Public Knowledge

Testimony of Jodie Griffin
Staff Attorney
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Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On:
Music Licensing Part One: Legislation in the 112th Congress

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Executive Summary

The Internet Radio Fairness Act (IRFA) sets out to create fairness in the radio marketplace. To actually achieve that goal, IRFA must follow three key principles:

(1) **Encourage Markets.** IRFA must use a royalty standard that encourages innovation in a robust and sustainable online radio marketplace.
(2) **Treat Like Services Alike.** IRFA must apply the same royalty standard to *all* types of radio services, including online, cable, satellite, and AM/FM radio.
(3) **Compensate Artists.** IRFA must ensure that the radio marketplace fairly compensates actual artists.

Without any one of these principles, IRFA would at best be a missed opportunity and at worst could sideline artists and innovators and entrench power structures that discourage new entrants in the market.

In its present form, IRFA succeeds at the first goal and take steps towards achieving the second, but more work must be done to create a comprehensive reform of the online radio marketplace. The § 801(b) factors are a proven standard, taking into account the interests of parties on all sides, including the public. Accordingly, these factors should be applied to all forms of radio services, including traditional AM/FM broadcasting, which currently pays no sound recording royalties at all. IRFA currently does not require AM/FM radio to pay any sound recording royalties: this exemption should be eliminated, and AM/FM radio should pay royalties set under the same rate as that used for cable, satellite, and online radio. Favoring incumbent technologies over innovative new upstarts will only stunt the growth of the music business and discourage entrepreneurs and investors from entering the market.

Finally, the chief stated objection of many opponents to IRFA is that the change in ratemaking standards will decrease overall payouts to artists. Although this concern will not come to fruition if the § 801(b) standard succeeds in stimulating the growth of the online radio business overall and if the bill brings AM/FM radio into the fold, IRFA could add further structural protection for many individual artists by increasing the percentage of royalties that SoundExchange pays directly to the artist.

Introduction

To achieve true fairness in Internet radio, the Internet Radio Fairness Act should have three main goals:

(1) Establishing a workable royalty standard that encourages innovation in a robust and sustainable online radio marketplace.
(2) Applying that royalty standard to all types of radio services, including online, cable, satellite, and AM/FM radio.
(3) Ensuring that royalty splits set by law distribute an adequate portion of the royalties directly to artists.

The online radio marketplace has the promise to be a robust and competitive market that benefits artists and consumers alike. Like many new technologies, online radio may also shake up the incumbent power structure and gatekeepers in the recorded music industry by helping artists reach consumers more meaningfully and get paid more directly. This opportunity should not be squandered, and the law should not waste the potential of the online radio marketplace by subjecting it to different rules and higher royalty rates than its predecessors and current competitors, such as AM/FM, cable, and satellite radio.[1]

Online radio services currently pay the highest royalty rate of all radio services because its rates are set by the government under a different standard: the so-called "willing buyer/willing seller" standard. This standard, however, is ill-suited to creating reasonable rates for online radio: it was created before the online radio marketplace began to bloom, so there is no actual marketplace on which to base the rates, and the standard fails to take into account the uniquely monopolistic nature of the marketplace, since only SoundExchange can currently negotiate and administer the relevant rights.

In contrast to the high rates paid by online radio, terrestrial broadcasters pay no sound recording royalties at all.[2] Thus, services that make essentially the same use incur very different costs, depending only on the type of technology they use to send out programs to listeners. This creates a disincentive for companies to develop and invest in new technologies that provide new avenues for musicians to reach their fans.

The willing buyer/willing seller standard was set in 1998, when broadcasters did not seem to fully appreciate the future of online radio, and pure online radio services had not yet become significant industry players. We have now seen how this standard has proven itself incapable of leading to reasonable royalty rates for the market, and at the same time we have seen how similar services using incumbent technologies thrive under lower royalty rates. The only way to encourage growth in the radio marketplace and ensure reasonable compensation to

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[1] These comments will use "radio," without further qualification, to mean all noninteractive music streaming services, including cable, satellite, AM/FM, and online radio services.

[2] *See The Performance Rights Act: Hearing on H.R. 4789 Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Nancy Sinatra) ("The competitive landscape thus is biased in favor of the old establishment players and against new start-up and innovative technologies . . . . Now we have a situation where one format—AM/FM radio—has a competitive advantage over another: digital radio. . . This isn't any more fair to digital radio than it is to artists.").

artists is to require all radio services—online, satellite, cable, and AM/FM—to pay royalties for their use of sound recordings, and to use the same standard to determine those rates.

IRFA takes several important steps towards creating parity in the radio marketplace while still arranging for reasonable compensation to artists. However, in order to achieve full fairness between platforms, IRFA should also include AM/FM radio broadcasters in its royalty scheme, and include structural protections for artists, like a higher percentage of payments made through the compulsory license and consideration in the § 801(b) factors.

I. IRFA Should Establish a Workable Royalty Standard that Encourages an Innovative and Sustainable Online Radio Marketplace.

The Internet Radio Fairness Act proposes shifting the standard by which online radio royalty rates are set from the willing buyer/willing seller standard to the factors set out in § 801(b) of the Copyright Act.[3] The § 801(b) standard is more appropriate and useful for determining reasonable online radio royalties, and indeed should be used for terrestrial radio as well.

The § 801(b) standard is currently used to determine royalty rates for digital cable and satellite broadcasters, namely: Sirius XM, Music Choice, and Muzak.[4] This same standard is also used to set royalty rates in several other areas of the music industry, like mechanical reproduction royalties paid by record labels to songwriters, and for broadcasters' payments to performing rights organizations ASCAP, BMI, and SESAC.[5]

Section 801(b) directs the CRB to consider a set of factors in setting the relevant royalty rate:

(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.[6]

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[3] *See* 17 U.S.C. § 801(b).

[4] Glenn Peoples, *Business Matters: Let's Get Ready To Rumble! 2013's Dueling Internet Radio Royalty Bills*, BILLBOARD, (Sept. 27, 2012), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-let-s-get-ready-to-rumble-1007962272.story.

[5] *See* 17 U.S.C. §§ 114(f)(1)(B), 115, 116.

