

The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties

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I. INTRODUCTION

SomaFM began as a pirate radio station which first broadcast at the 1999 Burning Man Festival in the desert of Nevada,¹ and has risen to become one of the largest “small” Internet-only radio stations, with over one million listener hours per month.² As stated by the creator of SomaFM, the problem with modern radio broadcasting is that, “[b]ig radio’s least-common-denominator approach creates playlists that the least amount of people will ever turn off. There’s no personality, no edge. . . . The challenge here is to do a lot with a little.”³ SomaFM, which grew through word of mouth and mailing lists, is an example of an enterprise springing directly from the independent and pioneering mindset of the Internet.⁴ It is also an example of the growing trend of listeners moving away from large, sterile, modern AM/FM stations to the world of niche Internet radio with more specialized audiences.⁵ Unfortunately, this area of Internet radio and independent programming may soon die.

Radio programming is playing an increasingly important role in the Internet world. By 1999, an estimated thirty-five percent of Americans, approximately twenty-nine million, had tried streaming audio or video via

1. Burning Man, <http://www.burningman.com> (last visited Jan. 31, 2009).

2. SomaFM, <http://www.somafm.com> (last visited Jan. 31, 2009).

3. David Downs, *The Day the Music Dies*, S.F. WEEKLY, June 26, 2007, <http://www.sfweekly.com/2007-06-27/news/the-day-the-music-dies/>.

4. Chris Coomey, *Move Over, Pirate Radio—From a Bernal Heights Garage, Internet Station SomaFM Plays Tunes for the Whole Wide World, and It’s All Perfectly Legal*, S.F. CHRONICLE, June 30, 2004, at E1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/06/30/DDGKO7DJ651.DTL>.

5. See Amanda S. Reid, Note, *Play It Again Sam: Webcasters’ Sound Recording Complement as an Unconstitutional Restraint On Free Speech*, 26 HASTINGS COMM. & ENT. L.J. 317 (2004); Sara J. O’Connell, *Counting Down Another Music Marathon: Copyright Arbitration Royalty Panels and the Case of Internet Radio*, 8 MARQ. INTELL. PROP. L. REV. 161, 162 (2004); see also Hear 2.0, <http://www.hear2.com/2007/11/radio-listening.html> (Nov. 14, 2007).

webcasts.⁶ Unfortunately, due to an ever-increasing number of actions by the Recording Industry Association of America (RIAA) and the Copyright Royalty Board's (CRB) recent setting of royalty rates for webcasters, the mix-tape genre of independent Internet radio may soon be gone. In March 2007,⁷ the CRB issued a decision that substantially increased the fees webcasters had to pay record labels through its royalty collection organization, SoundExchange.⁸ The CRB set the minimum annual fees at \$500 per channel.⁹ Previously, the fee was \$500 per service;¹⁰ this was a devastating rate hike. For example, after this fee increase, SomaFM's royalty bill rose from \$10,000 to \$600,000 for the year of 2006.¹¹ In effect, this increase would make webcasting so prohibitively expensive that it would put the vast majority of small webcasters out of business.

Only intellectual property law has had a more rapid growth than the overall average for federal statutes in the time period between 1946 and 1994.¹² Further, statutory expansion in copyright law has been more rapid than in any other intellectual property field.¹³ The problems dealt with in this Note are directly related not only to this rapid expansion, but also to the issues between lobbyists, copyright holders, and small businesses wishing to use intellectual property rights without being priced out of existence through the current economic rent system. A large part of the current predicament is that, "given the very long copyright term and the very low costs of duplication of many types of copyrighted work[s]" there are greater potential rents from copyright than through the other areas of intellectual property law.¹⁴ Therefore, this potentially lucrative income stream leads to much more aggressive lobbying and legal actions pursued by copyright holders and their representatives.

Some legal scholars state that there is a public-choice explanation for the net expansion of copyright law.¹⁵ The argument is as follows: there is an inherent asymmetry between the value that the creators of the intellectual property place on the property right, and the value placed on the

6. See Allison Kidd, Recent Development, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 340 (2003).

7. See, e.g., Downs, *supra* note 3.

8. *Id.*; see also SoundExchange, <http://www.soundexchange.com> (last visited Jan. 31, 2009).

9. See Downs, *supra* note 3.

10. *Id.*

11. *Id.* (SomaFM's gross revenue was only \$125,000 for that year).

12. See WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 2, available at http://www.aei.org/docLib/20040608_Landes.pdf.

13. *Id.* at 3.

14. *Id.* at 10.

15. *Id.* at 14.

freedom to copy (without having to obtain a license) by would-be copiers.¹⁶ If the copyright holder is able to enforce exclusive rights to the property, then they have access to a vast possibility of economic rents.¹⁷ In comparison, a would-be copier or user of a copy, such as SomaFM, can merely hope to obtain a competitive return for their use of the protected property.¹⁸ This large profit potential makes it easier for copyright holders to organize coalitions such as the RIAA to expand the legal protections of intellectual property.¹⁹ An example of the difference in power between coalitions such as the RIAA and those who wish to use the property right, such as SomaFM, is that most of the statutory language of the Copyright Act of 1976 “was not drafted by members of Congress or their staffs at all.”²⁰ “Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.”²¹

From this discussion, it is clear that there is a tremendous imbalance of not only power, but also a vast disproportion of motivating forces. Those who hold the property rights have already borne the cost of creation and everything following is almost entirely profit; while those who wish to use the property are fighting for mere competitive return. Unfortunately, the lopsided balance of power in favor of the copyright holder has reduced the possibility for such return and is ultimately choking off the ability of small businesses to use copyright-protected works.²² Any resolution in this field must take into consideration these underlying economic causes; therefore, the solutions suggested in this Note have been crafted in light of the financial realities of both the music business and copyright law.

This Note examines the issues affecting copyright holders and webcasters while suggesting possible resolutions. Part II provides a basic background of how webcasting works, copyright law, and the history of performance rights. Part III describes the controversy, the legal issues, and the current royalty rates and term structure. Lastly, Part IV discusses possible areas of improvement, and addresses the need for modernization of U.S. copyright law.²³

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (internal quotations omitted).

22. *Id.* at 23 (this article contains an excellent discussion of the problems in the legal structuring of intellectual property as real property and the problems this causes).

23. See generally Kara M. Wolke, *Some Catching Up To Do: How The United States, In Refusing To Fully Sign On To The WPPT'S Public Performance Right In Sound Recordings, Fell Behind The Protections Of Artists' Rights Recognized Elsewhere In This Increasingly Global Music Community*, 7 VAND. J. ENT. L. & PRAC. 411 (2005).

