How "Choruss" Can Turn Into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business

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Cite as: Andrey Spektor, *How "Choruss" Can Turn Into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business*, XVI Rich. J.L. & Tech. 3 (2009), http://law.richmond.edu/jolt/v16i1/article3.pdf

INTRODUCTION

[1] A sixty year-old man is delighted when his son shows him how to use Pandora—an interactive, hip Internet radio site that puts the listener in control.[1] Having grown up a huge Louis Armstrong fan, the man quickly selects the jazz singer as one of his "stations."[2] When listening to this station, Pandora will only play songs by Armstrong and other similar artists for him.[3] When he hears Armstrong's classic, "What a Wonderful World," the man immediately clicks the "Thumbs Up" icon, indicating his

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[1] *See generally* Pandora Radio, Frequently Asked Questions, http://blog.pandora.com/faq/ (last visited Sept. 26, 2009).

[2] *Id.*

[3] *Id.*

approval of Pandora's recommendation.[4] Pandora's recommendations are drawn from its "Music Genome Project," a database of song attributes that has been compiled by an army of professional musicologists.[5] Pandora's musicologist have analyzed and identified the attributes of "What a Wonderful World" and use this knowledge to recommend other songs for a listener.[6] In addition, Pandora further tailors its recommendations based on the choices other listeners have made.[7] In the end, the man's refined playlist contains a variety of artists, from jazz standards like Peggy Lee to new jazz artists, like Betty Carter. Pandora is extremely interactive, but it does not allow the man to download or skip through too many songs.[8]

[2] Reading the morning news and listening to Pandora each morning has left the man longing for catchy songs when he takes his stroll in the evening. Once again his son has a solution and gets his father an iPod for his birthday. After explaining how to use it, the son suggests to his father to load the iPod with songs the man enjoys listening to on Pandora. The son tells his father to simply click on the song and follow the link to iTunes. The man is marveled by the ease of the transaction to download the song. He continues exploring iTunes, filling out a few reviews and previewing some of iTunes' recommendations before downloading a few more songs. Before now, the man was just a casual music listener, too busy to spend hours shopping for complete albums on Compact Disc (CD) and too impatient to put up with the radio's incessant commercials and talking, not to mention all the songs he is not interested in hearing. Pandora and iTunes have eliminated the transaction costs and the noise that stood in the way of the man becoming a regular music listener and customer.

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[3] While this story may suggest that the marriage of music and the Internet has been uncontroversial, the reality is a bit more complicated. For one, the ease with which songs can be exchanged online has facilitated digital music piracy.[9] And there are also the self-interested grievances from those who are not particularly excited about digital music: the recording industry, which has watched CD sales decline,[10] and traditional radio broadcasters that now have to compete with the likes of Pandora.[11] It is the latter which is the subject of this article.

[4] Both the copyright laws that apply to digital transmissions and the relationships within the music industry are complicated. While one can say with certainty that most music artists are paid when Pandora plays their copyrighted work or when someone pays to download a song from iTunes, how *much* they receive is a legal question loaded with numerous practical considerations. Before answering this question, it is worth considering the context in which the question is being asked. To that end, Part I of this article traces the major developments in the digital revolution that have set the table for future battles. Part II explains the scheme set up by copyright law that regulates digital performances and sales of music online, tracking who exactly is paid when a song is downloaded or transmitted over the Internet. Part III of this article discusses the ongoing struggles of the recording industry with digital marketplaces and Internet radio, and predicts the battles that will make headlines in 2010, arguing that the law should be more conscious of accounting for the public interest that is derived from these emerging technologies.

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[9] *See* Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 335 (S.D.N.Y. 2000) (citing S. REP. 105-190, 105th Cong., 2d Sess. (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.")).

[10] Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 737-38 (2005) (summarizing the decline of U.S. music industry revenue).

[11] Nick Madigan, *Competition Abounds for Radio; MP3 Players, Satellite Challenge Conventional Version of Medium*, THE BALTIMORE SUN, 1A (Dec, 15, 2005).

I. HOW WE GOT HERE: THE DIGITAL REVOLUTION

[5] The trouble for the Recording Industry Association of America (RIAA) began in the late 1990s with the birth of peer-to-peer file sharing. To combat declining CD sales caused by digital music piracy over peer-to-peer networks, the RIAA began suing individual file-sharers. That campaign failed. The RIAA has developed a new strategy that is beginning to take shape—a focus on maximizing royalty payments from Internet sources. One immediate consequence of this new effort is the threat of extinction for Internet radio.

[6] At its peak in 1999, the recording industry was growing at an annual rate of six percent and had total profits of $14.6 billion.[12] But the turning point for the recording industry occurred in June 1999, when an undergraduate student at Northeastern University released the original version of Napster.[13] A year after Napster's launch, CD sales began to suffer a continuous decline, plunging six percent in 2001, followed by another nine percent in 2002 and seven percent more in 2003.[14] Most teenagers can tell you how the RIAA eventually took down Napster's network, but its roughly forty million users did not sign off—they simply migrated to other file-sharing services.[15] According to Hilliary Rosen, the former CEO of the RIAA, the migration that occurred between 2001 and 2003 was when they "lost the users."[16]

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[12] Mike Wiser, *Frequently Asked Questions*, FRONTLINE, May 27, 2004, http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/faqs.html.

[13] *Napster's High and Low Notes*, BUSINESSWEEK, Aug. 14, 2000, *available at* http://www.businessweek.com/2000/00_33/b3694003.htm.

[14] *See* Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 28, 2007, *available at* http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline.

[15] *See id.*

[16] *Id.*

[7] In 2003, the recording industry took its fight to the courtroom.[17] Without waiting for a federal appellate court to decide whether an Internet Service Provider (ISP) must provide the identities of its subscribers, the RIAA filed its first lawsuits against college students, alleging copyright infringement for sharing music over peer-to-peer networks.[18] By the end of the year, the recording industry had filed hundreds of lawsuits and issued hundreds more federal subpoenas to users of file-sharing networks.[19] In response to the holding of the Court of Appeals for the D.C. Circuit that the Digital Millennium Copyright Act (DMCA) did not require an ISP to comply with its subpoenas, the RIAA commenced a campaign of John Doe actions.[20] While the campaign began with a growl in 2003,[21] it ended with a whimper five years later.[22] Ironically, 2003 was

[17] *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Groster, Ltd., 243 F. Supp. 2d 1073 (C.D. Cal. 2003) (describing that movie and recording industries sued peer-to-peer media transfer network software providers for copyright infringement); *In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24 (D.C. 2003) (describing that the recording industry suit under the Digital Millennium Copyright Act seeking identity of anonymous ISP users who allegedly infringed copyrights).

[18] *See* Peter Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 660 (2005) ("[a]lthough the lawsuits raised public awareness of the illegality of online file trading, the recording industry soon found itself confronted with bad publicity and harsh criticism. In less than a month, the labels settled with the students, each of whom agreed to pay damages that ranged from $12,000 to $17,500.").

[19] *See* Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, Sept. 9, 2003, at A1; *Hundreds of Subpoenas in Net Piracy*, SEATTLE TIMES, July 19, 2003, at A3, *available at* http://community.seattletimes.nwsource.com/archive/?date=20030719&slug=ndig19.

[20] *See In re* Verizon Internet Servs., Inc., 351 F.3d 1229, 1234 (D.C. Cir. 2003) (holding that a subpoena may be issued only to an ISP storing infringing data, and not ISPs that facilitate peer-to-peer file sharing); Yu, *supra* note 18, at 674-75 (stating that the effect of the circuit court's ruling made the RIAA's litigation strategy more cumbersome: it would have to file John Doe actions against file-sharers, unable to weed out sympathetic defendants, and disclosure of information would only be provided for a pending lawsuit).

[21] *See* Jefferson Graham, *Swap Songs? You May Be on Record Industry's Hit List*, USA TODAY, July 22, 2003, at 1D, *available at* http://www.usatoday.com/tech/news/2003-07-21-swappers_x.htm.

also the year Apple launched its own response to illegal music file sharing—the now successful iTunes Store.[23]

[8] While the Napster litigation was underway, several recording industry executives secretly met with Hank Barry, the CEO of Napster.[24] At the July 2000 meeting, the executives attempted to strike a licensing deal with Napster that would allow its users to keep downloading songs for a monthly subscription fee, but an agreement was never reached.[25] According to Rosen: "The record companies needed to jump off a cliff, and they couldn't bring themselves to jump."[26] Today the story is equally revealing. People are listening to more music, while the recording industry has fewer and fewer customers.[27] Part of the problem for the recording industry is that the steady increase in digital transactions has not made up for plummeting CD sales,[28] leading many to doubt the continuing

[22] *See* Yu, *supra* note 18, at 663 (noting that the RIAA celebrated the subpoena power it won in the district court by launching a mass-litigation campaign against file-swappers); Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits,* WALL ST. J. Dec. 19, 2008, at B1, *available at* http://online.wsj.com/article/SB122966038836021137.html; Nate Anderson, *No More Lawsuits: ISPs to Work With RIAA, Cut Off P2P Users*, ARS TECHNICA, Dec. 19, 2008, http://arstechnica.com/tech-policy/news/2008/12/no-more-lawsuits-isps-to-work-with-riaa-cut-off-p2p-users.ars.

[23] *See* Laurie J. Flynn, *Apple Offers Music Downloads with Unique Pricing*, N.Y. TIMES, Apr. 29, 2003, at C2, *available at* http://www.nytimes.com/2003/04/29/business/technology-apple-offers-music-downloads-with-unique-pricing.html. *See generally* Apple iTunes, http://www.apple.com/itunes (last visited Sept. 10, 2009) (providing information on the features of iTunes Store, for example, to purchase and download music.).

[24] *See* Hiatt & Serpick, *supra* note 14.

[25] *Id.*

[26] *Id*.

[27] *See id*.

[28] RIAA KEY STATISTICS: 2007 YEAR-END SHIPMENT STATISTICS (2007), http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf (showing that CD sales hit their peak in 2000, and have declined each year through 2007, with digital sales having a 59% increase in 2006 and 38% increase in 2007).

vitality of the RIAA's current business model.[29] Equally troubling for the industry is the apparent desertion of its traditional partners. Computer and consumer electronics groups' interests have begun to diverge from the RIAA.[30] Senators have balked at the RIAA's strong-arm tactics of enforcement.[31] Even Mickey Mouse, "the protagonist of the copyright term extension drama," is not happy.[32]

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[29] *See*, *e.g.*, Alvin Chan, *The Chronicles of Grokster: Who Is the Biggest Threat In the P2P Battle?*, 15 UCLA ENT. L. REV. 291, 323 (2008) ("the most sensible solution requires the music industry to make the long-overdue admission that just like vinyl records and cassette tapes, the days of the simple compact disc are over. The long-anticipated transition from physical to ethereal music might finally be upon us, since the advent of new media has rendered record stores increasingly obsolete."); Tim Arango, *Digital Sales Surpass CDs At Atlantic*, N.Y. TIMES, Nov. 25, 2008, at B1, *available at* http://www.nytimes.com/2008/11/26/business/media/26music.html; Mark Hefflinger, *Report: Digital Music Download Sales to Pass CD Sales by 2012*, DIGITAL MEDIA Wire, Feb. 19, 2008, http://www.dmwmedia.com/news/2008/02/19/report:-digital-music-download-sales-pass-cd-sales-2012.

[30] *See* Yu, *supra* note 18, at 683-84 (stating that although they were former allies pushing for the DMCA legislation, the interests of the RIAA and consumer electronics have begun to diverge; having to pay more to copyright holders as a result of the way the DMCA has been interpreted, consumers have less to spend on new technology. Furthermore, copyright industries like the RIAA have been lobbying Congress to protect their royalty schemes, which has in turn stifled the development of new technologies).

[31] *See*, *e.g.*, Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, Aug. 1, 2003, at C1, *available at* http://www.nytimes.com/2003/08/01/business/01MUSI.html (describing Senator Coleman's remark, "[i]f you're taking someone else's property, that's wrong, that's stealing. . . . But in this country we don't cut off people's hands when they steal. One question I have is whether the penalty here fits the crime."); Grant Gross, *Congress Scrutinizes RIAA Tactics*, PC WORLD, Sept. 17, 2003, http://www.pcworld.com/article/112535/congress_scrutinizes_riaa_tactics.html (stating that Senators Brownback, Wyden, and Coleman have criticized RIAA's use of the DMCA subpoenas).

[32] Yu, *supra* note 18, at 680 ("[e]ven Mickey Mouse, the protagonist of the copyright term extension drama, could not help but give an interview blasting his owner: For almost 70 years, I've only been allowed to do what the Disney people say I can do. Sometimes someone comes up with a new idea, and I think to myself, 'Great! Here's a chance to stretch myself!' But of course they won't let me leave the reservation. If I do, they send out their lawyers to bring me home . . . Do you have any idea what it's like to

[9] Having recently given up on suing individuals,[33] the recording industry is now intent on squeezing out royalty payments from new sources of music.[34] Unfortunately, Internet radio may soon become a casualty of RIAA's fresh strategy. While affordable, high-speed Internet access was unheard of in the early 1990s.[35] as technology has developed, online broadcasting has grown into itself and enjoys considerable popularity today.[36] Indeed, more than a quarter of Americans have listened to Internet radio,[37] with Pandora alone claiming twenty million registered listeners.[38] Pandora's listeners have access to more than 600,000 songs, many of which are performed by artists who would otherwise have no access to a steady audience.[39] And Pandora provides its

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have to greet kids at Disneyland every single day, always smiling, never slipping off for a cigarette?").

[33] *See* McBride & Smith, *supra* note 22; Anderson, *supra* note 22.

[34] *See* Posting of Tim Westergren to Pandora Blog, http://blog.pandora.com/pandora/archives/2007/03/riaas_new_royal.html (Mar. 6, 2007, 00:49 EST) (commenting by the founder of Pandora that RIAA's struggle has nothing to do with internet radio's business model).

[35] *See* John Markoff, *Turning the Desktop PC Into a Talk Radio Medium*, N.Y. TIMES, Mar. 4, 1993, at A1, *available at* http://www.nytimes.com/1993/03/04/us/turning-the-desktop-pc-into-a-talk-radio-medium.html; Joshua, Quittner, *Radio Free Cyberspace*, TIME, May 1, 1995, at 91, *available at* http://www.time.com/time/magazine/article/0,9171,982874-1,00.html.