[6] 17 U.S.C. § 801(b).

These factors balance considerations for the level of compensation that should be distributed to the artists with the public interest in the distribution of works and the impact of the rates on the companies that will have to pay them. The § 801(b) standard is also on its face more in line with the Constitutional purpose of copyright law—creating economic incentives with the ultimate purpose of encouraging artists and platforms to create new works and bring those works to market.[7]

In past ratemakings, the CRB has used evidence from relevant or similar markets to estimate the upper limit of the compulsory rate.[8] The CRB then applies the four factors of § 801(b) to adjust the rate as necessary.[9] The first two factors are generally interpreted in the copyright owners' favor, while the third presents an opportunity for all parties to put forth evidence of the economic value of their contribution to the supply chain. In the past, the royalty rates have been lowered under the fourth factor to avoid significant disruption to satellite radio, but would also present an opportunity for copyright owners to present evidence on, for example, any substitution effects the online radio marketplace has on other product markets. Either way, the fourth factor does not in itself protect companies in any part of the process from going out of business.[10]

a. The Standard Proposed in IRFA Will Reach the Best Result for the Market

The factors set out in § 801(b) are more likely to consistently reach reasonable royalty rates than the willing buyer/willing seller standard. Practically speaking, the § 801(b) standard is likely to result in lower royalty rates (but not necessarily lower overall royalty payments) for the online radio market than the rate online radio companies currently pay. For example, in 2008, the CRB set a rate of 6-8% for subscription services and 7.25-7.5% for satellite digital audio radio services under the § 801(b) factors[11]—far lower than the rates paid by online radio, which often equate to more than half of their revenue.[12] Notably, the major record labels have vigorously

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[7] U.S. CONST. art. I, § 8, cl. 8. *See also Mazer v. Stein*, 344 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

[8] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080, 4093 (Jan. 24, 2008), http://www.loc.gov/crb/fedreg/2008/73fr4080.pdf.

[9] 17 U.S.C. § 801(b)(1)(A)-(D); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080, 4093 (Jan. 24, 2008).

[10] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080 (Jan. 24, 2008) (CRB adjusting rates downward to avoid disruption to satellite companies); 63 Fed. Reg. 89, 25394, 25408 (May 8, 1998) ("The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company.").

[11] Royalty Fees for the Digital Performance of Sound Recordings and the Making of Ephemeral Phonorecords by Preexisting Subscription Services, 37 C.F.R. § 382.2 (2008).

[12] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080, 4093 (Jan. 24, 2008). To put this number in a global context,

opposed applying the § 801(b) standard to online radio royalties without mentioning that they themselves use the § 801(b) standard for the royalties they pay to songwriters.[13]

The § 801(b) is no guarantee, however, that rates will always be a simple low percentage; digital cable services, for example, must pay a minimum of $100,000 per year as part of their royalties.[14] And in certain circumstances the CRB has in the past determined that none of the § 801(b) factors justified lowering the rates from the market evidence presented by the parties.[15]

In contrast to the § 801(b) factors, the willing buyer/willing seller standard requires the CRB to envision the rate that would be paid in a hypothetical marketplace.[16] Section 114 also requires the CRB to consider the promotional or substitutional effects of the online radio service for the sound recordings, and the relative contributions of the copyright owner and radio service. These factors are, incidentally, all still included in IRFA: the relative contributions of the parties and the substitutional effects of the service are included in the third and fourth factors of § 801(b), respectively, and the promotional value is listed separately in IRFA, as it does not cleanly fit into any of the existing § 801(b) factors.

Under the willing buyer/willing seller standard, the CRJs look for the perceived economic value of the sound recordings, as demonstrated by the fees that two hypothetical parties in a competitive marketplace would willingly agree to. The difficulty with this standard is that the realities of the marketplace are far removed from a hypothetical negotiation between a willing buyer and a willing seller. For one thing, the online radio market did not begin to grow until after 1998 (Pandora, for example, did not launch until 2000), so the CRJs never had an actual marketplace on which to base their rates. Additionally, the law never granted a digital audio transmission right without either exempting webcasters or establishing a compulsory license. This means that a marketplace with online radio services and rightsholders with the power to withhold permission has never existed. Moreover, the monopolistic nature of the marketplace in these negotiations means that there is no competitive benchmark to compare the rates to, so it is very difficult to determine what an undistorted market would look like.[17]

European broadcasters pay 3-8% of revenue to artists, and 3-5% of revenue for all radio broadcasts goes towards music publishers and songwriters.

[13] *See* 17 U.S.C. § 115.

[14] 37 C.F.R. § 382.2 (2008).

[15] Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding; Review of Copyright Royalty Judges Determination; Final Rule and Notice, 74 Fed. Reg. 15, 4510, 4523-4525 (Jan. 26, 2009), http://www.loc.gov/crb/fedreg/2009/74fr4510.pdf.

[16] 17 U.S.C. § 114(f)(2)(B) ("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."). *See also* 17 U.S.C. §§ 114(j)(6), (8).

[17] *See The Performance Rights Act and Parity among Music Delivery Platforms: Hearing on S. 379 Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Robert Kimball, Executive Vice President for Corporate Development & General Counsel, RealNetworks, Inc.) at 9, http://judiciary.senate.gov/hearings/testimony.cfm?id=4011&wit_id=8164. SoundExchange is the only entity with authority to license, collect, and distribute digital performance royalties for webcasting. SoundExchange Organization, http://www.soundexchange.com/about/.

The rates set under the willing buyer/willing seller standard have repeatedly been so high that that Congress has had to intervene to encourage industry negotiations that would reduce the rate set by the Copyright Royalty Board (CRB), and has led to many webcasters going out of business entirely.[18]

IRFA's additional amendments to the ratemaking deliberations will improve the likelihood that the CRB will be able to set reasonable rates that encourage new investment in technology while giving artists a fair return. IRFA instructs the CRB to fairly consider using a rate structured as a percentage of revenue, which is more flexible and better allows online radio companies to budget for their expenses. In fact, the privately negotiated PurePlay Agreement includes a percentage of revenue option, although the radio service is still required to pay the greater of the percentage of revenue or a per-stream fee.

