archive.org/web/20070702024959/www.savenetradio.org/musicians/pass_the_mic.html (last visited Jan. 7, 2009).

⁹¹ Press Release, SaveNetRadio, *Artists Raise Their Voices in Support of Net Radio Legislation* (July 10, 2007), http://web.archive.org/web/20070811083249/www.savenetradio.org/press_room/press_releases/070710-rma.pdf.

promotional value and that hundreds of fans have told him they first purchased his music after hearing it played on internet radio.⁹²

C. Internet Radio Royalty Rates

1. Copyright Royalty Board (CRB) Rate Decision for 2006-2010

On February 16, 2005, the CRB commenced the proceeding to determine Sections 114 and 112 royalty rates and terms for the period from January 1, 2006 to December 31, 2010.⁹³ The CRB released its initial determination on March 2, 2007 and several parties immediately filed motions for a rehearing, which the CRB denied.⁹⁴ The CRB issued its final determination on May 1, 2007.⁹⁵ The rates became effective immediately and were retroactive to January 1, 2006 (the start of the statutory licensing period).⁹⁶ The webcasters who participated in the proceedings appealed the CRB decision to the U.S. Court of Appeals for the District of Columbia Circuit and applied for a stay of the decision, which the

⁹² Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms: Hearing Before the S. Comm. on the Judiciary, 110th Congress (2008) (testimony of Matt Nathanson, Songwriter, Performer and Recording Artist), http://judiciary.senate.gov/hearings/testimony.cfm?id=3501&wit_id=7353.

⁹³ Determination of Rates and Terms, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,084 (Copyright Royalty Bd., Library of Cong. May 1, 2007) (codified at 37 C.F.R. pt. 380) [hereinafter CRB Webcasting Final Determination]. For rates prior to 2006, see Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule, 69 Fed. Reg. 5,693, 5,695 (Feb. 6, 2004) (codified at 37 C.F.R. pts. 262, 263); Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510, 78,511 (Dec. 24, 2002); Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,009 (June 11, 2003).

⁹⁴ CRB Webcasting Final Determination, *supra* note 93, at 24,085; DiMA Motion for Stay, *supra* note 14, at 8. The moving parties requested the CRB to clarify the meaning of the “per station” and “per channel” component of the \$500 minimum fee. The appellants also objected to the failure of the CRB to consider a percentage of revenue royalty, which the PROs offer for the performance of the underlying musical composition. The CRB denied the motion for rehearing without specifically addressing the parties’ objections, concluding the proceeding did not present “the type of exceptional case that would warrant a rehearing or reconsideration.” The CRB also refused to stay its decision pending appeal. *Id.*

⁹⁵ CRB Webcasting Final Determination, *supra* note 93, at 24,084.

⁹⁶ *Id.*; see also David D. Oxenford, Davis Wright Tremaine LLP, Copyright Royalty Board Releases Music Royalties for Internet Radio Streaming for 2006-2010—Clarifying the Confusion (Apr. 12, 2007), <http://www.dwt.com/LearningCenter/Advisories?find=24816> [hereinafter CRB Releases Music Royalties for Internet Radio].

2009]

Internet Radio

2145

court denied.⁹⁷ On July 10, 2009, the court vacated the minimum fee provision and remanded for further consideration by the CRB.⁹⁸ The court upheld all other aspects of the rate decision.⁹⁹

The CRB decision imposed minimum annual fees of \$500 per station or channel, with no cap on the maximum amount.¹⁰⁰ The CRB established the following royalty rates:

Time Period	Webcaster Type	Minimum Fee¹⁰¹	Rate	Annual Cost per 1,000 Listeners¹⁰²
2006–2010	Non-Commercial ¹⁰³	\$500 per station or channel	The \$500 min. fee covers the first 159,140 ATH ¹⁰⁴ per month (about 221 simultaneous listeners); any excess must be paid at the commercial CRB rate.	Same as below after first 221 simultaneous listeners

⁹⁷ *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, No. 07-1123 (D.C. Cir. July 11, 2007) (order denying stay of CRB decision).

⁹⁸ *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 571 F.3d 69, 82 (D.C. Cir. 2009).

⁹⁹ *Id.* at 76–90, 92.

¹⁰⁰ CRB Webcasting Final Determination, *supra* note 93, at 24,097.

¹⁰¹ This minimum fee was vacated by the court in *Intercollegiate Broadcast System*, 571 F.3d at 82.

¹⁰² This figure assumes 15 songs per hour and 1,000 simultaneous listeners.

¹⁰³ CRB Webcasting Final Determination, *supra* note 93, at 24,100.

¹⁰⁴ Aggregate tuning hours (“ATH”) is the total number of hours of music streamed, per person. Thus, if one person listens to a webcast for 1 hour, that is 1 ATH. If two people listen for 30 minutes each, that is also 1 ATH. 37 C.F.R. § 262.2(a) (2004).

2006	Commercial ¹⁰⁵	\$500 per station or channel	\$0.0008 per performance; ¹⁰⁶ OR \$0.0123 per ATH for music programming, \$0.0011 per ATH for non-music programming, \$0.0092 per ATH for broadcast radio simulcasts	\$105,120
2007	Commercial	\$500 per station or channel	\$0.0011 per performance; OR \$0.0169 per ATH for music programming, \$0.0014 per ATH for non-music programming, \$0.0127 per ATH for broadcast radio simulcasts	\$144,540
2008	Commercial	\$500 per station or channel	\$0.0014 per performance	\$183,960
2009	Commercial	\$500 per station or channel	\$0.0018 per performance	\$236,520
2010	Commercial	\$500 per station or channel	\$0.0019 per performance	\$249,660

2. Minimum Fee Cap of \$50,000

The minimum fee of \$500 “per station” or “per channel” in the CRB decision “threaten[ed] to reach truly astronomical levels.”¹⁰⁷ Arguing

¹⁰⁵ CRB Webcasting Final Determination, supra note 93, at 24,096.

¹⁰⁶ A “performance” is defined as a single song streamed to a single listener. Thus, ten people listening to a webcaster playing only one song counts as ten performances. See CRB Webcasting Final Determination, supra note 93, at 24,111. The CRB treated 15.3 songs (performances) as the equivalent of one ATH. This differential will be used throughout this Note when converting between per performance rates and aggregate tuning hours.

¹⁰⁷ DiMA Motion for Stay, supra note 14, at 3–4.

that the decision did not provide a clear definition of the terms “station” or “channel,” SoundExchange took the position that *each* of the hundreds, or thousands, or millions of streams that a webcaster might generate would constitute separate “stations” or “channels” and be subject to the \$500 minimum fee.¹⁰⁸ Under that position, the “minimum” annual fees would reach hundreds of millions of dollars each, if not more, for some of the largest webcasters that offer individual channels for their listeners.¹⁰⁹ The Digital Media Association (“DiMA”) (representing several of the largest webcasters)¹¹⁰ made the following observations on the cost of the minimum fees:

In stark contrast, the *total* royalties for *all licensees* operating under the Statutory License were less than \$10 million in 2004, under \$14 million in 2005, and approximately \$18 million (estimated) in 2006. Yet the “minimum” fees for 2006 for just three licensees (RealNetworks, Pandora, and Yahoo!) would be over *\$1.15 billion!* They would dwarf the licensees’ radio-related revenue by *substantially more than a billion dollars*. They would be more than *64 times* the *total* royalties collected by SoundExchange in 2006; an increase of more than *10 million percent* over the 2005 minimum fee of \$2,500 per licensee; and more than 150 times the entire radio royalties these licensees in the aggregate would pay for 2006, even under the sharply increased CRB performance-based rates.¹¹¹

On August 23, 2007, SoundExchange and DiMA announced an agreement to cap the minimum annual fee at \$50,000 per participating webcaster.¹¹² The agreement also stated that the webcasters would provide SoundExchange with a full census of all songs performed.¹¹³ This minimum fees cap was absolutely essential for large webcasters like Pandora. Had the parties not reached this agreement, Pandora’s mini-

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ DiMA’s members are: Amazon.com, Apple, BestBuy/Napster, iMeem, Live365, Microsoft, Motorola, MTV Networks, Muzak, Myspace Music, Nokia, Pandora Media, RealNetworks, RightsFlow, Sandisk, Slacker, Spacial Audio Solutions, and YouTube. DiMA, About DiMA: Members, http://www.digmedia.org/index.php?option=com_content&view=article&id=49&Itemid=69 (last visited Sept. 20, 2009).

