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DID COPYRIGHT KILL THE RADIO STAR? WHY THE RECORDED MUSIC INDUSTRY AND COPYRIGHT ACT SHOULD WELCOME WEBCASTERS INTO THE FOLD

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ABSTRACT

The Copyright Act has not kept pace with the times, and the next revolution is going full stream ahead. Rather than adapt, entrenched interests at the Copyright table push for more protection, while new technologies are demonized and underrepresented. The resulting Copyright Act's provisions relating to internet-based radio, ranging from passive over-the-air broadcasts to fully interactive music hosting sites, are a patchwork of accommodations and concessions to these interests. For all non-interactive services, licensing music typically occurs within the Copyright Act's compulsory licensing system. For interactive webcasters, licensing negotiations take place with the copyright holders directly. These negotiations have proven disastrous for all but the biggest of interactive broadcasters, and neither Pandora nor Spotify has posted a profitable quarter to date. The February 2014 In re Pandora Media decision in the Southern District of New York illustrates the lack of a free market for recorded music. The unique market for recorded music, the antiquated regulatory framework and the sheer volume of copyrighted works suggests that no satisfactory alternative to licensing through copyright exist. The article proposes that with legislative changes meant to withstand time and technological revolutions, the Copyright Act can once again harmonize with its original, explicit goals.

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I. INTRODUCTION

Technology and copyright law continue to do battle; the battlefield itself continues to change. The acceleration of advances in music delivery business models and in the accompanying technology has far outpaced the copyright structure's ability to adapt.[1] The music industry struggles to mount effective defenses to this perceived technological threat.[2] Since the inception of recordable media, copyright law and practice has accommodated each new advance in technology with incremental legislative and judicial action, resulting in a fractured regulatory structure and inconsistent common law.[3] The resulting Copyright Act is the dense product of lobbyist effort on behalf of powerful interest groups.[4] The product of all this effort is a Copyright Act unable to effectively regulate and enforce rights in the modern music industry.[5]

Fast-forward to 2014, and technology is yet again changing how the public consumes music.[6] The public demands to hear more music, they want it when they

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[1] *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 156 (2nd Cir. 2009)(quoting a letter from the Copyright Office acknowledging "rapidly changing business models emerging in today's digital marketplace….").

[2] *See* Mary Madden, *The State of Music Online: Ten Years After Napster*, PEW INTERNET & AM. LIFE PROJECT (June 15, 2009), http://www.pewinternet.org/2009/06/15/the-state-of-music-online-ten-years-after-napster/#fn-534-33 (detailing the recorded music industry's mostly unsuccessful efforts to enforce their copyrights in the wake of Napster).

[3] *E.g.*, Audio Home Recording Act ("AHRA")(1995)(codified as amended in 17 U.S.C. §§ 1001-1010)(creating a statutorily imposed tax in exchange for the ability to sell machines that allow recording of music enacted in response to cheap, widely available recordable Betamax videocassette tapes); Digital Performance Right in Sound Recordings Act, *Pub L. No. 104-39, 109 Stat. 336* (1995)(codified in scattered sections of 17 U.S.C.)(creating a limited performance right in digital audio transmissions for sound recording copyright holders enacted in response to the advent of online storage and broadcast of music); Digital Millennium Copyright Act ("DMCA"), *Pub. L. No. 105-304, 112 Stat. 2860* (1998)(codified as amended in scattered sections of 17 U.S.C.)(creating statutory requirements prohibiting "circumvention" measures in response to online piracy enacted in the wake of peer-to-peer sharing).

[4] Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 5 (2010).

[5] *Id.* at 3 (observing that the solutions that came about in each of these changes are now obsolete or irrelevant).

[6] Seth Ericsson, *The Recorded Music Industry and the Emergence of Online Music Distribution: Innovation in the Absence of Copyright (Reform)*, 79 GEO. WASH. L. REV. 1783, 1784 (2011)("The widespread and ever-growing practice of online music distribution has forever changed the way

ask for it, and they want to hear it for free.[7] Internet radio "webcasters" fill this demand.[8] The varied new media[9] business models in play today range from simple digital radio broadcasts to on-demand streaming in which the user exercises full control over the music that plays.[10] Pandora, Spotify, and other webcasters transmit music over high-speed wireless networks to millions of computers, cell phones, car radios, and other devices around the globe every day.[11] As a result of this high level of availability, the question the public is asking is no longer, "Why would I buy this music when I can download it for free?" but rather "Why would I illegally download this song when I can listen to it for free on-demand?"[12]

Webcasting provides a valuable service to the music industry: by "offering what the pirates offer," webcasters cannibalize illegal peer-to-peer downloads.[13] Additionally, webcasters benefit the public by contributing to a "vibrant cultural community" in the digital music marketplace by providing exposure and access to artists and genres through on-demand selections that traditional radio stations do not play.[14] Using on-demand and customizable radio stations, webcasters provide benefits

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collect, consume, and experience music."); *See also*, Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT L.J. 343, 344 (2004).

[7] SPOTIFY, www.spotify.com/us, (last visited Apr. 19, 2014)(highlighting Spotify's selling points to the listening public, including free on-demand at home streaming and advertising premium subscription service).

[8] *Digital Definitions*, HARRY FOX AGENCY, https://www.harryfox.com/public/DigitalDefinitions.jsp#71 (last visited Apr. 27, 2014)("Webcasting generally refers to online streaming, either live or on-demand, of an audio or video source to various simultaneous users").

[9] *In Re* Pandora Media, LLC, 2014 U.S. Dist. LEXIS 36914, *1, *2 n.1 (S.D.N.Y. 2014)("'New media' refers generally to internet transmissions.").

[10] 17 U.S.C § 114(j)(7)(2011)(An "interactive service" is 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 it is part of a program, which is selected by or on behalf of the recipient.); *See also*, *Arista Records,* 578 F.3d at 150 (stating that webcasters that provide free services that do not provide particular sound recordings on-demand are non-interactive); *In re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *26 (characterizing Pandora as a "customizable radio service," however, non-interactive according to the statute).

[11] *See Listener Stats: Pandora Blinks*, INVESTOR NEWS (Mar. 6, 2014, 7:04 PM), http://news.investors.com/030614-692425-stats-pandora-blinks.htm (noting that Pandora's listener hours during the month of February rose from 1.38 billion in 2013 to 1.51 billion in February 2014); SPOTIFY, http://press.spotify.com/us/information/ (last visited Apr. 12, 2014)(indicating that Spotify has over 24 million active users); PANDORA, http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1915496&highlight= (last visited Apr. 12, 2014)(indicating that Pandora listenership as of the end of March 2014 was 75.3 million).

[12] *Music File Sharing Declines Significantly in 2012,* THE NPD GROUP, INC., https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/ (last visited Apr. 11, 2014)(noting that peer-to-peer music sharing declined 17% in 2012 compared to 2011, illegal downloads declined 26% in the same period, and asserting that "the primary reason for this reduction in sharing activity is an increased use of free, legal music streaming services.").

[13] Statement of Marybeth Peters, Register of Copyrights, before the Subcomm. on Courts, the Internet, and Intellectual Prop. (2005), UNITED STATES COPYRIGHT OFFICE http://www.copyright.gov/docs/regstat062105.html#N_1_ (asserting that "in order to compete with the pirates, we must offer what they offer").

[14] Shane Wagman, *I Want My MP3: Legal And Policy Barriers To A Legitimate Digital Marketplace*, 17 J. INTELL. PROP. L. 95, 98 (2009)(stating "The Copyright Act's purpose is to encourage

to artists that may not have been realized otherwise.[15] Finally, most importantly to the industry, and in contrast to both traditional terrestrial broadcast radio and peer-to-peer file-sharing services, webcasters pay licensing and royalties fees to all copyright holders.[16]

The recording industry has been slow to recognize the benefits internet radio webcasters provide, partly because the industry as a whole has been reluctant to accept that a revolution in listenership has taken place.[17] According to sales data from the last fifteen years, the public has no intention of returning to the physical-medium model of music delivery.[18] It is natural that the parties who primarily benefitted from now-obsolete musical media and delivery systems would resist such change.[19] Against this backdrop, the current licensing and regulatory framework threatens webcasters' very existence.[20] Webcasters and emerging technologies intending to enter the

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a vibrant, accessible public culture," as well as incentivize artists to create, and reward them for their work).

