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We Interrupt this Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?

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Cover Page Footnote

I would like to acknowledge the enjoyment and availability of music generally as the inspiration for this Comment, and the support of my family and friends for helping me stay true to said inspiration, even in a law journal foot-note. I would especially like to thank Professor Andrew Sims for his feedback and encouragement during the development of this Comment, and my dearest Sara for her warmth, endless perspective and love throughout my time at Fordham Law.

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Erich Carey*

INTRODUCTION	258
I. SLOW TRAIN COMING: THE EVOLUTION OF A PERFORMANCE RIGHT IN SOUND RECORDINGS	262
A. <i>The Historical Absence of a Sound Recording Performance Right</i>	262
B. <i>The Digital Performance Right in Sound Recordings Act of 1995</i>	265
C. <i>The Digital Millennium Copyright Act</i>	271
D. <i>Webcaster I</i>	276
E. <i>The Small Webcaster Settlement Act of 2002</i>	279
F. <i>Formation of the Copyright Royalty Board</i>	283
II. THE SONG REMAINS THE SAME: A REVIEW AND CRITIQUE OF THE COPYRIGHT ROYALTY BOARD'S MARCH 2007 RATE SETTING DECISION FOR THE § 114 WEBCASTER'S PERFORMANCE LICENSE AND THE § 112 EPHEMERAL LICENSE	284
III. TRY A LITTLE TENDERNESS: A CONCLUSION AND SUGGESTED ALTERNATIVE TO THE PRESENT WEBCASTING RATE DETERMINATION PROCEDURE	301
ADDENDUM: THE WEBCASTER SETTLEMENT ACT OF 2008	306

INTRODUCTION

It's early in the morning and though there may be a long day of work ahead, the alarm clock is easy on the ears. The clock radio on the nightstand has the alarm set to "radio," and the radio itself has been set to WFUV 90.7 FM, Fordham University's own listener-supported public radio station.¹ Instead of the dreaded banshee wail of an alarm clock, a modest pair of speakers pipes radio programming into my bedroom that starts my day perhaps the way a cup of coffee does for many others. In a radio market the likes of New York City's, the dial of which can often seem as congested as rush hour on the subway, WFUV is a welcome reprieve. My analysis is subjective, but it would seem that in a medium driven by advertising revenue, in an area with as high a population density as New York City's, market conditions create a sort of diluted content on the radio, the quality of which, one may suspect, often plays second fiddle to the goal of increasing advertiser revenue by way of attracting the highest volume of listenership possible.²

By way of comparison, WFUV is a not-for-profit, noncommercial entity whose funding comes from the voluntary contributions of its listeners and corporate "underwrit[ers]."³ This support enables WFUV largely to escape the need experienced by most

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* J.D. Candidate, Fordham University School of Law, May 2009; Bachelor of Arts, English, Amherst College, 2002. I would like to acknowledge the enjoyment and availability of music generally as the inspiration for this Comment, and the support of my family and friends for helping me stay true to said inspiration, even in a law journal footnote. I would especially like to thank Professor Andrew Sims for his feedback and encouragement during the development of this Comment, and my dearest Sara for her warmth, endless perspective and love throughout my time at Fordham Law.

¹ See generally WFUV 90.7 FM Public Radio from Fordham University in New York City, <http://www.wfuv.org> (last visited Oct. 21, 2008).

² See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 360–63 (2004); Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 302–21 (2003).

³ See WFUV Public Radio—Support WFUV, <http://www.wfuv.org/support/index.html> (last visited Oct. 21, 2008).

commercial broadcasters to constantly cater to their advertising constituency.⁴ Perhaps it is also what allows WFUV to provide programming content the likes of which appeals to the interests of those for whom an appeal to the broadest number of people possible isn't, for lack of a better word, appealing at all. In my experience, WFUV has consistently programmed content in line with my existing musical interests, introduced me to a wide range of emerging talent and influenced my music purchasing and concert attendance decisions with respect to both new and familiar artists.

It was a welcome discovery then that I made, far from my bedroom, in an old office cubicle without access to a radio, where I learned that I could receive WFUV broadcasts on my computer through the Internet.⁵ In an era of technological innovation marked by the emergence of Apple's iPod and iTunes technology, I considered the new medium for the old format altogether fitting, appropriate and exciting. Whereas the industry for the transmission of actual copies of music was undergoing massive reinvention, it seemed logical that traditional radio should likewise benefit from and exploit the potential for growth through technology. This was my introduction to "webcasting," which refers to both "Internet radio stations and online 'simulcasts' of terrestrial radio broadcasts."⁶ Within the broader universe of webcasters, WFUV quali-

⁴ See Delchin, *supra* note 2, at 360–63; Laura M. Holson, *With By-the-Numbers Radio, Requests Are a Dying Breed*, N.Y. TIMES, July 11, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9F06E1DA1230F932A25754C0A9649C8B63>.

⁵ See WFUV Public Radio—WFUV On-Air: Listen Live, <http://www.wfuv.org/audio/stream.html> (last visited Oct. 21, 2008).

⁶ Recent Legislation, *Copyright Law—Congress Responds to Copyright Arbitration Royalty Panel's Webcasting Rates.—Small Webcaster Settlement Act of 2002*, Pub. L. No. 107-321, 116 Stat. 2780 (to be Codified at 17 U.S.C. § 114(F)–(G)), 116 HARV. L. REV. 1920, 1920 n.2 (2003). "Unlike file-swapping services, through which users download copies of songs from other users, webcasts are 'streamed' and leave no useable copy on the listener's computer." *Id.* SoundExchange, Inc. ("SoundExchange"), the entity that collects certain royalties for broadcasts by webcasters, defines "[a] commercial webcaster/broadcast simulcaster" as:

a noninteractive, nonsubscription digital audio transmission service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions. The primary purpose of the service must be to provide audio or other entertainment programming and not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events. To be "non-

fies as a “noncommercial webcaster.”⁷ Needless to say, my access to WFUV’s noncommercial programming through online streaming has only enhanced my exposure to and appreciation both for the station, and, by extension, its featured artists.

In March, 2007 the Copyright Royalty Board of the U.S. Copyright Office handed down “its decision on 2006–2010 royalties for the use of sound recordings when streaming music on the Internet by Internet radio stations and other non-interactive streaming services operating under the statutory license.”⁸ “[U]nless there is a subsequent settlement or a successful appeal [of the Copyright Royalty Board’s decision,] royalty rates [for webcasting] are going to rise significantly over the next few years.”⁹ For instance, under the old rate, noncommercial radio entities paid a flat fee for

interactive,” a service may not offer “on-demand” access to individual sound recordings or offer programs that are “specially created for the recipient.” Playing requests does not make a service interactive provided that the service does not substantially consist of sound recordings that are performed within one hour of the time they are requested or at a designated time.

SoundExchange, <http://www.soundexchange.com> (follow “Service Provider” hyperlink under “Where Do I Start?” column; then follow “Commercial Webcasters/Simulcasters” hyperlink) (last visited Aug. 16, 2008).

⁷ After providing the definition of a “commercial webcaster/broadcaster simulcaster,” *see supra* note 6, SoundExchange defines “[a] ‘noncommercial webcaster/broadcast simulcaster’” as:

any webcaster/simulcaster that: 1. is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. [§] 501); 2. has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or 3. is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

SoundExchange, <http://www.soundexchange.com> (follow “Service Provider” hyperlink under “Where Do I Start?” column; then follow “Noncommercial Webcasters/Simulcasters” hyperlink) (last visited Oct. 21, 2008). “WFUV is exempt . . . from Federal income tax under Section 501(c)(3) of the United States Internal Revenue Code.” WFUV-FM (A NONCOMMERCIAL, EDUCATIONAL FM STATION OWNED AND OPERATED BY FORDHAM UNIVERSITY), FINANCIAL STATEMENTS 6 (2007) (financial statements as of June 30, 2006 and 2005, audited by KPMG), *available at* <http://www.wfuv.org/about/financials2005.pdf>.

⁸ David D. Oxenford, Copyright Royalty Board Releases Music Royalties for Internet Radio Streaming for 2006–2010—Clarifying the Confusion (June 20, 2007), http://www.dwt.com/practc/broadcast/bulletins/04-07_CRBDecision.htm [hereinafter Oxenford, Clarifying the Confusion].

⁹ *Id.*

streaming which permitted them to stream up to a capped number of hours.¹⁰ If they exceeded those hours, they paid a royalty rate that was one-third the rate at which commercial broadcasters were required to pay.¹¹ “In the Board’s new decision, streaming [by noncommercial webcasters] in excess of the threshold would be paid at full commercial rates.”¹² “Thus, by 2010, the royalties will be approximately *nine times* as high as they were in 2005” for non-commercial webcasters who exceed the designated cap.¹³ Simply put, the dramatic rate increases imposed by the Copyright Royalty Board threaten the vitality of the Internet broadcasts of stations like WFUV, and countless other webcasters of comparable programming, both commercial and noncommercial alike.¹⁴

This Comment proposes to examine the propriety of the Copyright Royalty Board’s March 2007 rate determination proceeding for the performance of sound recordings by webcasters. Part I introduces the statutory and case law background leading up to the Copyright Royalty Board’s rate determination proceeding. Part II outlines and critiques the Copyright Royalty Board’s March 2007 Decision. Part III proposes a solution to the difficulties posed by the Copyright Royalty Board’s rate determination, ultimately advising the legislature to consider reform of the statutory standards underlying the Copyright Royalty Board’s March 2007 Decision. Finally, an Addendum was added to this Comment to appraise the reader of major legislative developments on the subject matter ad-

¹⁰ *Id.*

¹¹ *See id.*

¹² *See id.*

¹³ *Id.* (emphasis added).

¹⁴ *See, e.g.,* WFUV Public Radio—Streaming and Copyright Laws/Fees, <http://www.wfuv.org/audio/copyright.html> (last visited Oct. 21, 2008); Celia Hirschman, Cloudy Issues Surround Internet Radio, On the Beat, KCRW (July 4, 2007), http://www.kcrw.com/etc/programs/ob/ob070704cloudy_issues_surrou; Posting by Eliot Van Buskirk to Wired Listening Post Blog, *Pandora Could Be First Major Casualty of New Royalty Rates*, <http://blog.wired.com/music/2008/08/pandora-could-b.html> (Aug. 18, 2008, 01:32:03 PM); *see also* Hiawatha Bray, *Internet Radio Firms Say Royalties Limiting Choices*, BOSTON GLOBE, Mar. 14, 2008, available at http://www.boston.com/business/technology/articles/2008/03/14/internet_radio_firms_say_royalties_limiting_choices; KCBX Public Radio, Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Aug. 16, 2008); SaveNetRadio, <http://www.savenetradio.org/about/index.html> (last visited Sep. 3, 2008).

dressed by this Comment that arose as the Comment was going to print.

I. SLOW TRAIN COMING: THE EVOLUTION OF A PERFORMANCE RIGHT IN SOUND RECORDINGS

A. *The Historical Absence of a Sound Recording Performance Right*

The Copyright Act of 1976¹⁵ sets out several broad types of “original works of authorship” that are entitled to copyright protection.¹⁶ Among these types of authorship are the closely related, but distinguishable categories of “musical works”¹⁷ and “sound recordings.”¹⁸ “Copyright law affords each of these different aspects of music protection in recognition of the distinctive skills and individuality involved in their creation.”¹⁹ A “musical work” can be considered as the original melody, harmony, rhythm or lyrics of a composition, taken “individually or in combination.”²⁰ The Copyright Act defines “[s]ound recordings” separately as “works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects . . . in which they are embodied.”²¹ The copyright in the sound recording “does not attach to the underlying work *per se*, but only to the au-

¹⁵ Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006)) [hereinafter The Copyright Act].

¹⁶ 17 U.S.C. § 102; In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Determination of Rates and Terms [hereinafter CRB Final Determination], 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380), available at <http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>.

¹⁷ 17 U.S.C. § 102(a)(2).

¹⁸ *Id.* § 102(a)(7); see CRB Final Determination, 72 Fed. Reg. at 24,086; see also 17 U.S.C. § 101 (clarifying that the types of authorship are “illustrative and not limitative”).

¹⁹ ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 424 (4th ed. Aspen Publishers 2006).

²⁰ *Id.* at 424–25; see CRB Final Determination, 72 Fed. Reg. at 24,086; see also H.R. REP. NO. 94-1476, at 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666–67 (noting that the Copyright Act does not specifically define the category of “musical works” because it is thought to have a “fairly settled meaning[.]”).

²¹ 17 U.S.C. § 101. Note however, that sounds that accompany a motion picture do not qualify as “sound recordings.” *Id.*

ral version of such work” in whatever medium the work is fixed.²² So, for instance, a Frank Sinatra recording of a song written by Cole Porter would implicate two copyrights: a musical work copyright for Mr. Porter’s underlying composition, and an entirely separate sound recording copyright for the specific fixation of sound that comprises Mr. Sinatra’s recording of Mr. Porter’s song.²³ “[T]he musical composition copyright is typically owned by a musical publisher, while the sound recording copyright is typically owned by a record company.”²⁴

Copyright protection itself subsists in a veritable bundle of “exclusive rights” granted to the copyright owner.²⁵ Among these is the right “to perform the copyrighted work publicly,”²⁶ typically referred to as the performance right.²⁷ Originally the Copyright Act specified that the right of performance applied only to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works”²⁸ This enumeration of copyrightable works entitled to a performance right

²² 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10[A][2] (MB 2008).

²³ See *id.* at n.23. By extension, a separate recording of Mr. Porter’s song, say by Dean Martin, would make use of the same musical work, but result in a sound recording copyright entirely separate from that of Mr. Sinatra’s. See CRB Final Determination, 72 Fed. Reg. at 24,086. To throw a further wrinkle into the equation “[o]nly sound recordings that were ‘fixed’ (i.e., first embodied in a phonorecord) on or after February 15, 1972, are eligible for statutory copyright.” 1-2 NIMMER, *supra* note 22, § 2.10 [A][1]. As such, the preceding hypotheticals presume sound recordings produced on or after the relevant date.

²⁴ 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:160 (West 2008); see CRB Final Determination, 72 Fed. Reg. at 24,086.

²⁵ 17 U.S.C. § 106; see CRB Final Determination, 72 Fed. Reg. at 24086; MERGES ET AL., *supra* note 19, at 458.

²⁶ 17 U.S.C. § 106(4).

