COPYRIGHT EQUALITY: FREE SPEECH, EFFICIENCY, AND REGULATORY PARITY IN DISTRIBUTION

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Copyright law treats webcasters like Pandora, on-demand streaming services like Spotify, the satellite radio company Sirius XM, and traditional radio broadcasters like Clear Channel in vastly different ways. The total royalties paid by each type of music distribution service to copyright owners can vary from five to seventy percent of revenue. This and other forms of differential treatment have slowed or deterred innovation while limiting consumer choice. The disparities have become a pressing problem for policymakers. Two recently proposed bills, the Internet Radio Fairness Act and the competing Interim FIRST Act, both address the disparate treatment across webcasters, satellite radio, and cable radio. But each bill contains only fragments of a real solution. Copyright law needs a new approach grounded in the reasons for equal treatment of different distribution technologies.

This Article presents an equality principle based on both economic efficiency considerations and First Amendment principles. These two theories of copyright policy are often thought to conflict. But this Article shows that efficiency and free speech values can align and reinforce each other. The economic argument focuses on barriers to entry for new music distribution technologies and the distortions to consumer choice that result from unequal treatment. The First Amendment argument is both an extension and new application of longstanding jurisprudence that guards new communications media from discriminatory treatment, with an eye toward allowing the information environment to evolve to the public's benefit. The Article closes with policy recommendations in line with the equality principle and specific proposals for implementation.

INTRODUCTION

When you listen to music on some form of radio – FM, satellite, cable, or Internet – you may have little concept of what goes on behind the scenes. It is obscure who paid how much (if anything) to whom so that a particular song can play through your speakers or headphones. For instance, you might not have known until recently[1] that Pandora, the leading Internet radio service,

[1] In the fall of 2012, Pandora launched an aggressive advertising campaign that described its royalty situation and advocated legislation, a marketing strategy that one copyright owners' organization opposed. *See* Glenn Peoples, *Pandora, Clear Channel, Others Form Advocacy Group for Lower Web Radio Payments; MusicFirst Pushes Back*, BILLBOARDBIZ

pays a drastically larger percentage of its revenue to copyright owners than other forms of radio like satellite, cable, or AM and FM broadcasting. To take another example, you might not make a sharp distinction between Internet radio (webcasting) and on-demand streaming services like Spotify, Rhapsody, Last.fm, Rdio, and MOG.[2] Copyright law, however, considers webcasting and on-demand streaming to be completely separate modes of distribution.[3] Differences in copyright law's categorization lead to unequal treatment in terms of royalty rates and the process for determining those rates.[4] In this way, copyright acts as a barrier to entry for distributors. This harms consumers by delaying the rollout of new distribution technologies. For example, European consumers enjoyed Spotify's service for three years before American consumers could.[5] On a continuing basis, copyright law's impediments to new technologies deter innovation and limit consumer choice.

Yet the problem of copyright law's disparate treatment of music distribution services is even worse than that. Total royalty obligations vary from about five percent of revenue (for traditional radio) to about seventy percent of revenue (for on-demand streaming), with the other forms of radio falling in between.[6] Such large gaps in royalty obligations, which benefit the incumbent firms in older technologies like traditional and satellite radio, threaten the very existence of newer technologies for music distribution. For example, Pandora, the largest and most successful webcasting company, faces high royalty rates and uncertainty about the level of those rates beyond 2015.[7] In an industry with

(Oct. 25, 2012, 3:25 PM), http://www.billboard.com/biz/articles/news/1083273/pandora-clear-channel-others-form-advocacy-group-for-lower-web-radio.

[2] The legal distinction is especially obscure to listeners because many services offer both webcasting and on-demand streaming.

[3] *See* 17 U.S.C. § 114(d), (j) (2012) (differentiating between "noninteractive" webcasting and "interactive" on-demand streaming).

[4] *See, e.g.*, *id.* § 114(f) (specifying different rate setting standards for webcasting as opposed to satellite radio and cable music services).

[5] *See* Ben Sisario, *New Service Offers Music in Quantity, Not by Song*, N.Y. TIMES, July 14, 2011, at B1 (reporting that Spotify's European launch occurred in 2008 and that its U.S. launch would occur in July 2011). For qualitative empirical evidence on the difficulties of licensing new Internet music services, see Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. (forthcoming Winter 2014).