[15] Steve Bertoni, *Why Musicians Must Embrace Spotify and Pandora*, FORBES.COM (Jan. 17, 2014 7:09 PM), http://www.forbes.com/sites/stevenbertoni/2014/01/17/why-musicians-must-embrace-spotify-and-pandora/ (noting that "while most artists can't depend on music streaming for cash flow…they must rely on Spotify and others for something even more vital – exposure. Also explaining that traditional radio is 'monotonous and conservative' and plays 'less variety than ever'").

[16] *See generally,* SPOTIFY ARTISTS, How is Spotify Contributing to the Music Business? https://www.spotifyartists.com/spotify-explained/ (last visited Apr. 12, 2014); Glenn Peoples, *Business Matters: The Truth About Pandora's Payments to Artists*, BILLBOARD BIZ (Oct. 10, 2012 3:05 PM), http://www.billboard.com/biz/articles/news/1083455/business-matters-the-truth-about-pandoras-payments-to-artists.

[17] *See* Ericsson, *supra* note 6, at 1786 (arguing that although technological advances in online music distribution has clearly affected the recorded music industry, the industry was still operating according to a relatively traditional business model, which centers on the mass production and distribution of physical goods).

[18] 2013 Mid-Year Music Industry Report, NIELSON SOUNDSCAN, http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2013%20Reports/Nielsen-Music-2013-Mid-Year-US-Release.pdf (last visited Apr. 12, 2014) (reporting a 14.2% decline in album sales in the first six months of 2014 compared to the same period in 2013, and a 24% increase in the number of music streams over the same period**);** *see also* Jake Brown, *Music Sales Over the Years: 2013 Year-End Soundscan Data*, GLORIOUS NOISE (Jan. 6, 2014), http://gloriousnoise.com/2014/music-sales-over-the-years-2013-year-end-soundscan-data (compiling data from Nielson to produce report showing that CD sales peaked in 2000 with 730 million units sold, and that sales rapidly decline in the subsequent years. In 2013, only 165.4 million units were sold); Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J., 63, 65 (2011)[hereinafter "New Business Models"]("It is clear that the old order has been swept away....Compact Discs are dead as a distribution medium.").

[19] *See* Ericsson, *supra* note 6, at 1797 (indicating that the image of the recorded music industry after the *Napster* lawsuits was that of "a corporate machine seeking desperately to cling to an outdated and inefficient business model by any means possible, including by terrorizing its own customers").

[20] *See, e.g.*, Alex Pham, *Last.fm Pulls Out of Radio Streaming, Plugs Into YouTube*, BILLBOARD BIZ (Mar. 26, 2014 7:00 PM), http://www.billboard.com/biz/articles/news/digital-and-mobile/6022007/lastfm-pulls-out-of-radio-streaming-plugs-in-youtube (noting that Last.fm is shutting down its streaming service in Apr. 2014, also reporting that Last.fm struck deals with YouTube and Spotify to plug into their services and continue to stream music without paying licensing fees); *See also*, Ben Sisario, *Pandora and Spotify Rake in the Money and Then Send it Off in Royalties*, Media Decoder, NEW YORK TIMES (Aug. 24, 2012, 6:07 PM), http://mediadecoder.blogs.nytimes.com/2012/08/24/pandora-and-spotify-rake-in-the-money-and-then-send-it-off-in-royalties/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1 (reporting that Pandora lost $20 million on $81 million in revenue in the most recently reported quarter, and Spotify reported a loss of $57 million and revenues of $236 million in 2011).

marketplace face a complicated and expensive licensing scheme, potential litigation, and legislative agenda that do not include webcasters' interests.[21]

Musicians and copyright holders deserve payment for their creative works, and the public deserves access to those works.[22] Eliminating legislative obstacles to innovations in musical dissemination and instituting a more equitable licensing structure will better serve these twin objectives of copyright law. Although flawed, the copyright licensing structure remains the most effective way to regulate and enforce those intellectual property rights. This comment proposes that with reforms meant to withstand change, and an effort to normalize and streamline licensing, copyright can serve these purposes in the modern day, as well as be ready for the next revolution.

Part I will provide background into the complicated and divided world of copyright enforcement in the technological age, focusing on online music delivery and digital performance. Part I also provides an overview of the statutory framework of music licensing and copyright royalties in the digital age. Part II explores the Copyright Act's fractured and inconsistent application in the digital age. Special interest groups successfully lobbied for change in the Act, influencing major revisions of the Act. Part II uses the recent *In Re Pandora* rate decision to illustrate the failure of the "willing buyer/willing seller" model for setting copyright royalty rates. Finally, Part II explores alternatives to statutory copyright licensing, and discusses the viability of each theory. Part III suggests that copyright is the best way to regulate and enforce new media models, and proposes a streamlined regulatory framework that allows for efficient licensing of music both over traditional and digital broadcasts. By instituting compulsory licensing for interactive webcasters as well as eliminating the exemption for terrestrial broadcasts, the recording industry and webcasters can thrive in the current landscape. No alternative to copyright in existence today protects copyrights with a comprehensive system of regulations suitable to replace or substitute for Copyright. Rather than bending to entrenched interests, the Copyright Act must be rethought to be flexible and accommodating to new technologies. Part IV concludes that the framework of the Copyright Act should embrace current technologies, allow room for technological growth by being flexible enough to handle new technologies as they emerge.

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[21] Cydney A. Tune and Christopher R. Lockard, *Navigating the Tangled Web of Webcasting Royalties*, 27 ENT. & SPORTS LAW 20, 20 (2009)(asserting that "[w]eb sites who wish to perform music within the confines of copyright law… have encountered a confusing, impractical, and intimidating maze of laws and regulations governing music copyrights.").

[22] Mazer v. Stein, 347 U.S. 201, 219 (1954)

> The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and Useful Arts.' Sacrificial days devoted to such creative efforts deserve rewards commensurate with the services rendered.

Id. at 219.

II. BACKGROUND

Copyright's royalty scheme is ill-equipped to handle these new advances in music delivery, and neither the recorded music industry nor the copyright regime has adapted to the changes in the consumptive paradigm.[23] Since at least 1999, the recorded music industry has been fighting an uphill battle against various permutations of online music delivery.[24]

A. Copyrights in Musical Works and Sound Recordings

The Constitution empowers Congress to "promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[25] Pursuant to this constitutional mandate, Congress enacted the Copyright Act.[26] Congress intended to "secure the benefits derived by the public from the labors of authors" by offering limited monopolies in the form of copyrights.[27] Copyright protection arises as an operation of law when the "expression is fixed in a tangible medium."[28] The Copyright Act grants copyright holders protection in the form of a bundle of rights; including the right of reproduction,[29] of distribution,[30] of public performance,[31] and specifically in the case of sound recordings, the right of public performance by means of digital audio transmission.[32] Thus, the Copyright creates causes of action against "anyone who...trespasses into [the copyright holder's] exclusive domain by using or authorizing the use of the copyrighted work without permissions, is an infringer of copyright."[33]

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[23] *See also* Wagman, *supra* note 14, at 97 (arguing that "the tensions between copyright law and current consumptive trends are hampering the effort to build new business models that compensate artists, meet consumer need, and create an economically sustainable cultural community"); Ericsson, *supra* note 6, at 97 (acknowledging the existence of "a technology-induced rift" between the copyright regime and copyright's constitutionally prescribed purpose of "promoting the Science and Useful Arts").

[24] *See* Madden, *supra* note 2 (Stating that the RIAA filed more than 35,000 lawsuits against individual infringers in the wake of Napster, but ultimately abandoned that strategy as largely ineffective to stop music piracy); A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001)(holding that Napster is liable for vicarious and contributory infringement for the illegal file sharing of Napster users); *See also*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005).