II. WEBCASTING AND COPYRIGHT LAW: A HISTORY

A. *How Webcasting Works*

Internet radio has the ability to provide many more listening choices than traditional radio because of the potential for nearly unlimited bandwidth, an almost infinite user base, and the ability of the average person to set up and maintain a broadcasting station.²⁴ Originally, due to the lack of existing regulation, Internet stations were easy to set up and manage, and the resulting programming could be broadcast to the entire world.²⁵ In fact, most stations have historically been run by “small businesses, community and college broadcasters, and hobbyists.”²⁶

Unlike typical Web sites which rely on a “pull” method of transferring web pages where the page is not accessed or delivered until a browser requests it, webcasting or “streaming” relies on a “push” technology.²⁷ Regardless of whether anyone is requesting a song from the site, it is continuously pushing the data out there for anyone to tune in.²⁸ Music sent out using this technology transfers the data so that it is processed by the listener’s computer as a steady and continuous stream.²⁹ This technology facilitates the performance of a song “via transmission from the originating service, over the Internet, into a user’s computer RAM,³⁰ and through the user’s computer speakers.”³¹ Instead of being permanently stored on a user’s computer like downloaded songs, music sent in this format is not meant to be permanent.³² Once the song is over, the data from that song is erased and replaced by new data from the next song on the playlist of the webcast.³³ At the completion of the performance, no remnants of the song remain in the listener’s computer.³⁴

B. *Copyright Background*

The purpose of intellectual property law in the United States is to “promote the Progress of Science and useful Arts, by securing for limited

24. See, e.g., Kidd, *supra* note 6.

25. *Id.*

26. *Id.* (internal quotations omitted).

27. Reid, *supra* note 5, at 321.

28. See generally, *id.*

29. *Id.*

30. Random access memory is a type of computer data storage. The word RAM is mostly associated with types of memory where the information is lost when power is switched off.

31. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 860 (2007).

32. See Reid, *supra* note 5, at 321.

33. *Id.* at 322.

34. *Id.*

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ Copyright law protects “original works of authorship fixed in any tangible medium of expression.”³⁶ Current music copyright law actually entails two distinct types of copyright ownership.³⁷ A copyright holder of the recorded performance of a song has rights in both the (1) “musical composition,” and (2) the “sound recording” itself.³⁸ The “musical composition” consists of the lyrics and the actual notes of the song.³⁹ An example of this would be the information someone would need to reproduce the song on their own, such as the sheet music a pianist would need to play Ludwig van Beethoven’s Symphony No. 5. The “sound recording” copyright differs because it “subsists in the actual fixation or recording of the sounds,” instead of the sheet music or lyrics.⁴⁰

The holder of a sound recording copyright has many of the same rights as the copyright holder of a musical composition, but with some significant differences. First, the copyright holder of a sound recording has the right to reproduce the recording.⁴¹ Second, the holder of a sound recording copyright has the right to prepare derivative works based upon it.⁴² Third, the holder of the sound recording copyright has the right to distribute phonorecords of the recording to the public.⁴³

C. *The Musical Work (Composition) Copyright and Mechanical Compulsory Licensing*

In 1831, Congress first added musical compositions to the categories of copyrightable works.⁴⁴ The world of music copyright “remained in [a] relatively uncomplicated state for several decades.”⁴⁵ Rights began to change in 1909 when Congress made some significant additions to music copyright law. In response to the Supreme Court’s decision in *White Smith*

35. U.S. CONST. art. I, § 8, cl. 8.

36. 17 U.S.C. § 102 (2000).

37. Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 320 (2002).

38. See 17 U.S.C. § 106 (Supp. 2002).

39. Howard Cockrill, *Tuning the Dial on Internet Radio: The DPRA, The DMCA & The General Public Performance Right in Sound Recordings*, 9 INTELL. PROP. L. BULL. 103 (2005).

40. Reid, *supra* note 5, at 323.

41. See § 106.

42. *Id.*

43. *Id.*

44. Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution Is Being Downloaded: Why and How The Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 282 (2006).

45. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 680 (2003).

Music Publishing Co. v. Apollo Co.,⁴⁶ Congress expanded music copyright protections through the Copyright Act of 1909, which subsequently overturned the result of the Court by granting musical copyright holders the right to control “mechanical reproductions” of their work.⁴⁷

Perhaps the most revolutionary feature of that Act is that Congress also subjected the mechanical reproduction right to a compulsory licensing system.⁴⁸ The compulsory licensing process for mechanical reproductions is relatively simple: once a copyright holder has authorized distribution of a work to one member of the public, any other member of the public may reproduce and distribute that work without needing to obtain permission from the copyright holder.⁴⁹

However, there is a stipulation that requires potential licensees to then serve notice on the holder of the copyright and pay the statutorily prescribed licensing royalties.⁵⁰ The compulsory license for mechanical reproductions is still a part of the Copyright Act today, and is applicable to CDs, cassettes, and other similar media.⁵¹ Congress also added a less significant addition to music copyright by giving copyright holders a new right to “arrange or adapt”⁵² works that they had previously produced. This additional right gave assignees of the composer’s rights, quite often music publishers, the right to control adaptations of the musical work.⁵³

The trade association of music publishers—The National Music Publishers Association—created the Harry Fox Agency (HFA)⁵⁴ to issue and administer mechanical licenses.⁵⁵ The HFA represents over 27,000 publishers, who represent the interests of more than 160,000 songwriters.⁵⁶ This gives the HFA power to oversee the mechanical licensing, collection, and mechanical royalty distribution of more than 2.5 million copyrighted musical works.⁵⁷ The great majority of copyrighted sound recordings are of musical performances, and in many cases, musical sound recordings are not

46. 209 U.S. 1, 18 (1908) (stating that under current copyright law, player piano rolls did not constitute reproductions of musical compositions).

47. *Id.*

48. *Id.*

49. Cardi, *supra* note 31, at 843.

50. *Id.*

51. Loren, *supra* note 45, at 677 (the compulsory license provision is currently in Section 115 of the Copyright Act).

52. Act of March 4, 1909, ch. 1, § 1(b) (repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541) (granting the rights to copyright holders).

53. *Id.*

54. See generally About HFA, Harry Fox Agency, <http://www.harryfox.com/public/HFAHome.jsp> (last visited Jan. 31, 2009).

55. *Id.*

56. Loren, *supra* note 45, at 682.

57. *Id.*

owned by the original creator, but instead are owned by the five major record labels: Universal Music Group, Sony Music Entertainment, Warner Bros. Music, BMG Entertainment, and EMI Group.⁵⁸ All of these record labels, among others, are members of the RIAA.⁵⁹

D. *Digital Performance Right for Sound Recordings*

The rapid growth of digital technologies that allowed the distribution of high quality copies of recorded works brought about many changes in copyright law.⁶⁰ In the mid-1990s, representatives of the music industry brought to the attention of Congress the rapid growth of such technologies and their ability to monetarily injure the recording artists and copyright holders.⁶¹ These representatives stated that their concern was the adverse effect that this technology would have on the sales of CDs, tapes, and records.⁶² They feared the possibility of the “erosion of copyright owners’ ability to control and be paid for the use of their work.”⁶³

The argument presented to Congress was that lack of control by the copyright holder to limit the possible infringement of reproduction and distribution would be extremely harmful to the industry.⁶⁴ The labels also maintained “that if online services could freely transmit recordings in any manner they pleased, such performances would facilitate the creation of infringing reproductions on users’ computer hard drives.”⁶⁵ The record labels pushed for an exclusive right to digital performance which would help limit the types of performances available and possibly offset the infringement losses with royalties.⁶⁶ Congress found these arguments persuasive, and a digital performance right for sound recordings was granted in the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA).⁶⁷ This Act gave copyright holders of sound recordings the

58. Cardi, *supra* note 31, at 848.

59. Loren, *supra* note 45, at 686 (there are also three performing rights organizations (PROs) that handle virtually all of the performance rights in musical compositions: the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and the Society of European Stage Authors & Composers (SESAC)).