To perform . . . a work ‘publicly’ means—(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

²⁷ See, e.g., CRB Final Determination, 72 Fed. Reg. at 24,086; MERGES ET AL., *supra* note 19, at 498.

²⁸ 17 U.S.C. § 106(4).

left a conspicuous absence. “At its enactment in 1976, the Copyright Act was explicit in disallowing owners of sound recording copyrights from asserting any performance interest therein.”²⁹

This was no oversight. By the time a sound recording copyright was created in 1972, radio broadcasters had enough political influence to persuade Congress to exclude sound recordings from claiming a performance right.³⁰ This allowed broadcasters to avoid paying performance royalties for broadcasts³¹ of sound recordings on top of the performance royalties they already had to pay to the owners of copyright in the underlying musical compositions for broadcasts of their work.³² As a result, to return to our earlier example, when a traditional AM or FM radio station broadcasts a post-1972 Frank Sinatra recording of a Cole Porter composition, only Mr. Porter receives a royalty as compensation for the performance.³³ This is because, while Mr. Porter’s copyrighted musical work enjoys a performance right, Mr. Sinatra’s sound recording copyright does not.³⁴

Though seemingly lopsided, this arrangement prevailed largely due to its creation of a “symbiotic relationship” between broadcasters and record labels.³⁵ Record labels recognized that radio airtime was tantamount to free advertising for their sound recordings, which helped drive customers to retail outlets to purchase

²⁹ 2-8 NIMMER, *supra* note 22, § 8.14[A].

³⁰ See MERGES ET AL., *supra* note 19, at 566; see also William H. O’Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 253–54 (1994).

³¹ The Copyright Act defines “[a] ‘broadcast’ transmission” as “a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.” 17 U.S.C. § 114(j)(3). As such, Internet radio transmissions are not considered broadcasts.

³² See MERGES ET AL., *supra* note 19, at 500. In actuality, Mr. Porter’s publisher would most likely receive the royalty as owner of the copyright in his musical work. See *supra* note 24 and accompanying text. Royalty payment to musical composition copyright owners is “typically handled through blanket licenses—permission to publicly perform an [sic] song from a vast catalog in exchange for a fee based on the scale of the business activity—administered by the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), or Society of European Stage Authors and Composers (SESAC).” MERGES ET AL., *supra* note 19, at 498 n.28.

³³ See MERGES ET AL., *supra* note 19, at 498 n.28 and accompanying text.

³⁴ See 2-8 NIMMER, *supra* note 22, § 8.14[A].

³⁵ See *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003).

albums.³⁶ Broadcasters, on the other hand, enjoyed the listener-ship these sound recordings brought their stations without the burden of having to pay the record industry licensing fees for the performance of its sound recordings.³⁷

B. The Digital Performance Right in Sound Recordings Act of 1995

Record labels, deprived of a significant potential revenue stream, nevertheless tried repeatedly to secure a performance right for their copyrighted works.³⁸ These efforts continuously failed to pass Congress.³⁹ This effort reached a pitch in the mid-1990s, with the advent and increasing influence of digital technology and the Internet.⁴⁰ “The advance of digital recording technology and the prospect of digital transmission capabilities created the possibility that consumers would soon have access to services whereby they could pay for high quality digital audio transmissions (subscription services) or even pay for specific songs to be played on demand (interactive services).”⁴¹

The proliferation of such services led to concern in the recording industry that its “traditional balance . . . with . . . broadcasters would be disturbed and that new, alternative paths for consumers to purchase recorded music (in ways that cut out the recording industry’s products) would erode sales of recorded music.”⁴² The recording industry responded by advocating for the

³⁶ *See id.*

³⁷ *See id.* at 488.

³⁸ *See id.*

³⁹ *See id.*; 4 PATRY, *supra* note 24, § 14:81 (noting failed attempts at legislative reform in 1969, 1975, 1978, 1979, 1981, 1991 and 1993).

⁴⁰ *See* MERGES ET AL., *supra* note 19, at 566; *Bonneville*, 347 F.3d at 488.

⁴¹ *Bonneville*, 347 F.3d at 488. The Copyright Act itself defines a “subscription transmission” as “a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.” 17 U.S.C. § 114 (j)(14) (2006). In addition, the Copyright Act defines an “interactive service” as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.” *Id.* § 114(j)(7). The Copyright Act’s definition of “interactive services” does not generally include services that allow individuals “to request that particular sound recordings be performed.” *Id.*

⁴² *Bonneville*, 347 F.3d at 488.

creation of a performance right that would apply exclusively to performances transmitted by way of these emerging digital technologies.⁴³ Traditional broadcasters joined the recording industry in supporting the creation of such a right because it would “impose a new licensing requirement (and cost) upon potential new competitors.”⁴⁴ The fledgling Internet music industry lacked the massive political clout that traditional broadcasters had wielded in successfully opposing a performance right for sound recordings.⁴⁵ Congress, however, “sought to ensure that the new right would not unduly interfere with the development of new digital transmission business models.”⁴⁶ The resulting compromise was the creation, at long last, of a performance right for sound recordings, albeit a limited one.⁴⁷ In 1995, the Digital Performance Right in Sound Recordings Act (“DPRA”),⁴⁸ amended the Copyright Act by adding section 106(6) which gave the owners of sound recording copyrights the exclusive right to perform their sound recordings “publicly by means of a digital audio transmission.”⁴⁹ In essence, this provision created a “digital performance right.”⁵⁰

To qualify for this exclusive right, a performance of a sound recording essentially needs to meet three requirements: it “must be (a) in digital form, (b) audio-only, and (c) a transmission.”⁵¹ With regards to the first requirement, “[a] ‘digital transmission’ is a transmission in whole or in part in a digital or other non-analog format.”⁵² Effectively this maintains the status quo; a broadcast of a sound recording on traditional AM or FM radio still does not constitute a compensable performance under the Copyright Act af-

⁴³ See MERGES ET AL., *supra* note 19, at 566–67.

⁴⁴ *Id.*

⁴⁵ See *id.* at 567; see also *supra* note 30 and accompanying text.

⁴⁶ MERGES ET AL., *supra* note 19, at 567.

⁴⁷ See CRB Final Determination, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

⁴⁸ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

⁴⁹ 17 U.S.C. § 106(6) (2006).

⁵⁰ CRB Final Determination, 72 Fed. Reg. at 24,086.

⁵¹ Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 (4) ENT. L. REP. 4 (Sept. 1998).

⁵² 17 U.S.C. § 101.

ter the enactment of the DPRA.⁵³ Secondly, the requirement that the transmission be “audio-only” intimates that no visual content accompany the transmission of sound, as, for instance, occurs in a music video.⁵⁴ This is because such works already have a performance right under the Copyright Act.⁵⁵ Finally, with respect to the requirement that the performance be a “transmission,”⁵⁶ the Copyright Act provides that “[t]o ‘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.”⁵⁷ Effectively then, “rendering a live performance” of a digital sound recording in a single location through “the use of a megaphone or loudspeakers”⁵⁸ would not constitute a “digital audio transmission.”⁵⁹

The DPRA did not, however, extend the digital performance right to all types of digital audio transmissions.⁶⁰ The legislation itself was intended as “a narrowly crafted response” to concerns expressed by the recording industry “namely that certain types of *subscription and interaction* audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.”⁶¹ Indeed, the digital performance right was “limited by the creation of a statutory license for certain non-exempt, non-interactive subscription services” as well as for “preexisting satellite digital audio radio services” both of which make use of digital audio transmissions.⁶² These are what the Copyright Act presently defines as “preexisting

⁵³ See Kohn, *supra* note 51. Moreover, “[t]raditional television and radio broadcasters may continue to perform sound recordings without being subject to this new [performance] right, even if they convert their signal to digital form.” MERGES ET AL., *supra* note 19, at 567 n.33; see also 17 U.S.C. § 114(d)(1).

⁵⁴ Kohn, *supra* note 51.

⁵⁵ See 17 U.S.C. § 106(4) (providing the exclusive right of performance to owners of copyright in “audiovisual works”); Kohn, *supra* note 51.

⁵⁶ Kohn, *supra* note 51.

⁵⁷ 17 U.S.C. § 101.

⁵⁸ Kohn, *supra* note 51.

⁵⁹ 17 U.S.C. § 106(6); see also *id.* § 114(j)(5).

⁶⁰ See Kohn, *supra* note 51 (explaining that the provisions of the DPRA did not include webcasting); see also 4 PATRY, *supra* note 24, § 14:29.

⁶¹ H.R. REP. NO. 104-274, at 13 (1995) (emphasis added).

⁶² CRB Final Determination, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

subscription services”⁶³ and “preexisting satellite digital radio services.”⁶⁴

The statutory license essentially allows these services to make their digital audio transmissions without directly having to obtain “consent from, or having to negotiate license fees with, copyright owners of the sound recordings they perform.”⁶⁵ To achieve these ends, “Congress established procedures to facilitate voluntary negotiation of rates and terms including a provision authorizing copyright owners and services to designate common agents on a nonexclusive basis—as well as to pay, to collect, and to distribute royalties—and a provision granting antitrust immunity for such actions.”⁶⁶ This provision eventually led to the creation of SoundExchange, Inc. (“SoundExchange”), the “independent, nonprofit performance rights organization that is designated by the U.S. Copyright Office to collect and distribute digital performance royalties” for all digital audio transmissions of sound recordings, as well as to participate in rate-setting proceedings.⁶⁷

If voluntary negotiations between sound recording copyright owners or their designated agents and the subscription services failed to yield agreement, “the Librarian of Congress was directed

⁶³ 17 U.S.C. § 114 (j)(11). “A ‘preexisting subscription service’ is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998 . . .” *Id.* This would include, for example, the service Music Choice, which transmits programmed music on channels received by digital cable network subscribers. *See generally* Music Choice, <http://www.musicchoice.com> (last visited Oct. 28, 2008); *see also* 4 PATRY, *supra* note 24, § 14:94.

⁶⁴ 17 U.S.C. § 114 (j)(10). “A ‘preexisting satellite digital audio radio service’ is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998 . . .” *Id.* This includes XM and Sirius Satellite Radio services, which allow paying subscribers to receive a variety of audio content, including extensive music programming, by way of digital satellite transmission. *See generally* XM Satellite Radio, <http://www.xmradio.com> (last visited Oct. 28, 2008); Sirius Satellite Radio, <http://www.sirius.com> (last visited Oct. 28, 2008).

⁶⁵ CRB Final Determination, 72 Fed. Reg. at 24,086.

⁶⁶ *Id.*; *see also* 17 U.S.C. § 114(e) (“Notwithstanding any provision of the antitrust laws . . . copyright owners of sound recordings and any entities performing sound recordings . . . may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings . . .”).

⁶⁷ SoundExchange, <http://www.soundexchange.com> (follow “About” hyperlink under column to the right; then follow “Background” hyperlink) (last visited Oct. 28, 2008); *see* 4 PATRY, *supra* note 24, § 14:96.

to convene a Copyright Arbitration Panel (“CARP”) to recommend royalty rates and terms” for digital performances of sound recordings.⁶⁸ In determining the appropriate royalty rates “for the subscription services’ statutory license,” Congress provided that the CARP should set out to achieve “the policy objectives in section 801(b)(1) of the Copyright Act” (“801(b)(1) standard”).⁶⁹ In effect then, the CARP would be asked to set royalty rates that seek:

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

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

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

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.⁷⁰

After the CARP made its determination of rates, it was to recommend its determination to the Librarian of Congress, who, on the advice of the Register of Copyrights, was free to either reject or accept the decision of the CARP.⁷¹ In the event of a rejection, the Librarian was to substitute his own determination of rates based upon the record of the arbitration.⁷² Once the final rate determination was set, under the DPRA copyright owners were to allocate

⁶⁸ CRB Final Determination, 72 Fed. Reg. at 24,086.

⁶⁹ *Id.*; 17 U.S.C. § 114.

⁷⁰ 17 U.S.C. § 801(b)(1)(A)–(D).

⁷¹ Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings [hereinafter Webcaster I LoC Determination], 67 Fed. Reg. 45,240, 45,242 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

⁷² *Id.*

half “of the statutory licensing royalties that they receive from the subscriptions services to [sound] recording artists.”⁷³

While the DPRA set out extensive provisions for the licensing of the digital performance right of sound recordings by subscription services, the DPRA did not address digital audio transmissions made by nonsubscription,⁷⁴ noninteractive services⁷⁵ such as webcasting.⁷⁶ Technology continued to evolve rapidly. In 1995, the year the DPRA was passed, software developer Progressive Networks released RealAudio, “the first technology for streaming audio” content over the Internet.⁷⁷ The technology greatly facilitated the rise and proliferation of webcasting, “since anyone with a personal computer could set up their own Internet ‘radio station,’ and anyone with free RealAudio software could tune in.”⁷⁸ While noninteractive “pure webcasting” was not covered by the DPRA, some websites began offering users customized content based on individual preference, as well as archived webcasts on demand.⁷⁹ These sites began to call into question what exactly qualifies as a noninteractive service.⁸⁰ As a whole, webcasters maintained that their noninteractive, nonsubscription services were not subject to the digital performance right under the DPRA.⁸¹

The recording industry, however, perhaps frustrated by the limitations of the DPRA, countered with a different position.⁸²

⁷³ CRB Final Determination, 72 Fed. Reg. at 24,086.

⁷⁴ The Copyright Act simply defines a “nonsubscription” transmission as “any transmission that is not a subscription transmission.” 17 U.S.C. § 114(j)(9); *see also* 17 U.S.C. § 114(j)(14) (defining a subscription service); *supra* text accompanying note 41.

⁷⁵ The Copyright Act does not offer an independent definition of “noninteractive services.” *See* 17 U.S.C. § 114(j); *see also id.* at § 114(j)(7) (defining an “interactive service”); *supra* text accompanying note 41.

⁷⁶ *See* Kohn, *supra* note 51; 4 PATRY, *supra* note 24, § 1:104 (explaining that the DPRA didn’t apply to webcasters); *see also* Recent Legislation, *supra* note 6, at 1920 n.2.; *supra* text accompanying note 6 (defining webcasts as “noninteractive, nonsubscription” services); Steve Gordon, *Update on Webcasting Royalty Rates Part I of II*, ENT. L. & FIN., August, 2004, available at http://www.stevegordonlaw.com/update_webcast_royalty_rates.htm (last visited Oct. 28, 2008).

⁷⁷ Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out The Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 12 (2001).