¹¹¹ DiMA Motion for Stay, supra note 14, at 3–4 (emphasis in original) (internal citations omitted).

¹¹² Press Release, DiMA (Aug. 23, 2007), <http://web.archive.org/web/20071213060858/http://www.digmedia.org/content/release.cfm?id=7229&content=pr>.

¹¹³ Id.

num annual fees for 2008 would have exceeded \$10 billion (20 million users¹¹⁴ × at least 1 channel per user¹¹⁵ × \$500). Although the agreement only applied to the parties who signed it, SoundExchange stated that it would present the agreement to the CRB for industry-wide adoption.¹¹⁶

3. *Webcaster Settlement Acts (WSA)*

On October 16, 2008, Congress enacted the Webcaster Settlement Act of 2008 (WSA).¹¹⁷ The WSA permitted parties to reach new royalty rate agreements for a period of up to eleven years beginning on January 1, 2005.¹¹⁸ The WSA gave SoundExchange (on behalf of all holders of copyrights in sound recordings)¹¹⁹ and webcasters until February 15, 2009 to adopt one or more industry-wide agreements to be published in the Federal Register, which would become available to all eligible webcasters as part of the statutory royalty.¹²⁰ The Webcaster Settlement Act of 2009 extended the negotiation deadline until July 30, 2009.¹²¹ The significance of the WSA is that it allowed industry-wide royalty rates to be determined by private parties rather than the CRB.¹²² Had all parties reached agreements for a period of time including 2011–2015, there would have been no need for the CRB to complete the next rate setting proceeding. SoundExchange submitted eight agreements under the

¹¹⁴ Posting of Erick Schonfeld to TechCrunch, Pandora Hits 20 Million Registered Users (Via Twitter), <http://www.techcrunch.com/2008/12/19/pandora-hits-20-million-registered-users-via-twitter/> (Dec. 19, 2008) [hereinafter Schonfeld, Dec. 19, 2008].

¹¹⁵ Pandora allows users to create up to 100 channels each. Pandora, FAQ, <http://blog.pandora.com/faq/> (last visited Sept. 20, 2009).

¹¹⁶ Cydney A. Tune, Client Alert: Webcaster Royalties Update: Discount Offer for Small Webcasters, Fee Caps for the Largest, August 28, 2007, 943 PLI/Pat 117, 119–20 (2008) [hereinafter Discount Offer for Small Webcasters]; Posting of David Oxenford to Broadcast Law Blog, Yes We Do Exist - Claims Copyright Royalty Board, <http://www.broadcastlawblog.com/archives/internet-radio-yes-we-do-exist-claims-copyright-royalty-board.html> (June 25, 2008).

¹¹⁷ Webcaster Settlement Act of 2008, Pub. L. No. 110-435, § 2, 122 Stat. 4974 (to be codified as amended at 17 U.S.C. § 114).

¹¹⁸ *Id.* § 2.

¹¹⁹ SoundExchange is the sole “receiving agent” designed by the Copyright Office. Notice of Designation as Collective under Statutory License, *supra* note 66.

¹²⁰ Webcaster Settlement Act of 2008 § 2.

¹²¹ Webcaster Settlement Act of 2009, Pub. L. No. 111-36, § 2, 123 Stat. 1926 (to be codified as amended at 17 U.S.C. § 114).

¹²² Posting of David Oxenford to Broadcast Law Blog, Webcaster Settlement Act - What Does it Mean?, <http://www.broadcastlawblog.com/archives/internet-radio-webcaster-settlement-act-what-does-it-mean.html> (Oct. 1, 2008).

WSA.¹²³ These agreements covered various time periods through 2015 and provided alternatives to the CRB rates for public radio,¹²⁴ commercial broadcast radio,¹²⁵ small webcasters,¹²⁶ Sirius XM's internet radio service,¹²⁷ college radio,¹²⁸ religious and non-commercial broadcasters,¹²⁹ and "pureplay" commercial webcasters.¹³⁰

a. Pureplay Agreement for 2006–2015

On July 7, 2009, SoundExchange entered into an agreement under the WSA with AccuRadio, Digitally Imported, and radioIO.¹³¹ As provided by the WSA, this "Pureplay Agreement" was published in the Federal

¹²³ Three agreements were submitted under the deadline established by the Webcaster Settlement Act of 2008. Five agreements were submitted after the Webcaster Settlement Act of 2009 extended the deadline. Previously, SoundExchange had entered into a private agreement with 24 small webcasters for the period from 2006 to 2010. The agreement only covered sound recordings by members of SoundExchange. Ben Newhouse, *Select Small Webcasters Embrace SoundExchange Offer*, *Royalty Week*, Sept. 25, 2007, <http://www.royaltyweek.com/?p=67>; Interview with Anonymous, Signer of the September 2007 Agreement with SoundExchange (Jan. 5, 2009).

¹²⁴ Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9,293, 9,294 (Library of Cong., Copyright Royalty Office Mar. 3, 2009) (covering period from 2005–2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614, 40,624 (Library of Cong., Copyright Royalty Office Aug. 12, 2009) (covering period from 2010–2015). These rates apply to 450 public radio webcasters, including Corporation for Public Broadcasting supported stations, NPR and NPR members, the National Federation of Community Broadcasters members, and others. Public Broadcasters Agree to Web Music Royalties, Associated Press, Jan. 15, 2009, http://www.google.com/hostednews/ap/article/ALeqM5gC2S_RJm1bTc4_s7PePo-shcDCCAD95NRSF00.

¹²⁵ Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. at 9,294, 9,299 (covering period from 2006–2015).

¹²⁶ *Id.* at 9,294, 9,302, 9,306 (covering period from 2006–2015).

¹²⁷ Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. at 40,614–15 (covering period from 2009–2015). Sirius XM's *internet* radio service should not be confused with Sirius XM's *satellite* radio service.

¹²⁸ *Id.* at 40,616–17 (covering period from 2011–2015).

¹²⁹ *Id.* at 40,624 (covering period from 2006–2015).

¹³⁰ Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,798 (Library of Cong., Copyright Office July 17, 2009) [hereinafter *Pureplay Agreement*]. A "pureplay" webcaster is a commercial webcaster whose entire business is internet radio. While any commercial webcaster is able to elect into the *Pureplay Agreement*, the agreement requires the webcaster to subject itself to a minimum royalty payment of 25% of its gross revenue. *Id.* at 34,799.

¹³¹ Michael Schmitt, *News Flash: SoundExchange and "Pureplay" webcasters announce 2006-2015 royalty agreement*, RAIN: Radio and Internet Newsletter, July 7, 2009, <http://textpattern.kurthanson.com/articles/719/rain-77-soundexchange-and-pure-play-webcasters-reach-royalty-agreement/> [hereinafter RAIN July 7, 2009].