[36] *See* Olga Kharif, *The Last Days of Internet Radio?*, BUSINESSWEEK, Mar. 7, 2007, *available at* http://www.businessweek.com/technology/content/mar2007/tc20070307_534338.htm.

[37] *American Media Services Survey Shows Popularity of Internet Radio, Even as Regular Radio Continues Holding its Audience*, AMS NEWS, Apr. 8, 2009, http://americanmediaservices.blogspot.com/2009/04/american-media-services-survey-shows.html.

[38] Erick Schonfeld, *Pandora Hits 20 Million Registered Users*, TECHCRUNCH, Dec. 19, 2008, http://www.techcrunch.com/2008/12/19/pandora-hits-20-million-registered-users-via-twitter (stating that of the registered users, 40 percent have been recently active).

[39] *See* Pandora, CRUNCHBASE, http://www.crunchbase.com/company/pandora (last visited Sept. 10, 2009). Each of these songs is "digitally annotated with musical characteristics from a list of 400. Pandora differs from its competitors in the personalized

service with limited commercial interruptions.[40] Adding to the excitement of online broadcasting are the recent introductions of Internet-ready, ultra-popular iPhone and iPod Touch, which have effectively given rise to portable webcasting.[41]

[10] Years before webcasting emerged as a reliable medium, Congress threw the recording industry a bone. Largely through their lobbying efforts, traditional radio broadcasters have been able to keep sound recording owners (usually the record labels) from having exclusive performance rights in copyrighted works.[42] But the RIAA, with its own army of lobbyists, fought against this exemption.[43] In 1995, the National Association of Broadcasters sought to handicap the potential competitor it saw in webcasters by joining with the RIAA to lobby for a *limited* performance right of sound recording owners—limited because it would apply only to digital transmissions.[44]

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music that it delivers; with recommendations tailored to individual users by musicians rather by other users, Pandora delivers a unique experience. *Id*

[40] Jason Kincaid*, Pandora Radio Starts Serving Audio Ads*, TECHCRUNCH, Jan. 20, 2009, http://www.techcrunch.com/2009/01/20/pandora-radio-starts-serving-audio-ads. The audio advertisements are an addition to the image-based ones that Pandora has always employed. So far the audio commercials are sparse, and have not yet been implemented on the iPhone version of Pandora. *Id.*

[41] *See* Jeremy Horwitz*, iPhone Gems: 12 Internet Radio Apps for iPhone + iPod Touch* (Aug. 20, 2008), http://www.ilounge.com/index.php/articles/comments/iphone-gems-12-internet-radio-apps-for-iphone-ipod-touch (noting that Apple has added Pandora as an application for its iPhone and iPod Touch).

[42] Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?,* 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 265-67 (2008).

[43] *See id.*

[44] *Id.*

[11] The Digital Performance Right in Sound Recording Act of 1995 (DPRA) provided that this limited right would operate alongside traditional copyright protection of music.[45] In 1998, Congress amended the DPRA when it enacted the Digital Millennium Copyright Act (DMCA).[46] The DMCA eliminated the exemption for performances that occur as part of "[a] nonsubscription transmission other than a retransmission," leaving webcasters clearly subject to royalty payments.[47]

[12] More importantly, the Copyright Royalty Board has led to the establishment of rates that have sent many webcasters spinning out of business or, at the very least, depressed about their prospects for survival.[48] Because the recording industry remains skeptical about the potential revenue stream from Internet radio, negotiations over royalty payments for the digital performance right may not have yielded fair results.[49] Indeed, as discussed in further detail below, whether the DPRA allows webcasters to sustain a profitable business model remains to be seen.[50]

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[45] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as 17 U.S.C. § 106(6) (2006)).

[46] Digital Millennium Copyright Act § 202, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as 17 U.S.C. § 512).

[47] Digital Performance Right in Sound Recordings Act of 1995, *supra* note 34, § 114(d)(1)(A)(i), *amended by* 17 U.S.C. § 512 (1998).

[48] *See*, *e.g.*, Ben Newhouse, *Senate Committee Testimony of Tim Westergren of Pandora Media*, ROYALTYWEEK, Oct. 26, 2007, http://www.royaltyweek.com/?p=53. *See generally* Copyright Royalty Board, http://www.loc.gov/crb (last visited Sept. 15, 2009).

[49] *See* Paul Maloney, *Evaluating NAB/SoundEx Deal: Good Business, or Disaster*?, RADIO AND INTERNET NEWSL. Mar. 2, 2009, http://textpattern.kurthanson.com/articles/614/rain-32-evaluating-nabsoundex-deal-good-business-or-disaster (quoting industry expert Bob Bellin that "[as a result of the settlement] webcasters must pay a much bigger percentage of their revenue to the labels than what was the original calculus").

[50] *See* Posting of Marc Fisher to The Washington Post, http://voices.washingtonpost.com/rawfisher/2007/06/day_of_silence_internet_radio.html (June 26, 2007, 07:05 EST) (stating that a "day of silence" staged by many webcasters, including Pandora, protesting

II. DIGITAL MUSIC AND COPYRIGHT LAW

[13] Copyright law has its roots in the Constitution,[51] and its policy is carried out by the statutory scheme set up by the Copyright Act.[52] This section begins by discussing the general goals of copyright law that affect the specific provisions of the Act addressed throughout the article.[53]

[14] Copyright protection of music is complicated for two reasons: (1) it involves multiple parts to multiple rights (interests); and (2) influences a whole host of players in the music industry. In a simplified world, a performer would write and record his own song and then collect all the royalties whenever that song is played or purchased. But in its current form, the Copyright Act establishes distinct interests in each song that may be held by several individuals.

[15] The practical effect of owning a specific copyright, however, may not necessarily lead to direct or full payments to the owner. Following an explanation of the copyright scheme, this section will describe the trails that follow each interest to the eventual royalty payment. Concluding this section is a brief look at the two most popular ways of accessing music on the Internet: streaming and downloading. Since different interests may be at stake, depending on the method of transmitting a song, whether and how much an artist or songwriter is paid depends on how a user chooses to listen to music.

A. THE PURPOSE OF COPYRIGHT LAW

[16] Contrary to popular belief, the primary goal of copyright protection is not necessarily to maximize the rewards for the creator; rather, it is to

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the royalty rates determined by the Copyright Royalty Board in 2007 for the digital performance right in sound recordings).

[51] U.S. CONST. art. I, § 8.

[52] *See generally* 17 U.S.C. § 101 et seq.

[53] *See id.* § 102.

enrich the public domain. Of course, any discussion of the purpose of copyright law begins with the Constitution. But it is through the Copyright Act that the Supreme Court has teased out the aim of the protections granted by the law.

[17] The goals of copyright law in the United States are set out in the intellectual property clause of the Constitution: "To promote the Progress of Science and the useful Arts."[54] To meet those goals, the clause empowers Congress to provide legislation that secures exclusive rights "for limited times to Authors and Inventors . . . to their Writings and Discoveries."[55] Federal law, as interpreted by the Supreme Court, is in line with the Constitution: "the scheme established by the Copyright Act . . . [fosters] the original works that provide the seed and substance of [the harvest of knowledge]."[56] Therefore, while the "rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors,"[57] the protection is in fact employed for two reasons: "to motivate the creative activity of authors;"[58] and to enrich the public domain.[59] The Supreme Court has further collapsed these twin goals by stating that the sole interest and ultimate aim of copyright law lies "in the general benefits derived by the public from the labors of authors."[60]

[18] Applying these principles to the music business, the law should be careful in balancing the public's interest in having access to music with the protections given to artists, songwriters and their agents. In other

[54] U.S. CONST. art. I, § 8, cl. 8.

[55] *Id*.

[56] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545-46 (1985).

[57] *Id.* at 546 (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

[58] *Id*.

[59] *Twentieth Century Music Corp*., 422 U.S. at 156.

[60] *Id*.

words, while artists need to be sufficiently incentivized with the promise of royalty payments, high rewards may detract from the distribution of their songs, be it through sale or broadcasting. Therefore, the perfectly crafted laws and statutory rates would give no more to the artist than needed to sustain his level of motivation.[61]

B. RIGHTS INVOLVED IN A SALE OF MUSIC

1. THE PERFORMANCE AND MUSICAL WORK LAYERS OF A SONG

[19] Copyright law has created a scheme where the performance and reproduction of a given song implicates four distinct interests, any of which may be separately vested in individuals or entities. To begin with, every song has two layers of copyrightable protection.[62] A songwriter usually composes the "musical work" layer with notes and lyrics.[63] Stacked on top of this is the "sound recording" layer, which is the actual performance of the musical work by an artist, fixed in a digital file or a CD.[64] For instance, Daniel Jones and Darren Hayes, two English

[61] *See* Joseph P. Liu, *Copyright Law's Theory of the Consumer,* 44 B.C. L. REV. 397, 423-24 (2003) (arguing that consumer's interest in access to digital information should be carefully weighed against the incentives given to copyright owners so that the law does not over-incentivize); *see also* Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569, 589 (1997) (arguing that to address the concern underproduction of useful works, copyright law grants the author a limited statutory monopoly by conferring on him certain exclusive rights; without limitations these rights would inhibit copyright law's goal of maintaining the free flow of information on which creativity is built); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 335 (1989) ("too much protection can raise the costs of creation for subsequent authors to the point where those authors cannot cover them").

[62] 17 U.S.C. § 102(a)(2), (7) (2006).

[63] While there is usually more than one person who "writes" a song, traditionally there was a writer of the music and a lyricist. Today, rap and hip-hop music demands artists who create tracks or background rhythm. And royalties for the songwriter are shared among all these individuals. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 266 (Free Press 2006) (1991).

[64] 17 U.S.C. § 101 ("sound recordings").

musicians, wrote the song "Truly Madly Deeply."[65] It has been a hit, performed by both the Australian pop duo Savage Garden and the German Eurodance group Cascada.[66] Because the performing artists of the song are different, when a user downloads a file capturing either performance, only the musical work layer stays constant.

[20] The two layers in turn give rise to the four separate interests relevant to this discussion. Among other privileges, the copyright holder possesses the exclusive right to reproduce and perform his work.[67] As a result, copyright law recognizes an interest in reproducing a musical work,[68] reproducing a sound recording,[69] performing a musical work,[70] and most recently, in publically performing a sound recording by digital audio transmission.[71]

2. THE REPRODUCTION RIGHT

[21] When a user reproduces any track—which, in the digital world, means he copies or downloads a file to his computer[72]—he takes the

[65] *See* Savage Garden Biography, http://www.legacyrecordings.com/savage-garden.aspx (last visited Sept. 15, 2009).

[66] *See id.*; Cascada Biography, http://www.cascada-music.de/v2/index.php?option=com_content&task=view&id=16&Itemid=32 (last visited Sept. 15, 2009); Cascada Discography Singles Truly Madly Deeply, http://www.cascada-music.de/v2/index.php?option=com_content&task=blogsection&id=9&Itemid=48&lang=de (last visited Sept. 15, 2009).

[67] 17 U.S.C. §§ 106(1), (4), (6).

[68] *Id.* § 106(1).

[69] *Id*.

[70] *Id.* § 106(4).

[71] *Id.* § 106(6).

[72] *See e.g.* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (holding that software stored in RAM constitutes a fixed copy protected under the

musical work and the sound recording together. Consequently, the reproduction right implicates copyright holders of both layers of the song.

[22] There is a twist when it comes to the reproduction right involving musical works: the compulsory mechanical license.[73] Once the owner of a musical work permits or licenses someone to use his work as a layer in any song he makes publicly available, others may use that musical work so long as they follow the compulsory license requirements.[74] One of these requirements is paying the statutory rate established by the Copyright Office.[75] Significantly, the rate is determined using a standard set forth in § 801(b)(1).[76] Aside from fairness to the copyright owner, it is significant because, the factors under § 801(b)(1) include the public interest as well as the impact royalties may have on the "industries involved and on generally prevailing industry practices."[77] As discussed

Copyright Act from infringement in the absence of ownership of the copyright or permission by license).

[73] *See generally* 17 U.S.C. § 115 (2006) ("[s]cope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords").

[74] *Id*. § 115(a). Several conditions must be met: the song is a non-dramatic musical work; and it has been previously recorded; and the previous recording has been distributed publicly in phonorecords (CDs) or through a digital phonorecord delivery; the recording doesn't change the basic melody or fundamental character of the song; the use of recording will be in phonorecords or DPDs only, for distribution to the public for private use. *Id.*

[75] *Id.* § 115(c)(3)(D).

[76] *Id.* § 115(c)(3)(D)(ii) (stating that Copyright Royalty Judges may also consider rates and terms reached under voluntary license agreements)

[77] *Id.* § 801(b)(1) ("Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows: (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives: (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

below, this standard has been considered for determining rates in other contexts.

[23] For example, the group Cascada need not have approached Daniel Jones or Darren Hayes to perform their song "Truly Madly Deeply," they just had to have paid the statutory rate. Note that a compulsory license does not extend to the actual performance fixed in a sound recording. So anyone who is enamored by Cascada's voice and wants to reproduce her version of the song, needs permission from the owner of the sound recording, which as explained below, is probably a major record label.

3. THE PUBLIC PERFORMANCE RIGHT

[24] The right to perform a musical work publicly goes beyond a live concert.[78] Traditionally, an owner of a sound recording copyright has not enjoyed an exclusive right to perform his work publicly.[79] This partially changed in 1995, when Congress granted a limited performance right to owners of sound recordings—the digital transmission performance right (DTPR)[80]—while preserving an exemption for conventional, terrestrial AM/FM radio stations.[81] In fact, it is assumed that every time an Internet radio station transmits a song to a listener, it is performing that work

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.")

[78] *Id.* § 101 (providing definitions of "perform" and "publicly").

[79] *Id.* § 106(4).

[80] *Id.* § 106(6).