⁷⁸ Delchin, *supra* note 2, at 354.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; *see also* Craft, *supra* note 77, at 12.

The Recording Industry Association of America (“RIAA”), the U.S. recording industry’s trade association,⁸³ argued that webcasters were indeed subject to the DPRA’s digital performance right, and as such should be paying royalties for the performance of its copyrighted material on the Internet.⁸⁴

C. *The Digital Millennium Copyright Act*

Around the same time that the RIAA was arguing that webcasters were subject to the DPRA’s digital performance right, Congress was in the middle of drafting the Digital Millennium Copyright Act (“DMCA”),⁸⁵ primarily aimed at bringing the U.S. Copyright Act into harmony with World Intellectual Property Organization treaties concerning “Internet piracy and security.”⁸⁶ The recording industry sought to take advantage of the opportunity, intensely lobbying Congress to add language to the Copyright Act that would eliminate any uncertainty as to whether noninteractive, nonsubscription webcasting was subject to the digital performance right.⁸⁷ The recording industry backed its bark with bite, threatening litigation and vowing to withhold its copyrighted content if Congress declined to insert such revisions into the Copyright Act.⁸⁸

“In an effort to appease the RIAA, Congress permitted a last-minute hearing on the matter.”⁸⁹ The prominent players in the equation were hastily gathered in 1998.⁹⁰ The Digital Media Association (“DiMA”), digital media’s recently formed trade association, represented webcasters.⁹¹ “On Thursday, July 23, 1998” the RIAA and DiMA “met with the U.S. Copyright Office . . . and were told by the Register of Copyrights that they had until the following Friday, July 31, 1998, to draft the legislation” that the

⁸³ RIAA—Who We Are, <http://www.riaa.com/aboutus.php> (last visited Oct. 28, 2008).

⁸⁴ Kohn, *supra* note 51.

⁸⁵ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

⁸⁶ Craft, *supra* note 77, at 13.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.* at 12; *see also* Kohn, *supra* note 51.

RIAA was seeking.⁹² DiMA found itself in a difficult position. Even if DiMA was able to defeat the legislative amendment proposed by the RIAA, it would still be subject to the RIAA's threatened litigation, which, at the very least would impose a huge cost on the growing industry.⁹³ "Therefore, instead of fighting the amendment, DiMA negotiated a simpler compulsory licensing process—paying royalties to a single entity, [eventually to become SoundExchange] and not having to negotiate individually with each individual copyright holder."⁹⁴ In somewhat miraculous fashion, "on August 4, 1998, the House of Representatives passed an amendment to the [DMCA] which included the legislation drafted and agreed upon by the RIAA and DiMA just days, and perhaps hours, earlier."⁹⁵ The "eleventh hour" amendment, made it into the DMCA "without House or Senate debate," and was signed into law by President Clinton in October of 1998.⁹⁶

Under the DMCA the scope of the DPRA's digital performance right was broadened to include "digital transmissions and retransmissions, typically referred to as webcasting."⁹⁷ However, the DMCA also expanded the "statutory license for digital audio transmission of sound recordings."⁹⁸ Under the DMCA, webcasters who "transmit/retransmit sound recordings on an *interactive* basis" are ineligible for statutory licensing and have to directly "obtain the consent of, and negotiate fees with, individual owners" of sound recordings.⁹⁹ On the other hand, the DMCA provided that webcasters who stream digital audio transmissions on a non-subscription, noninteractive basis would be "eligible for statutory licensing"¹⁰⁰ much as "non-interactive, subscription services and preexisting satellite digital audio radio services" were under the DPRA.¹⁰¹ In essence then, by enacting the DMCA Congress cre-

⁹² Kohn, *supra* note 51.

⁹³ Delchin, *supra* note 2, at 357.

⁹⁴ *Id.*

⁹⁵ Kohn, *supra* note 51.

⁹⁶ Craft, *supra* note 77, at 15; *see* Delchin, *supra* note 2, at 357.

⁹⁷ *See* CRB Final Determination, 72 Fed. Reg. 24,084, 24,086 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

⁹⁸ *Id.*; *see also* 1 PATRY, *supra* note 24, § 1:104 (explaining that the DMCA expanded the provisions of the DPRA to include webcasters).

⁹⁹ CRB Final Determination, 72 Fed. Reg. at 24,086.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; *see supra* text accompanying note 60.

ated a new “statutory license” in § 114 of the Copyright Act for a distinct group of digital audio transmissions: “‘eligible non-subscription transmissions,’ which include[s] non-interactive transmissions of sound recordings by webcasters” (“§ 114 webcaster performance license”).¹⁰² In order to qualify for this statutory license, “the webcaster must comply with several” distinct technical requirements.¹⁰³

To determine rates for the webcaster’s statutory license, the DMCA “adopted the . . . voluntary negotiation and arbitration pro-

¹⁰² CRB Final Determination, 72 Fed. Reg. at 24,086; 17 U.S.C. § 114(d)(2), 114(f)(2) (2006).

¹⁰³ CRB Final Determination, 72 Fed. Reg. at 24,086. A laundry list of these requirements provides:

- (1) Webcasters must adhere to the “sound recording performance complement” originally established under the DPRA. This prohibits a webcaster from playing in any three-hour period more than three songs from the same album and more than two songs consecutively, or more than four different songs from the same artist or from any compilation.
- (2) The song, album, and featured artist must be textually identified on the user’s software program while the song is being played; however,
- (3) advanced song or artist playlists may not be published. DJs can use “teasers” to identify which artists will be played, but they cannot specify the time a particular song will be played.
- (4) If the program is archived on the webcaster’s website and made on-demand, it must be at least five hours in duration. The rationale [being] that a user is not willing to sit through a five hour rebroadcast in order to hear a particular song repeated again. Also, the archive may be made available only for a period of two weeks.
- (5) If the program is continuously looped (i.e., immediately re-played upon conclusion), it must be at least three hours in duration. This makes it more difficult to repeatedly tune in to particular songs.
- (6) Scheduled programs (i.e., songs announced in advance) of less than one hour in duration can only be transmitted three times in any two-week period, or four times for programs longer than one hour in duration.
- (7) The webcaster cannot suggest a connection in any way between the artist and any particular product or service (i.e., deceptive advertising). For example, the same advertisement displayed every time a particular song is played may suggest a misleading connection.
- (8) Webcasters have to take proactive steps to defeat copyright infringement if they are aware of such copying and have the technological capacity to prevent it, such as disabling copying features available through the service.
- (9) A webcaster may not intentionally switch channels from one program to another. For example, if a user is listening to one genre of music, the webcaster is prohibited from switching the channel to another genre.

Delchin, *supra* note 2, at 358–59.

cedures” established under the DPRA for satellite and subscription services.¹⁰⁴ Thus, if the interested parties were unable to voluntarily agree on a licensing fee for webcasting, the CARP, once again, was to be convened to determine and recommend to the Librarian of Congress a fair value for these services.¹⁰⁵ Significantly, however, while the DMCA left the DPRA’s rate setting *procedure* in place, “it changed the statutory *standard* for determining rates and terms.”¹⁰⁶ Rather than seeking to achieve the policy objectives articulated in the 801(b)(1) standard, in setting the statutory license rate for webcasting, the CARP was to determine what “most clearly represents the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller” (“willing buyer/willing seller standard”).¹⁰⁷ “The criteria for setting rates and terms for the § 114 webcaster performance license [were] enunciated under 17 U.S.C. [§] 114(f)(2)(B),” which presently, in slightly amended form provides:

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 such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges 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 Royalty Judges shall base its decision on

¹⁰⁴ CRB Final Determination, 72 Fed. Reg. at 24,086; *see supra* text accompanying notes 60–73.

¹⁰⁵ *See* Delchin, *supra* note 2, at 358; 17 U.S.C. § 114(e), 114(f).

¹⁰⁶ CRB Final Determination, 72 Fed. Reg. at 24,086 (emphasis added).

¹⁰⁷ 17 U.S.C. § 114(f)(2)(B); *see* CRB Final Determination, 72 Fed. Reg. at 24,086.

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.¹⁰⁸

Congress further provided that “[i]n establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.”¹⁰⁹

“Congress also recognized that webcasters who avail themselves of the [§] 114 webcaster performance license may need to make one or more temporary or ‘ephemeral’ copies of a sound recording in order to facilitate the transmission of that recording.”¹¹⁰ This involves the right of reproduction, an entirely different exclusive right than the right of performance,¹¹¹ which essentially provides the owner of a copyrighted work the exclusive right to make a copy of that work.¹¹² Unlike the right of performance, sound recordings, subject to a few enumerated exceptions, “enjoy the full scope of the reproduction right” under the Copyright Act.¹¹³ “Accordingly Congress created a new statutory license in [§] 112(e)” for copies of sound recordings that webcasters may have to make in the process of webcasting (“§ 112 ephemeral license”).¹¹⁴ “Congress retained the DPRA voluntary negotiation and arbitration

¹⁰⁸ CRB Final Determination, 72 Fed. Reg. at 24,087 (quoting 17 U.S.C. § 114(f)(2)(B)).

¹⁰⁹ 17 U.S.C. § 114(f)(2)(B).

¹¹⁰ CRB Final Determination, 72 Fed. Reg. at 24,086.

¹¹¹ See MERGES ET AL., *supra* note 19, at 500.

¹¹² *Id.* at 459.

¹¹³ 4 PATRY, *supra* note 24, § 11:18.

¹¹⁴ CRB Final Determination, 72 Fed. Reg. at 24,086; 17 U.S.C. § 112(e).

procedures for the § 112 ephemeral license. Congress again applied the willing buyer/willing seller standard applicable to the § 114 webcaster performance license. The webcasting and ephemeral statutory licenses created by the DMCA [were] the subject” of the March, 2007 decision that is the focus of this Comment.¹¹⁵

D. Webcaster I

The two licenses created by the DMCA were the subject of one prior proceeding (“Webcaster I”).¹¹⁶ Twenty-six webcasters were able to reach voluntary licensing agreements with the RIAA in the wake of the DMCA.¹¹⁷ In July, 1999, the RIAA petitioned the Librarian of Congress to convene a CARP to determine “industry-wide rates for webcasters with whom it had not yet completed agreements.”¹¹⁸ The CARP released its determination three years later.¹¹⁹ In the interim, National Public Radio (“NPR”), which had litigated on behalf of public radio in Webcaster I, reached a voluntary settlement agreement with the RIAA, which covered all NPR member and Corporation for Public Broadcasting (“CPB”) qualified webcasters through 2004.¹²⁰ The NPR settlement did not apply to the remaining non-CPB affiliated noncommercial web-

¹¹⁵ CRB Final Determination, 72 Fed. Reg. at 24,086–87. While the language of the § 114 webcaster’s performance license and the § 112 ephemeral license “varies in minor respects . . . the criteria for setting rates and terms [are] essentially identical.” *Id.* at 24,087–88.

¹¹⁶ *Id.* at 24,087; Webcaster I LoC Determination, 67 Fed. Reg. 45,240 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

¹¹⁷ Recent Legislation, *supra* note 6, at 1922; *see* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 64 Fed. Reg. 52,107, 52,108 (Sept. 27, 1999).

¹¹⁸ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 64 Fed. Reg. at 52,108.

¹¹⁹ *Id.*; In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel [hereinafter Webcaster I CARP Report] (Feb. 20, 2002), http://www.copyright.gov/carp/webcasting_rates.pdf.

¹²⁰ KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Aug. 16, 2008); *see* Webcaster I LoC Determination, 67 Fed. Reg. at 45,258. “A non-CPB, non-commercial broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. [§] 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. [§] 396.” Webcaster I LoC Determination, 67 Fed. Reg. at 45,243 n.12.

casters in the proceedings, and hence the CARP was left to determine a rate for these services.¹²¹

Recognizing the “extraordinary challenge” of setting a rate for noncommercial webcasters under the willing buyer/willing seller standard, the CARP noted that “[a]pplying the same commercial broadcaster rate to non-commercial entities affronts common sense.”¹²² At the RIAA’s proposal, the CARP reluctantly agreed to subject noncommercial webcasters to a per-performance of copyrighted material rate¹²³ that was one-third the rate set for commercial webcasters, the alternative being to subject noncommercial webcasters to full commercial rates.¹²⁴ Hence, whereas the CARP recommended that commercial webcasters pay at a rate of 0.07¢ per-performance, the CARP also recommended that non-commercial entities pay one-third that rate, or 0.02¢ per-performance, rounded to the nearest hundredth.¹²⁵

In his review of the CARP’s decision (“Webcaster I LoC Determination”), the Librarian of Congress revised some of the CARP’s findings.¹²⁶ Whereas the CARP had suggested a distinction between webcasts that were Internet-only transmissions and webcasts that were merely broadcast radio retransmissions, the Librarian of Congress rejected this distinction, and concluded that both of these types of transmissions should be subject to the same

¹²¹ See Webcaster I CARP Report, *supra* note 119, at 89.

¹²² *Id.*

¹²³ Per-performance, “i.e. [requiring] a payment for each song as heard by each listener.” Oxenford, Clarifying the Confusion, *supra* note 8. “A performance is defined as a single song, heard by a single listener. Thus, if a webcaster streams 10 songs in an hour to a single listener, there have been 10 performances during that period. If there were two listeners to those 10 songs, there would have been 20 performances.” *Id.*

¹²⁴ Webcaster I CARP Report, *supra* note 119, at 93.

¹²⁵ *Id.* This rate was essentially for non-commercial broadcaster’s “simulcasts” or Internet retransmissions of AM/FM broadcasts. *Id.* Furthermore, whereas the CARP had recommended that commercial entities be charged a higher rate for webcast transmissions of Internet only content (0.14¢ per-performance), the CARP likewise recommended that noncommercial entities be charged one-third of this adjusted rate (0.05¢ per-performance) for its transmissions of Internet only content, namely archived webcasts, and the operation of up to two Internet-only side channels. *Id.* at 93–94. Any additional side channels the noncommercial webcaster may host would be subject to the full commercial non-radio simulcast rate of 0.14¢ per performance. *Id.* at 94.