Register and is available for election by any commercial webcaster who meets the terms of the agreement.¹³² Because the agreement establishes minimum royalties based on a percentage of revenue, it is only suitable for entities that are engaged purely in the business of internet radio. The Pureplay Agreement creates three royalty rates: (1) small pureplay webcasters, (2) commercial webcasters (annual gross revenue more than \$1.25 million), and (3) subscription services.¹³³ The agreement defines “small pureplay webcasters” as commercial webcasters with annual gross revenue of not more than \$1.25 million and whose average monthly ATH does not exceed:¹³⁴

Year	Average Monthly ATH
2006–2008	7 million ATH (about 9408 simultaneous listeners)
2009	8 million ATH (about 10,752 simultaneous listeners)
2010	8.5 million ATH (about 11,424 simultaneous listeners)
2011	9 million ATH (about 12,096 simultaneous listeners)
2012–2014	10 million ATH (about 13,440 simultaneous listeners)

Webcasters must elect annually by January 31 whether to be treated as a small pureplay webcaster and therefore subject to the small pureplay webcaster rates for that year.¹³⁵ The small pureplay webcaster option is only available through 2014.¹³⁶

All webcasters under the Pureplay Agreement must pay a minimum fee of \$25,000 per year, which is credited toward the royalties owed during that year.¹³⁷ They must also keep and submit comprehensive census reports.¹³⁸ Small pureplay webcasters must pay annual royalties equal to the greater of: (1) 7% of expenses, or (2) a percentage of gross revenue, as follows:¹³⁹

¹³² Pureplay Agreement, *supra* note 130 at 34,796–802.

¹³³ *Id.* at 34,799.

¹³⁴ *Id.* at 34,797–98. For the definition of ATH, see *supra* note 104.

¹³⁵ *Id.* at 34,798.

¹³⁶ *Id.*

¹³⁷ *Id.* at 34,799.

¹³⁸ *Id.* at 34,801.

¹³⁹ *Id.* at 34,799–800.

2009]

Internet Radio

2153

Year	Percentage of Gross Revenue
2006-2008	10% of the first \$250,000 in gross revenue, and 12% of any gross revenue in excess of \$250,000
2009-2014	12% of the first \$250,000 in gross revenue, and 14% of any gross revenue in excess of \$250,000

The rate for commercial webcasters is the greater of (1) 25% of gross revenue, or (2) a per performance or per ATH fee as follows:¹⁴⁰

Year	Per Performance	Per ATH	Annual Cost Per 1,000 Listeners¹⁴¹
2006	\$0.00080	\$0.012	\$105,120
2007	\$0.00084	\$0.0126	\$110,376
2008	\$0.00088	\$0.0132	\$115,632
2009	\$0.00093	—	\$122,202
2010	\$0.00097	—	\$127,458
2011	\$0.00102	—	\$134,028
2012	\$0.00110	—	\$144,540
2013	\$0.00120	—	\$157,680
2014	\$0.00130	—	\$170,820
2015	\$0.00140	—	\$183,960

Finally, the rate for subscription services—those internet radio stations that charge a subscription for access—is as follows:¹⁴²

Year	Per Performance	Annual Cost Per 1,000 Listeners¹⁴³
2006	\$0.0008	\$105,120
2007	\$0.0011	\$144,540
2008	\$0.0014	\$183,960
2009	\$0.0015	\$197,100
2010	\$0.0016	\$210,240
2011	\$0.0017	\$223,380

¹⁴⁰ Id. at 34,799.

¹⁴¹ This assumes 15 songs per hour and 1,000 simultaneous listeners.

¹⁴² Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. at 34,799.

¹⁴³ This assumes 15 songs per hour and 1,000 simultaneous listeners.

2012	\$0.0020	\$262,800
2013	\$0.0022	\$289,080
2014	\$0.0023	\$302,220

The Pureplay Agreement was widely publicized as having saved internet radio.¹⁴⁴ Indeed, the Pureplay Agreement, along with the other WSA agreements, have granted internet radio a temporary reprieve. Tim Westergren, founder of Pandora (the largest pureplay internet radio station¹⁴⁵), rejoiced that the Pureplay Agreement removed the cloud of imminent death hanging over the company's head.¹⁴⁶ He went on to emphasize, however, the importance of parity across types of digital radio, noting that “[t]he revised royalties are quite high—higher in fact than any other form of radio.”¹⁴⁷ Under the Pureplay Agreement, Pandora's royalties will be “reduced from a stunning 70% of revenue as required by the Copyright Royalty Board to a merely extraordinary 50% of revenue.”¹⁴⁸ Bill Goldsmith, founder of Radio Paradise, observed that the WSA agreements “perpetuated a situation where the ability for the Internet radio industry to grow and prosper is hampered—to a nearly fatal

¹⁴⁴ See, e.g., Claire Cain Miller, *Music Labels Reach Online Royalty Deal*, N.Y. Times, July 8, 2009, at B1, available at <http://www.nytimes.com/2009/07/08/technology/internet/08radio.html> [hereinafter *Music Labels Reach Online Royalty Deal*]; Posting of Kurt Hanson to Kurt's Blog, *Internet Radio Saved! Behind the New “Pureplay” Webcaster License*, <http://textpattern.kurthanson.com/kurtsblog/720/behind-the-new-pureplay-webcaster-license/> (July 7, 2009, 12:48 EST) [hereinafter *Hanson*, July 7, 2009]; John Timmer, *Ars Technica, Pandora Lives! SoundExchange Cuts Deal on Webcasting Rates*, July 7, 2009, <http://arstechnica.com/media/news/2009/07/soundexchange-cuts-deal-on-music-webcasting-rates.ars>.

¹⁴⁵ Pandora has 30 million registered users. *Music Labels Reach Online Royalty Deal*, supra note 144.

¹⁴⁶ Posting of Tim Westergren to Pandora Internet Radio Blog, *Important Update on Royalties*, http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html (July 7, 2009).

¹⁴⁷ *Id.*

¹⁴⁸ *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 7 (2009)* (statement of Robert Kimball, Executive Vice President for Corporate Development & General Counsel, RealNetworks, Inc.), <http://judiciary.senate.gov/pdf/08-04-09KimballTestimony.pdf>.

degree”¹⁴⁹ If the CRB rates were a death sentence, the WSA agreements represent “[l]ife in prison instead of death by lethal injection.”¹⁵⁰

While the Pureplay Agreement will allow Pandora, and many other webcasters, to continue streaming music for the next several years, the agreement is far from a lasting solution to the problem. Significantly, SoundExchange has clearly stated it views the Pureplay Agreement as “experimental” and a “discount” from what the royalty rates should be.¹⁵¹ Thus, the standards used to determine internet radio royalties remain vitally important for the future survival of internet radio.

4. CRB Proceedings for 2011–2015

The Copyright Royalty Board has moved on to the next round of proceedings. On January 5, 2009, the CRB published a notice in the Federal Register announcing the commencement of proceedings to determine the royalty rate for the next five year license period (January 1, 2011 to December 31, 2015).¹⁵² While SoundExchange has signed agreements with many classes of webcasters, no deals were entered with the large webcasters who are not “pureplays,” that is those who “have substantial business outside of noninteractive webcasting,” such as CBS.¹⁵³ Moreover, several of the WSA agreements require the webcasters to opt-in annually. Thus, the CPB must determine the default rates for 2011 to 2015 that will apply to any webcasters who do not elect one of the WSA

¹⁴⁹ Web Radio Royalties Resolved*, http://voices.washingtonpost.com/fasterforward/2009/07/web_radio_royalties_resolved_1.html?hpid=news-col-blog (July 8, 2009, 8:07 EST).

¹⁵⁰ “Pureplay” Webcasters Settlement Still Stinks, <http://insidemusicmedia.blogspot.com/2009/07/pureplay-webcasterssettlementstill.html> (July 8, 2009).

¹⁵¹ Press Release, SoundExchange, SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement (July 7, 2009), <http://www.soundexchangeblog.com/?p=91>.

¹⁵² Digital Performance in Sound Recordings and Ephemeral Recordings, Notice Announcing Commencement of Proceeding with Request for Petitions to Participate, 74 Fed. Reg. 318 (Jan. 5, 2009). To participate in the proceedings, interested parties were required to file Petitions to Participate in accordance with 37 C.F.R. 351.1(b) no later than February 4, 2009. *Id.* at 319.