60. See generally Lamberto O. Abeleda, Jr., *Digital Compensation: Recording Artists’ Collective Fight for True and Fair Compensation*, 31 Sw. U. L. Rev. 701 (2002).

61. Kidd, *supra* note 6, at 342.

62. *Id.*

63. *Id.* (internal quotations omitted).

64. Cardi, *supra* note 31, at 850.

65. *Id.*

66. *Id.*

67. See Digital Performance Right In Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 350 (codified as amended in scattered sections of 17 U.S.C.). The Copyright Act states that to transmit a performance is to “communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101. A digital transmission is defined as a “transmission in whole or in part a

right “to perform the copyrighted work publicly by means of a digital audio transmission.”⁶⁸

Interestingly, the DPRSRA did not specifically address Internet radio technology,⁶⁹ although many of its implications and provisions drastically altered current webcasting law. At the time the law was written, webcasting was only an emerging technology since current Internet connection speeds were far too slow to be utilized in any useful way.⁷⁰ When the DPRSRA was passed, the concern was not necessarily for P2P⁷¹ (peer-to-peer) services such as Napster, but for sites offering “audio on-demand” and “pay-per-listen” services, which would be interactive sites that gave a personal selection of music that would possibly diminish a user’s interest in purchasing a CD of their own.⁷²

Although this was a victory for the representatives of the music industry, the DPRSRA was not without criticism. Some have stated that the DPRSRA is “one of the most convoluted and unreadable laws ever passed.”⁷³ Not only has it been criticized for its unreadable nature and confusing construction, but due to heavy lobbying by the RIAA and other music industry individuals, the passing of the Act has been construed as a “perfect example of interest-group policymaking that has been the hallmark of copyright legislation since the beginning of the twentieth century.”⁷⁴

E. Multi-Tiered System

In an attempt to balance several significant industry interests, Congress established a three-tiered system of copyright holder protection with each tier tailored to the specific type of performance being used. The system works as a varying means of protection depending on the likelihood that the performance would facilitate violation of the copyright.⁷⁵ The

digital or other non-analog format.” *Id.* Taken as a whole this means that to involve a copyright holder’s right, a sound recording must be sent via a digital means to a place beyond where the sender is located. This sending then constitutes a public performance.

68. Loren, *supra* note 45, at 687 (citing DPRSRA § 2 (codified as amended at 17 U.S.C. § 106(6))).

69. Kidd, *supra* note 6, at 348 (citing 148 Cong. Rec. H7043 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner)).

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

71. P2P (peer-to-peer) generally describes person-to-person data transfers through services such as Napster, Grokster, BitTorrent, and others.

72. See S. REP. NO. 104-128, at 14 (1995), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:sr128.104.pdf.

73. Jackson, *supra* note 70, at 455.

74. *Id.*

75. Cardi, *supra* note 31, at 850.

following is a very basic description of the three tiers from most to least protective.

1. Interactive Internet Transmissions

An interactive service transmission enables a member of the public to receive a program specially tailored for the recipient, or if requested, a particular sound recording.⁷⁶ Under this tier, copyright holders receive the greatest amount of protection, including full exclusive rights.⁷⁷ A simple example of an interactive service would be an Internet site which would allow the user to choose whatever song they would like to hear from a list. Another example of an interactive service is one which allows the user to narrow their listening selection down to songs by a single artist.⁷⁸ The copyright holder of the sound recording is entitled to any price that they might demand for the use of their recording, and can deny permission to use it entirely.⁷⁹

2. Non-interactive Internet Transmissions

A non-interactive Internet transmission is subject to compulsory licensing if the transmissions conform to certain statutory requirements, but if the service does not meet the statutory requirements then a compulsory license is not available to the service.⁸⁰ Instead, the service must negotiate an individual license with the copyright holders of the sound recording much like an interactive service.⁸¹ The statutory requirements are an attempt to limit the possibility of an infringing use by the listeners of the service. A good example of this is the webcast station Pandora⁸² which does not allow users to select or listen to more than three tracks from the same album or more than four tracks by one recording artist.⁸³

3. Non-subscription Broadcast Transmissions

These services are completely exempt from the digital performance right for sound recordings, as they apply to analog (non-digital) over-the-air transmissions.⁸⁴ This provision simply restates the long-standing agreement between radio stations and music copyright holders by

76. See 17 U.S.C. § 114(j)(7) (2000).

77. Cardi, *supra* note 31, at 850.

78. *Id.*

79. *Id.* (citing 17 U.S.C. § 114(d)(3)).

80. See 17 U.S.C. § 114(d)(2).

81. Cardi, *supra* note 31, at 851.

82. See Pandora Radio: Listen to Free Internet Radio, Find New Music, <http://www.pandora.com> (last visited Jan. 31, 2009).

83. See 17 U.S.C. § 114(d)(2)(C)(i).

84. § 114(d)(1)(A)-(B).

exempting radio broadcasts from the digital performance right. However, the RIAA has established that simultaneous webcasts of radio transmissions do not fall under this exemption.⁸⁵

II. THE DMCA AND A NEW ERA OF COPYRIGHT LAW

A. *Digital Millennium Copyright Act*

In 1998, after the initial rapid growth of the Internet (including webcasting and improved streaming technologies and capabilities), it became clear that the DPRSRA left many copyright issues unsettled;⁸⁶ the most significant of which was the dispute between the RIAA and services providing streaming Internet radio broadcasts.⁸⁷ As a result, Congress decided to focus on clarifying how copyright law should apply to streaming broadcasts.⁸⁸ This was done by passing the Digital Millennium Copyright Act (DMCA) just three years after the DPRSRA's passage.

The DPRSRA originally included an exemption for "a non-subscription transmission other than a retransmission."⁸⁹ In order to appease the RIAA, Congress modified the exemption in § 114(d)(1) of the Copyright Act, through the DMCA.⁹⁰ Congress eliminated the exemption and also extended statutory licensing to cover eligible non-subscription transmissions (non-interactive webcasts).⁹¹ Prior to these changes,⁹² webcasters were exempt from paying statutory fees. After the passage of a last-minute addition to the DMCA, to qualify for a license, webcasters had to conform to a detailed list of eligibility requirements.⁹³ The following is only a *partial* list of some of the requirements for webcasters under the DMCA. Even though partial, it is an extremely burdensome list of eligibility requirements for an area of broadcast run primarily by hobbyists

85. Cardi, *supra* note 31, at 852. In addition, the DPRSRA created three categories of digital transmissions under this already confusing multi-tiered system. A short listing of the categories includes: (1) exempt transmissions not requiring a license (non-subscription broadcast transmissions), (2) nonexempt transmissions which are eligible for the statutory license (non-interactive subscription transmissions), and (3) nonexempt transmissions which are not eligible for a statutory license (interactive transmissions). *See id.*; 17 U.S.C. § 114(d)-(j).