¹²⁶ See Webcaster I LoC Determination, 67 Fed. Reg. 45,240, 45,259 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

webcasting rate.¹²⁷ However, in essence the Librarian of Congress adopted much of the CARP's recommendations with regard to transmissions made by noncommercial stations, setting the webcasting rate for the noncommercial entities at one-third that of their commercial counterparts.¹²⁸

Many small commercial webcasters felt that the rates ultimately set by the Librarian of Congress were too high. The CARP had set its rates using a willing buyer/willing seller model based largely on a settlement agreement between Yahoo! and the RIAA, whereby Yahoo! paid the RIAA a lump sum of \$1.25 million for its first one and a half billion transmissions.¹²⁹ Although the Librarian of Congress set rates that were on the whole lower than what the CARP had recommended, he, like the CARP, also made the questionable assumption "that a voluntary rate agreement between RIAA and one of the largest webcasters in the market would also be appropriate for the smallest webcasters in the market."¹³⁰ In reality, however, small commercial webcasters have a much lower per-performance revenue than do large commercial webcasters, such as Yahoo!.¹³¹ As a result, small commercial webcasters began shutting down in droves after the Librarian of Congress' determination in Webcaster I.¹³² Many small commercial webcasters, however, also began complaining to Congress, and

¹²⁷ See Delchin, *supra* note 2, at 376.

¹²⁸ See Webcaster I LoC Determination, 67 Fed. Reg. at 45,259. The Librarian thus adopted the CARP's recommendations for a 0.02¢ per performance rate for Internet simulcasts of noncommercial radio broadcasts. *Id.* However, since the Librarian of Congress had done away with the CARP's distinction between Internet-only webcasts and webcasts that were merely retransmissions of radio broadcasts, it likewise did away with the CARP's recommendation of a higher rate for the latter, and subjected both of these transmissions to a 0.07¢ per performance rate for commercial entities. *Id.* By extension, noncommercial stations were subject to a downward adjustment from the CARP's recommendation of 0.05¢ per performance of Internet-only content (archived webcasts and up to two side channels) to a rate of 0.02¢ per performance of Internet-only content, again one-third of the 0.07¢ per performance rate for commercial entities for the same services. *Id.*

¹²⁹ Delchin, *supra* note 2, at 376.

¹³⁰ *Id.* at 377.

¹³¹ See *id.*

¹³² See *id.* Many noncommercial stations also stopped streaming after Webcaster I as well. See *Public Stations Now Offline*, RADIO & INTERNET NEWSL., Aug. 8, 2002, <http://www.kurthanson.com/archive/news/080802/index.shtml>.

noncommercial webcasters, not entirely satisfied by the Librarian of Congress' ultimate determination, joined the chorus.¹³³

E. The Small Webcaster Settlement Act of 2002

Congress was swift in action, responding to concerns by passing the Small Webcaster Settlement Act of 2002 ("SWSA").¹³⁴ "The SWSA provide[d] temporary relief to noncommercial webcasters and small webcasters"¹³⁵ and was met with general approval from both sides of the debate.¹³⁶ The SWSA itself did not set rates or terms for webcasting entities.¹³⁷ Rather the SWSA authorized SoundExchange, acting on behalf of the RIAA, and an agent of the Librarian of Congress to enter into "agreements, on behalf of all copyright owners and performers for the purpose of establishing an *alternative* payment structure for small commercial webcasters and noncommercial webcasters operating under" the § 112 [ephemeral] license and the § 114 webcaster performance license.¹³⁸ To achieve these ends, the SWSA provided that any royalty rates and terms reached in such agreements "shall be considered as a compromise motivated by the unique business, economic and political contributions of small webcasters rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller."¹³⁹ However, the rates and terms of agreements made under the SWSA were to apply only to

¹³³ 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, 687 (2004); KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Aug. 16, 2008); Oxenford, *Clarifying the Confusion*, *supra* note 8. Although the Librarian of Congress set noncommercial rates at one-third that of commercial entities, noncommercial stations were in fact seeking a rate that was one-thirty fourth of that for commercial entities. Webcaster I LoC Determination, 67 Fed. Reg. at 45,258.

¹³⁴ Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified as amended in scattered sections of 17 U.S.C.); see Recent Legislation, *supra* note 6, at 1924.

¹³⁵ Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 469 (2003).

¹³⁶ Kurt Hanson, *Congress Passes SWSA!*, RADIO & INTERNET NEWSL., Nov. 15, 2002, v.2, <http://www.kurthanson.com/archive/news/111502/index.shtml>.

¹³⁷ Delchin, *supra* note 2, at 377.

¹³⁸ Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008 (June 11, 2003) (emphasis added).

¹³⁹ *Id.* at 35,009 (quoting 17 U.S.C. § 114(f)(5)(C)).

the time periods specified in those agreements and were to be given no precedential effect in any future rate-setting proceedings.¹⁴⁰ While nothing compelled the RIAA to come to new agreements with webcasters under the terms of the SWSA, if no agreements were reached the rates set by the Librarian of Congress would take effect.¹⁴¹

Significantly for small commercial entities, the SWSA provided that any agreement with small webcasters must include a provision allowing these entities to pay royalties on a percentage of revenue or percentage of expenses basis, rather than on a performance basis.¹⁴² Also with regards to both small webcasters and noncommercial webcasters, the SWSA provided a “grace period for back payment of royalties”¹⁴³ Under these circumstances small webcasters were able to reach an agreement with SoundExchange in December of 2002.¹⁴⁴ The agreement for small webcasters reached under the SWSA, defined a small webcaster on a revenue scale graduated by calendar year.¹⁴⁵ Under the most recent definition, a small webcaster is one whose revenues do not exceed \$1.25 million a year.¹⁴⁶ As for rates, the most recent provisions of the SWSA provide that an eligible small webcaster must pay ten percent of its first \$250,000 in gross revenues and twelve percent of any gross revenues beyond that in a given year.¹⁴⁷ However, in the event that a small webcaster were to earn “little or no revenue, a percentage of expenses (seven percent) would be paid as a minimum fee if that figure exceeded the applicable percentage of revenues.”¹⁴⁸ “In addition, [under the SWSA] each [small] webcaster is required to maintain and provide arduous and

¹⁴⁰ *Id.* at 35,008.

¹⁴¹ Delchin, *supra* note 2, at 378.

¹⁴² See Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, sec. 4, § 114(f), 116 Stat. 2780, 2781–82; Delchin, *supra* note 2, at 378.

¹⁴³ Delchin, *supra* note 2, at 378; see Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, sec. 3(a)(1), (b)(1), § 114, 116 Stat. 2780, 2781.

¹⁴⁴ See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002), available at <http://www.copyright.gov/fedreg/2002/67fr78510.html>; Delchin, *supra* note 2, at 379.

¹⁴⁵ See Delchin, *supra* note 2, at 379.

¹⁴⁶ See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. at 78,513.

¹⁴⁷ See *id.* at 78,511.

¹⁴⁸ Oxenford, Clarifying the Confusion, *supra* note 8; see Delchin, *supra* note 2, at 379.

extensive notice and recordkeeping regarding the songs that they broadcast.”¹⁴⁹

With regards to noncommercial webcasters, the SWSA fore-stalled the payment of royalties due for the period between October 29, 1998 and May 31, 2003 until June 20, 2003.¹⁵⁰ With the breathing room afforded by this grace period, noncommercial webcasters and SoundExchange were able to reach an agreement as to royalty rates under the SWSA on June 2, 2003.¹⁵¹ Under the agreement, noncommercial webcasters transmitting a single channel, be it a retransmission of a radio broadcast or an Internet-only transmission, paid a flat minimum annual fee starting at \$200, escalating per year up to \$500 most recently.¹⁵² Noncommercial webcasters transmitting more than a single channel have always had to pay a minimum fee of \$500 under the agreement.¹⁵³ The flat minimum fee covered broadcasts by noncommercial webcasters up to a cap, designated at 146,000 Aggregate Tuning Hours¹⁵⁴ (“ATH”) in any month.¹⁵⁵ After that cap was exceeded,

¹⁴⁹ Delchin, *supra* note 2, at 379.

¹⁵⁰ See Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, sec. 3(a)(1), § 114, 116 Stat. 2780, 2781.

¹⁵¹ See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,009 (June 11, 2003).

¹⁵² See *id.* at 35,010. However, under the most recent rates a noncommercial webcaster, substantially all of whose programming can “reasonably [be] classified as news, talk, sports or business programming,” need only pay a minimum annual fee of \$250. *Id.*

¹⁵³ See *id.*

¹⁵⁴ The agreement defines the term Aggregate Tuning Hours as follows:

The term “Aggregate Tuning Hours” means the total hours of programming that a Noncommercial Webcaster has transmitted during the relevant period to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions, less the actual running time of any sound recordings for which the Noncommercial Webcaster has obtained direct licenses apart from 17 U.S.C. [§] 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Webcaster transmitted 1 hour of programming to 10 simultaneous listeners, the Noncommercial Webcaster’s Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Webcaster’s Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed),

noncommercial broadcasters were subject to a rate of 0.02¢ per-performance,¹⁵⁶ which, again, was one-third the rate for commercial broadcasters.¹⁵⁷ A noncommercial webcaster operating more than three channels of programming, however, was subject to pay for the performance of sound recordings on those channels at full commercial rates.¹⁵⁸ Furthermore, the agreement removed “the arduous recordkeeping requirements established under [the] CARP”¹⁵⁹ by permitting noncommercial webcasters to avoid these requirements by paying a fee between \$25 and \$50 a year.¹⁶⁰ This saved noncommercial webcasters a potentially much larger expense.¹⁶¹

In light of the CARP and Librarian of Congress’ determinations, “most noncommercial broadcasters regarded the agreement [reached under the SWSA] as a victory in keeping streams from shutting down.”¹⁶² Indeed, in 2002 most small webcasters and noncommercial groups felt that webcasting royalties would have “put them out of business . . . if not for the [SWSA].”¹⁶³ The terms of the agreements, reached under the SWSA determined rates for small and noncommercial webcasters through December 31, 2005, the last day prior to the beginning of the period covered by the March 2007 rate proceedings that are the focus of this Comment.¹⁶⁴

the Noncommercial Webcaster’s Aggregate Tuning Hours would equal 10.

Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. at 35,012.

¹⁵⁵ See *id.* at 35,010.

¹⁵⁶ See *id.* Alternatively, the agreement allowed noncommercial webcasters to elect to pay a rate of 0.251¢ per ATH. *Id.*

¹⁵⁷ See Oxenford, Clarifying the Confusion, *supra* note 8.

¹⁵⁸ See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. at 35,011.

¹⁵⁹ Delchin, *supra* note 2, at 382.

¹⁶⁰ See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. at 35,010.

¹⁶¹ Delchin, *supra* note 2, at 382.

¹⁶² *Id.*

¹⁶³ Oxenford, Clarifying the Confusion, *supra* note 8.

¹⁶⁴ Although the SWSA, as originally drafted, was only meant to cover the period from 1998 to 2004, the Copyright Royalty and Distribution Reform Act of 2004 extended the provisions of the SWSA an extra year to cover through the end of 2005. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, sec. 6(b)(3), § 118,

F. Formation of the Copyright Royalty Board

In the time during which the SWSA has been in effect, however, the rate setting procedure for the § 114 webcaster performance license and the § 112 ephemeral license has undergone significant reform.¹⁶⁵ After Webcaster I and other proceedings calling for the formation of a CARP, many parties offered criticisms of the CARP arbitration system, primarily that: “[(1)] CARP decisions are unpredictable and inconsistent[; (2)] [a]rbitrators lack appropriate expertise to render decisions and frequently reflect either a ‘content’ or ‘user’ bias [; and (3)] [t]he process is unnecessarily expensive.”¹⁶⁶ In response to these concerns Congress passed the Copyright Royalty and Distribution Reform Act of 2004 (“Reform Act”), which replaced the copyright arbitration royalty panels with three full-time, government-paid Copyright Royalty Judges, appointed by the Librarian of Congress.¹⁶⁷ The three judges collectively constitute the Copyright Royalty Board (“CRB”).¹⁶⁸ “The royalty judges are ‘housed’ in the Library of Congress, and after initial staggered appointments . . . serve for six years, with the possibility of reappointment.”¹⁶⁹ Rate setting procedures after the Reform Act maintain “the voluntary negotiation period that existed under the CARP system.”¹⁷⁰ However, if “copyright users and carriers cannot settle on the rates or methods to distribute royalties in private negotiations,” then under the Reform Act, the “three full-time Copyright Royalty Judges (CRJs) would replace the CARPs and make determinations on rates and

118 Stat. 2341, 2370–71; CRB Final Determination, 72 Fed. Reg. 24,084, 24,106 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

¹⁶⁵ See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified as amended in scattered sections of 17 U.S.C.).

¹⁶⁶ H.R. REP. NO. 108-408, at 18 (2004). Parties to CARP arbitration proceedings had to pay the costs of the arbitrators themselves. Oxenford, *Clarifying the Confusion*, *supra* note 8.

¹⁶⁷ See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, 2341 (codified as amended in scattered sections of 17 U.S.C.); Skyla Mitchell, Note, *Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1250 (2007).

¹⁶⁸ See Copyright Royalty Board: Governing Laws, <http://www.loc.gov/crb/laws> (last visited Aug. 30, 2008).

¹⁶⁹ 1 PATRY, *supra* note 24, § 1:110.

¹⁷⁰ David Jakhelln & James Menefee, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Intellectual Property Law*, 74 GEO. WASH. L. REV. 837, 849 (2006) (citing 17 U.S.C. § 803(b)(3)).

distribution of royalties.”¹⁷¹ The CRB “sits en banc” in a “hearing process, which includes the potential for discovery, live testimony, and other trial-like attributes.”¹⁷² After the hearing process, the three-judge CRB then makes its rate determinations by way of majority vote.¹⁷³ Most significantly, however, the Reform Act “removed the Librarian [of Congress] and the Copyright Office from further involvement in royalty adjustment proceedings.”¹⁷⁴ As a result, the determinations of the CRB are directly appealable to the United States Court of Appeals for the District of Columbia.¹⁷⁵

II. THE SONG REMAINS THE SAME: A REVIEW AND CRITIQUE OF THE COPYRIGHT ROYALTY BOARD’S MARCH 2007 RATE SETTING DECISION FOR THE § 114 WEBCASTER’S PERFORMANCE LICENSE AND THE § 112 EPHEMERAL LICENSE

The first decision of the newly formed CRB was its March 2007 determination of rates and terms for the § 114 webcaster performance license and § 112 ephemeral license for the period from January 1, 2006 through December 31, 2010.¹⁷⁶ Even with the elimination of arbitrators and the new CRB system in place, the results of the rate-setting proceedings were “eerily reminiscent” to those “which occurred in 2002, the last time the royalties were established.”¹⁷⁷ With the recent decision, however, it is not only small and noncommercial webcasters, “but virtually all of the webcasters involved in the proceeding who believe the royalties have been set too high, and that many Internet radio stations will be put out of business if [those royalties] remain in place.”¹⁷⁸

¹⁷¹ H.R. REP. NO. 108-408, at 20 (2004); see 1 PATRY, *supra* note 24, § 1:110.

