

# Saint Louis University Public Law Review

---

Volume 27

Number 2 *Elections in the Information Age: Making Your Money and Your Vote Count (Volume XXVII, No. 2)*

Article 9

---

2008

## A Digital Cry for Help: Internet Radio's Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard

Brian Flavin  
briflav@aol.com

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Flavin, Brian (2008) "A Digital Cry for Help: Internet Radio's Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard," *Saint Louis University Public Law Review*: Vol. 27 : No. 2 , Article 9.  
Available at: <https://scholarship.law.slu.edu/plr/vol27/iss2/9>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [erika.cohn@slu.edu](mailto:erika.cohn@slu.edu), [ingah.daviscrawford@slu.edu](mailto:ingah.daviscrawford@slu.edu).

**A DIGITAL CRY FOR HELP: INTERNET RADIO'S STRUGGLE TO SURVIVE A SECOND ROYALTY RATE DETERMINATION UNDER THE WILLING BUYER/WILLING SELLER STANDARD**

RECENT DEVELOPMENT

I. INTRODUCTION

On March 2, 2007, the Copyright Royalty Board (“CRB”) significantly increased the royalty rates that Internet radio webcasters pay under § 114 of the Copyright Act to digitally broadcast sound recordings over the Internet.<sup>1</sup> The new rates apply retroactively from the period of January 1, 2006 to December 31, 2010.<sup>2</sup> The only prior determination of such royalty rates was made in 2002 by the Librarian of Congress upon recommendation from a Copyright Royalty Arbitration Panel (“CARP”).<sup>3</sup> In making each of these rate determinations, the regulatory body charged with setting new rates was required to employ the willing buyer/willing seller standard—one of various amendments to the Copyright Act of 1976 introduced by the Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>4</sup> Not only is this standard flawed because it ignores traditional notions of copyright law, but the particular way in which it has been interpreted and applied has produced successively controversial royalty rates that many webcasters claim threaten to drive them out of business. At stake in this controversy is the future of Internet radio. If the fears of small and noncommercial webcasters are fully realized and they are driven out of business by excessive royalty rates, then the diversity that makes Internet radio an attractive alternative to today’s homogenized AM/FM radio will likewise disappear. Accordingly, Congress

---

1. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,096 (May 1, 2007) (codified at 37 C.F.R. pt. 380) [hereinafter CRB Determination]; 17 U.S.C. § 114 (West Supp. 2006). Note that in addition to setting rates for the digital transmission of sound recordings, the CRB also set rates for the making of *ephemeral copies* of sound recordings (often necessary for webcasting). This Recent Development will not address the details of CRB’s ruling on this related, but separate issue.

2. CRB Determination, 72 Fed. Reg. at 24,084.

3. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002) (codified at 37 CFR pt. 261) [hereinafter CARP Determination].

4. *See id.* at 45,243; CRB Determination, 72 Fed. Reg. at 24,087.

must address the shortcomings of the willing buyer/willing seller standard before the current licensing period ends in 2010. Otherwise, the battle over webcaster royalty rates will become a cyclical problem that prevents copyright owners, webcasters, and the public from realizing the full potential of Internet radio.

This Recent Development discusses the state of Internet radio in light of the CRB's 2007 rate determination under the willing buyer/willing seller standard. Retroactive royalties, dating back to January 1, 2006, have been due to SoundExchange since July 15, 2007.<sup>5</sup> However, the controversy is far from resolved. Part II of this article provides brief histories of Internet radio and federal protection of sound recordings. Part III addresses the 2002 and 2007 royalty-rate determinations, with particular emphasis on the latter decision. Part IV considers various criticisms of the current rate determination process, including claims that the willing buyer/willing seller standard is flawed and that the process is technologically biased against Internet radio. Part V analyzes the different relief efforts currently being pursued by webcasters, including (1) an appeal to the United States Court of Appeals for the District of Columbia Circuit, (2) proposed legislation in the form of the Internet Radio Equality Act ("IREA") and the Performance Rights Act, respectively, (3) direct negotiation with SoundExchange, and (4) relocating webcasting operations abroad. Finally, Part VI concludes that the passage of legislation like the IREA and the Performance Rights Act are necessary steps toward a long-term solution to the present royalty rate controversy.

## II. RELEVANT HISTORIES

### A. *Internet Radio*

Internet radio first garnered national media attention in 1993 when Internet Talk Radio began broadcasting its weekly half-hour radio programs over the Internet.<sup>6</sup> At the time, the notion of unsophisticated Internet-users creating their own Internet radio programs was still just that: a notion.<sup>7</sup> Over the next

---

5. Paul Maloney, *Webcasters get breathing room; CRB pushes D-day to July 15th*, RAIN, May 2, 2007, <http://www.kurthanson.com/archive/news/050207/index.shtml>. See SoundExchange, *Statement on Final Determination of Copyright Royalty Board on Webcasting Royalty Rates*, May 1, 2007, <http://soundexchange.com> (follow "News" hyperlink).

6. John Markoff, *Turning the Desktop PC Into Talk Radio Medium*, N.Y. TIMES, Mar. 4, 1993, at A1. See also MuseumMedia.org, <http://museum.media.org/radio> (last visited Feb. 11, 2008).

7. Markoff, *supra* note 6, at D18 ("Conceivably, any Internet user could create his own audio or video program and and [sic] make it available on the network, just as the creator of Internet Talk Radio plans.") (emphasis added).

decade and a half, advancements in technology and user accessibility turned many Internet hopes and dreams of the early 1990s into reality.<sup>8</sup>

Since those early days, Internet radio has become an increasingly popular alternative to traditional, “terrestrial radio.”<sup>9</sup> Commonly referred to as webcasting, Internet radio broadcasts are typically accomplished in one of two ways, both of which involve the non-interactive,<sup>10</sup> continuous transmission of digital content over the Internet using “streaming media technology.”<sup>11</sup> The distinction to be made is between Internet-only webcasting and simulcasting.<sup>12</sup> The former involves broadcasting content solely over the Internet; the latter involves broadcasting the same content contemporaneously over the Internet and over terrestrial radio waves.<sup>13</sup> Both types of webcasting are currently subject to the § 114 statutory royalty rates addressed in this Recent Development.<sup>14</sup>

Internet radio is currently the fastest-growing medium in radio. Bridge Ratings, a radio market analysis firm in Glendale, California, estimates that 57.6 million listeners tuned in to Internet radio each week in 2006.<sup>15</sup> With a

---

8. See Alex Cospér, *The History of Internet Radio* (2007), <http://www.tangentsunset.com/internetradio.htm> (last visited Feb. 11, 2008).

9. *Id.* “Terrestrial radio” is common jargon for traditional, over-the-air AM/FM radio, which is transmitted using land-based technology. Jason A. Auerbach, Note, *Recording Satellite Radio—Adapting to Modern Technology or Infringing Copyright*, 29 CARDOZO L. REV. 331, 333 (2007).

10. This article is generally concerned only with non-interactive Internet radio webcasting services. Interactive webcasting services, which allow users to control certain aspects of a station’s programming, are also subject to § 114 performance royalties. See 17 U.S.C. § 114 (West 2006).

11. ROBERT L. HILLIARD & MICHAEL C. KEITH, *THE QUIETED VOICE: THE RISE AND DEMISE OF LOCALISM IN AMERICAN RADIO* 177 (2005).

Streaming media technology enables the real time or on demand distribution of audio, video and multimedia on the internet [sic]. Streaming media is the simultaneous transfer of digital media (video, voice and data) so that it is received as a continuous real-time stream. Stream data is transmitted by a server application and received and displayed in real-time by client applications. These applications can start displaying video or playing back audio as soon as enough data has been received and stored in the receiving station’s buffer. A streamed file is simultaneously downloaded and viewed, but leaves behind no physical file on the viewer’s machine.

StreamingMedia.com, Streaming Media, <http://www.streamingmedia.com/glossary/term.asp?t=streaming%20media> (last visited Mar. 21, 2008).

12. HILLIARD & KEITH, *supra* note 11, at 177.

13. *Id.*

14. See *infra* Part II.B.2.

15. Bridge Ratings, Digital Media Growth Projections, [http://www.bridgeratings.com/press\\_08,15,07-digitalprojectionsupd.htm](http://www.bridgeratings.com/press_08,15,07-digitalprojectionsupd.htm) (comparing Internet, satellite, HD, and terrestrial radio). The Bridge Ratings’ sample consisted of 4,541 people, twelve years of age and up, randomly interviewed by telephone or in person at the mall, between May and July of 2007. *Id.* See also Shaun Assael, *Online and on the Edge*, N.Y. TIMES, Sept. 23 2007, at 32.

projected annual listener growth rate of twenty-seven percent, Internet radio could have 147.5 million weekly listeners by 2010 and more than 196 million listeners by 2020.<sup>16</sup> While terrestrial radio still dominates the radio market, averaging roughly 280 million weekly listeners in 2006, its projected annual listener growth rate is only one percent through 2020.<sup>17</sup> Comparative projections like these have some in the business saying that Internet radio is terrestrial radio's "biggest threat."<sup>18</sup>

Crucial to Internet radio's success is a growing feeling that "[Terrestrial] radio has lost its ability to engage the listener in a music experience"<sup>19</sup>—a phenomenon often attributed to a lack of variety in modern commercial programming. In large part, terrestrial radio's current homogeneity can be traced back to the Telecommunications Act of 1996 ("Telecom Act").<sup>20</sup> The Telecom Act effectively eliminated caps on national radio station ownership while raising caps on local station ownership.<sup>21</sup> Thus, the Telecom Act essentially encouraged the "unlimited national consolidation" of radio ownership.<sup>22</sup> According to a 2006 study, the extensive consolidation of ownership that ensued over the following decade produced, among other things, fewer radio companies, larger radio companies with increased revenue and ratings concentrations, declining local ownership, concentrated network ownership, and, ultimately, homogenized programming with fewer listeners.<sup>23</sup> The same study found that "[j]ust fifteen formats make up 76% of commercial programming," and that "[r]adio formats with different names can overlap up to 80% in terms of the songs played . . ."<sup>24</sup> This lack of variety has some

---

16. Bridge Ratings, Digital Media Growth Projections, [http://www.bridgeratings.com/press\\_08,15,07-digitalprojectionsupd.htm](http://www.bridgeratings.com/press_08,15,07-digitalprojectionsupd.htm).

17. *Id.*

18. HILLIARD & KEITH, *supra* note 11, at 178 (quoting David Porter of Live365); *cf.* Assael, *supra* note 15, at 32 (stating that webcasters are spurring a new golden age in radio).

19. HILLIARD & KEITH, *supra* note 11, at 178.

20. *See* DANIEL CASTRO, SENIOR ANALYST, THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, INTERNET RADIO AND COPYRIGHT ROYALTIES: REFORMING A BROKEN SYSTEM (May 2007), <http://www.itif.org/files/InternetRadio.pdf>; PETER DICOLA, FALSE PREMISES, FALSE PROMISES: A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY (2006), <http://www.futureofmusic.org/images/FMCradiostudy06execsum.pdf> (on file with author). *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 10 Stat. 56 (1996).

21. DICOLA, *supra* note 20, at 1–2.

22. *Id.* *See also* CASTRO, *supra* note 20, at 2 ("[B]etween 1996 and 2002 Clear Channel Communications grew from 40 stations to 1,240 stations.").

23. DICOLA, *supra* note 20, at 2–4.

24. *Id.* at 4.

critics saying that “the number one threat [to terrestrial radio] is crappy music; it’s not technology.”<sup>25</sup>

In contrast, many listeners are drawn to Internet radio specifically for its variety in programming.<sup>26</sup> As a medium, Internet radio currently promotes diverse programming in several ways. First, it is significantly easier to start up an Internet radio station than a traditional radio station.<sup>27</sup> As a result, not only do current webcasting ranks include “titans” such as AOL and Yahoo!, but also NPR, college radio stations, religious and community-based broadcasters, and hobbyists who broadcast from homes and workplaces.<sup>28</sup> Second, unlike terrestrial radio, Internet radio is not limited by the number of channels it can make available to listeners.<sup>29</sup> Third, Internet radio’s digital reach is far superior to that of terrestrial radio, which is intrinsically restricted by the finite reach of traditional analog radio waves.<sup>30</sup> The diversity of Internet radio programming has even garnered the attention of Congress.<sup>31</sup> To summarize Internet radio’s appeal:

Internet radio explodes the boundaries of radio broadcasting, opening up a universe of stations offering far more diversity than what is available on the

---

25. HILLIARD & KEITH, *supra* note 11, at 178 (quoting Jay Frank of Yahoo’s Internet radio station, Launch).

26. See Allison Kidd, Recent Developments, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J. L. & TECH. 339, 344 n.32 (2003) (noting survey results indicating that the number one reason listeners tuned-in to Internet radio was that “it provides audio content you cannot get otherwise” (quoting JOAN FITZGERALD & LARRY ROSIN, RADIO AND E-COMMERCE: THE ARBITRON INTERNET LISTENING STUDY II 23 (1999), <http://www.arbitron.com/downloads/E-Commerce.pdf>)).

27. Entrance into the terrestrial radio market has traditionally been heavily regulated by the communications industry. See generally DiCola, *supra* note 20. This is not so for Internet radio. For example, one online guide to starting your own Internet radio station claims that you can start a “legal [I]nternet radio station for less than \$40,” assuming you have a computer that is “3 years old or newer” and a broadband Internet connection. ILikeTunes.com, Building Your Dream: How to Start an Internet Radio Station, <http://www.iliketunes.com/stationguide.asp> (last visited Feb. 8, 2008).

28. Assael, *supra* note 15, at 32. See CRB Determination, 72 Fed. Reg. at 24,084–86.

29. See, e.g., Elliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED MAGAZINE, Mar. 6, 2007, available at <http://www.wired.com/entertainment/music/news/2007/03/72879> (last visited Nov. 9, 2007) (“Larger services that offer *thousands of channels*, such as the free Pandora, are also facing a huge spike in royalty costs.”) (emphasis added).

