THE QUEST FOR “PARITY”: AN EXAMINATION OF THE INTERNET RADIO FAIRNESS ACT

by RICK MARSHALL

For more than two years now I have been eagerly anticipating the day when I could finally write these words: the royalty crisis is over! Webcasters, artists, and record labels have reached a resolution to the calamitous Internet radio royalty ruling of 2007. Pandora is finally on safe ground with a long-term agreement for survivable royalty rates. This ensures that Pandora will continue streaming music for many years to come!

– Tim Westergen, Chief Strategy Officer & Founder of Pandora Radio, July 7, 2009

A predatory licensing fee orchestrated over ten years ago by the RIAA and their lobbyists in Washington has devastated internet radio. Few now deem it worthy of major investment . . . This is not a recipe for a sustainable industry. It is a destructive stranglehold that is putting at risk a much larger reward for musicians everywhere.

– Tim Westergen, Chief Strategy Officer & Founder of Pandora Radio, October 9, 2012

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INTRODUCTION

Several members of Congress have introduced legislation aimed at reducing the royalties that non-interactive streaming radio services (webcasters) pay rights holders for performing their sound recordings over digital channels. Under U.S. copyright law, there is currently a two-tiered system for determining compulsory digital sound recording performance royalty rates. Under the two-tiered system, webcasters are subject to market-based rates set pursuant to the “willing buyer-willing seller” standard, while digital cable and digital satellite broadcasters are subject to below-market rates set pursuant to the “801(b)(1)” standard. With this new legislation, the webcasters claimed to be seeking “parity” with the cable and satellite services. Specifically, they were requesting that all digital services have their rates calculated under a modified 801(b) standard designed to result in below-market determinations.

This article will attempt to answer the question: “Why shouldn’t services whose business models depend almost entirely on transmitting sound recordings be required to compensate sound recording owners at a fair-market rate?” Section I introduces the Internet Radio Fairness Act; Section II provides a brief history of the digital performance right in sound recordings; Section III examines the competing rate-setting standards; and, Section IV analyzes recurring issues in the argument between webcasters and sound recording owners over which standard should govern rate-setting proceedings.

I. THE INTERNET RADIO FAIRNESS ACT

The success of Internet radio is undeniable. From the monolith Pandora, to the sleek, noise-pop-driven BAGeL Radio, non-interactive digital music streaming services (better known as “webcasters”) have become major players in the music industry.3 Thanks to user-friendly interfaces

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3 Non-interactive digital music streaming services transmit a pre-programmed series of audio files to users, giving the users limited control over the specific audio files the service transmits to them. For a more comprehensive explanation of the different types of digital music streaming services, see W.
and innovative music curation filters, webcasters continue to capture large segments of the listeners shifting from physical to digital music consumption.4

The largest webcasters owe much of their modern success to the pureplay webcasters settlement agreement (“PurePlay Agreement”).5 Effective circa 2009, the PurePlay Agreement codified an uneasy truce between sound recording owners and webcasters.6 Prior to the agreement, the two had been locked in a decade-long battle over the appropriate royalty rate for digitally transmitted sound recordings. Importantly, the parties used a rate schedule set by the Copyright Royalty Board (“CRB”) under the “willing buyer-willing seller standard” as the starting point for negotiating terms they both deemed acceptable.7

When the PurePlay Agreement went into effect, it received unanimous praise. Webcasters declared the “royalty crisis” over and championed the agreement for containing “survivable royalty rates” that would ensure they would be able to continue streaming music “for many years to come.”8 Sound recording owners claimed the new rates would compen-


4 For the quarter ending in June 2012, the audience for Internet radio services in the U.S. grew 27% from the same period a year earlier. See Greg Sandoval, Web Radio Growing Faster than On-Demand Services (Study), CNET.COM (Nov. 8, 2012), http://news.cnet.com/8301-1023_3-57546854-93/web-radio-growing-faster-than-on-demand-services-study.

5 For the remainder of this article, the phrase “PurePlay Agreement” will reference the settlement negotiated between “pureplay” webcasters and SoundExchange pursuant to the Webcaster Settlement Act of 2009 that determines the royalty rates for the use of sound recordings by Internet radio stations for the period from 2006-2015. For details of the agreement, see Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 136, 34796 (July 17, 2009). For clarity, a “pureplay” webcaster is an Internet radio service whose primary business is to transmit sound recordings under the statutory license, not to sell or promote any other service or product. See David Oxenford, Pureplay Webcasters Settlement Agreement Published in Federal Register – 30 Days for Webcasters to Make a Choice, BROADCAST LAW BLOG (July 18, 2009), http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-settlement-agreement-published-in-federal-register-30-days-for-webcasters-to-make-a-choice.


sate both “the artists who create music and the music labels that invest in that music creation” on a “fair and equitable basis.”

Fast forward to 2012, and the détente has ended. In what appears to be a thinly veiled attempt to gain leverage in the next round of webcasting negotiations (set to take place in 2014), webcasters and their supporters have begun publicly criticizing the current rate-setting landscape. Some go so far as to call it “outrageous,” “destructive,” and “out of touch with the realities of the twenty-first century marketplace.”

In late 2012, a coalition led by the largest commercial webcasters began pressuring Congress to modify the legal standard the CRB uses to set the rate schedule for commercial digital webcasters. The vehicle for the coalition’s effort was the Internet Radio Fairness Act (“IRFA”). The Act called for Congress to create a “level playing field” by replacing the

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13 The IRFA was introduced in the U.S. House of Representatives by Representatives Jason Chaffetz (R-UT) and Jared Polis (D-CO) and has a companion in the Senate introduced by Senator Ron Wyden (D-OR). For the House and Senate bills, see H.R. 6480, Internet Radio Fairness Act of 2012, 112th Cong. (2012); S. 3609, Internet Radio Fairness Act of 2012, S. 3609, 112th Cong. (2012).
“willing buyer-willing seller” standard with a modified “801(b)” standard — the standard the CRB uses to set the rates for digital satellite and digital cable services. The remainder of this article will analyze the IRFA, focusing primarily on the recurring arguments that plague the statutory rate-setting process.

