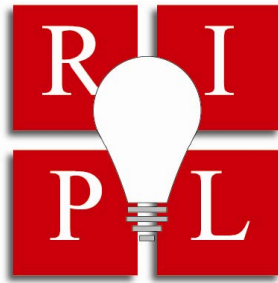


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## STREAMING INTO THE FUTURE: WHY LEGISLATION AND TECHNOLOGY HAVE OPENED PANDORA'S BOX FOR THE RECORDING INDUSTRY AND THE WEBCASTING SERVICES

RACHAEL STACK

### ABSTRACT

Today, music is everywhere, but this was not always the case. Listeners are surrounded by endless access to libraries and playlists from the advancement in technology. With the rapid technological advancements, Copyright law has been left behind at a stand still. Since the enactment of the Copyright Act, sound recordings have received less favorable treatment compared to their music counterpart. Sound recording copyrights are afforded digital performance royalties when broadcasted on popular Internet streaming services, like Pandora. In the last few years, music streaming has become more popular among listeners and thus, more sound recording royalties have been distributed; but, at a large cost to the services. The webcasters seek lower royalty rates for playing sound recordings, because they view their service as promotional. The sound recording copyright owners seek equality among all broadcasting services to receive fair compensation for every public performance, not merely digital. Recent bills have been introduced by both sides of this debate, but have yet to become law. The Internet Radio Fairness Act (IRFA), backed by the webcasters, places a higher burden of proof on the sound recording owner to develop a royalty rate the services deem fair, which would undoubtedly lower rates. On the other side, the Free Market Royalty Act (FMRA) seeks a comparable royalty beyond digital transmissions to all broadcast services. Balancing the needs of both parties provide an avenue to create parity within the music industry and the law.

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## I. INTRODUCTION

At the dawn of the music era, a listener was limited to either attending a live performance or using a music box<sup>1</sup> in order to experience popular phonorecords.<sup>2</sup> Moving along through the decades and centuries, the same listener was able to experience music at church or theatres through the assistance of a barrel organ,<sup>3</sup> and later through a more consumer friendly mechanism called an organette,<sup>4</sup> which played perforated music roll sheets in a similar fashion to a music box.

After further advancements in technology and time, the listener experienced recorded music with the help of a phonograph.<sup>5</sup> Finally, in the twentieth century, the surge of ideas and technology led the listener to enjoy music everywhere: from home, with the long play (“LP”) record album on a turntable; then later with an on-the-go

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\* © Rachael Stack 2014. J.D. Candidate, May 2015, The John Marshall Law School, B.A. in Criminology and Sociology, University of Minnesota Duluth, Duluth, Minnesota. My affinity towards music began in my early childhood when I realized the power music had over me. Music has simultaneously brought back fond memories, and empowered me to push my own limits. These dramatic effects have only strengthened since taking a music licensing course, and learning the legal rights involved with every broadcast. As a listener in the newer age of streaming, I am passionate about keeping music available to the public; while as a future attorney, I am an advocate for justly compensating the creators behind the music. I would like to thank The John Marshall Review of Intellectual Property Law for the constant assistance in developing this article. Lastly, I would like to thank my family and friends for the encouragement and support throughout the writing process.

<sup>1</sup> KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 21 (Am. Bar Ass’n, 2012). Music box technology played a single tune after the user wound up the metal coil inside the box. *Id.* The drum inside the box consists of metal protrusions, which vibrate the teeth of a metal comb that brushed against the drum, creating noise, or music. *Id.*

<sup>2</sup> 17 U.S.C. § 101 (2012). The statute defines “Phonorecords” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* The descriptor “phonorecords” includes the “material object in which the sounds are first fixed.” *Id.*

<sup>3</sup> PARKS, *supra* note 1, at 21–22. Organ Barrels were not owned individually, and thus the average listener could not control what he or she was hearing on an organ barrel. *Id.*

<sup>4</sup> *Id.* at 22. Organette was a portable consumer product, which made music production and ownership more accessible and inexpensive as compared to earlier devices. *Id.*

<sup>5</sup> See *Thomas Edison and the First Phonograph August 12, 1877*, AMERICA’S STORY FROM AMERICA’S LIBRARY, [http://www.americaslibrary.gov/jb/recon/jb\\_recon\\_phongrph\\_1.html](http://www.americaslibrary.gov/jb/recon/jb_recon_phongrph_1.html) (last visited Sept. 21, 2013). Invented in the late nineteenth century by Thomas Edison, the Phonograph was the first mechanical device to have the capabilities to record music, and thus transmitting sound recordings to the listener. *Id.*

cassette tape player; and finally, with the subsequent compact disc player, which revolutionized the listener's experience.<sup>6</sup>

The inception of the digital age brought music accessibility into the hands of anyone with a computer; files known as Motion Picture Experts Group-1 Layer 3 ("MP3") allowed the listener to control what music to play and when to play it.<sup>7</sup> The new millennium introduced the online music store iTunes, which provided the listener with paid music downloads, stored on an iPod, and gave the listener a portable jukebox of playlists at his or her disposal. Then in 2011, the market shifted from the trend of purchasing and owning music to streaming music through Internet radio services like Pandora and Spotify.<sup>8</sup>

Today, the constantly plugged-in listener has a myriad of playlists available at the touch of a button, without the hassle of individual purchases. These recent progressions in technology are producing discord in the music industry, and causing lawmakers to consider enacting new legislation with respect to the applicable copyright statutes.<sup>9</sup> The rapid progress has led to serious debate over royalty payments and who should foot the bill.<sup>10</sup> This comment will introduce the history of how copyright law came to protect music, and explore how the evolution of technology has transformed the way listeners experience music. From the exploration of current laws and market trends, this comment will propose a solution considering both the webcasters' and copyright holders' interests without adversely affecting the listener.