30. See, e.g., Peter Passell, *Coast-to-Coast Radio Without Squawk or Fade*, N.Y. TIMES, Nov. 27, 1994, at F8 (explaining that “signals from [radio] transmission towers will always have limited range.”). Similar to Internet radio, HD and satellite radio also offer a stronger and clearer reception than traditional analog radio. See Glenn Fleishman, *Revolution on the Radio*, N.Y. TIMES, July 28, 2005, at C11.

31. See Kidd, *supra* note 26, at 363 n.148 (“This lower payment schedule will ensure that Internet radio continues to offer consumers a nearly endless number of listening choices . . .”) (quoting Rep. Karen McCarthy, 148 Cong. Rec. 19,283 (2002)).

traditional radio dial. Once you start listening to Internet radio, the limits of AM and FM—a limited number of stations, within a limited geographical area—seem like a throwback to another era. Net radio provides possibilities for listening well beyond the advertising-soaked sameness of the commercial stations available.<sup>32</sup>

Internet radio's success has not gone unnoticed. Advertisers have certainly started to follow listeners to Internet radio. In fact, Bridge Ratings projects that advertising revenue from Internet radio may even surpass that of traditional radio in 2008 and will continue to increase as Internet radio attracts more listeners.<sup>33</sup> Moreover, the recording industry has taken notice of Internet radio's success. After suffering years of declining record sales, the industry has recently put more and more pressure on Congress to strengthen federal protection of sound recording in order to realize Internet radio's potentially lucrative and previously untapped revenue stream.<sup>34</sup> Unfortunately, recent increases in federal protection of sound recordings—particularly as reflected by the current royalty system—threaten the very diversity that has made Internet radio a successful alternative to terrestrial radio.<sup>35</sup>

---

32. HILLIARD & KEITH, *supra* note 11, at 178 (quoting critic Allan Hoffman).

33. Bridge Ratings, *HD vs. Internet Radio* (Aug. 8, 2007), [http://www.bridgeratings.com/press\\_08.08.07.HDvs Internet.htm](http://www.bridgeratings.com/press_08.08.07.HDvs%20Internet.htm) (last visited Nov. 25, 2007). Unfortunately, increased ad revenue alone has not proven sufficient to counterbalance or fully account for recent increases in royalty rates. In fact, since the latest rates became effective, many webcasters have either been forced to shut down or cut back on the number of music streams offered to the public, or even restrict the number of listeners able to tune-in to the station at a given time. Hiawatha Bray, *Internet Radio Firms Say Royalties Limiting Choices*, THE BOSTON GLOBE, Mar. 14, 2008, at C1. If increased ad revenue sufficiently accounted for increased royalty costs, webcasters would be adding listening streams and trying to attract more listeners rather than decreasing those amounts, given that an advertiser's willingness to pay is directly tied to the number of consumers its advertising reaches.

34. See, e.g., Assael, *supra* note 15, at 32 ("If our artists aren't making money from CD sales, we think they should make money from [all Internet radio broadcasts].") (quoting John Simson, Executive Director of SoundExchange); All Access Music Group, *Exclusive: SoundExchange's Simson Ties Royalty to New Artist Airplay*, Nov. 19, 2007, (on file with author) available at <http://www.allaccess.com/site/features/index.php?bs=sk&sn=interviews&f=%3Cspan%20class=simson&ag=172> ("What you have to recognize is that radio play can be substitute [sic] for CD sales." (quoting John Simson, Executive Director of SoundExchange)). Since the recording industry is targeting Internet radio as a way to make up lost record sales, should it not also be targeting terrestrial and satellite radio and trying to get those media outlets to pay equivalent digital performance royalties? Is not the only significant difference between these types of radio the *medium* over which content is broadcast? This Recent Development suggests that, in fact, medium is the only relevant difference between terrestrial, Internet, and satellite radio, and that this distinction is insufficient to justify the disparate treatment of broadcasters concerning royalty rates.

35. Bray, *supra* note 33, at C5 ("Critics of the royalty system say the result [of increased royalties] is decreasing musical diversity on the Internet . . . 'Your Internet radio is going to sound like your AM and FM.'") (quoting Johnie Floater, general manager of media for Live365).

### B. Federal Protection of Sound Recordings

Section 102 of the Copyright Act of 1976 extends federal copyright protection to eight types of works, including “musical works” and “sound recordings.”<sup>36</sup> A musical work consists of the underlying notes and lyrics of a song, while a sound recording results from the specific fixation or recording of a song.<sup>37</sup> Thus, one musical work may have multiple sound recordings, depending on the number of times the work is recorded.<sup>38</sup>

Historically, federal copyright law has granted copyright owners of musical works the exclusive right to publicly perform their works.<sup>39</sup> The same cannot be said for owners of sound recordings, who did not even enjoy federal copyright protection until 1971, when Congress passed the Sound Recording Amendment (“SRA”) in an attempt to fight the growing threat of recording piracy.<sup>40</sup> While the SRA granted owners of sound recordings provisional rights to reproduce and distribute their sound recordings—rights that became permanent under the Copyright Act of 1976<sup>41</sup>—it did not grant them the public performance right they had been lobbying for since the 1920s.<sup>42</sup> It would be 1995 before Congress finally granted sound recording owners (part of) what they had been asking for.

#### 1. The DPRA

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (“DPRA”).<sup>43</sup> The DPRA extended federal copyright protection of sound recordings by adding § 106(6) to the Copyright Act of

---

36. 17 U.S.C.A. § 102 (West 2006).

37. *See*, 17 U.S.C. § 101 (2004); CRB Determination, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

38. CRB Determination, 72 Fed. Reg. at 24,086.

39. The public performance right for musical compositions dates back to the year 1856. WILLIAM F. PATRY, *PATRY ON COPYRIGHT*, § 14:3, at 14-7, § 14:4, at 14-8 (2007) (explaining that “[t]he 1909 [Copyright] Act continued the 1856 public performance right for dramatic works and musical compositions”).

40. *Bonneville Int’l Corp. v. Peters (Bonneville Two)*, 347 F.3d 485, 487 (3rd Cir. 2003); Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391. Sound recordings made prior to February 17, 1972—the effective date of the SRA—are protectable under common and/or state law until February 15, 2047. U.S. Copyright Office, *Copyright Registration for Sound Recordings*, Circular 56, (2007), available at <http://www.copyright.gov/circs/circ56.pdf>.

41. *Bonneville Int’l Corp. v. Peters (Bonneville One)*, 153 F.Supp.2d 763, 766 (E.D. Penn. 2001), *aff’d*, 347 F.3d 485 (3rd Cir. 2003). *See* Copyright Act of 1976, Pub. L. No. 93-573, 88 Stat. 1873 (1974).

42. *Bonneville One*, 153 F.Supp.2d at 766; PATRY, *supra* note 39, at §14:29 (explaining that after 75 years of lobbying Congress granted sound recording owners a limited public performance right).

43. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) [hereinafter DPRA].

1976.<sup>44</sup> This section granted sound recording owners the limited right to publicly perform or authorize the public performance of their sound recordings “by means of a digital audio transmission.”<sup>45</sup> Congress enacted the DPRA at the behest of a recording industry just beginning to worry that advances in digital recording might lead to fewer sales of recorded music.<sup>46</sup> The rationale underlying the industry’s worry was simple: If technology continued to progress such that users could make and freely transmit “perfect” digital copies of sound recordings, these copies would replace (or at least negatively impact) physical sales of recorded music.<sup>47</sup> While Congress seems to have accepted the recording industry’s rationale, the performance right it granted to copyright owners of sound recordings was different from the performance right enjoyed by copyright owners of musical works. The new “digital performance right” of § 106(6), as it came to be known,<sup>48</sup> had significant limitations.

One major limitation of the digital performance right was the DPRA’s implementation (by means of amendment to the Copyright Act) of a statutory licensing scheme for sound recordings.<sup>49</sup> A new § 114 allowed certain “qualified”<sup>50</sup> services to publicly perform sound recordings without consent from or negotiation with sound recording owners as long as proper royalties were paid.<sup>51</sup> Copyright owners and users could voluntarily negotiate this royalty rate amongst themselves.<sup>52</sup> If they failed to agree on an industry-wide licensing rate, either party could petition the Librarian of Congress to convene a Copyright Arbitration Royalty Panel (“CARP”), which would then determine reasonable rates.<sup>53</sup>

---

44. *Id.*

45. DPRA § 106(6).

46. *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 488 & n.4 (3rd Cir. 2003) (explaining that when the DPRA was passed “the possible role of the commercially-nascent Internet in the transmission of music was not yet significant enough to be considered.”).

47. Paul Maloney, *Copyright Law and the CRB: What Went Wrong?*, RADIO AND INTERNET NEWSLETTER, Mar. 16, 2007, <http://textpattern.kurthanson.com/crb/53/copyright-law-and-the-crb-what-went-wrong>. In fact, digital copies of sound recordings are not “perfect” copies; they are “exact” copies.” *Id.*

48. CRB Determination, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

49. *See* 17 U.S.C. § 114 (1995).

50. *Bonneville Int’l Corp. v. Peters*, 153 F.Supp.2d 763, 768 n.5 (E.D. Penn. 2001). To qualify for a statutory license, digital audio transmitters (1) could not be “interactive;” (2) could “not use a signal that causes the receiver to change from one program channel to another;” (3) could “not preannounce the broadcast of particular songs;” and (4) were required, if feasible, to “include various information about the recording being transmitted.” In other words, interactive and subscription services still had to directly negotiate licenses from sound recording owners.

51. *Id.* at 767. Further, sound recording owners cannot prevent qualified users from using their works. *Id.* at 767–68.

52. *Id.*; DPRA § 114(e)(1).

53. *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 489 (3rd Cir. 2003); DPRA § 114(f)(2).

Under the DPRA, a CARP was directed to calculate digital performance royalty rates with the goal of achieving the following policy objectives of § 801(b)(1) of the Copyright Act:

(A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.<sup>54</sup>

As explained below, the Digital Millennium Copyright Act of 1998 (“DMCA”) replaced this policy-based standard for determining digital performance royalties with the arm’s-length willing buyer/willing seller standard.<sup>55</sup> However, it should be noted that the § 801(b) policy-based standard was not discarded altogether; It continues to be the standard by which the CRB sets royalty rates for all other forms of radio subject to the § 114 statutory license (i.e. satellite radio).<sup>56</sup>

Congress further limited the digital performance right by providing exemptions from the new statutory licensing scheme in § 114(d)(1)(A). In particular, it provided that non-interactive, “nonsubscription broadcast transmission[s]” were exempt from paying digital performance royalties.<sup>57</sup> The classic example of such a transmission is a traditional over-the-air radio broadcast.<sup>58</sup> Congress explained that it did “not want to impose any ‘new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.’”<sup>59</sup> Interestingly, webcasters were initially able to take advantage of this exemption because, at the time the law was written, Internet speeds were still slow and webcasting technology was still in its developmental

---

54. Copyright Act of 1976, Pub. L. No. 94-553, §§ 801(b)(1)(A)–(D), 90 Stat. 2541 (1976); see DPRA § 114(f)(2).

55. See *infra* Part II.C.2.

56. See In the Matter of Determination of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, No. 2006-1, available at <http://www.loc.gov/crb/proceedings/2006-1/sdars-final-rates-terms.pdf>; Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 71 Fed. Reg. 1455 (Jan. 9, 2006).

57. DPRA, § 114(d)(1)(A)(iii).

58. *Bonneville Two*, 347 F.3d at 488.

59. *Id.* (quoting H.R. REP. NO. 104-274, at 14 (1995)).

stages.<sup>60</sup> However, this apparent oversight (and the loophole it created for webcasters) would be addressed in 1998, the year Congress passed the DMCA.

## 2. The DMCA

Congress's enactment of the Digital Millennium Copyright Act of 1998 ("DMCA") significantly amended § 114's digital performance right.<sup>61</sup> The recording industry was again the impetus behind enactment of the DMCA, much as it had been with the DPRA. The difference this time was that the industry was really convinced that technology advancements, including those made in Internet radio technology, were causing people to buy fewer records.<sup>62</sup> Accordingly, the industry pushed Congress for stronger protection of sound recordings, and Congress responded by expanding the scope of § 114's compulsory licensing scheme.<sup>63</sup>

In drafting the DMCA, Congress clarified the nature of webcasters' relationship to the § 114 compulsory license by amending § 114(d)(1)(A) so as to make non-interactive, Internet-only webcasting explicitly subject to the statutory licensing scheme.<sup>64</sup> In addition, Congress removed two exemptions from § 114(d) that may have caused some confusion for Internet-only webcasters.<sup>65</sup> But while Congress clarified Internet-only webcasters' relationship to the statutory licensing scheme, it failed to explain simulcasting webcasters' relationship to the licensing scheme with the same specificity.

After the DMCA was passed, simulcasting radio stations still argued that digital retransmissions qualified as § 114(d)(1)(A) "nonsubscription broadcast transmissions" since Congress had left that section untouched when drafting the DMCA.<sup>66</sup> Thus, in March of 2000, the Recording Industry Association of America ("RIAA") petitioned the Copyright Office for a rulemaking to clarify whether these simulcasters were exempt from or subject to the statutory licensing scheme.<sup>67</sup> On December 11, 2000, the Register of Copyrights issued an administrative final ruling that "AM/FM broadcast signals transmitted

---

60. Matt Jackson, Comment, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 457 (2003).

61. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA].

62. *Bonneville Two*, 347 F.3d at 489.

63. CARP Determination, 67 Fed. Reg. 45,240 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

64. *Id.* See DMCA §§ 114(d)(2), 114(f)(2).

65. *Bonneville Two*, 347 F.3d at 489.

66. *Bonneville Int'l Corp. v. Peters*, 153 F.Supp.2d 763, 765 (E.D. Penn. 2001).