[25] U.S. CONST. art. 1, § 8, cl. 8.

[26] 17 U.S.C. § 101 *et seq*. (2011).

[27] *See also* Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)("The monopoly privileges that Congress may authorize….[are] the means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the creation of a special reward."); In *Sony*, the court noted that "the sole interest of the United States and the primary object in conferring the monopoly...lie[s] in the general benefit[] derived by the public from the labors of authors." *Id.* at 432.

[28] 17 U.S.C § 102(a)(2011).

[29] *Id.* § 106(1).

[30] *Id.* § 106(3).

[31] *Id.* § 106(4).

[32] *Id.* § 106(6). The right to prepare derivative works and the right to publicly display works are not implicated by this discussion. *Id.* § 106(2); § 106(5).

[33] *Sony Corp.*, 464 U.S. at 433; *see also* 17 U.S.C. § 501.

Copyright protection adheres to a musical composition when it is fixed in any medium, such as musical notes on a page of sheet music or lyrics on a napkin.[34] In 1971, with the invention of the recordable cassette tape, Congress declared that the sound recordings themselves constituted copyrightable material.[35] As a result of this legislation, today there are two protected works embodied in every recorded song, one in the underlying "musical work" and another in the sound recording itself.[36] Congress further protected sound recordings by defining internet broadcasts as "performances" under the Copyright Act, and enacting the digital performance right for sound recordings in 1995.[37]

Music delivery platforms implicate the exclusive rights of copyright holders in various ways, meaning the requirements of each entity can be vastly different.[38] Broadcasting a work on the radio implicates the exclusive right to public performance of both the musical work and the sound recording copyright holder.[39] Terrestrial radio broadcasts currently enjoy an exemption from paying royalties to the sound recording copyright holder.[40] However, playing to an internet-based audience implicates the exclusive right to reproduction and to public performance by digital audio transmission in both the musical work and the sound recording.[41] A digital audio transmission invokes two rights of two copyright holders are invoked in a digital audio transmission, and transmitters must obtain licenses for all four uses.[42]

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[34] *Id.* ("Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."); 17 U.S.C. § 101 (2011)(A work is "created" when it is fixed in a copy or phonorecords for the first time).

[35] Copyright protection in sound recordings were first recognized in the Sound Recording Amendment of 1971 ("SRA"), *85 Stat. 391* (1971).

[36] Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 487 (3rd Cir. 2003)(noting that the owner of a copyright of a sound recording has little copyright protection, and before 1971 had no protection at all).

[37] Digital Performance Right in Sound Recordings Act, *Pub L. No. 104-39, 109 Stat. 336* (1995)(codified in scattered sections of 17 U.S.C.); *see also* Ericsson *supra* note 6.

[38] *See* Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, UNITED STATES COPYRIGHT OFFICE, http://www.copyright.gov/carp/webcasting_rates_final.html (last visited Jun. 28, 2014)(showing the rate determinations in a chart separated by the classification of the music delivery service).

[39] 17 U.S.C. § 101 (2011)(defining "performance" as reciting or playing any musical work, either directly or by means of any device, and defining "public performance" as any transmission of a performance to the public, by means of any device or process, whether members of the public capable of receiving the performance receive it in the same place or in separate place and at the same time or at different times).

[40] 17 U.S.C. § 114(d)(1)(A)(2011)(Exempting non-subscription broadcast transmission from the licensing process); *See Bonneville*, 347 F.3d 485 at 500. (holding that although terrestrial broadcasts are exempt from licensure, simultaneous internet broadcasts of the same broadcasts are not exempt from paying royalties).

[41] 17 U.S.C. § 101 (2011)(Defines "digital transmission" as a transmission in whole or in part in a digital or other non-analog format).

[42] *See* Wagman, *supra* note 14, at 100 (explaining that a musical composition requires a public performance license for both terrestrial and digital broadcast, in addition, it requires a mechanical license for physical and digital reproduction and distribution. A sound recording requires a public performance license only for digital broadcast and a master use license for physical and digital distribution and reproduction); *See* Tune, *supra* note 21, at 20-21 (providing an overview of the rights implicated and the licenses needed).

B. Licensing Music under the Copyright Act in the Digital Age

Typically, the author of the musical work assigns the copyright to a music publisher.[43] The sound recording performance artist assigns to the record company the copyright in the sound recording.[44]

The largest music publisher is The Harry Fox Agency ("HFA").[45] HFA licenses the musical works for reproduction and distribution, collects licensing fees and royalties, and distributes the proceeds to the appropriate parties.[46] To compensate the composer of the underlying musical work for the right to reproduce or distribute the work, potential licensees contact HFA, or the publisher holding the copyright.[47] For the purposes of this discussion, the "mechanical licenses" administered by HFA are limited to the "ephemeral recordings" made on a computer in the process of streaming a song digitally.[48]

Additionally, to compensate copyright holders for the right to publicly perform the work, potential licensees contact a performance rights organization ("PRO"). Three major PROs manage licensing and fee collection for over 90% of commercially available music: ASCAP,[49] BMI,[50] and SESAC.[51] Section 115 of the Copyright Act regulates the issuance of licenses to perform musical works and sound recordings.[52] Each of the PROs manages the royalty collection for several major labels, and they issue blanket licenses for their entire catalogs.[53] The licenses are compulsory, meaning that all correctly made requests for licenses must be granted.[54] The licensee is then able to perform the work publicly without infringing on the copyright of the underlying musical work. Because terrestrial radio, internet radio, non-interactive and fully

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[43] The Author assigns rights to reproduction and distribution to a mechanical licensing entity, and performance rights to a performance rights organization ("PRO"), *see* Lydia Pallas Loren, *Copyright in the Digital Age: Reflections on Tasini and Beyond: Untangling the Web of Music Copyrights,* 53 CASE W. RES. 673, 681-682 (2003)(detailing the history of mechanical licensing, and the role that mechanical licensing plays in modern music copyright).

[44] Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as we Figure Out the Copyright Law: The Story of the Music Industry at War with Itself,* 24 HASTINGS COMM. & ENT. L.J. 1, 5–6 (2001)(describing how copyrights arise and how the copyrights in sound recordings end up belonging to the record company).

[45] THE HARRY FOX AGENCY, INC., https://www.harryfox.com/public/LicenseMusiclic.jsp (last visited Apr. 19, 2014).

[46] *Id.* ("HFA was established as an agency to license, collect and distribute royalties on behalf of musical copyright owners").

[47] THE HARRY FOX AGENCY, INC., https://www.harryfox.com/public/LicenseMusiclic.jsp (last visited Apr. 12, 2014).

[48] 17 U.S.C. § 112 (2011) Limitations on Exclusive Rights: Ephemeral Copies.

[49] AMERICAN SOCIETY OF SONGWRITERS, COMPOSERS AND PUBLISHERS, http://www.ascap.com/ (last visited Apr. 11, 2014).

[50] BROADCAST MUSIC, INC., http://www.bmi.com (last visited Apr. 11, 2014).

[51] SOCIETY OF EUROPEAN STAGE AUTHORS AND COMPOSERS, http://www.sesac.com (last visited Apr. 11, 2014).

[52] 17 U.S.C. § 115 (2011).

[53] *In Re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *10-11 (discussing how ASCAP operates in accordance with a Department of Justice Consent Decree in order to avoid antitrust issues).