¹⁵³ Posting of David Oxenford to Broadcast Law Blog, SoundExchange Announces 4 More Settlements Under Webcaster Settlement Act - Sirius, College and Religious Non-commercial Broadcasters and a Group to be Named Later, <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/soundexchange-announces-4-more-settlements-under-webcaster-settlement-act-sirius-college-and-religious-noncommercial-broadcasters-and-a-group-to-be-named-later/> (July 31, 2009).

agreements. Live365 has filed a lawsuit seeking to enjoin these proceedings pending its challenge of the constitutionality of the CRB.¹⁵⁴

III. ANALYSIS OF ROYALTY RATES AND THEIR ECONOMIC IMPACT ON INTERNET RADIO

A. Webcasters under CRB 2006–2010 Rates

While the leading internet radio services like Pandora and Live365 continued streaming music to millions of listeners, the increased royalties under the CRB decision forced many smaller webcasters out of business and threaten to eventually do the same for larger webcasters.¹⁵⁵ The CRB rate increases are “huge—faster than it would seem possible that advertising revenues could possibly keep up with, much less catch up with. 2007’s rate is a 37.5% increase over 2006; 2008 and 2009’s annual increases are about 28% per year; and 2010 adds another 5.5% increase.”¹⁵⁶

Even the internet radio giants are facing possible extinction. After the CRB decision was announced, the two largest internet radio services, Yahoo! LAUNCHcast and AOL Radio respectively,¹⁵⁷ stopped directing users to their internet radio services.¹⁵⁸ In 2008, CBS Radio took over the internet radio services of both AOL Radio and Yahoo! radio.¹⁵⁹ Fred

¹⁵⁴ Live365 v. Copyright Royalty Board, No. 1:09-cv-01662-RBW (D.D.C. filed Aug. 31, 2009) (seeking preliminary injunction to stay the CRB 2011–2015 webcasting determination).

¹⁵⁵ Hiawatha Bray, Internet Radio Firms Say Royalties Limiting Choices, *The Boston Globe*, Mar. 14, 2008, at C1, available at http://www.boston.com/business/technology/articles/2008/03/14/internet_radio_firms_say_royalties_limiting_choices.

¹⁵⁶ Daniel McSwain, Webcast Royalty Rate Decision Announced, RAIN: Radio and Internet Newsletter (Kurt Hanson), Mar. 2, 2007, <http://www.kurthanson.com/archive/news/030207/index.shtml> [hereinafter RAIN, Mar. 2, 2007] (italicized text bolded in original).

¹⁵⁷ CBS RADIO Makes Another Investment in Internet Radio, Takes Over Yahoo’s Launchcast, Audio4cast, Dec. 3, 2008, <http://audio4cast.com/2008/12/03/cbs-radio-makes-another-investment-in-internet-radio-takes-over-yahoos-launchcast>.

¹⁵⁸ Tirrell, *supra* note 1.

¹⁵⁹ Press Release, AOL, CBS Radio Signs Exclusive Agreement to Power AOL Radio, One of the Nation’s Most Listened to Online Radio Networks (Mar. 7, 2008), <http://corp.aol.com/press-releases/2008/03/cbs-radio-signs-exclusive-agreement-power-aol-radio-one-nation-s-most-listene>; Press Release, Yahoo!, CBS Radio to Power Yahoo!’s LAUNCHcast Radio Providing Listeners with Access to an Additional 150+ Stations (Dec.

McIntyre, senior vice president of AOL Radio, said that royalties were too high to operate the business at a profit even before the CRB decision. As for the new CRB rates, McIntyre said, “There’s no way you can build an Internet radio business, operating the way we were, with these kinds of royalties.”¹⁶⁰ At the end of 2008, Pandora founder Tim Westergren said the company was “losing money as it is” and that Pandora was “approaching a pull-the-plug kind of decision,” describing the situation as a “last stand for webcasting.”¹⁶¹ Westergren reported that the company expected to pay 70% of its projected \$25 million revenue in 2008 to SoundExchange for performance royalties.¹⁶² On October 16, 2008, Pandora announced that it was forced to lay off approximately 14% of its employees.¹⁶³ According to Westergren, “The moment we think this problem . . . is not going to get solved, we have to pull the plug because all we’re doing is wasting money.”¹⁶⁴ According to Johnie Floater, general manager of media for Live365, the CRB royalties will “push all of us out of business.”¹⁶⁵ Executive director of the Digital Media Association (DiMA) Jonathan Potter, predicts that “[i]f Pandora can’t make it, if Live365 can’t make it, then . . . CBS, Clear Channel, and Entercom are going to take over Internet radio.”¹⁶⁶

Conditions are equally dire for the medium-size “small commercial webcasters” and “noncommercial webcasters.” Four of the small commercial webcasters that participated in the CRB proceeding faced royalty increases from 11% of revenues under the previous rate structure to “300% of revenues in 2006, 306.5% of revenues in 2007, and 345% of revenues in 2008—royalty increases of over 2,000%!”¹⁶⁷ According to Bill Goldsmith of Radio Paradise,

3, 2008), <http://yhoo.client.shareholder.com/press/releasedetail.cfm?ReleaseID=351938>.

¹⁶⁰ Bray, *supra* note 155.

¹⁶¹ Peter Whoriskey, *Giant of Internet Radio Nears Its ‘Last Stand’*, Wash. Post, Aug. 16, 2008, at D1 [hereinafter *Giant of Internet Radio Nears Its Last Stand*].

¹⁶² *Id.*

¹⁶³ Posting of Tim Westergren to Pandora Blog, *A Sad Day*, http://blog.pandora.com/pandora/archives/2008/10/a_sad_day.html (Oct. 16, 2008, 13:48 EST).

¹⁶⁴ *Giant of Internet Radio Nears Its Last Stand*, *supra* note 161.

¹⁶⁵ Bray, *supra* note 155.

¹⁶⁶ *Id.*

¹⁶⁷ DiMA Motion for Stay, *supra* note 14, at 4.

This royalty structure would wipe out an entire class of business: Small independent webcasters such as myself & my wife, who operate Radio Paradise. Our obligation under this rate structure would be *equal to over 125% of our total income*. There is no practical way for us to increase our income so dramatically as to render that affordable.¹⁶⁸

While that might seem like a dramatic claim, Kurt Hanson, of RAIN: Radio and Internet Newsletter, described Radio Paradise as “perhaps the most-successful webcaster in its class!” and noted that most other operators in the class faced an even higher royalty obligation of approximately 150 to 200% of total revenues.¹⁶⁹

Noncommercial webcasters also faced a steep increase under the CRB rates.¹⁷⁰ In 2005, noncommercial webcasters paid a \$500 minimum annual fee that covered the first 146,000 ATH per month (about 200 simultaneous listeners).¹⁷¹ After the first 146,000 ATH, noncommercial webcasters paid 0.02¢ per performance, which was less than one-third the 0.07¢ per performance paid by commercial webcasters under the 2005 rates.¹⁷² Under the CRB decision, however, noncommercial webcasters who stream more than the 159,140 ATH per month must pay the full commercial rate for the excess.¹⁷³ By 2010, “the royalties will be approximately nine times as high as they were in 2005” for such noncommercial webcasters.¹⁷⁴

While the WSA agreements¹⁷⁵ provide somewhat more favorable terms than the CRB rates for many webcasters, they are not a solution to the problem. First, the royalties under the agreements are still excessive when compared to the rates paid by the other forms of digital radio (6%–8% of revenue for satellite radio and 7.5% of revenue for digital cable

¹⁶⁸ RAIN, Mar. 2, 2007, *supra* note 156 (italicized text bolded in original).

¹⁶⁹ *Id.*

¹⁷⁰ CRB Releases Music Royalties for Internet Radio, *supra* note 96. Although SoundExchange reached an agreement with the Corporation for Public Broadcasting on January 15, 2009, that agreement only covers 2005–2010. See Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9,293, 9,294 (Library of Cong., Copyright Royalty Office Mar. 3, 2009). Thus, the significant increase under the previous CRB may manifest itself again in the next CRB decision for the 2011–2015 rate period.

¹⁷¹ See *supra* note 93 and accompanying text.