## II. BACKGROUND

Music has evolved immensely over time, but more notably in the last century with the listening experience rapidly changing. The two copyrights applicable to music, the musical composition and the sound recording, have seen very distinct treatments throughout their histories.<sup>11</sup> The following will provide reasoning behind the different treatments of the separate elements, and further explore the sound

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<sup>6</sup> See PARKS, *supra* note 1, at 160. The Compact Disc player was the first mechanical device that revolutionized sound and portability of music by embedding the recording into a digital format which allowed for more playing times without degrading the quality of the sound like its predecessor formats did. *Id.*

<sup>7</sup> *Id.* at 174. MP3 refers to an audio file that can be moved over the Internet and stored on a computer or device's hard drive. *Id.*

<sup>8</sup> See *id.* at 191 (laying out the paradigm shift in music consumption from a product to a service industry by offering complimentary or subscription services for listeners). Apple introduced the iPod portable music player in 2001. *Id.*

<sup>9</sup> *Id.* at 201; see also Maria Pallante, *The Next Great Copyright Act*, U.S. COPYRIGHT OFFICE 10–11, [http://www.copyright.gov/docs/next\\_great\\_copyright\\_act.pdf](http://www.copyright.gov/docs/next_great_copyright_act.pdf) (last visited May 12, 2014); *The Register's Call for Updates to the U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Maria A. Pallante, Register of Copyrights, United States Copyright Office).

<sup>10</sup> See PARKS, *supra* note 1, at 201 (explaining that each side of the dispute is claiming the opponent is money hungry).

<sup>11</sup> MICHAEL D. SCOTT, *SCOTT ON MULTIMEDIA LAW* § 22.01 (Wolter Kluwer 2013). While the underlying musical composition has always received public performance royalties, the sound recording has only just recently been afforded a limited public performance right through a digital transmission. *Id.*

recording's current state from the perspectives of the copyright owner, the streaming services that play the sound recordings, and the listeners who enjoy them.

### A. Picking Favorites

Under the current Copyright Act,<sup>12</sup> music is broken into two separate elements: the underlying musical composition and the sound recording.<sup>13</sup> From a listener's perspective, it can be confusing to discern between the two copyrights because the same person or entity does not always own both elements.<sup>14</sup> From a licensing perspective, the musical composition and the sound recording play two very different melodies. Musical works consist of the notes and accompanying words in the composition,<sup>15</sup> whereas the sound recording is what the listener is hearing, such as the spoken sounds.<sup>16</sup> The copyright holder for each work is afforded exclusive rights under the Copyright Act with respect to public performance, reproduction, and distribution.<sup>17</sup> This comment, and the industry-wide debate, is most concerned with the sound recording public performance right.<sup>18</sup> Additionally, the public performance is the right that distinguishes the sound recording element from the underlying musical work.<sup>19</sup>

Many perceive sound recordings as the bastard children of the Copyright Act, because they were considered sound recordings like an afterthought to the musical work.<sup>20</sup> Within the last twenty years, the Copyright Act has amended sound recording protection with the Digital Performance Right in Sound Recordings Act ("DPRA") in 1995, later amended to the Digital Millennium Copyright Act ("DMCA") in 1998.<sup>21</sup> Since these recent amendments, sound recordings have enjoyed expanded

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<sup>12</sup> *Copyright Basics*, U.S. COPYRIGHT OFFICE 1 (2012), <http://www.copyright.gov/circs/circ01.pdf>. To clarify, the Copyright Act of 1976, codified as 17 U.S.C. §§ 101–803, is the current version of the Act referred to in this article as either "the Act," or "the current Act." *Id.*; see also 17 U.S.C. § 102 *et seq.* (2012).

<sup>13</sup> 17 U.S.C. §§ 102(a)(2), (a)(7) (2012). Sound recordings referred to in this Article are those sound recordings that were copyrighted after 1972, because they were not added to the Act until it was amended in 1976. Cydney A. Tune, *Music Licensing—From the Basics to the Outer Limits*, 21 ENT. & SPORTS L. 25, 28 (2003).

<sup>14</sup> Tune, *supra* note 13, at 27–28; 17 U.S.C. §§ 102(a)(2), (a)(7) (2012).

<sup>15</sup> 17 U.S.C. § 102.

<sup>16</sup> 17 U.S.C. § 101 (defining sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied").

<sup>17</sup> 17 U.S.C. § 106 (2012).

<sup>18</sup> PARKS, *supra* note 1, at 201.

<sup>19</sup> 17 U.S.C. § 106(6) (2012).

<sup>20</sup> SCOTT, *supra* note 11 (delineating the history of sound recordings, which were relatively new copyrightable works within the Copyright Act of 1976). Not until 1995, pursuant to the Digital Performance Right in Sound Recordings Act, did sound recordings actually receive a performance right by means of digital transmissions. *Id.*

<sup>21</sup> *Id.*

protection for exclusive public performance rights via digital transmissions, whereas musical works enjoy protection with every public performance.<sup>22</sup>

To put it into perspective, take the classic popular song “Dancing in the Dark,” performed by Bruce Springsteen.<sup>23</sup> The songwriter is Mr. Springsteen himself, and the music publisher and copyright owner is Bruce Springsteen in care of Nancy Chapman of Chapman, Bird & Grey, Inc.<sup>24</sup> The underlying musical work belongs to these parties, and they are paid royalties by the American Society of Composers, Authors and Publishers (“ASCAP”), which is one of three major Performance Rights Organizations (“PROs”) that license musical works for public performances.<sup>25</sup>

Bruce Springsteen, the writer, will receive full writing royalties whenever “Dancing in the Dark” is performed publicly, whether the performance is by him or another artist.<sup>26</sup> As a performer, however, he will not receive any royalties from ASCAP or any other source when “Dancing in the Dark” is played on traditional over-the-air radio, or otherwise publicly. The only way Bruce Springsteen, the artist, will receive public performance royalties is when the recording is digitally transmitted on an Internet webcast.<sup>27</sup> A quick search on Bruce Springsteen’s website provides the necessary sound recording copyright information of artist Bruce Springsteen, and record label Columbia Records.<sup>28</sup> These sound recording owners receive royalty payments that are allocated either directly from the webcaster or indirectly by the nonprofit PRO, SoundExchange.<sup>29</sup> The Copyright Act controls indirect licensing and payments, whereas the parties control direct royalty payments.<sup>30</sup>

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<sup>22</sup> 17 U.S.C. § 101 (2012). A digital transmission is defined as “a transmission in whole or in part in a digital or other non-analog format.” *Id.*; see also PARKS, *supra* note 1, at 201 (describing that debates have been raised about extending the same performance right to sound recordings that is enjoyed by musical works through the broadcast of traditional terrestrial radio, but that the debates have calmed because mandating royalties on over-the-air broadcasters would likely drive them out of business); Cydney A. Tune & Christopher R. Lockard, *Navigating the Tangled Web of Webcasting Royalties*, 27 ENT. & SPORTS L. 20, 21 (2009) (explaining the popular belief that terrestrial radio has been viewed by the broadcasters themselves as promoting the sound recordings, performers, and copyright owners, which is a major reason why Congress does not want to burden them with paying sound recording royalties).