IRFA also rightly instructs the CRB to not consider agreements struck under past law as precedent. In intellectual property, the scope and degree of exclusivity of the right is what sets the market to begin with, so it would be counter-productive to tie the CRB's decisions to a "market" that was negotiated under the auspices of a different royalty standard, or negotiated in a different market, like interactive streaming, that has no compulsory license at all. Such agreements are so far afield from the IRFA standard that they would be more likely to confuse than to be helpful in the CRB's deliberations.

There is, however, one way in which IRFA should be amended to alter the § 801(b) standard. Section 801(b) currently only refers to copyright owners and copyright users, but not to artists directly.[19] Often the copyright owner of a sound recording will be a record label, but the label's interest in these proceedings may not always align with the actual creator. IRFA should remedy this and explicitly include artists in the second and third factors of the § 801(b) standard.

b. The Economics of Online Radio and Sound Recording Royalties

The economics of radio royalties are notoriously complicated. Similar services are currently subject to different standards based on the technology they use, some technologies are exempt altogether, and the rates set by the CRB are often bypassed in favor of negotiated settlements. Research into consumer use of online radio and other streaming platforms is relatively new, and much more data is needed to give a complete picture of the online radio business.

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[18] *See* Webcaster Settlement Act of 2009, S. 1145, 111th Cong., 1st Sess. (2009); Webcaster Settlement Act of 2008, H. R. 7084, 110th Cong., 2d Sess. (2008); Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 3, 116 Stat. 2780, 2781 (suspending payments under CARP rates in favor of subsequently negotiated agreement). For a more detailed history of online radio legislation and ratemakings, see Appendix.

[19] 17 U.S.C. § 801(b).

1. Online Radio: Dominated by One Company and Devoid of Profits

Even a brief overview of the online radio marketplace will reveal that what should be an innovative, competitive market is instead a market dominated by one company in which not one significant company have made a profit.

The online-only webcasters are front and center in the IRFA debate: these are the services that provide noninteractive radio using the Internet. Their service is most analogous to AM/FM radio broadcasters,[20] but they must pay a compulsory license set under the willing buyer/willing seller standard, while AM/FM broadcasters need not pay sound recording royalties at all.

The most prominent online-only radio service today is Pandora. Pandora broke new ground in the radio business, creating personalized online radio stations by mapping the "genomes" of songs and using its calculations to make recommendations to users. The company now streams 1.1 billion hours of music per month to 58 million users, and has a $1.4 billion market capitalization. Pandora currently enjoys 70% of the online radio market, but only 6.4% of radio listening overall.[21]

Pandora is subject to the willing buyer/willing seller standard for compulsory licenses, but currently operates under the privately negotiated 2009 PurePlay Agreement, which gives it around 40% off the rates dictated in the latest CRB ratemaking. This deal expires in 2015. Even so, Pandora paid 64% of its revenues in royalties in the first and second quarters of 2012, and posted a net loss of $5.4 million in the second quarter alone.[22] Pandora incurred this loss despite increasing its advertising and subscription revenues by 51% to $101.3 million in the second quarter of 2012.[23] Despite its growing revenues, Pandora's licensing costs are growing more quickly: up 79% to $60.5 million in the second quarter. As of January 1, 2012, Pandora had an accumulated deficit of $104 million.

Besides Pandora, the online radio space includes a handful of smaller players experimenting with their own revenue streams and business models for online radio. Rdio, for example, pays artists $10 for every subscriber they bring to Rdio as a way to build a user base and build relationships with artists directly.[24] 7Digital recently announced $10 million funding for, among other things, a radio service.[25] Senzari, a Miami-based competitor to Pandora, has

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[20] *See* Bruce Houghton, *If Pandora Can Write Lil Wayne A $3 Million Check, Why Should They Pay Less?*, HypeBot (Oct. 10, 2012), http://www.hypebot.com/hypebot/2012/10/pandora-says-top-artists-make-1m-a-year-2000-make-more-than-10000.html.

[21] Tim Westergren, *Pandora and Artist Payments*, Pandora (Oct. 9, 2012), http://blog.pandora.com/pandora/archives/2012/10/pandora-and-art.html.

[22] Pandora Media Inc. Form 10-Q (Sept. 4, 2012).

[23] *Id.*

[24] Rdio Artist Program (last visited Nov. 26, 2012), http://www.rdio.com/artistprogram/?utm_source=promoted_US_blog&utm_content=ArtistProgram_2012_10_02l.

[25] Tim Ingham, *7digital launches streaming service, secures £6m investment*, MUSICWEEK (Oct. 19, 2012), http://www.musicweek.com/news/read/7digital-launches-streaming-service-secures-6m-investment/052227.

been acquired by Disco Volante—the same Berlin-based start-up that created wahwah.fm, the now-defunct online radio service that went out of business after trying to negotiate royalty rates directly with the major labels.

Other companies have responded to the pressures of the online radio environment by bundling their radio services with other products. The Samsung Music Hub combines a cloud storage locker, download store, and streaming radio service with unlimited music. Spotify, the interactive streaming company partially owned by the major record labels, has recently introduced a free online radio service for iOS and Android operating systems.

The recently revamped social networking site MySpace has also recently set its focus on the music market. Parent company Interactive Media Holdings is trying to raise $50 million to re-launch MySpace as a competitor to Spotify and Pandora.[26] MySpace's traffic is up 36% since December 2011, but it will still only generate $15 million in revenue this year. This means that MySpace will lose $40 million in 2012, and in a pitch to investors, Interactive projected that it will lose another $25 million in 2013. Notably, MySpace's owners say its biggest advantage over Spotify and Pandora is that it pays a lower per-stream rate for music, in part because MySpace pays no royalties to the 27 million unsigned artists who use MySpace—50% of the music played on the site. This disparity between how MySpace treats record labels and how it treats unsigned musicians would certainly undercut the sustainability of an independent music career if it became standard among digital music services—which is why royalty rates must be set at a level that encourages robust competition among music services, so no single service holds outsized leverage against musicians.