[54] 17 U.S.C. § 115 (2011)(a) Compulsory licenses are subject to (b) the filing of a notice of intent to obtain a compulsory license, and the (c) royalty payable under the compulsory license. *Id.* §115(a)-(c).

interactive webcasting implicate the public performance right, all forms of broadcast pay royalties to the PRO for the license to play the music.[55]

Section 114 of the Copyright Act governs licensing sound recordings for performance.[56] Terrestrial radio stations have long been exempted from paying the sound recording copyright holder under this section of the statute.[57] As a result of the exclusive public performance right by digital audio transmission granted to sound recording copyright holders, all internet broadcasts require a digital performance license and pay royalties to the copyright holders of the sound recording as well as the copyright holder to the underlying musical work.[58]

To be eligible for the Section 114 statutory license, the Copyright Act requires that the service be "non-interactive"; interactive services are not able to obtain the compulsory license.[59] Thus, Spotify and other services classified as interactive under the statutory definition must negotiate directly with the sound recording copyright holders in order to license public performances of the copyrighted work via digital transmission.[60] Finally, SoundExchange, a separate, distinct PRO manages the digital performance rights for sound recording copyright holders.[61]

C. Copyright's Royalty Framework

Webcasters and broadcasters pay for the licenses to use music in the manners described above. The Copyright Act created the Copyright Royalty Board ("CRB") to set the royalty rates for these licenses.[62] The CRB is comprised of three Copyright Royalty Judges, appointed by the Librarian of Congress.[63] Copyright royalty rates are set once every five years for the next five-year period.[64] In addition, the CRB arbitrates rate disputes between parties.[65] Licensees pay rates set by the CRB using either the "801(b)" standard or the free market using the "willing buyer/willing seller" standard.[66]

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[55] *Id.*

[56] 17 U.S.C. § 114 (2011).

[57] *Id.* § 114(d)(1)(A); the reasoning and justification for this exemption will be discussed *infra* Section III.

[58] *Id.*

[59] *See* 17 U.S.C. § 114(j)(7)(2011). Definition of "interactive," *supra* note 8; *see also* Tune, *supra* note 21, at 21 (explaining that a compulsory license [under § 114] cannot be obtained for interactive services, such as on-demand performances, downloads, and podcasts).

[60] *In re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *38-39 (explaining that the distinction between interactive and non-interactive services is meaningful because "non-interactive services are eligible for a compulsory or statutory licensing fee…whereas interactive services must independently negotiate rates for sound recording licenses").

[61] *See generally*, SOUNDEXCHANGE, www.soundexchange.com/about (last visited Apr. 12, 2014)(displaying a diagram showing how SoundExchange manages digital performance rights).

[62] 17 U.S.C. § 801 (2011).

[63] *Id.* § 801(a).

[64] *Id.* § 114(f)(1)(setting procedure for setting five year rate schedules for services based on statutory classification).

[65] *Id.* § 114(f).

[66] 17 U.S.C. § 801(b); § 114(f)(2)(B); *see also* Intercollegiate Broadcast System, Inc. v. Copyright Royalty Bd., 574 F.3d 748, 756-757 (D.C. Cir. 2009)(discussing the justifications for applying the "willing buyer/willing seller" standard in the context of digital transmissions of college sporting events).

Given the complexities of the statutory licensing scheme, there have been many legislative proposals to amend the Copyright Act.[67] Most recently, Pandora joined with other webcasters who felt they paid unreasonably high royalties, and lobbied for passage of the Internet Radio Fairness Act.[68] This met with much resistance, however, and the bill ultimately failed in Congress.[69] Aside from the public and the creators, the structure of the Copyright Act itself and the music industry add layers of interests needing protection.[70] Without reform, innovation will be curbed, the public interest will suffer, and the Copyright Act's original intention and constitutional mandate will be frustrated.[71]

III. ANALYSIS

Copyright protection for creative works aims to stimulate artistic creativity for the general public good.[72] Copyright policy demands that recent technological advances in music streaming technology be construed in light of promoting this essential purpose.[73] The tension between the recorded music industry and these new media models stems from the tension between copyright protection and copyright policy.[74] The record industry would have the public believe that online music distribution cannibalizes record sales, driving demand for music down, and will ultimately lead to the demise of the music industry itself.[75] However, new media and

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[67] Copyright Legislation, Legislative Developments, 113th Congress, UNITED STATES COPYRIGHT OFFICE, http://www.copyright.gov/legislation/ (last visited Apr. 12, 2014)(listing currently pending legislation); *compare, e.g.,* The Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. (2012), *with* The Songwriter Equity Act of 2014, S. 2321, 113th Cong. (2014).

[68] *See supra* note 67.

[69] Glenn Peoples, *Pandora Stops Internet Radio Fairness Act Legislation Efforts, To Focus on CRB*, BILLBOARD BIZ (Nov. 25, 2013, 4:59 P.M. EST), http://www.billboard.com/biz/articles/news/digital-and-mobile/5800772/pandora-stops-internet-radio-fairness-act-legislation (detailing the failure of the IFRA and Pandora's shift to the CRB, which ultimately gives rise to the *In Re Pandora* rate decision analyzed in this comment).

[70] *See* Litman, *supra* note 4, at 5 (noting that "the number of interests affected by copyright is huge, and the complaints those interests have with the current regime are diverse").

[71] *See id.* at 8 (explaining that to the extent that the system poses difficult entry barriers to creators, imposes demanding impediments on intermediaries, or inflicts burdensome conditions and hurdles on listeners, the system fails at least some of its purposes).

[72] *Sony Corp.*, 464 U.S. at 431-432 (1983) (stating that incentivizing creative work should be encouraged, but only in service of the ultimate good of broad availability of literature, music and the arts); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[73] *See id.* at 432 ("When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose").

[74] *See* New Business Models, *supra* note 18, at 65 (observing that the music industry is in the middle of a revolution, and that the "major labels are on life-support"); *see also*, Litman, *supra* note 70, at 3. ("Copyright law's confrontation with evolving technology has been a near-constant theme since Congress enacted its first copyright law").

[75] Who Music Theft Hurts, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/physicalpiracy.php (last visited Jun. 22, 2014)(asserting that music theft results in an annual loss of $12.5 billion dollars, 70,000 jobs, and $2 billion in lost wages to American workers).

online music distribution present threaten only the record company's existing business model.[76]

Lobbying by particularly powerful parties to the music copyright table has led to an unbalanced regulatory framework strongly favoring these interests.[77] Such efforts fracture the Copyright Act's ability to regulate by carving out exceptions and exemptions, and push artists and independent record labels to eschew the traditional copyright process in various ways. Furthermore, the results of such efforts do not effectively regulate in the current technological environment, as illustrated in the *In Re Pandora* rate litigation.

A. Copyright's Fractured Licensing and Royalty Structure

The Copyright Act currently makes several distinctions when setting the rates that a given music provider must pay.[78]

1. Terrestrial Radio's Exemption

The right to public performance by means of digital audio transmission is an exclusive right of the owner of a sound recording copyright.[79] Notably, the Copyright Act does not grant the right to analog performance of a sound recording.[80] The Copyright Act limits the grant of the exclusive right by exempting "non-subscription broadcast transmissions."[81] A typical over-the-air radio broadcast must pay the musician or composer to perform the underlying musical work, but there is no royalty fee due to the sound recording copyright owner.[82] Until the recent introduction of digital broadcasts, the recorded music industry and radio station owners mutually benefitted this exemption from paying royalties.[83] Radio stations enjoyed the exemption from expensive royalties and record companies viewed the radio airplay as free advertising promoting record sales.[84]

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[76] *See* New Business Models, *supra* note 18 at 67 (stating that the record labels, their lobbyists and lawyers are trying to crush an environmental threat posed by the "technology-driven revolution").

[77] *See* Litman, *supra* note 4, at 4 (stating that lawyers for copyright intensive interests have come up with revisions that would "scratch their respective itches").

[78] *See, e.g.*, 17 U.S.C. § 114 (2011)(distinguishing between types of digital transmissions, whether they invoke the digital performance right or are exempted therefrom).

[79] 17 U.S.C. § 106(6)(2011).

[80] *Id.* § 114(a).

[81] *Id.* § 114(d)(1)(A)(A radio broadcast that does not charge its users a fee is a "non-subscription broadcast transmission").

[82] *Bonneville Int'l Corp.*, 347 F.3d at 487 (the exemption for non-subscription broadcast transmissions only pertains to AM/FM broadcast signals).

[83] *Id.* (noting that the exemption from royalties for terrestrial radio broadcasts "produced high levels of contentment for all parties").