86. Kidd, *supra* note 6, at 349.

87. *Id.*

88. *Id.* (citing Podcast: Internet 9: The Media and Entertainment World of Online Consumers (Sept. 5, 2002) (archived at <http://www.arbitron.com/onlineradio/studies.htm>)).

89. Jackson, *supra* note 70, at 457 (internal quotations omitted).

90. *Id.*

91. *Id.*

92. Reid, *supra* note 5, at 326.

93. Joseph E. Magri, *New Media-New Rules: The Digital Performance Right and Streaming Media Over the Internet*, 6 VAND. J. ENT. L. & PRAC. 55, 59 (2003).

and small businesses. As Joseph Magri has noted, in order to be eligible for the statutory license, the service must abide by the following:

1. Sound Recording Performance Complement. A Webcaster must comply with the “sound recording performance complement,” which prohibits a Webcaster from transmitting within any given three hour period: (A) more than three different songs from the same *album* if more than two such songs are transmitted consecutively or (B) four different songs by the same *artist* (or four different songs from the same *compilation*) if more than three such songs are transmitted consecutively.
2. No Prior Announcements. A Webcaster must not publish an advance program schedule that discloses: (i) the titles of specific songs, (ii) the names of *albums* or (iii) the names of *artists* to be transmitted (with exception).
3. Programming Rules. A Webcaster’s programming must also comport with the following rules:
 - (a) Archived Programming. An archived program must be at least five-hours long and cannot be made available for more than two weeks;
 - (b) Looped Programming. A continuously looped program must be at least three-hours long.
 - (c) Rebroadcast Programming. A rebroadcast of an identifiable program that contains songs, which are played in a predetermined order (other than an archived or continuous program) and is less than one-hour in length, can be transmitted no more than three times in any two-week period when the program has been publicly announced in advance (with exception) and no more than four times in any two-week period when the program is one-hour or more in length (with exception).
4. Prohibition of False Affiliation. The Webcaster must not knowingly contemporaneously play or synchronize a song to visual images in a manner that is likely to cause confusion as to the affiliation of the copyright owner of the Sound Recording or the artist with the Webcaster or a particular product or service.
5. Cooperate to Defeat Scanning. The Webcaster must cooperate to prevent (to the extent feasible) listeners from automatically scanning the Webcasters transmissions in order to select a particular song to be transmitted (with exception).
6. Limit Duplication by Recipient. The Webcaster cannot affirmatively cause or encourage the duplication of songs and if the Webcaster uses technology that allows them to limit the ability to duplicate songs directly in a digital format, the Webcaster must set such technology to limit the ability to duplicate songs to the extent permitted by the technology.
7. No Transmission of Bootleg Copies. The Webcaster must use Sound Recordings that are legally sold to the public or authorized for performance by the copyright owner of the Sound Recording and that are legally manufactured (with exception).
8. Accommodate Technical Protection Measures. The Webcaster must accommodate and cannot interfere with the transmission of technical

measures that are widely used by copyright owners of Sound Recording[s] to identify or protect copyrighted works if such measures can be transmitted without imposing substantial costs on the Webcaster or result in perceptible aural or visual degradation of the digital signal (with exception).

9. Transmission of information. The Webcaster must display the title of the *song*, the title of the *album*, and the featured recording *artist* to the listener as the song is being played (with exception).⁹⁴

B. DMCA Fallout

Shortly after the DMCA was passed, traditional radio broadcasters made the argument that simultaneous streaming broadcasts of “over the air” transmissions⁹⁵ were exempt from licensing under § 114(d)(1)(A), which exempted regular broadcast transmissions.⁹⁶ The counterargument presented by the RIAA was that the exemption was strictly and specifically only for traditional radio broadcasts, and that any Internet streaming programming must be licensed, “even if it is the *identical* programming and source” of the radio broadcast.⁹⁷ The Copyright Office ruled that Internet radio transmissions by broadcast stations were not exempt from the licensing requirements under the DMCA.⁹⁸ The Copyright Office stated that “the narrowly drawn safe harbors for retransmissions of radio signals illustrate Congressional intent to distinguish between a traditional over-the-air broadcast transmission of an AM/FM radio signal and a retransmission of that signal.”⁹⁹

The Copyright Office argued that it would have been illogical to believe that Congress would grant broadcasters an exemption for simulcasting their AM/FM signals while requiring other parties to pay the statutory licensing fees for the same signal.¹⁰⁰ Therefore, only traditional over-the-air transmissions by broadcasters are exempt from the licensing requirements of § 114 of the DMCA.¹⁰¹ The radio broadcasters were not satisfied with the ruling by the Copyright Office because they were also streaming the same programming over the Internet. They appealed the ruling in *Bonneville International Corp. v. Peters*.¹⁰² The court affirmed the

94. *Id.* (citing Digital Millennium Copyright Act of 1998, § 405(a)(4)(B)); *see also* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 112, 114(j)(13)) [hereinafter DMCA]; Wolke, *supra* note 23.

95. This is also known as “simulcasting.”

96. Jackson, *supra* note 70, at 459.

97. *Id.* at 460 (emphasis added).

98. *Id.*

99. *Id.* (quoting Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,298 (Dec. 11, 2000) (codified at 37 C.F.R. pt. 201)).

100. *Id.*

101. *Id.*

102. 153 F. Supp. 2d 763 (E.D. Pa. 2001).

ruling stating that, “it strains credulity to suggest that Congress intended to exempt AM/FM streaming, which is global in nature, while simultaneously limiting retransmissions to specific FCC-defined geographic areas.”¹⁰³

C. *CARP Royalty Rates*

Even though the DMCA and the Copyright Office’s decisions were attempts to settle the growing dispute between webcasters and the RIAA, as well as other music industry parties, the disagreements continued. After the DMCA was passed, the Copyright Office gave webcasters and record companies an opportunity to negotiate royalty rates among themselves.¹⁰⁴ Initially, the RIAA offered a flat fee of \$0.004 for each song streamed, which was approximately fifteen percent of the webcasters’ gross revenue.¹⁰⁵ The webcasters, specifically the Digital Media Association (DiMA),¹⁰⁶ countered with an offer of \$0.0015 per “listener hour.”¹⁰⁷ The rates do not appear to be much different at first glance; however, they are significantly different in practice. The following example clearly illustrates the difference.

To start, imagine one hour of music, which equates to roughly ten songs. Under the DiMA plan, that amount of air play would cost a webcaster \$0.0015 *per listener*. Under the RIAA’s plan, each *song* would cost \$0.004, which would total \$0.04 per listener hour for the same number of songs. To continue this illustration, imagine a webcast reaches 10,000 listeners per hour. Now, the DiMA plan equates to \$15 *per hour*, while the RIAA plan equals \$400 *per hour*. In a study conducted of a successful radio station, research data provided numbers tending to show that under the DiMA, a station would pay roughly \$192,000 per year. If the RIAA plan were to be adopted, however, the same station would have to pay over \$5.5 million.¹⁰⁸

Neither side could agree to terms, so under Section 114 and Section 112 of the Copyright Act, a compulsory arbitration process was conducted.¹⁰⁹ The Copyright Office formed a Copyright Arbitration Royalty Panel (CARP) to determine a schedule of rates and terms.¹¹⁰ When

103. *Id.* at 776.