[6] *See infra* Part I (discussing royalty rate inequalities across various modes of music distribution).

[7] *See* Pandora Media, Inc., Registration Statement (Form S-1), at F-4 (Feb. 11, 2011), *available at* http://www.sec.gov/Archives/edgar/data/1230276/000119312511032963/ds1.htm (detailing Pandora's financial operations for fiscal years 2008 to 2010); Ethan Smith & John Letzing, *At Pandora, Each Sale Drives up Its Losses*, WALL ST. J., Dec. 6, 2012, at B1 (describing Pandora's increasing royalty costs); *infra* Part I.D (explaining the current framework for determining webcasting royalties, as well as that framework's uncertain future).

global value of $168 billion according to one recent estimate,[8] in which U.S. companies and creators play a large role, copyright's unequal treatment of distributors presents an important economic threat to growth. Moreover, similar problems could soon arise in other copyright industries like film, television, books, and video games.

Why does the government sometimes choose to set, or otherwise influence, the terms of licenses between copyright-owning and distribution technology firms? It may seem surprising that copyright regulates this activity at all, let alone in such an unequal manner. As this Article emphasizes, copyright law is about more than authorship, infringement, and fair use.[9] Many provisions of the Copyright Code – and much of the Code's volume in terms of sheer pages – are instead regulatory in nature.[10] Congress, the courts, and various agencies use copyright law to settle disputes between copyright owners and an unending parade of firms with new technologies for distributing copyrighted works.[11] Recent copyright scholarship in this regulatory vein has examined when different government institutions have chosen to intervene, the various modes of intervention they have deployed, and whether the government's choices are normatively justified. But government institutions and previous scholarship have considered each dispute in isolation. It is essential to consider how copyright law regulates all music distribution services as a group. What emerges from that broader view is a landscape of vast regulatory disparities.[12]

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[8] MICHAEL MASNICK & MICHAEL HO, THE SKY IS RISING: A DETAILED LOOK AT THE STATE OF THE ENTERTAINMENT INDUSTRY 25 (2012).

[9] *See* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) ("[T]he main challenges for twenty first century copyright are not challenges of authorship policy, but rather new and harder problems for copyright's communications policy: copyright's poorly understood role in regulating competition among rival disseminators." (emphasis omitted)); *see also* Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 COMMLAW CONSPECTUS 375, 411-19 (2010) (discussing how copyright reforms could promote competition between multichannel video program distributors and online video platforms); Molly Shaffer Van Houweling, *Communications' Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97, 105-10 (2005) (discussing the regulation's usefulness in protecting against copyright infringement without restricting noninfringing conduct).

[10] *See* 17 U.S.C. §§ 108-22, 512 (2012) (containing detailed and often industry-specific provisions that resolve disputes between copyright owners and technology firms).

[11] Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173 (2012) (investigating various governmental methods of resolving copyright disputes between copyright holders and content distributors).

[12] Previous work has identified the problem of achieving regulatory parity among certain types of distributors. *See* Jessica L. Bagdanov, Comment, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14 CHAP. L. REV. 135 (2010) (considering parity among webcasting, satellite radio, and cable music services); Andrew Stockment, Note, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2166-70 (2009); Rick Marshall, The Quest for "Parity": An

The economic argument against unequal treatment starts with recognizing that the various forms of radio are all imperfect substitutes for each other. From the perspective of consumers, each medium for distributing music (traditional radio, satellite radio, webcasting, and so on) has its own appealing features. The inefficiency comes from the distortion of consumers' choices among these media, like an unjustified tax or subsidy that favors certain firms or industries and disfavors others. One can think of the differential royalty rates in the music industry as analogous to farm subsidies, which have caused an overemphasis on corn and other "base crops."[13] In the music industry, copyright's policy on music distribution has had the effect of propping up traditional and satellite radio while hampering webcasting and on-demand streaming. Congress, in short, has been picking winners in the music industry.[14] The playing field tilts in favor of incumbent technologies and against new entrants. As a result, some investors have shied away from the music industry, during a time when innovation should be flourishing and investment opportunities lucrative.[15] Popular webcasting services like Pandora and on-demand streaming services like Spotify operate under enormous uncertainty about their future royalty obligations, much like Netflix does in the video industry.[16] The ultimate effects of unequal treatment of music distributors are to limit consumer choice, subsidize incumbents, and slow down innovation.