[81] *See id*. § 114(d)(1). Note that "exemption" may not be the best word here because Congress granted the performance right in sound recording for the first time and only for digital performances. Traditional radio is exempted in the sense that the right, fairly or not, only applies to internet radio. In any event, "exemption" is the way most commentators and legislators have continued to describe broadcast radio's status with respect to the performance right in sound recordings.

publicly.[82] It is worth noting that Representative Conyers recently introduced a bill in to Congress that would remove this exemption by applying the right to terrestrial broadcasters, albeit with some limitations.[83]

[25] Three years after granting the DTPR, and at the insistence of the RIAA, Congress clarified that webcasters are subject to the digital performance right when it enacted the Digital Millennium Copyright Act (DMCA).[84] As it stands today, the DMCA provides holders of sound

[82] *Id*. (providing the definition of "transmit"). Note that this conclusion need not follow from the language of the statute. Under § 106, webcasters are clearly either performing or distributing the music when they transmit songs over the internet. All the players involved seem to have concluded that webcasters are performing music rather than distributing it. This is evidence from the fact that the entities collecting royalties from internet radio are licensed to collect for public performances (for example, collective rights societies as opposed to the Harry Fox Agency). Indeed, SoundExchange was designated by the Copyright Office "to collect and distribute digital performance royalties" for digital audio transmissions of sound recordings, while ASCAP and BMI collect royalties for the performances of musical works. *See* SoundExchange Background, http://www.soundexchange.com (last visited Sept. 15, 2009); SoundExchange: Future of Music Coalition, http://www.futureofmusic.org/article/soundexchange (explaining that BMI and ASCAP collect royalties for webcasters' performances of musical works) (last visited Sept. 15, 2009). *But see* Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121, 136 (2d Cir. 2008) (holding that when a customer requests a movie to be played on his television from a remote storage location, that is not a public performance).

[83] H.R. 848, 111th Cong. (1st Sess. 2009); *see also* Matthew DelNero, *Long Overdue?* 6 VAND. J. ENT. L. & PRAC. 181, 196 (2004) (predicting that imposition of this right would not cause a great financial burden on radios); Press Release, Nat'l Ass'n of Broadcasters, NAB Statement on Today's Comments From Chairman Boucher (Mar. 31, 2009), *available at* http://www.nab.org/AM/Template.cfm?Section=News_Room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14240 (responding to Congressman Boucher's suggestion that broadcasters should accept that there will be a performance royalty for sound recordings and should therefore negotiate for the rate; pointing out the promotional benefits of airtime and Congressional support it has for a resolution against a performance royalty).

[84] S*ee* Carey, *supra* note 42, at 270-71. *See generally* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

recording copyrights an exclusive right to perform the work "by means of a digital audio transmission."[85] The DMCA further qualified the DTPR through categories that reflect the manner in which songs may be transmitted online.[86] Consequently, an interactive service that plays songs on-demand must negotiate with the sound recording copyright owner of the performance right.[87] The non-interactive family is divided into different subcategories.[88] Internet radio generally falls within the subcategory that is eligible for a compulsory license, which it may obtain through a procedure similar to the one implicated in receiving a compulsory license for the reproduction of a musical work.[89] The two licenses, however, are distinct, with payments often going to unrelated organizations.

C. WHO GETS THE MONEY AND HOW MUCH?

1. FOR THE REPRODUCTION RIGHT IN SOUND RECORDINGS—ARTIST'S AND LABEL'S TAKE

[26] Most performing artists contract with record labels to produce their music.[90] The agreement between the label and the artist typically assigns copyright ownership of the sound recording to the record company in

[85] 17 U.S.C. § 106(6).

[86] *See id*. §§ 114(j)(3), (5), (7), (9), (12) (noting a respective form of transmission category).

[87] *See id*. §§ 114(j)(1)-(2); *id.* § 114(d)(3)(D).

[88] *See id.* §114(j)(6), (7), (8), (11) (describing noninteractive categories as "eligible nonsubscription transmission," "new subscription service" and "preexisting subscription service").

[89] *See* M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THE BUSINESS OF MUSIC 72 (10th ed., 2007) (noting that even Pandora, an extremely interactive webcaster, has been considered non-interactive for the purpose of the statute).

[90] PASSMAN, *supra* note 63, at 61.

return for the various services it provides.[91] Most major record labels have many divisions within them that are responsible for, among other things, marketing the new record.[92] Thus, the label will promise the artist a specific cut of the royalty payments it receives, paying the artist an amount that is computed based on the price and number of records sold.[93] But when all the costs are taken out, the reproduction right of the sound recording often yields significantly less than ten percent of the wholesale record price for the artist.[94]

[27] Record labels also charge performers for the cost of recording an album, which can range from $100,000 to $500,000.[95] A cost that is not included in the promotional expenses noted above.[96] And it is common practice for artists to pay record producers—individuals responsible for facilitating the recording process—out of their share.[97] Producers receive around three to four percent of the wholesale price.[98] In addition, while the price of producing CDs is originally borne by the labels, they deduct these costs from the artist as well.[99] This is usually done by subtracting production expenses (around twenty percent of the suggested retail of the CD) from the price that the labels use to compute the artist's royalty

[91] *See id*. at 61-63.

[92] *Id*.

[93] *See id*. at 68-69.

[94] *Id*.

[95] Diane Rapaport, *How Record Companies Make Money*, http://www.music-business-producer.com/record-companies-money.html (last visited Sept. 20, 2009).

[96] *Id*.

[97] PASSMAN, *supra* note 63, at 88, 114.

[98] *Id*. at 88.

[99] Rapaport, *supra* note 95.

payments.[100] Therefore, assuming the suggested retail price of a CD is fifteen dollars, the record label will subtract the three dollars or so in production costs before calculating the artist's cut.[101]

[28] Artists are often rewarded when their records are popular, allowing for an increase in the artist's take after a certain number of records are sold. [102] Depending on name recognition and previous success, artists may receive between thirteen and twenty percent of the wholesale price of the record.[103] A typical "escalation," however, is less than one percent of the rate after about 500,000 to a million albums are sold.[104]

[29] In the end, the artist sees nowhere near the twenty percent royalty cut he may expect. So the fifteen-dollar CD of a successful performer, who had managed to negotiate the generous twenty percent rate, may hope to receive only $2.28 after paying all the production costs and the producer. And after paying back any advance the artist may have had to borrow from the label to pay for recording costs and paying for the promotional expenses, the artist will find an even smaller reward.[105]

[100] *See id*. ("[s]ome record companies pay royalties on a percentage (8% to 16%) of the suggested list retail price (SLRP) less a packaging cost, generally 15% to 25% of the SLRP").

[101] *Id*.

[102] *See* PASSMAN, *supra* note 63, at 86–87.

[103] *See* PASSMAN, *supra* note 63, at 86–87.

[104] *Id*. at 87.

[105] *Cf. id*. at 78-79 (describing the basic situation of advance and recoupment by the record company).

2. FOR THE REPRODUCTION RIGHT IN MUSICAL WORKS—SONGWRITERS' TAKE

[30] Songwriters either assign the entirety of their copyrights to publishers or allow the publisher to administer the compositions.[106] In the latter case, the songwriter splits royalty payments with the publisher down the middle.[107] Publishers serve many useful functions; for example, they match writers with singers, help them with their writing, and promote records.[108] But publishers are no longer the power holders they once were.[109] This is partly because many major songwriters today have in-house publishing, and a growing number of artists are writing their own songs.[110]

[31] Publishers in turn have "agents," like the Harry Fox Agency, that issue mechanical licenses on their behalf.[111] For a charge of about 6.75 percent of the money collected, the Harry Fox Agency accounts to the publisher for the royalties that are being collected.[112] This accounting includes the auditing of record companies in order to accurately allocate royalty payments among the publishers.[113] While in practice labels do not use the statutory license, the mechanical license that the Harry Fox Agency issues on behalf of the publishers is usually tied to some percentage of the statutory rate.[114] As a result, songwriters not only have

[106] *See* PASSMAN, *supra* note 63, at 206-07.

[107] *Id*. at 207-08.

[108] *Id*. at 209.

[109] *See id*.

[110] *Id*.

[111] *Id*. at 213.

[112] *Id*.

[113] *Id*.

to pay their publishers and the Harry Fox Agency, but also have to settle for receiving less than the statutory rate promised.[115]

[32] As previously discussed, anyone who wishes to use a musical work that has already been captured by a song may do so with a compulsory mechanical license.[116] Intense lobbying by the record companies has kept the statutory rate for the license decidedly low.[117] From 1909 to 1976, the rate was two cents per record.[118] In practice, the compulsory license is rarely used.[119] Nevertheless, the statutory rate is important in setting the ceiling in any negotiation for mechanical royalty payments.[120]

[33] The 1976 Copyright Act raised the compulsory license rate to 2.75 cents per record and allowed for further adjustments by the Copyright Royalty Board (CRB).[121] The CRB consists of three judges, holds hearings to determine the statutory rate, using the "willing buyer/willing seller" standard.[122] More recently, in 2008, the CRB ruled that a rate of

[114] *Id*. at 212 (describing that the rate is usually fixed, meaning that even if the statutory rate goes up, the rate that the Harry Fox Agency receives stays the same. This fixed rate can equal the full statutory rate, or at seventy-five percent of it, as record labels generally ask).

[115] *See id.*

[116] *Id*.

[117] *See id.* at 203.

[118] *Id*.

[119] *See, e.g.*, *Music Licensing Reform: Hearing Before the Subcomm. on Intel.l Prop. of the Senate Comm. on the Judiciary*, 109th Cong. (1st Sess. 2005) (testimony of Marybeth Peters, Register of Copyrights) *available at* http://www.copyright.gov/docs/regstat062105.html (noting that Section 115 has been used simply as a ceiling for the royalty rate in privately negotiated licenses).

[120] *See* PASSMAN, *supra* note 63, at 203-04.

[121] *Id.*

[122] Carey, *supra* note 42, at 284-85.

9.1 cents per song would be effective for the following five years, regardless of whether customers buy the song as a digital track online or as a CD in a record store.[123] Today, record labels typically try to limit their payment to about seventy-five percent of the statutory rate, which is just under seven cents per song sold.[124] Therefore, with compulsory license fees essentially operating as a maximum rate, and with publishers taking a substantial portion of any royalties, songwriters generally receive less than five cents for every track sold.[125]

3. FOR THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS—ARTIST'S AND LABEL'S TAKE.

[34] Royalty payments are collected and distributed by SoundExchange, the designated non-profit organization for digitally played recordings that collects license fees and distributes them to the performer and sound recording copyright owner.[126] SoundExchange also makes payments directly to the record label and the artists,[127] dividing payments using a consistent formula where the record company gets fifty percent, the featured artist receives forty-five percent, and the remainder going to unions representing the non-featured musicians and non-featured vocalists.[128] This means that performers not only receive money they

[123] Posting to Future Music Blog, http://futuremusic.com/blog/?p=3428 (Oct. 2, 2008, 16:44 EST).

[124] *See, e.g.*, *id.* at 216 (describing that seventy-five percent is the standard that new artists usually have to settle for; those with bargaining power may get a bit more); Diane Rapaport, *supra* note 95.

[125] *See* PASSMAN, *supra* note 63 at 68-69, 200-01.

[126] This is assuming that the artist and record company are in the SoundExchange database. Digital performance royalties are distributed as long as SoundExchange has the payee information regardless of membership with SoundExchange. *See* SoundExchange, *supra* note 67.

[127] *See id.*

[128] *Id.* 2.5% to the American Federation of Musicians (AFM) and 2.5% to the American Federation of Television and Radio Artists (AFTRA).

would not earn if their song is played over conventional radio (because terrestrial broadcasters have been exempt from paying a public performance right for sound recordings), but their cut from a digital transmission (forty-five percent) is even larger than from a CD purchase (less than ten percent).[129] Additionally, artists who have retained the copyright in their sound recording get even more money.[130]

[35] Since royalty payments for digital performances are made directly to the performer, the newest right created by copyright law earns artists the biggest cut (fifty percent) but not necessarily the most money.[131] Indeed, they receive only a small fraction of a cent for every performance.[132] The CRB also sets these rates, which have been subject to much controversy. But if Internet radio is able to pay the recently announced rates, while continuing to grow in popularity, fractions of pennies may quickly add up to dollars for the artists and their labels.

[36] The CRB has concluded that these rates should replicate the "terms that would have been negotiated in a hypothetical marketplace,"[133] where the webcaster is the buyer and record company is the seller. The payments for these "complete repertoire of sound recordings," however, are supposed to reflect the "fair market value" of a world without compulsory licenses.[134]

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[129] *Id.*

[130] *Id.*

[131] *See* Posting of Rashmi Rangnath to Public Knowledge, http://www.publicknowledge.org/node/1982 (Feb. 7, 2009, 19:22 EST).

[132] *See* Future of Music Coalition, *Public Performance Right Hearing on the Hill*, Mar. 11, 2009, http://futureofmusic.org/blog/2009/03/11/public-performance-right-hearing-hill.

[133] *Id.* at 286.

[134] *Id.* at 287.

[37] The CRB's first decision, issued in March 2007, set out rates that even Congress admitted threatened the "survival of webcasting . . . in the United States."[135] Since then, several groups, including the "Small Commercial Webcasters" and SoundExchange, have filed appeals in the D.C. Circuit stemming from the CRB's 2007 decision.[136] These cases challenged the constitutionality of the CRB and the validity of the rates it set.[137]

[38] Congress subsequently passed the Webcaster Settlement Act of 2008, which allowed SoundExchange and webcasters to negotiate royalty rates to replace those set by the CRB in 2007.[138] On March 3, 2009, the Federal Register published the rates agreed to in the settlement.[139] Independent broadcasters, like Pandora, were parties to the negotiation, but they must file notice with the Register if they would like to rely on the settlement rates.[140] If an independent broadcaster does not file notice, then

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[135] *Id.* at 306-07.