II. A BRIEF HISTORY OF WEBCASTER ROYALTIES

It is impossible to fully grasp the issues raised by the IRFA without first understanding how the modern compulsory license royalty rate structure came to be. The following is a brief history of the digital performance right in sound recordings.

A. 1971 – The Sound Recordings Act

Every song fixed as a phonorecord has two separate and distinct copyrightable components: the sound recording and the underlying musical composition.14 Prior to 1971, the musical composition was the only component Congress deemed worthy of statutory protection.15 The 1971 Sound Recordings Act was the first piece of legislation to extend Federal copyright protection to sound recordings.16 The Act, however, did not grant sound recording owners complete control over their newly protected works. As a result of strong lobbying efforts by terrestrial radio broadcasters (who wanted over-the-air AM/FM broadcasts to remain exempt from the new right) the Act only recognized the rights to control the reproduction and distribution of sound recordings.17 For sound recording owners, the right to request remuneration when others played and performed their works for commercial gain was still out of reach. Despite mounting international pressure, an increased lobbying effort by the

14 See 17 U.S.C. § 102(a) (2006) (Subject matter of copyright: In general); see also id. § 114 (scope of exclusive rights in sound recordings).
15 See White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1 (1908) (holding a perforated piano roll was not a copy of the underlying music; thus, the author of the composition had no control over its use and its progeny) for examples of how the law treated sound recordings prior to 1971.
16 Sound Recordings Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Congress extended Federal copyright protection to sound recordings fixed on or after February 15, 1972 (the effective date of the Act)).
sound recording copyright owners, and reports from the Register of Copyrights expressly endorsing the creation of a sound recording performance right, the 1971 Sound Recording Act would remain the sole legislation protecting sound recordings for the next twenty-five years.

B. 1995 – The DPRA and the 801(b) Standard

With the 1990s came the proliferation of technologies that enabled new digital music services to deliver sound recordings directly to users without implicating traditional reproduction and distribution rights. Recognizing that the new services threatened the livelihood of those who traded in the large-scale creation and distribution of sound recordings, Congress enacted the Digital Performance Right in Sound Recordings Act (“DPRA”).

The DPRA granted sound recording owners an exclusive right to control the public performance of their sound recordings by means of digital

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21 The Copyright Act of 1976 was the most significant overhaul of U.S. copyright law since 1909. Yet, Congress chose to succumb to political pressures from terrestrial broadcasters and continue to exclude a public performance right for sound recordings. See Villasenor, supra note 19, at 3. In section 106(4) of the 1976 Act, Congress acknowledged a copyright owner’s exclusive right to control the public performances of his or her works. However, in section 114(a), it carved out a critical exception to this right, providing that “[t]he exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under section 106(4).” Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).


transmissions. This right, however, was not unlimited. In an attempt to balance the interests of the music industry, traditional broadcasters, and the new digital music services, Congress created a number of exceptions to the exclusivity of the digital performance right.

The exceptions are complex, and a comprehensive understanding of them is key to navigating the current music licensing landscape. However, for purposes of understanding the IRFA, there are three crucial aspects to keep in mind: First, the DPRA ensured that traditional over-the-air AM/FM “terrestrial” broadcasters would remain exempt from paying performance royalties. Second, the DPRA created a new compulsory license that compelled copyright owners to license their sound recordings for use by certain nonexempt, non-interactive, digital music services. And third, the DPRA called for the compulsory license royalty rate to be set according to a four-part policy standard found in Title 17, Section 801(b)(1) of the United States Code. It is this “801(b)” standard that will play a major role in the outcome of the Internet Radio Fairness Act and other webcaster-supported legislation.

24 17 U.S.C. § 106 lists the “Exclusive rights in copyrighted works.” The DPRA amended § 106 to include the right to perform copyrighted sound recordings publicly “by means of a digital audio transmission.”


26 General Counsel for the Recording Industry Association of America, Steven Marks, has agreed with characterizations of the statutory license framework in the DPRA as “virtually incomprehensible” and “more complex than the Internal Revenue Code.” See Marks, supra note 19, at 312, referencing Lionel S. Sobel, A New Music Law for the Age of Digital Technology, 17 Ent. L. Rep. 3, 4 (1995).


28 17 U.S.C. § 114(f) (2006). Importantly, the section 114 compulsory license did not apply to interactive digital music services, which is why Spotify, Rhapsody, Rdio, MOG, and other on-demand and high-functionality services cut deals in the marketplace, while non-interactive services benefited from the compulsory license.

29 Id. § 801(b)(1)(A)–(D).

30 To be clear, the 801(b) standard pre-existed the DPRA. Congress did not create the standard specifically to apply to the performance right in sound recordings. Rather, Congress decided that the standard, which was already
Soon after Congress enacted the DPRA, it became questionable whether the new compulsory license applied to certain types of advertiser-supported, non-interactive webcasting services.\textsuperscript{31} Congress took the 1998 implementation of the Digital Millennium Copyright Act ("DMCA") as an opportunity to clarify this perceived insufficiency.\textsuperscript{32}

In the DMCA, Congress made clear that the compulsory license applied to all commercial, non-interactive webcasting services, regardless of their revenue models.\textsuperscript{33} It also opted to dispense with the 801(b) standard in favor of a standard that better reflected the rates "that would have been negotiated in the marketplace between a willing buyer and a willing seller."\textsuperscript{34} Unfortunately for sound recording owners, by the time the DMCA deliberations took place, digital satellite and digital cable services had amassed enough political support to oppose total adoption of the "willing buyer-willing seller" standard.\textsuperscript{35} As a result, the modern day two-tier royalty rate structure was born.

Under the modern structure, services that meet the definition of either "preexisting satellite digital audio radio service"\textsuperscript{36} or "preexisting subscription service"\textsuperscript{37} are "grandfathered" so that their rates continue to be used to calculate royalty rates for the section 115 compulsory license for making and distributing sound recordings, was ideal for calculating digital performance royalties.