104. Kidd, *supra* note 6, at 361.

105. Jeremy Delibero, Note, *Copyright Arbitration Royalty Panels and the Webcasting Controversy: The Antithesis of Good Alternative Dispute Resolution*, 5 PEPP. DISP. RESOL. L.J. 83, 93 (2005).

106. The Digital Media Association, <http://www.digmedia.org> (last visited Jan. 31, 2009). The DiMA was founded by seven leading web-centric companies, including Yahoo! and AOL, to ensure that new media companies are not disadvantaged “merely because they deliver content digitally or using the Internet rather than via print, film, terrestrial broadcast or other traditional media.” *Id.*

107. Delibero, *supra* note 105, at 94.

108. *Id.* at 94-95 (emphasis added).

109. Magri, *supra* note 93.

110. *Id.*

the CARP convened, the arbitration process focused on three questions: first, the determination of what royalty rate and terms should be instituted for payments retroactive to the “effective” date of the DMCA; second, the determination of a royalty rate for the next two years; and, lastly, what to do about ephemeral¹¹¹ copies made in order to assist Internet webcasting.¹¹²

The process began on November 27, 1998 and ended on February 20, 2002 when the CARP made its report to the U.S. Copyright Office.¹¹³ During the rate-setting process, Yahoo!, Inc., one of the largest and most lucrative Internet radio broadcasters, negotiated its own royalty rate agreement with the RIAA.¹¹⁴ However, despite the deal cut by Yahoo!, the vast majority of other webcasters would be bound by rates set by the CARP.¹¹⁵ As stipulated by the Copyright Act, the arbitration panel based their rate decision on a “willing buyer/willing seller” standard.¹¹⁶

D. *Problems with the Willing Buyer/Willing Seller Standard*

A significant obstacle to the application of a willing buyer/willing seller standard was that, at this point in the history of Internet radio, there was no existing market which the arbitration panel could use as a benchmark. The only example of a possible market standard was that of the Yahoo! settlement.¹¹⁷ Therefore, the panel considered the Yahoo! settlement (being representative of two parties with equal bargaining power) as the sole basis for their decision of what a willing buyer/willing seller standard would look like.¹¹⁸

To complicate matters further, the negotiated rates between Yahoo! and the RIAA worked out to be overly advantageous for both, leading to a skewed result.¹¹⁹ The final agreement between the parties specified that Yahoo! would pay a high per-song fee for Internet-only transmissions, but would pay a much lower rate for radio retransmissions—which made up

111. See David D. Oxenford, Davis Right Tremaine LLP, *Internet Radio—The Basics Of Music Royalty Obligations*, BRDCST. ADVISORY BULL., June 20, 2007, http://www.dwt.com/practc/broadcast/bulletins/08-06_InternetRadio.htm (stating that ephemeral copies, also known as buffered copies are “[a] transient copy of the recording that is made in any digital transmission process, as data is transmitted from server to server and, theoretically, copies reside on the memory of a computer for at least some period of time, no matter how short that time may be”).

112. For an excellent discussion of the impact of the panel’s decision on its own disbandment and an overturn of the CARP process, see Deliberero, *supra* note 105, at 93-99.

113. *Id.*

114. Kidd, *supra* note 6, at 373.

115. *Id.*

116. *Id.* at 351-52.

117. *Id.*

118. *Id.* at 352.

119. *Id.*

the vast majority of its webcasting business.¹²⁰ This rate agreement worked out well for both parties; the RIAA was able to get extremely high rates for performance royalties, which would adversely affect the willing buyer/willing seller standard for CARP purposes, while Yahoo! was able to maintain a lower rate for the majority of their business.¹²¹ Small webcasters believed that this system was rigged against the “little guy.” As, Rusty Hodge, General Manager and Program Director of SomaFM explains, “[t]hey use a ‘willing buyer/willing seller’ system that doesn’t ask, ‘Which buyer? Which seller?’ They need something that takes into account the real world.”¹²²

E. CARP Rate Recommendations

Based on the rate agreement between the RIAA and Yahoo!, the CARP established a rate of \$0.0014 per performance for Internet-only transmissions.¹²³ Simulcasts, or retransmissions of radio broadcasts, had a rate of \$0.0007 per performance.¹²⁴ Non-commercial broadcasters would be charged \$0.0002 per performance for simultaneous retransmissions of radio broadcasts.¹²⁵ The response to the rate recommendations by small webcasters was fear and shock.¹²⁶ Many small webcasters, such as KPG,¹²⁷ ceased to broadcast after the announcement of the proposed fees by the CARP.¹²⁸ Many other small webcasters shut down out of fear of being hit with large royalty fees.¹²⁹

Following the CARP decision, both sides appealed.¹³⁰ The RIAA argued that the rates were set too low and the remaining webcasters argued that the rates were set too high.¹³¹ On May 21, 2002, the Library of Congress rejected the CARP recommendation.¹³² The Librarian of Congress modified the rate to \$0.0007 per performance for both Internet-only webcasts, as well as for the simulcasts of traditional radio stations. However, this did not appease the webcasters as the proposed rates would still require many small webcasters to pay more in royalty fees than they

120. *Id.* at 352-53.

121. *Id.* at 352.

122. Downs, *supra* note 3.

123. Kidd, *supra* note 6, at 352.

124. *Id.* at 353.

125. *Id.*

126. *Id.* at 354.

127. KPG was one of the oldest webcasting stations at the time. *Id.*

128. *Id.*

129. *Id.*

130. Jackson, *supra* note 70, at 461.

131. *Id.*

132. Kidd, *supra* note 6, at 355.

received in revenue.¹³³ There was much public outcry at the establishment of rates, which led the webcasters to seek support from Congress.¹³⁴

F. Congressional Legislation

On September 26, 2002, Representative James Sensenbrenner (R-WI) proposed the Small Webcaster Amendments Act of 2002 (SWAA).¹³⁵ The thrust of the Act was to place a six-month moratorium on the Librarian of Congress's royalty rate decision to allow the parties additional time to negotiate.¹³⁶ Thirteen webcasters and the RIAA entered into negotiations which eventually lengthened the one paragraph bill of the SWAA into thirty-plus pages, also including new royalty rates.¹³⁷ The newer version of the SWAA required webcasters to pay royalties as a percentage of their revenues instead of the previous per-performance and per-listener basis that was proposed by the Librarian.¹³⁸ Although the rates were agreeable to the thirteen webcasters involved in the negotiation, the other smaller webcasters still feared high rates would put them out of business.¹³⁹

On October 7, 2002, the SWAA was passed and approved by the House, thirteen days before webcasters were scheduled to pay four years of back royalties to copyright holders.¹⁴⁰ Following the passage of the SWAA in the House, the Act was introduced in the Senate.¹⁴¹ On the day the SWAA was scheduled for debate in the Senate, Senator Jesse Helms (R-NC) introduced his own amendment to the SWAA that stopped consideration of the previous version. Helms' amendment reintroduced the idea of private negotiations between webcasters and copyright holders.¹⁴² The amendment also gave SoundExchange—the division of the RIAA which is responsible for royalty collections—the authority to negotiate royalty rates with small webcasters.¹⁴³ The amendment divided webcasters into two classes: noncommercial webcasters and small commercial webcasters (including traditional Internet radio stations).¹⁴⁴ If negotiations with SoundExchange were unsuccessful, the amendment would force

133. Jackson, *supra* note 70, at 460.

134. *Id.*

135. Kidd, *supra* note 6, at 355.

136. *Id.*

137. *Id.* at 355-56.