<sup>23</sup> ACE Search, ASCAP, <https://www.ascap.com/Home/ace-title-search/index.aspx> (last visited Jan. 22, 2014) (select a search for a song by “Title,” then type in the title “Dancing in the Dark,” and scroll down to the title with Bruce Springsteen appearing as a writer and expand the relevant drop down menus).

<sup>24</sup> *Id.*

<sup>25</sup> See *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*12 (S.D.N.Y. Mar. 18, 2014); *ASCAP Payment System: Introduction*, ASCAP, <http://www.ascap.com/members/payment/> (last visited Oct. 11, 2013). ASCAP, the PRO in charge of distributing royalty payments for the song “Dancing in the Dark,” distributes royalty payments based on the license fees it has set up with the user that will be performing publicly, including but not limited to broadcast radio, websites, bars, shopping malls, airlines and sports venues. *Id.*

<sup>26</sup> David Lowery, *The Digital Royalty Fight: A Primer for Journalists. Part 1.*, THE TRICHORDIST (July 8, 2013), <http://thetrichordist.com/2013/07/08/the-digital-royalty-fight-a-primer-for-business-journalists-part-1/>.

<sup>27</sup> 17 U.S.C. § 106(6) (2012).

<sup>28</sup> *Born in the U.S.A.*, BRUCE SPRINGSTEEN, available at <http://brucepringsteen.net/albums/born-in-the-u-s-a> (last visited Apr. 11, 2014).

<sup>29</sup> *About Digital Royalties*, SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/digital-royalties/> (last visited Oct. 29, 2013) (providing a breakdown of how sound recording royalties are divided, 50% going to the copyright owner, which is generally the record

*B. “Mo Money, Mo Problems”: The Breakdown of Rates for Publicly Performed Sound Recordings*

The current licensing regulations for digital transmissions of sound recordings are divided between two types of web services: interactive and noninteractive.<sup>31</sup> Interactive service rates are party-controlled, and without an agreed rate, webcasters are precluded from performing the sound recordings.<sup>32</sup> On the other hand, the government-controlled noninteractive web services lead to wide debate over what the sound recordings are worth.<sup>33</sup> Within the noninteractive category, there are sub-categories of broadcasters and each has a separate royalty rate.<sup>34</sup> These rates are determined through agreements reached with SoundExchange through rates set forth by the Copyright Royalty Board (“CRB”).<sup>35</sup>

*1. Noninteractive Royalties: Compelling Performances at Compelling Rates*

The royalty rates are determined every five years by the CRB, a three-judge panel.<sup>36</sup> The rates calculated for which webcasters are required to pay per performance<sup>37</sup> of sound recordings started at \$0.0017 in 2011.<sup>38</sup>

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label, 45% going directly to the featured artist, and 5% going to the backup singers/musicians and session players).

<sup>30</sup> Tune & Lockard, *supra* note 22, at 21.

<sup>31</sup> 17 U.S.C. § 114(j)(6–7) (2012). An interactive service is defined as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as a part of a program, which is selected by or on behalf of the recipient.” *Id.* A noninteractive service is one that “provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions . . . .” *Id.*

<sup>32</sup> 17 U.S.C. § 114(d)(3)(A) (2012).

<sup>33</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 149 (2d Cir. 2009). In *Arista Records*, the court affirmed a jury determination that the webcasting service offered by Launch Media was not an interactive service, and thus, as a noninteractive service, would not have to negotiate the potentially higher royalty rates directly with the plaintiff record companies for using their sound recordings. *Id.*

<sup>34</sup> Tune & Lockard, *supra* note 22, at 23–24.

<sup>35</sup> *See id.* at 21.

<sup>36</sup> *See* 17 U.S.C. § 801(a–b) (2012); *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1223–24 (D.C. Cir. 2009). The three full-time judge panel is appointed by the Librarian of Congress, and are in charge of determining the appropriate royalty rates by ensuring that the following objectives are met: (1) to keep the works accessible to the public, (2) to provide a fair income for the owner of the copyright, (3) to reflect the contribution roles of the copyright owner and user in the public, and (4) to minimize any industry impacts. 17 U.S.C. § 801(a–b) (2012).

<sup>37</sup> *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 FED. REG. 13,026, 13,047 (Mar. 9, 2011) (to be codified at 37 C.F.R. pt. 380) (labeling performance as “each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission,” excluding a recording that is not copyrighted, a performance of an already obtained license, and incidental performances that do not use the entire sound recording).

<sup>38</sup> *Id.* at 13,051.

The rates increase each year and extend through 2015, when the fee will rise to \$0.0025 per performance.<sup>39</sup> These rates, however, are higher than those paid by Pandora due to the Webcaster Settlement Agreement Act of 2009 with SoundExchange, which allows Pandora to pay lower per performance royalties with the requirement that it pay a minimum of twenty-five percent of its gross revenue within those rates.<sup>40</sup> To put these numbers into perspective, the traditional broadcasters that stream their signals over the Internet currently pay out \$23.00 in royalties for playing ten songs an hour to one thousand listeners, whereas Pandora currently pays \$13.00 (or \$0.0013 per performance) for the same broadcast.<sup>41</sup>

Additionally, Digital Music News predicts the newly-released Internet radio platform, iTunes Radio, will drive other noninteractive webcasters, including the current heavyweight, Pandora, out of business.<sup>42</sup> As a noninteractive service, iTunes Radio is compelling to copyright owners, because instead of going through SoundExchange to obtain licenses to perform the sound recordings like Pandora, iTunes goes straight to the record labels.<sup>43</sup> While iTunes Radio starts its rates off at \$0.0013 per performance, which is the same as Pandora's current rates, iTunes also affords the copyright owners fifteen percent of net advertising revenues.<sup>44</sup> Furthermore, the \$0.0013 royalty rate is merely for independent labels and artists, and not all sound recording owners.<sup>45</sup>

Because it is currently only offered in the United States, iTunes Radio does not have a base as large as Pandora's global listener base.<sup>46</sup> As one of the wealthiest companies in the world, Apple can afford to compete with current noninteractive

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<sup>39</sup> *Id.*

<sup>40</sup> See Rick Marshall, *The Quest for "Parity": An Examination of the Internet Radio Fairness Act*, 60 J. COPYRIGHT SOC. 445, 462 (2013) (describing how the Pureplay royalty rates pursuant to the Webcaster Settlement Act went from \$0.0011 in 2012 to \$0.0014 per performance in 2015).