Examination of the Internet Radio Fairness Act (Nov. 18, 2012) (unpublished manuscript, available at http://ssrn.com/abstract=2177603); John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field* 1 (Issues in Tech. Innovation Series, Aug. 7, 2012), *available at* http://www.brookings.edu/research/papers/2012/08/07-music-royalties-technology-villasenor; *see also* Daniel Gervais, *Keynote: The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 591, 610-13 (2011) (discussing disparate treatment between webcasting and on-demand streaming). This Article provides a more comprehensive look at all types of music distribution services and offers a theoretical framework for understanding why regulatory parity is desirable.

[13] *See, e.g.*, Julie Foster, Comment, *Subsidizing Fat: How the 2012 Farm Bill Can Address America's Obesity Epidemic*, 160 U. PA. L. REV. 235, 252-53 (2011) ("[S]upporting only base crops promotes excessive production of those commodities at the expense of nonsubsidized crops, like fruits and vegetables.").

[14] This Article does not argue against regulation in general – copyright law itself is a significant government intervention – but against regulation that discriminates among media without justification.

[15] *See* Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 916-17 (describing the music industry as a "wasteland" due to its lack of venture-capital activity).

[16] *See, e.g.*, Hillery Nye, *Netflix's Big Licensing Dilemma*, BUS. INSIDER (July 15, 2011, 3:03 PM), http://articles.businessinsider.com/2011-07-15/tech/30057451_1_licensing-fees-price-hikes-netflix ("In the next one to two years, many of Netflix's content and licensing agreements will be up for renewal – and the cost of those licensing agreements will be considerably higher than what the company is paying today.").

Unequal treatment, moreover, threatens freedom of speech and freedom of the press.[17] The distinct features of each distribution technology represent several choices about what content will be available, in what sequence, with what user interface, and so on. For example, the playlists of AM and FM radio are vastly different than the playlists of webcasting services.[18] By allowing some technologies, like traditional and satellite radio, to pay lower royalties, Congress is implicitly favoring the kind of content that those media tend to provide. By treating different media for music distribution unequally, both procedurally and substantively, Congress is shaping the public sphere and implicitly favoring some types of content over others. This violates the principles developed in two lines of First Amendment Supreme Court cases.[19] Thus, the unequal treatment of the distributors of copyrighted works is not just arcane, bureaucratic, and complicated; it is also inefficient and a violation of free speech values.

To resolve the problem, I propose an equality principle for copyright. Regulatory parity, meaning the instantiation of an equality principle, can take the form of equality of regulatory process (the forum and standard used in rate setting) or equality of substantive outcomes (the royalty rates ultimately reached). Drawing from both economics and free-speech theory, the equality principle I propose has three core components. First, traditional AM and FM radio stations must be required to pay all the same copyright owners that other forms of radio do for their use of the same music. Second, each type of music distribution service – traditional radio, satellite radio, cable music services, webcasting, on-demand streaming, podcasting, and even user-generated cloud services and video – should be subject to the same rate setting process. Recognizing a principle of equality should mean, at a minimum, procedural equality with uniform standards. Third, I propose extending First Amendment precedent to the provisions of copyright law that regulate music distribution services. The strong form of this component of my proposal is that provisions establishing unequal treatment should be declared facially unconstitutional. The weaker, but still powerful, form is that deviations from equality enacted by Congress or decided by the Copyright Royalty Board – the entity that currently sets various royalty rates – should be subject to heightened scrutiny. This

[17] *See infra* notes 208-15 and accompanying text (explaining that music is speech and that music distribution services, as communications media, are members of the press under the First Amendment).

[18] *See* KRISTIN THOMSON, SAME OLD SONG: AN ANALYSIS OF RADIO PLAYLISTS IN A POST-FCC CONSENT DECREE WORLD (2009), *available at* http://www.futureofmusic.org/sites/default/files/FMCplaylisttrackingstudy.pdf (demonstrating the prevalence of major-label recordings, as opposed to independent-label recordings, on FM radio). The narrow playlists of contemporary broadcast radio differ greatly from the virtually unlimited catalog available on online services.