138. *Id.*

139. *Id.* at 357.

140. *Id.*

141. *Id.*

142. *Id.* at 358.

143. *Id.*; see also SoundExchange, <http://www.soundexchange.com> (last visited Jan. 31, 2009).

144. Kidd, *supra* note 6, at 359.

webcasters to make the royalty payments outlined by the Librarian of Congress.¹⁴⁵ On October 8, 2002, both houses of Congress unanimously passed the amended version of the SWAA, now known as the Small Webcasters Settlement Act (SWSA).¹⁴⁶

The negotiations between SoundExchange and Voice of Webcasters¹⁴⁷ reached an agreement a few weeks later.¹⁴⁸ The agreement stipulated that the webcasters must pay either eight percent of gross revenues or five percent of expenses (whichever is greater) for the period of time after the enactment of the DMCA through 2002. Further, for 2003 and 2004, webcasters paid either ten percent of the first \$250,000 in revenues and twelve percent of gross revenues above that amount or seven percent of expenses, whichever was higher.¹⁴⁹ Every webcaster had to pay the minimum amount of \$500 per year for the period from the enactment of the DMCA to the end of that year, and a minimum of \$2,000 per year for the years 1999 through 2002.¹⁵⁰ Again, for 2003 and 2004, small webcasters with gross revenues below \$50,000 had to pay at least \$2,000 per year.¹⁵¹ Those with gross revenues greater than \$50,000 had to pay at least \$5,000 per year.¹⁵² Webcasters were allowed to choose between the rates established through the negotiation or to pay the fees set by the Librarian of Congress.¹⁵³

Even though it was a great improvement over the CARP rates and the Librarian rates, the SWSA had other significant problems. As discussed herein, the SWSA gave SoundExchange the power to negotiate all royalty payment agreements. While this may not seem troubling on its face, the considerable disparity between the bargaining power of SoundExchange¹⁵⁴ over small webcasters is extreme. This stipulation in the SWSA placed small webcasters between a rock and hard place. They had to choose to opt out of the royalty fees set by SoundExchange, which they likely could not afford, or be forced to pay the rates established by the Librarian of Congress, which were even higher. The fallout from the SWSA caused a

145. *Id.* at 359-60.

146. *Id.* at 360 & n.127.

147. *Id.* Voice of Webcasters is a coalition of small commercial webcasters formed to promote diversity and quality of Internet radio, and to educate the public on Internet radio issues. See Voice of Webcasters, <http://www.voiceofwebcasters.org/> (last visited Jan. 31, 2009).

148. Kidd, *supra* note 6, at 361.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. SoundExchange operates as the collection arm of the RIAA. See SoundExchange, <http://www.soundexchange.com> (last visited Jan. 31, 2009).

schism in the webcasting community.¹⁵⁵ The agreement had been negotiated by larger, more lucrative webcasters, and although it was an improvement to both the CARP rate and the Librarian of Congress rate, it still did not effectively take into account the smallest of webcasters.¹⁵⁶ In particular, small webcasters such as SomaFM, would still face rates that would put them off the air.¹⁵⁷

IV. THE FORGOTTEN FEW

A. *Internet Radio Post-SWSA*

While the rates established under SWSA were a great improvement over the previous rates, many webcasters still faced royalty rates that would challenge their continued existence.¹⁵⁸ Shortly after the passage of the SWSA, many stations—such as WebRock.Net and CyberRadio2000—announced the end of their streams.¹⁵⁹ There were other casualties as well. Clear Channel, the nation's largest radio network at the time, stopped the broadcast of approximately 150 of their stations after they learned that they would have to pay webcasting fees in addition to their already established budgets.¹⁶⁰

Even though Internet radio was dealt a severe blow from the drastic increase in legislation, litigation, and statutory fee stipulations, the genre of small webcasters still managed to survive. This is not, by any means, due to the fee arrangements and litigation spurred along by the RIAA. Rather, it was because of the drastic increase in listener base and increasing support by the webcasting audience.¹⁶¹ Increases in technology, specifically bandwidth capabilities and data compression, have had a dramatic effect on the ability of the average person listen to webcasts on a regular basis. Statistical data shows that as soon as 2004, following the rate agreement, the number of Americans who streamed either audio or video at least once a month increased by 27.5 percent.¹⁶² Without such a dramatic increase in user base and technology, in all likelihood, the era of Internet radio could have been terminally damaged by the rates established by the Librarian of Congress and the SWSA.

155. Kidd, *supra* note 6, at 362.

156. *Id.*

157. *Id.*; see also Downs, *supra* note 3.

158. See Emily D. Harwood, Note, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L.J. 673, 674 (2004).

159. *Id.* at 688.

160. *Id.* at 689.

161. *Id.* at 690.

162. *Id.* at 689.

B. *The “Changing” of the Guard*

Congress decided in 2003 that it wanted a permanent body to set royalty rates.¹⁶³ On March 27, 2003, Congressman Lamar Smith (R-TX) introduced the Copyright Royalty and Distribution Reform Act.¹⁶⁴ The Act phased out the CARP system by establishing the Copyright Royalty Board (CRB).¹⁶⁵ Unsurprisingly, “[w]ebcasting royalty rates became the CRB’s first case.”¹⁶⁶ During the course of eighteen months, between 2005 and 2007, the CRB heard evidence and testimony from the RIAA, and the DiMA on behalf of webcasters.¹⁶⁷ The litigation was an instant replay of the issues which arose during the previous years:

SoundExchange asked for at least 30 percent of gross revenue and/or a similarly increased rate for each song played per listener. DiMA went the other way and [asked] for a decrease in royalties from 10.9 to 5.5 percent of gross revenues. Testimony and documents numbered in the *tens of thousands*. Lawyers for both sides called dozens of economists, industry spokespeople, and artists. Rebuttals occurred. The two sides played a game of negotiation chicken, each making ridiculous demands and refusing to budge.¹⁶⁸

The ruling by the CRB came down on March 2, 2007, and granted SoundExchange nearly everything they asked for.¹⁶⁹ The CRB set new rates for webcasting for the License Period of 2006 to 2010.¹⁷⁰ The judges stated that they based their rate hikes on the willing buyer/willing seller standard as ordered by Congress.¹⁷¹ The CRB decided that an individual record company consisted of the basic unit of a willing seller. The current rate system is now established with a yearly increase on a per-play and per-listener basis.¹⁷²

Commercial Webcasters, Per Performance Rate¹⁷³

Year	2006	2007	2008	2009	2010
Rate	\$0.0008	\$0.0011	\$0.0014	\$0.0018	\$0.0019

There is a minimum annual statutory fee of \$500 per channel or station, in addition to the above per-play fees. Noncommercial webcasters

163. See, e.g., Downs, *supra* note 3.

164. Harwood, *supra* note 163, at 692.

165. Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board’s March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 283 (2008).