Finally, many online radio companies that have previously used the compulsory licenses have since gone out of business under the weight of high licensing fees.

2. Satellite Radio: Thriving, Growing, and Attracting New Listeners

In contrast to the online-only webcasters, Sirius Satellite Radio—the subscription satellite service owned and operated by Sirius XM Radio[27]—is thriving while paying approximately 8% of its revenues in sound recording royalties under rates set with the § 801(b) standard, and has developed a healthy business model. In the third quarter of 2012, SiriusXM achieved record revenue of $867.4 million, $757.7 million of which was subscriber revenue. Sirius's adjusted earnings before income taxes, depreciation, and amortization was $245 million, and its year-to-date subscriber acquisitions were up 27% from one year ago, to 1.47 million, resulting in a record of 23.37 million total subscribers. For the entire year of 2012, SiriusXM expects revenue just under $3.4 billion and adjusted EBITDA of $900 million.[28]

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[26] Nicholas Carlson, *LEAKED: MySpace's Master Plan to Raise $50 Million and Relaunch as a Spotify Killer*, BUSINESS INSIDER (Nov. 19, 2012), http://www.businessinsider.com/leaked-myspaces-master-plan-to-raise-50-million-and-re-launch-as-a-spotify-killer-2012-11?op=1.

[27] Liberty Media owns 48% of SriusXM's common stock, but has a pending request at the Federal Communications Commission to convert its preferred shares into common shares and thus acquire a controlling interest in SiriusXM.

[28] Glenn Peoples, *SiriusXM CEO Karmazin Calls Internet Radio 'Race to the Bottom' on Earnings Call*, BILLBOARD (Nov. 1, 2012), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/siriusxm-ceo-karmazin-calls-Internet-radio-1007995612.story.

The royalties paid by satellite, cable, and online radio are all administered through SoundExchange, an entity formed by the RIAA in 2000 to administer royalties under the digital transmission compulsory licenses. After the first webcasting ratemaking, SoundExchange was spun off from the RIAA and re-launched as a non-profit organization.[29] SoundExchange is currently the only entity authorized by the Library of Congress to negotiate on behalf of sound recording copyright owners and administer, collect, and distribute the compulsory license royalties

3. Online Radio Usage

The relatively recent entry of online music services has benefitted artists and consumers alike, and although online radio has a not insubstantial share of radio listeners, there is still much room for growth. According to one recent NPD study, 50% of 96 million Internet users listened to online streaming services in the past 3 months. 37% of US Internet users listened to online radio, and 36% of US Internet users listened to an on-demand streaming service (although these groups may overlap significantly). In the past year, the Internet radio audience grew 27% and the on-demand music audience grew 18%.[30] The extent to which these services supplant older modes of consuming music is still being studied—the NPD study reportedly found that Pandora users were on average less likely to use AM/FM radio, CDs, and portable music players than they were in 2009, but did not examine how much demographic changes in Pandora's audience or the use of other services like Spotify contribute to the correlation. On the other hand, that study also found that the average Pandora listener purchased 29% more music during the second quarter of 2012 compared with last year, even though music purchases went down overall.[31]

The emergence of online radio has also brought new opportunities for artists. For one thing, 64% of users of online music streaming services reported rediscovering older music, and 51% reported discovering new music on the service.[32] And more importantly, as discussed above, online radio services are part of the emerging online music platforms that empower artists to remove unnecessary middlemen.

[29] This structural change may have been made in response to allegations of anticompetitive conduct by the RIAA through SoundExchange. *See Webcaster Alliance, Inc. v. RIAA*, No. C-03-3948, 2004 WL 1465722, 2 (N.D. Cal. Apr. 1, 2004).

[30] NPD Music Acquisition Monitor, https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-Internet-radio-and-on-demand-music-services-rise-putting-pressure-on-traditional-forms-of-music-listening/.

[31] Russ Crupnick, Senior Vice President of Industry Analysis, The NPD Group, citing NPD Music Acquisition Monitor study.

[32] NPD Music Acquisition Monitor, https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-Internet-radio-and-on-demand-music-services-rise-putting-pressure-on-traditional-forms-of-music-listening/.

4. The Nascent Online Radio Market

Despite the great promise of online radio, many webcasters have left the business and a surprisingly small number have achieved a critical mass of market share. Notably, the companies that have lost their online radio businesses include large corporations like Yahoo! and Microsoft in addition to many small entrepreneurial webcasters. When companies with deep technological expertise and enormous financial backing cannot create a profitable online radio service, small start-ups and independent companies have little chance of ever reaching a profit.

The financial difficulties of online radio companies in turn discourage investment in the field. As Union Square Ventures partner Fred Wilson noted, music services face extremely high startup costs compared to other industries, like software development.[33] A music startup will need anywhere from $5 million to $20 million just to launch its service, much of which goes toward licensing costs. As a result, it is more difficult for would-be music company founders to find funding. Wilson did, however, predict that more advertising dollars would eventually enter the online radio space—but this prediction can only come true if online radio services become sustainable enough to survive the transition.

Online radio stations have reportedly had significant trouble increasing advertising revenue enough to keep up with corresponding increases in listener hours. Some point out that increasing the number of advertisements per hour past a certain point can lead to a service losing its user base: users tend to leave freemium services around the time the service starts interrupting streams with ads.[34] As a result, after a certain point in time, the online radio service will be under pressure from its funding to increase advertisement frequency to increase revenues, but if the company does so its users will flock to a newer, ad-free radio service that is not yet under pressure to monetize its business model. Royalty rates exacerbate this problem: rates that are too high cause unsustainability for online radio by forcing start-ups to choose too early between achieving a product that consumers will respond to in the long term, and covering content costs to appeal to investors.

In large part due to the disproportionately high royalty rates that online radio pays compared to its satellite, cable, and terrestrial competitors, the online radio marketplace has the somewhat unique and very concerning characteristic of being devoid of profits. This alone is one of the most persuasive points for why the online radio royalty rates are currently set too high. For-profit companies, like most online radio services, have ample incentive to increase their revenues and earn a profit. The online radio market has yet to produce a single major company that could create a profitable business model. Investors may understand that companies will need to run a deficit in their first few years, but this trajectory is not sustainable in the long term, and

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[33] Sarah Mitroff, *So You Want in on the Music Biz? Fred Wilson Has 4 Things to Tell You*, WIRED (Nov. 16, 2012), http://www.wired.com/business/2012/11/music-startups/.