[136] *See, e.g.*, Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 574 F.3d 748, 752 (D.C. Cir. 2009); Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/archives/internet-radio-two-court-of-appeals-arguments-on-sound-recording-music-royalty-rates-and-the-real-question-is-whether-the-copyright-royalty-board-is-constitutional.html (Mar. 24, 2009, 00:00 EST) [hereinafter *Appeals*]. The small webcasters are challenging the board's rates as too high, while SoundExchange contends they were set too low. The former are arguing that the board should have adopted a percentage of revenue standard because anything else would guarantee the webcasters would be going out of business. Large webcasters challenge the flawed reasoning. In both cases the "overriding question [is] whether the Judges on the CRB were constitutionally appointed and thus whether any decisions of the Board had any validity." *Id*.

[137] *See Appeals*.

[138] Webcaster Settlement Act of 2008, 17 U.S.C.A. § 114(e)(1) (2009).

[139] Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293, 9296 (Mar. 3, 2009).

[140] *See* Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/archives/internet-radio-details-of-the-broadcaster-soundexchange-settlement-on-webcasting-royalties.html (Mar. 7, 2009, 01:55 EST); John Timmer,

it must pay the rates established by the CRB in 2007.[141] In addition, webcasters must retain the services of one of the companies that attempt to track performances.[142] But small broadcasters may be exempt from this record-keeping requirement.[143]

[39] The settlement sets out royalty payments on a per song, per listener basis.[144] For example, if Pandora plays Cascada's "Truly Madly Deeply" five times and the song is transmitted to a thousand listeners, there are five thousand performances.[145] The new rates, however, represent modest savings from the 2007 CRB determination. Although in 2008 webcasters had to pay fourteen cents, unchanged from the 2007 decision, the settlement establishes annual rate increases from 2009 to 2015. But the increases during this period will be gradual when compared with the

Pandora Lives! SoundExchange Cuts Deal on Webcasting Rates, ARS TECHNICA, July 7, 2009, http://arstechnica.com/media/news/2009/07/soundexchange-cuts-deal-on-music-webcasting-rates.ars.

[141] *See Appeals*.

[142] *Id*.

[143] *Id.*; *see also* Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/archives/internet-radio-soundexchange-settlement-with-microcasters-a-royalty-option-for-the-very-small-webcaster.html (Mar. 28, 2009, 04:53 EST) (stating that a few of the very small webcasters ($1.25 million in revenue and 5 million monthly aggregate tuning hours) also agreed with SoundExchange to a number of conditions, the most important of which is the right to pay royalties based on a percentage of their revenue. The bottom line is that this may not be a fair deal. But "for small webcasters, this may be the only way that some may be able to stay in business. Small webcasters will need to surrender some rights to fight the royalties, and will have to live with the other provisions of the deal, and weigh those downsides against the opportunity to continue streaming in deciding whether to sign on to this deal by April 30.").

[144] *See Appeals*.

[145] *Id*.

increases under the 2007 determination.[146] The settlement also preserves a floor and establishes a ceiling for the rates for each channel: a minimum annual fee of $500 (the same as under the 2007 decision) and a maximum fee of $50,000.[147]

[40] In the end, it is unclear whether the settlement will provide webcasters with the breathing room they need to grow their industry.[148] Consequently, despite the large number of Internet radio listeners, artists may not see much in terms of royalty payments from their new right.

4. FOR THE PERFORMANCE RIGHT IN MUSICAL WORKS—SONGWRITERS' TAKE.

[41] Unlike with reproduction rights, there is no compulsory license for the performance of music works. As a practical matter, this makes little difference. While it is difficult to predict how much a songwriter will receive for each performance because the organizations granting musical works performance licenses do not do so on an individual basis and vary royalty rates on factors independent of the artist, the total money collected for these royalties is substantial.

[42] Collective rights societies, like the two giants, American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), serve most of the songwriters, paying them directly and bypassing the publishers.[149] For a fee, these collective rights organizations grant

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[146] *Compare Appeals* (showing minimal increases in 2008 to 2011 followed by a larger increase), *with* Carey, *supra* note 42, at 290-91 (showing greater increases in 2007 to 2009 followed by a smaller increase).

[147] *See Appeals*; 37 C.F.R. § 380 (2008). An Internet radio channel is usually a category of music genre or type of artist that the listener chooses. *See* Steve Gordon, *Clearing Music Recordings and Compositions for Use in Digital Music Services*, 12 Ent. L. & Fin. 3 (2002) (describing the variety of music available on Internet radio.).

[148] *See Appeals*.

[149] *See* PASSMAN, *supra* note 63, at 225; *see also* About BMI, http://www.bmi.com/about/entry/538061 (last visited Sept. 15, 2009).

blanket licenses to webcasters for a specific period of time for all the musical works' performance rights they own.[150] In 2008, ASCAP and BMI distributed more than $1.3 billion in royalties for approximately 600,000 members,[151] which makes for an average payment of $2,500 per songwriter.

[43] While webcasters that choose the broadest license need to provide only a minimal amount of tracking, other webcasting licensees must submit detailed music use data.[152] ASCAP, for example, represents over 300,000 songwriters and publishers, and has different licensing rates depending on the level of activity on a given website and the amount of income it generates.[153] The following illustrates the general steps used by ASCAP to determine the royalty payment for songwriter.

[44] First, based on where the work has been played, ASCAP calculates the number of credits the songwriter earned for each performance.[154] It then determines the dollar value of each credit at the end of the year, by tallying the total money available for distribution, and the number of credits being processed.[155] After deducting operating costs, which for ASCAP is currently 11.3 percent,[156] ASCAP divides the royalties they

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[150] *See* PASSMAN, *supra* note 63, at 225.

[151] Ben Newhouse, *BMI Retools Network Television Distribution System*, ROYALTY WEEK, Nov. 14, 2007, http://www.royaltyweek.com/?p=49; *see* ASCAP ANNUAL REPORT (2007), http://www.ascap.com/about/annualReport/annual_2007.pdf; Money Matters, http://www.bmi.com/about/entry/533106 (last visited Sept. 15, 2009).

[152] *See* Customer License: License Fee Calculations, http://www.ascap.com/weblicense/feeCalc.aspx (last visited Sept. 15, 2009).

[153] *See id.*

[154] *See* About ASCAP: Turning Performances Into Dollars, http://www.ascap.com/about/payment/dollars.html (last visited Sept. 15, 2009).

[155] *See id.*; About ASCAP: Royalty Calculation, http://www.ascap.com/about/payment/royalties.html (last visited Sept. 15, 2009).

[156] Customer Licensees: About ASCAP Licensing, http://www.ascap.com/licensing/about.html (last visited Sept. 15, 2009)

have received among the copyright owners based on estimates of how much of the songwriters' work has been used.[157]

[45] Therefore, because there are a number of factors that determine the royalty payment, it is difficult to estimate how much money a songwriter actually receives every time his musical work is performed.[158]

D. APPLICATION OF THE RIGHTS ON THE INTERNET

1. STREAMING TRANSMISSIONS

[46] Anytime Pandora plays a song, it involves the same ritual. First, the user requests a file (in a non-interactive service this is sometimes accomplished by selecting the genre of music one prefers).[159] Second, as Pandora transmits the song, it temporarily stores "buffer" copies, or portions of the file, on the user's computer to facilitate uninterrupted playback.[160] As soon as Pandora plays any given segment of the song, it deletes the buffer copy responsible for that segment.[161] After the transmission is complete, no buffer copies remain on the user's computer.[162]

[47] As previously mentioned, the transmission of any song in this manner clearly implicates the performance right of both layers of the song:

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[157] *Id.*

[158] *See* About ASCAP: How to Get Paid At ASCAP, http://www.ascap.com/about/payment/paymentintro.html (last visited Sept. 15, 2009); About ASCAP: Royalty Calculation, http://www.ascap.com/about/payment/royalties.html (last visited Sept. 15, 2009).

[159] *See* Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 250–51 (2001).

[160] *Id.* at 251.

[161] *Id.*

[162] *Id.*

that of the musical work and of the sound recording.[163] As a result, sites like Pandora not only need to pay SoundExchange, but also obtain a blanket license from one of the collective rights societies.[164]

[48] Because webcasters store temporary copies of songs on the listeners' computer, streaming transmissions arguably constitute reproductions of the work as well.[165] A district court in New York, however, recently disagreed with such a broad interpretation of the reproduction right.[166] The implication of a reproduction right would involve a new set of players, thereby increasing both transactional and actual costs for transmission sites.[167]

2. DOWNLOAD TRANSMISSIONS

[49] Unlike a streaming transmission, a download transmission that follows an iTunes purchase ends with the user retaining the file on her hard drive.[168] The user can enjoy the song at her convenience without having to connect to the Internet.[169] Since the transmitting site reproduces the file on the user's hard-drive, downloads clearly implicate the reproduction right.[170] Therefore, the transmitter would need to obtain the

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[163] *See* PASSMAN, *supra* note 63, at 224-25.

[164] *Id.* at 225.

[165] Reese, *supra* note 159, at 251-57.

[166] United States v. ASCAP, 485 F. Supp. 2d 438, 444-47 (S.D.N.Y 2007) (holding that the downloading of a music file constitutes a reproduction of a musical work, but not a public performance of it). The district court also noted that "a transmission might, under certain circumstances, constitute both a stream *and* a download . . ."). *Id.* at 446 n.5.

[167] *See* Reese, *supra* note 159, at 257-59.

[168] *See generally* Apple iTunes, http://www.apple.com/itunes/affiliates/download/?itmsUrl=itms%3A%2F%2Fax.itunes.apple.com%2FWebObjects%2FMZStore.woa%2Fwa%2FstoreFront%3Fign-mscache%3D1 (last visited Sept. 15, 2009).

[169] *See id.*; Reese, *supra* note 159, at 257-59.

[170] Reese, *supra* note 159, at 257–59.

compulsory mechanical license, or a license from the Harry Fox Agency for the musical work, as well as permission from the owner of the copyright in the sound recording.[171]

[50] While the public performance right is implicated if the transmitter plays the song as the user downloads it, most digital vendors like iTunes do not allow simultaneous streaming.[172] ASCAP and BMI have argued that even those sites are publicly performing the song within the meaning of the statute, but this view has not prevailed.[162]

III. NEW FRONTIERS BRING NEW BATTLES

[51] The RIAA has been scrambling to find new sources of revenue and to squeeze out as much as it can from the existing streams.[174] To accomplish the former, it is prepared to materialize on the vision that some of the recording industry executives have had since the downfall of Napster: monetizing peer-to-peer music transactions.[175] As for the latter goal, the RIAA has pushed for onerous royalty rates to be imposed

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[171] *See id.*

[172] *See generally* Apple iTunes, http://www.apple.com/itunes (last visited Sept. 15, 2009).

[173] *See* ASCAP, 485 F. Supp. 2d at 444, 446–47 (recognizing that this is an "unsettled point of law that is subject to debate," but classifying ASCAP's construction as "sweeping" and not comporting with the language and purpose of 17 U.S.C. § 106(4) (2006): "the mere fact that a customer's online purchase is conveyed to him in a piecemeal manner, each segment of which is capable of playback as soon as the transmission is completed, does not change the fact that the transaction is a data transmission rather than a musical broadcast. Surely ASCAP would not contend that if a retail purchaser of musical records begins audibly playing each tape or disc as soon as he receives it the *vendor* is engaging in a public performance.").

[174] *See*, *e.g.*, Posting of Brandon Lovested to UsefulArts.us, http://usefularts.us/2008/05/19/los-angeles-countys-new-revenue-source-copyright-infringement (May 19, 2008); Greg Sandoval, *Sources: AT&T, Comcast May Help RIAA Foil Piracy*, Jan. 28, 2009, http://news.cnet.com/8301-1023_3-10151389-93.html.

[175] *See* Erika Morphy, *RIAA Beats Minnesota Mom to the Tune of $1.92 Million*, June 19, 2009, http://www.ecommercetimes.com/story/67384.html?wlc=1252972915.

primarily on Internet radio.[176] In evaluating this dual-headed strategy, it is useful—indeed imperative—to remember that the goal of copyright law is to enrich the public domain by incentivizing the creator.[177] By this standard, both of the RIAA's initiatives should be discouraged.

A. RIAA VS. ITUNES

[52] After facing consecutive years of declining revenue, the recording industry is poised to roll out its new strategy of monetizing the digital transmissions of music: a blanket license to perform and reproduce sound recordings to be collected and sold by an organization called "Choruss."[178] While the initial experiment will involve selected universities, the hope is that the majority of Internet users will subscribe in one form or another. As one can imagine, Choruss has already faced criticism; unthinkable epithets like "music tax" and "covenant not to sue" have been flying around on blogs to describe the concept.[179] But the real problems are how Choruss will actually function and its effects on the emerging digital markets.

1. A NEW BUSINESS MODEL FOR THE RIAA

[53] Born out of necessity, Choruss represents the recording industry's attempt to adapt its business model to the realities of the 21st century. In charging individuals a one-time fee for the right to share files, Choruss is a way for the RIAA to have its cake and eat it too. If successful, Choruss

[176] *See* Posting of Steven Marks to RIAA Music Notes Blog, http://www.riaa.com/blog.php?content_selector=Its-Licensing-Stupid (July 8, 2009).

[177] 17 U.S.C. § 102 (2006).

[178] *See* Fred von Lohmann, *Move on Choruss, Pro and Con*, Electronic Frontier Foundation, Mar. 20, 2009, http://www.eff.org/deeplinks/2009/03/more-choruss-pro-and-con.

[179] *See* Posting of Michael Masnick to Techdirt, http://www.techdirt.com/ (Mar. 18, 2009, 10:17 EST).

would inoculate peer-to-peer exchanges by mandating regular data inspection and then charge a university or ISP a flat royalty fee.[180]

[54] The RIAA struggles are well documented. Even the chairperson of Columbia Records, Rick Rubin, admits that the recording industry is a "dinosaur."[181] As he explains, "[u]ntil a new model is agreed upon and rolling, [Columbia Records] can be the best at the existing paradigm, but until the paradigm shifts, it's going to be a declining business."[182] But opinions vary because different things are at stake in these precarious times for the labels. For some, it is a promise of liberation—liberation of the artist from unfair contracts and the consumer from unfair prices. This view is not shared by the RIAA. Indeed, in the eyes of one music executive, David Geffen (founder of Geffen records), preserving a role for the record labels means nothing less than saving the music business:

> IPods made it easy for people to share music, and Apple took a big percentage of the business that once belonged to the record companies. *The subscription model is the only way to save the music business*. If music is easily available at a price of five or six dollars a month, then nobody will steal it.[183]

In Geffen's view, the RIAA is the last standing guard against music thieves.[184] Should it fall, he reasons, music business will no longer be viable.[185]

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[180] *See* Eliot Van Buskirk, *Three Major Record Labels Join the "Choruss"*, EPICENTER, Dec. 8, 2008, http://www.wired.com/epicenter/2008/12/warner-music-gr.