67. *Bonneville Two*, 347 F.3d at 489-90. See RIAA, Who We Are, <http://www.riaa.com> (last visited Apr. 8, 2008) ("The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry." Its "members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.").

simultaneously over a digital communications network, such as the Internet, [were] not exempted by § 114(d)(1)(A).”<sup>68</sup> Simulcasters challenged this ruling on constitutional grounds, arguing that it was promulgated in excess of the Copyright Office’s statutory authority.<sup>69</sup> Both the district court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals upheld the Copyright Office’s ruling as constitutional.<sup>70</sup> As a result, simulcasters joined Internet-only webcasters under § 114’s licensing scheme.

Maybe more significant, though, was the fact that the DMCA changed the standard by which § 114 compulsory licensing rates were determined. Under the DPRA, Congress had directed digital performance royalty rates to be calculated with the aim of achieving the policy objectives of § 801(b)(1) of the Copyright Act.<sup>71</sup> But under the DMCA, Congress discarded these policy objectives in favor of a new standard pursuant to which royalty rates should “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”<sup>72</sup>

### III. THE ROYALTY RATE DETERMINATIONS

Three different adjudicatory bodies have been charged with the task of setting copyright royalty rates. The first was the Copyright Royalty Tribunal (“CRT”), created under the Copyright Act of 1976 as part of the legislative branch.<sup>73</sup> The CRT set statutory license rates for cable retransmissions, jukeboxes, recordings, and noncommercial broadcasts of protected works.<sup>74</sup> The CRT existed until December 17, 1993, when it was replaced by an ad hoc Copyright Arbitration Royalty Panel (“CARP”) system pursuant to the Copyright Tribunal Reform Act of 1993.<sup>75</sup> Once a CARP convened for a particular proceeding, it had 180 days to recommend royalty rates to the Librarian of Congress.<sup>76</sup> The Librarian of Congress, after consulting with the

---

68. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (codified at 37 C.F.R. pt. 201).

69. *Id.* at 77,293.

70. *See Bonneville Two*, 347 F.3d 485, 487 (3rd Cir. 2003).

71. DPRA, Pub. L. No. 104-39, § 114(f)(2), 109 Stat. 336 (1995); *see* Copyright Act of 1976, Pub. L. No. 94-553, § 801(b)(1), 90 Stat. 2541 (1976).

72. DMCA, Pub. L. No. 105-304, § 114(f)(2)(B), 112 Stat. 2860 (1998).

73. Copyright Act of 1976 § 801 *et seq.*

74. *Id.* The CRT consisted of five commissioners appointed to seven-year terms by the President with advice and consent from the Senate. Copyright Act of 1976 § 802.

75. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993). A CARP consisted of three members: two chosen by the Librarian of Congress on recommendation from the Register of Copyrights, and a third chosen by the first two members to act as chairperson. All members were chosen from lists provided by professional arbitration associations. Copyright Royalty Tribunal Reform Act of 1993 § 802 (1993).

76. Copyright Royalty Tribunal Reform Act of 1993 § 802(e).

Register of Copyrights, had sixty days to accept or reject a panel's rate recommendation.<sup>77</sup> The CARP system existed until 2004, when it was replaced by the current Copyright Royalty Board ("CRB") pursuant to the Copyright Royalty and Distribution Reform Act.<sup>78</sup> The CRB consists of three Copyright Royalty Judges who serve for six-year, staggered terms.<sup>79</sup>

In 2002, the Librarian of Congress made the first-ever determination of webcaster digital performance royalties upon rejecting rates recommended by a CARP.<sup>80</sup> Five years later, in 2007, the CRB made the second-ever determination of such royalties.<sup>81</sup> In making these determinations, both entities employed the same willing buyer/willing seller standard.<sup>82</sup>

In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall 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 arbitration royalty panel may consider the rates and terms for comparable types of digital audio

---

77. Copyright Royalty Tribunal Reform Act of 1993 § 802(f).

78. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004).

79. Copyright Royalty Board, <http://www.loc.gov/crb/background> (last visited Apr. 8, 2008). Currently, James Scott Sledge, William J. Roberts, and Stanley C. Wisniewski are the Copyright Royalty Judges, with Sledge acting as Chief Judge. They were appointed on January 11, 2006. *Id.*

80. See CARP Determination, 67 Fed. Reg. 45,240 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

81. See generally CRB Determination, 72 Fed. Reg. 24,084 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule).

82. CARP Determination, 67 Fed. Reg. at 45,243-44; CRB Determination, 72 Fed. Reg. at 24,087.

transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A) [of § 114(f)(2)].<sup>83</sup>

Both rate determinations are explained below, with emphasis on the CRB's 2007 decision.

A. *The 2002 Rate Determination*

In July of 2001, the CARP began proceedings to determine webcaster royalty rates for two separate licensing periods, ranging from October 28, 1998 to December 31, 2002.<sup>84</sup> During the proceedings, the CARP considered differing rate proposals from the RIAA and individual webcasters.<sup>85</sup> The RIAA proposed a royalty of either \$.004 *per performance* or 15% of a webcaster's gross revenue; in addition, it suggested that each webcaster pay a minimum annual fee of \$5,000 per webcasting service.<sup>86</sup> The RIAA derived these proposed rates from twenty-six voluntarily negotiated agreements between itself and individual webcasters.<sup>87</sup> Webcasters, on the other hand, proposed rates of \$.00014 *per song*, \$.0021 per hour, or 3% of a webcaster's gross revenue, to be paid in addition to a minimum annual fee of \$250.<sup>88</sup>

The CARP began by considering whether any of the RIAA's twenty-six agreements represented the price that willing buyers and sellers would have agreed to in the hypothetical marketplace.<sup>89</sup> It determined that one agreement, between Yahoo! and the RIAA, was sufficiently representative.<sup>90</sup> The other twenty-five agreements were disregarded on the grounds that many of them were between the RIAA and smaller webcasters, whose bargaining power was unequal to that of the RIAA.<sup>91</sup> Based largely on the Yahoo! agreement, the CARP determined that Internet-only webcasters should pay \$.00014 per

---

83. 17 U.S.C. § 114(f)(2)(B)(1998). Compare 17 U.S.C. § 114(f)(2)(B)(1998) and § 114(f)(2)(B)(2004) to note changes in the statutory language made after the CRB replaced the CARP.

84. CARP Determination, 67 Fed. Reg. at 45,241.

85. *Id.* at 45,241–42.

86. *Id.* at 45,241. In addition to charging the CARP with setting royalty rates, the Copyright Act directed the panel to set a “minimum fee for each such type of service.” § 114(f)(2)(B)(1998). Note also that paying a “per-performance” royalty is the equivalent of paying a royalty “per song, per listener”—meaning that the royalty is calculated by multiplying the royalty rate for broadcasting one song by the number of listening devices receiving that broadcast at a certain time. *See id.* at 45,273.

87. CARP Determination, 67 Fed. Reg. at 45,241.

88. *Id.* at 45,242. Compared to a “per-performance” royalty, a “per-song” royalty is paid for a single transmission regardless of how many people hear it at the time. *See id.* at 45,273.

89. CARP Determination, 67 Fed. Reg. at 45,244–45.

90. *Id.* at 45,245.

91. Jeremy Delibero, *Copyright Arbitration Royalty Panels and the Webcasting Controversy: The Antithesis of Good Alternative Dispute Resolution*, 5 PEPP. DISP. RESOL. L.J. 83, 95–96 (2005).

performance, that simulcasters should pay \$0.0007 per performance, and that each webcasting service should pay an additional minimum annual fee of \$500.<sup>92</sup> The CARP recommended these rates to the Librarian of Congress in February of 2002.<sup>93</sup>

Upon recommendation from the Register of Copyrights, the Librarian of Congress rejected the CARP's suggested rates because they did not reflect the true rates that willing buyers and sellers would have agreed to in the marketplace.<sup>94</sup> Accordingly, the Librarian reduced the proposed rate for Internet-only webcasters from \$0.0014 to \$0.0007 in order to achieve parity with the simulcasting rate.<sup>95</sup> However, the Librarian upheld the \$500 minimum annual fee as reasonable in light of administrative licensing costs.<sup>96</sup> The main reason the Librarian of Congress reduced the Internet-only webcasting rate was a lack of evidence in the record showing that Internet-only webcasting was of less promotional value to copyright owners than was simulcasting.<sup>97</sup> Apparently, the CARP assumed this fact when it decided that Internet-only webcasters should pay higher rates than simulcasters.<sup>98</sup> After reducing the Internet-only rate, the Librarian of Congress issued his final determination of rates on July 8, 2002.<sup>99</sup> These rates would be short-lived, though, given that the licensing period was scheduled to expire on December 31 of that same year.<sup>100</sup>

Fortunately, the Librarian of Congress was aware of this fact.<sup>101</sup> In January of 2002, before rates for the 1998 to 2002 licensing period were

---

92. U.S. COPYRIGHT OFFICE, REPORT OF THE COPYRIGHT ARBITRATION ROYALTY PANEL, APP. A, SUMMARY OF ROYALTY RATES FOR § 114(f)(2) and § 112(e) STATUTORY LICENSES A-1 (2002), [http://www.copyright.gov/carp/webcasting\\_rates\\_a.pdf](http://www.copyright.gov/carp/webcasting_rates_a.pdf). See also U.S. COPYRIGHT OFFICE, SUMMARY OF THE DETERMINATION OF THE LIBRARIAN OF CONGRESS ON RATES AND TERMS FOR WEBCASTING AND EPHEMERAL RECORDINGS, [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html) (2003).

93. CARP Determination, 67 Fed. Reg. at 45,241.

94. *Id.* at 45,243. Marybeth Peters was the Register of Copyrights at this time; James H. Billington was the Librarian of Congress. *Id.* at 45,276.

95. *Id.* at 45,272. The Librarian of Congress reviewed the CARP's recommendation under an arbitrary and capricious standard. *Id.* at 45,242–43.

96. *Id.* at 45,272. See also 37 C.F.R. 261.3(e) (2007).

97. CARP Determination, 67 Fed. Reg. at 45,252 (“The fundamental flaw in the Panel’s analysis . . . is the Panel’s determination that the differential rate structure reflects a true distinction in value between Internet-only transmissions and radio retransmissions based upon the promotional value to the record companies and performers due to airplay of their music by local radio stations.”).

98. *Id.*

99. *Id.* at 45,240.

100. *Id.* at 45,241.

101. See Digital Performance Right in Sound Recordings and Ephemeral Recordings, 69 Fed. Reg. 5,693, 5,694 (Feb. 6, 2004) (codified at 37 C.F.R. pts. 262–63) [hereinafter 2003 Determination].

recommended by the CARP, the Librarian had initiated proceedings to set rates for the upcoming 2003 to 2004 licensing period.<sup>102</sup> Even with this head start, however, the Librarian would not issue his final ruling on rates for the 2003 to 2004 period until February 6, 2004.<sup>103</sup> Interestingly, these rates would largely be influenced by webcasters' reaction to the Librarian's 2002 rates.<sup>104</sup>

Neither the RIAA nor webcasters were pleased with the Librarian's 2002 determination of rates under the willing buyer/willing seller standard. Webcasters in particular responded with vocal opposition, claiming that the rates were excessive to the point they would likely drive webcasters of all sizes out of business.<sup>105</sup> The controversy prompted litigation, appeals, and proposed legislation as webcasters explored a variety of means for obtaining relief from the rates. For instance, those that partook in the CARP proceedings appealed to the United States Court of Appeals for the District of Columbia Circuit.<sup>106</sup> Smaller webcasters, many of whom did not partake in the CARP proceedings because of the excessive costs required to do so,<sup>107</sup> pursued other options. Most notably, small webcasters petitioned Congress for legislative relief. As a result, small webcasters gained support for their cause under the guise of a proposed bill, entitled the Internet Radio Fairness Act ("IRFA"), which managed to pinpoint a serious problem with the royalty rate system.<sup>108</sup> Significantly, the IRFA would have eliminated the willing buyer/willing seller as the guidepost for future determinations of digital performance royalties.<sup>109</sup>

---

102. *Id.*

103. *Id.* at 5,693.

104. *See id.* at 5,693–95.

105. *See, e.g.,* Paul Maloney, *Today is the Day of Silence*, RADIO AND INTERNET NEWSLETTER, May 1, 2002, <http://www.kurthanson.com/archive/news/050102/index.shtml> ("Decrying a government-proposed royalty rate on musical recordings that they say would make operating their businesses impossible, hundreds of webcasters and broadcasters—totaling literally thousands of streams—are suspending their normal programming today."). Many webcasters actually ceased webcasting because of the 2002 rates. *See, e.g.,* Jefferson Graham, *Royalty Fees Killing Most Internet Radio Stations*, USA TODAY, July 22, 2002, at D1 ("More than 200 Internet-based radio stations have shut down because of a royalty fee that takes effect in September, and more are closing daily.").

106. *See* Stuart A. Maxey, Note, *That CARP is No Keeper: Copyright Arbitration Royalty Panels—Change is Needed, Here is Why, and How*, 10 J. INTELL. PROP. L. 385, 395 (2003).

107. *Id.* at 395–96 (discussing the costs of CARP proceedings). *See also* Copyright Arbitration Panel (CARP) *Structure and Process: Hearing before the House Subcomm. on Courts, the Internet, and Intellectual Prop.*, 107th Cong. 3 (2002), available at <http://permanent.access.gpo.gov/websites/www.judiciary.house.gov/media/pdfs/80194.pdf> (Rep. Howard L. Berman explains the often great expense of participating in a CARP proceeding).

108. *See* H.R. 5285, 107th Cong. (2002) (introduced by Rep. Jay Inslee, D-WA, on July 26, 2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_bills&docid=f:h5285ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5285ih.txt.pdf).