¹⁷² Jakhelln & Menefee, *supra* note 170, at 849 (citing 17 U.S.C. § 803(a)(2), (b)(6)).

¹⁷³ *Id.*; 17 U.S.C. § 803(a)(3) (2006).

¹⁷⁴ CRB Final Determination, 72 Fed. Reg. 24,084, 24,106 (May 1, 2007) (codified at 37 C.F.R. pt. 380). “The exception is the limited role of the Register of Copyrights on questions of law.” *Id.* at n.72 (citing 17 U.S.C. § 802(f)(1)(A)(ii), 802(f)(2)(B)(i), and 802(f)(1)(D)).

¹⁷⁵ Jakhelln & Menefee, *supra* note 170, at 850.

¹⁷⁶ See Oxenford, Clarifying the Confusion, *supra* note 8; CRB Final Determination, 72 Fed. Reg. at 24,084.

¹⁷⁷ Oxenford, Clarifying the Confusion, *supra* note 8.

¹⁷⁸ *Id.*

The CRB first issued a notice announcing the commencement of rate determination proceedings for the § 114 webcaster performance license and the § 112 ephemeral license for the 2006–10 period on February 16, 2005.¹⁷⁹ After the CRB issued its rate determination decision, many parties petitioned the CRB for a rehearing.¹⁸⁰ The CRB subsequently denied the petition.¹⁸¹ After the rehearing was denied, many parties appealed the CRB’s rate determination decision to the D.C. Court of Appeals.¹⁸² At its enactment, it was hoped the Reform Act, which eliminated the CARPs and established the CRB, would make the statutory license “ratemaking and royalty distribution process less expensive and more expeditious and efficient.”¹⁸³ With over three years past since the commencement of proceedings, and over a year past since the initial rate determination of the CRB, still very little, if anything, has been neatly resolved in the way of statutory license rates for webcasting.¹⁸⁴ It is hard to see how the ends of the Reform Act have been achieved at all.

Before determining royalty rates, the CRB, in its decision, analyzed the nature and the application of the willing buyer/willing seller standard.¹⁸⁵ The CRB noted the standard requires a determination of 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.¹⁸⁶ Throughout its decision the CRB relied heavily on the precedent of both the CARP’s

¹⁷⁹ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 70 Fed. Reg. 7,970 (Feb 15, 2005) (providing a “[n]otice announcing commencement of proceeding with request for Petitions to Participate”).

¹⁸⁰ CRB Final Determination, 72 Fed. Reg. 24,084, 24,085 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

¹⁸¹ *Id.*; In the Matter of Digital Performance Right in Sound Recording and Ephemeral Recordings, Order Denying Motions for Rehearing (Apr. 16, 2007), <http://www.loc.gov/crb/proceedings/2005-1/motion-denial.pdf>.

¹⁸² See Posting of David Oxenford to Broadcast Law Blog, *Briefing Dates Set on Internet Radio Royalty Court Appeal*, <http://www.broadcastlawblog.com/archives/internet-radio-briefing-dates-set-on-internet-radio-royalty-court-appeal.html> (Nov. 20, 2007).

¹⁸³ H.R. REP. NO. 108-408, at 21 (2004).

¹⁸⁴ Posting of David Oxenford to Broadcast Law Blog, *A Year After the Webcasting Royalty Decision—No Settlement, Appeal Briefs Filed*, <http://www.broadcastlawblog.com/archives/internet-radio-a-year-after-the-webcasting-royalty-decision-no-settlement-appeal-briefs-filed.html> (Mar. 15, 2007).

¹⁸⁵ CRB Final Determination, 72 Fed. Reg. 24,084, 24,087–88 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

¹⁸⁶ *Id.* at 24087 (quoting 17 U.S.C. § 114(f)(2)(B) (2006)) (emphasis in original).

and the Librarian of Congress' determinations in *Webcaster I*.¹⁸⁷ Citing to *Webcaster I LoC Determination*, the CRB attempted to clarify the relationship of the statutory factors, which the CRB is to consider in its webcasting rate determinations,¹⁸⁸ "to the willing buyer/willing seller standard."¹⁸⁹ The CRB acknowledged that, in the case of both the § 114 webcaster performance license and the § 112 ephemeral license, the Copyright Act requires the CRB to:

[T]ake into account evidence presented on such factors as (1) whether the use of the webcasting services may substitute for or promote the sale of phonorecords and (2) whether the copyright owner or the service provider make relatively larger contributions to the service ultimately provided to the consuming public with respect to creativity, technology, capital investment, cost and risk.¹⁹⁰

However, the CRB insisted that these statutory factors do not themselves define the willing buyer/willing seller standard.¹⁹¹ Rather, the CRB provided that these "statutory factors are merely to be considered, along with other relevant factors, to determine the rates under the willing buyer/willing seller standard."¹⁹²

In considering the nature of the marketplace in which the willing buyer and the willing seller transact, the parties to the proceeding agreed, and the CRB concurred, that the statutory language "reflects Congressional intent for the Judges to attempt to replicate rates and terms that 'would have been negotiated' in a *hypothetical* marketplace."¹⁹³ In this hypothetical market, the CRB explained that it would consider the webcasters as buyers, and the record companies as sellers.¹⁹⁴ The product changing hands essentially

¹⁸⁷ See generally *id.* at 24,084. To clarify, the CARP's report in *Webcaster I* is referred to herein as "Webcaster I CARP Report," and the Librarian of Congress' determination in *Webcaster I* is referred to herein as "Webcaster I LoC Determination." See *supra* notes 118 & 125 and accompanying text.

¹⁸⁸ See 17 U.S.C. § 114(f)(2)(B)(i), (ii); *id.* § 112(e)(4)(A), (B); *supra* text accompanying note 109.

¹⁸⁹ CRB Final Determination, 72 Fed. Reg. at 24,087.

¹⁹⁰ *Id.* at 24,088 (citing 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B)).

¹⁹¹ See *id.* at 24,087.

¹⁹² *Id.*

¹⁹³ *Id.* (quoting *Webcaster I CARP Report*, *supra* note 119, at 21).

¹⁹⁴ See *id.*

was a blanket license permitting the webcasters to make digital audio transmissions of the “record companies’ complete repertoire of sound recordings.”¹⁹⁵ Furthermore, the marketplace in which these parties transact, would be “one in which no statutory license exists,”¹⁹⁶ seemingly because the CRB believed that it would be hard to consider “a compulsory license, where the licensor has no choice but to license,” as truly reflective of “fair market value.”¹⁹⁷

In determining the rates that would be set between a willing buyer and seller in a hypothetical marketplace, the CRB acknowledged, and both the copyright owners and webcasters agreed that “the best approach . . . is to look to comparable marketplace agreements as ‘benchmarks’ indicative of the prices to which willing buyers and willing sellers . . . would agree.”¹⁹⁸ The CRB, however, strongly rejected proposals by webcasters that would consider as a benchmark the rates webcasters pay to performing rights organizations such as ASCAP and BMI for the digital performance of musical compositions underlying sound recordings (“musical composition benchmark”).¹⁹⁹ Rather, the CRB adopted a benchmark formulated by one of SoundExchange’s expert witnesses.²⁰⁰ This benchmark was based on rates found in the market for interactive webcasting, where users are able to specifically select music that they will receive by way of digital audio transmission (“interactive benchmark”).²⁰¹ Interactive services do not qualify for statutory licensing, and hence such services must negotiate privately with record labels for the right use of sound recordings.²⁰² The interactive benchmark “was set by taking the rate paid by certain interactive webcast services . . . and adjusting those rates to take into account the differences in the statutory services,” namely “the lesser value to consumers” using statutory services

¹⁹⁵ *Id.* (citing Webcaster I LoC Determination, 67 Fed. Reg. 45,240, 45,244 (July 8, 2002) (codified at 37 C.F.R. pt. 261)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (quoting Noncommercial Educational Broadcasting Compulsory License (Final Rule and Order), 63 Fed. Reg. 49,823, 49,834 (Sept. 18, 1998)) (internal quotation marks omitted).

¹⁹⁸ *Id.* at 24,091.

¹⁹⁹ *See id.* at 24,092, 24,094–95.

²⁰⁰ Oxenford, Clarifying the Confusion, *supra* note 8.

²⁰¹ *Id.*

²⁰² *Id.*; *supra* text accompanying note 99.

who “do not have the ability to [interactively] select songs” when receiving webcasts.²⁰³ The CRB accepted this benchmark because it found the “interactive webcasting market is a benchmark with characteristics reasonably similar to non-interactive webcasting.”²⁰⁴ In spite of the many inherent differences between interactive and noninteractive services,²⁰⁵ the CRB was comfortable using the interactive benchmark because it found that SoundExchange’s “expert had applied an appropriate ‘adjustment factor’ to take into account the differences in value between a consumer-influenced interactive subscription service . . . [and] service[s] that, by law, can not be interactive.”²⁰⁶

While showing much leniency in its willingness to consider the analogous, but distinctly different interactive webcasting market as the benchmark for setting rates for noninteractive webcasting, the CRB showed no such leeway in its consideration of the webcaster’s proposed musical composition benchmark.²⁰⁷ In rejecting the musical composition benchmark in wholesale fashion, the CRB pointed to the inherent differences between sound recordings and musical compositions, noting that “substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights” in different markets, such as those for “digital downloads.”²⁰⁸ However, in using “digital downloads” as part of the basis for rejecting the musical composition benchmark by comparison, the CRB shows questionable reasoning. Digital downloads implicate a totally different exclusive right of the copyright owner than the right at issue in the CRB’s rate determination proceeding: that being the right of reproduction, as opposed to the right of performance.²⁰⁹ To imply that because

²⁰³ Oxenford, Clarifying the Confusion, *supra* note 8.

²⁰⁴ CRB Final Determination, 72 Fed. Reg. at 24,092.

²⁰⁵ Indeed the differences between interactive and noninteractive services arguably account for much of the turmoil that gave rise to the legislative reform with respect to webcasters in the DMCA. *See supra* Part I.

²⁰⁶ Oxenford, Clarifying the Confusion, *supra* note 8.

²⁰⁷ *See* CRB Final Determination, 72 Fed. Reg. at 24,092, 24,094–95.

²⁰⁸ *Id.* at 24,094.

²⁰⁹ *See* 3 PATRY, *supra* note 24, § 8.23; SoundExchange, <http://www.soundexchange.com> (follow “FAQ” hyperlink under column to the right; then follow “Does SoundExchange cover downloads?” hyperlink) (last visited Sep. 1, 2008) (“A download is governed by the reproduction right”); *see also* United States v. Am. Soc’y of Composers, Authors & Publishers, 485 F. Supp. 2d 438, 443–44

sound recordings are valued more than musical compositions in the market for reproduction, they will be valued more in the market for performances as well is to make an unsupported, and unexplained comparison across markets. To analogize, this very well could be like saying because people in Alaska pay more for heating their homes in an average year than they do for air -conditioning, people in Florida are likely do the same. Admittedly, it may be the case that the market for performances and reproductions of sound recordings are closer than those for heating and cooling in Alaska and Florida; nonetheless, without a more nuanced explanation and understanding of the differences between the markets for the exercise of the exclusive rights of a copyright holder, and the uses of sound recordings in those markets, it is difficult to understand why the rate paid for the performance of musical compositions is an inadequate standard from which to base rates paid for the performance of sound recordings.

In a historical context, while “copyright owners of musical works have enjoyed the performance right since the end of the nineteenth century,”²¹⁰ sound recordings, with respect to the right of performance, have had literally no valuation until as recently as 1995.²¹¹ If the rates paid for the performance of musical compositions are excluded from consideration by comparison, indeed the only history then, and perhaps reliable evidence of an approximation of the value of a performance right for sound recordings in the noninteractive webcasting context are the rates set in Webcaster I. While the provisions of the SWSA are strict in their provision that agreements made under the SWSA shall have no precedential value in future proceedings,²¹² no such restriction applies to the determinations of the CARP and Librarian of Congress in Webcaster I.²¹³ Indeed, as mentioned earlier, the CRB’s decision liberally re-

(S.D.N.Y. 2007) (“Although we acknowledge the term ‘perform’ should be broadly construed . . . the downloading of a music file is more accurately characterized as a method of *reproducing* that file.”).

²¹⁰ CRB Final Determination, 72 Fed. Reg. at 24,086 n.3.

²¹¹ See *supra* Part I.

²¹² See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008 (June 11, 2003); see also text accompanying *supra* note 140.

²¹³ Indeed, 17 U.S.C. § 803(a)(1) provides that the CRB, in its proceedings “shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of

lied on the CARP's and Librarian of Congress' decisions in Webcaster I as precedent. Curiously, however, the CRB's report makes no mention of the actual rate determinations made by the Librarian of Congress in Webcaster I. Controversial though the Librarian of Congress' rate determinations may have been at the time,²¹⁴ by comparison to the CRB's March, 2007 decision, the Librarian of Congress' determination in Webcaster I seems eminently reasonable. At the very least the Librarian of Congress' rate determinations in Webcaster I were based on a marketplace benchmark that can actually said to be representative in some part of the marketplace at issue, namely that for digital audio transmissions made by a noninteractive webcaster.²¹⁵ In not acknowledging the Librarian of Congress' chosen benchmark and ultimate rate determinations in Webcaster I, the CRB essentially ignored actual evidence of the value afforded to the digital performance of sound recordings by a willing buyer and a willing seller. Effectively then, the CRB through its use of abstract, hypothetical benchmarks, determined and applied its own market value for the use of sound recordings by noninteractive webcasters. This undoubtedly sets a dangerous precedent for CRB determinations in the future.

Nevertheless, the CRB concluded that the interactive benchmark, by itself “[p]rovides the [b]est [b]enchmark for [s]etting” rates for commercial webcasters.²¹⁶ As a result, the CRB abandoned the 0.07¢ per-performance standard that had been in place for commercial webcasters since Webcaster I, and determined a new, per-performance rate which steeply escalates in each successive year.²¹⁷ Under the CRB's determination, the new rates for commercial webcasters per year are as follows: 2006: 0.08¢ per-

Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, [and] copyright arbitration royalty panels”

²¹⁴ See *supra* Part I.