[181] Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, § 6 (Magazine), at 26, *available at* http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?pagewanted-5&_r1.

[182] *Id.*

[183] *Id.* (emphasis added).

[184] *See id.*

[185] *Id.*

[55] Pinning down the source of RIAA's problems is not as easy as it may appear. At least one challenge that has faced the industry since the day Napster was released is similar to the one that the print media must confront today: battling social norms.[186] Indeed, a segment of the population today apparently believes that paying for music is voluntary.[187] Rather than offer free content online the way many newspapers have, the recording industry has until now pursued a "fear strategy," going after individual file sharers.[188] But thousands of lawsuits later,[189] the RIAA may have realized that suing its customers was a strategy doomed to fail from the start.[190]

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[186] Walter Isaacson, *How to Save Your Newspaper*, TIME (Feb. 5, 2009), *available at* http://www.time.com/time/business/article/0,8599,1877191,00.html (arguing that traditional journalism is more popular than ever, but fewer people are paying for it because people do not expect to pay for content available online).

[187] *See* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 655 (2006).

[188] *Id.*

[189] *See* Posting of RIAA Watcher to RIAA Watch, http:// sharenomore.blogspot.com (June 16, 2006 14:57 EST) (noting that the RIAA had sued almost 18,000 people as of 2006).

[190] *See* Sam Gustin, Fee For All, Mar. 27, 2008, http://www.portfolio.com/news-markets/top-5/2008/03/27/Warners-New-Web-Guru/index.html (describing how Jim Griffin, the record industry guru responsible for spearheading a plan that would sustain a profitable business model, admits that the RIAA should not be suing students or "people in their homes"); Schultz, *supra* note 187, at 662–65 (showing that suits may have the important effect of putting people on notice that infringement is illegal, but it quickly reaches the point of diminishing returns as exhibited by the passing of the NET ACT, which criminalized some infringement conduct but failed to deter it); *see also* Fred von Lohmann, Is Suing Your Customers a Good Idea?, Sept. 29, 2004, http://www.law.com/jsp/article.jsp?id=1095434496352 (arguing that while RIAA had netted a high "batting-average" in prevailing in these suits, they are having little impact). *But see* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 729-35 (2005) (arguing that while these lawsuits have had a limited downside because consumers identify with the artist rather than the RIAA that is suing them, their upside is palpable:

[56] To be sure, the consumer's state of mind is not the end of RIAA's troubles; the cost of recording, producing, and distributing records has also declined, as has the need for brick and mortar record stores.[191] If that was not bad enough already for the RIAA, the advent of digital transactions has made it even worse; the growth of peer-to-peer file sharing has led to an increase in copyright infringement, while artists have gained a way to connect with their fans more cheaply, without a label.[192] In fact, given the reduced access costs, record companies may no longer be needed to fill their traditional "role of absorbing both the risks [that a new record or artist will fizzle] and the costs in the recording business."[193] Some big names like Madonna have already split with their labels.[194]

[57] One seemingly logical path the recording industry could have taken is throwing full support behind legal alternatives to music file

consumers have become more aware that songs are protected by copyright, and evidence that file sharing has grown is misleading).

[191] *See* Schultz, *supra* note 187, at 689.

[192] *See id.*

[193] Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 690 (2009).

[194] *See* Duncan Riley, And the Walls Came Tumbling Down: Madonna Dumps Record Industry, TechCrunch, http://www.techcrunch.com/2007/10/10/and-the-walls-came-tumbling-down-madonna-dumps-record-industry (stating that Nine Inch Nails, Oasis, Madonna, and Jamiroquai have moved away from record industry, some even offering future albums directly to the public: "the deal shows that even for a world famous act, a record company is no longer required in the days of digital downloads . . ."); *see also* Mark F. Schultz, *supra* note 193, at 692 (stating that 2007 was a milestone year where the Spice Girls, Paul McCartney and Joni Mitchell signed recording deals not involving record labels). *See generally* David Carr, *Media Business Tips from U2*, N.Y. TIMES (Nov. 28, 2005), at C1, available at http://www.nytimes.com/2005/11/28/business/28carr.html ("[w]hile [others] were scolding and threatening fans for downloading music . . . U2 was bust working on a new business model . . . a special edition iPod . . . was a smash hit and gave visibility to the band at a time when most radio station playlists don't extend much beyond a narrow selection . . .").

sharing like iTunes.[195] Mark Schultz makes this argument by drawing on research in the field of psychology that demonstrates that music fans want to obey the law, but also need to feel that others are doing the same.[196] In practice, this notion of reciprocity is aided by tighter bonds that labels would be wise to develop.[197]

[58] However, this does not seem to be where the industry is heading.[198] Perhaps kicking itself for not signing an agreement with Napster back in 2000, the RIAA is poised to embrace a subscription-like fee model. As Rick Rubin envisions it:

> You'd pay, say, $19.95 a month, and the music will come anywhere you'd like. In this new world, there will be a virtual library that will be accessible from your car, from your cellphone, from your computer, from your television. Anywhere. The iPod will be obsolete, but there would be a Walkman-like device you could plug into speakers at home. You'll say, 'Today I want to listen to . . . Simon and Garfunkel,' and there they are. The service can have demos, bootlegs, concerts, whatever context the artist wants

[195] *See* Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 25, 2003, at 31, 32-33, available at http://www.rollingstone.com/news/story/5939600/steve-jobs_the_rolling_stone_ interview. Steve Jobs, founder of Apple, explained: "Our position from the beginning was that eighty percent of the people stealing music online don't really want to be thieves. . . . It is corrosive to one's character to steal. We want to provide a legal alternative." *Id.*

[196] Schultz, *supra* note 187, at 665-68.

[197] *Id.* at 668-69, 719-21 (stating that jambands, such as fans of the Grateful Dead who followed the band from show to show, even taking interest in the band members' personal lives, provide an interesting case study of how to engender in this bond).

[198] *See* Hirschberg, *supra* note 181 (noting that the co-head of Columbia Records, Rick Rubin, suggested that the direct digital sale model embraced by iTunes will soon be obsolete).

> to put out. And once that model is put into place, the industry will grow 10 times the size it is now.[199]

As Rubin's quote illustrates, the industry has come to grips with the fact that it cannot control file sharing. However, that does not mean it cannot profit from the exchange.

[59] The novel role that Rubin advocates for the RIAA is that of a one-way stream flowing into a river full of file-sharers. The stream would carry only the music files that the industry deems appropriate for sharing. The users can still have fun tossing those files back-and-forth. Of course, before they can get their feet wet, people would have to pay the RIAA an admissions fee. The fee would be worth it, Rubin promises, because without having to purchase each individual song, users could have their own constant stream of music. And having paid for their ticket, people would no longer be deemed infringers . . . at least by the RIAA. This is the picture painted by the RIAA's next great hope – Choruss.[200]

[60] In 2008, Warner Music Group hired Jim Griffin—a noted industry critic and proponent of a licensing fee model.[201] Griffin's contract gives him three years to find a way to pool money from users' fees that could then be distributed to copyright holders.[202] His plan to "monetize the anarchy of the [I]nternet"[203] has materialized into Choruss—an

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[199] *Id.*

[200] *See generally* Brennon Slattery, *The Day the Music Service Ruckus Died*, PC WORLD, Feb. 10, 2009, http://www.pcworld.com/article/159258/the_day_the_music_service_ruckus_died.html; William Colsher, *Ruckus Gains Users*, THE DAILY COLLEGIAN ONLINE, Sept. 20, 2007, http://www.collegian.psu.edu/archive/2007/09/20/ruckus_gains_users_2.aspx (giving background on Ruckus, a recently shutdown free music download service that loaded songs with digital rights management (DRM) and was supported by advertisements, which should be distinguished from Choruss).

[201] Gustin, *supra* note 190.

[202] *Id.*

[203] *Id.*

independent entity currently backed by three major labels that will grant blanket licenses to universities and ISPs, allowing users to stream and to download music.[204] The experiment will start in the fall of 2009 on selected campuses, with the hope of moving on to ISPs a year later.[205]

2. THE CASE FOR CHORUSS

[61] Ever since the RIAA started mulling over a Choruss-like model, criticisms of the concept have been emerging.[206] From a pragmatic standpoint, some have indicated that there would be problems in implementing Choruss.[207] While there are reasons to believe that Choruss would be incompatible with the existing digital markets and with various statutes, Jim Griffin, the mastermind behind Choruss, recently held a public presentation with the intent of dispelling certain myths.[208] Although he was light on specifics, Griffin's presentation provides a useful insight into the RIAA's vision for its future.[209]

[62] Choruss embodies a license fee model that functions differently than the subscription fee model discussed by the label executives with the Napster CEO Hank Barry in 2000.[210] Some have already called the

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[204] Posting of Fred von Lohmann to Deeplinks Blog, http://www.eff.org/deeplinks/ (Mar. 20, 2009).

[205] Jim Griffin, PowerPoint Presentation: Choruss: A New Business Model for Digital Music (Mar. 3, 2009), *available at* https://admin.na3.acrobat.com/_a729300474/p72627963/ (last visited Sept. 15, 2009). Griffin explains that universities are essentially controlled laboratories where the students may be subject to all kinds of fees imposed on them. *Id.*

[206] *See generally* Masnick, *supra* note 179; Cheaper Than Therapy, http://benjaminlipman.wordpress.com/ (Dec. 10, 2008, 14:14 EST).

[207] *See* Masnick, *supra* note 179; Cheaper Than Therapy, *supra* note 206.

[208] Griffin, *supra* note 205.

[209] *See id.*

[210] *Id.* ("[Napster] offered audio fingerprinting for determining actual usage and was one subscription service – albeit a potentially huge one – but it was not an ISP.")

Choruss model a tax because non-users of music would theoretically still have to pay a fee.[211] Others see it as an extortion scheme – the RIAA forcing people to pay in return for not suing.[212]

[63] More nuanced criticism comes from two copyright attorneys, Christian Castle and Amy Mitchell.[213] As they explain, any proposal to legalize file sharing amounts to "a capitulation to the disintegration of private property rights online."[214] In other words, despite the illegal file sharing that persists today, Griffin's portrayal of anarchy is farfetched.[215] In reality, music property rights are successfully exchanged via digital markets like iTunes, Rhapsody, and Amazon.com.[216] Legalizing peer-to-peer file sharing would instantly undercut these markets.[217] And any licensing system would have to incur tremendous transactional costs, which would, in turn, detract from the payments artists deserve.[218]

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[211] *See, e.g.*, Gustin, *supra* note 190. David Barrett, an engineering manager for peer-to-peer networks, explained: "It's too late to charge people for what they're already getting for free . . . . This is just taxation of a basic, universal service that already exists, for the benefit [of] a distant power that actively harasses the people being taxed without offering them any meaningful representation." *Id.*

[212] *See, e.g.*, Reihan Salam, *The Music Industry's Extortion Scheme*, SLATE, Apr. 25, 2008, http://www.slate.com/id/2189888 ("Swap files to your heart's content – we promise, we won't sue you . . . .").

[213] Christian L. Castle & Amy E. Mitchell, *What's Wrong with ISP Music Licensing*?, ENT. & SPORTS LAW., Fall 2008, 4, at 4-7.

[214] *Id.* at 4.

[215] Griffin, *supra* note 205.

[216] *See, e.g.*, Seeking Alpha, Amazon, Rhapsody Gain in Digital Music Market; iTunes Still Top Dog, http://seekingalpha.com/article/99383-amazon-rhapsody-gain-in-digital-music-market-itunes-still-top-dog (last visited Sept. 15, 2009).

[217] *See* Castle & Mitchell, *supra* note 213, at 4-5.

[218] *Id.* at 7. Castle and Mitchell argue that some of the functions the system would need to accomplish are: "File recognition; UPC/ISRC/ISWC matching; W-9s for all royalty participants . . . ; Tax reporting; Royalty accounting; Letters of direction for producers,

[64] To fairly divide the pool of money, any license fee model presupposes the ability of the ISP to track what songs have been downloaded or streamed through its network.[219] But in the absence of a compulsory license, no Choruss-like arrangement would be able to secure the license of every copyright holder.[220] As a result, tracking usage would invariably show some infringement, potentially leading ISPs to lose their safe harbor protection under the DMCA.[221] ISPs are shielded from secondary liability under § 512(c)(1)(A), only if the ISP:

> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.[222]

remixers, or other royalty participants; Monthly accounting; Royalty audits; Sarbanes-Oxley compliance."

[219] *See id.* at 6-7.

[220] *Id.* at 7; *see* Griffin, *supra* note 205. Castle and Mitchell point out that ISP licensing proposals have not received support from the copyright community. Castle & Mitchell, *supra* note 213, at 4.

[221] Castle & Mitchell, *supra* note 213, at 7; *see* 17 U.S.C. § 512(c)(1)(A)(i)-(iii) (2006).