\textsuperscript{31} See \textcite{Kohn & Kohn, supra note 22, at 1471.}
\textsuperscript{33} Id.
\textsuperscript{34} Hereinafter the "willing buyer-willing seller" standard.
\textsuperscript{35} The DMCA process involved "a frenzied several months of lobbying, meetings, and hearings involving trade groups including the RIAA, DiMA, the National Association of Broadcasters, and the Songwriter's Guild of America . . . ." \textcite{Villasenor, supra note 19, at 4.}
\textsuperscript{36} The DMCA defines a "preexisting satellite digital audio radio service" as follows: "a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service." 17 U.S.C. § 114(j)(10) (2006).
\textsuperscript{37} The DMCA defines a "preexisting subscription service" as follows: "a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service. Id. § 114(j)(11).
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be set pursuant to the 801(b) standard. Meanwhile, services that fall under the category of “new subscription services” or that broadcast “eligible non-subscription transmissions” have their rates calculated pursuant to the willing buyer-willing seller standard.

D. 2002 – The Creation of CARP Through the Implementation of the CRB

To be clear, the rate standards proscribed by the DMCA are designed to set compulsory rates in the event that direct negotiations between sound recording owners and digital music services break down. Theoretically, before the government sets a statute-based royalty rate, the sound recording industry and qualifying members of the digital music industry should approach one another and attempt to independently negotiate a rate. It is only when these industry-wide negotiations fail that the parties are forced to litigate the rate before a government entity.

That said, in the wake of the DMCA, webcasters were unable to reach an agreement with the record labels that owned most commercially desirable sound recordings. Congress, in turn, authorized a Copyright Arbitration Royalty Panel (“CARP”) to set an appropriate compulsory license rate.


39 The DMCA defines a “new subscription service” as follows: “a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.” See 17 U.S.C. § 114(j)(8) (2006).

40 The DMCA defines “eligible nonsubscription transmission” as follows: “a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.” Id. § 114(j)(6).

41 Despite the DMCA amendments, terrestrial radio remained exempt from having to pay to perform sound recordings (though not from having to pay for online transmissions such as Internet simulcasts of AM/FM programming). Stockment, supra note 38, at 2163; Marks, supra note 19 at 315-17; Villasenor, supra note 19, at 4.

42 Marks, supra note 19, at 315-17; Villasenor, supra note 19, at 4.

43 A CARP is an ad-hoc panel of three arbitrators from the private sector, appointed and administered by the U.S. Copyright Office and the Library of Congress, which meet for limited times for the purpose of adjusting rates and distributing royalties. The CARP’s job is to hear evidence from wit-
In 2002, a CARP applied the willing buyer-willing seller standard and delivered a report recommending a corresponding rate.\textsuperscript{44} The webcasters balked at the CARP’s recommendation, causing the Librarian of Congress to intervene, partially reject the CARP’s findings, and issue his own substantially lower webcast rates.\textsuperscript{45}


Following the 2002 CARP proceedings, both webcasters and sound recording owners petitioned Congress to modify the statutory rate-setting process.\textsuperscript{46} Congress responded by enacting the Copyright Royalty and Distribution Reform Act of 2004.\textsuperscript{47} Among other things, this Act replaced the CARP system with a permanent three-judge Copyright Royalty Board (“CRB”).\textsuperscript{48}

In 2007, the CRB issued a decision that set webcaster rates through 2010.\textsuperscript{49} As required, the CRB determined the rate schedule by applying

\textsuperscript{44} On February 20, 2002, the Copyright Arbitration Royalty Panel (“CARP”) delivered its report recommending rates and terms for the statutory license for eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions (webcasting) under 17 U.S.C. § 114 and to make ephemeral recordings of sound recordings for use of sound recordings under the statutory license set forth in 17 U.S.C. § 112. For details of the proceeding, see 66 Fed. Reg. 141, 38324-26 (July 23, 2002).


\textsuperscript{46} CARP reform was largely webcaster-driven. See \textit{Webcaster Alliance and U.S. Based Webcasters Say – WE NEED AIRR}, PRWEB.com (Jan. 29, 2003), http://www.prweb.com/releases/2003/01/prweb55908.htm.


\textsuperscript{48} Id.

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the willing buyer-willing seller standard. Dissatisfied with the CRB’s determination, the webcasters once again appealed to Congress for a rate reduction — this time mobilizing their growing pools of listeners in a large-scale, grassroots lobbying campaign.\(^{50}\) Eventually, Congress yielded to public pressure and passed a pair of Webcaster Settlement Acts designed to induce webcasters and sound recording owners into negotiating their own rate agreements.\(^{51}\)

By mid-2009, a majority of webcasters had entered into agreements pursuant to the Webcaster Settlement Acts.\(^{52}\) The most important of these agreements being the PurePlay Agreement — which established the rates commercial, Internet-based webcasters will pay through 2015.\(^{53}\) Presently, a majority of large webcasters pay royalties based on the schedule laid out in the PurePlay Agreement.\(^{54}\)

### III. COMPULSORY LICENSE RATE-SETTING

As the above history indicates, there are currently three mechanisms that determine the royalties large, commercial digital music services pay to sound recording owners: the schedule set pursuant to the “willing buyer-willing seller” standard (which applies to all webcasters that qualify for a compulsory license to stream sound recordings); the schedule set pursuant to the 801(b) standard (which applies to all preexisting digital satellite and digital cable music services that qualify for a compulsory license to stream sound recordings); and the schedule created in the PurePlay Agreement (which applies to webcasters that qualify for a compulsory license to stream sound recordings and agree to “opt-in” to the PurePlay Agreement’s terms). This section analyzes each of the three schedules.


\(^{52}\) See note 5, supra.


\(^{54}\) See note 5, supra.
A. Willing Buyer / Willing Seller

The “willing buyer-willing seller” standard applies to “new subscription services” and “eligible non-subscription transmission services.” Most, if not all, commercial webcasters fall into one of these two categories. Under the standard, the CRB is required to set rates at a level that most clearly represents “the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” Put simply, the standard’s aim is to determine the fair-market value of a license to digitally transmit sound recordings.