[84] *Id.* at 488 (noting that Congress enacted and continually reinforced the exemption on the grounds that radio and television broadcasters promote rather than pose a threat to the distribution of sound recording)(internal citations omitted).

The National Association of Broadcasters ("NAB") has successfully fought to maintain this exemption through the internet revolution.[85] However, that right is being parsed by the changes in the technological and statutory environment. Terrestrial radio stations that simulcast their broadcasts over the internet do not receive to the statutory exemption.[86]

To the extent that a music service is a replacement for sales, it cannibalizes the sales; to the extent that it encourages sales, it promotes sales.[87] Given the steady decline in recorded, physical-format music sales over the past fifteen years, it is clear that the record sales are no longer there to justify the exemption from royalties currently enjoyed by terrestrial radio broadcasts.[88] Congress has repeatedly attempted to remove the non-subscription broadcast transmission exemption from paying royalties to sound recording copyright owners, most recently in 2009.[89] However, each of these bills has failed to pass, due to heavy pressure from lobbying groups like the NAB.[90]

2. Interactive Webcasters' Exception

Under the Copyright Act, interactive webcasters are ineligible for statutory licensing.[91] This fact is justified by the threat that interactive webcasters pose to recorded music sales.[92] Because interactive webcasters lie outside the statutory licensing scheme, they must negotiate directly with the copyright owners.[93] The archetypal interactive webcaster is Spotify. Spotify's users can decide what musical work will play next, choosing from Spotify's library of over 20 million songs.[94]

The first consideration given to interactive webcasters is that they operate within copyright's structure. Spotify pays copyright royalties and negotiates directly with record companies to license the use of their works, much to their detriment.[95] In the

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[85] Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1056 Before the Comm. on the Judiciary, 104th Cong. (1995).

[86] *Bonneville*, 347 F.3d 485 at 498 (finding that the DPRA maintained the exemption for *over-the-air* broadcast transmissions, but did not extend to "*AM/FM webcasting*," i.e. digital transmission of the same broadcast) (emphasis added).

[87] *In Re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *40.

[88] *See* Nielson Soundscan, *supra* note 18.

[89] Performance Rights Act, H.R. 848, 111th Cong. (2009).

[90] Olga Karif, *Terrestrial Radio Royalties Bill Gets Through Mark-Up,* BUSINESSWEEK (May 13, 2009), http://www.businessweek.com/the_thread/techbeat/archives/2009/05/terrestrial_rad.html (noting that members of Congress were "bombarded" with phone calls representing the music industry and broadcasters' distaste for the bill).

[91] 17 U.S.C. § 114 (2011).

[92] *In Re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *33 (noting that ASCAP charges a higher licensing fee to interactive services, as considers its music to be more valuable to those services).

[93] *See also, Arista Records*, 578 F.3d 148 at 150 (noting that if a service is interactive, then that service is required to pay individual licensing fees to the copyright holders rather than to a PRO through the compulsory licensing of the Copyright Act).

[94] Information, SPOTIFY, http://press.spotify.com/us/information/ (last visited Apr. 30, 2014); throughout the discussion, Spotify will be used as an example of an interactive webcaster.

[95] *See* Sisario, *supra* note 20 (reporting that Spotify's CEO stated that Spotify pays over 70 percent of its income "back to the industry" in licensing fees, although the actual price of the negotiated licenses are kept private).

wake of Napster, this fact should be a welcome change to record companies, seeing royalties where there were none with the advent of file-sharing.[96] On one hand, Spotify and others similarly situated may be cannibalizing non-existent record sales, but on the other hand, these services are also cannibalizing peer-to-peer sharing numbers.[97] Introducing a statutory framework whereby interactive webcasters can predict their expenses will promote innovation within this sphere of technological development, the result of which will be further dissemination of musical works.

B. Failure of the "willing buyer/willing seller" Standard

The "willing buyer/willing seller" standard[98] is the process by which the CRB sets the rates by approximating what the rates would be on the open market.[99] After abandoning its legislative agenda, Pandora took issue with the CRB rate determinations in court.[100] As discussed in the recent *In Re Pandora* rate decision, record companies are holding musical works hostage, demanding a ransom for their release.[101]

The Copyright Act classifies Pandora as a non-interactive service, thus entitling Pandora to compulsory licenses from the PROs.[102] At issue in the *In Re Pandora* case are the rates that a non-interactive service must pay. In 2011, ASCAP modified its rules to allow record companies to selectively withhold from ASCAP the right to license works to new media entities.[103] Three of the four major record companies withdrew these rights from ASCAP within a year.[104] In the wake of this withdrawal, the record companies were free to negotiate direct licenses with new media providers.[105] Although the modification was eventually invalidated, the situation created the

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[96] Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle,* NEW YORK TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html (stating that purveyors of legally licensed music, such as Pandora, Spotify and YouTube have been largely welcomed by an industry still buffeted by piracy).

[97] Ernesto, *Spotify: An Alternative to Music Piracy*, TORRENTFREAK (Jan. 2, 2009), http://torrentfreak.com/spotify-an-alternative-to-music-piracy-090102/ (noting that Spotify is an application that competes with BitTorrent, a peer-to-peer sharing service).

[98] *In Re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *101 (defining "fair market value" as the cash equivalent value at which a willing and unrelated buyer would agree to buy and willing and unrelated seller would agree to sell)(internal citations omitted).

[99] 17 U.S.C. § 801(b)(1)(2011)(describing the CRB's functions and guidelines in setting royalty rates).

[100] Clyde Smith, *Pandora Abandons Internet Radio Fairness Act, Turns to Copyright Royalty Board*, HYPEBOT.COM (Nov. 27, 2013), http://www.hypebot.com/hypebot/2013/11/pandora-abandons-internet-radio-fairness-act-turns-to-copyright-royalty-board.html.

[101] *In Re Pandora*, 2014 U.S. Dist. LEXIS at *67–81 (detailing the negotiations between Pandora and Sony Records over licensing rates, and acknowledging "Pandora must pay what Sony wants, or they can't use [Sony's catalog], by law.") *Id.* at 81.

[102] *Arista Records*, 578 F.3d 148, 154 (2d Cir. 2009)(distinguishing between the compulsory licensing for non-interactive services and the individual licenses needed for interactive services).

[103] *In Re Pandora,* 2014 U.S. Dist. LEXIS 36914 at *35 (addressing the issue of the "April 2011 ASCAP Compendium Modification").

[104] *Id.* at *36 (noting that EMI, Sony, and Universal withdrew their new media licensing rights from ASCAP).

[105] *Id.*

semblance of an open-market where record companies and webcasters could freely negotiate licensing terms.[106]

In the negotiations that followed, Pandora was at a great disadvantage.[107] Sony capitalized on this lack of bargaining power, drastically increasing the rates that Pandora paid for access to Sony's content.[108] Negotiations with Universal brought similarly dismal results for Pandora.[109] As noted above, the Court held that the 2011 Compendium Modification violated the Consent Decree with the Justice Department under which ASCAP operates.[110] The Southern District of New York thus held that ASCAP is required to issue a blanket license for any work in its repertoire, unless the publishers completely withhold the work from ASCAP.[111]

This experiment using the "willing buyer/willing seller" standard to set royalty rates illustrates the unequal bargaining powers of copyright holders and the licensees.[112] Pandora is the largest webcaster, presumably with the most leverage against the copyright holders.[113] If the largest webcaster cannot survive on the open market because of abuse of bargaining power by copyright holders, then there is little hope for smaller webcasters or start-up technologies that employ models that lie outside the scope of statutory licensing.

C. Counterarguments

In increasing numbers, various parties to the musical copyright transaction are spurning the copyright regime and rejecting as inadequate the royalties flowing from streaming services.[114] Many artists are forging out on their own instead of submitting their music to the vagaries of copyright licensing, advocating for the destruction of copyright.[115] "Creative Commons" licenses work alongside copyright and grant copyright holders some control and enforceable rights over their works.[116] Every day

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[106] *Id.*

[107] *Id.* at *69 (noting that because Sony bought out EMI's catalog and effectively controlled 25-30% of the market, Pandora could not survive without access to [Sony's] catalog).