[222] 17 U.S.C. § 512(c)(1)(A)(i)-(iii). Note that the safe harbor only protects against monetary liability. *Id.* But copyright holders may be granted injunctive relief, which would require ISPs to find and block access to infringing material, or remove it before it is downloaded. *See id.*

While losing its safe harbor protection would not automatically make an ISP liable, it would certainly bring it to the doorstep of contributory infringement.[223]

[65] In response to the criticism stirring over the concept of a license-collecting model, and without giving much detail about Choruss itself, Griffin gave a presentation in early March 2009.[224] At the beginning of the talk Griffin stressed that new technology is not the answer to the

[223] Courts find contributory liability when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). The knowledge requirement for purposes of § 512(c), however, may be different from that of the contributory infringement inquiry. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001) ("We do not agree that Napster's potential liability for contributory and vicarious infringement renders the Digital Millennium Copyright Act inapplicable per se."). Some courts still treat the two concepts separately, thereby assuming that a contributory infringer could use one of the safe harbors under the DCMA. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 732 (9th Cir. 2007). What might help ISPs is a recent decision by the Ninth Circuit in which the court did not impose "investigative duties" on the provider. Perfect 10, Inc. v. CCBill, L.L.C., 481 F.3d 751, 763 (9th Cir. 2007) (holding that an online provider did not need to determine whether passwords were used for infringement purposes). Therefore, it is possible that ISPs would not be required to fish for rare infringing use even if they know such use exists. *See id.* at 763-64. The investigative duties involved in *Amazon.com* were much more burdensome because the direct infringement was considerably removed from the provider's contribution. *See Amazon.com*, 487 F.3d at 727-29. Here, the conduct would occur on the ISP's own network. In any event, considering some of the recent case law development in this area, a full discussion of an ISP's potential liability is beyond the scope of this paper. *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 933-34 (2005) (introducing the inducement theory of liability which holds that facilitators of direct infringement may be liable despite showing capability of substantial noninfringing use). The important point for the purpose of this discussion is that a Choruss scheme would put ISPs in serious danger of liability, making this type of arrangement less realistic. Castle & Mitchell, *supra* note 213, at 7.

[224] Griffin, *supra* note 205.

anarchy of the Internet.[225] The remainder of the presentation focused on dispelling myths.[226]

[66] First, Choruss would not be an attempt to legalize peer-to-peer file sharing, Griffin explained, because the focus is on the network; webcasting would be subject to the license, as well.[227] He also took issue with the tax label.[228] The government would not be moving in to impose any fees, and agreeing to the scheme would be up to individual ISPs.[229] Griffin observed, however, that university students share the burden for supporting gyms and libraries, and sustaining access to music does not have to be any different.[230] Also denying that Choruss essentially amounts to extortion or a "covenant not to sue" (the phrase Choruss proponents had actually used to describe the system), Griffin emphasized that Choruss's mission is to license rather than to sue.[231]

[67] Second, taking note of the more specific criticism, Griffin rejected the notion that Choruss would put iTunes out of business, as there is a market for both services.[232] Griffin explained that some individuals engage in illegal file sharing, while others choose to purchase tracks from iTunes.[233] According to Griffin, Choruss would monetize the practice of the former without affecting the latter.[234]

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[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[68] Finally, after confessing that he was not a lawyer, Griffin offered a distinction between monthly network inspections that ISPs would perform and the actual knowledge of specific infringement as it is occurring, which is required for contributory infringement (and for loss of safe harbor protection).[235] Pointing to the successes of ASCAP and BMI that are also responsible for aggregating copyright owners, Griffin maintained that the Choruss "experiment" holds promise.[236] But he admitted that both the system and the law may need some tinkering to make it work.[237] Indeed, Griffin commented that it "would not be a surprise" if the law changed in this area.[238]

3. CHORUSS'S CASE EVALUATED

[69] The problem with Choruss is not the idea of giving out a blanket license. Rather, it is how Griffin plans to carry it out. Putting the burden on ISPs and universities to monitor their networks not only raises both practical and legal concerns, but, by implementing an opaque accounting system and by undercutting the emerging digital markets, Choruss also threatens to detract from the goals of copyright law.

[70] The call for blanket licensing in the digital world is not a concept advocated by the struggling RIAA alone. Lawrence Lessig advocates "simple blanket licensing" to address online music piracy.[239] William Fisher boldly proposes the replacement of copyright of music by a general fee, coupled with digital watermarks on all media capable of digital use.[240]

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[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 271 (2008) (arguing that such licensing would result in small fees that would "decriminalize file-sharing").

[240] William Fisher, Digital Music: Problems and Possibilities, http://www.law.harvard.edu/faculty/tfisher/Music.html (last visited Sept. 15, 2009); *see also* WILLIAM W. FISHER

Jessica Litman argues that the law should encourage music file sharing, while instituting a statutory yet voluntary general license, in order to more easily distinguish between music that is "hoarded" and "shared."[241] And there are others still.[242] To be sure, all of these plans are different, but the concept of charging for the privilege of peer-to-peer file sharing is the same. Therefore, while the RIAA's proposal for a blanket licensing scheme may be self-serving, it is not necessarily without merit.

[71] Indeed, battles over labels—like whether blanket licensing is a tax or amounts to extortion—contribute little to the substantive debate. Yes, a fee would be imposed on users, so it may act like a tax even in the absence of government involvement.[243] And yes, file-sharers would no longer face the prospect of lawsuits, so the plan may seem like a covenant not to sue.[244] But it is not clear why semantics should play a role in determining the best way to incentivize performers and songwriters in order to maximize the public's access to music.

[72] The difficulties lie in the actual implementation of Choruss.[245] Griffin claims that details about Choruss have been thin because it is only an experiment, and he expects the system to change with input from

III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-258 (2004) (proposing a tax on peer-to-peer file-sharing activities while advocating free access to music that is used only in noncommercial contexts).

[241] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT L.J. 1, 41-42 (2004) (advocating the avoidance of intermediaries so that the right to collect would be held by the creators).

[242] *Id.* at 33-34 (describing briefly proposals by Netanel, Lunney, Ku, and Gervais).

[243] Griffin, *supra* note 205.

[244] *Id.*

[245] *See* Posting of Adam Thierer to The Technology Liberation Front, http://techliberation.com/ (Dec. 1, 2008) (criticizing Lessig's proposal for a blanket licensing system for the lack of details and appreciation of regulatory complexities).

universities.[246] But there are reasons to be skeptical of Choruss. To begin with, the only way for Choruss to truly succeed is if there is a fair way to track song usage on various networks.[247] To the extent that Griffin hopes to rely on current technology, he may be disappointed.[248] Moreover, if accurate monitoring technology *does* indeed develop, then more fundamental problems will surface.

[73] First, there would be privacy concerns.[249] Putting aside the political headwind that Big Brother monitoring would face, there would be legal implications to overcome.[250] Indeed, any honest inspection of users' network data would immediately be on tenuous legal ground.[251] Not only

[246] Griffin, *supra* note 205 (admitting that Choruss does not even have a website at this time).

[247] *See* Castle & Mitchel, *supra* note 213, at 6-7.

[248] E-mail from Christian Castle to author (Feb. 18, 2009, 09:36 EST) (on file with author) (explaining that cache monitoring on the network level, aside from presenting privacy concerns, would be "virtually unauditable from a royalty accounting perspective," and getting ASCAP or BMI distribution formulas would also be problematic as BMI and ASCAP are prohibited by their antitrust consent decrees from entering into side business that uses their data and that information is secret anyway).

[249] *See* Posting of Saul Hansell to Bits Blog, http://bits.blogs.nytimes.com/ (Mar. 13, 2009, 18:17 EST) (discussing the increased possibility of new legislation actually reflecting privacy concerns, as a result of the new FTC chief being a long-time privacy advocate).

[250] *See, e.g.*, Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. (forthcoming 2009) (manuscript at 21-22, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261344) (tracing the history of ISP monitoring and discussing legal implications).

[251] *See id.* (manuscript at 22); *see also* Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 671 (2008) (explaining that even assuming the ISP has a right to control copyright infringing behavior, it is not clear that this can justify packet inspection).

do numerous state and federal laws reach private ISPs,[252] but if Choruss was implemented in public universities as planned, then the schools would have to answer Fourth Amendment claims.[253]

[74] Second, as Castle points out, contributory infringement concerns would place online service providers, which are defined broadly by copyright law to include universities, in a Catch 22;[254] either employ

[252] *See* Ohm, *supra* note 250 (manuscript at 65-68) (discussing federal statutes, concluding that there are persuasive arguments for and against liability that ISPs would be wise not to test).

[253] *See, e.g.*, United States v. Heckenkamp, 482 F.3d 1142, 1146 (9th Cir. 2007) (holding that an individual does not lose reasonable expectation of privacy just because he is plugged into a network); *see also* Smith v. Maryland, 442 U.S. 735, 741 n.5 (1979), in which the Supreme Court held:

> In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper. *Id.*

While courts have considered policies to determine reasonable expectations of privacy, there may be a limit to how broad those policies may be. Monitoring employees for illegal network activity is one thing, regularly searching *every* student's network activity is quite another. Indeed, as the Supreme Court has observed, the police may not announce that every house would be regularly searched and expect that homeowners' Fourth Amendment claim falters on the subjective prong. *But see* United States v. Simons, 206 F.3d 392, 398-99 (4th Cir. 2000) (holding that a government employee could not have a reasonable expectation of privacy in the files he downloaded from the Internet in light of the policy that notified him that his Internet use would be overseen). If universities hope to argue that students have no subjective expectations of privacy because the policy of inspecting their network activity would be widely known, they may be disappointed to find that argument is not bulletproof.

[254] 17 U.S.C. § 512(k)(B) (2006) (defining service provider as "provider of online services or network access, or the operator of facilities therefor, and includes any entity described in subparagraph (A)").

accurate tracking and risk liability or cling to the safe harbor and guarantee arbitrary distribution of royalty payments.[255]

[75] Third, there is the underlying policy of copyright law to consider. In his presentation, Griffin repeatedly referred to collective rights societies, ASCAP and BMI, as successful models for blanket license schemes employed by copyright holders.[256] After all, as explained above, the two organizations collected and distributed more than one billion dollars in royalty payments last year alone.[257] Copyright law, however, demands that the merit of any royalty collection scheme be measured by the rewards given to the creator. Using this yardstick, there are reasons to be concerned with the RIAA taking its cue from ASCAP and BMI;[258] stories of royalty payments never reaching artists are bountiful, as are

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[255] *See supra* note 223.

[256] Griffin, *supra* note 205.

[257] *See* Newhouse, *supra* note 151.

[258] *See, e.g.*, Richard Hayes Phillips, *How One Independent Musician Defeated BMI*, WOODPECKER RECORDS, http://www.woodpecker.com/writing/essays/phillips.html. Phillips writes:

> ASCAP and BMI will tell you it is foolish not to join their organizations, because you cannot collect royalties unless you do. But the truth is that unless you are famous, you are unlikely to collect any royalties even if you do join. The distribution of royalties is based upon airplay. ASCAP secretly tapes about 0.1% of all radio broadcasts each year, and only 1% of the sampled hours come from public radio stations. BMI uses radio station logbooks to determine who gets royalties. Owners of performance venues are required to pay licensing fees even though none of the money will ever go to those who wrote the music being played on their stage, unless it is also being played on the radio. *Id.*;

see also Harvey Reid, *ASCAP & BMI – Protectors of Artists or Shadowy Thieves?*, WOODPECKER RECORDS, http://www.woodpecker.com/writing/essays/royalty-politics.html (cataloging many of the problems with ASCAP and BMI distribution methods).

criticisms of their "blackbox method" of divvying up the proceeds.[259] And without an honest accounting method, Choruss can easily start sounding like a cacophony.[260]

[76] Nevertheless, comparing Choruss to the collective rights societies is not entirely fair. Even if ASCAP and BMI were respectable models for aggregating licenses and distributing payments, there is at least one notable difference from any scheme Griffin has in mind; these collective rights societies (and SoundExchange for that matter) distribute payments directly to the artists.[261] And while Choruss will be an independent organization, licenses will flow from the labels.[262] This has two implications: first, labels will recoup any fees the artists owe them (e.g., for recording and promoting the records);[263] and second, the performer's rate will be much smaller (less than ten percent) than what artists would receive under SoundExchange (forty-five percent) or ASCAP/BMI

[259] *See, e.g.*, Reid, *supra* note 258 (supporting the claim that promoters of performance venues who want to make sure their artists are being fairly compensated feel so strongly that their money is not being fairly distributed, they have offered to submit logs of performances, thus far without success; money could easily be paid to artists who had nothing to do with a performance without any suspicion because the identities of "experts" who identify unknown works are not made public).

[260] *See, e.g.*, Future of Music Coalition, Principles for Artist Compensation in New Business Models, http://futureofmusic.org/article/article/principles-artist-compensation-new-business-models-0 (last visited Sept. 15, 2009) (stating that traditional sample methods of accounting for royalties have favored the biggest artists).

[261] *See, e.g.,* PASSMAN, *supra* note 63, at 225 (noting ASCAP and BMI pay songwriters directly); SoundExchange: Future of Music Coalition, *supra* note 82 (stating SoundExchange makes payments directly to artists).

[262] Castle, *supra* note 238.

[263] *See, e.g.*, Future of Music Coalition, *supra* note 260 ("Without direct payment, all the revenue generated by these new models will be delivered to the labels for dissemination to the artists in the form of royalties, but history has demonstrated that labels accounting practices are not to be trusted.").

schemes (as much as ninety percent).[264] In the end, this would reaffirm Choruss's true mission of ensuring that the RIAA has a profitable business model in the digital market. That mission, however, conflicts with the goal of copyright law, which instead focuses on rewarding the artists.

[77] Perhaps the most dubious response that Griffin offered to a specific concern was his vision of a world where the market for iTunes functions in harmony with a system like Choruss.[265] It defies common sense to expect people to pay iTunes $1.29 per song[266] after they have subscribed to another music service – one simply does not buy pizza on the way to an all-you-can-eat buffet. Griffin claims that iTunes attracts individuals who have plenty of money but little time as they can quickly sample music before making their decisions.[267] File sharing is more time consuming, he says, but it allows music aficionados to download a great number of songs.[268] Of course, the more plausible distinction, and the one initially made by RIAA executives when it was convenient, is between legal and illegal activity.[269] Indeed, as Schultz demonstrates, people generally want

[264] SoundExchange: Future of Music Coalition, *supra* note 82 (SoundExchange pays the performer forty-five percent of royalties); *see also* Griffin, *supra* note 205. Of course, SoundExchange would only distribute money in the case of streaming music, which is not an unfair comparison given that Choruss seeks to monetize that use as well. In the case of ASCAP and BMI, the ninety percent rate is a ceiling (after subtracting the transactional fees the societies charge). Perhaps big names receive even more than that for performances they did not earn at the expense of other artists.

[265] Griffin, *supra* note 205.