Section 114 of the Copyright Act requires the CRB to base its willing buyer-willing seller rate calculation on “economic, competitive and programming information presented by the parties.” In doing so, it is to pay particular attention to the following factors: (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and, (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

It is important to note that the CRB considers these factors along with other relevant, market-based factors when it determines willing buyer-willing seller rates. The factors are not additional standards or policy considerations to be used to reduce or modify the rate after the

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56 See note 39, infra, for the 17 U.S.C. § 114(j)(8) definition of “new subscription services”; see note 40, supra, for the 17 U.S.C. § 114(j)(6) definition of “eligible non-subscription transmission services.”
60 In calculating the willing buyer-willing seller rate, the CRB will analyze the deals struck in the unregulated marketplace between sound recording owners and interactive streaming services (as noted, interactive streaming services like Spotify, Rhapsody, and MOG do not qualify for the section 114 compulsory license) and then discount to account for the difference in functionality between the types of services.
CRB makes its market-based determination. In other words, these factors highlight what should go into determining the fair-market value of a license to digitally transmit sound recordings; they are not justifications for straying from a market-based rate.

The most recent round of “willing buyer-willing seller” rate setting took place between 2009 and 2010. In it, the CRB set the rates webcasters are required to pay through 2015 as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per Digital Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>$0.0019</td>
</tr>
<tr>
<td>2012</td>
<td>$0.0021</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0021</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0023</td>
</tr>
</tbody>
</table>

B. 801(b)

The 801(b) standard applies to “preexisting satellite digital audio radio services” and “preexisting subscription services.” Only two broadcasting industries currently pay rates under this standard: digital satellite broadcasters and digital cable broadcasters. Within these industries, there are currently only three music services that actually qualify for the 801(b) rates (Sirius XM, MusicChoice, and Muzak). The CRB sets the statutory rates for all other webcasters by applying the willing buyer-willing seller standard.

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63 See note 36, infra, for the 17 U.S.C. § 114(j)(10) definition of “preexisting satellite digital audio radio services”; see note 37, infra, for the 17 U.S.C. § 114(j)(11) definition of “preexisting subscription services.
66 See Section III.A, infra.
Rate calculation under 801(b) has been characterized as a two-step process. First, the CRB estimates the rate digital transmission services would pay for sound recordings in an unregulated, fair market. This marketplace valuation becomes the “upper boundary” for the CRB’s rate calculation. Second, the CRB applies four 801(b) “policy objectives” and adjusts the marketplace valuation where the objectives dictate it do so.

The first and second policy objectives are fairly straightforward — as they echo the constitutional mandate that copyright law strike a balance between incentivizing authors and benefiting the public good. The third objective calls for the CRB to set a rate that reflects the nature of the parties’ respective businesses (the roles they play in making sound recordings available to the public), the various resources the parties expend in conducting their businesses (creative contribution, technological contribution, capital investment, cost, risk, etc.) and the effect licensing between the parties will have on the distribution of digital music (“contribution to the opening of new markets for creative expression and media for their communication”). These criteria, for all intents and purposes, are what any reasonable arbiter should consider in attempting to set a fair-market rate. Importantly, the “willing buyer-willing seller” standard expressly

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69 Id.


(A) To maximize the availability of creative works to the public;
(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions;
(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

71 U.S. Const. art. I, § 8; see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

calls for the use of these same variables in calculating a rate representative of what the parties would negotiate absent government interference.\footnote{See Section III.A, infra.}

The fourth objective calls for the CRB to consider the “disruptive impact” rates will have on “prevailing industry practices.”\footnote{17 U.S.C. § 801(b)(1)(D) (2006).} This factor divuls the true intended purpose of the 801(b) standard when applied in the digital transmission rate setting context. That is, to protect “pre-existing” services with business models dependent on legitimate expectations that they would not have to pay market-based royalty rates.\footnote{“The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company.” 63 Fed. Reg. 89, 25394, 25408 (May 8, 1998).}

In many ways, Congress’ extension of the 801(b) standard to sound recordings was about ensuring that a sudden increase in royalty rates would not cause preexisting digital broadcasters to fold.\footnote{See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080, 4097 (Jan. 24, 2008), available at http://www.loc.gov/crb/fedreg/2008/73fr4080.pdf.} Congress’ intentions are evidenced by the fact that only a limited number of digital satellite and digital cable services qualified to be “grandfathered” under the 801(b) standard when it made the switch to the willing buyer-willing seller standard.\footnote{Sirius XM, MusicChoice, and Muzak. See Peoples, supra note 65.} Indeed, in setting the rate for digital satellite services, the CRB relied heavily, if not entirely, on arguments that the industry would face major disruption if required to pay sound recording owners a market-based royalty rate. In its final determination, the CRB went so far as to insinuate that satellite services would not be able to launch satellites if they were forced to pay market-based rates.\footnote{See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 16, 4080, 4097 (Jan. 24, 2008), available at http://www.loc.gov/crb/fedreg/2008/73fr4080.pdf.}

Upon examining the 801(b) standard in the digital performance of sound recordings context, one should take away three important details: (1) the CRB has interpreted three of the four policy objectives as indicating that the standard seeks to establish a market-based rate; (2) the lone objective calling for adjustment of the market-based rate only applies to a finite subset of preexisting digital services; and, (3) where the CRB finds the fourth objective to be immaterial, the rates it sets under the 801(b) standard are similar, if not identical to the rates it sets under the willing buyer-willing seller standard.\footnote{It is worth noting that the “disruption” objective was the subject of discussion in 2010 in connection with the proposed Performance Rights Act. See H.R. 848, Performance Rights Act, 111th Cong. (2010). Under the proposed
From 2008 through 2012, the 801(b) rate schedule for “preexisting subscription services” is as follows: 80

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of Gross U.S. Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008–2011</td>
<td>7.25%</td>
</tr>
<tr>
<td>2012</td>
<td>7.50%</td>
</tr>
</tbody>
</table>

From 2007 through 2012, the 801(b) rate schedule for “preexisting satellite digital audio radio services” is as follows: 81

<table>
<thead>
<tr>
<th>Year^82</th>
<th>Percentage of Gross U.S. Revenue^83</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007–2008</td>
<td>6.0%</td>
</tr>
<tr>
<td>2009</td>
<td>6.5%</td>
</tr>
<tr>
<td>2010</td>
<td>7.0%</td>
</tr>
<tr>
<td>2011</td>
<td>7.5%</td>
</tr>
<tr>
<td>2012</td>
<td>8.0%</td>
</tr>
</tbody>
</table>