[108] *In Re Pandora*, 2014 U.S. Dist. LEXIS 36914 at *78 (stating that Sony understood this [5% rate] to be a 25% increase over the prevailing rate [of 4%]).

[109] *Id.* at *81–91 (detailing the negotiations between Pandora and Universal, wherein Universal used the Sony rate as a bargaining chip to double the rate from 4% to 8%. As a result of these negotiations, Pandora instituted this action challenging the legality of the Compendium Modification).

[110] *Id.* at *36 (referring to another Pandora rate district court decision, *In Re* Pandora Media, Inc., 2013 U.S. Dist. LEXIS 133133 *1. (S.D.N.Y. 2013), which requires ASCAP to license to any applicant all works in its repertoire, and holds that the selective withdrawal violates the provisions of the Consent Decree as amended).

[111] *Id.* at 92 (granting Pandora partial summary judgment).

[112] *Id.* at 101 (concluding that "there is no competitive market in music rights" and that "fair market value is a hypothetical matter")(internal citations omitted).

[113] *Pandora Remains Top Webcaster, Even After Launch of iTunes Radio*, ALLACCESS.COM (Nov. 5. 2013).

[114] David Byrne, *The Internet is Sucking All Creative Content Out of the World*, THE GUARDIAN (Oct. 11, 2013 10:53 AM).

[115] *The Surprising History of Copyright and the Promise of a Post-Copyright World*, QUESTIONCOPYRIGHT.ORG, http://questioncopyright.org/promise (last visited Jul. 12, 2014).

[116] Jacobsen v. Katzer, 535 F.3d 1347, 1381–1382 (Fed. Cir. 2008) (noting that copyright holders have the right to allow modification and distribution through an open-source license, of which Creative

a new business model or music delivery model arises which attempts to exploit copyright in new ways.

1. Direct-to-Consumer Marketing

Musicians are utilizing the interconnectedness of the internet age to market directly to their fans.[117] Artists are retaining the copyrights to their own sound recordings, then marketing directly to their listeners, cutting out the record companies and copyright licensing structure.[118] One of radio's main functions is to introduce fans to music they like.[119] In bypassing the copyright licensing scheme, artists are increasing transaction costs as well as consumers' search costs.[120]

2. Creative Commons Licensing

Harvard Law Professor Lawrence Lessig is leading the "Creative Commons" ("CC") movement.[121] CC licenses essentially allow an artist to limit copyright protection, allowing certain uses of copyrighted material that would otherwise be infringing.[122] As of 2006, several artists have released artistic material under a CC license, most notably Nine Inch Nails in 2008.[123] Creative Commons performs a useful function in today's society: by respecting artists' rights, but allowing flexibility in protecting those rights, innovation and new creation is encouraged.[124]

Commons is one, and use that is unauthorized by the terms of the licenses still constitutes infringement).

[117] Daphne Carr, *Nine Inch Nails Radiohead, Free Music and Creative Competition*, L.A. WEEKLY (May 28, 2008) (stating that Trent Reznor's release of Nine Inch Nails' material on-line was a reaction to and commentary on the "continued failures of the music industry" and the "dismal efforts" made by his record company).

[118] Ernesto, *RIAA 'Protects' Radiohead's In Rainbows*, TORRENTFREAK (Aug. 1, 2010) https://torrentfreak.com/riaa-protects-radioheads-in-rainbows-100801/ (detailing Radiohead's initial circumvention of the major label by releasing the album for "whatever price you feel comfortable paying," and subsequent distribution through Sony and BMI).

[119] *See* New Business Models, *supra* note 18, at 65 (asserting that record companies and radio are intermediaries performing match-making functions, connecting consumers with music they like).

[120] *See id.* at 65 (finding that the less centralized the music industry becomes, the greater the burden on the individual consumer to find new music).

[121] CREATIVE COMMONS, http://creativecommons.org/about (last visited Apr. 26, 2014); LESSIG.COM, Biography, http://www.lessig.org/about/ (last visited Apr. 27, 2014).

[122] *See id.* (denying that CC is an "alternative to copyright"); *See also,* CREATIVE COMMONS, *How Do Licenses Operate*, http://wiki.creativecommons.org/FAQ#How_do_CC_licenses_operate.3F (last visited Apr. 26, 2014) (describing the function and legal consequences of issuing a Creative Commons license).

[123] NINE INCH NAILS, *The Slip* http://dl.nin.com/theslip/signup (last visited Apr. 27, 2014) ("The Slip is licensed under a Creative Commons attribution non-commercial share alike license," encouraging users to download the album and remix the music files without fear of infringement); CREATIVE COMMONS, Summary of attribution, non-commercial, share like 4.0 license, http://creativecommons.org/licenses/by-nc-sa/4.0/ (last visited Jul. 26, 2014)

[124] Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 275

Creative commons licenses arguably provide a unique avenue for musicians to selectively control and protect their work, but the protection artists reserve is still enforced through copyright.[125] To abandon copyright protection altogether is not within the mission statement of the CC movement.[126] Copyright and Creative Commons can exist harmoniously in a digital world. However, the RIAA and ASCAP among others, see this as a threat to their bottom line.[127] As a result, CC licensing is unlikely to replace or meaningfully supplement copyright licensing.

3. New Technological Business Models

Finally, technology companies are exploring variations of the internet webcasting paradigm. SoundCloud is an online purveyor of music that eschews the traditional copyright process.[128] The site allows any user to post a musical work on their server, provided they agree to the terms and conditions, which grant SoundCloud a "limited, world-wide, royalty-free and fully paid license."[129] SoundCloud's business model is similar to that of YouTube, which is based on user-generated content to stream music and video.[130] Although services such as these operate legally through disclaimers, there is no guarantee that copyrights will be protected in the first instance.[131] Further, the DMCA provides safe-harbor provisions for ISP's and technologies that are based on user-generated content.[132]

New business models such as SoundCloud provide a narrow opportunity for copyright holders to post their music to the public over the internet while granting

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(2007)("Clearly defining the rights on both the public side and the private side is important for this 'semi-commons' to effectively achieve the goals of copyright law").

[125] *Jacobsen*, 535 F.3d 1373 at 1380 (affirming that where a copyright owner grants a license limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement).

[126] *See generally*, CREATIVE COMMONS, http://creativecommons.org/about (last visited May 30, 2014)("Creative Commons develops, supports, and stewards legal and technical infrastructure that maximizes digital creativity, innovation and sharing").

[127] Mike Masnick, *ASCAP Claiming That Creative Commons Must Be Stopped; Apparently They Don't Believe In Artist Freedom*, TECHDIRT (Jun. 25, 2010, 7:57 A.M.) https://www.techdirt.com/articles/20100624/1640199954.shtml (showing that ASCAP is fighting Creative Commons, Electronic Frontier Foundation, and Public Knowledge organizations under the guise protecting artists' copyrights).

[128] Adam Satariano, *SoundCloud Said to Near Deals With Record Labels*, BLOOMBERG NEWS (Jul. 10, 2014, 5:54 P.M. CT)(detailing SoundCloud's negotiations with record companies, who are leveraging copyright violations in order to gain a stake in the company).

[129] SOUNDCLOUD, Terms of Use, https://soundcloud.com/terms-of-use (last visited Jul. 11, 2014)(stating that by uploading the material, the user is allowing any other "users, websites and/or platforms to use, copy, repost, transmit or otherwise distribute, publicly display, publicly perform, adapt, prepare derivative works of, compile, make available and otherwise communicate to the public" the material).

[130] *See generally*, YOUTUBE, Copyright Basics, https://www.youtube.com/yt/copyright/ (last visited May 1, 2014).

[131] 17 U.S.C. § 512 (2011)(creating a safe-harbor for internet service providers from copyright infringement liability provided certain criteria are met, including duties that arise when the ISP is put on notice that user-generated content is copyright protected).