[19] *See infra* Part III.A (exploring First Amendment case law regarding differential tax treatment of media companies and disparities in Federal Communications Commission (FCC) regulation of broadcasters versus newspapers).

would encourage more rational policies supported by facts.[20] Justifying unequal treatment under First Amendment scrutiny would require Congress and the Copyright Royalty Board to put forward a coherent economic theory and substantial evidence in support of their policies.[21]

In the end, an equality principle would almost certainly mean that the substantive rates would converge. But under my proposal, equality would not necessarily mean equal rates.[22] Regulatory parity is a distinct issue from the level of royalties paid. Achieving equality might mean higher rates for some distributors and lower rates for others. The total sum of royalties flowing to copyright owners could be maintained, or could increase or decrease, while still moving toward equal treatment of music distributors.[23]

The proposed reforms would remedy the current regulatory disparities in procedures and the resulting substantive royalty rates. Equal treatment would bring economic benefits and serve free speech values. With royalties set at an equal percentage of revenue, or at least approaching parity, barriers to entry would fall. Music distribution services would compete based on the value they generate for consumers and their costs for everything other than the use of copyrighted works. This is as it should be. High-cost, low-value media should have incentives to change their business models. Low-cost, high-value media should be allowed to thrive. In terms of free speech, an equality principle would serve two levels of speakers. Distribution firms would have more freedom to choose their technology, programming, and user interface without facing the discontinuities of regulations that treat close economic substitutes in vastly different ways. More importantly, with their choice among distribution media no longer distorted, consumers would enjoy greater freedom to enjoy music in a larger variety of ways.

This Article speaks to issues in copyright law, administrative regulation, and First Amendment law. Moving beyond discussions of copyright-versus-

[20] *Cf.* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 205-07 (2008) (describing intellectual property policy as “an evidence-free zone”).

[21] For example, if distribution across a certain medium rendered copyrighted works significantly more susceptible to unauthorized file sharing, that could justify a higher royalty rate for distribution services in that medium. Below, I express skepticism about this particular justification. *See infra* Part II.D.5 (arguing that claims of lost sales lack a coherent baseline specifying the number of sales to which the copyright owner is entitled).

[22] In particular, I am not arguing – as Pandora has – that royalty rates should be drastically lower for webcasting. *See* Peoples, *supra* note 1 (announcing Pandora and other webcasters’ formation of an advocacy group aimed at reducing royalty rates through legislation).

[23] For an examination of the effects of contracting around copyright laws, a proposal for statutory amendmends to maximize efficiency while guaranteeint fairness, and exploration of issues of distributional equity toward musicians in the context of digital distribution, see Kristelia A. Garcia, *Private Copyright Reform*, 20 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229538.

technology disputes in isolation, the equality principle is a framework to consider the relationships across different music distribution services. It explains why the piecemeal approach has left such a mess in the music industry, and cautions against allowing the same to happen in other copyright industries like the film, television, book, and video game industries.[24] The equality principle is also an extension of thinking about copyright as communications regulation. Scholars and policymakers have addressed the need for regulatory parity in other areas, such as telecommunications,[25] finance,[26] and environmental regulation.[27] Much of the Copyright Act as amended is a detailed regulatory scheme that governs the relationship between copyright owners and technology companies, with the latter group including music distribution platforms.[28] One theoretical contribution of this Article is the incorporation of recent insights regarding the First Amendment's potential to shape copyright doctrine with recent thinking as to the appropriate role of copyright in the regulation of communications.

The strength of the argument for equality comes from the confluence of the economic and free speech justifications. Contemporary scholarship has identified many possible theories to explain, justify, and shape copyright law. But none of the existing theories of copyright law – such as the incentive theory, authors' rights theories, users' rights theories, and First Amendment theory – have adequately addressed how copyright should treat distributors. The intersection of copyright law and the First Amendment has been a topic of increasing interest for judges and scholars.[29] It is most natural to think of

[24] Theoretically, I see no reason that an equality principle for distribution should not apply to film, print media, and games. But a detailed survey of the unequal treatment of distributors and a review of the possible economic justifications for unequal treatment in these industries is beyond the scope of this Article.

[25] *See, e.g.*, James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1136-40 (2004) (discussing regulatory parity between cable, wireline telephone, and wireless providers of Internet access).

[26] *See generally* Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry*, 77 WASH. U. L.Q. 319, 339-61 (1999) (surveying the tools of financial regulation and explaining that different approaches apply to different entities).

