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THE NEXT GREAT COPYRIGHT ACT AND THE FUTURE OF RADIO

CHRISTOPHER DOVAL, DON ANQUE, AND MAESEA MCCALPIN

ABSTRACT

With the advancement of digital broadcasting technologies, the lack of a revision to copyright law has created a creative and distribution bottleneck for artists by companies. The current range for compulsory licensing agreements does not protect the interests of artists through modern digital transmission tools, and leaves them fending for themselves if they wish to have access to new digital platforms. Moreover organizations, such as the Recording Industry Association of America, are in greater positions of power when applying existing copyright laws and definitions to new technologies that innovators never intended to be analogous to pre-existing technologies to begin with. After extensive studies, Director Maria Pallante of the U.S. Copyright Office has given her recommendations for change, but it may be a while before copyright law revisions may be enacted. This paper will highlight the background of copyright and digital broadcasting laws and review Director's Pallante's vision as it pertains to the digital audio broadcasting landscape now and in the future.

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I. INTRODUCTION.....	379
II. XM SATELLITE RADIO	380
III. RADIO AND COPYRIGHTS.....	381
A. Digital Performance Right in Sound Recordings Act of 1995	381
B. Non-Subscription Broadcast Transmission.....	382
C. Subscription Broadcast Transmission	382
D. Interactive Services	383
E. The Digital Millennium Copyright Act of 1998.....	383
IV. NEW TECHNOLOGY CREATES GRAY AREAS.....	384
V. THE CONTROVERSY OF THE INNO	384
VI. RIAA v. XM SATELLITE RADIO	385
A. The Audio Home Recording Act of 1992	386
VII. CONCLUSION: THE NEXT GREAT COPYRIGHT ACT	388
A. Licensing and the Section 115 Reform Act.....	388
B. Private Licensing Reform	389
C. Voices for Reform: All Roads Lead to the DMCA.....	390

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I. INTRODUCTION

Throughout its history, copyright law has evolved as a legislative response to the introduction of new technology that has the capacity to undermine the creative rights of original works. For example, Johannes Gutenberg's printing press gave governments and universities the ability to copy and distribute print material on a massive scale without the permission of the original authors. In the same way, the development of the digital audiotape in the late 1980s created the potential for mass reproduction and the sale of sound recordings without the permission of the original performers.¹ Thus, copyright law was developed and remains a necessity in protecting the work of authors, artists, and musicians as well as the public they serve.

Today, new and dynamic forms of broadcast technologies have once again spurred the development of modified copyright and royalty legislation in an attempt to protect concerned copyright owners.² Ultimately the goal of copyright law is to create an incentive system by compensating copyright holders sufficiently to spur further innovation. For today's music industry, this principle is no longer unique to musicians. It has come to apply to the business models that disseminate their work. However, despite legal developments, current copyright law suffers from high levels of discontent on a number of fronts. Musicians, consumers, record labels, technology developers, and broadcast companies are just a few of the entities that have an invested, and often

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Christopher Doval is an attorney, currently serving as an assistant professor of business administration at Morgan State University, in Baltimore, Maryland. His fields of research include business ethics and law, copyright law, human rights law, and Internet, cyber security and privacy law, as well as pedagogy. Committed to effective teaching, he uses innovative teaching methods to help students improve performance and critical thinking skills. He has presented his research at conferences all over the country, and served as a guest speaker in a variety of forums including the Yale University Interdisciplinary Center for Bioethics Summer Institute.

Don Anque is an emerging scholar from the College of Law at Syracuse University. His research interests include commercial law, corporate social responsibility, and good governance. He has been a guest speaker and panelist in over a dozen higher education events and business conferences. Anque is also an AmeriCorps Equal Justice Works service member for his work on criminal defense.

Maesea McCalpin is currently a graduate student studying international relations at American University's School of International Service with a concentration in international development and conflict resolution. Her current academic work includes a position as the Community and Economic Development Fellow at Sustainable Community Development Group in Washington DC. Her research interests include strategies for inclusive sustainable development as well as correlates of various types of political violence in an international context. In addition, Maesea has collaborated on a number of projects to examine the affects of both domestic and international law on policy decisions.

¹ Carson, David. *Statement of David O. Carson, General Council, United States Copyright Office before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*. Library of Congress, Washington, D.C. 15 July, 2004, available at <<http://www.copyright.gov/docs/carson071504.pdf>> [hereinafter Carson].

² Jason A. Auerbach, *Recording Satellite Radio - Adapting to Modern Technology or Infringing Copyright?*, 29 CARDOZO L. REV. 331, 336 (2007) [hereinafter Auerbach].

divergent, interest in the law. The complicated relationships between these various appendages of the music industry have made it difficult to develop solutions that are both comprehensive and far-sighted.