<sup>41</sup> David Oxenford, *Final Webcasting Royalty Rates Published—A comparison of How Much Various Services Pay*, BROADCAST L. BLOG (Mar. 14, 2011), <http://www.broadcastlawblog.com/2011/03/articles/final-webcasting-royalty-rates-published-a-comparison-of-how-much-various-services-pay/>.

<sup>42</sup> See Paul Resnikoff, *Tim Westergren: "iTunes Radio Will Only Have a Modest Impact . . ."*, DIGITAL MUSIC NEWS (Sept. 24, 2013), <http://www.digitalmusicnews.com/permalink/2013/20130924modestimpact> [hereinafter Resnikoff, *Modest Impact*] (questioning the long-term prospects that Pandora holds with iTunes Radio after its shares dropped over ten percent within the three days of Apple launching the radio platform); Paul Resnikoff, *7 Reasons Why Apple's "Pandora Killer" May Actually be a "Pandora Killer . . ."*, DIGITAL MUSIC NEWS (Sept. 9, 2013), <http://www.digitalmusicnews.com/permalink/2013/20130909appledestroy> (last visited Oct. 20, 2013) [hereinafter Resnikoff, *Pandora Killer*].

<sup>43</sup> See *Digital Music Download Sales Agreement*, DIGITAL MUSIC NEWS, [http://www.digitalmusicnews.com/wp-content/uploads/2013/11/iTunes\\_Americas\\_-Music\\_v16.pdf](http://www.digitalmusicnews.com/wp-content/uploads/2013/11/iTunes_Americas_-Music_v16.pdf) [hereinafter *Digital Sales Agreement*] (setting out the agreement terms between iTunes and independent performers and labels, providing them with information regarding the nonsubscription radio service pursuant to section 114 license, and further reporting that the starting royalties are to be paid at \$0.0013 per royalty bearing performance, as well as 15% of net advertising revenues).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also Paul Resnikoff, *Apple is Now Sending Non-Negotiable iTunes Radio Contracts to Indie Labels . . .*, DIGITAL MUSIC NEWS (June 13, 2013), <http://www.digitalmusicnews.com/permalink/2013/06/13/appleinferior>.

<sup>46</sup> Ed Christman & Alex Pham, *Underwhelming Start to iTunes Radio Lights Fire Under Apple*, BILLBOARD BIZ (Apr. 9, 2014, 10:00A.M.), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6042224/underwhelming-start-to-itunes-radio-lights-fire-under>.



webcasters and pay higher royalties.<sup>47</sup> Moreover, despite the fact that iTunes Radio is in its infancy, the current trend indicates that it will be a significant competitor.<sup>48</sup>

## 2. Where the Listening Experience is Leading the Industry

With the digital age in full swing, many industries have had to determine how to reach consumers on a more efficient and cost-effective level.<sup>49</sup> The music industry is no exception. While download sales continue to maintain a steady pace within the market,<sup>50</sup> the most popular experience among young adult listeners is free Internet radio.<sup>51</sup> With Pandora currently dominating the noninteractive market, and the introduction of iTunes Radio, it becomes clear that listeners are making, or have made, the switch to experiencing music on a whole different level than before.<sup>52</sup> Even as Pandora's revenue is growing year by year, its liabilities are also growing at an equally rapid rate, the largest of which are its "accrued royalties" paid to the sound recording copyright owners.<sup>53</sup>

In the fall of 2012, Pandora was the lead force behind the introduction of the Internet Radio Fairness Act of 2012 ("IRFA").<sup>54</sup> The bill substituted the current standard the CRJs follow in applying royalty rates with a more webcaster-friendly formula.<sup>55</sup> Additionally, it proposed to shift the burden of proof that the amount sought is reflective of the competitive market circumstances to the copyright owners seeking the royalties.<sup>56</sup> The IRFA was not enacted into law, nor will it be introduced,

<sup>47</sup> Resnikoff, *Modest Impact*, *supra* note 42.

<sup>48</sup> *Id.*

<sup>49</sup> Beth Stackpole, *How 4 Companies Use Mobile Apps to Court Customers*, COMPUTERWORLD (Oct. 28, 2013, 6:00 AM), [http://www.computerworld.com/s/article/9243392/How\\_4\\_companies\\_use\\_mobile\\_apps\\_to\\_court\\_cust\\_omers](http://www.computerworld.com/s/article/9243392/How_4_companies_use_mobile_apps_to_court_cust_omers) (explaining that companies are using the mobile platform to continue nurturing their relationships with customers because they are so dependent on the devices in today's market).

<sup>50</sup> *Engine of a Digital World*, IFPI DIGITAL MUSIC REPORT 2013, [http://www.ifpi.org/downloads/dmr2013-full-report\\_english.pdf](http://www.ifpi.org/downloads/dmr2013-full-report_english.pdf) [hereinafter *Digital World Engine*]. The International Federation of the Phonographic Industry ("IFPI") published the digital music revenues in the United States, including free and paid subscription services which have reached 19% of the music market, and not much further ahead are the download sales at 28%. *Id.*

<sup>51</sup> See *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*9 (S.D.N.Y. Mar. 18, 2014) (describing how Pandora accounts for over 8% of all radio listening and over 71% of the Internet radio market).

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at \*8; *Press Release, Pandora Media, Inc.*, PANDORA DETAILED FINANCIALS Q2FY14, 1, 4 (Mar. 2013) (on file with author) (stating that Pandora's Accrued Royalties alone grew from \$18,080,000 in 2011 to \$53,083,000 in 2013).

<sup>54</sup> Glenn Peoples, *Internet Radio Fairness Act Slips Into Hibernation*, BILLBOARD (Jan. 3, 2013, 3:11 PM), <http://www.billboard.com/biz/articles/news/1510514/Internet-radio-fairness-act-slips-into-hibernation>.

<sup>55</sup> H.R. 3609, 112th Cong., 1, 4–6 (2012) *available at* <https://www.govtrack.us/congress/bills/113/hr3219/tex>.