[266] Posting by malware to techPowerUp!, http://www.techpowerup.com/ (Oct. 16, 2007, 21:09 EST) ("DRM-free song files were originally priced at $1.29 per song . . . .").

[267] Griffin, *supra* note 205.

[268] *Id.*

[269] *See* PC World, Apple Touts ITunes Success, http://www.pcworld.com/article/111304/apple_touts_itunes_success.html (last visited Sept. 15, 2009). Steve Jobs, CEO of Apple, said: "The ITunes Music Store is changing the way people buy music. Selling five million songs in the first eight weeks has far surpassed our expectations, and clearly illustrates that many customers are hungry for a legal way to acquire their music online." *Id.* Doug Morris, CEO of Universal, said: "The ITunes Music Store has defined

to obey the law, opting for the legal path when they think others are doing the same.[270] But examining the psychology of a peer-to-peer file-sharer is beyond the scope of this article. Thus, it is likely that Choruss would draw a healthy number of its subscribers from digital music markets like iTunes, Rhapsody, and Amazon.com.[271]

[78] Discouraging the growth of these markets is poor policy. Their interactivity encourages exposure to new artists,[272] while direct sales ensure that the deserving performer, songwriter, publisher, and producer are paid. At the expense of these two benefits, Choruss would provide a more reliable way for record labels to collect money from all listeners. We should be hesitant to make these sacrifices. Griffin may see anarchy online, [273] but others take note of the steady growth that the digital markets

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what it means for people to have music instantly – and legally – at their fingertips. The ITunes Music Store is pushing us into the future of how music is produced and consumed." *Id.* Roger Ames, CEO of Warner, said: "Everyone in our industry is looking for a solution, and Apple is leading the way with the ITunes Music Store." *Id.*

[270] Schultz, *supra* note 187, at 665-66. To be fair, there are other reasons that make iTunes attractive: high quality recordings, user-friendly browsing, peer reviews, and most importantly, seamless integration with users' iPods. However, if people have an unlimited access to songs, it is unlikely that iTunes's perks will be sufficient to keep people coming back for music.

[271] *See* Karl Joyce, *Amazon and Rhapsody Show Strong Gains in Digital Music Market While iTunes Remains Dominant*, IPSOS NEWS CENTER, Oct. 8, 2008, http://www.ipsos-na.com/news/pressrelease.cfm?id=4089.

[272] *See, e.g.*, Sam Costello, *Using iTunes Genius To Discover New Music*, ABOUT.COM, http://ipod.about.com/od/advanceditunesuse/ss/genius_store.htm (last visited Sept. 20, 2009) (detailing how iTunes Genius analyzes the library to suggest new music); Jasmine France, *Goombah Helps iTunes Users Discover New Music*, CNET NEWS, http://news.cnet.com/8301-17938_105-9680599-1.html (last visited Sept. 20, 2009) (describing add-on software for iTunes that identifies songs in the users' library to make recommendations of other artists); Amazon.com, Follow Your Muse and Discover New Artists and Sounds, http://www.amazon.com/gp/richpub/syltguides/fullview/3B873R6GV5BEU (last visited Sept. 15, 2009) (applauding Amazon's recommendations of new artists based on other customers' recommendations).

[273] Griffin, *supra* note 205.

have exhibited since their emergence. And while continuing to increase their sales will not be easy when a black market infested with pirates continues to detract from legitimate sales,[274] iTunes, for one, has been defying skeptics for years.[275] If we are serious about incentivizing creators of music, then we may have to tolerate growing pains for the recording industry in the digital era.

B. RIAA v. INTERNET RADIO

[79] As discussed earlier, Internet radio is an exciting new medium for transmitting music to anyone armed with a computer or one of a growing number of Internet-ready gadgets. But it is also a medium on the verge of collapsing.[276] Although this article has focused on Pandora, it is only one of the many Internet radio sites available today.[277] That being said, Pandora is a different kind of site. Its highly interactive and individualized experience differs from that offered by other webcasters that generally only aggregate music based on other listeners'

[274] RIAA, Piracy: Online and on the Street, http://www.riaa.com/physicalpiracy.php (last visited Sept. 15, 2009) (citing one study estimating that music piracy causes $12.5 billion of economic losses every year); *see also* Stan J. Liebowitz, Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far 27 (June 2003) (unpublished manuscript, *available at* http://ssrn.com/abstract=414162) (concluding that illegal peer-to-peer file-sharing is the only explainable cause of the decline in album sales); *cf.* Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 573 (2005) (documenting an increase in traffic within peer-to-peer networks from 2002 to 2004).

[275] *See, e.g.*, Posting by Glenn to Coolfer, http://www.coolfer.com/blog/ (July 24, 2006, 17:50 EST) (showing how at the time, rivals hardly thought iTunes would be the revolutionary service that it has become).

[276] *See* Peter Whoriskey, *Giant of Internet Radio Nears Its 'Last Stand,'* WASH. POST, Aug. 16, 2008, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503367.html.

[277] *See, e.g.*, Paul Gil, *The Top 5 Internet Radio Stations of 2009*, ABOUT.COM, http://netforbeginners.about.com/od/readerpicks/ss/bestnetradio.htm (last visited Sept. 20, 2009) (listing Nullsoft SHOUTcast Radio, realRadio, and Accuradio as the top three).

recommendations.[278] But as one of the more familiar Internet radio sites, with a founder and CEO who have actively campaigned on behalf of all webcasters, Pandora serves as a useful reminder of the type of casualties the next couple of years may bring.[279]

[80] Webcasters allow the public greater access to music and expose artists to an audience in a way traditional radio simply does not. These are advantages that matter for anyone who is worried about the policy goals of copyright protection. The high royalty rates imposed on the webcasters, however, have made the new business difficult to sustain.[280] Indeed,

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[278] *See* CrunchBase, *supra* note 28. The word "interactive" as it is normally understood, and as it accurately describes Pandora's interface (for Pandora's constant response to the user's feedback), does not mean to imply that Pandora is an "interactive" transmitter within the meaning of § 114. Indeed, Digital Music Association, an organization to which Pandora belongs, has negotiated with SoundExchange to determine the rates for the compulsory license, making it evident that Pandora has been assumed to be non-interactive. Pandora takes steps to protect this status by restricting skipping, disallowing rewinding, and limiting the number of times a song can be played each hour. At least one commentator has argued that Pandora is gambling with its non-interactive status by customizing listeners' music. *See* Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/ (Nov. 17, 2008); Pandora Internet Radio Frequently Asked Questions, http://blog.pandora.com/faq/#25 (last visited Sept. 15, 2009) ("Our music licenses do not allow us to play a specific song immediately, or 'on demand.'"). *But see* M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 72 (Robert Nirkind & Sylvia Warren eds., 10th ed. 2007), which explains:

> The definition of "interactive" (or "noninteractive") is constantly being pushed to take advantage of lower rates and compulsory license. Pandora, for example, has created personalized streaming channels for an individual based on their tastes. Pandora is gambling that "noninteractive" covers services where listeners do not have high-resolution control over what they are listening to. The fact that their channels are custom-created for an individual puts them outside of any rational understanding of noninteractive. *Id.*

[279] *See* Newhouse, *supra* note 48 (providing the testimony of Tim Westergren, founder of Pandora, given before Congress on behalf of Pandora and the Digital Media Association).

[280] *See* Whoriskey, *supra* note 276.

Pandora provides a revealing case study for the current debate over royalty rates. Pandora keeps the user engaged while promoting artists, yet it teeters on the verge of collapse under the RIAA's consistent push for unreasonably high payments.[281] From a policy standpoint, there is no compelling reason why Congress should be quick to compensate a struggling recording industry at the expense of the two constituents with which copyright law is concerned, the artist and the public.

1. WHAT IS AT STAKE?

[81] Internet radio offers several advantages over traditional broadcasters—advantages that matter if we are trying to pursue the general goals of copyright law. First, Internet radio provides airtime for new and little-known performers.[282] While terrestrial radio has faced much controversy over its payola system that, as a practical matter, limits airtime to popular songs and established artists,[283] Internet radio is user-driven, playing whatever the taste of a particular listener demands.

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[281] *See id.*

[282] *See* Newhouse, *supra* note 48, where Westergren appears before Congress and quotes a Pandora listener:

> I think the best thing you've done is introduced me to so many artists that I love but would have never known that they existed otherwise. Now I buy their albums and look for upcoming shows in my area. You've done the music industry a great service from what I can tell. *Id.*

Westergren also quotes a musician:

> Hi guys – just wanted to thank you for putting my music into your system. I have had sales all over the US from people who found me via your site. Pandora is great. I use it all the time. And I can't believe what a promotional tool it has become for my own music. *Id.*

[283] *See* Eric Boehlert, *Will Congress Tackle Pay-for-Play?*, SALON.COM, June 25, 2002, http://dir.salon.com/story/ent/feature/2002/06/25/pfp_congress/index.html (stating the pay-for-play cost to the music industry is $150 million a year, effectively shutting off commercial FM radio for many artists).

Making listeners more accessible to artists who are not bankrolled by major labels, but still presenting the public with "useful Arts," furthers the goals of copyright law. That is to say, more artists are incentivized to create music and the public domain is enriched by their contributions.

[82] Second, Internet radio broadens the public's access to music. Without any limitation on radio frequency, broadcasting online offers an unlimited variety of music.[284] Traditional radio stations often have to collapse different genres of music in order to have sufficiently varied playlists.[285] As a result, some people who, for example, love old-school rap but cannot stand today's hip-hop may never tune in.[286] This is a non-issue with Internet radio, as people have access to thousands of channels.[287]

[83] Third, unlike terrestrial radio stations, webcasters' channels can afford to retain their unique flavors. Having to cater to determined geographic regions, radio stations have always had to have a specific mix of songs in their playlists to sustain a reliable audience.[288] Indeed, one can

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[284] STAN GIBILISCO, HANDBOOK OF RADIO AND WIRELESS TECHNOLOGY 547-48 (1999); *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) ("The facilities of radio are limited and therefore precious . . . .").

[285] *E.g.*, Hot 97, http://www.hot97.com/ (last visited Sept. 15, 2009).

[286] *See, e.g.*, Posting of Mental_Floss to Blogcritics Music, http://blogcritics.org/ (Oct. 19, 2006, 07:18 EST) (asserting hip-hop has "a particular beat and uses scratching and 'breaks'" so all hip-hop might be rap but not all rap is hip-hop).

[287] With Pandora, for example, users can create as many channels or stations as there are artists. *See* Pandora Internet Radio, About Pandora, http://www.pandora.com/corporate/ (last visited Sept. 15, 2009) (stating that with Pandora, for example, users can create as many channels or stations as there are artists).

[288] *See* Raffi Zerounian, Bonneville International v. Peters, 17 BERKELEY TECH. L.J. 47, 68-69 (2002), which argues:

> AM/FM radio broadcasters have as their primary market, and thus their primary concern, their "over-the-air listeners." Airwaves only reach a certain distance, which results in between 20 and 50 radio stations in any particular geographic area. To survive, an AM/FM

often tell what part of the country she is in by the music blasting through her car speakers. As a result, radio listeners may have found themselves deprived of the type of music for which *they*—not their neighbors—long for.[289] Again, not wanting to suffer through popular songs they do not enjoy, listeners may instead choose a silent car ride. And if we truly want to promote "useful Arts," we should be concerned with songs that go unheard because they are buried underneath the unrelated, more popular bunch.

[84] Fourth, Internet radio has the potential to be more effective at promoting artists and increasing music sales.[290] The reality of digital markets today is that any song purchase is potentially a click away. We have all begged the radio DJ to tell us the name of that catchy song he keeps playing during the day, only to find it stale the eighth time we hear it, as he finally announces the title. Pandora, however, displays the artist and song name, along with the album's artwork.[291] Choosing the song takes you to information about the album, showing the rest of the tracks,

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> radio station must cater to a broad audience and receive revenue through advertising, which results in stations having a wider variety of music. Thus, a listener with a particular preference in music might have to listen to music not of their choosing. *Id.*

[289] *See* Newhouse, *supra* note 48, where Tim Westergren offers one listener's experience with Pandora:

> Let me tell you that you are a blessing in my life. I'm 77 years old and the music I like and grew up with just isn't played much any more. Sometimes tears come to my eyes when I hear certain songs. They bring back so many memories. I don't think I have heard any songs I haven't liked. Thank you from the bottom of my heart. I send you arms full of appreciation. *Id.*

[290] *See id.* Tim Westergren claims that "[a]n August 2007 Nielsen/NetRatings research study concluded that Pandora listeners are three to five time more likely to have purchased music in the last 90 days than the average American." *Id.* This conclusion has been disputed by music record executives, although the report does not seem to be publicly available.

[291] *See generally* Pandora Radio, http://www.pandora.com/ (last visited Sept. 15, 2009).

and providing links to purchase the song immediately through either iTunes or Amazon.com.[292] Minimizing transaction costs for the listener and making his buying experience more pleasant puts money in the pockets of creators – just the type of incentives copyright law demands.

[85] Finally, individual webcasters have come up with their own unique features that benefit the public and the artist. Pandora, for example, has pioneered the "Music Genome Project."[293] As Tim Westergren, the founder and Chief Strategy Officer of Pandora, describes it, a team of university-degreed musicologists has worked to identify hundreds of musical attributes in thousands of songs.[294] When a user highlights the songs he has enjoyed, commonalities trigger the next song, most often performed by a different artist.[295] If the listener does not like the new song, he can inform Pandora, which then blacklists those attributes.[296] Additionally, Pandora notes the tendencies of all its listeners and reflects them in the choices it suggests to its users. As for the end-product, Westergren puts it best:

> The result is remarkable in many ways. More than 8.5 million registered Pandora listeners enjoy a better radio experience, and they are passionate about our service. They listen to more music, they re-engage with their music, and they find new artists whose recordings they purchase and whose performances they attend. Pandora is a bit of a phenom – in only two years since our launch we have become the third largest Internet radio service in America.

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[292] *Id.*

[293] *See* R. Kayne, *What Is the Music Genome Project*?, WISEGEEK, July 26, 2009, http://www.wisegeek.com/what-is-the-music-genome-project.htm (stating that the project was actually a "brainchild" of Tim Westergren).

[294] Newhouse, *supra* note 48.