As technology has changed and molded the way we create, distribute, and consume music, new copyright law has become necessary to encompass both the technological changes and the definition of equitable compensation for all those involved in the creative exchange. Unfortunately, the rampant number of law suits involving the licensing of music audio recordings and royalty payments show evidence that technology and its effects on various business models continue to greatly outpace the scope of current legislation. As suggested by Maria Pallante, the US Register of Copyrights, and echoed by others in the field, current legislative inaction could ultimately present obstacles to innovation and monumentally hinder the future development of the music industry.

II. XM SATELLITE RADIO

Today's audiophiles can now compose, create, and record on a single device and share it with the world almost instantaneously. Due to technological innovation the process of collecting and organizing one's music and other media is now dramatically easier and more satisfying than ever before.³ iTunes⁴ and MP3s⁵ have rendered vinyl and cassettes obsolete. New broadcast mediums have emerged to leave "traditional" analog AM/FM radio in the dust. If one were to peruse through a typical FM radio band, the listener would have a relatively small number of musical styles and formats from which to choose and an even more limited playlist of artists and songs from which to enjoy.⁶ This has changed dramatically through the availability of Satellite Radio.

XM Satellite Radio (XM) is one of the satellite radio services in the United States and Canada operated under Sirius XM Radio, Inc.,⁷ which resulted after the acquisition of XM Satellite Radio by Sirius Satellite Radio in 2008.⁸ Post-merger, Sirius XM Radio constitutes 25.6 million subscribers, making it the second largest radio company, based upon revenue, in the country as well as one of the largest subscription media businesses in the United States.⁹ For many, XM Satellite Radio is arguably one of the most advanced radio broadcasters in the world.

³ Gary Parsons, Chairman of the XM Satellite Radio Board of Directors, Digital Content and Enabling Technology: Satisfying the 21st Century Consumer, Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the U.S. House Committee on Energy and Commerce, 109th Congress (2006), available at <<http://archives.energycommerce.house.gov/reparchives/108/Hearings/05032006hearing1846/Parsons.pdf>>. [hereinafter Parsons Testimony].

⁴ Apple iTunes, available at <<http://www.apple.com/itunes/>>.

⁵ Fraunhofer IIS – mp3 History, available at <<http://www.iis.fraunhofer.de/EN/bf/amm/products/mp3/mp3history/index.jsp>>.

⁶ Parsons Testimony, *supra* note 3.

⁷ Dawn Kawamoto, *Sirius and XM Close Merger*, CNET, July 29, 2008, at 1, available at <http://news.cnet.com/8301-1035_3-10001299-94.html>.

⁸ *Sirius Completes Acquisition of XM Satellite*, REUTERS, July 29, 2008, at 1, available at <<http://www.reuters.com/article/idUSN2926292520080730?sp=true>>.

⁹ Press Release, Sirius XM Radio Inc., Sirius and XM Complete Merger (July 29, 2008) (on file with Sirius XM Radio Inc.).

Despite numerous satellites¹⁰ and vast digital libraries,¹¹ the most fragile component of Sirius XM Radio's infrastructure is its relationships with its musical content providers. Without rights to the musical recordings used in its daily broadcasts, Sirius XM Radio is nothing more than a sophisticated broadcasting array. Sirius XM Radio must maintain programming and licensing arrangements with both the copyright owners of the musical compositions as well as the copyright owners of the sound recordings themselves in order to flourish.¹² Copyright legislation is paramount to their operation on a number of levels. It not only constitutes an essential part of Sirius XM Radio's business equation by dictating a sizeable portion of their operational costs, but as is demonstrated by the lawsuits surrounding certain product creations, it is also an inescapable factor in the future development of the company.

III. RADIO AND COPYRIGHTS

In order to better understand the controversy and resulting lawsuit involving Sirius XM Radio, it is important to understand the relevant copyright law. A strong distinction exists in copyright between musical compositions and sound recordings. Where a musical composition consists of the written words and/or musical notation, a sound recording is the recording of spoken, musical, or other sounds. Both types of copyrights are embodied in any single musical recording.¹³

Four exclusive rights were made available to the copyright owners of musical compositions in the Copyright Act of 1976: the right to reproduce the work, the right to prepare derivative works, the right to distribute the work, and the right to publicly perform the work.¹⁴ All but one of these, the right to public performance, were afforded to the copyright owners of sound recordings until 1995 when the advancement of technology and the resulting change in business models required further legislation to be enacted.¹⁵

A. Digital Performance Right in Sound Recordings Act of 1995

Prior to the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), the public performance right was exclusively found in musical compositions and not audio recordings. Essentially, songwriters and composers enjoyed performance royalties over their works but the actual performer did not. This difference in

¹⁰ *XM Completes New State-of-the-Art Satellite System with "Rhythm" and "Blues,"* SATCOM SERVICES COMM. NEWSL. (XM Satellite Radio), Jan. 2007.