[27] *See, e.g.*, Thomas O. McGarity, *The Goals of Environmental Legislation*, 31 B.C. ENVTL. AFF. L. REV. 529, 545 (2004) (describing clean water standards that apply industry wide).

[28] *See, e.g.*, 17 U.S.C. § 111 (2012) (regulating the relationship between cable television companies and programming producers); *id.* § 114 (governing relationships between record labels and digital radio services of various kinds); *id.* § 115 (regulating publishers and record labels); *id.* § 116 (governing publishers and jukebox operators); *id.* § 118 (regulating noncommercial television broadcasters and programming producers); *id.* § 119 (governing satellite television providers and programming producers).

[29] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 218-21 (2003) (discussing the relationship between the First Amendment and copyright law at an abstract level). *See generally* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008) (providing a theory of how legal

economically motivated intellectual property rights and free speech values clashing with each other – a conflict that is most poignant when a copyright infringement suit threatens to stifle an individual speaker's expression. This Article suggests a new avenue of thought about how the economic analysis of copyright and First Amendment theory intersect. In the context of music distribution services, the two theories align and reinforce each other.

The need for regulatory parity in copyright is becoming apparent to policymakers. During the previous term, Congress considered two bills that would address the issue of regulatory parity for music distribution. The Internet Radio Fairness Act (IRFA) would change the standard under which webcasting royalty rates are determined to bring it in line with the standard under which satellite radio and cable music-service royalties are determined.[30] Since traditional AM and FM radio stations do not pay royalties to sound recording copyright owners, a competing bill instead proposes to increase the royalties they pay for offering their broadcasts on the Internet.[31] While both bills speak of fairness and regulatory parity, they offer highly incomplete and under-theorized solutions. It is not enough to pick one music distribution technology and move it some distance toward the regulatory regime faced by other technologies. The solution for the music industry should not be another piecemeal measure that layers favoritism upon favoritism; it should instead set forth a comprehensive and rational policy based on equality among distribution methods.

Part I explains the regulatory schemes that apply to each of the several music distribution technologies, demonstrating the inequality in terms of procedures, rate setting standards, and the ultimate royalty rates. Part II presents an economic framework that explains the inefficiencies that likely result from this unequal treatment. Building on that economic analysis, Part III argues that unequal treatment of music distributors should be subject to heightened scrutiny under the First Amendment. With the need for equality established, Part IV discusses the most pressing practical considerations regarding the equality principle, with a focus on implementation, transition problems, and outstanding questions.

I. UNEQUAL TREATMENT OF MUSIC DISTRIBUTORS

A piece of music often will be subject to two separate copyrights: one for the underlying composition, and one for the particular recording.[32] In other words, music embodies two different kinds of copyrightable subject matter: the

doctrine should resolve the tension between the First Amendment and copyright law).

[30] Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. § 3(a)(2) (2012).

[31] Interim Fairness in Radio Starting Today Act of 2012, 112th Cong. § 3 (Discussion Draft Aug. 7, 2012), *available at* http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf.

[32] *See* KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 75-76 (2011).

"musical work" and the "sound recording."[33] These two copyrights in the very same piece of music can be – and often are – owned by different people or different entities. As a result, as one leading treatise explains, "[c]learance of the music and of the sound recording are wholly distinct undertakings."[34] The bifurcated nature of music copyright is reflected in the structure of the music industry.[35] This means that many music distributors – though not all, as the next Section explains – will have to acquire licenses from two different types of entities, corresponding to the two kinds of copyrightable subject matter in music.

A. *Traditional AM and FM Radio*

When AM and FM radio technology were created, federal copyright law only protected musical works – it did not apply to sound recordings.[36] Battles over royalty rates raged for decades between the publishers and composers on one side and radio companies on the other.[37] Entities known as performing rights organizations (PROs) represented the publishers and composers as the owners of musical work copyrights.[38] The battling parties reached a resolution about radio royalties just after World War II. The basic institutional framework established at that time persists today.

Two large PROs and one smaller PRO represent the copyright owners in radio-royalty negotiations.[39] Initially, the collective nature of the PROs raised significant antitrust concerns.[40] The two larger PROs, the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), negotiate radio royalties (among other performance royalties) subject to

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[33] *See* 17 U.S.C. § 102(a)(2) (listing "musical works, including any accompanying words" as one type of copyrightable subject matter); *id.* § 102(a)(7) (listing "sound recordings" as a separate category).