109. *Id.* ("Section 114(f)(2)(B) of [17 U.S.C.] is amended—(1) by striking 'Such rates and terms shall distinguish' and all that follows through 'capital investment, cost, and risk.'; and (2)

But, the IRFA never became law.<sup>110</sup> Instead, an untimely failure in negotiations between the RIAA and webcasters led Congress to pass the Small Webcasters Settlement Act of 2002 (“SWSA”), which effectively negated any immediate need for the IRFA.<sup>111</sup>

The SWSA empowered SoundExchange,<sup>112</sup> then the royalty collection arm of the RIAA, to directly negotiate royalty rates with small commercial and noncommercial webcasters.<sup>113</sup> It also provided the parties with an additional six to twelve months in which to negotiate lower rates.<sup>114</sup> Under the SWSA, any agreement reached between SoundExchange and webcasters would be published in the Federal Register.<sup>115</sup> Further, qualified webcasters could opt-in to those agreements instead of paying the Librarian of Congress’s default rates.<sup>116</sup>

After President Bush signed the SWSA into law on December 4, 2002, SoundExchange and a group of small commercial webcasters negotiated a settlement agreement that allowed “small” webcasters to retroactively pay the greater of 8% of their revenue or 5% of their expenses for the period of 1998 to 2002.<sup>117</sup> For 2003 and 2004, small webcasters could pay the greater of 7% of

---

by inserting after ‘as the parties may agree.’ the following: ‘The copyright arbitration royalty panel shall establish rates and terms in accordance with the objectives set forth in section 801(b)(1).’”).

110. See THE LIBRARY OF CONGRESS, BILL SUMMARY & STATUS FOR THE 107TH CONGRESS: H.R. 5285, <http://thomas.loc.gov/>.

111. See Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) (hereinafter SWSA), available at <http://www.copyright.gov/legislation/pl107-321.pdf>. The SWSA resulted from The Helms Amendment to the Small Webcaster Amendments Act of 2002, H.R. 5469, 107th Cong. (2002) (emphasis added). See Kidd, *supra* note 26, at 355–360.

112. See SoundExchange, <http://soundexchange.com> (“SoundExchange is an independent, nonprofit performance rights organization that is designated by the U.S. Copyright Office to collect and distribute digital performance royalties for featured recording artists and sound recording copyright owners . . . SoundExchange currently represents over 3,500 record labels and over 31,000 featured artists.”) (last visited Ap. 13, 2008). CRB Determination, 72 Fed. Reg. 24,084, 24,102 & n.59 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (explaining that SoundExchange once was an unincorporated division of the RIAA, but is now an independent entity).

113. Kidd, *supra* note 26, at 358–59 (“Noncommercial stations were given until June 20, 2003 and small commercial webcasters until December 15, 2003 to negotiate royalty rates [with SoundExchange].”).

114. *Id.* at 359.

115. *Id.*

116. *Id.* at 361–62.

117. See Notification of Agreement under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510, 78,510–11 (Dec. 24, 2002) (not codified in 37 C.F.R. pt. 261) [hereinafter First Agreement]. To qualify as an “eligible small webcaster” under this agreement, a webcaster’s gross revenue could not exceed \$1 million to \$1.25 million from 1998 to 2004. *Id.* at 78,513, App. A (appendix not codified).

their expenses or 10% of their first \$250,000 in revenue, plus 12% of any revenue above that amount.<sup>118</sup>

On May 20, 2003, a second SWSA settlement set alternate rates for all nonsubscription webcasting services (including large and small commercial webcasters) for 2003 and 2004.<sup>119</sup> Significantly, this broader agreement gave nonsubscription services the option to choose between per-performance and per-aggregate-tuning-hour (“ATH”) payment schemes.<sup>120</sup> The per-performance rate was set at \$0.000762; the per-ATH option ranged from \$0.000762 to \$0.0117, depending on the type of programming involved.<sup>121</sup>

Finally, a third SWSA agreement between SoundExchange and noncommercial webcasters was published on June 11, 2003, with similar terms to the May 20th agreement.<sup>122</sup> Under these three agreements, SoundExchange essentially agreed to industry-wide rates that were lower and offered more payment options than the Librarian of Congress’s default rates.<sup>123</sup> Webcasters who had opted-in to any prior SWSA settlement agreement could notify SoundExchange in writing if they wanted to opt-in to any later SWSA agreement.<sup>124</sup> Because the industry-wide SWSA settlement agreements extended through 2004, the Librarian of Congress did not need to convene a CARP to determine the default 2003 and 2004 licensing rates.<sup>125</sup> The Librarian merely adopted the negotiated rates, and webcasters ended up paying these rates through 2005 and 2006.<sup>126</sup>

Overall, while the SWSA provided webcasters with some short-term relief from the CARP’s 2002 rate determination, it ultimately failed to address the

---

118. *Id.* at 75,111.

119. *See* Digital Performance Right in Recordings and Ephemeral Recordings, 68 Fed. Reg. 27,506, 27,506–07 (May, 20, 2003) (codified at 37 C.F.R. pt. 262) [hereinafter Second Agreement]. Note that this agreement actually superseded and amended a May 1, 2003 settlement agreement. *Id.* at 27,506. *See* 68 Fed. Reg. 23,241, 23,241–43 (May 1, 2003).

120. Second Agreement, 68 Fed. Reg. at 27,508–09. An aggregate tuning hour (“ATH”) is a method of calculating the total number of hours of programming transmitted by webcasters to listeners across the country. Thus, one ATH is the equivalent of one listener listening for one hour, or two listeners listening for half an hour each, and so on. *See, e.g.*, CRB Determination, 72 Fed. Reg. 24,084, 24,110 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (defining Aggregate Tuning Hours).

121. Second Agreement, 68 Fed. Reg. at 27,508–09.

122. Notification of Agreement under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008–12 (June 11, 2003) [hereinafter Third Agreement]. *See also* Second Agreement, 68 Fed. Reg. at 27,510.

123. *See* Third Agreement, 68 Fed. Reg. at 35,009–11. *See also* Second Agreement, 68 Fed. Reg. at 27,510.

124. Third Agreement, 68 Fed. Reg. at 35,009–10.

125. Second Agreement, 68 Fed. Reg. at 27,506.

126. *Id.* However webcasters would only get the benefit of these rates for 2005 since the CRB’s 2007 rate determination applied retroactively to 2006. CRB Determination, 72 Fed. Reg. 24,084, 24,084 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

underlying problem pinpointed by the IRFA, namely, the flawed standard by which webcaster royalty rates are determined under the Copyright Act. Thus, the willing buyer/willing seller standard survived to see a second rate determination.

*B. The 2007 Rate Determination*

After replacing the CARP system in 2004, the CRB received its first case in early 2005 when it was petitioned to set new webcaster royalty rates for the licensing period of January 1, 2006 to December 31, 2010.<sup>127</sup> After an initial discovery period and the filing of written statements, twenty-three parties remained to make their cases before the CRB.<sup>128</sup> Litigation consumed half of 2005 and all of 2006.<sup>129</sup> The CRB made its initial determination of rates and terms on March 2, 2007, three months after hearing closing arguments.<sup>130</sup> The CRB's decision was met by motions for rehearing filed by nearly all parties.<sup>131</sup> All such motions, however, were subsequently denied because none of them demonstrated that the CRB's initial determination was unsupported by the evidence, was erroneous, was contrary to legal requirements, or justified the introduction of new evidence.<sup>132</sup> The CRB issued its final ruling on May 1, 2007.<sup>133</sup>

In that ruling, the CRB began by laying out the willing buyer/willing seller standard pursuant to which the Copyright Royalty Judges ("Judges") would attempt to determine the prices that webcasters and record companies would

---

127. CRB Determination, 72 Fed. Reg. at 24,084–86.

128. *Id.* ("The parties to this proceeding are: (i) Digital Media Association and certain of its member companies that participated in this proceeding, namely: America Online, Inc. ("AOL"), Yahoo!, Inc. ("Yahoo!"), Microsoft, Inc. ("Microsoft"), and Live365, Inc. ("Live365") (collectively referred to as "DiMA"); (ii) "Radio Broadcasters" (this designation was adopted by the parties): namely, Bonneville International Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee ("NRBMLC"), Susquehanna Radio Corp.; (iii) SBR Creative Media, Inc. ("SBR") and the "Small Commercial Webcasters" (this designation was adopted by the parties): namely, AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, Discombobulated, LLC, 3WK, LLC, Radio Paradise, Inc.; (iv) National Public Radio, Inc. ("NPR"), Corporation for Public Broadcasting-Qualified Stations ("CPB"), National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC"), Collegiate Broadcasters, Inc. ("CBI"), Intercollegiate Broadcasting System, Inc., ("IBS"), and Harvard Radio Broadcasting, Inc. ("WHRB"); (v) Royalty Logic, Inc. ("RLI"); and (vi) SoundExchange, Inc. ("SoundExchange").").

129. *Id.* at 24,084–85.

130. *Id.* at 24,085.

131. *Id.* at 24,085 & n.2 ("Motions were filed by DiMA, IBS, WHRB, NPR, Radio Broadcasters, RLI, Small Commercial Webcasters, SoundExchange and CBI."). See *supra* note 128 for party abbreviations.

132. CRB Determination, 72 Fed. Reg. at 24,085–86.

133. *Id.* at 24,084.

have agreed to in a hypothetical market not restricted by a statutory license. The Judges granted that this hypothetical marketplace would invariably consist of “significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors.”<sup>134</sup> However, they determined that Congress would have been aware of these variations when it created the standard. Thus, they concluded that the language of the statute demonstrated Congress’s intent that the Judges make their determination of webcaster royalty rates “absent [these] special circumstances.”<sup>135</sup>

The CRB’s application of willing buyer/willing seller standard can be broken into two parts. The first addressed the most appropriate rate structure for webcasters; the second attempted to determine the exact rates that the parties would have agreed to in the hypothetical marketplace.

### 1. Appropriate Rate Structures

The CRB’s first task was to determine the most appropriate type of rate structure for commercial and noncommercial webcasters, respectively.<sup>136</sup> The CRB distinguished noncommercial and commercial webcasters on the basis that they “represent different segments of the marketplace.”<sup>137</sup> The Judges considered various proposals from SoundExchange and from webcasters in making its decision.<sup>138</sup> Commercial webcasters proposed a rate structure under which webcasters could elect to pay under per-performance, per-ATH, or percentage-of-revenue metrics.<sup>139</sup> SoundExchange proposed alternative payment metrics for commercial webcasters, consisting of per-performance and percentage-of-gross-revenue options.<sup>140</sup> After considering the parties’ proposals and expert witness testimony, the CRB decided that the appropriate rate structure for commercial webcasters was solely a per-performance usage rate.<sup>141</sup>

When small commercial webcasters objected that a percentage-of-revenue structure was necessary for the “nascent” Internet radio industry, or at least required for small entrepreneurs to grow their businesses, the Judges’ response was that small webcasters were not really as concerned with the *structure* of the rate as they were with the *amount* of the rate, the latter of which would

---

134. *Id.* at 24,087.

135. *Id.*

136. *Id.* at 24,088. A “commercial webcaster” is a webcaster and § 114 compulsory licensee, and is neither a nonprofit nor a government-owned organization. *See id.* at 24,111 (defining commercial and noncommercial webcasters).

137. CRB Determination, 72 Fed. Reg. at 24,091.

138. *Id.* at 24,088.

139. *Id.*

140. *Id.*

141. *Id.*

ultimately determine the financial viability of webcasters' businesses.<sup>142</sup> The Judges emphasized that it was not their job to "guarantee a profitable business to every market entrant" and commented that treating small webcasters differently from other webcasters would involve "making a policy decision rather than applying the willing buyer/willing seller standard of the Copyright Act."<sup>143</sup> Moreover, the Judges explained that they preferred a metric based on performances because it was "directly tied to the nature of the right being licensed," whereas "revenue merely serves as 'a proxy' for . . . 'performances.'"<sup>144</sup> Further, the Judges thought a revenue-based system would lead to auditing and enforcement problems and an overall increase in transaction costs.<sup>145</sup> For these reasons, the Judges decided that a per-performance metric alone was the most appropriate payment structure for commercial webcasters.

The CRB next turned its attention to noncommercial webcasters. Noncommercial webcasters had proposed a variety of distinct rate structures, most of which revolved around annual per-station flat fees.<sup>146</sup> For example, NPR proposed an annual \$80,000 flat fee that would cover all of its stations and would adjust annually for the cost of living.<sup>147</sup> SoundExchange, which believed that noncommercial and commercial webcasters should be treated alike, proposed the same per-performance and revenue-based structures that it had for commercial webcasters.<sup>148</sup> After considering the proposals and expert testimony, the CBR determined that the appropriate rate structure for noncommercial webcasters was "an annual flat per-station rate structure . . . up to a specified cap coupled with a per-performance rate for use by noncommercial services that exceed the cap."<sup>149</sup>

The CRB gave several reasons for its decision. Because noncommercial rates had traditionally been structured as flat-fee arrangements, the Judges decided to maintain this distinction from commercial webcasters.<sup>150</sup> Further, the Judges were worried that the line between noncommercial and commercial webcasters was starting to blur. The Judges decided to further preserve the distinction between the types of webcasters by placing a cap on the amount of

---

142. CRB Determination, 72 Fed. Reg. at 24,089 (quoting Kurt Hanson, CEO/President of AccuRadio, LLC) (emphasis added).

143. *Id.* at 24,088 n.8.

144. *Id.* at 24,089 (quoting Dr. Adam B. Jaffe, Brandeis University, professor in economics).

145. *Id.* at 24,089–90.

146. *Id.* at 24,090.

147. *Id.* (explaining that NPR has roughly 798 stations). Other proposed flat fees proposed by noncommercial webcasters ranged from a twenty-five dollar annual rate for smaller collegiate educational stations to \$500 per year for noncommercial music stations. *See, id.* at 24,090–91.

148. CRB Determination, 72 Fed. Reg. at 24,090.

149. *Id.* at 24,091.

150. *Id.*

hours a noncommercial station could broadcast under the flat fee.<sup>151</sup> If a noncommercial webcaster exceeded the hourly cap, it would have to pay royalties at commercial per-performance rates.<sup>152</sup>

In sum, the CRB concluded in the first part of its analysis that commercial webcasters should pay according to a per-performance rate and that noncommercial webcasters should pay an annual flat per-station rate, capped and coupled with a per-performance rate for any use in excess of the cap.