166. Downs, *supra* note 3, at 2.

167. *Id.*

168. *Id.* (emphasis added).

169. *Id.*

170. See generally Kidd, *supra* note 6.

171. See, e.g., Downs, *supra* note 3.

172. Carey, *supra* note 165, at 290.

173. *Id.*

are still treated as a separate category under the new rates, but the basis upon which they pay royalties has been changed.¹⁷⁴ Noncommercial webcasters pay a minimum annual fee of \$500 per channel or station. This fee is applicable only if the webcasters conduct digital audio transmissions below 159,140 aggregate tuning hours per month (ATH).¹⁷⁵ If the noncommercial webcaster exceeds this limit, they must pay additional royalties at the same rate as that paid by commercial webcasters for digital audio transmissions in excess of the cap.¹⁷⁶ The new rates make webcasters pay between 50 and 1,000 percent of gross revenue.¹⁷⁷

The CRB issued an order on April 16, 2007 denying all motions for rehearing. The order stated that there was no new evidence or clear error warranting a reconsideration of the decision.¹⁷⁸ However, there were changes to the CRB's Initial Determination.¹⁷⁹ First, the CRB amended the decision to allow a transitional option for the years of 2006 and 2007.¹⁸⁰ The webcasters, during this period, could continue to use ATH as a basis for calculation and payment of royalties.¹⁸¹ This transitional period was allowed in order to ease the shift in methodology and to facilitate the timely payment of royalties.¹⁸² The CRB expressly rejected the notion of continued availability of this method as a permanent part of the royalty structure.¹⁸³

C. *Internet Radio Equality Act*

The Internet Radio Equality Act (IREA), a proposed form of legislation in opposition to the Initial Determination of the CRB, is currently before both the House of Representatives (H.R. 2060) and the Senate (S. 1353).¹⁸⁴ The bill would give webcasters the choice of paying

174. See Cydney A. Tune, *Client Alert: Webcaster Music Royalty Rates—in Flux and on the Rise*, CLIENT ALERT: COPYRIGHTS MEDIA & ENTMT' INTELLECTUAL PROP. COMM., (Pillsbury, Winthrop, Shaw, Pittman, L.L.P., NEW YORK, N.Y.) June 15, 2007, at 2, available at <http://www.pillsburylaw.com/content/portal/publications/2007/6/20076158311946/Copyrights%20Media%20Ent%20IP%20Communications%20Vol%201401%20No%204018%2006-15-07.pdf>.

175. *Id.* Aggregate tuning hours is a method whereby one listener who listens for one hour would constitute one aggregate tuning hour, two listeners who each listen for a half hour would also be one aggregate tuning hour, and so on.

176. *Id.*

177. See Downs, *supra* note 3.

178. Carey, *supra* note 165, at 285 & n.181.

179. Tune, *supra* note 174.

180. See Downs, *supra* note 3, at 2-3.

181. *Id.* at 3.

182. *Id.*

183. *Id.*

184. *Id.*; see also SaveNetRadio.Org, <http://www.savenetradio.org/> (last visited Jan. 31, 2009).

royalties of \$0.33 per hour of sound recordings transmitted to a single listener, or 7.5 percent of revenues received by the webcaster during that year, or revenues that are directly related to the provider's digital transmissions of sound recordings.¹⁸⁵ Further, the bill proposes a \$500 minimum fee for each channel or broadcasting station.¹⁸⁶ In comparison to prior years beginning in 1998, the IREA (assuming the cost of 100 listeners for four weeks at the average listening time of fourteen hours per week) would allow webcasters to pay one-third of their previous rates.¹⁸⁷ The proposed Act is gaining popularity, especially among small webcasters, but its passage remains uncertain.¹⁸⁸

D. *Negotiations*

From the above discussion it is clear that small webcasters are the party most affected by the established rates. It is estimated that the royalty increase for most small webcasters could possibly reach as high as 1,200 percent of revenues.¹⁸⁹ In turn, this would force the vast majority of small webcasters off the air and out of business. On May 21, 2008, SoundExchange offered to reinstate the terms of the expired SWSA for the 2006 to 2010 period.¹⁹⁰ However, many small webcasters rejected this offer as being only a temporary solution, and felt that it did not properly address their major concerns.¹⁹¹ This coalition of small webcasters supports a scheme closely related to that of the Internet Radio Equality Act.¹⁹²

E. *Possible Solutions To Keep Internet Radio on the Air*

As of the writing of this Note, no final rate agreement between SoundExchange and webcasters has been reached; however, there have been marked improvements in the dialogue between the two parties in an effort to compromise.¹⁹³ SoundExchange has made offers to the webcasters, that "[have] some problems, but the base rate is acceptable."¹⁹⁴ In the meantime, the small webcasters have verbally agreed to continue

185. *Id.* at 3.

186. *Id.*

187. See Ben Newhouse, *Thoughts on the Internet Radio Equality Act*, ROYALTY WEEK, July 11, 2007, available at http://www.royaltyweek.com/issues/Royalty_Week_071107.pdf.

188. See Tune, *supra* note 174, at 4.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. See Rusty on Radio, http://somafm.com/blogs/rusty/2008_01_01_archive.html (Jan. 22, 2008).

194. *Id.*

paying the 2006 rates while the discussions continue.¹⁹⁵ The exact base rate and proposed solution(s) are only available to those involved in the negotiations. As a result, the solutions suggested in this Note are not based upon the most recent terms currently under discussion by the involved parties.

Since the beginning of the webcasting royalty rates, there have been two key sticking points: (1) small webcasters have been largely ignored in many of the key negotiations and considerations surrounding the rate setting, and therefore have been dissatisfied with the process and resulting rates; and (2) there is an ever-increasing market and burgeoning interest in Internet radio. Quite simply, Internet radio is larger than ever and continues to grow rapidly.

1. Jukebox Approach

Perhaps the broadest and simplest solution would be to explicitly exempt “buffered”¹⁹⁶ music from copyright owners’ reproduction rights altogether.¹⁹⁷ This is not an entirely novel concept, as it is the current approach adopted by the European Union.¹⁹⁸ Similarly, it is the approach Congress adopted when exempting jukebox operators from performance royalties in 1909 because the songwriters were already compensated for the reproduction necessary for that type of performance.¹⁹⁹ Not only does this fairly compensate the copyright holders for the reproduction of their work, but it also helps prevent the sort of “double dipping” that many believe the RIAA seeks. It could also be extended further to protect cache copies, and other ephemeral copies used in the process of digital performance via streaming technology.²⁰⁰ The simplicity of this approach would be a radical and welcome change to current copyright law.