C. The PurePlay Settlement Agreement

The PurePlay Agreement is the unprecedented compromise struck between webcasters and sound recording owners pursuant to the negotiat-

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81 See id.
82 Digital cable services also agree to pay a minimum $100,000 per year payment. Their per-performance royalties or revenue-based payments apply against this fee. 37 C.F.R. § 382.2 (2008).
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ing authority created by the Webcaster Settlement Acts.\(^\text{84}\) The agreement establishes a schedule of rates and terms for all commercially available sound recordings. Any qualifying webcaster that chooses to opt-in to the agreement agrees to pay royalties under its terms through 2015.\(^\text{85}\)

The Agreement provides for three rate classes, each based on the “opting-in” webcaster’s annual revenues and streaming capabilities.\(^\text{86}\) For “large commercial webcasters” (those who earn more than $1.25 million in annual revenues), the rate is the greater of twenty-five percent of their total U.S. revenues or a per-performance rate 40% lower than the CRB’s market-based rate.\(^\text{87}\) For “small commercial webcasters” (those who earn $1.25 million or less in annual revenues and place a cap on the amount of sound recordings they stream), the rate is the greater of a percentage of their total U.S. revenues or a percentage of their expenses.\(^\text{88}\) For webcasters providing bundled, syndicated or subscription services, the rates are the same as those agreed to by the National Association of Broadcasters (“NAB”).\(^\text{89}\)

\(^\text{84}\) See note 5, supra; see also Bryan Calhoon, SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement, SOUNDEXCHANGE (July 7, 2009), http://www.soundexchange.com/2009/07/07/soundexchange-and-%E2%80%9Cpureplay%E2%80%9D-webcasters-reach-unprecedented-experimental-rate-agreement.

\(^\text{85}\) Webcasters may elect to “opt-in” to the agreement at the beginning of each year. Upon opting-in, commercial webcasters must agree to withdraw from any rate-setting proceedings before the Copyright Royalty Board and refrain from participating in any such proceedings for the duration of the agreement.


\(^\text{87}\) “Large webcasters” also agree to pay a minimum $25,000 per year payment. Their per-performance royalties or revenue-based payments apply against this fee.

\(^\text{88}\) For 2012–14, the percentage of revenue for “small webcasters” is 12% of their first $250,000 in U.S. revenue and 14% of any U.S. revenue above $250,000. The percentage of expenses is 7%. Additionally, the agreement provides for a transitional rate for “small webcasters” that exceed the $1.25 million total revenue threshold.

\(^\text{89}\) This category generally applies where subscription services offer one or more products or services (including a digital music service) “bundled” together without separate pricing for the individual components of the bundle. In other words, the bundle is such that it becomes too difficult to untangle the revenue generated by the digital music service from the total revenue generated by the whole of the bundle. See generally Kevin Zhu & Bryan MacQuarrie, The Economics of Digital Bundling on the Music Industry, 46 COMMUNICATIONS OF THE ACH 264 (2003), available at http://rady.ucsd.edu/faculty/directory/zhu/pub/docs/papers/paper13_CACM_DigitalBundling_p264-zhu_published.pdf.
The initial success of the PurePlay agreement can be attributed to its inclusion of revenue sharing as an alternative rate option. The agreement differed from the statutory rates in that it offered webcasters a discount from the CRB’s market-based rate determination in return for a share of their revenues. This was hugely important — as the webcasters viewed the discounted rates as an opportunity to grow their businesses and the sound recording owners viewed the revenue sharing as an opportunity to take stakes in services with the potential to reinvent the music industry.

Beginning in 2012, the rates for “large commercial webcasters” that opt-in to the pure play agreement are the greater of 25% of their total revenues or the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per Digital Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$0.0011</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0012</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0013</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0014</td>
</tr>
</tbody>
</table>

Beginning in 2012, the rate for “small commercial webcasters” that opt-in to the pure play agreement is the greater of 7% of their expenses or the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per Digital Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012–2014</td>
<td>12% of the first $250,000 in gross revenue; and 14% of gross revenue in excess of $250,000</td>
</tr>
</tbody>
</table>

Beginning in 2012, the rate schedule for webcasters providing bundled, syndicated or subscription services that opt-in to the pure play agreement is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per Digital Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$0.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0022</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0025</td>
</tr>
</tbody>
</table>

90 See Calhoon, supra note 83.
92 See Calhoon, supra note 83.
IV. WHAT CONSTITUTES A "FAIR" STANDARD

The IRFA was a one-sided piece of legislation. Packaged as a way to “level the playing field” across all digital music platforms, the Act was in all facets — designed to force the CRB to set below-market rates. The Act did not pass in 2012, but nevertheless, the issues that plague the rate-setting process will undoubtedly carry over into the next Congress; and, the tension between sound recording owners and webcasters will continue to escalate as the 2015 PurePlay Agreement expiration date grows nearer. This section analyzes the recurring issues in the argument between webcasters and sound recording owners over which rate standard should govern CRB royalty-setting proceedings.

A. Parity

Perhaps the most compelling argument put forth by proponents of the IRFA is their desire for “parity.” Webcasters believe the standard the CRB uses to set the compulsory license rates should be the same across all digital platforms.94 On its face, this is a legitimate grievance. The webcasters’ concept of parity, though, is inconsistent with modern rate setting trends.

When Congress enacted the DMCA in 1998, it made clear that all digital music services should pay a rate set according to the willing buyer-willing seller standard. Preexisting satellite and cable services with business models that depended on the former 801(b) rate standard were the lone exceptions.95 As of 2012, there are only three services that qualify to pay 801(b) rates.96 To be clear, this number is finite. Barring a merger or other corporate restructuring, these will be the last services to pay under the current 801(b) statutory scheme. By comparison, there are currently over 2,000 digital music webcasters, all of which are subject to the willing buyer-willing seller rates.97 If parity is the goal, it seems more logical to eliminate the now-obsolete subsidy enjoyed by three preexisting services.