¹¹ *Satellite Radio's Two-Way Competition Takes Aim at Broadcast Radio*, PBS NewsHour (Mar. 30, 2005), available at <http://www.pbs.org/newshour/bb/media-jan-june05-radio_3-30/> [hereinafter NewsHour].

¹² *Annual Report (Form 10-K)* at 13 (Mar. 1, 2007). XM Satellite Radio Holdings Inc., available at <<http://investor.siriusxm.com/common/download/sec.cfm?companyid=SIRI&fid=930413-07-1865&cik=908937>>.

¹³ 17 U.S.C. §§ 102(a)(2), (7) (1998).

¹⁴ 17 U.S.C. § 106(1)–(4) (2000).

¹⁵ Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1996).

copyright law was in some part due to the fierce opposition to the creation of performance rights when the law was enacted in 1976.¹⁶ In response, Congress rationalized that in the case of sound recordings a performer's interests were compensated through advertising,¹⁷ such as the free publicity generated by airplay on AM/FM radio.

By 1995, however, it had become apparent that “[r]ecord labels and musicians rely particularly on the right to control reproduction and ‘public performance’ of the sound recordings, subject to certain statutory exceptions, and collect royalties based on these exclusive rights.”¹⁸ In accordance with this view, the DPRA extended a limited public performance right to digital recordings. This was accomplished by introducing a tier system, which groups digital recordings according to the business structure that broadcasts them. The tiers include non-subscription broadcast transmission, subscription broadcast transmission, and interactive services.¹⁹ Each tier has a separate standard by which public performance royalty rates are determined.

B. Non-Subscription Broadcast Transmission

The first tier of the DPRA, non-subscription broadcast transmissions, is exempt from paying royalties associated with the exclusive public performance right.²⁰ According to the DPRA, the performance of a sound recording by means of a digital audio transmission is not infringing upon a performance right insofar as broadcast is part of a non-subscription broadcast transmission.²¹ Instances of this include “live performances, background music services, performances and transmissions in stores and restaurants,” as well as AM/FM radio.²² While radio stations must continue to pay royalties towards the use of musical compositions, the copyright owners of the sound recording are not entitled to royalties from broadcasts.²³

C. Subscription Broadcast Transmission

In contrast to non-subscription broadcast transmissions, copyright owners of sound recordings are entitled to royalties for the public performance of their works transmitted by subscription services, which include satellite radio (Sirius and XM) as

¹⁶ Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B. J. 79, 85 (1994).

¹⁷ *Id.*

¹⁸ Auerbach, *supra* note 2, at 339.

¹⁹ 17 U.S.C. § 106(6) (1995), available at <<http://www.copyright.gov/title17/92chap1.html#106>>.

²⁰ 17 U.S.C. § 111(a)(3)(1995), available at <<http://www.copyright.gov/title17/92chap1.html#111>>.

²¹ 17 U.S.C. § 114(d)(3)(D) (1995), available at <<http://www.copyright.gov/title17/92chap1.html#107>>.

²² Auerbach, *supra* note 2, at 339-40.

²³ 17 U.S.C. § 114 (d)(1) (1995), available at <<http://www.copyright.gov/title17/92chap1.html#114>>.

well as Music Choice, DMX Music Inc., and Muzak L.P.²⁴ At the time the DPRA was passed, the royalty rate was set by the Librarian of Congress under a compulsory licensing scheme.²⁵ The caveat to these royalty payments for subscription service business models is that as long as satellite radio programming complies with specific statutory criteria to diminish the likelihood of piracy, copyright owners cannot withhold licensing. Essentially, for a flat fee, satellite radio companies have at their disposal a tremendous if not unlimited wealth of music and programming.²⁶ The compulsory licensing scheme may also be replaced by direct negotiations with recording copyright owners if both parties are amenable to such an arrangement.²⁷ However, neither the compulsory license nor private agreements absolve broadcasters from negotiating with copyright owners of the musical composition behind the works they intend to perform.²⁸ Broadcasters still have to pay a separate royalty for each musical composition because it is not included in the royalties for audio recordings.