²¹⁵ Recall that in Webcaster I, the Librarian of Congress based his rate determinations on a willing buyer/willing seller model that largely looked to settlement agreements voluntarily negotiated between RIAA and Yahoo! for the digital performance of sound recordings by Yahoo!'s noninteractive webcasting stations. See Webcaster I LoC Determination, 67 Fed. Reg. 45,240, 45,245 (July 8, 2002) (codified at 37 C.F.R. pt. 261); Delchin, *supra* note 2, at 376; text accompanying *supra* note 128.

²¹⁶ CRB Final Determination, 72 Fed. Reg. 24,084, 24,095 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²¹⁷ See Oxenford, Clarifying the Confusion, *supra* note 8.

performance; 2007: 0.11¢ per-performance; 2008: 0.14¢ per-performance; 2009: 0.18¢ per-performance; and in 2010: 0.19¢ per-performance.²¹⁸ These rate increases have proven so dramatic that even the largest commercial webcasters have expressed an intention to cease webcasting operations if the rates remain in effect.²¹⁹ Some webcasters have shut down and others fear they will soon be forced to follow suit.²²⁰ Indeed Time Warner Inc.'s AOL has even gone so far as to sell its webcasting business to CBS Broadcasting Inc., because it felt "[t]here's no way [it could] build an Internet radio business . . . with these kinds of royalties."²²¹

In its rate determination decision, the CRB acknowledged that there are two sides of the willing buyer and willing seller equation, essentially that of the buyer and that of the seller, and that the CRB's objective is to create rates representative of a *willing* agreement between these two sides.²²² It is hardly apparent, however, to see how a buyer of services would willingly agree to rates and terms so ruinous that they would make it difficult to "let [their] business operate at a profit."²²³ Moreover, it is hard to see how such conditions would even benefit a willing seller: if rates are set so high so as to eliminate a buyer's profitable participation in the marketplace, surely buyers will withdraw, leaving the seller with its own product in hand, having clearly exceeded an optimal pricing for its product.

Furthermore, the CRB's decision eliminated the pay as a percentage-of-revenue model that arguably allowed many small webcasters to survive after the Librarian of Congress' determination in Webcaster I.²²⁴ Under the SWSA, royalty rates "based on revenues or expenses meant the payments would never exceed the stations' revenues and put them at risk of going out of business. The new rate formula the CRB decreed in its March [2007] ruling ef-

²¹⁸ *See id.*

²¹⁹ Meg Tirrell, *Yahoo, AOL May Abandon Web Radio After Royalties Rise (Update2)*, BLOOMBERG.COM, Nov. 28, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&sid=a0pKOrcpw6yE&refer=us>.

²²⁰ Bray, *supra* note 14.

²²¹ *Id.*

²²² *See* CRB Final Determination, 72 Fed. Reg. 24,084, 24,091 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²²³ Bray, *supra* note 14.

²²⁴ *See* CRB Final Determination, 72 Fed. Reg. at 24,088–90; *supra* Part I.

fectively remove[d] that safe harbor.”²²⁵ Nevertheless the CRB “specifically rejected a percentage of revenue royalty for reasons including the difficulty of determining what revenues would be covered by such a royalty.”²²⁶ The CRB declined to apply a “revenue-based metric” to both commercial and noncommercial webcasters alike.²²⁷ The CRB “also imposed a \$500 minimum fee on each station or channel” operated by a webcaster.²²⁸ “These new rates will also have an immediate administrative impact on webcasters. Since the rate is calculated on a performance per listener basis, each webcaster will have to track performances for each individual listener to determine its royalty payments.”²²⁹

Merely as a study in contrast, and not to equate the two different commodities at issue, the United States District Court for the Southern District of New York recently convened to determine Yahoo!, AOL and RealNetwork’s application for a blanket license from ASCAP.²³⁰ The blanket license was to cover the performance of musical compositions from the ASCAP repertoire on both interactive and noninteractive music platforms offered by these services.²³¹ Although the court was to determine usage rates for the performance of musical compositions as opposed to sound recordings, the standard for determining this rate was similar to that used in the CRB’s rate setting procedure for the performance of sound recordings by noninteractive webcasters.²³² Specifically, in

²²⁵ Anthony L. Soudatt & Natalie Sulimani, *Net Radio and Royalty Rates, The Sounds, Perhaps, of Silence*, N.Y.L.J., Feb. 4, 2008, § 2, at 1.

²²⁶ Oxenford, *Clarifying the Confusion*, *supra* note 8.

²²⁷ See CRB Final Determination, 72 Fed. Reg. 24,084, 24,090 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²²⁸ Soudatt & Sulimani, *supra* note 225, at 4.

²²⁹ *Id.*

²³⁰ See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 562 F. Supp. 2d 413 (S.D.N.Y. 2008), available at <http://www.ascap.com/press/2008/pdf/ratecourtddecision.pdf>; Posting of David Oxenford to Broadcast Law Blog, *Rate Court Determines ASCAP Fees for Large Webcasters—Some Interesting Contrasts with The Copyright Royalty Board Decision*, <http://www.broadcastlawblog.com/archives/internet-radio-rate-court-determines-ascap-fees-for-large-webcasters-some-interesting-contrasts-with-the-copyright-royalty-board-decision.html> (May 1, 2008).

²³¹ See Posting of David Oxenford to Broadcast Law Blog, *Rate Court Determines ASCAP Fees for Large Webcasters—Some Interesting Contrasts with The Copyright Royalty Board Decision*, <http://www.broadcastlawblog.com/archives/internet-radio-rate-court-determines-ascap-fees-for-large-webcasters-some-interesting-contrasts-with-the-copyright-royalty-board-decision.html> (May 1, 2008).

²³² See *id.*

“determining a reasonable fee for [an ASCAP] blanket license” the court was to make an “appraisal of [its] fair market value—an appraisal based essentially on an estimation of the price a willing buyer and a willing seller would agree to in an arms-length transaction.”²³³

In spite of the nearly identical standards, the rate structure adopted by the Southern District of New York in the case of the ASCAP license was drastically different than that created by the CRB in its rate determinations for noninteractive webcasters. Whereas the CRB implemented a royalty calculated on a per-performance basis,²³⁴ the Southern District of New York adopted a royalty based on a percentage of revenue for the performance of musical compositions.²³⁵ While the CRB bluntly rejected a royalty based on a percentage of revenue, in the case of the ASCAP blanket license, the court was ample in its praise of the percentage of revenue approach, in essence observing that:

[1] It was economically efficient, as it did not provide any disincentive to a service not to use music as might be the case for a royalty that demanded a per performance fee;

[2] It adapts to changing conditions, as it will collect more when a service makes more revenue and less when a service has hard economic times, thus taking into account changing economic and competitive conditions, variations in financial fortunes and changes in technology and other unforeseen changes in the circumstances of the services that may occur over time;

[3] Revenues were simple to verify as information about total revenues were routinely collected by a service;

[4] . . . [T]hese royalties provided the kinds of efficiencies expected for a blanket license—easy ad-

²³³ *Am. Soc’y of Composers, Authors & Publishers*, 562 F. Supp. 2d at 477 (internal citation and quotation marks omitted).

²³⁴ *See supra* notes 224–27 and accompanying text.

²³⁵ *See Am. Soc’y of Composers, Authors & Publishers*, 562 F. Supp. 2d at 498.

ministration, that covered all rights to all the music represented by ASCAP, and gave the service certainty as to its music costs so that it did not need to take royalties into account in deciding how to introduce any new aspect of its service.²³⁶

Although the ASCAP blanket license covers a different commodity (again musical compositions as opposed to sound recordings), the economic principles behind the licensing aren't all that different from those in the § 114 webcaster performance license. Indeed, in the case of the ASCAP license, the court set this rate structure for not only noninteractive services, but for interactive services as well,²³⁷ which arguably could demand a higher royalty on account of the end user's ability to select preferred musical compositions.²³⁸ Even if it's assumed that the market for the performance of musical compositions doesn't provide an analagous hypothetical marketplace for the performance of sound recordings, nonetheless, many of the efficiencies of the per percentage of revenue royalty noted by the court in the case of the blanket license from ASCAP could apply equally well in the case of the § 114 webcaster performance license, really as they could for most any business model. Essentially, a royalty structure that responds to and respectively taxes both increased and decreased use equally, as the percentage of revenue royalty in the case of the ASCAP blanket license does, seems far more representative of an agreement between a willing buyer and a willing seller, than a royalty that has the potential to ultimately exceed revenue, as does that determined by the CRB in the case of the § 114 webcaster per-

²³⁶ Posting of David Oxenford to Broadcast Law Blog, *Rate Court Determines ASCAP Fees for Large Webcasters—Some Interesting Contrasts with The Copyright Royalty Board Decision*, <http://www.broadcastlawblog.com/archives/internet-radio-rate-court-determines-ascap-fees-for-large-webcasters-some-interesting-contrasts-with-the-copyright-royalty-board-decision.html> (May 1, 2008); see *Am. Soc'y of Composers, Authors & Publishers*, 562 F. Supp. 2d at 480–81.

²³⁷ See *supra* note 231 and accompanying text.

²³⁸ See Posting of David Oxenford to Broadcast Law Blog, *Rate Court Determines ASCAP Fees for Large Webcasters—Some Interesting Contrasts with The Copyright Royalty Board Decision*, <http://www.broadcastlawblog.com/archives/internet-radio-rate-court-determines-ascap-fees-for-large-webcasters-some-interesting-contrasts-with-the-copyright-royalty-board-decision.html> (May 1, 2008).

formance license and its counterpart, the § 112 ephemeral license.²³⁹

The flaws with respect to the CRB's rate determinations are perhaps even more troubling with respect to noncommercial webcasters. In its decision, the CRB created a "two tiered royalty rate" for noncommercial webcasters.²⁴⁰ On the first tier of this structure, the \$500 per channel fee²⁴¹ paid by noncommercial webcasters covers "up to 159,140 Aggregate Tuning Hours . . . of streaming per month."²⁴² If these webcasters stay within this streaming threshold, they need pay no more in royalties beyond the \$500 cap.²⁴³ However, "[n]oncommercial webcasters who exceed" the 159,140 ATH streaming limit on the first tier, pay the *full* "commercial rate for all listening in excess of that limit" on the second tier.²⁴⁴ The 159,140 ATH threshold is one that the many popular noncommercial webcasters are sure to routinely exceed.²⁴⁵ Thus, while noncommercial webcasters paid a 0.02¢ per-performance rate before the CRB's March 2007 decision,²⁴⁶ by subjecting noncommercial webcasters to full commercial rates, which themselves have increased substantially based on the CRB's use of the interactive benchmark, by 2010, noncommercial webcasters who exceed the minimum threshold, will pay at a rate of 0.19¢ per-performance, a rate more than nine times greater than

²³⁹ See Bray, *supra* note 14; *supra* text accompanying note 222.

²⁴⁰ Oxenford, Clarifying the Confusion, *supra* note 8.

²⁴¹ See *supra* note 228 and accompanying text.

²⁴² Oxenford, Clarifying the Confusion, *supra* note 8.

²⁴³ See CRB Final Determination, 72 Fed. Reg. 24,084, 24,097, 24,100 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²⁴⁴ Oxenford, Clarifying the Confusion, *supra* note 8; see CRB Final Determination, 72 Fed. Reg. at 24,100; *supra* text accompanying note 217.

²⁴⁵ See KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Oct. 21, 2008). An explanation of the 159,140 ATH cap provides as follows:

A station could have 218 streaming listeners per hour for each twenty four hour day in a month. Since most listeners are not online the maximum amount per month, the number of average listeners a station can have and remain under the cap is larger than 218.

If a station's average listener is online four hours a day, it could have 1,300 average listeners per month; if the average listener streamed music two hours a day, a station could have 2,600 average listeners per month without exceeding the cap.

Id.

²⁴⁶ See *supra* Part I.

that previously in place for noncommercial webcasters.²⁴⁷ In the words of the CARP in Webcaster I, surely this “affronts common sense.”²⁴⁸ Indeed “[i]n the over 25 years that public radio has paid on-air or online music royalties, this is the first time that a decision has failed to differentiate public radio from commercial media.”²⁴⁹

Furthermore, even amongst noncommercial webcasters that would routinely fall under the cap, “[m]any stations do not have the data to measure ATH.”²⁵⁰ Indeed, NPR calculates that almost 80% of its member stations would not be able to calculate listener volume based on ATH.²⁵¹ The reportage requirement alone has even resigned some stations to stop streaming altogether.²⁵²

In its consideration of noncommercial webcasters, the CRB defined a “segmented” marketplace that ultimately gave rise to the CRB’s determination of a two-tiered royalty structure.²⁵³ While the CRB recognized that there are differences between commercial and noncommercial webcasters, the CRB credited these differences “only up to a certain point.”²⁵⁴ That point, essentially, was the 159,140 ATH streaming per month threshold, beyond which the CRB subjected noncommercial webcasters to full commercial royalty rates.²⁵⁵ The CRB reasoned that noncommercial webcasters who operate below this cap represent a distinct, different segment of the marketplace, than do noncommercial webcasters who operate above it.²⁵⁶ This is the segmented marketplace the opinion rec-

²⁴⁷ See Oxenford, *Clarifying the Confusion*, *supra* note 8.

²⁴⁸ Webcaster I CARP Report, *supra* note 119, at 89.

²⁴⁹ KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Oct. 21, 2008).

²⁵⁰ *Id.*

²⁵¹ Press Release, National Public Radio, NPR Files Motion for Rehearing with Copyright Royalty Board (Mar. 19, 2007), available at <http://www.npr.org/about/press/2007/031907.copyrightroyalty.html>.

²⁵² See Sarah Snyder, *KDNE Ends Online Broadcasts*, DOANE LINE, Mar. 6, 2008, <http://media.www.doaneline.com/media/storage/paper1214/news/2008/03/06/News/Kdne-Ends.Online.Broadcasts-3256145-page2.shtml>.

²⁵³ See CRB Final Determination, 72 Fed. Reg. 24,084, 24,097–100 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

²⁵⁴ KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Oct. 21, 2008).

²⁵⁵ See CRB Final Determination, 72 Fed. Reg. at 24,100.