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ CRB Releases Music Royalties for Internet Radio, *supra* note 96.

¹⁷⁵ See *supra* Subsection II.C.3.

2009]

Internet Radio

2159

radio).¹⁷⁶ As discussed above, even under the Pureplay Agreement, Pandora will be paying half its revenue for the Section 114 performance and Section 112 ephemeral license royalties, which are in addition to the royalties it must pay to the PROs (ASCAP, BMI, SESAC) for the public performance of the musical composition.¹⁷⁷ Second, SoundExchange views the agreements as an “experimental discount,” suggesting it will likely press for higher rates when the WSA Agreements expire in 2015.¹⁷⁸ In fact, SoundExchange has proposed rates for the 2011–2015 period that are twice the amount required by the WSA agreements.¹⁷⁹

B. Comparison to Satellite Radio, Cable Radio, and Digital Radio via Satellite TV

The obligation to pay Section 114 performance and Section 112 ephemeral license royalties is not limited to internet radio. Satellite radio providers (for example, Sirius Satellite Radio and XM Satellite Radio), providers of digital radio via satellite TV, and digital cable radio providers are all required to pay royalties under Sections 114 and 112. Broadcast radio stations, however, do not have to pay these royalties unless they are simulcasting their programming over the internet.¹⁸⁰

1. Satellite Radio

Sirius XM Radio is publicly traded¹⁸¹ and is the parent company of two satellite radio services: SIRIUS and XM Radio. The combined services expected to have 19.5 million subscribers at the end of 2008.¹⁸² “The company said it expects to post a \$350 million adjusted loss from earnings before interest, taxes, depreciation and amortization in 2008

¹⁷⁶ See *infra* Section III.B.

¹⁷⁷ Kimball, *supra* note 148. See *supra* note 42–51 and accompanying text.

¹⁷⁸ Press Release, SoundExchange, SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement (July 7, 2009), <http://www.soundexchangeblog.com/?p=91>.

¹⁷⁹ Michael Schmitt, SoundEx wants double in 2011 what they’re getting under current pureplay settlement, RAIN: Radio and Internet Newsletter, Oct. 5, 2009, <http://textpattern.kurthanson.com/articles/792/rain-108-soundex-wants-double-in-2011-what-theyre-getting-under-current-pureplay-settlement/>.

¹⁸⁰ 17 U.S.C. §§ 112, 114 (2006).

¹⁸¹ NASDAQ: SIRI.

¹⁸² Ruthie Ackerman, Sirius XM Fights the Static, *Forbes.com*, Sept. 10, 2008, http://www.forbes.com/2008/09/10/sirius-xm-satellite-markets-equity-cx_ra_0910markets41.html.

and an adjusted profit of \$300 million in 2009.”¹⁸³ Analysts forecasted 2008 revenue of \$1.9 billion and \$2.8 billion in 2009.¹⁸⁴ These figures indicate that satellite radio has much greater revenue than the internet radio industry, but also has less than one-third as many listeners.¹⁸⁵

Sirius Satellite Radio and XM Satellite Radio paid Section 114 performance and Section 112 ephemeral license royalties through 2006 under a lump sum agreement that was the equivalent of less than 5% of their revenues.¹⁸⁶ On January 9, 2006, the CRB announced the commencement of proceedings to determine the royalty rates and terms for “preexisting subscription services” (digital cable radio) and “preexisting satellite digital audio radio services” (satellite radio).¹⁸⁷ Music Choice, a provider of digital cable radio,¹⁸⁸ settled with SoundExchange.¹⁸⁹ The rates and terms for Section 114 performance royalties for a preexisting satellite digital audio radio service provider are to be determined by the CRB under the standards found in 17 U.S.C. § 801(b)(1).¹⁹⁰

On January 24, 2008, the CRB issued a final order setting the rates for preexisting satellite digital audio radio services for the period from 2007 through 2012.¹⁹¹ No minimum fee was established.¹⁹² The royalty rates range from 6% of revenue in 2007 to 8% in 2012.¹⁹³ Thus, the royalties for satellite radio are substantially lower than those for internet radio. As demonstrated above, internet radio royalties are far greater than 8% of

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* note 14 and accompanying text.

¹⁸⁶ DiMA Motion for Stay, *supra* note 14, at 4–5.

¹⁸⁷ Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4,080 (Library of Cong., Copyright Royalty Bd. Jan. 24, 2008) (to be codified at 37 C.F.R. pt. 382) [hereinafter CRB Satellite Radio Final Decision].

¹⁸⁸ Music Choice – About Us, <http://broadband.musicchoice.com/mcbroadband/mso/player/about.html> (last visited Jan. 17, 2009).

¹⁸⁹ See *infra* note 195 and accompanying text.

¹⁹⁰ 17 U.S.C. §§ 114(f)(1)(B), 801(b)(1) (2006). Although § 112 ephemeral license royalties are to be determined under the “willing buyer, willing seller” standard, the § 112 royalties were deemed to be included in the § 114 royalties in all the most recent decisions. See, e.g., CRB Satellite Radio Final Decision, *supra* note 187.

¹⁹¹ CRB Satellite Radio Final Decision, *supra* note 187.

¹⁹² *Id.*; 37 C.F.R. § 382.12 (2008).

¹⁹³ 37 C.F.R. § 382.12 (2008). The U.S. Court of Appeals for the District of Columbia Circuit upheld the CRB rate determination as to the § 114 royalties, but remanded the case to the CRB to determine a separate § 112 royalty. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009).

2009]

Internet Radio

2161

revenue, with internet radio royalties often approaching or even exceeding 100% of revenue for many webcasters.

2. *Digital Cable Radio*

Unless the parties can voluntarily reach an agreement, the rates and terms for a “preexisting subscription service” (for example, digital cable radio) are to be determined by the CRB under the standards found in 17 U.S.C. § 801(b)(1).¹⁹⁴ After the January 9, 2006 commencement of CRB rate setting proceedings for “preexisting subscription services,” the sole digital cable radio provider involved in the proceeding, Music Choice, reached an agreement with SoundExchange.¹⁹⁵ On December 19, 2007, the CRB adopted this agreement as a final regulation for the 2008–2012 rate period.¹⁹⁶ The terms require an annual advance payment of \$100,000, against which the royalty payments for that year shall be recoupable.¹⁹⁷ In addition, for 2008–2011 the licensee must pay a monthly royalty fee of 7.25% of monthly gross revenue, and 7.5% of monthly gross revenue for 2012.¹⁹⁸

3. *Digital Radio via Satellite TV*

On December 5, 2005, the CRB announced the commencement of proceedings

to determine the reasonable rates and terms for a new type of subscription service that performs sound recordings on digital audio channels programmed by the licensee for transmission by a satellite television distribution service to its residential customers where the audio chan-

¹⁹⁴ 17 U.S.C. §§ 114(f)(1)(B), 801(b) (2006). Although § 112 ephemeral license royalties are to be determined under the “willing buyer, willing seller” standard, the § 112 royalties have been deemed to be included in the § 114 royalties in all the most recent decisions. See, e.g., CRB Satellite Radio Final Decision, *supra* note 187.

¹⁹⁵ Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 72 Fed. Reg. 71,795 (Library of Cong., Copyright Royalty Bd. Dec. 19, 2007) (to be codified at 37 C.F.R. pt. 382) [hereinafter CRB Digital Cable Radio Final Decision].

¹⁹⁶ *Id.*

¹⁹⁷ 37 C.F.R. § 382.2(c) (2008).