D. Interactive Services

Unlike subscription or non-subscription based broadcast transmissions, the final tier of the DPRA's structure for digital performance rights focuses more on the control of the consumer than the licensee. Interactive services under the act reflect transmissions of sound recordings selected directly by or on behalf of the consumer rather than the limited and controlled genres of terrestrial and satellite radio. Interactive services do not fall under a safe harbor for broadcast nor are they subject to a compulsory license; they require direct negotiations with the copyright owners themselves or any representative organization on their behalf.²⁹ Apple's iTunes Music Store is a prime example. A customer selects a particular song or album they wish to purchase and the interactive service provides that specific track for the consumer. Apple must negotiate with each and every copyright owner or his or her representative company to secure the rights to that work. This process can be incredibly difficult due to the volume of work by each copyright owner. We hope in the future that copyright reform can address these issues.

E. The Digital Millennium Copyright Act of 1998

In 1998 the Digital Millennium Copyright Act (DMCA) was passed to revise certain sections of the DPRA. One such revision added a fourth tier to the DMCA to incorporate non-interactive, non-subscription broadcast services or webcasters, such as Pandora, into the list of broadcast mediums required to pay public performance

²⁴ *S. Comm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 33-34 (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office), available at <http://www.copyright.gov/docs/carson071504.pdf> [hereinafter Carson].

²⁵ *Id.*

²⁶ Auerbach, *supra* note 2, at 334.

²⁷ Kristelia A. Garcia, *Private Copyright Reform*, 20 MICH. TELECOMM. & TECH. L. REV. 1 (2013).

²⁸ R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 245-49 (2001).

²⁹ 17 U.S.C. § 114(d)(3) (1995).

royalties.³⁰ Another provision of the DMCA changed the standard used to calculate the performance royalty rates. This created separate standards for pre-existing subscription services and services that began after the law was passed. While pre-existing subscription services, such as XM, maintained a “reasonable rate” known as the 801b standard set by a panel of Copyright Royalty Judges, non-interactive and new subscription services pay royalties at a willing buyer/willing seller rate, which is aimed at emulating a fair market value.³¹ This has created a disparity for new business models considering that the 801b standard yields royalty rates that are significantly lower than the willing buyer/willing seller model.³²

IV. NEW TECHNOLOGY CREATES GRAY AREAS

It is clear that generating legislation to adequately govern the variety of broadcast mediums and their surrounding technologies in a finite and all-encompassing manner is a difficult endeavor. This is particularly true considering the rapid and unpredictable rate of innovation that drives today’s convergence of music and technology. It is also made apparent by the often contrary interests of the parties involved in the licensing process. As the controversy over Pioneer’s development of the Inno – a satellite receiver with recording capabilities – will demonstrate, the tiered structure of the DMCA is a testament to both Congress’ recognition of the ever widening gap between technology and legislation as well as its inadequacy in tackling it. Additionally, the lack of symmetry in royalty rates between tiers indicates that congress chose to deal with the legislation in narrow terms to fix the issues at hand rather than taking a broader approach to reform. In an attempt to strike a short term balance between parties in order to protect copy written work, little consideration was given for the relationship between the DMCA and business models with their own capacity for innovation.

V. THE CONTROVERSY OF THE INNO

In 2004, XM Satellite Radio released XM2go, a portable satellite radio receiver akin to Sony’s Walkman. While the first generation of this device was nothing more than a portable satellite receiver, later models were released with functions of more questionable legality. Beyond playing satellite radio, the later XM2go devices could also record and store several hours of radio airplay.³³ In 2006, the Inno³⁴ from the

³⁰ Carson, *supra* note 24, at 10.

³¹ Garcia, *supra* note 27, at 9–10.

³² *Id.* at 10–11.

³³ *Pioneer Inno XM2go. ORBITCAST REVIEW, available at* <https://web.archive.org/web/20110624035425/http://www.orbitcast.com/archives/pioneer-inno-xm-2.html> [hereinafter Orbitcast Review].

³⁴ *Pioneer and XM Satellite Radio Achieve Major Milestone in Portable Audio with Pioneer Inno, the Next Generation XM2GoPlayer with Live XM and MP3*, PIONEER ELECTRONICS (Mar. 2006), <http://www.pioneerelectronics.com/PUSA/Press-Room/Car-Audio-Video/Pioneer+and+XM+Satellite+Radio+Achieve+Major+Milestone+IN+Portable+Audio+with+Pioneer+Inno,+The+Next-Genertaion+XM2GO+Player+with+Live+XM+and+MP3>.

Pioneer Corporation was the first of this new wave of portable satellite radio receivers marketed and designed for the receiving, recording, and storing of satellite radio broadcasts.³⁵ As long as there was an XM Satellite Radio subscription attached, an Inno could record and store as much as 50 hours of XM Satellite Radio programming for “personal, non-commercial replay.”³⁶ Directly from the device, one could select any date, time, or channel, as well as record and separate satellite radio broadcasts into individual tracks. The Inno functioned simultaneously as a terrestrial radio receiver and an Mp3 player with the addition of recording capabilities.³⁷ Essentially, XM Satellite Radio created a device, which seriously grayed the area between what had originally been considered two separate tiers under the DPRA: subscription transmissions and interactive services.