[34] Joey Flores, *Why Music Startups and Ad Networks Suffer from "Flavor of the Month Syndrome,"* SIDEWINDER.FM (Oct. 16, 2012), http://sidewinder.fm/post/33702805158/why-music-startups-and-ad-networks-suffer-from-flavor. As Joey Flores put it, "The only thing stopping advertising from being a sustainable model for music startups right now is royalties." *Deep Think: Joey Flores of Earbits on the Challenges of Building a Music Startup*, HYPEBOT (Oct. 30, 2012), http://www.hypebot.com/hypebot/2012/10/deep-think-joey-flores-of-earbits-on-the-challenges-of-building-a-music-startup.html.

the overall health of the online radio marketplace will decline if nothing is changed. As more online radio companies go out of business, less music will be heard via online radio, which will ultimately hurt consumers and musicians alike.

It is also important to keep in mind the relative sizes of the business segments at play here. Thus far this year, SoundExchange has distributed a total of $316.9 million in royalties for all compulsory licenses.[35] In contrast, David Touve, Assistant Professor of Business Administration at Washington and Lee University, has estimated that terrestrial radio stations would pay nearly $2.5 billion per year in royalties if they paid the same royalty rate as online radio does.[36] This estimate, however, does not attempt to include any decrease in the size of the AM/FM radio business as a result of the royalties, nor the percentage of terrestrial radio programs that does not include music. Billboard estimated that the rates, adjusted for non-music listening, would be more towards $2.05 billion instead.[37] In a $15 billion industry, this would mean that AM/FM broadcasters would pay 20% of their revenue in fees.[38] While online radio may have a chance at being the future of music access, it is by no means the dominant player in the current marketplace, despite being subject to the highest fees.

c. A Cautionary Tale: Interactive Streaming Services

Rather than go out of business entirely, there is another path that online radio companies could take in pursuit of a profitable business model: giving up their independence and giving equity stakes to companies that are already dominant in the music business, like major record labels or large AM/FM broadcast networks. This would only serve to entrench incumbent power structures and stifle innovation in the online music business, and the compulsory license should certainly not force this result on the industry by making online radio choose between unsustainably high compulsory license rates and private deals with the dominant gatekeepers.

This type of development has already occurred in the interactive streaming market, where digital music services do not have any compulsory license to rely on and so must negotiate directly with the record labels. The major labels have repeatedly abused their leverage in these negotiations: demanding outsized advance fees before the services even launch, requiring royalty rates disproportionately high compared to those given to independent musicians, and even demanding ownership in the streaming companies as a condition to getting a license. Spotify, for

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[35] Ed Christman, *SoundExchange Pays Out $122.5 Million In Q3 -- Its Largest Sum Yet*, BILLBOARD (Nov. 14, 2012), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/soundexchange-pays-out-122-5-million-in-1008015922.story

[36] David Touve, *$2.5 Billion: The Big Number that "Big Radio" could owe each year if it paid music royalties at Pandora's rates* (Nov. 19, 2012), http://davidtouve.com/2012/11/19/2-5-billion-the-big-numbers-that-big-radio-could-owe-each-year-if-it-paid-music-royalties-at-pandoras-rates/. Touve used the "pureplay" webcaster rate of $0.0011 per performance per listener for these calculations. Touve also calculated rates under the general webcaster rate of $0.0021 per performance per listener, which were significantly higher.

[37] Glenn Peoples, *Business Matters: If Big Radio Had Pandora's Royalty Rate, It Would Owe Billions*, BILLBOARD (Nov. 20, 2012), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-if-big-radio-had-pandora-1008024632.story.

[38] In contrast, Pandora paid out 50.3% of its revenues to SoundExchange in the most recent fiscal quarter.

example, is partially owned by all of the major record labels, and has been dogged with accusations of giving independent and unsigned musicians a lower royalty rate than major label musicians for the same number of streams. The incumbents have thus been able to use their copyrights to create a tax on innovation in the interactive streaming marketplace.[39]

As Congress deliberates on the right way forward for Internet radio royalties, it should remember how outsized bargaining power can be used to hamper innovation and entrench the dominant players. Setting a compulsory rate too high or otherwise unnecessarily driving companies to direct licensing deals would similarly give major labels and their representatives the opportunity to stymie the progress of the online radio market and disadvantage independent labels and unsigned musicians.

II. IRFA Should Apply the Same Royalty Standard to all Types of Radio Services, Including Online, Cable, Satellite, and AM/FM Radio.

If IRFA is to actually achieve "fairness" in the marketplace, it cannot allow the law to continue to treat the same services differently simply based on the transmission technology used by the broadcaster. Fairness requires treating like service alike. IRFA is right to set online radio royalties by the same standard as that used for cable and satellite radio royalties, and should be amended to also require AM/FM radio to pay royalties under the same standard used by everyone else.

There is no logical reason why the law should impose different royalty standards on companies that all provide essentially the same service to consumers. Whether transmitted by cable, satellite, AM/FM broadcasting, or through an Internet connection, radio companies all offer to consumers a noninteractive stream of music or other audio programming. Their actual royalty payments need not be exactly the same, but the CRB should consider the same factors when setting each of their royalty rates.

This point is much more than legal theories and semantics: experience tells us that the difference in ratemaking standards has led to wildly divergent royalty rates for companies that all provide consumers will substantially similar services. Under the willing buyer/willing seller standard and subsequent settlements, Pandora paid $60.5 million—64% of its revenue—in the quarter ending July 31, 2012.[40] Meanwhile, under the § 801(b) standard, satellite radio operator SiriusXM pays only 8% of its revenues of $867.4 million for the quarter ending September 30, 2012[41]—seemingly paying a similar amount in royalties to Pandora despite having more than 8 times the revenue.