¹⁹⁸ *Id.* § 382.2(a)–(b).

nels are bundled with television channels as part of a “basic” package of service and not for a separate fee¹⁹⁹

The rates and terms for a new type of subscription digital audio transmission service by a preexisting satellite digital audio radio service provider are to be determined by the CRB under the “willing buyer, willing seller” standard found in 17 U.S.C. § 114(f)(2)(B).²⁰⁰ Before the aforementioned proceeding was finished, however, the licensees (Sirius Satellite Radio, XM Satellite Radio, and MTV Networks) reached an agreement with SoundExchange regarding rates and terms.²⁰¹

On December 20, 2007, the CRB issued a final rule adopting the proposed agreement, thereby establishing industry-wide rates and terms through 2010.²⁰² The royalty rates require a minimum annual fee of \$100,000, which is fully creditable against royalties due in the calendar year in which it is paid.²⁰³ The royalty rate is the greater of 15% of revenue or a per subscriber monthly fee ranging from (a) \$0.0075 in 2006 to \$0.0150 in 2010 for “stand-alone contracts” or (b) \$0.0220 in 2006 to \$0.0250 in 2010 for “bundled contracts.”²⁰⁴

Thus, the royalties for digital audio delivered by a satellite television service are substantially lower than those for internet radio. As demonstrated above, internet radio royalties are much greater than 15% of revenue. Using the highest per subscriber rates listed above (for “bundled contracts” in 2010), assuming *every* internet radio listener subscribed to the digital audio by satellite TV service for 12 months, the royalty would be \$21,600,000.²⁰⁵ This is about the amount paid by a single one of the largest webcasters, and therefore substantially less than the royalties collected for the *entire* internet radio listenership.

¹⁹⁹ Copyright Royalty Board – Docket 2005-5, July 16, 2008, <http://www.loc.gov/crb/proceedings/2005-5/>; Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, 70 Fed. Reg. 72,471 (Library of Cong., Copyright Royalty Bd. Dec. 5, 2005) (announcing commencement of proceeding).

²⁰⁰ 17 U.S.C. §§ 114(f)(2)(B), 801(b)(1) (2006).

²⁰¹ Copyright Royalty Board – Docket 2005-5, *supra* note 199.

²⁰² Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, 72 Fed. Reg. 72,253 (Library of Cong., Copyright Royalty Bd. Dec. 20, 2007) (to be codified at 37 C.F.R. pt. 383) [hereinafter CRB Digital Radio Satellite TV Final Decision].

²⁰³ 37 C.F.R. § 383.3(b) (2008).

²⁰⁴ *Id.* § 383.3(a).

²⁰⁵ 72 million listeners \times 12 \times \$0.0250 = \$21,600,000. See *supra* note 14 and accompanying text.

IV. ARGUMENT FOR TECHNOLOGY NEUTRAL ROYALTY RATES

A. The Problem of the Double Standard

The Copyright Act requires a compulsory license for the performance of sound recordings by digital radio providers: cable, satellite, and internet radio.²⁰⁶ All of these services perform essentially the same function—they provide digital radio to consumers. Yet, the royalty rates imposed by the CRB for these three types of digital radio are dramatically different across technologies. Satellite and cable providers pay between 6% and 15% of annual revenue while internet radio providers pay 40% or more of revenue.²⁰⁷ In fact, as discussed above, royalties for internet radio often approach or even exceed 100% of revenue for many webcasters.²⁰⁸

The source of this inequity is the manner in which the Copyright Act classifies digital audio transmission services and the associated standards for determining the Section 114 compulsory license royalties. The DMCA divides the services that provide digital audio transmissions into four categories: (1) Preexisting Subscription Services (that is, digital cable radio), (2) Preexisting Satellite Digital Audio Radio Transmissions (3) Eligible Nonsubscription Transmissions (that is, internet radio), and (4) New Subscription Digital Audio Transmissions (for example, Digital Radio via Satellite TV).²⁰⁹ The performance royalties for the first two categories are determined by the CRB using a standard set forth in Section 801(b)(1) of the Copyright Act, whereas the CRB determines the royalties for the second two categories using the “willing buyer, willing seller” standard in Section 114 of the Copyright Act.

1. Standard #1: Section 801(b)(1)

Section 801(b)(1) directs the Copyright Royalty Board to calculate royalties to achieve four objectives:

(A) To maximize the availability of creative works to the public.

²⁰⁶ 17 U.S.C. § 114(d)(2) (2006).

²⁰⁷ Press Release, SaveNetRadio, Performance Royalty Rates Topic of Discussion on Capitol Hill: House Judiciary Subcommittee Considers Value of Music for Broadcasters (June 11, 2008), http://www.savenetradio.org/press_room/press_releases/080610-performance_royalty_rates.pdf.

²⁰⁸ See *supra* Section III.A.

²⁰⁹ 17 U.S.C. §§ 114(d)(2), 801(b)(1) (2006).

(B)To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C)To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D)To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.²¹⁰

The Section 801(b)(1) standard seeks to balance the interests of all three parties to the copyright system—the public, copyright owners, and copyright users. Unlike the “willing buyer, willing seller” standard discussed below, the Section 801(b)(1) standard takes into consideration the goal of copyright policy in fostering the availability of creative works to the public. It also explicitly directs the CRB to take into consideration the value provided by the copyright user in bringing the copyrighted works to the public and directs the CRB to avoid setting royalty rates that threaten to shut down the industry using the copyrighted works.

The Section 801(b)(1) standard dates back to the Copyright Act of 1976.²¹¹ The standard is used to determine (1) performance royalties for jukeboxes (Section 116),²¹² (2) mechanical license royalties for making and distributing phonorecords of musical compositions (Section 115),²¹³ and (3) performance royalties for digital audio transmissions via (A) “preexisting subscription services” (that is, digital cable radio) and (B) “preexisting satellite digital audio radio services.” The Section 115 mechanical license is the most important compulsory license in the music industry.²¹⁴ It allows artists to make a “cover” recording of another art-

²¹⁰ Id. § 801(b)(1).

²¹¹ CRB Satellite Radio Final Decision, *supra* note 187, at 4,082.

²¹² 17 U.S.C. § 116 (2006). Note that these royalties are for the public performance of the musical composition. The sound recording copyright holder is only entitled to royalties for public performances by means of a digital audio transmission. See *supra* Parts I and II.

²¹³ 17 U.S.C. § 115 (2006). For the definition of a “phonorecord,” see *supra* note 32 and accompanying text.

²¹⁴ Id. § 115. See generally Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 *Cardozo Arts & Ent. L.J.* 1239 (2007) (discussing the history of § 115, its deficiencies, and proposed improvements).

2009]

Internet Radio

2165

ist's song—"to create a new version of a pre-existing musical composition with different musicians."²¹⁵ (Thus, this compulsory license only applies to the musical composition, not to the sound recording.) Once a recording of a musical composition has been distributed to the public, Section 115 provides that anyone else may make and distribute to the public another recording of the composition upon payment of a royalty determined by the CRB using the Section 801(b)(1) standard.²¹⁶ The current rate is: (a) the greater of 9.1¢ or 1.75¢ per minute of playing time or fraction thereof for each physical phonorecord or permanent digital download, or (b) 24¢ for each ringtone.²¹⁷

The fact that the Section 801(b)(1) standard is used to determine Section 115 mechanical license royalties is particularly noteworthy because that is the royalty recording artists must pay to composers for the use of their songs.²¹⁸ Thus, "the recording industry utilizes the traditional four-factor Section 801(b) rate-setting standard when it is a licensee in proceedings to set songwriters' royalties, but benefits from the more favorable willing buyer-willing seller standard when it is licensor in the Internet radio context."²¹⁹ If Section 801(b)(1) is an appropriate standard for determining how much the recording industry pays (to composers and publishers), it would also seem to be an appropriate standard for determining how much the recording industry is paid (by webcasters).

2. Standard #2: "Willing Buyer, Willing Seller"

When the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)²²⁰ created the new right of digital audio transmission,²²¹ it directed that the royalty rates be determined under the longstanding Section 801(b)(1) standard. When the omnibus Digital Millennium Copy-

²¹⁵ Joshua Keesan, *Let It Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 *Berkeley Tech. L.J.* 353, 355 (2008).

²¹⁶ 17 U.S.C. § 115(a), (c)(3)(D) (2006); 17 U.S.C. §§ 115, 801(b)(1) (2006).