95 See Section II.B., supra.
96 Sirius XM, MusicChoice, and Muzak. See Peoples, supra note 64.
than to radically revise how rates are calculated for an entire industry sector.\textsuperscript{98}

The “parity” argument also begs the question: How will applying the 801(b) standard to webcasters create rate parity with satellite and cable music services? When the CRB set rates for the digital satellite and cable sectors it relied heavily on section 801(b)(1)(D) — the “minimization of disruptive impact” on industry practices.\textsuperscript{99} The CRB’s objective for setting a below-market rate was to ensure these services did not see their business models threatened by having to pay market-price to use sound recordings.\textsuperscript{100} Remove the section 801(b)(1)(D) accounting for “disruptive impact” from the equation, and what remains are three policy objectives that tend to indicate sound recording owners should be compensated at market value.\textsuperscript{101}

Of course, the drafters of the IRFA recognized that simply applying the 801(b) standard in its current form would not automatically result in the rate reduction they equate with parity. Language in the Act called for the addition of many one-sided objectives to the section 801(b)(1) policy considerations — all favoring digital music services. These included: (1) adding a new subparagraph to section 114(f)(1)(C) that would require the CRB to consider the income necessary for webcasters to receive “a reasonable return on all relevant investments, including investments in prior periods for which returns have not been earned”\textsuperscript{102}; and (2) adding a new

\textsuperscript{98} True parity, would be what was recognized during discussions on the Performance Rights Act. The bill, passed by both the Senate and House Judiciary Committee, established for the first time that AM/FM radio broadcasters need to compensate artists and labels for the music they use. The bill also established a fair, market-rate standard agreed to by both the music industry and webcasters. See note \textsuperscript{95}, supra.

\textsuperscript{99} See Section III.B, supra.

\textsuperscript{100} See id.

\textsuperscript{101} See id.; see also Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding; Review of Copyright Royalty Judges Determination; Final Rule and Notice, 74 Fed. Reg. 15, 4510, 4523-25 (Jan. 26, 2009) (to be codified at 37 C.F.R. pt. 385), available at http://www.loc.gov/crb/fedreg/2009/74fr4510.pdf. (In this 2009 ruling related to statutory royalty rates for ringtones, CDs, and permanent downloads, the CRB concluded that none of the 801(b) objectives justified any downward adjustment to rates.)

\textsuperscript{102} IRFA, sec. 3(a)(2)(A)(iv). Past rate setting proceedings do not indicate that more factors are better. Every new factor has the potential to weigh down proceedings with more evidence and argument, yet there is no indication that they help the CRB with the ultimate task of arriving at a rate. For example, the willing buyer-willing seller standard incorporates Section 114(f)(2)(B) supplemental factors that would be structurally similar to this would-be IRFA objective. Despite both sides spending enormous amounts of time addressing the supplemental factors, the CRB has never been persuaded that they point to a rate different from the one indicated by the
The Quest for “Parity” 465

subparagraph to section 114(f)(1)(D) that directs the CRB to “not disfavor percentage of revenue based fees” in applying the Section 801(b) policy objectives103 (among others).

The Act also called for the removal of language Congress included to ensure the 801(b) rate setting process gives equal weight to all parties’ legitimate concerns — further skewing the statute in favor of webcasters. For example, the IRFA would have required the CRB to give “full consideration” to the value of any promotional benefits the webcasters’ digital performances confer on the sound recording owners whereas the existing standard directs the CRB to consider both the impact substitution of digital performances for sales will have on sound recording owners and the value of promotional benefits.104 Additionally, the IRFA would have required the CRB to give “full consideration” to the contributions webcasters make to the content and value of their programming whereas the existing standard directs the CRB to consider the contributions of both webcasters and sound recording owners.105

All in all, the concept of parity is sound. Though, it seems true parity would mean a rate structure that recognizes the webcaster, satellite, cable and terrestrial radio industries for what they are: mature industries with an obligation to pay market-based prices for the music they use to build, grow, and drive their business models.

B. Artists’ Revenues

A shift to a below-market standard means an across the board decline in revenues for artists, record labels, and a host of others involved in com-

basic rate standard. Thus, these new factors seem likely to add complexity to proceedings without any clear benefit.

103 Id. The CRB tends to favor per play fee structures because they more accurately capture the value of usage of sound recordings. A percentage-of-revenue based fee structure encourages webcasters to focus on building scale rather than efficiently monetizing the works they use in their services. The PurePlay Agreement addresses these issues by coupling percentage of revenue-based fees with per-play and per-user payment components. However, promoting percentage-based approaches alone seems calculated simply to give services a favorable rate structure that does not guarantee creators fair value for use of their works.

104 Id. Existing subsection 114(f)(2)(B)(i) directs the CRJs to consider evidence of both substitution and promotion. This new provision only takes promotional benefit into account, replacing an even-handed provision with a one-sided provision.

105 Id. Existing subsection 114(f)(2)(B)(ii) directs the CRJs to consider the contributions of both the copyright owner and the transmitting entity with respect to various parameters, and Section 801(b)(1)(C) does much the same. This one-sided provision is another blatant effort to give extra weight to contributions made by the service.
mercial music production.\textsuperscript{106} Lower rates mean sound recordings generate fewer royalties. If sound recordings generate fewer royalties, there is less money to be split amongst those whose livelihoods depend on making and selling music. To illustrate: SoundExchange is the non-profit performance rights organization that the CRB has designated to collect and distribute digital performance royalties for sound recordings. Of the royalties it collects for a given sound recording, SoundExchange pays 50% to the sound recording owner (in most cases a record label), 45% to the artist featured on the sound recording, and 5% to any non-featured performing artists (background singers, musicians, etc.).\textsuperscript{107} The artists' share is not subject to “recoupment,” meaning record labels cannot generally leverage digital royalties against the advances often incorporated into record deals. Obviously, artists that self-record or otherwise retain ownership of their sound recordings receive nearly 100% of any digital performance royalties.\textsuperscript{108} With this in mind, it is easy to see why the traditional music industry opposes a shift to below-market rates.

Proponents of rate reform believe lower royalty payments will ultimately result in increased artist and label revenues.\textsuperscript{109} They believe that lower rates will open the door for more webcasters to enter the digital music delivery market. More webcasters will mean more potential royalty streams, thereby, allowing artists and labels to make up what they lose from lower per-stream compensation when their music is played more frequently. This theory of “trickle-down innovation” is based on two rather large premises: (1) the current rate schedule is cost prohibitive, preventing new webcast services from entering the market; and (2) listener demand will rise to meet a hypothetical increase in digital music services.