Of course, AM/FM radio has the lowest sound recording royalties of any radio services: $0.00, despite bringing in $15 billion in revenue. To the extent that the outright exemption for

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[39] *See* Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation, and Consumers as the Digital Revolution Matures: The Case Against the Universal-EMI Merger and E-Book Price Fixing* (June 14, 2012), http://publicknowledge.org/case-against-umg-emi.

[40] Pandora Media Inc. Form 10-Q (Sept. 4, 2012).

[41] Sirius XM Radio Inc. Form 10-Q (Nov. 1, 2012).

AM/FM radio was ever justified, it certainly is not now.[42] AM/FM radio provides listeners with essentially the same service as other radio services, and the disparity in treatment only serves to entrench industry incumbents and discourage innovation in the market. If IRFA implements the § 801(b) standard for webcasters but lets the AM/FM broadcasters continue to pay no royalties at all, the bill will only entrench the current broadcasters, who will get to enjoy lower rates for their online retransmissions *and* a special exemption for their AM/FM broadcasts. This does not help competition, it does not help artists, and it does not encourage new companies to enter the market. The only solution is to put all radio services under the same ratemaking standard.

III. IRFA Should Ensure that Artists Are Fairly Compensated.

Finally, the reforms in IRFA would be incomplete if they failed to ensure that actual artists are fairly compensated. The distribution system for the online radio compulsory licenses currently offers several important benefits to artists, but IRFA should take this opportunity to improve artist compensation under the compulsory licenses.

The current online radio compulsory license system offers three very important benefits to artists: transparency, equal treatment, and direct payment. The license fees paid by cable, satellite, and online radio are by statute divided between copyright owners and artists.[43] Federal law allocates 50% of the royalty to the copyright owner (usually a record label), 45% to the featured artist, 2.5% to side musicians, and 2.5% to back-up vocalists. This law offers a level of transparency that is practically unheard of in the recorded music business. Very often, all revenue related to recorded music distribution is funneled through the artist's record label without transparent reporting to the artist, and the artist's contract makes audits of the record label's accounting expensive and time-consuming. But under the compulsory licenses, the royalty rates and distribution splits are publicized for all to see—an important first step in empowering artists.

The compulsory license also has the benefit of being applicable to all artists, regardless of whether they have signed to a major record label, and independent label, or no label at all. By applying the same rate across the industry, every musician can receive their fair share of the payments made by licensees.

Finally, the current compulsory license system ensures that the actual artists receive fair payment even if they have sold away their copyrights—a practice that is essentially a pre-requisite for signing to a major label. Usually, record labels demand copyright ownership and a sizable share of royalties from artists in return for their financing, production, and distribution services. Moreover, artists usually do not receive any portion of the royalties until she has paid back the entire advance investment the label made in producing and promoting the album. But

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[42] Many broadcasters have justified their exemption in the past by saying that the promotional value of playing the recording on their stations outweighs any value they may owe to the recording artist. If they are correct here, the broadcasters can easily present evidence on the promotional value of their service to artists, which the CRB would duly consider under the factors set out in § 801(b) and IRFA.

[43] 17 U.S.C. § 114(g)(2).

under the radio compulsory licenses, artists are directly paid a cut of the royalties, regardless of whether they are still in debt to their record labels.

However, the compulsory license distribution system can and should be amended to direct more compensation directly to artists. Rather than the statutory royalty splits discussed above, the law should distribute 50% of royalties to the featured artist, 5% to side musicians, 5% to back-up vocalists, and 40% to the record label. After all, copyright law's ultimate purpose of incentivizing the creation of works is much better served by directing more payments to actual artists than by giving intermediaries like record labels take an unnecessarily large piece of the pie. This change in royalty splits also offers more structural protection to individual artists, who might be less able to engage in the ratemaking proceedings than record labels and webcasters.

IV. What's At Stake: Online Radio Benefits Artists and Consumers

Emerging online radio services are part of the relatively recent wave of new online music platforms that have been a boon to musicians and their fans alike.

a. Increasing Consumer Access to Legal Music Services

From the consumer's perspective, online radio services allow users to access, discover, and re-discover music more easily than ever before. Particularly as Internet access spreads and music-playing devices become increasingly portable and connected, online radio allows audiences to access radio streams in areas where traditional AM/FM broadcasts did not reach. Online radio technology also allows consumers to access the music that most resonates with them. The global nature of the Internet allows a single niche online radio station to attract a geographically diverse listenership, and sophisticated music analysis technology allows companies to give users more personalized webcasts to fit their specific tastes. This lets musicians with widely spread audiences develop those audiences in a way that geographically-limited AM/FM radio does not.

b. Empowering Artists and Avoiding Gatekeepers

Artists also stand to benefit from the emergence of online radio. When the growth of online radio services reaches new listeners, future fans can discover their next favorite band. Online radio platforms could easily (and often do) incorporate ways for fans to learn more about the musician they are listening to, and even can enable direct merchandising or ticketing opportunities. Online radio also helps to decrease copyright infringement by giving consumers a convenient, affordable way to access music legally.

Perhaps more importantly, online radio has leveled the playing field to help unsigned and independent artists remove unnecessary middlemen and reach fans directly, if they so choose. AM/FM radio has always been limited in the number of stations it can have in any one location, and as a result the most popular music—almost always music owned or distributed by the major labels—has received a disproportionate amount of airplay. This trend is only exacerbated by increasing consolidation in the ownership of local radio stations.[44]

This scarcity in AM/FM radio outlets created the incentive for money to influence the selection of new music for station playlists. Only companies with the largest budgets could play this game, and independent artists without the money or connections to improperly influence the process were left out.[45] In contrast, online radio allows any artist to reach consumers, and fans can just as easily reach stations dedicated to niche genres as they can Top 40 music. When the gatekeepers are removed from the equation, the music that gets played is chosen by the artists and their fans, not by the most powerful corporate executives.

As a result, an artist need not sign to a record label or give up her copyright to be played on online radio and, thanks to the compulsory licensing regime, she will be paid using the same rate as a major label act would. In absence of undue influence from incumbent gatekeepers, new technologies can help artists reach consumers more directly, enabling artists to forge their own paths and give them the ability to operate independently of traditional distribution intermediaries. Where they provide substantial value, intermediaries like record labels can still have a place in the business, but building more tools for artists gives them a meaningful choice in how to direct their own careers.