<sup>56</sup> *Id.* at 8–9. The following is the proposed standard set forth by the bill when determining royalties for webcast services; the CRJs:

- (i) shall not disfavor percentage of revenue-based fees; (ii) shall establish license fee structures that foster competition among the licensors of sound recording

because Pandora abandoned the widely criticized bill; that is not to say the goals of the legislation will not resurface under different legislation.<sup>57</sup> The main objectives, however, have the potential of significantly affecting the music industry and possibly the everyday listener.<sup>58</sup>

With the release of iTunes Radio, other webcasters have even more incentive to lobby for the enactment of similar legislation to stay in business.<sup>59</sup> The current battle between webcasters and sound recording owners may soon produce a second battle between the webcasters themselves, which could very well affect the listeners and their pockets.<sup>60</sup>

### III. ANALYSIS

In order to have any indication as to what the future holds for the sound recording copyright owners and the noninteractive webcasters, it is necessary to know where both sides are coming from in the dispute over royalty rates. Moreover, the current rates from the most recent Webcasters Settlement Agreement are nearing their expiration, and the CRB must determine new royalty rates owed to the copyright owners.<sup>61</sup> The following analysis will provide current arguments surrounding recent bills and their goals. It will then postulate why each side's propositions are incomplete solutions.

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performances and between sound recording performances and other programming, including per-use or per-program fees, or percentage of revenue or other fees that include carve-outs on a pro-rata basis for sound recordings the performance of which have been licensed either directly with the copyright owner or at the source, or for which a license is not necessary; (iii) shall give full consideration for the value of any promotional benefit or other non-monetary benefit conferred on the copyright owner by the performance; (iv) shall give full consideration to the contributions made by the digital audio transmission service to the content and value of its programming; and (v) shall not take into account either the rates and terms provided in licenses for interactive services or the determinations rendered . . . prior to the enactment of the Internet Radio Fairness Act of 2012.

*Id.*

<sup>57</sup> Paul Resnikoff, *Pandora Abandons Its Royalty-Slashing IRFA Legislation . . .*, DIGITAL MUSIC NEWS (Nov. 26, 2013) <http://www.digitalmusicnews.com/permalink/2013/11/26/pandoraabandoning>.

<sup>58</sup> Compare H.R. 3609, 112th Cong., at 3–4 (2012), with H.R. 3219, 113th Cong., 1, 3–4 (2013) (introducing the opposing viewpoints of the IRFA, the Free Market Royalty Act (FMRA) proposing amending the current exclusive right in sound recordings to include traditional over the air radio paying royalties to the copyright owners along with getting rid of the Copyright Royalty Board completely and having the noninteractive services negotiate with SoundExchange).

<sup>59</sup> *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*8 (S.D.N.Y. Mar. 18, 2014).

<sup>60</sup> See *id.* at \*9 (describing its efforts to maintain its competitiveness with other broadcasters by playing less advertisements, even as advertisements remain the company's largest revenue source).

<sup>61</sup> See Marshall, *supra* note 40, at 460–61 (explaining that the current noninteractive webcast service royalty rates are only valid through 2015, after which the CRB must issue new rates for another five year period).

*A. Rhythm and Blues: How Recent Bills Provide Rhythm for One Side and Blues for the Other*

Provided the recent bills, or any related legislation, are not enacted into law before the next royalty calculation, royalty rates are likely to either stay consistent or increase slightly based on the statutory standard the CRB employs.<sup>62</sup> This would cause Pandora, as well as every other noninteractive webcast service, to accrue more liabilities and profit less for the same service.<sup>63</sup> Since the inception of Pandora and other webcast services, the listening experience has dramatically shifted from ownership to streaming, on an array of consumer products.<sup>64</sup> In 2013, smartphones accounted for the largest market share in global phone sales.<sup>65</sup> This gives hope for the webcasters to argue for lower or stagnant rates because the public has constant access to stream the sound recordings; but it also requires more of an uphill battle for the copyright owners requesting higher rates.<sup>66</sup> The following will express how the recent proposals are out of sync when it comes to creating equilibrium between both parties.

*1. The Internet Radio Fairness Act ("IRFA") or Its Successor*

If enacted into law, the IRFA, or its later descendants, would save webcasters tremendous amounts of money, because prior rate determinations would not serve as precedent like they have in the past.<sup>67</sup> Because noninteractive services are more restricted than interactive services, the IRFA would set a level starting point by prohibiting the CRB from comparing the two rates.<sup>68</sup> Rather, the IRFA would treat

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<sup>62</sup> See *id.* at 462.

<sup>63</sup> See *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1222 (D.C. Cir. 2009); *Pandora Media, Inc.*, 2014 WL 1088101, at \*9 (explaining that by balancing the objective goals of the CRB, by which the Board must look to the webcaster and the copyright owner to afford both sides the fair return on their investments, as well as by looking to the public availability in the market, rates are likely to only increase with the CRJs' balancing act, especially with the constant accessibility of Internet radio).

<sup>64</sup> See *Digital World Engine*, *supra* note 50, at 17 (stating that streaming music is growing rapidly among listeners, and with products that include over sixty car brands now capable of supporting Pandora Radio platforms, listeners do not have to be at home in order to enjoy the music).

<sup>65</sup> *Gartner Says Smartphone Sales Grew 46.5 Percent in Second Quarter of 2013 and Exceeded Feature Phone Sales for First Time*, GARTNER (Aug. 14, 2013) [hereinafter *Gartner Smartphone Sales Growth*], <http://www.gartner.com/newsroom/id/2573415>.

<sup>66</sup> See *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*9 (S.D.N.Y. Mar. 18, 2014) (competing to stay relevant, Pandora's goal is to make its service accessible anywhere Internet is available).

<sup>67</sup> See H.R. 3609, 112th Cong., at 8–9 (2012) (applying the objectives of the IRFA, noting that the webcasters would benefit substantially from the CRB not disfavoring revenue-based rates, and recognizing the promotional value of the services and the cost of providing the digital transmission to the public).