VI. RIAA v. XM SATELLITE RADIO

The Recording Industry Association of America (RIAA) is the trade organization behind approximately 85 percent of all legitimately recorded music produced and sold in the United States.³⁸ The RIAA’s mission is to protect the intellectual property and first amendment rights of the artists and music labels under its purview.³⁹ Therefore, it was not surprising that XM Satellite Radio’s release of the Inno in 2007 and the product’s novel capabilities received a great deal of negative attention from the RIAA. While the RIAA conceded that compulsory licensing gives XM Satellite Radio the right to perform songs in the form of transmissions, they asserted that the Inno’s capacity to record and store satellite radio over-stepped the DPRA’s statutory language and violated copyright holders’ right to distribution.⁴⁰ Specifically, the RIAA believed that XM Satellite Radio’s license gave them “one limited right: to publicly perform...copyrighted works in a non-interactive radio-like service. It did not give XM Satellite Radio the right to distribute or reproduce...copyrighted works.”⁴¹

According to the RIAA, satellite radio recording devices should be classified as download devices and therefore fall under the interactive services tier expressed in the DPRA. This would entitle artists and music labels to an additional license fee for each song recorded in conjunction with the compulsory license fee for broadcasting.⁴² It is the RIAA’s view that because the potential to retain “copies” of songs while attached to an XM Satellite Radio subscription is limited only by the number of recorded hours the device can store, adding a recording option to a subscription broadcast device is an abuse of the compulsory licensing terms and constitutes a serious threat to the sale of licenses for digital audio files and to tangible record sales. Under the fair assumption

³⁵ Geoff Duncan, *XM Readies Inno and Helix Portable Players*. DIGITAL TRENDS, available at <<http://www.digitaltrends.com/gadgets/xm-readies-inno-and-helix-portable-players/>>.

³⁶ Auerbach, *supra* note 2, at 349.

³⁷ Orbitcast Review, *supra* note 33.

³⁸ RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa.

³⁹ *Id.*

⁴⁰ Auerbach, *supra* note 2, at 334.

⁴¹ Complaint for Declaratory and Injunctive Relief and Damages for Plaintiffs at 1, *Atlantic Recording Corp. v. XM Satellite Radio Inc.* (S.D.N.Y. May 16, 2006).

⁴² *Id.* at 2.

that technology will only develop larger capacity devices, 50 hours of recorded radio broadcast could overtime dramatically reduce a consumer's need to invest in an actual music collection.⁴³ Therefore, the RIAA sought an injunction against XM Satellite Radio and \$150,000 USD in damages per recorded song per subscriber based on infringement.⁴⁴

Citing legislative foresight in defense of RIAA's litigation, XM Satellite Radio claimed compliance with the Audio Home Recording Act of 1992 (AHRA) and stated that the AHRA was in favor of satellite recording devices like the Inno.⁴⁵ Congress enacted the AHRA in the wake of the digital audio tape (DAT), a technology that at the time possessed the unprecedented ability to make perfect multi-generational digital audio recordings in contrast to previously used analog recordings which would typically degrade through the copying process. At the time it was developed, this new technology had a potential for copyright infringement not yet seen by consumers.⁴⁶ Devices, such as DATs, and disposable mediums, such as CD-Rs, posed an unavoidable threat to copyright owners and therefore became a liability to developers without proper legislative protection.

A. The Audio Home Recording Act of 1992

The Audio Home Recording Act (AHRA) embodied a "compromise reached between the audio hardware industry and the various segments of the music industry" by making a clear distinction between direct and contributory infringement.⁴⁷ According to the AHRA, manufacturers, distributors, or importers incur no liability for copyright infringement committed by consumers with the use of a digital audio recording device (DARD) or medium (DARM).⁴⁸ In exchange, artists and music labels now receive royalties from the manufacture, distribution, and importation of DARDs and DARMs by default as an attempt to recover the costs of potential infringement.⁴⁹ Furthermore, the AHRA mandates that a digital rights management system must be created to prevent mass reproduction.⁵⁰

Under the AHRA, a "digital audio recording device" is defined as any device designed or marketed for the primary purpose of making digital audio recordings for private use.⁵¹ With this in mind, XM Satellite Radio filed a motion to dismiss the

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 17–18.