Make no mistake: online radio is an enormous opportunity to create a sustainable platform that is both artist- and consumer-friendly. The fact that no major company has been able to create a profitable online radio service should be of concern to parties on all sides of the recorded music business.

Conclusion

The online radio market is complex and still relatively new, but IRFA takes steps in the right direction to preserve this promising marketplace while still compensating artists for the use of their works.

IRFA takes a well-planned and principled approach to the rate-setting process. IRFA achieves some measure of parity between platforms, which must be extended to include all technologies—including AM/FM broadcasters—under the same rate-setting standard. By being technology-neutral, the law would allow the most efficient and valuable technology reach its appropriate market.

The royalty-setting standard that IRFA sets will also stimulate the growth of online radio, bringing new players to the field. The standard follows the basic purpose of the compulsory license—to guarantee fair compensation but not going so far as to grant an absolute right to refuse a license—is entirely undermined if the rate is set too high. When the sound recording copyright owner has the right to demand a payment higher than any service could pay, there cannot be said to be any true functioning market. By framing the ratemakings through the tried-

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[44] *See False Premises, False Promises*, Future of Music Coalition (Dec. 13, 2006), http://futureofmusic.org/article/research/false-premises-false-promises.

[45] *See* Jim Ayre, *FMC on Payola and Localism*, FUTURE OF MUSIC COALITION (June 16, 2008), http://futureofmusic.org/blog/2008/06/16/fmc-payola-and-localism.

and-true § 801(b) standard, IRFA will encourage the growth of online music, to the benefit of both consumers and artists.

APPENDIX

The History of Online Radio Royalties

The law governing sound recording transmission royalties is currently a patchwork of rules that were written at different times and supported by different influential industry lobbies. It is thus necessary to review the history of the online radio royalties to understand how the Congress arrived at the standard it uses today, and how the Copyright Royalty Board (CRB) interprets that standard.

Until relatively recently, sound recordings did not receive federal copyright protection at all. In 1971, the Sound Recordings Act created copyright protection for sound recordings, but only granted the rights to control reproduction and distribution of sound recordings.[46]

In 1995, the Digital Performance Right on Sound Recordings Act[47] ("DPRA") granted a public performance right in sound recordings that applied only to digital audio transmissions. The law also gives exemptions from this right for terrestrial broadcasts licensed by the Federal Communications Commission, certain retransmissions of those broadcasts, and certain other transmissions.[48] Notably, the DPRA exempted many webcasters from royalties entirely by exempting noninteractive nonsubscription services.[49]

The DPRA also created a new statutory license under which non-exempt, noninteractive online music services could use sound recordings for their online radio services.[50] The DPRA called for this compulsory license to be set according to the standard set in section 801(b) of the Copyright Act.[51]

The decision to create a right for digital transmission but exempt AM/FM radio was in part based on the fear that digital music services would supplant sales of recorded music sales, both for singles and for full albums.[52] Digital music services caused apprehension that the music streaming services would change the entire structure of recorded music consumption, from an ownership model to an access model. The recorded music industry also worried that digital technology would move control over where and how listeners accessed recorded music from the incumbent companies to the users themselves, and would enable listeners to copy and distribute music streams. The exemption of AM/FM radio from this new performance right can also in part be attributed to the influence of groups like the National Association of Broadcasters, which

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[46] Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (1971).

[47] Pub. L. No. 104-39, 109 Stat. 336 (1995).

[48] 17 U.S.C. §§ 114(d), (j).

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

[50] 17 U.S.C. § 114(f).

[51] 17 U.S.C. § 801(b)(1). This standard pre-existed the DPRA, and was already being used to determine the rates for a compulsory license to reproduce and distribute sound recordings. *See* 17 U.S.C. § 115.

[52] S. Comm. on the Judiciary, 104th Cong., Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 14 (statements by Sen. Hatch) ("[C]urrent copyright law is inadequate to . . . protect the livelihoods of the recording artists . . . who depend upon revenues derived from traditional record sales.").

argued that terrestrial radio only promoted sales and did not threaten the status quo of the industry.[53]

Then, in 1998, the Digital Millennium Copyright Act[54] ("DMCA") divided online radio services into Internet, satellite, and cable services, and applied a different royalty standard to each.[55] The DMCA required noninteractive nonsubscription webcasters to pay a license for the first time, creating the category of an "eligible nonsubscription service."[56] After the DMCA was passed, webcasters and the major record labels could not agree on the appropriate licensing rates, so a Copyright Arbitration Royalty Panel recommended a rate under the willing buyer/willing seller standard.[57] The Librarian of Congress then adjusted the recommended rate and issued a final rate.[58]

In 2001 and 2002, the Copyright Arbitration Royalty Board convened the first webcasting ratemaking.[59] Notably, small webcasters were largely absent from this proceeding, perhaps due to the requirement that participants to the proceeding pay a portion of the arbitrators' fees. One major issue of contention in this proceeding was the choice between structuring the fee as a percentage of revenue and a flat per-use fee. The RIAA argued for a per-use fee, what small webcasters could participate argued for a percentage of revenue, and the Digital Media Association purposed a combination.[60] The CARP ultimately relied on a previous agreement between Yahoo! (which at the time was operating an online radio service that has since gone out of business) and the RIAA, and settled on a per-use fee.[61] Many webcasters objected that the Yahoo! and RIAA settlement was an inappropriate model because Yahoo! had accepted a higher fee for online-only transmissions in return for lower radio retransmission rates, which was the bulk of Yahoo! online radio business at the time. Online-only webcasters were therefore stuck with high rates without being able to benefit from the discounted retransmission rates.

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[53] *See The Performance Rights Act*: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Steven Newberry, Commonwealth Broadcasting Corporation, On Behalf of the National Association of Broadcasters).

[54] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[55] 17 U.S.C. § 114.

[56] 17 U.S.C. § 114(j).

[57] 66 Fed. Reg. 141, 38324-38326 (July 23, 2002).