While the RIAA may argue that there is still the possibility of perfect copies being made from the digital streams, it has been well established that “Internet radio, while the sound quality is good, in most cases, it’s not as good as the FM broadcast.”²⁰¹ As Internet technology improves, there is a rational fear held by copyright holders that users would use the better

195. *Id.*

196. Buffering refers to data stored temporarily to keep the music playing as a continuous stream. See *Streaming Audio: ots [sic] of Music, No Wait. Find Out How Internet Radio Gets from the Web to Your PC Without Delay*, PCWORLD, Apr. 10, 2000, <http://www.pcworld.com/article/id,16060-page,1/article.html>.

197. *Cardi*, *supra* note 31 at 867.

198. *Id.*

199. *Id.* at 867-68.

200. *Id.* at 867.

201. Katherine Mieszkowski, *Web Radio’s Last Stand*, SALON.COM, Mar. 26, 2002, http://dir.salon.com/story/tech/feature/2002/03/26/web_radio/index.html.

technology to capture and record the streaming audio from webcasts. However, to prevent this, a simple cap could be imposed on all webcasters that would not allow them to broadcast above a certain signal quality.

2. Elimination of Multiple Intermediaries

The reduction of transaction costs in the music business would allow for higher revenues for the artists themselves. The elimination of the multiple intermediaries that deal with copyright holders' individual rights is a solution that would be beneficial to both sides. As discussed throughout this Note, there are many players involved in the system—e.g., the HFA, SoundExchange, the RIAA, and BMI. Specifically, Congress could eliminate SoundExchange and other private organizations that collect and distribute webcasting royalties and perform quasi-governmental functions.²⁰² The creation of a neutral, detached party which could collect and distribute the webcasters' royalties would allow for a reduction in the fierce lobbying and would hopefully foster a system that could allow for a rate-setting process that equally considers both parties' interests.²⁰³ The desire for small businesses to thrive is an ideal that has a strong hold in the American consciousness. A system that can help promote this paradigm, as well as safeguard copyright holders' interests, would be beneficial to the general public as well.

3. Satellite Radio Rates

Recently, the CRB handed down a decision establishing the rates for music broadcast by satellite radio.²⁰⁴ Under the rates set for satellite companies such as XM and Sirius,²⁰⁵ satellite broadcasters will pay a performance license rate of six percent of certain revenue for sound recordings played over their networks.²⁰⁶ They will also pay a performance license rate of six percent of gross revenue subject to the fees of 2009, which will then increase by 0.5 percent annually until reaching eight percent in 2012.²⁰⁷ To put this into context alongside Internet radio, up until 2006, webcasters paid ten to twelve percent of their revenue in performance license rates.²⁰⁸ Unless a new agreement is negotiated, the current legislation indicates that most webcasting stations might have to

202. Susan A. Russell, *The Struggle Over Webcasting—Where Is The Stream Carrying Us?*, 1 OKLA. J.L. & TECH. 13 (2004).

203. *Id.*

204. See Rusty on Radio, *supra* note 193.

205. Now a single broadcasting entity (Sirius XM Radio), as the two companies have merged.

206. See Rusty on Radio, *supra* note 193.

207. *Id.*

208. *Id.*

pay 300 to 600 percent of their revenues. It is a possibility that the fallout caused by the punitive Internet radio rates led to the new lenient rates for satellite radio instituted by the CRB.

A simple solution would be to match webcasting rates to those of satellite radio. In comparison, the two technologies are similar in their ability to broadcast to worldwide global audiences, while also being part of an ever-advancing area of technology. If the two new broadcasting technologies—satellite and Internet radio—were given rate parity, it would be greatly beneficial to the parties involved. This revised rate structure would allow for the growth of both mediums and would be economically beneficial for the industry as a whole. The furtherance of any mode of broadcast provides for the artists' music to be heard across an increasing audience, and, in turn, generates increased revenue. Not only does this help support the industry, but it also advances the primary purpose of copyright law: to promote freedom of ideas and expression by granting protection to the creators of those works for a limited time.

4. Revision of the DMCA

A more extreme possibility would be a revision of the DMCA either wholesale or in part.²⁰⁹ One of the most positive aspects of Internet technology is its ability to grow and expand. As the Internet has developed from a mostly university-based technology to its current form, which is available to nearly every individual who has a cell phone or a computer, the need for the adaptation of law in this area has become increasingly apparent. The passage of the DMCA itself, as well as the judicial system's dealings with cases involving peer-to-peer programs such as Napster, Grokster, and the like, shows the need for adaptation to current and future changes. A rapidly changing technology demands a newfound perspective from the legal community. Communication technology is no longer a slowly evolving behemoth, but instead, is a quickly progressing facet of everyday life. In light of this, the concerns and rationalizations behind the passage of the DMCA in 1998 would likely be very different if considered today. Therefore, adherence to such a technologically archaic legal structure prohibits the free flow of information that the Internet not only thrives upon, but demands.

Various authors have proposed a multitude of changes that would be beneficial to the free flow of ideas as well as to copyright holders who deserve to benefit from their original work of authorship. One of the suggested revisions would be to rework the DMCA to allow webcasters more opportunity to "voice their opinions and to participate in setting

209. For a thorough discussion of the topic, see Wagman & Kopp, *supra* note 44.

royalty fees that [would be more] agreeable to the RIAA and webcasters.”²¹⁰ The past practice of setting restrictively high fees and hoping the parties would negotiate out of them imposes a high burden and a severe reduction in bargaining power for the party wishing to use the copyrighted material. This is not an effective way to resolve disputes, and the current controversy illustrates this. Fortunately, it appears that a change to the Copyright Act may be on the horizon.²¹¹

V. CONCLUSION

The webcasting industry has been financially and legislatively abused as a forerunner of rapidly advancing digital technology. This is an unfortunate reaction by an old industry afraid of changing technology and unwilling to modify its marketing strategy. In order to increase the flow of ideas through the widening scope of technology, the legal system should not be used as a club to set high rates and scare off entrepreneurs. Instead, it should act as a mediator, encouraging the market while protecting the rights of intellectual property holders. While some of the changes suggested in this Note may not be possible to implement immediately, at the very least, this Note defines the much needed change in the copyright system as it currently exists.

The old adage of “if it’s not broke, don’t fix it” does not apply to music copyright law in the information era. It is broken, and it desperately needs to be fixed. Fortunately, it seems that both parties have come to recognize this and are beginning to bridge the gaps in their disagreement. Webcasting technology is not an affront to the music market; rather, it is a logical and practical extension of the music business and should be viewed in the same positive light as traditional radio broadcasting. It is an effective tool for promoting artists and for advertising the music industry’s product. Once the RIAA and others realize this, hopefully the fear of this emerging webcasting technology will diminish. Until then, Rusty Hodge and SomaFM will continue broadcasting until “they send me a collection notice. And then, I guess SomaFM will go bankrupt.”²¹²

210. Russell, *supra* note 202, at 16.

211. See Rusty on Radio, *supra* note 193.

212. Downs, *supra* note 3.