⁴⁵ *Atlantic Recording Corp. v. XM Satellite Radio Inc.*, No. 06 Civ. 3733, 2006 U.S. Dist. 2007 WESTLAW 136186, at 4 (S.D.N.Y. July 17, 2006).

⁴⁶ Mitchell Zimmerman, FENWICK & WEST, AUDIO HOME RECORDING ACT DOES NOT PROTECT DEVICE DISTRIBUTOR AGAINST COPYRIGHT CLAIMS ARISING FROM BROADCASTER ROLE 1 *available at* <http://www.fenwick.com/publications/pages/audio-home-recording-act-does-not-protect-device-distributor-against-copyright-claims-arising-from-broadcaster-r.aspx>.

⁴⁷ S. REP. NO. 102-294, at 33 (1992).

⁴⁸ 17 U.S.C. § 1008 (2006).

⁴⁹ 17 U.S.C. § 1004 (2006).

⁵⁰ 17 U.S.C. § 1002 (2006).

⁵¹ 17 U.S.C. § 1001(3) (2006).

action based on the language of § 1008 of the AHRA.⁵² The district court responded with the following rejection:

. . . if XM is a distributor of DARDs within the definition of the AHRA, there is no limit to the infringing conduct in which they may engage⁵³ . . . It is manifestly apparent that the use of a radio/ cassette player to record songs played over free radio does not threaten the market for copyrighted works as does the use of a recorder which stores songs from private radio broadcasts on a subscription fee . . . Finding that this conduct is not protected under the AHRA is consistent with the fundamental tenet of copyright law that “all who derive value from a copyrighted work should pay for that use.”⁵⁴

A plain language analysis of the AHRA reveals that it provides a safe harbor for manufacturers, distributors, or importers only when the infringement in question takes place while the manufacturers, distributors, or importers are acting within their capacity or role.⁵⁵ In this case, XM Satellite Radio was not being sued for its acts as a DARD distributor, but rather for operating outside the authority of its statutory license.⁵⁶ Therefore, the district court found XM Satellite Radio was not immunized from the infringement claim in question.⁵⁷ Rather than pursue litigation, XM Satellite Radio sought settlements with each of the four music labels behind the RIAA suit: EMI,⁵⁸ Sony BMG,⁵⁹ Warner,⁶⁰ and Universal.⁶¹ Each unique settlement resulted in a multi-year agreement of an undisclosed nature regarding all the XM Satellite Radio devices sold with recording functionality. Industry pundits speculate that the sale of each recording device may come with a substantial royalty return for the music labels, much like how Universal received an unspecified amount from every Zune sold by Microsoft.⁶²

While it is true that the industry tends to ask for forgiveness rather than permission regarding the misuse of another’s work, in a legislatively vulnerable industry such as radio, the introduction of a product to the marketplace with the ability

⁵² Atlantic Recording Corp. v. XM Satellite Radio Inc., No. 06 Civ. 3733, 2007 U.S. Dist., at 5 (S.D.N.Y. Jan. 19, 2007).

⁵³ *Id.* at 16.

⁵⁴ *Id.* at 23–24.

⁵⁵ Zimmerman, *supra* note 47, at 2.

⁵⁶ *Id.* at 2–3.

⁵⁷ *Id.* at 19.

⁵⁸ Kawamoto, Dawn. “EMI and XM Satellite Radio reach settlement.” CNET News Blog, *available at* <http://news.cnet.com/8301-10784_3-9964615-7.html>.

⁵⁹ Press Release, Sony Music, XM Satellite Radio and Sony BMG Music Entertainment Reach Agreement on Pioneer Inno (Jan. 31, 2008) (on file with Sony Music) *available at* <http://www.sonymusic.com/sonymusic/xm-satellite-radio-and-sony-bmg-music-entertainment-reach-agreement/>.

⁶⁰ Press Release, PRNewsWire, XM Satellite Radio and Warner Music Group Reach Multi-Year Agreement on Pioneer Inno and Future Devices (on file with PRNewsWire).

⁶¹ Press Release, Universal Music Group, Universal Music Group (UMG) and XM Satellite Radio Reach Agreement on Pioneer Inno (on file with Universal Music Group) *available at* <http://www.universalmusic.com/corporate/detail/521>.

⁶² Block, Ryan. “Universal Music get fee for every Zune sold.” Engadget, *available at* <<http://www.engadget.com/2006/11/09/universal-music-get-fee-for-every-zune-sold/>>.

to record and store satellite broadcasts should have caused some alarm. Due to the grand scale at which XM operates and the high demand the company has for content, perhaps XM Satellite Radio should have considered preemptive measures rather than gambling that the compulsory licensing scheme would be enough to satisfy its royalty obligation.