\textsuperscript{106} See Statement Ted Kalo, MusicFIRST Coalition Executive Director: “Going from a fair market, ‘willing buyer, willing seller’ rate to a government mandated subsidy will break the backs of artists, while Pandora executives pad their pockets. We support rate parity that addresses the greatest inequity of all, the lack of a performance right for terrestrial radio, and is fair to music creators.” Peoples, New Bill Seeks Internet Radio Parity, supra note 95.


\textsuperscript{108} Roughly 6% goes to SoundExchange to cover administrative costs and fees. See SoundExchange, Future of Music Coalition (May 15, 2008), http://futureofmusic.org/article/fact-sheet/soundexchange.

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For artists and labels, betting on new webcast services accelerating the growth of an already expanding listener pool is a risky proposition. As it is now, a listener is unlikely to stream more than one song on one service at any given time. If rates plummet under a new standard, artists and labels will have to count on each new webcaster attracting its own unique group of new listeners. If the hypothetical new services simply cannibalize the already existing listener market, a below-market rate will be of little benefit to them. Of equal concern to artists and labels is how webcasters will monetize a listener pool spread across multiple new services. As the critical mass of users dissipates, it will become more difficult for webcasters to entice the advertisers they rely on for the means to pay the royalties their transmitting sound recordings generates.

Moreover, Internet radio has thrived under the willing buyer-willing seller standard. Since 2007, the number of digital music services has more than doubled in size, growing from less than 900 to over 2,000. As of September 2012, there were over 2,047 Internet radio services (representing thousands of additional individual stations) operating in the U.S. alone.110 Indeed, several successful companies operate Internet radio services at the current rates, including: Pandora,111 Clear Channel Communications,112 Sirius XM,113 Slacker Radio,114 Spotify Radio,115 Univision Radio,116 Rhapsody Radio,117 and others.

Pandora, the company pushing hardest for a below-market rate standard, is a testament to webcaster success.118 In 2011, Pandora went public with an initial public offering (IPO) that generated just short of $235 mil-

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110 A list of the webcasters that have paid SoundExchange, see Who Pays SoundExchange, supra note 97.
118 Pandora, whose business revolves around transmitting sound recordings to listeners via personalized, non-interactive “radio stations,” has also filed a federal lawsuit against the American Society of Composers, Authors and Publishers (“ASCAP”) calling on the court to set more reasonable rates for the licensing fee it pays to the composers who write the underlying musical compositions in the sound recordings it streams. See Don Jeffrey, Pandora Media Sues Ascap Seeking Lower Songwriter Fees, BLOOMBERG (Nov. 5, 2012), http://www.bloomberg.com/news/2012-11-05/pandora-media-sues-ascap-seeking-lower-songwriter-fees.html.
lion dollars. In late 2012, company had a market cap of $1.38 billion dollars, boasted the second most popular app on the iPhone, and commanded an audience larger than any single AM/FM radio market in the U.S. Its executives make millions of dollars per year in salary, bonuses, and stock options. Entrenched webcasters like Pandora might genuinely believe that below-market rates will benefit the music industry, but any balanced debate on the subject must recognize the massive short-term gains such services will enjoy by paying less for the artist and label-supplied music that drives their services.

C. Innovation

Despite IRFA supporters’ claims that lower rates encourage webcaster participation, there is a case to be made that below-market rates will stifle innovation in the Internet radio sector.

Innovation is the force that drives growth and improvement in the digital marketplace. Of course, there is an inherent risk in bringing innovations to market. Companies that anticipate future consumer demands and develop innovative products and services are rewarded with increased profits. At the same time, companies that make incorrect predictions and introduce products and services that fail to take hold in the marketplace suffer losses.


120 Pandora’s market cap was calculated by multiplying the shares outstanding taken from its “Form 10-Q” filed September 4, 2012 (on file with author) by its closing NYTSE stock price on October 26, 2012. For current market prices, see Pandora Media, YAHOO! FINANCE, http://finance.yahoo.com/q?s=P (last visited Feb. 20, 2013).

121 The top five executives at Pandora were paid $11.8 million in FY2012 (not including co-founder and Chief Strategy Officer Tim Westergren’s salary) and exercised stock and options worth over $6 million in the first seven months of 2012 alone. See Kristen Hainen, Pandora Executives Cashing Out Millions, MUSICFIRSTCOALITION.ORG (Oct. 31, 2012), http://www.musicfirstcoalition.org/node/833.


123 “Lower rates could very well encourage sub-standard market entrants who were not innovative enough to compete when rates were higher. The marketplace may be worse off having lower rates and more marginal services.” Glenn Peoples, Business Matters: Internet Radio Bill Is About Fairness – and Money, BILLBOARD.BIZ (Nov. 2, 2012), http://www.billboard.biz/bbbiz/
take the risks associated with innovation. In other words, the greater the subsidy, the less imperative it is for digital technology firms to increase their net income and the less likely it may be that they push the envelope by introducing new, innovative products and services.

A below-market rate is essentially a subsidy for webcasters.\textsuperscript{124} Certainly, paying less allows them more freedom to innovate, but it could also reduce their incentive to explore new business models that lead to revenue streams. For example, Pandora’s public campaign in support of the IRFA included a claim that it cannot maintain profitability if it has to continue paying 50\% of its revenue to sound recording owners. Yet, there is nothing in the PurePlay Agreement that requires it to turn over such a large chunk of its profits. Experts have indicated that Pandora’s woes stem from its failure to adequately monetize its relative market dominance.\textsuperscript{125} Rather than innovate new ways to make money from sound recordings, Pandora is asking for Congress to intervene and reduce its cost structure.\textsuperscript{126} In other words, Pandora would rather see artists and labels compensated at a below-market rate than have to shoulder all of the risks associated with developing new, innovative revenue streams.

\textsuperscript{124} The WTO lists one of several generally accepted definitions of “subsidy” as: “a sum of money granted from public funds to help an industry or business keep the price of a commodity or service low.” See \textit{World Trade Report 2006: Exploring the Links Between Subsidies, Trade and the WTO 47} (2006).