[132] 17 U.S.C. § 512(c)(2011).

SoundCloud a limited license to perform the work, royalty-free.[133] SoundCloud is attractive to investors, who note that royalties typically account for 50-70% of the webcasters' budget.[134] Although SoundCloud does promote dissemination of creative works, it does so at the cost of any monopoly the artist may have enjoyed, and cannot replace copyright protection.

D. Record Company Profits and Interests

Monetary incentives provide motivation for artists to create or record companies to finance and distribute music.[135] Record companies are businesses seeking to maximize profit, and thus are seen as the enemy of creativity, the musician and the public alike.[136] Since 1999, the patterns of music consumption have been changing, and the record industry has been slow to adapt.[137] Record companies face extinction as the marginal cost of producing music approaches zero.[138] Artist compensation has also sharply declined, but a musician has other ways of earning income.[139] As a result of the changing landscape, the recorded music industry should be looking for ways to adapt to the climate. One of the avenues to revenue generation that should be of major interest is the burgeoning internet music industry.[140]

When the public stops purchasing recorded music, record companies will collapse under their own weight.[141] Yet record companies finance musicians who might otherwise only partially devote themselves to making music, and thus provide a valuable service in the dissemination of creative works.[142] Record companies' survival depends on embracing new revenue sources such as webcasters.

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[133] *See generally*, SOUNDCLOUD, *Terms of Use*, https://soundcloud.com/terms-of-use (last visited Jul. 12, 2014).

[134] Glenn Peoples, *SoundCloud Raises New Funding,* BILLBOARD BIZ (Jan. 24, 2014, 6:54 P.M.) http://www.billboard.com/biz/articles/news/5885281/soundcloud-raises-new-funding

[135] *But see*, New Business Models, *supra* note 18, at 66 (arguing that most musicians want to make a living making music, but will continue to do so "for pennies or for free" for the "hedonic values" of simply making music).

[136] *See* New Business Models, *supra* note 18, at 88 (stating that record companies are "marketing and promotion bureaucracies" that depend on the high margins album sales generate in order to survive).

[137] *See supra*, note 17 and accompanying text; *see also*, New Business Models, *supra* note 18, at 80 (noting that "fundamental change is difficult" for record companies whose interests are entrenched in the physical-medium model of delivery of music).

[138] New Business Models, *supra*, note 18, at 80 (arguing that record labels' business models have substantial overhead and are bound by inertia that have not been adjusted to fit current technology); Gerald R. Faulhaber, *File Sharing, Copyright, and the Optimal Production of Music*, 13 MICH. TELECOMM. TECH. L. REV. 77, 91 (2006)(noting that although the marginal cost of making may be rapidly decreasing, there is a social cost when record companies produce less music).

[139] Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 685 (2009) (asserting that live performance is the only "unique, excludable, non-duplicable product left in the music business").

[140] *See* Sisario *supra* note 20 (noting Pandora paid $147 million in royalties in 2011).

[141] *See* Litman, *supra* note 4, at 12 (noting that there are many ways to distribute music without spending much money, and that the new economics of the digital world dictate that intermediaries' (i.e. record companies, distributors) rights should be severely limited).

[142] *See* New Business Models, *supra* note 18, at 79 (detailing record companies' typical functions: 1) recruiting artists, 2) providing capital, 3) managing the recording process, 4) manufacturing CDs,

IV. PROPOSAL

The Copyright Act is the most advantageous way to deal with copyright licensing and royalties, therefore all forms of online music delivery should be brought within this framework.[143] Eliminating exemptions and exceptions and establishing predictable rates across technological platforms will encourage innovation, which in turn will better serve copyright's purpose of making creative works widely available to the public.[144]

As discussed above, copyright royalties are a labyrinth for new technologies to maneuver, and unless there is a concerted effort to normalize the rate structure, technological advances will be inhibited.[145] Music delivery models are moving within copyright's boundaries, a trend that is encouraging to copyright holders.[146] The paradigm has shifted, but the public still has a great interest in hearing music.[147] Instead of seeking to protect profits that resulted from record sales, record companies should be seeking to maximize profit from the models which the public endorses.

There is no single, simple solution to this issue. The decisions that reshape copyright law should be made in light of copyright policy, even in the face of the recorded music industry's tough lobbying efforts.[148] Due to the lack of serious alternatives to copyright licensing, the regulatory framework must be updated to match the revolution in the listenership and reflect the ever-changing landscape. These competing demands call for three changes that should be made to the copyright act.

A. Eliminate Terrestrial Radio's Exemption from Copyright Royalties

The first change to be made is the elimination of terrestrial radio's exemption from paying royalties. The economic justifications which have maintained the exemption

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5) advertising and promoting CDs, 6) distributing media, 7) revenue and royalty accounting functions, and 8) copyright enforcement).

143 Pamela Samuelson, *The Copyright Principles Program, Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176 (noting that a well-functioning copyright system effectively creates and regulates markets around the works that it protects, and in the process, copyright plays a role in the new technologies that allow access to creative works).

144 *See* Craft, *supra* note 44, at 3 (observing that as of the last major revision of the Copyright Act, the DMCA, there were so many conflicts that innovation and new technologies stagnated while the conflicts were sorted out).

145 *See* DIGITAL MEDIA ASSOCIATION, *Issues and Policy: Modernizing Music Licensing to Promote Innovative Business Models,* http://www.digmedia.org/issues-and-policy/copyright-and-royalties/145-modernizing-music-licensing-to-promote-innovative-business-models (last visited May 31, 2014).

146 B*ut see Webcasters and Rising Royalty Fees: Paying the Price for Innovation?* THE WASHINGTON POST (Mar. 18, 2007) (quoting John Simson, executive director of SoundExchange: "The attitude that really has to change is the idea that the people playing this music on the Web are somehow doing artists a favor").

147 *See* Ericsson, *supra* note 5, at 1803 (stating that interactive streaming services has further expanded the market for legal consumption of digital music).

148 *See* Litman, *supra*, note 4 at 6 (noting that interests involved in the current copyright regime are varied and often adverse, and that those interests get nervous when new parties attempt to declare their rights).

since radio's inception cannot survive close scrutiny.[149] The sheer will and power of the NAB holds the exemption in place.[150] Broadcast radio is a $20 billion industry, who, without justification should be forced to pay royalties the same way that other services who are publicly performing sound recordings do. To do this, § 114(d)(1) would have to be stricken from the Copyright Act, and the word "digital" stricken from § 106(6).

B. Integrate Interactive Webcasters Into the Copyright Structure

The second recommendation is to allow interactive webcasters to participate in the statutory licensing scheme. Interactive webcasters do not replace record sales to the extent that record companies would have us believe. Furthermore, because owning music is not as desirable as it once was, interactive webcasting promotes music as much as traditional radio broadcasts do.[151] The copyright act does recognize the importance of regulating webcasters by including non-interactive webcasters in the statutory licensing scheme, but this does not go far enough.[152]

C. Allow Room for Technological Growth

The third modification that is in line with the changed landscape of the music industry in the Web 2.0 age is that the Copyright Act should address technologies not yet on the market. Rather than leave it up to the courts, or the individual interests involved, the copyright act should set up an effective way to deal with new media business models that would encourage growth and innovation.[153] With royalty rates that are predictable, emerging technologies in online music delivery can take into

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[149] Kurt Hanson & Jay Rosenthal, *Sounds and Cents*, L.A. TIMES (June 12, 2007)(arguing that terrestrial radio's exemption from paying royalties is an "injustice" and that eliminating the exemption will level the playing field for webcasters). In addition, Hanson and Rosenthal note that the exemption from terrestrial radio in the U.S. has negative international repercussions for American musicians and record labels. *Id.*

[150] *See* Craft, *supra* note 44, at 6 (noting that the RIAA released a statement attributing the tenacity of the broadcast radio exemption to the strong lobby presence of the industry in Washington); FREE RADIO ALLIANCE, *Press Release: The White House on Performance Rights* (Mar. 21, 2011) http://freeradioalliance.org/2011/03/the-white-house-on-performance-rights/ (noting that although the right of public performance sees broad support both from the White House and the Copyright Office, both Free Radio Alliance and the NAB argue that such a right will be detrimental to local radio stations); *see also*, Hanson and Rosenthal, *supra* note 149.