## 2. Royalty Rates in the Hypothetical Market

The second part of the CRB's analysis attempts to determine the royalty rates that would have been negotiated by willing buyers and sellers in a hypothetical marketplace not constrained by a statutory license.<sup>153</sup> Both SoundExchange and webcasters agreed that the best way to determine such rates would be to use comparable marketplace agreements as "benchmarks" for guidance.<sup>154</sup> However, the parties disagreed on how to define the hypothetical seller's marketplace: SoundExchange blamed webcasters for falsely characterizing the marketplace as perfectly competitive; webcasters claimed that SoundExchange viewed the marketplace as a monopoly in favor of the seller.<sup>155</sup>

In settling the dispute, the CRB referred to the CARP's 2002 analysis of the relevant marketplace.<sup>156</sup> The CARP had determined that the target market should be a "competitive" market—not a monopoly or a perfectly competitive market—in which record companies were the appropriate hypothetical seller.<sup>157</sup> The Judges adopted this definition of the pertinent target market; further, they chose to incorporate the two statutory factors of the willing buyer/willing seller test into their search for the most appropriate benchmark in the target market.<sup>158</sup>

The CRB accepted proposals from the parties on what they thought the appropriate benchmarks would be, again treating commercial and noncommercial webcasters separately.<sup>159</sup> Commercial webcasters suggested that the most appropriate benchmarks were agreements between webcasters and performing rights organizations concerning licenses to publicly perform musical works.<sup>160</sup> However, the CRB sided with SoundExchange and found

---

151. *Id.*

152. *Id.*

153. CRB Determination, 72 Fed. Reg. 24,084, 24,091.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 24,091–92.

159. CRB Determination, 72 Fed. Reg. 24,084, 24,092.

160. *Id.*

that the most suitable benchmarks were royalty agreements between record companies and large *interactive* webcasting services regarding sound recording licenses.<sup>161</sup> In accepting SoundExchange's proposal, the Judges reasoned that the interactive and non-interactive webcasting markets were reasonably similar, especially after adjustments were made to account for the ability of interactive-webcasting listeners to influence the programming they hear.<sup>162</sup> Further, the Judges rejected commercial webcasters' musical works benchmark because, while the buyers in both markets were the same, the sellers and the rights being sold in the two markets were different.<sup>163</sup> In other words, the CRB rejected commercial webcasters' benchmark because (1) those who typically sold public performance rights (i.e., performing rights organizations) differed from those who typically sold sound recording rights (i.e., record labels), and (2) public performance rights and sound recording rights were not sufficiently similar according to empirical evidence presented by SoundExchange, which showed that buyers paid much more for sound recording rights (e.g., in ring tones, digital downloads, music videos, etc.) than they did for public performance rights in musical works.<sup>164</sup>

After deciding to use SoundExchange's interactive webcasting benchmark, the CRB further decided to adopt the exact per-performance rates proposed by SoundExchange.<sup>165</sup> Thus, the CRB ruled that commercial webcasters have to pay the following royalties per song, per listener from 2006 to 2010: \$0.0008 for 2006, \$0.0011 for 2007, \$0.0014 for 2008, \$0.0018 for 2009, and \$0.0019 for 2010.<sup>166</sup> In addition to adopting SoundExchange's rate structure, the CRB also adopted SoundExchange's proposed minimum annual fee of \$500 per channel or station.<sup>167</sup> The Judges explained that the relevant purpose of the minimum fee was to prevent situations where it would cost the license administrator more to administer the license than the license administrator would receive in performance royalties from the licensee.<sup>168</sup>

The CRB next set out to determine the appropriate benchmark for noncommercial webcasters.<sup>169</sup> Following the same analysis, the CRB first analyzed the parties' proposals.<sup>170</sup> SoundExchange again proposed the same interactive webcasting benchmark that it had proposed for commercial

---

161. *Id.*

162. *Id.*

163. *Id.* at 24,094.

164. *Id.*

165. CRB Determination, 72 Fed. Reg. at 24,095.

166. *Id.* at 24,096.

167. *Id.* at 24,096–97.

168. *Id.* at 24,096.

169. *Id.* at 24,097.

170. *Id.*

webcasters.<sup>171</sup> Noncommercial webcasters argued that they were sufficiently different from commercial webcasters to warrant a unique benchmark.<sup>172</sup> Accordingly, they proposed two alternatives: one benchmark based on the rates that terrestrial radio stations pay to broadcast musical works over-the-air, and a second benchmark based on the rates found in a 1998-2004 agreement between NPR and SoundExchange concerning the streaming of sound recordings.<sup>173</sup>

After considering the proposals, the CRB determined that neither party's benchmarks adequately approximated the fee that noncommercial webcasters would have negotiated with record companies.<sup>174</sup> However, after determining that the administrative costs incurred by record companies in licensing rights to both noncommercial and commercial webcasters were the same, the CRB decided that these administrative costs would best serve as its benchmark.<sup>175</sup> Thus, the CRB concluded that the appropriate flat fee would be an annual \$500 minimum per-channel or station flat fee for all noncommercial webcasters.<sup>176</sup>

Furthermore, the CRB's new rate structure required an ATH cap above which noncommercial webcasters would pay commercial per-performance rates.<sup>177</sup> Recall that the purpose of the cap was to maintain the distinction between commercial and noncommercial stations.<sup>178</sup> SoundExchange argued for a cap at 14,600 ATH based on expert testimony suggesting that the typical noncommercial station averaged twenty simultaneous listeners at any given time.<sup>179</sup> But the CRB found that cap too limiting, especially after considering the terms of a 2001 agreement between NPR and SoundExchange, in which NPR negotiated substantially lower rates than commercial stations.<sup>180</sup> This evidence convinced the Judges that, because NPR was sufficiently distinct from commercial webcasters in SoundExchange's eyes, NPR's average ATH rates would be a good place at which to establish its ATH cap.<sup>181</sup> After consulting a 2004 survey regarding typical NPR streaming practices, the Judges found that NPR stations averaged 159,140 ATH per month (or 218 simultaneous listeners per station).<sup>182</sup> This was the ATH cap the CRB used.<sup>183</sup>

---

171. CRB Determination, 72 Fed. Reg. at 24,097.

172. *Id.* at 24,097.

173. *Id.* at 24,098.

174. *Id.* at 24,099.

175. *Id.*

176. *Id.*

177. CRB Determination, 72 Fed. Reg. at 24,099.

178. *Id.* at 24,091.

179. *Id.* at 24,099.

180. *Id.* ("Based on the available evidence, the typical NPR station . . . would not have been treated as the functional equivalent of a commercial station.").

181. *Id.* at 24,100.

182. *Id.* at 24,099.

183. CRB Determination, 72 Fed. Reg. at 24,100.

The CRB’s final ruling came down on May 1, 2007.<sup>184</sup> In its ruling, the CRB created a two year transition period (2006 and 2007) in which commercial webcasters could use ATH under previous rates to estimate usage and royalties.<sup>185</sup> The CRB’s final rates look like this:

Commercial Rates		Noncommercial Rates	
Year	Fee Per Performance	Year	Flat Rate Plus Commercial Rates
2006*	\$0.0008	2006 to 2010	\$500 per station or per channel up to 159,140 ATH per month, plus commercial rates in excess of cap.
2007*	\$0.0011		
2008	\$0.0014		
2009	\$0.0018		
2010	\$0.0019		

3. Reactions to the 2007 Rates

Webcasters of all sizes have decried the CRB’s new rates, which boast fewer payment options and significantly higher fees than the previous term. According to the SaveNetRadio Coalition,<sup>186</sup> the latest royalties represent a 300 percent to 1,200 percent increase over the royalties paid in the previous term.<sup>187</sup> Joe Kennedy, CEO of the relatively large webcaster Pandora, admits that he is “not aware of any Internet radio service that believes it can sustain a

184. *Id.* at 24,084.

185. *Id.* at 24,100 n.55 (“The Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges hereinabove may be aided by permitting the limited use of an ATH calculation option.”) The ATH rates of the prior regime ranged from \$0.0008 to \$0.0169, depending on the type of programming (e.g. non-music, simulcasting, or other programming). *Id.* at 24,096.

186. SaveNetRadio Coalition, <http://www.savenetradio.org/about/index.html> (“The SaveNetRadio Coalition is made up of artists, labels, listeners, and webcasters” with the common goal of creating “an environment where Internet radio, and the millions of artists it features, can continue to grow for generations to come.”). John Draper, a hobbyist webcaster, purchased the domain name SaveNetRadio.org and “offered it to colleagues as a rallying point to fight back against the CRB’s increased rates. Assael, *supra* note 15, at 32 (explaining that Draper’s monthly royalty payments increased from \$120 to \$6500 under the latest rate increase).

187. Press Release, SaveNetRadio Coalition, SaveNetRadio Coalition Joins the Fight to Preserve the Future of Internet Radio (Apr. 16, 2007), [http://www.savenetradio.org/press\\_room/press\\_releases/070416-savenetradio.pdf](http://www.savenetradio.org/press_room/press_releases/070416-savenetradio.pdf). *But see* All Access Music Group, *supra* note 34,

In 2006, the rate was raised [five percent] over the existing rate in 2005, but the rate had been flat for the seven years prior to that. We figure the increase to [thirty-five percent] in 2007, but that [i]s not much when you put that in context to the rate almost [ten] years ago. (quoting John Simson, Executive Director of SoundExchange).

business” under what he calls the “disastrous” new rates.<sup>188</sup> Bill Goldsmith of Radio Paradise, a smaller webcaster, agrees: “This royalty structure would wipe out an entire class of business,” namely, “small independent webcasters such as myself [sic] and my wife.”<sup>189</sup> Moreover, it has been reported that even large commercial webcasters like Yahoo! and AOL are considering shutting down their Internet radio operations altogether due to a reported thirty-eight percent increase in royalties.<sup>190</sup>

As in 2002, webcasters have been actively seeking judicial and legislative relief from the royalty rates produced through application of the willing buyer/willing seller standard. Their hope is to secure a “reasonable, long term solution” to the controversy that is not “subject to increase at the whim of the recording industry every five years” and that achieves “royalty parity” with other forms of radio (e.g. satellite and terrestrial radio).<sup>191</sup>

On the other side of the controversy, the recording industry and SoundExchange have “applaud[ed] the higher worth” placed on sound recordings by the CRB.<sup>192</sup> SoundExchange in particular has been quick to dismiss webcasters’ worries, predicting that the overall business of webcasting will continue to thrive despite the increase in rates.<sup>193</sup> It maintains that the willing buyer/willing seller standard produces “fair and reasonable” rates and has called for webcasters to be “forthcoming” about the integrity of the current rate-determination process, categorizing webcasters’ complaints of unfairness as “not really about the process, but rather about the results.”<sup>194</sup> Likewise, SoundExchange believes that webcasters have failed to appreciate the full

---

188. Van Buskirk, *supra* note 29; *see also* Pandora, <http://www.pandora.com>.

189. Van Buskirk, *supra* note 29; *see also* Radio Paradise, <http://www.radioparadise.com>.

190. Meg Tirrell, *Yahoo, AOL May Abandon Web Radio After Royalties Rise*, BLOOMBERG NEWS, Nov. 28, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&refer=us&sid=a0pK0rcpw6yE>.

191. Press Release, SaveNetRadio Coalition, Small Webcasters Reject SoundExchange License (Sept. 19, 2007), [http://www.savenetradio.org/press\\_room/press\\_releases/070919-reject.pdf](http://www.savenetradio.org/press_room/press_releases/070919-reject.pdf); Press Release, SaveNetRadio Coalition, Cable Radio Royalties Align with Internet Radio Legislation (Nov. 5, 2007), [http://www.savenetradio.org/press\\_room/press\\_releases/071105-cable\\_music\\_agreement.pdf](http://www.savenetradio.org/press_room/press_releases/071105-cable_music_agreement.pdf). Many webcasters also believe that terrestrial radio should be subject to the same royalty payments to which Internet and satellite radio are subject. *See infra* Part IV.2 for more discussion about this issue.

192. Dale Buss, *Internet Radio in the Balance*, 5 INTELL. PROP. L. & BUS. 14, 14 (2007).

193. *Id.*

194. Press Release, SoundExchange, Statement by SoundExchange Regarding the Copyright Royalty Board’s Decision Setting Webcasting Royalty Rates for 2006-2010 (Mar. 9, 2007), <http://www.soundexchange.com> (follow “News” hyperlink, then follow “SX News” hyperlink) (“The Copyright Royalty Board has issued a fair and reasonable decision . . . .”); *see also* SoundExchange, SoundExchange Calls on Webcasters to Recognize Value of Music Performers to Web Business (Mar. 21, 2007), <http://www.soundexchange.com> (follow “News” hyperlink, then follow “SX News” hyperlink)(quoting John Simpson, Executive Director of Sound Exchange).

value that recording artists provide to the webcasting industry and that the CRB's rates properly reflect this value.<sup>195</sup> The CEO of SoundExchange has even suggested that higher royalty rates may actually be a valuable means for getting new and emerging artists radio airplay.<sup>196</sup> Overall, the recording industry does not believe that webcasters should be able to digitally perform sound recordings without fully compensating artists for creating the music, even if that means webcasters cannot maintain financially viable businesses.<sup>197</sup>

#### IV. CRITICISMS OF THE RATE-DETERMINATION PROCESS

As demonstrated by Part III above, each rate determination under the willing buyer/willing seller standard has generated significant conflict between the webcasting and recording industries. Critics have generally characterized the underlying cause of the controversy as some fundamental flaw in the rate-determination process.<sup>198</sup> Likewise, Congress has noticed and even attempted to repair flaws in the determination process, most recently following the Librarian of Congress's 2002 decision.<sup>199</sup> However, after enacting the SWSA and replacing the CARP system with the CRB, Congress found itself confronted by a webcasting community seeking legislative and judicial relief for the second time in five years. Apparently, Congress failed to address the relevant flaw in the determination process the first time around. If that flaw manages to survive subsequent rate determinations, the webcasting and recording industries will likely find themselves in a cyclical struggle over

---

195. *Id.* (“The music created by artists is the main reason why people listen to [I]nternet radio, and those artists should be fairly compensated for the value they bring to each webcaster’s business . . . .”); *see also* Press Release, SoundExchange, Statements by SoundExchange Regarding the Copyright Royalty Board’s Decision Setting Webcasting Royalty Rates for 2006-2010, *supra* note 194 (“Artists have earned the right to be fairly compensated for the performance of their work by webcasters who benefit—financially or otherwise—from their talents. . . . [I]t is our strong desire to see a thriving online radio marketplace . . . . However, such a marketplace cannot be sustained without music, and the decision of the CRB fully recognizes and reflects this fact.”).