<sup>68</sup> Compare 17 U.S.C. § 114(f)(1)(B) (2012) (giving the CRB the discretion to calculate noninteractive rates based on current comparable voluntary license agreements), with H.R. 3609, 112th Cong., at 9 (limiting the CRB from basing the calculations on current noninteractive rates, which would reflect the service more accurately and further lower the liabilities paid to sound recording owners).

webcasters more like traditional over-the-air services, as providing a promotional value to the public performances, because the burden to prove the value of the sound recordings performed shift to the copyright owner.<sup>69</sup>

Moreover, given the advances in technology leading to widespread use of noninteractive webcasting services, sound recording owners will likely benefit more, whether the rates are consistent or even lowered.<sup>70</sup> Because of the market shift and constant public access to sound recordings, the IRFA would simply bridge the gap by providing a chance for per-performance royalties to be calculated on a basis that is more forgiving to the services that are keeping music accessible.

On the other hand, the IRFA could adversely affect many new sound recording owners who are without past royalties, because they would be required to prove the just rate in the CRB's already subjective analysis.<sup>71</sup> Additionally, by expanding the CRB's analysis with the percentage-of-revenue standard, sound recording owners are even more likely to receive less compensation for their work than with the current rates, especially when new webcasting services join the market.<sup>72</sup>

Furthermore, noninteractive webcasting is becoming the norm for how the public consumes music.<sup>73</sup> With listening hours expected only to increase in the future, a percentage-based royalty standard would provide webcasters a proportionate rate (given their revenues) to allocate towards sound recording owners.<sup>74</sup>

Even if the CRB were to keep the per-performance royalty standard, unknown recording artists would still receive a much lower rate for their work than well-known artists because of the burden to prove the sound recording's worth.<sup>75</sup> Likewise, the CRB would consider webcaster contributions by broadcasting the sound recordings, and the promotional value would likely outweigh many copyright owners' arguments for increased royalties.<sup>76</sup>

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<sup>69</sup> See *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003); H.R. 3609, 112th Cong., at 3–4 (establishing a new shift in the burden of proof, whereby the fees and terms of the royalty rate agreement must be satisfied by the copyright owner, which would provide for a more competitive market for both webcasters and sound recording copyright owners by requiring proof their work is worth a higher rate).

<sup>70</sup> See *Gartner Smartphone Sales Growth*, *supra* note 65 (explaining that smartphones comprise over half of all cellular phones in the world); Marshall, *supra* note 40, at 468. This in turn allows for more products that will perform the sound recordings, raising more money in royalties paid out; in late 2012, a year after the company went public with an initial public offering, Pandora was the second most popular application on the iPhone. Though Pandora's rank could change with the introduction of iTunes Radio, for now, Pandora has the upper hand. Marshall, *supra* note 40, at 468.

<sup>71</sup> H.R. 3609, 112th Cong., at 3–4.

<sup>72</sup> See *id.* at 8 (comparing the current rates with changes posed by the IRFA, the change in analysis potentially allowing for a set percentage of royalties to be paid to the copyright owners based on the revenue of the webcaster, whether or not the songs are being played more or less often by the public).

<sup>73</sup> *Digital World Engine*, *supra* 50, at 17.

<sup>74</sup> See *In re Pandora Media, Inc. v. Am Soc. Of Composers*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*8 (S.D.N.Y. Mar. 18, 2014) (predicting that the future revenues of Pandora will rise, but that with licensing fees rising to over 60% last year, the liabilities will continue to rise disproportionately to the revenue).

<sup>75</sup> H.R. 3609, 112th Cong., at 3–4 (2012).

<sup>76</sup> See *id.* at 9.

## 2. *The Free Market Royalty Act ("FMRA")*

Singing a different tune is the recently introduced FMRA, which has webcasters and broadcasters alike concerned about the possibility of direct licensing replacing the CRB for determining royalty rates.<sup>77</sup> The bill provides artists and record labels more bargaining power for the copyrighted work, because the rates are determined solely through party negotiations.<sup>78</sup> However, the FMRA may harm the very parties it seeks to protect because the sound recordings would not be broadcast unless the parties reached an agreement.<sup>79</sup>

Likewise, by phasing out the statutory rate, webcasters would be required to license directly in order to perform the sound recording.<sup>80</sup> This requirement would likely raise royalty rates from the current amount and/or decrease in the amount of music available to the public. The direct negotiations would undoubtedly take time, during which time the webcasters would be unable to perform the music to the listening public.<sup>81</sup>

This bill would not affect current noninteractive webcasters that are licensing directly with the sound recording owners, such as iTunes Radio, because they are not taking advantage of the statutory rates determined by the CRB. It would affect both current webcasters' statutory licensing agreements and all terrestrial broadcasters who currently pay nothing for sound recordings, because the public performance copyright licenses would expand across all platforms.<sup>82</sup> The question then becomes: if sound recording performance rights extended beyond digital transmissions, should there have ever been a statutory rate in the first place? Or should direct licensing have always been in place?

It may be too late (not to mention pointless) for Pandora to switch over to direct licensing, because there remains the risk of not reaching an agreement between the parties. Under the FMRA, broadcasters like Pandora would either lose the ability to play the sound recordings or go back to paying the statutory rate, which is the very rate that both sides of the dispute are determined to change.<sup>83</sup>

Moreover, what distinguishes Pandora from other webcasters that license directly (including iTunes Radio) is the vast catalog of music it streams to the public; this is exactly why those services would suffer if Congress enacts the FMRA.<sup>84</sup> By phasing out the statutory license and expanding the public performance right, the

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<sup>77</sup> H.R. 3219, 113th Cong., at 2–4 (2013) (changing the public performance right to include all audio transmissions, and eliminating the CRB's role through direct licensing with the copyright holders).

<sup>78</sup> *Id.* at 4.

<sup>79</sup> *Id.* at 3–4.

<sup>80</sup> *Id.* at 13.

<sup>81</sup> *See id.* at 3–4 (explaining that by attempting to create more bargaining power for the sound recording owners, the FMRA could potentially limit public music availability because webcasters like Pandora would be unwilling to increase their liabilities).

<sup>82</sup> *Id.* at 2; *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003).

<sup>83</sup> H.R. 3219, 113th Cong., at 4, 13.