[151] *News and Notes on RIAA Industry Shipment and Revenue Statistics*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://76.74.24.142/4A176523-8B2C-DA09-EA23-B811189D3A21.pdf (last visited May 31, 2014)(noting that digital growth (of RIAA sales in 2012) was driven by a shift in user's "access models," from single song online purchases to free online listening to vast libraries of music).

[152] *See* Ericsson, *supra* note 6, at 1811 (noting that it is within the recorded music industry's self-interest and a comprehensive copyright policy to pursue an all-inclusive online music delivery licensing policy).

[153] I. Trotter Hardy, *Project Looking Forward, Sketching the Future of Copyright in a Networked World* 1, 258 (1998) (available at http://www.copyright.gov/reports/thardy.pdf) (noting that the problem is that without foresight, Congress must legislate under uncertainty, and the issue is whether the new technology will grow sufficiently important that it will replace existing ones).

account the expenses that would be involved in their venture, instead of gambling on what they might be forced to pay after a significant investment.[154] New technologies that operate within copyright's framework will be encouraged with the ability to accurately forecast royalty expenses.

There is no single sentence that can be added or stricken from the Copyright Act to account for technologies known or unknown that have yet to impact the music industry.[155] What interested parties can be certain of is that technology has revolutionized the music industry again and again, and will do so in the future.[156] The revolutionizing technology strains the language of the act, stretches the application of the regulatory framework and taxes judicial, business, and legislative resources sorting the mess out.[157] The regulatory framework should be flexible enough to handle changes that lie on the horizon and beyond, or else Copyright risks becoming irrelevant.[158]

D. No Effective Alternative to Copyright Exists

There is no alternative to copyright licensing or royalties that effectively regulates and enforces musical authors' copyrights. Alternatives to copyright licensing are taking shape, but each of the systems has flaws.

Direct to consumer marketing ignores the benefits that marketing, publicizing, distribution, and exposure that record companies provide. In the recorded music paradigm, record companies provide capital for expenses related to recording and thus are furthering the goal of the public's access to creative works.[159] In a world without intermediaries as investors, financial constraints would choke out creativity. The fact

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[154] *See* Ericsson, *supra* note 6, at 1787 (pointing out that the end result of a lack of legislative guidance and judicial decisions is a suboptimal utilization of the internet both as an incentive for creation of music and models for music's dissemination).

[155] For an example of language that encapsulates future developments, *see* 17 U.S.C. § 102 (2011) (extending copyright protection to any work fixed in a tangible medium "known or later developed," thus encompassing technologies and media not in existence at the time of drafting).

[156] Devin Coldewey, *30 Years Ago, the CD Started the Digital Music* Revolution, NBC NEWS (Sep. 28, 2012) http://www.nbcnews.com/tech/gadgets/30-years-ago-cd-started-digital-music-revolution-f6167906; Chris Neiger, *Is Intel on the Cusp of the Next Tech Revolution?*, THE MOTLEY FOOL (Jan. 11, 2014) http://www.fool.com/investing/general/2014/01/11/is-intel-on-the-cusp-of-the-next-tech-revolution.aspx.

[157] *See* Litman, *supra* note 4, at 4-5 (chronicling the Copyright Act's revisions as new technology stretched the previous Act to its limits). Litman also posits that each iteration of the Copyright Act has been a reflection of the copyright-affected interests' reshaping of the Act to accommodate their needs and fears. *Id.* at 6; Richard A. Posner & Williams M. Landes, *An Economic Analysis of Copyright Law,* 18 J. LEGAL STUD. 325, 331 (1989) (arguing that rights in intangibles, like intellectual property rights, are especially expensive to enforce).

[158] *See* Samuelson, *supra* note 143, at 1216 (making suggestions for future guidance and reform, including the incorporation of safe harbor provisions for those services that make reasonable efforts to deter infringements).

[159] *But see*, New Business Models, *supra* note 18, at 98 (arguing that musicians will continue to make music despite the fact that they are not making any money, because doing so satisfies the musician's hedonic, or non-pecuniary, desires); Litman, *supra* note 4, at 7 (stating that perhaps the incentives that copyright currently gives to distributors actually controverts copyrights purpose by placing control of access into the hands of record companies, whose main motive is profit, not dissemination or creation).

that some musicians have eschewed record companies in releasing their music does not lead to the conclusion that records companies should not exist at all. Rather, the inescapable conclusion is that the recorded music industry thus must adapt or perish.[160]

Creative Commons licensing grants an artist a level of control over a given copyright.[161] Thus, without a copyright to constrain, there would be no creative commons license.[162] Furthermore, Creative Commons does not contain nor attempt any regulation or enforcement.[163] CC license are simply an alternative to traditional copyright licensing.[164]

Finally, although some innovation has occurred at the fringes of online music delivery, the models in existence today operate to circumvent copyright control. Rather than to provide a reasonable and equitable alternative to copyright, operations which purport to grant licenses to users without a primary copyright check is inadequate.[165]

Given the scale of copyright, both in musical works and sound recordings, the only structure of the magnitude necessary is the Copyright Act. However, the framework presents several adaptive shortcomings which require consideration before the next revolution occurs.

V. CONCLUSION

All legislative decisions to amend the Copyright Act should be guided by the purpose set forth by the framers of the Constitution.[166] Copyright royalties should be regulated through a tested, established framework, and an effective, predictable incentive protects the intellectual property of musicians and authors currently in existence. The current Copyright Act is not well-adapted to change, while the world continues to change at an exponentially increasing speed.[167] In order to accommodate the nature of the landscape, any revisions to the copyright act should take the pace of change into account. A single band-aid solution will not solve the problems facing everybody in the music industry. Some parties will be forced to readjust to losses and

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[160] Alexandra Topping, *'Record Labels are not Dinosaurs of the Music Industry',* THE GUARDIAN (May 13, 2011) http://www.theguardian.com/business/2011/may/13/record-labels-not-dinosaurs-music-industry (quoting Tony Wadsworth, current chairman of BPI and former CEO of EMI as saying: "Today's record labels are unrecognizable compared to those of the 90's, they are smaller, more efficient, and they have diversified and taken on many more functions").

[161] *See, supra* note 121.

[162] Pallas Loren, *supra* note 124, at 274 (Creative Commons licenses "are designed to permit certain uses of creative works that would otherwise be subject to the full panoply of rights the Copyright Act grants to copyright owners.").

[163] *Id.* at 274.

[164] *Id.* at 273 (stating that creative commons seeks to build a flexible licensing structure in the face of increasingly inflexible and restrictive copyright rules).

[165] Ernesto, *Universal Music Can Delete Any SoundCloud Track Without Oversight*, TORRENTFREAK.COM (Jul. 3, 2014) (detailing Universal Music Group's unorthodox enforcement of copyright on the SoundCloud platform, which takes music directly off the server and allows no recourse to that user to appeal).

[166] *See* Mazer, *supra* note 22, 347 U.S. at 219.

[167] Litman, *supra* note 4, at 3 ("the statute is not well-designed to withstand change, and has aged badly").

profit margins that do not measure up to the time when consumers would gladly pay $14.99 for a compact disc. The sooner record companies come to grips with the revolution that has already occurred, the sooner they can find the new baseline from which to build and grow.

The interest of the public in hearing the works of musicians and performing artists is paramount. The best way to protect that interest is to properly incentivize creation, which will ensure that musicians keep writing music, record companies keep supporting artists and distributing music, new technologies are harnessed to deliver the music. By fostering growth through a streamlined statutory framework in which new media flourish, the resulting environment will better serve the interests of the public, the recording industry, webcasters, and the music community. In creating such a model for sustainable growth in the digital music marketplace, musicians will gain exposure, the public will gain access, and the recorded music industry will see new revenue growth.