Regardless of how one feels about the legal standing of the parties involved, *RIAA v. XM* is pertinent to a discussion of modern copyright law for another reason. Despite XMs possible misuse of the compulsory licensing scheme, the merit of the Inno as a technological innovation remains undiminished. Barriers to consumer access to devices of its kind stem not from a lack of demand but from legislative red tape. Current copyright law has no way to encompass a technological device sold by a company that does what the law considers a function of not just two different devices, but two entirely different business models. This clearly calls into question the structure and scope of the DMCA as well as the efficacy and equity of current compulsory licensing frameworks. The tiered structure of the DMCA does not have a place for products such as the Inno. This effectively limits a company's capacity to develop products of its kind and acquire licensing agreements at a cost that's reasonable enough to warrant production and obviate the fear of a law suit. These kinds of limitations to innovation are contrary to the spirit and purpose of copyright law and prove the necessity of reform.

VII. CONCLUSION: THE NEXT GREAT COPYRIGHT ACT

In a speech in March of 2013 the United States Register of Copyright, Maria Pallante, acknowledged the distinction between small and relatively frequent modifications versus larger more comprehensive restructuring, the latter of which, according to Pallante, has not occurred in almost fifteen years. Pallante attributes this predominantly to the tedious degree of expertise required for this manner of reform and yet insists that many issues are now "ripe for resolution."⁶³ In addition, Pallante asserts that much of the meticulous research the United States Copyright Office typically engages in when examining reform has inadvertently been under way for some time.⁶⁴ In her vision of reform for the "Next Great Copyright Act" she includes the adoption of a full and exclusive public performance rights for sound recordings, review of the DMCA, and licensing and royalty disparities.

A. Licensing and the Section 115 Reform Act

Due to the current structure of compulsory licensing, Pallante highlights that "because of the disparity in royalty obligations, there is a stark economic disadvantage for businesses that offer sound recordings over the internet."⁶⁵ This is clearly a reference to the two separate compulsory licensing schemes established by the DMCA.

⁶³ Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J.L. & Arts 315, 321 (2013), available at <http://www.copyright.gov/docs/next_great_copyright_act.pdf> [hereinafter Pallante].

⁶⁴ *Id.* at 320.

⁶⁵ *Id.*

While the DMCA 801b standard used to set rates for preexisting companies like XM yields rates of approximately 6 to 8 percent of revenues, the willing buyer and willing seller system can cost companies not grandfathered under the law as much as 50 to 60 percent of their revenue.

In 2006, Congress considered new legislation for copyright law to address some of these issues. The proposed law, Section 115 Reform Act (SIRA), would have changed the United States Copyright Act Section 115 licensing structure to a blanket-style system for digital uses.⁶⁶ Despite the legislative discussion, SIRA was not enacted.⁶⁷ In 2012, Congress examined Section 114's Scope of Exclusive Rights in Sound Recordings which contains the statutory licensing language for satellite radio and others seeking to engage in the digital performance of sound recordings in the Internet Radio Fairness Act of 2012 (IRFA).⁶⁸ The proposed legislation would change rates for non-interactive online radio services like Pandora from the "willing buyer, willing seller" standard to the one used to determine rates for Sirius XM Radio.⁶⁹ In the proposed judicial model of the IRFA, a panel of federal judges could consider evidence on the market value of the music as well as the effect the royalty rate would have on the industry.⁷⁰

Opponents of IRFA argued that the existing model is fair and accused Pandora of seeking to deprive copyright holders of the income they deserve.⁷¹ Ted Kalo, executive director of the MusicFirst coalition, commented that going from a fair market to government-mandated subsidy model will "break the backs of artists, while Pandora executives pad their pockets."⁷² IRFA advocates, like Pandora, argued that new legislation would create lower royalty rates.⁷³ Ultimately, the legislation was never voted upon.⁷⁴ Director Pallante suggests it may be time for Congress to revisit some of the proposed legislation.⁷⁵

B. Private Licensing Reform

Pallante acknowledges the potential of private licensing reform by stating "the development of newer, more efficient licensing models is essential to the digital marketplace and the many submarkets that comprise it."⁷⁶ Some of these possible reformations do not require Congressional legislation, but the business customs should merely be encouraging this practice amongst each other.⁷⁷ For example in *RIAA v.*

⁶⁶ *Id.* at 334.

⁶⁷ *Id.*

⁶⁸ Internet Radio Fairness Act of 2012 ("IRFA"), H.R. 6480, 112th Cong. (2d Sess. 2012).