[295] *Id.*

[296] *See id.*

> But the real winners are music fans, artists, record companies, songwriters and music publishers.[297]

Westergren also touts the sheer breadth of music examined by his team and made available to the listeners.[298] Each month Pandora catalogues about 14,000 new songs that span across genres and range from the obscure, amateur artists to the stars affiliated with major record labels.[299] Unlike traditional broadcasters who play the "safer" song or, in some cases, the one that has been bankrolled through the "payola system,"[300] Pandora's user-driven model ensures that songs are chosen based on their musical relevance and merit.[301] As a result, Westergren explains, more than half of Pandora's performances are from independent musicians, compared to less than ten percent played by traditional radio.[302]

2. THE STRUGGLE CONTINUES

[86] The 2007 CRB decision would have cost Pandora $18 million of an expected $25 million in revenue in 2008.[303] Unchanged, the rates set by the CRB would have led Tim Westergren, the founder of Pandora, to pull the plug.[304] And the Webcasters Settlement Act agreement will

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[297] *Id.*

[298] *See id.*

[299] *See id.* In his testimony, Westergren was "proud to report" that seventy percent of the songs in Pandora's collection (35,000 artists at the time) were by "artists not affiliated with a major record label." *Id.*

[300] *See* DelNero, *supra* note 71, at 196-97.

[301] *See* Newhouse, *supra* note 48.

[302] *Id.*

[303] Tim Bajarin, *Saving Internet Radio*, PC MAGAZINE, Oct. 3, 2008, http://www.pcmag.com/article2/0,2817,2331594,00.asp.

[304] Posting by Eliot Van Buskirk to Listening Post, http://www.wired.com/listening_post/ (Aug. 18, 2008, 11:32 EST).

effectively keep webcasters in the same place they were in 2007—on the brink of collapse.[305]

[87] To be sure, exposure of new artists and public access to music alone should not trump proper compensation to copyright owners. Music piracy achieves as much, and yet copyright law has rightly deemed it illegal. Internet radio, however, is not the old Napster. In 2006 alone, Pandora paid more than $2 million in royalties, and before the CRB decision, it was on track to pay $4 million in 2007.[306] Westergren has not been begging Congress for a bailout or an exemption, he simply wants reasonable rates that would make Internet radio economically sustainable.[307]

[88] Why would the RIAA, through its royalty-collecting agent, SoundExchange, seek to impose crushing royalties, potentially choking off a growing revenue stream? One likely reason is that it wants to force webcasters into license agreements where it could impose its own terms for how they stream music.[308] Another reason may be that the RIAA wants "to cull the small and non-profit webcasters that offer more diverse and esoteric content, while preserving the larger, more easily-controlled players."[309] As economically rational as these reasons may be, they are, nevertheless, in tension with the policy goals of copyright law.

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[305] Maloney, *supra* note 38.

[306] Newhouse, *supra* note 48.

[307] *Id.* In his testimony, Westergren pointed to the more than 6000 artists who have joined his cause, along with several hundred thousand listeners. *Id.*

[308] Kevin Fayle, *Will the RIAA Kill Net Radio?*, THE REGISTER, Mar. 30, 2007, http://www.theregister.co.uk/2007/03/30/webcasting_royalties_analysis/ (giving the example of applying DRM to every song).

[309] *Id.* As Fayle explains, it would cut out administrative costs at the expense of having varied programming. "Keeping the big webcasters around while letting the small stations and non-profits wither away will keep the money streaming in, but cut out the deadwood that the organizations consider a threat to their long-term interests." *Id.*

3. LOOKING TO THE POLICY BEHIND COPYRIGHT LAW TO FIND SOLUTIONS

[89] While the Internet Radio Equality Act (IREA) no longer has a prospect of passing, it is useful to revisit the debate over the bill. The force that blocked the IREA is the same one that is behind the high royalty rates for webcasters: the legislators' willingness to defer to a self-interested party like the recording industry to determine how much money it should take from webcasters without any regard for the significant benefits that webcasters offer. From a policy standpoint, this is indefensible. Even if the digital revolution has made the RIAA's business less profitable, it is an insufficient reason to impede the distribution of the "useful Arts."

[90] Westergren testified before Congress in 2007 partly to support the IREA,[310] when the bill was introduced in both chambers of Congress.[311] IREA proposed several changes responding to the CRB's 2007 decision, the most interesting of which was doing away with the "willing buyer, willing seller" standard in favor of the Copyright Act's § 801(b) factors.[312] As discussed earlier, these factors consider the distribution of works to the public, the disruption to the industry, the relative value of the contributions of the copyright holder and the service, and the fair rate of return.[313] Minding the public interest and the artist's in preserving a new way for him to communicate with the listener, these factors begin to approach the general concerns of copyright law. Unfortunately, IREA

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[310] Newhouse, *supra* note 48.

[311] Internet Radio Equality Act of 2007, S. 1353, 110th Cong. (2007); Internet Radio Equality Act, H.R. 2060, 110th Cong. (2007).

[312] *See* Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/ (Apr. 26, 2007).

[313] *See* 17 U.S.C. § 115(c)(3)(D)(ii) (2006). Interestingly, since the CRB has applied this standard to determine the rate for satellite radio, satellite radio has been paying between six and eight percent of revenues. *See* Anthony L. Soudatt & Natalie Sulimani, *Net Radio and Royalty Rates: The Sounds, Perhaps, of Silence*, N.Y.L.J., Feb. 4, 2008, at S2.

died without hope of being resuscitated at the end of the 110th Congress.[314]

[91] Nonetheless, the gap between the supporters and the opponents of the IREA illustrate the larger rift in the current debate regarding Internet radio. It is a rift neatly captured by David Oxenford in observing one of the Senate Judiciary Committee hearings regarding the bill:

> Senator Wyden on behalf of the Internet Radio Equality Act [stated] that it was necessary to avoid having the high royalties decided by the Copyright Royalty Board (CRB) destroy a fledgling technology, while Senator Corker of Tennessee talked about the importance of music to radio and the exhaustive process that the CRB had gone through in arriving at the royalties that it approved. But in the day's principal panel, the issues became crystal clear, as John Simson of SoundExchange talked about the "vibrant" business of Internet radio, citing an analyst's report that Internet radio would be a $20 billion advertising market by 2020, and the statement of an employee of CBS that Internet radio was a great business and that CBS was going to "own it." Speaking next, Joe Kennedy, CEO of Internet radio company Pandora had a dramatically different perspective – talking about an industry analyst who stated that the royalties that would result from the CRB royalties would exceed the revenue of the Internet Radio industry, and that, for Pandora, the failure to find a compromise

[314] At least as indicated by their websites, the original sponsors, Senators Brownback and Wyden and Representatives Inslee and Manzullo, have no plans for similar legislation in the 111th Congress. *See also* BRIAN T. YEH, STATUTORY ROYALTY RATES FOR DIGITAL PERFORMANCE OF SOUND RECORDINGS: DECISION OF THE COPYRIGHT ROYALTY BOARD, CONG. RESEARCH SERV. (2009), *available at* http://ipmall.info/hosted_ resources/crs/RL34020_090527.pdf. Indeed, Congress will likely be on the sideline watching the settlement talks play out. *See* E-mail from David Oxenford to author (Mar. 12, 2009, 19:13 EST) (on file with author).

> solution to the CRB-imposed royalties would mean that his service would "die."[315]

Put another way, the key question seems to be whether we are more concerned about growing the pie or handing out the slices. Are we more worried about nourishing Internet radio or maximizing the compensation it can provide to musicians and record labels right away? As Oxenford's account illustrates, the two concerns have been in tension since at least the 2007 CRB decision. And with the settlement rates not having advanced the ball much, coupled with a Congress that appears content to stay on the sidelines, the tables are set for the debate to heat up in the near future.

[92] The law should weigh the benefit to the public and emerging artists as much as, if not more than, the work contributed by the heavyweights of the music industry and their artists. Therefore, using § 801(b)-like factors would produce a fairer result—a result that fits with the general goals of copyright law. To be sure, we can grow the pie while we cut it, and anyone who had a part in creating a digital music performance does deserve compensation. But we should be aware that the pie might shrink if we cut it too quickly.

[93] The danger lies in allowing players in the music industry to determine how large their portions ought to be. Indeed, its declining revenue in the twenty-first century has made the RIAA, in particular, greedier, more shortsighted, and unyielding. For instance, since the imposition of the digital performance right, the RIAA has consistently lobbied for unreasonable rates.[316] It first asked Congress for a rate of 0.4 cents per a 2004 performance, which is five times larger than what the 2007 CRB decision set for 2006 performances.[317] The same CRB decision

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[315] Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/ (Aug. 5, 2008).

[316] *See* DelNero, *supra* note 71, at 200.

[317] *See id.*; Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/ (Mar. 2, 2007).

that caused a stir among webcasters and Congress alike! As one commentator concluded, when it came to dividing the new pie created by Internet radio, the RIAA was more than just biased, it was unfair: "[T]he recording industry's request for unbridled power in establishing webcasting rates bordered on the inequitable."[318] In the end, even as the "fledgling [small] webcasters" were going out of business, the "politically powerful" RIAA relented only after facing "an onslaught of intense political pressure."[319]

[94] There are other examples of the RIAA's behavior which cast doubt on the future alignment of its concerns with the underlying copyright law policy. For instance, as Oxenford observes, the recording industry has shown a degree of hypocrisy in fighting against the very standard (§ 801(b)) that has kept the compulsory license under § 115—the ceiling for what labels pay to reproduce compositions—at such a low rate.[320] Also telling is the way in which the RIAA bullied Congress into clarifying that the digital performance right includes all webcasters: a congressional debate was suppressed and a heavy burden on an emerging industry was hastily imposed.[321] By worrying mostly about supplanting the RIAA's

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[318] DelNero, *supra* note 71, at 200. Even "[a]fter losing the compulsory license battle, the RIAA did not retreat to a more reasonable position." It "ultimately . . . agreed to a percentage-of-revenue formula for small webcasters," but only as a result of the political pressure it faced. *Id.*

[319] *Id.*

[320] *See* Posting of David Oxenford to Broadcast Law Blog, http://www.broadcastlawblog.com/ (July 30, 2008).

[321] Carey, *supra* note 42, at 271-72. As Carey explains:

> In an effort to appease the RIAA, Congress permitted a last-minute hearing on the matter." The prominent players in the equation were hastily gathered in 1998. The Digital Media Association ("DiMA"), digital media's recently formed trade association, represented webcasters. "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 RIAA was seeking. DiMA found itself in a difficult position. Even if DiMA was able to defeat the

declining revenue, Congress is remembering only one part of copyright law's equation. And to the extent that some artists benefit from Internet radio's promotional benefits, even *that* part of the equation needs to be reconsidered.

[95] It is true that part of the RIAA's struggles is directly attributable to the digital revolution. Indeed, music piracy started to affect CD sales as early as 1999 and probably continues to have some impact today.[322] Although the RIAA and Congress may have been given a reason to tighten up on webcasters because songs broadcasted over the Internet can be "ripped,"[323] piracy is not what SoundExchange focused on in its fight

> 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. "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." 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." 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. *Id.*

[322] Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 737-44 (2005) (documenting the decline of U.S. music industry revenue, discussing potential causes, and concluding that peer-to-peer file-sharing has had at least some impact); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence* 71-79 (Review of Econ. Research on Copyright Issues, Working Paper No. 1122, 2004), *available at* http://www.cesifo-group.de/pls/guestci/download/CESifo%20Working%20Papers%202004/CESifo%20Working%20Papers%20January%202004/cesifo1_wp1122.pdf (summarizing two studies and concluding that downloading of mp3s may have caused a twenty percent reduction in music sales worldwide).

[323] Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 489 (3d Cir. 2003) ("[T]he recording industry became concerned that [webcasting] would erode recording sales by providing alternative sources of high quality recorded performances. In 1998 Congress responded by amending the DPRA's amendments to the Copyright Act with the Digital Millennium Copyright Act."); *see also* Carey, *supra* note 42, at 303 (arguing that if the concern is

against the IREA or in its negotiations with webcasters. With music theft from Internet radio vanishing as a major concern, there remains little reason to demand more from the emerging industry, regardless of how much potential it has, than from the more established mediums like satellite radio and terrestrial broadcasting.[324]

CONCLUSION

[96] Just as 1999 was a turning point for the music industry and the consumer, 2010 may be the year the two find themselves at a crossroads once more. While Warner Music is testing the RIAA's next great hope, Choruss,[325] and iTunes's sales are climbing,[326] Internet radio is currently struggling for its survival, 2009 is setting the stage for landscape-altering battles. But the war will not be won on business models alone; it will be shaped by the RIAA's old ally—copyright law.

[97] Ayn Rand once wrote that "one cannot give that which has not been created. Creation comes before distribution—or there will be nothing to distribute."[327] Regardless of how the RIAA tries to spin its interest in collecting royalties, neither iTunes nor Pandora distribute at the

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replacing CD sales, then the distinction between subscription and nonsubscription webcaster services for purposes of the digital performance right – with the latter facing the harsher standard – does not make sense; it seems that consumers who pay on a subscription basis are more likely to replace CD sales with that service).

[324] Indeed, it is tough to explain copyright law's disparate treatment of Internet radio when the reason that has been traditionally accepted to justify the exemption of radio from a performance right in sound recordings – promotional benefits for the records – can apply with even more force to Internet radio. *See, e.g.*, DelNero, *supra* note 71, at 196 (arguing the promotional effect of radio broadcasting on the sale of CDs has traditionally been the primary reason used for not subjecting broadcasters to a performance right of the sound recordings).

[325] *See* Cheaper Than Therapy, *supra* note 206.

[326] *See* Posting of Erick Schonfeld to TechCrunch, http://www.techcrunch.com/ (Jan. 6, 2009).

[327] AYN RAND, THE FOUNTAINHEAD 712 (Penguin Group 1994) (1943).

expense of the creator. Just the opposite is true. The emerging digital markets and Internet radio are a boon to the listener and artist alike. If Congress admits as much, then copyright law demands legislative action that imposes less onerous rates on webcasters and a fairer standard for determining them in the future. It also demands that Choruss not be looked on with favor.