²⁵⁶ See *id.* at 24,098, 24,099–100.

ognized, likening this segmentation to the way residential electricity users occupy a different segment of the market for electricity than do commercial users, and as such are subject to a different usage rate correspondingly.²⁵⁷ Likewise, noncommercial webcasters who stream above the designated 159,140 ATH usage cap, in the eyes of the CRB, become a different creature altogether. “[A]s a matter of pure economic rational based on the willing buyer/willing seller standard,” the CRB seemed to concur with a SoundExchange expert who suggested that, beyond a designated cap, noncommercial webcasters enjoying a lower royalty rate may “cannibalize” the commercial webcasting market.²⁵⁸ Though it briefly considered the different factors that distinguish noncommercial webcasting from commercial webcasting, the CRB ultimately concluded that “as webcasting has evolved, *some* convergence between some noncommercial webcasters can be observed ultimately resulting in competition for audience.”²⁵⁹ On the basis of this purported convergence, the CRB reasoned that noncommercial webcasters who stream in excess of the designated cap ought to be subject to *full* commercial rates.²⁶⁰

In reaching this conclusion, the CRB essentially jettisoned what it itself had recognized as “a significant history of [n]oncommercial [w]ebcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates over the corresponding period.”²⁶¹ The CRB recognized the “myriad of characteristics” that set noncommercial webcasters apart from their commercial counterparts: “[n]oncommercial licensees are non-profit organizations”; “[t]he noncommercial webcasters’ mission is to provide educational, cultural, religious and social programming not generally available on commercial venues”; “[n]oncommercial webcasters have different sources of funding than ad-supported commercial webcasters—such as listener donations, corporate underwriting or sponsorships, and university funds.”²⁶² In considering all these

²⁵⁷ *Id.* at 24,097.

²⁵⁸ *Id.* (internal quotation marks omitted).

²⁵⁹ *Id.* at 24,098 (emphasis added).

²⁶⁰ *See id.* at 24,098, 24,100.

²⁶¹ *Id.* at 24,097.

²⁶² *Id.* at 24,098.

factors, however, the CRB felt that “as webcasting has developed, some of these traits have become blurred.”²⁶³ However, this argument is unavailing, and to a degree, tautological. By definition a noncommercial webcaster must maintain these characteristics to even be considered a noncommercial webcaster at all.²⁶⁴

The CRB made much of facts that it saw as blending the commercial and noncommercial webcasting market, such as the fact that “college radio stations use the Live365 service to stream their simulcasts, making them just another consumer choice available on Live365 together with numerous commercial stations.”²⁶⁵ However in the context of traditional broadcast radio, noncommercial stations, much the same, have always been broadcast on the very same AM and FM signals as their commercial counterparts, effectively making them “just another consumer choice available” on the radio dial.²⁶⁶ Nonetheless, albeit for a different right, non-commercial entities have traditionally enjoyed a different standard than their commercial counterparts with respect to royalty rates, in spite of their technological proximity in broadcast radio.²⁶⁷ Why a similar proximity should merit a different treatment in the context of webcasting is not readily apparent.

Furthermore, while the willing buyer/willing seller standard certainly provides for a less holistic marketplace analysis than the 801(b) standard,²⁶⁸ surely the unique, non-profit nature of non-commercial webcasters would affect their resources, status, and purchasing power as a willing buyer in the marketplace. Indeed, it would even seem to make intuitive sense that as a willing seller, we might expect a higher compensation from a buyer, such as a commercial webcaster, whose ultimate use of the product being

²⁶³ *Id.*

²⁶⁴ *See supra* note 7 (defining a noncommercial webcaster as one that is “exempt from taxation under the Internal Revenue Code”); *see also* 26 U.S.C. § 501(c)(3) (2006) (explaining that “[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual” are exempt from taxation under the Internal Revenue Code).

²⁶⁵ CRB Final Determination, 72 Fed. Reg. at 24,098.

²⁶⁶ *Id.*

²⁶⁷ *See supra* text accompanying note 249; *see also* 17 U.S.C. § 118 (2006) (providing a compulsory license for noncommercial broadcasters).

²⁶⁸ *See supra* text accompanying note 70.

sold was for its own economic gain, as opposed to one with a distinctly non-profit motive, such as a noncommercial webcaster. To borrow from the CRB's own example then, it would seem that treating large noncommercial webcasters as a distinct and separate segment of the marketplace, when their characteristics remain largely the same no matter their size, would be like subjecting a residential electricity user to full commercial electricity usage rates merely because they had an exceedingly large family.

Even conceding that the willing buyer/willing seller standard may be as unaccommodating of the unique nature of noncommercial webcasters as the CRB seemed to construe it, perhaps what is most troubling about the CRB's opinion is its rejection of prior negotiated agreements between SoundExchange and NPR for the digital performance of webcasts between 1998 and 2004 as a benchmark for setting rates under the willing buyer/willing seller standard.²⁶⁹ The § 114 webcaster performance license directs the Copyright Royalty Judges to "establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."²⁷⁰ It is hard to imagine a clearer representation of the terms and rates agreed to by a willing buyer and seller, than the terms actually agreed to by a willing buyer and seller, as were indeed represented in the NPR-SoundExchange agreements. Given the few prior examples of a comparable valuation for the performance right of sound recordings, the CRB, once again, set a dangerous precedent by ignoring actual evidence of an agreement between a willing buyer and a willing seller for the very right at issue. Troubling too is the CRB's rationale for rejecting the NPR-SoundExchange agreements as an adequate benchmark: that an "agreement covering streaming from 1998 to 2004 does not provide clear evidence of a per station rate that could be viewed as a proxy for one that a willing buyer and a willing seller would negotiate today."²⁷¹ In lopsided fashion, the CRB seemed to make no provision for an adjustment factor, comparable to the one it liberally used in adapting the interactive webcasting market as a

²⁶⁹ See CRB Final Determination, 72 Fed. Reg. at 24,098.

²⁷⁰ 17 U.S.C. § 114(f)(2)(B) (2006) (emphasis added).

²⁷¹ CRB Final Determination, 72 Fed. Reg. at 24,098.

benchmark for setting rates for noninteractive webcasters,²⁷² for adjusting a 1998 to 2004 agreement to cover the 2006 to 2010 time period for rates covering an identical product and usage.

With regard to the § 112 ephemeral license, for both commercial and noncommercial webcasters, the CRB determined “the appropriate § 112 reproduction license rate . . . to be included in the applicable respective § 114 license rates.”²⁷³ In sum total, by subjecting noncommercial webcasters to full commercial rates, the CRB has presented noncommercial webcasters with an inherent conflict of interest. Historically speaking:

[a]n element of public radio’s mission, whether by broadcast or webcast, is to introduce music and musical performers to the largest possible audience. Under the CRB decision, however, the more public radio succeeds in that mission, the larger the fees become. Practically and financially speaking, the newly proposed fee structure penalizes public radio for performing its statutorily-based public service mission. The CRB decision is directly contrary to the intentions of the Congress’ public policy objectives in establishing public radio.

The new fee structure imposes a commercial financial and revenue model on the public service, not-for-profit operations of public radio webcasters. This model is not only inappropriate, but cannot be sustained by public radio webcasters who operate for the public good, not their own commercial success.²⁷⁴

If permitted to stand, the CRB decision will certainly have a powerful impact on the still nascent webcasting industry. Very little of this impact, it would seem, would stand to benefit Internet radio, noncommercial or otherwise, and by extension, either a willing buyer or willing seller in the noninteractive webcasting market.

²⁷² See *supra* text accompanying notes 197–205.

²⁷³ CRB Final Determination, 72 Fed. Reg. at 24,088.

²⁷⁴ KCBX FM—Copyright Royalty Board Decision (CRB) on New Fees to Stream Music Sound Recordings Online, <http://kcbx.org/main/Copyright.html> (last visited Aug. 16, 2008).

III. TRY A LITTLE TENDERNESS: A CONCLUSION AND SUGGESTED ALTERNATIVE TO THE PRESENT WEBCASTING RATE DETERMINATION PROCEDURE

Although the CRB's March 2007 rate determination for the § 114 webcaster performance license and § 112 ephemeral license is presently being appealed before the D.C. Court of Appeals, the statutory standard for review of a CRB decision is "exceptionally differential."²⁷⁵ Under the CRB, and the CARP process before that, rate determination proceedings for the digital performance right have undoubtedly created much conflict between webcasters, the recording industry and the U.S. Copyright Office alike. In terms of a resolution for this conflict, while a successful appeal of the CRB's rate determination is not impossible, it will certainly be difficult given the standard of review and the present statutory standards for setting license rates.²⁷⁶ Even if the CRB's determination were to be set aside, however, such a ruling would really only address the symptom and leave the disease uncured. To a degree, many arguments that are being leveled against the CRB's decision echo those made in the wake of Webcaster I, where it was recognized that: "[e]ven if the CARP simply misinterpreted the [willing buyer/willing seller] standard, Congress should revise the standard instead of hoping that the Panel gets it right next time."²⁷⁷ While the SWSA provided relief from many such concerns after Webcaster I, indeed such relief has proven to be a temporary band-aid on a much more enduring problem. If there was any downfall to the SWSA, perhaps it was in securing clemency across the webcasting industry in place of resolve to address the statutory standards that gave rise to the need for the SWSA in the first place. Unfortunately, webcasters now find themselves in a similar imbroglio as a result of a statutory rate proceeding. Although their timing is certainly less than perfect, many parties have now turned to

²⁷⁵ Jakhelln & Menefee, *supra* note 170, at 851 (internal quotation marks omitted); see 17 U.S.C. § 801(d)(3) (2006) (citing to the standards provided by 5 U.S.C. § 706).

²⁷⁶ Posting of David Oxenford to Broadcast Law Blog, *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).

²⁷⁷ Recent Legislation, *supra* note 6, at 1926.

Congress in hopes of revising the relevant statutory standards.²⁷⁸ Ultimately such revision may be what is needed to resolve the present tension surrounding webcasting royalty rates.

Perhaps the most fruitful proposal before Congress is one set forth in the Internet Radio Equality Act (“IREA”).²⁷⁹ Amongst other things, the IREA proposes to revise the statutory rate setting procedure by replacing the willing buyer/willing seller standard used to determine royalty rates for the § 114 webcaster performance license and the § 112 ephemeral license, with the 801(b)(1) standard that was originally applied to noninteractive subscription services and preexisting satellite digital audio radio services under the DPRA.²⁸⁰ As opposed to the strict marketplace rationale of the willing buyer/willing seller standard, the 801(b)(1) standard seeks to balance “the needs of copyright owners, copyright users, and the public” in setting statutory rates.²⁸¹ The CRB has used the 801(b)(1) standard to set royalty rates for satellite radio for its digital audio transmissions of sound recordings. It is exactly the same right for which the CRB subjects webcasters to the willing buyer/willing seller standard. As a consequence of the 801(b)(1) standard, satellite radio pays a “revenue based royalty” that amounts to “between six and eight percent of revenues,” a “much lower rate” than that which the CRB’s recent decision would impose on webcasters.²⁸²

As a matter of basic fairness, “[i]t is hard to reconcile [the] disparate rate structures” that the present statutory scheme has yielded.²⁸³ “Satellite radio, XM and Sirius, are subscription-based services that have much deeper pockets than do the majority of

²⁷⁸ See Daniel McSwain, *Internet Radio Equality Act Introduced in House*, RADIO & INTERNET NEWSL., Apr. 26, 2007, v.2, <http://www.kurthanson.com/archive/news/042607b/index.shtml>; see also Posting of David Oxenford to Broadcast Law Blog, *Senate Hearing: The Search for Compromise on Music Performance Royalties—Part One: The Issue of Standards*, <http://www.broadcastlawblog.com/archives/internet-radio-senate-hearing-the-search-for-compromise-on-music-performance-royalties-part-one-the-issue-of-standards.html> (July 30, 2008) (comparing “The Perform Act” with “The Internet Radio Equality Act”).

²⁷⁹ H.R. 2060, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2060>.

²⁸⁰ See McSwain, *supra* note 278, at v.2; *supra* text accompanying note 70.

²⁸¹ McSwain, *supra* note 278, at v.2.

²⁸² Soudatt & Sulimani, *supra* note 225, at 8.

²⁸³ *Id.* at 8–9.

Internet webcasters.”²⁸⁴ Moreover, if we look at the historical rationale for the creation of a digital performance right, the concerns with webcasting first articulated under the DPRA were specifically with regard to subscription- and interactive-based services.²⁸⁵ Indeed, originally:

[T]he distinction between subscription and non-subscription transmissions was made because it was felt that the risk of a music service which consumers pay for on a subscription basis poses a moderate to high risk of replacing the sales of records (either physical CDs or digital phonorecord deliveries), while those which are on a nonsubscription basis, like traditional, advertising supported radio broadcasts, and the like, pose only a low risk of replacing record sales.²⁸⁶

Taking this historical rationale for the distinction between subscription and nonsubscription services into consideration, it would seem to make even less sense to subject nonsubscription based services to the harsher, less encompassing willing buyer/willing seller standard, while setting rates for subscription-based services, which are potentially more threatening to the music industry, under the 801(b)(1) standard.²⁸⁷

The disparity between standards for varying services is even starker if we look to traditional broadcast radio, where still, in spite of proposed legislation,²⁸⁸ no performance right for sound recordings is recognized at all. The idea of affording traditional ra-

²⁸⁴ *Id.* at 8.

²⁸⁵ See *supra* text accompanying note 61.

²⁸⁶ Kohn, *supra* note 51, at 12.

²⁸⁷ See Posting of David Oxenford to Broadcast Law Blog, *What a Difference a Standard Makes*, <http://www.broadcastlawblog.com/archives/internet-radio-satellite-radio-music-royalty-reconsideration-denied-by-copyright-royalty-board-what-a-difference-a-standard-makes.html> (Jan. 12, 2008).