196. All Access Music Group, *supra* note 34 (Perhaps what will happen is that this will get radio more engaged in playing newer and emerging artists more often, instead of giving the majority [o]f airplay to established superstars. Record companies and new artists would be more likely to make a deal, something like ‘We [woul]d love you to play this record, so we [wi]ll give you a break on performance rates for the first [ninety] days [the record’s] out. (quoting John Simson, Executive Director of Sound Exchange)).

197. *Id.*

198. *See, e.g.,* Kidd, *supra* note 26, at 369 (“To avoid placing webcasters, small or large, in a royalty fight similar to the one that arose in 2002, Congress should reform the CARP process.”); *see also* CASTRO, *supra* note 20, at 1 (“Congress needs to enact legislation to reform the current system.”).

199. *See, e.g.,* the Copyright Royalty and Distribution Reform Act, Pub. L. No. 108-419, 118 Stat. 2341 (2004); *see also* SWSA, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

royalty rates that will prevent both industries and the public from realizing the full potential of Internet radio.

Criticism of the current determination process runs both narrow and broad in scope. The narrow line of criticism takes critical aim at the willing buyer/willing seller standard—particularly at its overall suitability for and effectiveness in determining Internet radio royalty rates.<sup>200</sup> The broader line of criticism addresses concerns that the current rate-determination process discriminates against Internet radio on the basis of technology.<sup>201</sup>

### 1. A Flawed Standard

Several commentators have pinpointed the willing buyer/willing seller standard as one of the key flaws of the current determination process.<sup>202</sup> In fact, it appears to be the very root of the royalty controversy. Perhaps the simplest criticism of the willing buyer/willing seller standard is that it has twice proven ineffective at producing credibly fair royalty rates for the type of rights at issue in Internet webcasting. The fact that it has produced extremely controversial royalty rates in the only two instances it has ever been applied provides reasonable support for this criticism. Moreover, Congress arguably did not intend to induce a cyclical clash between the recording and webcasting industries when it adopted the willing buyer/willing seller standard in 1998. Further, there is no evidence indicating that Congress intended application of the standard to strengthen the digital performance right at the ultimate expense of small and noncommercial webcasters. On the contrary, following the Librarian of Congress's 2002 rate determination, Congress displayed a different intent when it rescued small commercial and noncommercial webcasters from apparently oppressive rates by enacting the Small Webcaster Settlement Act of 2002.<sup>203</sup> In doing so—whether explicitly or not—Congress recognized for important policy reasons that it is in the “public interest” to protect these webcasters from being driven out of business.<sup>204</sup>

Arguably then, the willing buyer/willing seller standard's ineffectiveness stems from the fact that it has been interpreted as prohibiting the rate-setter from making similar public policy decisions in determining reasonable rates.<sup>205</sup>

---

200. Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 411 (2003).

201. CASTRO, *supra* note 20, at 1.

202. See Fessler, *supra* note 200, at 411; see also Kidd, *supra* note 26, at 372; Jackson, *supra* note 60, at 476; Delibero, *supra* note 91, at 111–12.

203. See SWSA, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

204. *Id.* (“It is, nevertheless, in the public interest for the parties to be able to enter into such an agreement without fear of liability for deviating from the fees and terms of the July 8 [2002] order . . .”).

205. CARP Determination, 67 Fed. Reg. 45,240, 45,254 (July 8, 2002) (codified at 37 C.F.R. pt. 261) (“Where the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in

If this interpretation of the statute is accurate, it would be contradictory and hypocritical for Congress to continue to direct the CRB to make policy-barren royalty determinations only to undercut the effect of those determinations at a later date with policy-based legislation (like the SWSA). To avoid this result, it is imperative that Congress realize that public policy considerations should play an important role in the determination of webcaster royalty rates, particularly since the ultimate goal of copyright law in American jurisprudence is “to stimulate artistic creativity for the public good.”<sup>206</sup> The willing buyer/willing seller standard—in its one-sided, fair market approach—has failed to stimulate artistic creativity for the public good. Instead, it has twice produced royalty rates that threaten to drive webcasters—particularly those supplying the diversity that makes Internet radio such an appealing alternative to today’s homogeneous AM/FM stations—out of business. The standard is flawed in this respect and needs to be replaced by a one that consistently encourages artistic creativity for the public good.

Other criticisms of the willing buyer/willing seller standard focus more on perceived flaws in how the standard has been applied in the rate-determination process. One such criticism is that application of the standard consistently produces a “one-size-fits-all” royalty rate that affects all webcasters—from basement hobbyists to multimillion-dollar corporations—without accounting for noticeable differences between types of webcasters.<sup>207</sup> A close reading of § 114(f)(2)(B) reveals that these “one-size-fits-all” rates are best explained as the product of statutory interpretation rather than clear statutory mandate.<sup>208</sup> The

---

the marketplace. . . . The law . . . is silent on what effect the rates should have on particular individual services who wish to operate under the license.”)

See also CRB Determination, 72 Fed. Reg. 24,084, 24,088 n.8 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (“It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. . . . Furthermore, it would involve the Copyright Royalty Judges in making a policy decision rather than applying the willing buyer/willing seller standard of the Copyright Act.”).

206. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the *ultimate* aim is, by this incentive, to stimulate artistic creativity for the general public good.”) (emphasis added); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create *and disseminate* ideas.”)(emphasis added). These quotations represent the “utilitarian” justification for copyright law, which is currently the dominant justification in American jurisprudence. CRAIG JOYCE ET. AL., *COPYRIGHT LAW* 52 n.2 (LexisNexis 7th ed.) (2007).

207. Fessler, *supra* note 200, at 417. While the CRB did, of course, make the minimal distinction between commercial and noncommercial webcasters, it refused to go any further. See CRB Determinations, 72 Fed. Reg. at 24,089 n.9.

208. 17 U.S.C. § 114(f)(2)(B) (2004) states,

text directs the rate-setting body to set rates that “distinguish among the different types of eligible . . . services.”<sup>209</sup> Moreover, it gives the rate-setters the uninhibited freedom to consider any criteria in making such distinctions.<sup>210</sup>

One might expect a straightforward application of this language to produce *multiple* royalty rates based on the seemingly numerous grounds on which to distinguish webcasters,<sup>211</sup> especially given that the CARP and the CRB have conceded that the webcasting market is composed of diverse members.<sup>212</sup> And yet, in the actual rate determinations, industry-wide rates were established solely on the distinction between commercial and noncommercial webcasters. It seems contradictory for the rate-setting body to admit market diversity on the one hand and then attempt to set rates that “most” willing buyers and willing sellers would have agreed to by refraining from identifying and delineating the circumstances that make the market diverse.<sup>213</sup> Furthermore, since the CARP and the CRB each set their industry-wide rates solely with reference to marketplace (“benchmark”) agreements between copyright owners and *larger* webcasters, any shortcomings in the application of the willing buyer/willing seller standard have no doubt been borne primarily by small and noncommercial webcasters, whose unique circumstances essentially were

---

Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each type of service, such differences to be based on criteria including, *but not limited to*, the quantity and nature of the use of the sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

(emphasis added).

209. *Id.*

210. *Id.* If the criteria on which the CRB can distinguish webcasters are truly unlimited, would not a public policy interest in protecting small and noncommercial webcasters be a sufficient ground on which to make a distinction for purposes of setting a different rate?

211. For example: means of broadcasting, income, type of programming, average number of listeners, number of channels/streams, average number of hours broadcast, available resources, business structure, profitability, demographic of target audience, availability of advertising, business growth projections/aspirations, etc.

212. *See* CRB Determination, 72 Fed. Reg. at 24,087 (“In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors.”); *see also* CARP Determination, 67 Fed. Reg. 45,240, 45,244 (July 8, 2002) (codified at 37 C.F.R. pt. 261) (“Because of the diversity among the buyers and the sellers . . . one would expect ‘a range of negotiated rates’ . . .”).

213. Instead, the CRB appears to have placed the burden on the parties to make distinctions between types of webcasters. CRB Determination, 72 Fed. Reg. at 24,089 n.9 (explaining that it will not distinguish between small and large commercial webcasters because the parties did not provide sufficient evidence on which to base such a distinction).

unaccounted for.<sup>214</sup> Such interpretation and application of the willing buyer/willing seller standard seems pointedly unfair.

Another criticism is that, in applying the willing buyer/willing seller standard, the CARP and CRB both assume the presence of a functioning marketplace with reliable benchmarks from which fair rates for all participants can be drawn.<sup>215</sup> One commentator has argued that the existence of the statutory licensing scheme itself “distorts the very market that it seeks to replicate.”<sup>216</sup> Similarly, another critic has called it “circular” to employ a licensing scheme to set rates that would have been set in the absence of a licensing scheme.<sup>217</sup> The reality of the marketplace is that SoundExchange, on behalf of the recording industry, can presently negotiate an industry-wide royalty rate with full knowledge that, if negotiations with webcasters fall through, a safety net of default rates (and so far, favorable rates) is the worst it can do. This safety net is what arguably distorts the marketplace and prevents its normal functioning by providing SoundExchange with the disincentive to meaningfully negotiate with webcasters.<sup>218</sup> Without a properly functioning marketplace, the hypothetical marketplace of the willing buyer/willing seller standard has no reference point. In other words, if the CRB’s goal is to ascertain and set royalty rates at the “true value” of the underlying sound-recording right (assuming such a value can be determined), its current approach to determining that “true value” is flawed by reference to a third party’s “perceived value” of the underlying right, which is likely skewed by self-interest.<sup>219</sup>

By far the most suggested solution to these criticisms of the willing buyer/willing seller standard and its application is reversion back to the § 801(b)(1) policy guidelines. This move would better promote traditional

---

214. See CARP Determination, 67 Fed. Reg. at 45,245 (adopting the Yahoo!/RIAA agreement as its benchmark); CRB Determination, 72 Fed. Reg. 24,092 (adopting Dr. Pelcovits’ interactive webcasting market as its benchmark); Testimony of Michael Pelcovits, In re Digital Performing Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, at 11–12 (Copyright Royalty Bd. Oct. 2005) (referring only to agreements between “major copyright owners” and major record label[s]).

215. See Fessler, *supra* note 200, at 418.

216. *Id.* at 421 (“The standard permits CARP to turn to marketplace agreements in fabricating its hypothetical willing buyer and seller, when these agreements themselves are the product of influences that would not exist absent the CARP, therefore not reflecting agreements that would have been reached in a normal, free-flowing marketplace.”); see also *id.* at 400.

217. Jackson, *supra* note 60, at 476.

218. Fessler, *supra* note 200, at 419. *But cf.* CARP Determination, 67 Fed. Reg. 45,240, 45,245 (July 8, 2002) (codified at 37 C.F.R. pt. 261)(explaining that the CARP found in its 2002 proceeding that the “RIAA’s perceived market power was tempered by the existence of the statutory license, which, for purposes of negotiating a fair rate for use of sound recordings, leveled the playing field.”).

219. Jackson, *supra* note 60, at 476.

copyright goals by allowing for a more equitable balancing of the competing interests of copyright owners, copyright users, and the public.<sup>220</sup> The current balance of these interests under the willing buyer/willing seller standard seems tipped disproportionately in favor of copyright owners, with little regard for the interests of copyright users and little assurance that the balance actually benefits the public in any way.

A second suggested solution, broader in scope, is to replace the current system with a tiered royalty rate scheme that would account for differing types of webcasters.<sup>221</sup> Such a standard might separate webcasters into categories with assigned royalty rates that would increase as the webcaster's listening-base increased (similar to an ATH payment option)<sup>222</sup> or perhaps as the webcaster's revenue increased.<sup>223</sup> Such a scheme might allow small and noncommercial webcasters to negotiate separate royalty rates with the recording industry, which in effect would allow the market to determine the tiers through voluntary party negotiation.<sup>224</sup> On the other hand, Congress could determine the tiers by passing legislation that sets separate rates for different categories of webcasters.<sup>225</sup> This type of tiered scheme would require Congress to statutorily identify and define the different categories of webcasters—a task neither it, the CRB, nor the parties to the rate determinations have yet to accomplish.<sup>226</sup>

## 2. Removing Bias from the Royalty Determinations

A second problem with the current royalty rate-determination process is that it is biased against Internet radio solely on the basis of technology.<sup>227</sup> When it created the digital performance right for sound recordings in 1995, Congress expressly exempted terrestrial radio from paying sound recording royalties because of the promotional value radio has traditionally provided record companies.<sup>228</sup> Conversely, all forms of non-terrestrial radio (e.g. Internet radio and satellite radio) have been subject to such royalties for at least

---

220. Fessler, *supra* note 200, at 400–401, 411 n.82; Jackson, *supra* note 60, at 478; Delibero, *supra* note 91, at 112.

221. Kidd, *supra* note 26, at 367; CASTRO, *supra* note 20, at 10.

222. Kidd, *supra* note 26, at 367.

223. Delibero, *supra* note 91, at 110–11.

224. CASTRO, *supra* note 20, at 10.

225. Kidd, *supra* note 26, at 373–74.

226. See CRB Determination, 72 Fed. Reg. 24,084, 24,089 n.9 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (“Indeed, since none of the small commercial webcasters participating in this proceeding provided helpful evidence about what demarcates a ‘small’ webcaster from other webcasters at any given point in time.”).