<sup>84</sup> *See Arista Records, LLC v. Launch Media, Inc.* 578 F.3d 148, 161 (2d Cir. 2009) (noting that in responding to the wide use of interactive services, Congress intended the compulsory license to prevent further declines in revenue for the copyright holders by creating qualifications for services to obtain before utilizing the statute).

scale completely tips in favor of the sound recording owners.<sup>85</sup> This phase out does not take into consideration the value the broadcasters provide by streaming the works publicly, especially with improving technology and changing music consumption habits.<sup>86</sup>

*B. Between a Rock (and Roll) and a Hard Place: Finding a “Happy” Medium*

Both the IRFA and the FMRA contain possible solutions to the inequalities within the sound recording industry, but the competing bills each favor one side at the expense of the other. The IRFA seeks to promote the webcasters as a business by lowering royalty liabilities and shifting the burden to the sound recording owner to establish proof of worth.<sup>87</sup> As a result, the IRFA requires the sound recording owners to produce an objective monetary value using a subjective test.<sup>88</sup> On the other end of the spectrum, the FMRA seeks to abrogate the entire industry of broadcasting services by expanding the public performance copyright of sound recordings as well as eliminating the compulsory license within the statute.<sup>89</sup> This would produce higher royalty rates than those already in effect, and force many broadcasting services into bankruptcy.<sup>90</sup> Because of the extreme consequences posed by both bills, it is probable Congress will refuse to enact either of them.

For better or worse, the CRB is likely to remain the neutral third party in calculating appropriate royalties because it weighs both sides of the spectrum when determining a fair rate.<sup>91</sup> Even with the subjective goals followed by the CRB, the upcoming royalty decision will be neither quick nor easy. On the webcasters’ side, there is tremendous competition to stay in business and profit, especially now with iTunes Radio entering the market.<sup>92</sup> On the sound recording side, concern remains

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<sup>85</sup> See *id.* (suggesting that preventing noninteractive services from utilizing the statute would treat them the same as interactive services, giving the sound recording owner more control in negotiating rates).

<sup>86</sup> See *Pandora Reports Record 4Q13 Fiscal Year 2013 Financial Results*, PANDORA (Mar. 7, 2013) [hereinafter *Pandora Reports Record 2013*], [http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle\\_print&ID=1793815&highlight=](http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle_print&ID=1793815&highlight=) (presenting financial results from the final quarter of the fiscal year 2013, which reflect the most growth in the mobile revenues, which 105% from the previous year to hit \$255.9 million, as well as in mobile listener hours, which grew 89% from the previous year).

<sup>87</sup> H.R. 3609, 112th Cong., at 3–4 (2012).

<sup>88</sup> Compare *id.*, with 17 U.S.C. § 801 (2012). A major obstacle would be to attempt to calculate what new artist sound recordings are worth when there is nothing to compare to the past work they have done, and to compare a new artist and song with a current one would result in an equally unfair royalty rate. H.R. 3609, 112th Cong., at 3–4 (2012).

<sup>89</sup> H.R. 3219, 113th Cong., at 2, 13.

<sup>90</sup> See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 161 (2d Cir. 2009) (abolishing the CRB’s duties completely by expanding the public performance right, and holding that requiring direct licenses for noninteractive webcasts goes against Congress’ intentions for § 114 of the Copyright Act).

<sup>91</sup> See *Live365 v. Copyright Royalty Bd.*, 698 F.Supp.2d 25, 47 (D.C. Cir. 2010) (denying the webcaster’s injunction against the CRB’s rate determinations, and concluding that the injury to copyright owners would be greater if the injunction was granted because the entire music industry would be disrupted).

<sup>92</sup> Resnikoff, *Modest Impact*, *supra* note 42.

for the livelihoods of artists and record labels to reap benefits for allowing public performances of their work.<sup>93</sup> It is too early to tell the effect iTunes Radio will have on the existence of the current Internet radio powerhouse, Pandora. With its current position as a noninteractive webcaster that directly licenses with the sound recording owner, iTunes Radio sits in a good position to remain unaffected by the impending royalty determination.<sup>94</sup>

The CRB is responsible for calculating a fair market rate for both sides, while also balancing the needs of the webcasters and copyright owners in producing fair compensation for the public performances of sound recordings.<sup>95</sup> Based on the most recent royalty determination, and the dramatic shift in consumer behavior since the determination, the CRB again faces the herculean task of predicting a fair rate for the ensuing five years.<sup>96</sup> There is no question that technology has exponentially advanced the listening experience, transforming how the public accesses music.<sup>97</sup> Since the latest royalty determination, smartphones have become even more popular, providing mobile platforms to all listeners.<sup>98</sup>

The CRB's upcoming decision is likely to have a large impact on all the parties involved, including the listeners. A feasible solution exists between the extreme perspectives of the IRFA and the FMRA, and a middle ground could alleviate the adverse effects to all parties and create parity within the music industry.<sup>99</sup>

#### IV. PROPOSAL

With two antithetical bills proposing goals that their respective drafters deem fair, the only rational response is to compromise. There is a middle ground between the IRFA and the FMRA, and the subsequent molding and shaping of the two bills is an attempt at reaching equilibrium within the long and drawn out dispute. By consolidating the main goals of each piece of proposed legislation, an agreement between the sound recording owners and the webcasters remains possible.

##### A. "Come Together Right Now . . ."

The IRFA's main goals include producing a uniform standard for rate calculations across all digital platforms, shifting the burden to the sound recording owner to provide a competitive rate, and requiring the CRB to fully scrutinize the

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<sup>93</sup> *Bonneville Int'l. Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003).

<sup>94</sup> See *Digital Sales Agreement*, *supra* note 43, § 3(a) (stipulating that by setting forth direct licensing terms as a noninteractive service, iTunes would be unaffected by similarly proposed legislation to the FMRA).

<sup>95</sup> 17 U.S.C. § 801(b) (2012).

<sup>96</sup> *Pandora Reports Record 2013*, *supra* note 86 (suggesting that with the gains Pandora has had in the mobile revenues and listening hours within 2013, technology is evidently leaving the law in the dust).

<sup>97</sup> *Id.*

<sup>98</sup> *Gartner Smartphone Sales Growth*, *supra* note 65.

<sup>99</sup> Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 324–25 (2013) (describing concerns Congress has in promulgating new legislation, and stressing the need to balance the copyright owners' needs with those of the businesses streaming the sound recordings).

promotional benefit offered by the webcasting services.<sup>100</sup> The FMRA's main goals are to eliminate the compulsory license provided by the Copyright Act and expand the sound recording's public performance right across all audio broadcasts, instead of merely digital transmissions.<sup>101</sup> Drawing from the principal objectives of each bill, each provide a useful foundation in developing potential solutions to give both webcasters and sound recording owners what they seek to obtain: equality.