²⁸⁸ See Posting of David Oxenford to Broadcast Law Blog, *More on the Broadcast Performance Royalty Bills*, <http://www.broadcastlawblog.com/archives/broadcast-performance-royalty-more-on-the-broadcast-performance-royalty-bills.html> (Dec. 19, 2007); Posting of David Oxenford to Broadcast Law Blog, *Senate Hearing: The Search for Compromise on Music Performance Royalties—Part One: The Issue of Standards*, <http://www.broadcastlawblog.com/archives/internet-radio-senate-hearing-the-search-for-compromise-on-music-performance-royalties-part-one-the-issue-of-standards.html> (July 30, 2008).

dio broadcasters almost sacrosanct protection against the imposition of a sound recording performance right has traditionally been justified by the promotional value radio air play has been said to have on the sale of sound recordings.²⁸⁹ This justification, however, quickly loses currency if sales of sound recordings start to decline in any period, as they have done precipitously since the onset of the digital music era.²⁹⁰ Looking at the broader picture then, it's perhaps not all that hard to see below the surface of Congress' rationale in enacting the DMCA at the insistence of the RIAA, and subjecting webcasters, and webcasters only, to the willing buyer/willing seller standard. At a time when the webcasting industry was still very much in development, and paralleled to a degree by the very separate, but nonetheless devastating impact of illegal music downloading, perhaps Congress was rightfully concerned with the potential effect webcasting would have on the market for sales of sound recordings.²⁹¹ Perhaps, moreover, subjecting webcasters to the willing buyer/willing seller standard was seen as a way to check a growing industry, a precautionary measure taken to guard against an as of yet unforeseen development.

To the extent this rationale made sense at the time, it may now be even more appropriate to take measure of the realities of the webcasting industry, and to adjust the willing buyer/willing seller standard to the 801(b)(1) standard. Recognizing a sound recording performance right makes good sense as a means of compensating the music industry for the use of its copyrighted content, especially in an era when its traditional streams of revenue have been so ruinously drained. It strains reason, however, to think the ideal solution is to subject a limited segment of the market for the performance of sound recordings to a particularly stringent rate-setting standard,²⁹² to leave another segment of that market completely

²⁸⁹ See *supra* note 36.

²⁹⁰ See generally Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 27, 2007, available at http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline; Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply*, WALL ST. J., Mar. 21, 2007, available at http://online.wsj.com/public/article/SB117444575607043728-oEugjUqEtTo1hWJawejgR3LjRAw_20080320.html.

²⁹¹ See *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 489 (3d Cir. 2003).

²⁹² Namely this refers to webcasters who are subject to the willing buyer/willing seller standard.

exempt from paying royalties,²⁹³ and to leave a third market middling somewhere in between.²⁹⁴ A proposed solution would be to subject webcasters, radio broadcasters and satellite radio subscription services alike to a unilateral statutory license for the public performance of sound recordings, digital or otherwise, as determined by a panel of judges seeking to implement the standards provided for under the 801(b)(1) standard. So doing, it seems, would inherently allow services on all platforms to operate at a royalty rate that would allow their continued operation. Under such a standard, stations would be less likely to sporadically shut down on the occasion of every CRB rate determination proceeding, which have been shown to yield unsustainable royalties under their present administration. In turn, by subjecting all mediums of the performance of sound recordings to a statutory licensing scheme under the 801(b)(1) standard, copyright owners would undoubtedly receive steady revenue from a source that just over thirteen years ago provided no income at all. Any losses that sound recording owners feel they would lose by subjecting webcasters to the 801(b)(1) standard instead of the willing buyer/willing seller standard could easily be offset by the expansion of the sound recording performance right to include transmissions by traditional radio broadcasters. This is of course presuming that there would be any losses at all; a sustainable royalty in the first instance may very well lead to more webcasting stations, and in turn more potential sources of revenue for a recording industry that should be seeking to adapt its business model to account for the realities of the market it serves.²⁹⁵

In conclusion, subjecting webcasters, subscription and satellite radio services, and traditional radio broadcasters alike to a statutory licensing scheme under a unilateral 801(b)(1) standard, or a close equivalent, seems to be a strong solution to the current difficulties posed by the institution and administration of a sound recording performance right. With respect particularly to web-

²⁹³ Namely this refers to traditional radio broadcasters, who are not subject to any royalty rate for the performance of sound recordings.

²⁹⁴ Namely this refers to satellite radio subscription services, which are subject to the 801(b)(1) standard.

²⁹⁵ Rather than trying to adapt the market to fit an unrealistic business model.

casters, this proposal is in keeping with the basic purpose of the Copyright Act. As Justice Stewart described that purpose:

The limited scope of the copyright holders's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.²⁹⁶

The virtues of webcasting have been extolled by its advocates as providing the public with a far more diverse range of programming than traditional broadcast radio, under its current limitations, could ever hope to provide.²⁹⁷ A ruling like that of the Copyright Royalty Board's, which runs counter to the ends of promoting a service such as webcasting, inherently conflicts with the Copyright Act's mandate that the copyright laws "ultimately serve the cause of promoting broad public availability" of the arts.²⁹⁸ In keeping with that mandate, Congress should intervene on behalf of webcasters, and by extension the public at large, to institute standards that will ensure the continued vitality of the burgeoning cultural outlet of webcasting.

ADDENDUM: THE WEBCASTER SETTLEMENT ACT OF 2008

As this Comment was going to press, Congress passed legislation in the form of the Webcaster Settlement Act of 2008 which bears significantly on the issues this Comment raises.²⁹⁹ The legislation was introduced in light of the CRB's March 2007 decision

²⁹⁶ MERGES ET AL., *supra* note 19, at 374 (quoting *Twentieth Century Music Corp. v. Aiken*, 522 U.S. 151, 156 (1975)).

²⁹⁷ See Delchin, *supra* note 2, at 360–64; Bray, *supra* note 14.

²⁹⁸ MERGES ET AL., *supra* note 19, at 374 (quoting *Twentieth Century Music Corp. v. Aiken*, 522 U.S. 151, 156 (1975)).

²⁹⁹ See Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (codified at 17 U.S.C. §§ 101, 114); Press Release, SaveNetRadio Coalition, Senate Approves Webcaster Settlement Act (Oct. 1, 2008), available at http://www.savenetradio.org/latest_news/08-10-01.html. The Webcaster Settlement Act of 2008 was signed into law by the President of the United States on October 16, 2008. See GovTrack.us, H.R. 7084: Webcaster Settlement Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=h110-7084> (last visited Nov. 1, 2008).

in an effort to help support “the survival of webcasting . . . in the United States”³⁰⁰ and passed the House of Representatives by voice vote and the Senate by unanimous consent.³⁰¹

In rough terms, the Webcaster Settlement Act of 2008 grants SoundExchange and webcasters until February 15, 2009 to negotiate a settlement agreement to replace the royalty rates set for webcasters by the CRB in its March 2007 decision.³⁰² Many voices in Congress seem to represent that the parties affected by the CRB’s decision are “gradually coming together, and growing closer to finding common ground.”³⁰³ However because Congress is going into recess, and “[b]ecause the parties will not be able to finish their negotiations before Congress recesses . . . and because authority by Congress is required for a settlement to take effect under the government compulsory license” Congress proposed this legislation.³⁰⁴ In effect, it gives the parties the necessary authority to reach a settlement agreement on their own, without Congress’ intervention, in the hopes that “negotiations . . . continue in a positive direction for both sides.”³⁰⁵ To those ends the Webcaster Settlement Act of 2008 “grants limited statutory authority to SoundExchange . . . to enter into and negotiate agreements with webcasters for the performance of sound recordings over the Internet.”³⁰⁶

This compromise solution is reminiscent of the results from Webcaster I, whereby many webcasters would have ceased opera-

³⁰⁰ 154 Cong. Rec. H10278-01, H10279 (daily ed. Sept. 27, 2008) (statement of Rep. Inslee, author of the legislation).

³⁰¹ Tony Dutra, *Legislation/Webcasting: Congress Votes to Allow Webcasters to Negotiate with Sound Exchange*, 76 BNA PAT., TRADEMARK & COPYRIGHT J. 753 (2008). It is not insignificant to note that the Webcaster Settlement Act of 2008 was passed while Congress was in the midst of considering a highly publicized \$700 billion government bailout of the nation’s financial institutions. Posting by Eliot Van Buskirk to Wired Listening Post Blog, *Congress Considers Webcaster Bill Too, as Royalty Battle Ensues*, <http://blog.wired.com/music/2008/09/congress-to-con.html> (Sep. 26, 2008, 04:06:15 PM).

³⁰² See Dutra, *supra* note 301.

³⁰³ 154 Cong. Rec. E2148-02, E2148 (daily ed. Sept. 28, 2008) (statement of Rep. Blackburn); see also 154 Cong. Rec. H10278-01, 10278, 10280 (daily ed. Sept. 27, 2008) (statements of Rep. Berman and Rep. Inslee respectively).

³⁰⁴ 154 Cong. Rec. H10278-01, H10279 (statement of Rep. Berman).

³⁰⁵ *Id.*

³⁰⁶ *Id.* (statement of Rep. Smith).

tions if it weren't for Congress' intervention in the form of the SWSA.³⁰⁷ In fact, the Webcaster Settlement Act of 2008 essentially revises the Copyright Act by substituting the words "Webcaster Settlement Act of 2008" for the words "Small Webcasters Settlement Act of 2002"³⁰⁸ ("SWSA") and updating the timeline for agreements from 1998 to 2004 to "a period of not more than 11 years beginning on January 1, 2005."³⁰⁹ To encourage settlement discussions among the relevant parties, the Webcaster Settlement Act of 2008 modifies a handful of the conditions of the SWSA.³¹⁰ Namely, the Webcaster Settlement Act of 2008: makes the SWSA's requirement that any agreements between SoundExchange and webcasters include a provision "for payment of royalties on the basis of a percentage of revenue or expenses" permissive instead of mandatory;³¹¹ deletes "[a]ll instances of the word 'small' . . . such that all webcasters are now able to make private deals;"³¹² and, in contrast to the SWSA, the Webcaster Settlement Act of 2008 allows "parties to agree that their alternative rates may be precedential in future rate-setting proceedings."³¹³

The Webcaster Settlement Act of 2008 should be regarded with optimism for the solution it may yield to the complex problem discussed in this Comment. Such optimism, however, should be tempered with a broader perspective. The Webcaster Settlement Act of 2008 is merely a mechanism to facilitate settlement negotiations. As this Comment was going to press, the Webcaster Settlement Act of 2008 has not yet yielded any rates in settlement; indeed it remains to be seen "if the hard part—actually entering into

³⁰⁷ See Posting of David Oxenford to Broadcast Law Blog, *Webcaster Settlement Act—What Does it Mean?*, <http://www.broadcastlawblog.com/archives/internet-radio-webcaster-settlement-act-what-does-it-mean.html> (Oct. 1, 2008); *supra* Part I.E.

³⁰⁸ Webcaster Settlement Act of 2008, Pub. L. No. 110-435, sec. 2(4)(A), § 114(f)(5)(D), 122 Stat. 4974, 4974.

³⁰⁹ *Id.* at sec. 2(1)(B), § 114(f)(5)(A), 122 Stat. 4974, 4974.

³¹⁰ See generally Dutra, *supra* note 301.

³¹¹ Dutra, *supra* note 301; Webcaster Settlement Act of 2008, Pub. L. No. 110-435, sec. 2(1)(D), § 114(f)(5)(A), 122 Stat. 4974, 4974.

³¹² Dutra, *supra* note 301; Webcaster Settlement Act of 2008, Pub. L. No. 110-435, sec. 2 *passim*, § 114(f)(5) *passim*, 122 Stat. 4974, 4974.

³¹³ Dutra, *supra* note 301; Webcaster Settlement Act of 2008, Pub. L. No. 110-435, sec. 2(3)(C), § 114(f)(5)(C), 122 Stat. 4974, 4974.

... settlements—will occur.”³¹⁴ While the Webcaster Settlement Act of 2008 certainly has the potential to help webcasters survive the CRB’s March 2007 royalty rate determinations, it should be recognized as well for what it fails to achieve. Perhaps most importantly, the Webcaster Settlement Act of 2008 does not change the statutory standard for determining the rates webcasters pay for the performance of sound recordings.³¹⁵ As such, the Webcaster Settlement Act of 2008 addresses only a fraction of a much larger problem.

To a degree, the Webcaster Settlement Act of 2008 is consistent with the criticism this Comment levies against CRB rates yielded by the willing/buyer willing seller standard. It seems to be a recognition that the rates imposed by the CRB were unsustainable, and perhaps an implicit suggestion that the process that led to the creation of those rates is flawed. As was observed in commentary in the Senate, the Webcaster Settlement Act of 2008 is, in effect, a “legislative readjustment[.]”³¹⁶ In other words, it allows the relevant parties to work around the results of Congress’ own rate-setting procedure, because the results produced by that procedure proved to be unsustainable. It would seem to this Comment’s author that an ideal solution would address not just the results of that procedure, as the Webcaster Settlement Act of 2008 seems to do, but would remedy the procedure that lead to those results as well. Indeed, the Webcaster Settlement Act of 2008 still leaves the potential, as anticipated by this Comment, of webcasters having to shut down operations on the occasion of every CRB rate determination,³¹⁷ until and unless Congress is able to intervene with similar “legislative readjustments”³¹⁸ in future proceedings. It would stand to reason that an ideal rate-setting standard would lead directly to the results anticipated by settlement initiatives such as the

³¹⁴ Posting of David Oxenford to Broadcast Law Blog, *Webcaster Settlement Act—What Does it Mean?*, <http://www.broadcastlawblog.com/archives/internet-radio-webcaster-settlement-act-what-does-it-mean.html> (Oct. 1, 2008).

³¹⁵ *See id.*

³¹⁶ 154 Cong. Rec. S10186-02, S10186 (daily ed. Sept. 30, 2008) (statement of Sen. Leahy).

³¹⁷ *See supra* Part III.

³¹⁸ 154 Cong. Rec. S10186-02, S10186 (daily ed. Sept. 30, 2008) (statement of Sen. Leahy).

SWSA and the Webcaster Settlement Act of 2008, rather than hoping that resort to such initiatives will be available in the future.

As such, the thrust of this Comment as outlined in its conclusion remains intact in spite of the Webcaster Settlement Act of 2008. It is this author's hope that the considerations raised in this Comment will be addressed by a future Congress which will hopefully undertake to resolve the issues underlying the Webcaster Settlement Act of 2008 by revising the relevant statutory standards for setting royalty rates for the performance of sound recordings, not only for Internet radio, but indeed for broadcast radio and subscription services as well. Congress failed to do so in the wake of the Small Webcaster Settlement Act of 2002, and after months of turmoil resulting from the CRB's March 2007 rate determination, it is hard not to see the Webcaster Settlement Act of 2008 as a temporary fix rather than a long term solution to an industry-wide disparity.