227. CASTRO, *supra* note 20, at 1.

228. *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 488 (3rd Cir. 2003); 17 U.S.C. § 114(d)(1)(A) (1995).

a decade. Moreover, the actual amount of the sound recording royalties paid by Internet radio greatly exceeds the amount typically paid by other radio services that make similar digital transmissions. As a result, some commentators have labeled the current rate structure as “technology-biased” in favor of non-Internet radio services, especially in favor of terrestrial radio.<sup>229</sup>

Several proposed solutions aim to eliminate this type of discrimination. One commentator believes that if “promotional value” continues to be the reason terrestrial radio is exempted from paying sound recording royalties, Internet radio should also be exempted since it “provides far greater promotion for aspiring musicians because of its greater geographic reach, as compared to over the air radio.”<sup>230</sup> A second commentator believes that terrestrial radio’s original exemption was “solely a [sic] historical accident and the result of tremendous lobbying power.”<sup>231</sup> As such, she believes that Congress should make terrestrial radio subject to the same royalties as Internet and satellite radio.<sup>232</sup> Moreover, she has suggested that terrestrial stations pay three percent of their gross revenue as the royalty fee, 100 percent of which would go directly to artists (as opposed to the fifty-fifty split between record companies and artists under the current § 114).<sup>233</sup> Finally, a third commentator has proposed that Congress take an “all-or-nothing approach” to the issue, which entails either exempting all forms of radio from the payment of sound recording royalties or subjecting all forms of radio to the same rate, regardless of the medium used to transmit the recordings.<sup>234</sup> Without the universal application of royalties to all forms of radio, it is argued that exempt stations will have a competitive advantage over non-exempt stations and that copyright owners will be unfairly compensated as a result.<sup>235</sup> Therefore, it is suggested that Congress “promote technology-neutral policies to ensure a fair and competitive market for all forms of radio.”<sup>236</sup>

Moreover, Internet and satellite royalties for the same performance right are calculated under different standards. Royalties for the former are calculated under the willing buyer/willing seller standard, while royalties for

---

229. See generally Anthony L. Soudatt & Natalie Sulimani, *Net Radio Royalty Rates*, N.Y.L.J., Feb. 4, 2008, 2–4, 10–11, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1201864417399>; CASTRO, *supra* note 20, at 8.

230. Soudatt & Sulimani, *supra* note 229, at 10.

231. Gigi B. Sohn, Presentation to the New Media and the Market place of Ideas Conference, Boston University College of Communication: Six Steps to Digital Copyright Sanity: Reforming a Pre-VCR law for a YouTube World (Oct. 26, 2007), <http://www.publicknowledge.org/pdf/gbsohn-speech-20071026.pdf>.

232. *Id.*

233. *Id.*; see also 17 U.S.C. § 114(g)(2) (2000).

234. CASTRO, *supra* note 20, at 9.

235. *Id.*

236. *Id.*

the latter are calculated under the policy objectives of § 801(b)(1).<sup>237</sup> Under the willing buyer/willing seller standard, the CRB determined that commercial webcasters should pay under a per-performance metric from 2006 to 2010, with no alternative payment option; but under the § 801(b)(1) standard, the CRB more recently determined that satellite radio stations should pay six percent to eight percent of their gross revenue from 2007 to 2012 for use of the same royalties.<sup>238</sup> The main reason satellite radio's rate structure is more forgiving appears to be the different standards.<sup>239</sup> One commentator has pointed out that the main difference in § 801's policy-based standard (when compared to the willing buyer/willing seller standard) is the explicit element of "fairness."<sup>240</sup> Thus, to completely address the discrimination issue, Congress not only must equally apply exempt or non-exempt status to all forms of radio, but it must ensure that the royalties these stations pay (under a non-exempt scenario) are determined under the same standard.

In fact, terrestrial radio's exemption from the payment of digital performance royalties for sound recordings may be short-lived. On December 18, 2007, the Performance Rights Act was introduced to the House of Representatives to "provide parity in radio performing rights."<sup>241</sup> This Act is addressed more completely in Part V.B.2 below.

In sum, the current rate-determination process is plagued by two fundamental problems. The first is the standard by which webcaster royalties are determined. The second involves discrimination against Internet radio solely on the basis of technology. Any long-term solution to the Internet radio controversy should address both of these issues.

## V. SURVIVAL OPTIONS FOR WEBCASTERS

Webcasters have responded in a number of ways to the CRB's new royalty scheme. On March 20, 2007, webcasters filed various motions for rehearing, reconsideration, and clarification of the CRB's March 2, 2007 initial determination. The CRB denied all such motions on April 16, 2007, explaining that the issues and arguments raised by the webcasters had either been addressed in its initial determination or were not significant enough to

---

237. Compare 17 U.S.C. § 114(f)(1)(B) (2000) with § 114(f)(2)(B) and § 801(b)(1).

238. Kurt Hanson, *CRB Sets Royalty Rate for Satellite Radio: 6% of Revenues Now, Rising to 8%*, RAIN, Dec. 5, 2007, <http://textpattern.kurthanson.com/crb/110/crb-sets-royalty-rate-for-satellite-radio-6-of-revenues-now-rising-to-8>.

239. *Id.* SoundExchange explained in a press release that "due to a federal law requiring that any new royalty rate avoid creating an overly 'disruptive' impact on the satellite services, the CRB reduced the royalty from the benchmark [thirteen] percent to six percent in the first two years of the term, with a gradual increase to [eight] percent in 2012." *Id.*

240. Fessler, *supra* note 200, at 422.

241. See H.R. 4789, 110th Cong. (2007) (introduced by Rep. Howard Berman); see also *infra* Part V.B.2.

warrant rehearing.<sup>242</sup> Since then, webcasters have been forced to pursue other options, such as appeal, legislative remedies, direct negotiation with SoundExchange, and the possibility of relocating operations abroad. This part addresses the likelihood of success of each of these options.

#### A. *Appeal*

One option being pursued by webcasters is appeal of the CRB's rate determination to the United States Court of Appeals for the District of Columbia Circuit.<sup>243</sup> The Court of Appeals will only deem unlawful and set aside agency actions, findings, and conclusions found to be (1) arbitrary and capricious, (2) contrary to constitutional law, (3) in excess of either statutory jurisdiction, authority, or limitation, (4) without observance of the requisite procedures, (5) unsupported by substantial evidence, or (6) unwarranted by the facts, but only if the facts are subject to a trial de novo.<sup>244</sup>

Though webcasters filed their appeals in June of 2007, little progress has been made thus far. Presently, the parties' briefs are due on the following dates: February 25, 2008 for webcasters; April 25, 2008 for the CRB; and May 15, 2008 for SoundExchange and for the Department of Justice, which is defending the CRB in the proceedings.<sup>245</sup> Reply briefs are due on June 12, 2008.<sup>246</sup> Under this timeline, it is projected that oral arguments will not be held until autumn of 2008, with a decision coming sometime in late 2008 or early 2009.<sup>247</sup>

Most recently, webcasters filed three separate briefs with the Court of Appeals.<sup>248</sup> Large and small webcasters jointly filed one brief; various commercial broadcast groups filed a second; and several noncommercial broadcast groups filed a third.<sup>249</sup> Together, webcasters' briefs raised roughly

---

242. See *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA (Copyright Royalty Bd. Apr. 16, 2007), available at <http://www.loc.gov/crb/proceedings/2005-1/motion-denial.pdf> (denying motion for rehearing).

243. See 17 U.S.C. § 803(d)(1) (2000) (allowing appeal to the U.S. Court of Appeals for the District of Columbia Circuit within thirty days after the CRB's opinion is published in the Federal Register).

244. 17 U.S.C. § 803(d)(3) (2000); 5 U.S.C. § 706(2) (2000).

245. Soudatt & Sulimani, *supra* note 229, at 10; Posting by David Oxenford to Broadcast Law Blog, <http://www.broadcastlawblog.com/archives/internet-radio-a-year-after-the-webcasting-royalty-decision-no-settlement-appeal-briefs-filed.html> (Mar. 15, 2008) (on file with author).

246. Soudatt & Sulimani, *supra* note 229, at 10.

247. *Id.*

248. Oxenford, *supra* note 245. A fourth brief was filed at the same time by Royalty Logic (not a webcaster), challenging SoundExchange's sole right to collect digital performance royalties. *Id.*

249. *Id.* On appeal, large webcasters are represented by Digital Media Association; small webcasters include AccuRadio, Radioio, Radio Paradise, and Digitally Imported Radio; commercial broadcast groups include Bonneville, the NAB and the National Religious

six issues criticizing the CRB's 2007 rate determination.<sup>250</sup> One criticism is that the CRB failed to address webcasters' proposal that they be allowed to pay a flat royalty fee, similar to the one collected by performing rights organizations in exchange for the license to publicly performing musical works.<sup>251</sup> Similarly, noncommercial stations claimed that the CRB should have adopted a flat fee comparable to one that had previously been negotiated between SoundExchange and NPR.<sup>252</sup> A third criticism concerns the CRB's determination that small commercial webcasters did not really care about obtaining a percentage-of-revenue rate structure "despite consistent testimony that the fee was necessary to their survival."<sup>253</sup> A fourth criticism is that the CRB adopted the \$500 per-channel minimum fee without any evidence that the fee accurately reflects SoundExchange's collection costs.<sup>254</sup> A fifth complaint is that the CRB adopted SoundExchange's "adjusted" interactive webcasting-services benchmark despite (1) the fact that a similar benchmark had been proposed and abandoned by SoundExchange in a recent royalty-rate proceeding against satellite radio broadcasters and (2) the existence of an agreement between the recording industry and Yahoo! (similar to the one relied on by the CARP in 2002), which webcasters believe is a more analogous benchmark.<sup>255</sup> Finally, webcasters argue that the CRB was not required to adopt a specific proposal advanced by the parties (which the CRB essentially did, in favor of SoundExchange); instead, webcasters argue that the Copyright Royalty Judges should have considered *all* of the relevant evidence before them with the ultimate goal of crafting the most appropriate royalty rate (or rates) overall.<sup>256</sup>

According to attorney David Oxenford, the "principal point" raised on appeal by small commercial webcasters was the CRB's failure to adopt a percentage-of-revenue rate structure.<sup>257</sup> To win this argument, it appears that small commercial webcasters will have to show that the CRB's rejection of this rate structure was either arbitrary and capricious or unsupported by substantial evidence. However, after reading the CRB's decision, it is hard to imagine that webcasters can meet this high burden of proof. First, although small commercial webcasters may argue that expert witness testimony consistently demonstrated that their survival depends on a percentage-of-

---

Broadcasters Association; and noncommercial groups include NPR, college broadcasters, and noncommercial religious broadcasters. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Oxenford, *supra* note 245.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

revenue rate structure, the CRB addressed the issue in detail. It explained that the small commercial webcasters' only witness conceded that, in "requiring" a percentage-of-revenue structure, small webcasters were ultimately worried about staying in business.<sup>258</sup> Further, the CRB reasoned that, even if it decided to treat "small" webcasters differently, there was a problem with defining "small" webcasters: the Judges refused to do so in the absence of evidence offered by the parties.<sup>259</sup> Moreover, the Judges found that small commercial webcasters had failed to provide evidence (aside from assertion) that such a structure was actually required for survival.<sup>260</sup> After rejecting the percentage-of-revenue structure, the CRB proceeded to give a number of reasons supporting its choice of a per-performance fee structure over a percentage-of-revenue structure.<sup>261</sup> Overall, the CRB's treatment of this issue does not appear to be arbitrary and capricious since its reasoning is detailed and at least plausibly supports its conclusion. Moreover, there seems to be enough evidence in the record, based on the CRB's treatment of witness testimony, to support their rejection of a percentage-of-revenue structure.

Webcasters' other claims also are likely to run into similar problems with meeting the high standard of proof. The CRB considered a sizeable amount of written and oral evidence from all parties involved. It seems unlikely in the end that the Appellate Court will find that the Judges' decisions on these other issues lack sufficient evidentiary support or are arbitrary and capricious in nature. Even if the Appellate Court does find in favor of webcasters on a certain issue, the likely result will be a remand to the CRB to better explain or support its finding. Furthermore, webcasters have a financial incentive to resolve these issues sooner rather than later; it would be risky to rely solely on the judicial process for relief when there is no guarantee of a satisfactory resolution. Accordingly, webcasters have been seeking other solutions in addition to appeal.

## B. Proposed Legislation

### 1. The Internet Radio Equality Act

Whereas their success in the judicial arena seems unlikely, webcasters appear to have a much better chance of securing an effective legislative remedy. Soon after the CRB's initial decision, webcasters around the country

---

258. CRB Determination, 72 Fed. Reg. 24,084, 24,088 (codified at 37 C.F.R. pt. 380) (May 1, 2007).

259. *Id.* at 24,088–89. While the CRB may have made the distinction between small and large webcasters on its own, it does not appear that it was affirmatively required to do so under 17 U.S.C. § 114(f)(2)(B).