²¹⁷ 37 C.F.R. § 385.3 (2009).

²¹⁸ 17 U.S.C. § 115(a) (2006).

²¹⁹ Jonathan Potter, Executive Director, Digital Media Association, Testimony before U.S. House of Rep., Subcommittee on Courts the Internet and Intellectual Property, Hearing on "Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with those of Broadcasters" (July 15, 2004), <http://www.judiciary.house.gov/Legacy/potter071504.htm> [hereinafter Potter, July 15, 2004].

²²⁰ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.).

²²¹ 17 U.S.C. § 106(6) (2006).

right Act of 1998 (DMCA)²²² extended the digital audio transmission right to cover webcasting, however, it created the new “willing buyer, willing seller” standard found in 17 U.S.C. § 114.²²³ Unfortunately, the legislative history does not contain any explanation for why Congress adopted this new standard for internet radio.²²⁴ Section 114(f)(2)(B) directs the Copyright Royalty Board to “establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”²²⁵ The standard further directs the CRB to

base its decision on economic, competitive and programming information presented by the parties, including—

- (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and
- (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements²²⁶

The “willing buyer, willing seller” standard thus encompasses only parts (B)²²⁷ and (C)²²⁸ of the Section 801(b)(1) standard. In applying the “willing buyer, willing seller” standard to internet radio, however, the

²²² Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2890-91, 2898 (codified as amended in scattered sections of 17 U.S.C.).

²²³ Pub. L. No. 104-39, 109 Stat. at 340-41.

²²⁴ Potter, July 15, 2004, *supra* note 219, at 48.

²²⁵ 17 U.S.C. § 114(f)(2)(B) (2006).

²²⁶ *Id.* § 114(f)(2)(B).

²²⁷ “To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.” *Id.* § 801(b)(1)(B).

²²⁸ “To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.” *Id.* § 801(b)(1)(C).

2009]

Internet Radio

2167

CRB seemed to disregard the first half of the standard—the rates and terms that would be paid by a “willing buyer”—and did not seem to show concern for “afford[ing] . . . the copyright user a fair income under existing economic conditions.”²²⁹ Therefore, in practice, the “willing buyer, willing seller” standard is the equivalent of part (C) and the first half of part (B) of the Section 801(b)(1) standard.

The “willing buyer, willing seller” standard completely disregards the public interest in the availability of creative works. Instead, it directs the CRB to focus on “whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings”²³⁰ Thus, at its core, the “willing buyer, willing seller” standard focuses on the recording industry’s “sales of phonorecords” and “streams of revenue,” reflecting the recording industry’s argument that internet radio is a threat.²³¹

3. Comparison of Outcomes under the Two Standards

These two royalty standards, with their disparate goals, have produced equally disparate results. When the CRB determined royalties using the Section 801(b)(1) standard, with its focus on balancing the interests of all parties, it assigned rates equal to 6%–8% of revenues.²³² In stark contrast, when the CRB used the “willing buyer, willing seller” standard, with its focus on the interests of the recording industry, it assigned rates ranging from at least 15% for digital radio via satellite TV²³³ to approaching or even exceeding 100% of revenues for internet radio.²³⁴

²²⁹ Id. § 801(b)(1).

²³⁰ Id. § 114(f)(2)(B).

²³¹ See supra Section II.B.

²³² See supra Section III.B.

²³³ While the rate for digital radio via satellite TV was the result of a negotiated agreement, the parties were negotiating in the shadow of the “willing buyer, willing seller” standard. Because the “willing buyer, willing seller” standard had recently been applied by the CRB in determining the royalties for internet radio, the negotiating parties knew that they could expect a similarly high royalty rate if negotiations broke down.

²³⁴ See supra Section III.A.

B. Constitutional and Policy Argument

“In the United States, the justification for copyright protection is overwhelmingly utilitarian. The law grants protection for copyrighted works in order to achieve a goal—the advancement of knowledge and learning.”²³⁵ This purpose of copyright policy is found in the intellectual property clause of the U.S. Constitution, which authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²³⁶ At the time the Constitution was written, “science” was synonymous with “knowledge” and “learning.”²³⁷ In fact, a compelling case has been made that this purpose clause actually serves as a constitutional limitation on Congress’ authority.²³⁸ The U.S. Supreme Court has held that “the Copyright Act must be construed in light of its basic purpose of “promoting broad public availability of literature, music, and the other arts.”²³⁹

The fact that the basic purpose of copyright protection in the United States is to promote the progress of knowledge and learning suggests that copyright policy should be technology neutral. Disfavoring one technology over another can hardly be said to “promote the progress of science and useful arts.” Copyright policy should not discriminate on the basis of technology by imposing higher royalties for digital radio delivered by the internet than when the same music is delivered by a satellite transmission.²⁴⁰ Yet, that is precisely what has happened. The root of the problem is the double standard for the different types of technology.

Technology neutrality (or “platform parity”) does not necessarily mean equal royalty rates for all digital radio services. Rather, sound copyright policy dictates parity in the standards applied to determine the royalty rates across technologies. It may well be the case that different royalty rates are appropriate for different types of technology. For ex-

²³⁵ Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 *La. L. Rev.* 1, 6 (2008).

²³⁶ U.S. Const. art. I, § 8, cl. 8. This clause is also the basis of authority for the Patent Act.

²³⁷ Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 *J. Intell. Prop. L.* 1, 51 (1994); see also 1-1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.03A (2009).

²³⁸ Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 *Geo. L.J.* 1771 (2006).

²³⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

²⁴⁰ See Subsection IV.A.3.

ample, internet radio almost certainly has significantly greater promotional value than all other forms of radio—traditional broadcast radio, satellite radio, and cable radio. A person who listens to satellite radio in his car may hear a song he likes and want to buy it, but if he is driving he cannot even write down the name of the song and the artist, much less purchase the song.²⁴¹ In contrast, most internet radio stations provide direct links to purchase the song or album being played.²⁴² In fact, a song being played on Pandora can be purchased in a matter of seconds with as few as three clicks of the mouse.²⁴³ Thus, it would probably be appropriate to have a *lower* royalty rate for internet radio than for satellite radio because of internet radio's greater promotional value to recording artists. Nevertheless, whether or not the rates achieved are the same, sound copyright policy dictates parity in the rate-setting standard applied across technological platforms. To achieve such parity, a single standard should be used by the CRB to determine royalty rates for Section 114 performance and Section 112 ephemeral license royalties.

The Section 801(b)(1) standard captures the constitutional purpose of copyrights better than the “willing buyer, willing seller” standard. The Section 801(b)(1) standard balances the interests of all three parties to the copyright system—copyright owners, copyright users, and the public.²⁴⁴ In contrast, the “willing buyer, willing seller” standard focuses primarily on maximizing the copyright owner's “streams of revenue.”²⁴⁵ While the “willing buyer, willing seller” standard purports to simulate marketplace royalties, it is actually biased in favor of higher royalties for the copyright owner. The standard directs the CRB to consider the

²⁴¹ The same applies to broadcast radio, except that the situation is even worse for broadcast radio because unless the listener happens to listen long enough to hear the announcer say the name of the song that was played, he would not know the name of the song or the recording artist. Satellite radio transmissions are at least capable of displaying the name of the song and the artist.

²⁴² For example, in 2007 the small commercial (medium size) internet radio station AccuRadio reported selling \$40,000 worth of CDs per month via links to Amazon.com for the songs being played. Fisher, *supra* note 6. The music sales generated by larger stations, like Pandora, are almost certainly much greater.

²⁴³ E.g., (1) Click on the “menu” button in the Pandora player, (2) Click “Buy Amazon MP3”, (3) Click “Buy MP3 song with 1-Click.” (Steps tested Jan. 18, 2009).

²⁴⁴ 17 U.S.C. § 801(b)(1) (2006). Both providers of digital radio and the public are “copyright users.” However, in the context of the digital audio transmission of sound recordings, it is the digital radio services that “use” the digital audio transmission right that the public “consumes.”