The webcasters seek parity among royalty rates across digital transmissions, while sound recording owners want equal performance rights currently enjoyed by musical compositions.<sup>102</sup> The natural solution is not to eliminate the compulsory license suggested by the FMRA but to keep it in place. The replacement of the statutory rate with direct licensing would not only be impractical, but would further raise rates charged by sound recording owners, thus perpetuating the current fees that the webcasters seek to decrease. Notwithstanding that the compulsory rate would need to be altered by the CRB, a new uniform rate would then apply to all public performances. The common agent, SoundExchange, would still collect the royalties and distribute the compensation among the record labels and recording artists, and licensing would remain compulsory and defined by the neutral third party CRB.

By keeping the compulsory rate, webcasters and other services can still broadcast sound recordings while fully and fairly compensating the copyright owners with every transmission within the performance expansion.<sup>103</sup> This would stabilize the market for all broadcasters by requiring all sound recording transmissions be subject to a uniform statutory rate, even though traditional over-the-air radio broadcasters would undeniably object to suddenly having a royalty obligation.<sup>104</sup>

The argument the terrestrial radio broadcasters would make is the same argument the webcasters currently make when advocating for lower royalty rates: the public performances benefit copyright owner by promoting the sound recording.<sup>105</sup> While sound recording owners benefit when their works are performed and advertised to the listening public, there should also be some accountability on the broadcasters' part to compensate the owners for performing the works. Simply because the transmission is not digital should not exempt just compensation to the owners.

Instead of demanding royalty disbursements on a per-performance basis, the transmissions would instead be based on percentage-of-revenue basis, much like what the IRFA proposes.<sup>106</sup> This would provide a set number for each fiscal quarter that the broadcaster would allocate to the sound recording owners, which would be less dependent on public listening hours until the final numbers are calculated. For instance, if fifteen percent of all broadcasters' revenues were designated to sound

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<sup>100</sup> Marshall, *supra* note 40, at 464–65.

<sup>101</sup> H.R. 3219, 113th Cong., at 2, 13 (2013).

<sup>102</sup> Marshall, *supra* note 40, at 463.

<sup>103</sup> See Pallante, *supra* note 99, at 334–35 (explaining that in balancing the interests of the sound recording owners and the webcasters, Congress should not isolate either side in amending the Copyright Act, but must look to the industry as a whole).

<sup>104</sup> *Bonneville Int'l. Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003).

<sup>105</sup> Marshall, *supra* note 40, at 465.

<sup>106</sup> H.R. 3609, 112th Cong., at 8.



recording owners, then no matter how many hours of music are broadcast, the percentage-of-revenue would remain the same.

Revenue-based royalty rates provides services broadcasting the sound recordings a cap in their royalty obligations. Furthermore, with the uniform royalty rate lowering costs for webcasters, the sound recording owners would still receive comparable, if not more, compensation from the public performance expansion, thus creating equilibrium between the two parties.<sup>107</sup>

Merging the main goals of the IRFA and the FMRA brings to the table the compromise of the equality and fairness principles both parties seek. The CRB needs only to determine the percentage royalty rate.

The current CRB objectives for calculating fair statutory rates would still apply to the revenue percentage determination.<sup>108</sup> Moreover, the Board's current task of defining fair royalty rates five years in advance without being privy to changes in the music consumption would become much more manageable with a fixed revenue percentage.<sup>109</sup>

### B. "You Can Go Your Own Way . . ."

With the new royalty proceedings quickly approaching, if webcasters and sound recording owners cannot agree to a mutually beneficial compromise between the IRFA and FMRA, the royalty rates are likely to increase.<sup>110</sup> If they do, the noninteractive webcasters may have no other choice but to shift some of the royalty burden to the listening public.

However, if the trend of streaming instead of purchasing continues through the next royalty determination, royalties will reflect that and follow suit.<sup>111</sup> In order to better balance the needs of the industries involved, the CRB would be wise to strike the per-performance rate and implement a percentage-based royalty within the compulsory license so the sound recordings can remain in the public and enjoyed at no cost to the listener.

## V. CONCLUSION

Even though there is still time to come to the plausible agreement laid out above, uncertainty remains on both sides of the dispute as to the future of their respective industries. Accompanying the shift in music consumption is the hope that

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<sup>107</sup> Marshall, *supra* note 40, at 465.

<sup>108</sup> 17 U.S.C. §801. By adhering to the same objectives, the CRJs would be able to fairly recognize the contribution the sound recording provides to the public due to the performance right expansion. *Id.*

<sup>109</sup> Pandora Reports Record 2013, *supra* note 86. Even with the trend of technology advancing more rapidly than any CRB determinations, a fair rate becomes more feasible with a percentage rate because Internet radio is more accessible. *Id.*

<sup>110</sup> Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule, 76 FED. REG. 13,026, 13,051 (Mar. 9, 2011) (to be codified at 37 C.F.R. pt. 380).

<sup>111</sup> See PARKS, *supra* note 1, at 219–20 (explaining that the last ten years have resulted in dramatic growth of digital royalties because of the "paradigm shift" of music enjoyment).

the experience remains complimentary to the listeners. But even though the experience has shifted, there may inevitably be some financial accountability placed on the listener if an agreement is not reached between the parties.<sup>112</sup>

Listeners continue to purchase physical formats of music, and with the advances in digital technology, there is an overwhelming number of choices between downloading and streaming services.<sup>113</sup> If royalty rates increase because the parties do not reach an agreement, webcasters may attempt to transfer a portion of their liability to the listener by charging for the service. While no listener wants to pay for what was once free, the burden would likely be slight as the listening experience shifts towards streaming.<sup>114</sup>

The significant consideration within the royalty dispute is that without the listener, neither industry would survive. Listeners are the ultimate regulators within the music industry, and where they go, the experience will follow. No matter the royalty rates, the listening experience should govern fair compensation for the universally accessible sound recordings.

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<sup>112</sup> *Id.* at 220.

<sup>113</sup> See *Digital World Engine*, *supra* note 50, at 7, 9 (noting that downloads account for 70% of global digital revenues and that subscription services saw a 44% increase from 2011 to 2012 for paying subscribers).

<sup>114</sup> Marshall, *supra* note 40, at 465.