260. CRB Determination, 72 Fed. Reg. at 24,089.

261. *Id.*

began organizing in hopes of presenting Congress with unified opposition to the CRB's ruling.<sup>262</sup> Webcasters started campaigning to raise awareness of the issues facing Internet radio and encouraged listeners to contact their Congressmen for support.<sup>263</sup> By April 26, 2007—even before the CRB's final determination came down—webcasters had found a voice in Congress. On that date, Congressmen Jay Inslee, a Democrat from Washington, and Don Manzullo, a Republican from Illinois, introduced The Internet Radio Equality Act (“IREA”) to the House of Representatives.<sup>264</sup> Shortly thereafter, a companion bill was introduced in the Senate by Senators Ron Wyden, a Democrat from Oregon, and Sam Brownback, a Republican from Kansas.<sup>265</sup> The stated purpose of both bills is: “To nullify the March 2, 2007, determination of the Copyright Royalty Judges with respect to webcasting, to modify the basis for making such a determination, and for other purposes.”<sup>266</sup>

The IREA would allow commercial webcasters to choose between paying seven and a half percent of their gross revenue or \$0.0033 per ATH for the remainder of the current term (i.e., until 2010).<sup>267</sup> Noncommercial webcasters would pay only one and a half times the rates they paid during 2004.<sup>268</sup> But most significantly, the IREA would amend the Copyright Act by striking the willing buyer/willing seller standard and reinstating § 801(b)(1)'s policy-based standard as the guidepost for determining future royalty rates.<sup>269</sup>

One of the questions lurking behind the IREA is whether or not Congress is serious about enacting it. In hindsight, the IREA looks very similar to the Internet Radio Fairness Act (“IRFA”), which was proposed in 2002 by one of the same congressmen who introduced the IREA.<sup>270</sup> The IRFA was ultimately tabled and succeeded by the SWSA, which provided only short-term relief to webcasters while ignoring the flawed willing buyer/willing seller standard.<sup>271</sup> It is unclear whether the IREA is destined for the same fate. On one hand, Congress may simply be using the IREA as a blunt instrument to pressure SoundExchange into meaningful negotiations with webcasters. John Simson of SoundExchange seems to agree. He thinks it would “go against common sense” for Congress to legislatively overrule the CRB's rates, given that Congress specifically created the CRB to utilize its expertise in making such

---

262. See generally SaveNetRadio, <http://www.savenetradio.org>.

263. *Id.*

264. Internet Radio Equality Act, H.R. 2060, 110th Cong. (2007).

265. Internet Radio Equality Act of 2007, S. 1353, 110th Cong. (2007).

266. H.R. 2060, 110th Cong. (2007); accord S. 1353, 110th Cong. (2007).

267. H.R. 2060, 110th Cong. (2007).

268. *Id.*

269. *Id.*

270. See H.R. 5285, 107th Cong. (2002) (introduced by Rep. Jay Inslee).

271. See *supra* Part III.A.

decisions.<sup>272</sup> On the other hand, perhaps the controversy surrounding these rate determinations under the willing buyer/willing seller standard has actually forced Congress to reconsider the underlying problem it originally pinpointed in the IRFA.

By last count, the IREA had 145 co-sponsors in the House and five in the Senate.<sup>273</sup> It remains true that the introduction of a bill like the IREA is only the first step in the legislative process. Such bills must make it through committees that deliberate, investigate, and revise them before being sent on to a general debate. Most bills never make it out of committee.<sup>274</sup>

## 2. The Performance Rights Act

More recently, on December 18, 2007, the Performance Rights Act was introduced to the House of Representatives by Representative Howard Berman.<sup>275</sup> A companion bill was introduced in the Senate by Senator Patrick Leahy.<sup>276</sup> If passed, these bills would subject terrestrial radio to the same digital performance royalty for the transmission of sound recordings that all other forms of radio have been subject to since the mid-to-late 1990s.<sup>277</sup> Notably, the Performance Rights Act would accord separate rates for small, noncommercial, educational, and religious terrestrial broadcasters.<sup>278</sup> SoundExchange has apparently welcomed the bill, which would provide another source of income to its artists and record labels.<sup>279</sup> Thus far, the Performance Rights Act has five co-sponsors in the House and three in the Senate.<sup>280</sup>

Interestingly, an opposition resolution titled the Local Radio Freedom Act also has been proposed in the House.<sup>281</sup> Its purpose is to prevent disruption of the mutually beneficial relationship that has existed historically between

---

272. All Access Music Group, *supra* note 34.

273. GovTrack.us, H.R. 2060: Internet Radio Equality Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2060>; GovTrack.us, S. 1315: Internet Radio Equality Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1353>.

274. GovTrack.us, H.R. 2060: Internet Radio Equality Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2060>.

275. See H.R. 4789, 110th Cong. (2007) (introduced by Rep. Howard L. Berman).

276. See S. 2500, 110th Cong. (2007).

277. S. 2500, 110th Cong. (2007); OpenCongress.org, H.R.4789 Performance Rights Act, <http://www.opencongress.org/bill/110-h4789/show>; OpenCongress.org, S.2500 Performance Rights Act, <http://www.opencongress.org/bill/110-s2500/show>.

278. S. 2500, 110th Cong. (2007).

279. *Bill to Levy 'Performance Fee' Introduced; Conaway, Green Oppose*, RADIO WORLD NEWSPAPER, Dec. 21, 2007, <http://www.rwonline.com/pages/s.0100/t.10383.html>.

280. OpenCongress.org, <http://www.opencongress.org/bill/110-h4789/show> (last visited Feb. 11, 2008).

281. See H.R. Con. Res. 244, 110th Cong. (2007).

terrestrial radio stations and record companies.<sup>282</sup> Putting its weight behind this resolution will certainly be the National Association of Broadcasters (“NAB”), a traditional lobbying power. Accordingly, the resolution already has 140 co-sponsors in the House.<sup>283</sup> It should be interesting to see which lobby, the RIAA or the NAB, wins this battle in the end. In the meantime, the fact that a bill like the Performance Rights Act has actually been proposed demonstrates that Congress is at least aware of the potential unfairness of subjecting non-terrestrial radio stations to performance royalties simply because their broadcast media differs from that employed by terrestrial radio stations.

*C. Direct Negotiation with SoundExchange*

For the moment, the most immediate (and provisional) solution for webcasters is direct negotiation with SoundExchange, which has remained at the table under pressure from Congress. For instance, SoundExchange and the Digital Media Association (“DiMA”), which represents large commercial webcasters, reached a settlement agreement on August 23, 2007 regarding the CRB’s new minimum fee requirement.<sup>284</sup> Recall that the CRB’s rates require all webcasters to pay a minimum annual fee of \$500 per station or channel in addition to higher rates. This minimum fee itself could drive webcasters with numerous channels or stations out of business (e.g., Pandora, which creates unique stations for each individual listener).<sup>285</sup> Under this settlement agreement, SoundExchange agreed to cap the per-channel minimum fee at \$50,000 per service.<sup>286</sup> DiMA called this agreement an “important first step”

---

282. H.R. Con. Res. 244, 110th Cong. (2007). Supporters of this bill must assume that terrestrial radio influences the physical sale of music more so than Internet radio. However, there seems to be little credible evidence supporting this assumption. Instead, common sense seems to suggest that Internet radio would influence just as many (if not more) physical sales as terrestrial radio, especially since Internet radio providers often provide listeners with direct links to stores from which to purchase the music they are hearing—something of which terrestrial radio is simply incapable. Supporters of the bill, who argue that any support Internet radio provides to physical record sales is diminished because people steal the music they listen to online, should consider the distinction between downloading MP3’s and copying music from streaming music. The former, which is not associated with Internet radio broadcasting, is more prevalent and is generally blamed (with little support) as the cause for declining record sales. The latter, while possible, is less widespread and certainly cannot credibly be blamed as any significant source of less record sales.

283. OpenCongress.org, H.Con.Res.244: Supporting the Local Radio Freedom Act, <http://www.opencongress.org/bill/110-hc244/show>.

284. See Press Release, Digital Media Association (Aug. 23, 2007), <http://www.digmedia.org/content/release.cfm?id=7229&content=pr>.

285. See Van Buskirk, *supra* note 29.

286. See Digital Media Association, *supra* note 284.

in negotiations, implying that it still hopes to coax some kind of concession from SoundExchange regarding the CRB's per-performance rates.<sup>287</sup>

Regarding smaller webcasters, SoundExchange has offered to extend some of the terms of 2002's SWSA for the remainder of this licensing period.<sup>288</sup> This offer came only after members of Congress directly asked SoundExchange to negotiate in good faith with smaller webcasters.<sup>289</sup> Under the proposal, small webcasters would pay fees of ten percent of all gross revenue up to \$250,000, and twelve percent for all gross revenue above that amount. However, there is a catch: to qualify for the offer, webcasters first must meet revenue and usage cap requirements. Only webcasters who make less than \$1.25 million and broadcast less than five million tuning hours are eligible to accept the offer.<sup>290</sup>

Many small webcasters were insulted by this offer from SoundExchange, particularly by the revenue and usage caps. One criticism of this offer is that the caps "do not permit small webcasters to grow their businesses—artificially condemning them to be forever small, at best minimally profitable operations, in essence little more than hobbies."<sup>291</sup> Jake Ward of SaveNetRadio agrees, adding that SoundExchange's proposal would turn Internet radio into "a lousy long-term business."<sup>292</sup> Another shortcoming of SoundExchange's offer is that it does not allow webcasters to play *all* recorded music for their ten to twelve percent revenue payments (as did the terms of the SWSA).<sup>293</sup> Instead, SoundExchange's reduced rate applies only to music produced by SoundExchange artists. Thus, playing music from non-SoundExchange artists would require payment at CRB rates.<sup>294</sup> Finally, and maybe most importantly, SoundExchange's offer is only good through 2010, when payments will again revert to CRB default rates.<sup>295</sup>

SoundExchange's offer has had mixed success. As of September 18, 2007, twenty-four small webcasters had accepted the proposal and signed individual

---

287. Digital Media Association, *supra* note 284.

288. Press Release, SoundExchange, SoundExchange Extends Offer to Small Webcasters, (May 23, 2007), <http://www.soundexchange.com> (follow "News" hyperlink, then follow "SX News" hyperlink).

289. *Id.*

290. Press Release, SoundExchange, Sound Exchange Offers Small Webcasters Discounted Rate Agreement Through 2010 (Aug. 21, 2007), <http://www.soundexchange.com> (follow "News" hyperlink, then follow "SX News" hyperlink).

291. David Oxenford, Another Offer From SoundExchange—Still Not a Solution, <http://www.broadcastlawblog.com/archives/internet-radio-another-offer-from-soundexchange-still-not-a-solution.html> (Aug. 22, 2007).

292. Press Release, SaveNetRadio, Proposal Would Decimate Internet Radio Industry (May 22, 2007), [http://www.savenetradio.org/press\\_room/press\\_releases/070522-rejection.pdf](http://www.savenetradio.org/press_room/press_releases/070522-rejection.pdf).

293. Oxenford, *supra* note 291.

294. *Id.*

295. See SoundExchange, *supra* note 290.

agreements with SoundExchange.<sup>296</sup> On the other hand, many small webcasters have rejected the proposal outright as “unrealistic and unacceptable.”<sup>297</sup> Overall, while direct negotiation with SoundExchange—at least under its latest proposal—may offer some immediate relief for qualified small webcasters, it does not provide a long-term solution to the royalty rate controversy.

#### D. Relocating Operations Abroad

Some webcasters, as an alternative to dealing with SoundExchange or pursuing judicial and legislative remedies, have considered relocating their webcasting operations outside the United States to avoid the CRB’s new rates.<sup>298</sup> However, as attorney David Oxenford points out, this would not be a viable option for webcasters who plan to continue streaming music to U.S. listeners; CRB royalties still apply to such streams.<sup>299</sup> In fact, U.S. copyright law extends to all incoming foreign radio streams, which is why many foreign webcasters have purposely stopped streaming to U.S. residents after the CRB reached its decision in 2007.<sup>300</sup> Only if a webcaster is willing to leave the U.S. market behind is relocating abroad a viable option. However, moving beyond the reach of the CRB and U.S. copyright laws does not mean that a webcaster will be free from royalty obligations to *foreign* performing rights organizations.<sup>301</sup> The only hope is that these rates might be more affordable than those imposed by the CRB.

#### E. Conclusion

Together, the IREA and the Performance Rights Act offer the best long-term solution for webcasters. Passage of the IREA would replace the willing buyer/willing seller standard with policy objectives that would better promote traditional notions of copyright law. Passage of the Performance Rights Act would begin to address the current system’s technological bias against Internet radio by leveling the digital performance playing field. However, it remains to be seen whether Congress is willing to amend copyright law again and legislatively overrule the CRB’s new rates, or whether it is just entertaining the idea to appease webcasters and pressure SoundExchange into meaningful

---

296. Press Release, SaveNetRadio, Small Webcasters Reject SoundExchange License (Sept. 19, 2007), [http://www.savenetradio.org/press\\_room/press\\_releases/070919-reject.pdf](http://www.savenetradio.org/press_room/press_releases/070919-reject.pdf).

297. *Id.*

298. David Oxenford, What Next for Internet Radio In Light of the Copyright Royalty Board Decision, <http://www.broadcastlawblog.com/archives/internet-radio-what-next-for-internet-radio-in-light-of-the-copyright-royalty-board-decision-html> (Mar. 7, 2007) (on file with author).

299. *Id.*

300. *Id.*

301. *Id.*

negotiation. Further, it is uncertain how Congress will react to the clashing RIAA and NAB lobbies concerning imposition of performance royalties on the traditionally exempt terrestrial radio industry.

## VI. CONCLUSION

Congress has a second chance to repair a determination process that has caused an ongoing royalty war between the Internet radio and recording industries. Part of the problem is the willing buyer/willing seller standard, which has twice failed to produce fair and competitive royalty rates and has twice threatened to drive small and noncommercial webcasters out of business despite strong public policy reasons for protecting these businesses. Another part of the problem is that the current system is technology-biased against Internet radio, holding it to higher standards than terrestrial and satellite radio when the only difference between the parties' uses of sound recordings is the medium by which recordings are transmitted. A long-term solution to this ongoing controversy will address both the faulty standard and the historically disparate treatment of radio media with regard to sound recording performance royalties. Attempts to address both issues are presently before Congress in the form of the Internet Radio Equality Act and the Performance Rights Act, respectively. If these bills are passed, Congress will have taken a large step toward creating a sound recording royalty scheme that simultaneously promotes innovation and growth in the Internet radio industry and that fairly compensates performing artists and sound recording owners for creating music and sharing it with the world.

BRIAN FLAVIN\*

---

\* Brian Flavin graduated from the University of Missouri in 2005 with bachelor degrees both in Philosophy and English. He obtained his Juris Doctor degree from Saint Louis University School of Law in 2008, and is currently a member of the Missouri Bar. He would like to thank the Public Law Review, especially Mike Brockland and Jamie Mitchell, for giving him the opportunity to write on a topic that truly interests him. He would also like to thank Professor Henry M. Ordower for his advice and guidance throughout the process.