[58] Order, Digital Performance Right in Sound Recordings and Ephemeral Recordings (May 21, 2002), http://www.copyright.gov/carp/webcasting-rates-order.html; Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 130, 45239-45276 (July 8, 2002).

[59] *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (2002) (codified at 37 C.F.R. pt. 261).

[60] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (2002) (codified at 37 C.F.R. pt. 261) at 45,241-42.

[61] *Id.* at 42,250.

The Librarian of Congress ultimately accepted the CARP's structuring of the royalties, but rejected the actual rates as too high, and adjusted the rates downward.[62] However, this decision was eventually partially superseded by the Small Webcaster Settlement Act of 2002,[63] under which the parties re-negotiated a percentage of revenue-based fee for small and noncommercial webcasters.

In 2004, Congress enacted the Copyright Royalty and Distribution Reform Act of 2004, which replaced the CARP system with the Copyright Royalty Board (CRB).[64] In 2007, the CRB set the online radio compulsory license through 2010.[65] In this ratemaking, the CRB followed SoundExchange's request to discount rates in the interactive music streaming market to approximate market rates for noninteractive streaming.[66] After public outcry objecting that the rates were too high for webcasters to operate a sustainable business, Congress enacted two pieces of legislation intended to encourage settlements between the webcasters and copyright owners.[67]

2007 CRB Ratemaking ($500 minimum)	
Year	Royalty per Digital Transmission
2006	$0.0008
2007	$0.0011
2008	$0.0014
2009	$0.0018
2010	$0.0019

By 2009, many webcasters had negotiated settlements with SoundExchange pursuant to the Webcaster Settlement Acts, including the PurePlay Agreement, through which a majority of webcasters pay their royalties through 2015.[68] The PurePlay Agreement lowered the CRB rates by as much as 40% in return for greater reporting requirements, leading some webcasters to announce that they could now continue to operate for the near future. Meanwhile, terrestrial radio earned $16.5 billion in profits, but paid $0 in sound recording royalties.[69]

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[62] *Id.* at 45,255, 45,272.

[63] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 3, 116 Stat. 2780, 2781 (suspending payments under CARP rates in favor of subsequently negotiated agreement).

[64] Copyright Royalty and Distribution Reform Act of 2004, H. R. 1417, 108th Cong., 1st Sess. (2003).

[65] Digital Performance Right in Sound Recordings and Ephemeral Records, 72 Fed. Reg. 24,084, 24,088 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

[66] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084 (May 1, 2007) (codified at 37 C.F.R. pt. 380) at 24,091-94.

[67] Webcaster Settlement Act of 2008, H. R. 7084, 110th Cong., 2d Sess. (2008); Webcaster Settlement Act of 2009, S. 1145, 111th Cong., 1st Sess. (2009).

[68] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 136, 34796 (July 17, 2009).

[69] *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing on S. 379 Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Robert Kimball, Executive Vice President for Corporate Development & General Counsel, RealNetworks, Inc.), http://judiciary.senate.gov/hearings/testimony.cfm?id=4011&wit_id=8164.

The PurePlay Agreement created a schedule of rates, terms, and conditions for all commercially available sound recordings through 2015, to which any eligible webcaster can opt-in. If they choose to do so, commercial webcasters must agree to withdraw from any ratemakings before the CRJs and not participate in any ratemakings while the PurePlay agreement is in effect. The PurePlay Agreement contains three rate classes, based on gross revenues and streaming capabilities.[70]

<table>
<tr><th>Class</th><th>Eligibility Requirements</th><th>Rate</th><th>Minimum Fee</th></tr>
<tr><td>Large commercial webcasters</td><td>> $1.25 million annual revenues</td><td>The greater of: 25% of U.S. revenues; or per performance rate 40% lower than CRB’s set rate (see below).</td><td>$25,000 per year</td></tr>
<tr><td>Small commercial webcasters</td><td>≤ $1.25 million annual revenues, must place cap on the number of sound recordings they play</td><td>The greater of: 12% of their first $250,000 in revenue and 14% of revenue above $250,000; or 7% of expenses.</td><td></td></tr>
<tr><td>Webcasters providing bundled, syndicated, or subscription services</td><td></td><td>Same as those agreed to by the NAB:
<table>
<tr><th>Year</th><th>Royalty per Digital Performance</th></tr>
<tr><td>2012</td><td>$0.0020</td></tr>
<tr><td>2013</td><td>$0.0022</td></tr>
<tr><td>2014</td><td>$0.0023</td></tr>
<tr><td>2015</td><td>$0.0025</td></tr>
</table></td><td></td></tr>
</table>

In return for the discounted rates, the PurePlay Agreement requires more stringent reporting requirements for the webcasters to give more detailed census reports to SoundExchange.

The market has most recently begun to see private direct deals that bundle payments for online radio with terrestrial broadcasting. For example, in 2012, Clear Channel and Big Machine Records agree to a deal that encompassed both digital licensing and terrestrial broadcasting, even though the terrestrial sound recording right has never been made law.[71]

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[70] Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 40, 9293-99 (Mar. 3, 2009).

[71] Clear Channel, *Big Machine Label Group and Clear Channel Announce Groundbreaking Agreement to Enable Record Company and Its Artists to Participate in All Radio Revenue Streams and Accelerate Growth of Digital Radio*,

CRB Rates	
Year	Royalty per Digital Performance
2012	$0.0011
2013	$0.0012
2014	$0.0013
2015	$0.0014

Unlike the compulsory license, however, much about the Clear Channel/Big Machine deal remains a mystery. The negotiating process was not public, nor are the exact terms of the deal. Rumors indicate that the deal may split royalties between record labels and artists, but without transparency this is difficult to confirm, and even if true the royalties may be subject to the record label accounting process or even withheld until the record label concludes it has broken even on the album. All of these mechanisms for record labels to decrease the royalties that go directly to the artists are avoided under the compulsory license process, which ensures that a transparent split is distributed directly to sound recording owner and the performing artists.

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http://www.clearchannel.com/MediaAndEntertainment/PressRelease.aspx?PressReleaseID=3107.