\textsuperscript{125} Richard Greenfield, a media analyst at BTIG, argues:

On the surface, the rates paid by Pandora and other online radio services appear onerous and in need of congressional relief. However, the reason why companies such as Pandora pay such high royalty rates as a percentage of revenues is because they severely limit audio advertising to protect the user experience and keep people on the platform. If Pandora ran several minutes of audio ads per hour (the way terrestrial radio does) vs. just a few 15 sec. spots, the \% of revenues paid out as royalties would be dramatically lower and would be more in line with satellite radio or cable TV [who do run more ads]. Interestingly, Spotify’s radio product runs substantially more advertising per hour than Pandora. We suspect this is a business decision focused on reducing royalty costs relative to revenues.


\textsuperscript{126} Pandora plays one minute of advertising per hour, compared to satellite’s thirteen minutes per hour. See David Lowery, \textit{Pandora Comes Out of the Closet, Confirms Clear Channel and Pandora “More Than Just Friends”}, \textsc{TheTrichordist.com} (Oct. 26, 2012), http://thetrichordist.com/2012/10/26/pandora-comes-out-of-the-closet-confirms-clear-channel-and-pandora-more-than-just-friends.
Pandora’s position is inconsistent with the theory of “creative destruction” — the notion that existing business models and methods must be continually challenged in order to move forward. Webcasters that advocate for a balanced digital marketplace should be wary of those that endorse a standard that potentially favors “anti-disruption” and subsidiization over growth and innovation.

D. Restructuring the CRB

Balanced, neutral CRB proceedings are essential to a successful statutory rate-setting process. In their bids to gain favorable determinations, it could be said that both sound recording owners and webcasters are guilty of pushing for Congress to add one-sided factors to the CRB’s rate-calculation equation. The IRFA, however, takes CRB reform to the next level.

For example, the Act called for a complete overhaul of the Copyright Royalty Judge (CRJ) selection process. Currently, the authority to appoint CRJs rests with the Librarian of Congress. The IRFA, Section 2, would have relieved the Librarian of that authority and provided instead for a Presidential appointment and Senate confirmation process. Such a change has the potential to politicize the CRB, opening the door for industry alliances and political perspectives to dominate appointment decisions.

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127 Technologists and Internet evangelists pride themselves on embracing “creative destruction,” the notion that existing business models and methods must be continually challenged in order to move forward. A below-market rate standard deliberately helps webcasters avoid disruption and innovative challenges. See, e.g., Larry Walsh, Creative Disruption: An Absolute Necessity, CHANNELNOMICS.COM (Sept. 15, 2010), http://channelnomics.com/2010/09/15/creative-disruption-an-absolute-necessity.

128 See Nadler draft bill, which directed the CRB to take the value of over-the-air performances into account when applying the willing buyer-willing seller standard. See generally IRFA.

129 The Librarian of Congress is a “Department Head” and selects CRJs after consulting with the Register of Copyrights. 17 U.S.C. § 801(a) (2006); see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).

130 See IRFA, sec. 2. When Congress last revisited statutory rate setting procedures in 2004, it very intentionally chose to learn from past mistakes and avoid creating a political body like the CRT. The bill reversed course, politicizing the appointment process for CRJs (the CRT was replaced by CARP in 1993, the CRB replaced CARP in 2004). See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108-419, 118 Stat. 2341.

131 The IRFA also would have altered the qualifications for the CRJs that comprise the CRB. Currently, the CRB must include one CRJ with significant knowledge in economics and one CRJ with significant knowledge in copyright law. Under the IRFA, CRJs needed only ten years of general legal
Additionally, the Act would have restricted the body of precedent the CRB can rely on in making rate determinations. Sections 3 and 6 of the Act indicate the CRB should only defer to past proceedings decided under the 801(b) standard. They also prohibited the CRB from factoring “the rates and terms provided in licenses for interactive services” or “determinations rendered by the [CRJs] prior to the enactment of the [IRFA]” into its decisions. In other words, the IRFA would have forced the CRB to ignore most of the last decade of statutory rate setting decisions (a bulk of which the CRB made by applying the willing buyer-willing seller standard) and give extra weight to less-current determinations made by defunct tribunals.

The importance of a neutral CRB cannot be overstated. The entire compulsory license system depends on both sound recording owners and webcasters having at least some confidence that they will get a fair shake during rate-setting proceedings. A shift to a politicized, one-sided rate-setting process benefits no one.

V. CONCLUSIONS AND RECOMMENDATIONS

Private marketplace agreements on digital performance royalties for sound recordings provide the fairest rates for webcasters and sound recording owners. Unfortunately, as long as the government compels sound recording owners to license their works to webcasters, true private marketplace agreements will remain impossible. The compulsory license may be a necessary evil, but it should not serve as a means to deprive sound recording owners of an otherwise market-based royalty rate. In other words, if Congress is going to continue forcing sound recording owners to make their works available for commercial use, the least it can do is ensure they get a fair-market return for the automatic right to use their property. If Congress acts on a new IRFA bill or other rate-process altering legislation, it should endorse a standard that creates true parity — a market-based rate that applies across all digital music platforms. A one-sided

experience and demonstrated significant experience in adjudication of arbitrations or court trials. See IRFA, sec. 2.

See generally id., sec. 3. The CRJs frequently rely on “the rates and terms provided in licenses for interactive services” as benchmarks for determining the value of sound recordings in a competitive market unconstrained by the statutory license. The D.C. Circuit has upheld this approach multiple times. Sections 3 and 6 of the IRFA would have prohibited the CRB from doing so. See generally id., secs. 3, 6.

More specifically, it would seem that under the IRFA, the CRB was to treat as precedential the CRT’s 1981 jukebox and mechanicals decisions and the CARP/Librarian’s 1998 subscription services decision, but not the CRJs’ more recent satellite digital audio radio services (SDARS) and mechanicals decisions under Section 801(b), or any prior webcasting decisions.
rate-setting mechanism, like the one the IRFA suggested, will only create more turmoil amongst webcasters, sound recording owners, and the music industry in general.