⁶⁹ Ben Sisario, *Proposed Bill Could Change Royalty Rates for Internet Radio*, N. Y. TIMES, Sept. 23, 2013, available at <http://www.nytimes.com/2012/09/24/business/media/proposed-bill-could-change-royalty-rates-for-internet-radio.html?_r=0>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ H.R.6480 - Internet Radio Fairness Act of 2012, available at <<http://beta.congress.gov/bill/112th-congress/house-bill/6480/all-actions-with-amendments/>>.

⁷⁵ Pallante *supra* note 64, at 333.

⁷⁶ *Id.* at 333.

⁷⁷ *Id.*

XM, *XM* might have paused to consider steps such as a secondary or private licensing agreement prior to release of its product to leave open opportunity for collaboration. Private licensing agreements circumvent the statutory license and allow companies to deal directly with copyright holders or their respective record labels to set rates and develop terms.⁷⁸ This was the approach taken by Apple Inc. and Warner Music Group in June of 2013 when they finally settled a recorded music licensing deal for the iRadio internet streaming service.⁷⁹ Apple agreed to pay Warner 16 cents per stream rather than the 12 cents mandated under the 2009 compulsory licensing framework as well as a portion of the ad revenue generated by the service.⁸⁰

Some have suggested that private licensing, if properly regulated, may be a viable long-term solution to current licensing controversies. While private licensing may alleviate some incongruities in the current system by allowing companies to conduct their own “private licensing reform,” the practice raises infringement concerns of its own. Compulsory licensing frameworks set up by Congress inherently contain protection for copyright holders by clearly defining what royalties are to be paid, how much, and to whom as well as setting up third parties to distribute payments. Private licensing agreements create the opportunity for parties to circumvent the distributive justice built into the laws. Any attempt at regulation of these agreements would have to examine current practices for both for their strengths as well as their capacity to abuse lack of oversight.

C. Voices for Reform: All Roads Lead to the DMCA

Pallante is far from alone in her calls for reform and while many aspects are up for debate, it is relatively clear that the road to reform begins at the DMCA. In July of 2004 David Carson, General Council of the US copyright office, made a statement in front of the Library of Congress strongly condemning the exemption of royalty payments for the first tier, non-subscription broadcast transmissions, and arguing vehemently for a full performance right for digital audio recordings.⁸¹ In reference to the advent of digital audio recording devices, such as the Inno, with the capacity to record radio broadcasts Carson stated that, “[t]hese technological advances threaten to disrupt the careful balance Congress struck between the record industry, on the one hand, and the purveyors of new digital technologies, on the other, in the DPRA and the DMCA.”⁸² He calls for the full performance right for digital audio recording as a way to ensure the proper compensation for performers, record companies, and authorized on-line record stores.⁸³

Similarly, in an article entitled “Digital Music Broadcast Royalties: The Case for a Level Playing Field,” John Villasenor makes a compelling argument about the disparity between the different royalty standards for music broadcasters before and

⁷⁸ *Garcia*, *supra* note 27, at 3.

⁷⁹ Alex Pham, *Warner Music Group Inks iRadio Deal for Publishing, Recorded-Music Licensing*, BILLBOARD (June 2, 2013), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1565596/warner-music-group-inks-iradio-deal-for-publishing>.

⁸⁰ *Id.*

⁸¹ *See Carson*, *supra* note 24.

⁸² *Id.* at 32.

⁸³ *Id.* at 33–34.

after the implementation of the DMCA.⁸⁴ He compares the multiple rates for audio recording to the blanket rates used by the US copyright office for musical compositions. Placed in this context and combined with the knowledge that non-interactive digital broadcasts face fluctuating royalty rates depending on “the year, the technology used to deliver music, and whether their digital music service was in existence in 1998” does seem to effectively draw into question the equity of the legislation.⁸⁵

In spite of this, far from trivializing the DMCA in her speech, Pallante calls it “our best model of future-leaning legislation.”⁸⁶ She does however acknowledge that almost fifteen years have passed since its passage and technology has changed considerably since that time.⁸⁷ Pallante suggests that the DMCA be reviewed and reconsidered in broad terms. She argues that any attempt to develop a comprehensive reform of copyright needs to consider the application of current legislation for both congruities and disparities. Reform should also look at the effectiveness of the law and consider what parts are still pertinent to the current state of affairs. The Register keeps this general tone throughout her speech, consistently asserting that current law is not a lost cause, but rather a foundation from which new laws can be derived and tailored to the times.

⁸⁴ John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field*, 19 ISSUES IN TECHNOLOGY INNOVATIONS 1, 2 (2012), http://www.brookings.edu/~media/research/files/papers/2012/8/07%20music%20royalties%20technology%20villasenor/cti_19_villasenor.pdf.

⁸⁵ *Id.* at 3.

⁸⁶ Pallante, *supra* note 63, at 329.

⁸⁷ *Id.* at 320.