²⁴⁵ 17 U.S.C. § 114(f)(2)(B) (2006).

“streams of revenue” of the copyright owner (the “willing seller”) without any regard for the income of the copyright user (the “willing buyer”).²⁴⁶ In contrast, the Section 801(b)(1) standard directs the CRB to calculate a rate that affords both the copyright owner *and* the copyright user a fair revenue.²⁴⁷

Moreover, in the context of a compulsory license, a standard that ignores the interests of the public and has a lopsided focus on the revenue of the copyright owner is particularly inappropriate because the compulsory license establishes a royalty rate even if the copyright owner does not wish to license his work. In fact, for the Section 114 performance royalties for internet radio, there may not be a rate upon which a “willing buyer” and a “willing seller” would agree. Behavior economics may explain why reaching a reasonable determination of webcasting royalty rates has been so difficult.²⁴⁸ In situations where someone has been “endowed” with a benefit, that person’s sense of the value of the item can become inflated. This “endowment effect” suggests that there may be no royalty rate upon which a “willing buyer” and a “willing seller” would agree.²⁴⁹ Dan Ariely, Professor at M.I.T. and author of *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, conducted an experiment in which he asked Duke University Blue Devils fans who had just won tickets to a big basketball game through a lottery the minimum amount for which they would sell the tickets.²⁵⁰ Conversely, fans who had failed to win tickets in the lottery were asked the maximum amount they would be willing to pay for the tickets.²⁵¹ “From a rational perspective, both the ticket holders and the non-ticket holders should have thought of the game in exactly the same way,” Ariely observes.²⁵² One might have expected, therefore, that some of the winners and losers

²⁴⁶ Id. § 114(f)(2)(B)(i).

²⁴⁷ Id. § 801(b)(1). “The rates . . . shall be calculated . . . [t]o afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.” Id.

²⁴⁸ Kurt Hanson, Behavior Economics May Explain Royalty Rate Increase, RAIN: Radio and Internet Newsletter, Feb. 21, 2008, <http://textpattern.kurthanson.com/crb/276/behavioral-economics-may-explain-royalty-rate-impasse>; see also Elizabeth Kolbert, What Was I Thinking?, *The New Yorker*, Feb. 25, 2008, at 78, available at http://www.newyorker.com/arts/critics/books/2008/02/25/080225crbo_books_kolbert.

²⁴⁹ Hanson, *supra* note 248.

²⁵⁰ Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* 127–35 (2008).

²⁵¹ Id.

²⁵² Id. at 133.

would have been able to strike deals.²⁵³ “But whether or not a lottery entrant had been ‘endowed’ with a ticket turned out to powerfully affect his or her sense of its value.”²⁵⁴ The average amount winners were willing to accept for their tickets was \$2,400, whereas the average amount that losers were willing to offer was only \$175. In fact, out of a hundred fans, “not a single ticket holder would sell for a price that a non-ticket holder would pay.”²⁵⁵ That is, “[w]ithin that group of a hundred fans, there *was* no ‘willing buyer/willing seller’ price.”²⁵⁶ It may well be that some of the attorneys and executives at SoundExchange (most likely the representatives of large record labels) have a similar attitude of endowment toward the newly created digital performance right.²⁵⁷ Because the “willing buyer, willing seller” standard focuses primarily on the copyright owner’s “stream of revenue,” it is particularly ill-equipped to determine the royalty rate in a situation where the “seller” has an inflated view of the value of the newly created right of public performance for sound recordings. In fact, the Copyright Royalty Board itself may be suffering from an “endowment effect” and overvaluing the copyright owners’ new right at the expense of copyright users and the public. Such an effect is made worse when the governing standard focuses primarily on the “seller” without considering a “fair income” for the “buyer” or the public benefit derived by “maximiz[ing] the availability of creative works.”²⁵⁸

C. Proposed Amendments to the Copyright Act

To correct the inequities resulting from the double standard described above, the Copyright Act should be amended to employ a single standard: the Section 801(b)(1) standard.²⁵⁹ To effectuate this change, the second sentence of 17 U.S.C. § 801(b)(1) should be amended by replacing “Sections 114(f)(1)(B), 115, and 116” with “Sections 112, 114, 115, and 116.” In addition, 17 U.S.C. § 114(f)(2)(B) should be amended by

²⁵³ Kolbert, *supra* note 248.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Hanson, *supra* note 248 (emphasis in the original).

²⁵⁷ *Id.*

²⁵⁸ 17 U.S.C. § 801(b)(1)(A) (2006).

²⁵⁹ A slightly different method of amendment was proposed in the Internet Radio Equality Act (IREA), H.R. 2060, 110th Cong. (2007); S. 1353 110th Cong. (2007). The amendments proposed by the IREA, however, are incomplete because the bill does not amend § 801(b)(1), which limits that standard to §§ 114 (f)(1)(B), 115, and 116.

striking the text from “In establishing” to the end of subparagraph (B). Finally, 17 U.S.C. § 112(e)(4) should be amended by striking the text from “The Copyright Royalty Judges shall establish” to the end of paragraph (4). These amendments would ensure that the public performance and ephemeral license royalties for all types of digital audio transmissions would be determined using a single standard: Section 801(b)(1). The result would be copyright royalties that are determined in a manner that (A) balances the interests of copyright owners, copyright users, and the public; (B) is technology neutral; and (C) conforms to the purposes of United States copyright policy in promoting “progress of science and useful arts.”²⁶⁰

CONCLUSION

Internet radio holds tremendous promise for recording artists and the listening public. The 69 million Americans who listen to internet radio each month can choose virtually any genre of music conceivable²⁶¹ and listen to it anywhere in the world they have an internet connection. Services such as Pandora are specifically designed to introduce listeners to new music. Musicians benefit from all this exposure both in terms of promotion and increased popularity and recognition and also in terms of increased music sales. Yet current copyright law threatens to silence internet radio. As demonstrated above, the existence of a double standard for determining performance and ephemeral license royalties has resulted in royalty rates that are dramatically higher for internet radio than for all other types of digital radio. Moreover, the royalty rates established by the CRB are so high that they have forced many webcasters out of business and they threaten to shut down even the internet radio giants like Pandora.

While some webcasters have negotiated short-term royalty agreements as alternatives to the CRB rates, these negotiated agreements are only a temporary solution. When the WSA agreements expire in 2015, webcasters will once again be faced with the industry crushing royalty rates established by the CRB under the “willing buyer, willing seller” standard. Furthermore, even if webcasters are able to negotiate new agreements when the current batch of WSA agreements expire, they will

²⁶⁰ U.S. Const. art. I, § 8, cl. 8.

²⁶¹ See, e.g., Live365 Internet Radio, Complete Genre List, <http://www.live365.com/listen/browse.live> (last visited Sept. 15, 2009).

2009]

Internet Radio

2173

still be negotiating in the shadow of the “willing buyer, willing seller” standard. The royalty rates contained in the current internet radio agreements vastly exceed those paid by all other forms of digital radio, and all future agreements are likely to do so as well unless the Copyright Act is amended to impose a single technology neutral royalty standard.

It should not be the policy of the United States to favor one form of digital radio over another. Such a policy runs counter to the very purpose of the copyright system authorized by the Constitution. Copyright policy should be technology neutral and should apply a consistent royalty-rate setting standard across technologies. To accomplish this, the Copyright Act should be amended to require the Copyright Royalty Board to apply the Section 801(b)(1) standard in all rate setting proceedings for digital radio. The result would be the flourishing of internet radio, to the benefit of the recording industry, individual musicians, and the listening public.

2174

Virginia Law Review

[Vol. 95:2129

2009]

Internet Radio

2175

2176

Virginia Law Review

[Vol. 95:2129

2009]

Internet Radio

2177

2178

Virginia Law Review

[Vol. 95:2129

2009]

Internet Radio

2179

2180

Virginia Law Review

[Vol. 95:2129

2009]

Internet Radio

2181