[34] 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22[A][3][a] (Matthew Bender ed., rev. ed. 2013).

[35] As a matter of industry practice, publishers often own musical works, while record labels often own sound recordings. *See* MCLEOD & DICOLA, *supra* note 32, at 76-77.

[36] *See* NIMMER & NIMMER, *supra* note 34, § 8.22[A][3][a] ("Sound recordings, as a class of copyrightable subject matter, are technically capable of embodying subject matter not otherwise subject to protection. Nonetheless, as a practical matter sound recordings almost invariably piggy-back on another category of protectable works: musical compositions." (footnote omitted)).

[37] *See* DiCola & Sag, *supra* note 11, at 203-07 (describing the dispute between the American Society of Composers, Authors, and Publishers (ASCAP) and radio companies during the 1920s and 1930s).

[38] *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1328-40 (1996) (discussing the history of ASCAP).

[39] DiCola & Sag, *supra* note 11, at 182.

[40] *See* JOHN RYAN, THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY: THE ASCAP-BMI CONTROVERSY 94-99 (1985).

consent decrees supervised by the U.S. District Court for the Southern District of New York.[41] Radio royalties take the form of "blanket licenses," in which radio stations pay a certain fee for access to the entire catalog represented by a given PRO.[42] Most recently, ASCAP and BMI negotiated with a collective organization that represents most of the commercial radio broadcasters.[43] Music radio stations now pay 1.7% of their revenue to ASCAP.[44] Royalty payments to BMI are analogous and have the same 1.7% rate.[45] The details of the rates paid by the Society of European Stage Authors and Composers (SESAC) are not known.[46]

Congress granted federal copyright protection to sound recordings in 1971, which became effective in 1972.[47] At the time, owners of copyright in other categories of copyrightable subject matter enjoyed an exclusive right to publicly perform their works.[48] In the contemporary copyright statute, the Copyright Act of 1976, Congress declined to offer a performance right to

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41 DiCola & Sag, *supra* note 11, at 207 (discussing ASCAP's and BMI's consent decrees and their effects).

42 *See, e.g.*, Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 350-51 (2001) (discussing blanket licensing as PROs' typical practice).

43 *See* David Oxenford, *What Is the RMLC, and Why Should a Radio Station Pay Their Bill?*, BROAD. L. BLOG (Aug. 24, 2012), http://www.broadcastlawblog.com/2012/08/articles/broadcast-performance-royalty/what-is-the-rmlc-and-why-should-a-radio-station-pay-their-bill (discussing deals with ASCAP and BMI). The broadcasters' organization has recently sued the Society of European Stage Authors and Composers (SESAC), alleging anticompetitive behavior. *See Radio Industry Files SESAC Anti-Trust Complaint*, RADIO MUSIC LICENSE COMM. (Oct. 11, 2012), http://www.radiomlc.org/pages/6282116.php.

44 *See* David Oxenford, *Details of the ASCAP Settlement with the Radio Industry*, BROAD. L. BLOG (Jan. 30, 2012), http://www.broadcastlawblog.com/2012/01/articles/broadcast-performance-royalty/details-of-the-ascap-settlement-with-the-radio-industry-what-will-your-station-pay.

45 *See Federal Court Approves Radio Industry Settlement with BMI*, RADIO MUSIC LICENSE COMM. (Aug. 28, 2012), http://www.radiomlc.org/pages/6282052.php (indicating BMI's receipt of 1.7% of gross revenue from the U.S. commercial radio industry); David Oxenford, *Radio Music Licensing Committee Announces Settlement with BMI Following Settlement with ASCAP*, BROAD. L. BLOG (May 15, 2012), http://www.broadcastlawblog.com/2012/05/articles/music-rights/radio-music-licensing-committee-announces-settlement-with-bmi-following-settlement-with-ascap-why-sesac-is-not-included (predicting that the Radio Music Licensing Committee's (RMLC) settlement with BMI would be similar to the terms of ASCAP's settlement).

46 SESAC is a private company and is not subject to a consent decree, so it need not publicly disclose its royalty rates and generally chooses not to do so.

47 Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified in pertinent part and as amended at 17 U.S.C. § 102(a) (2012)).

48 "[L]iterary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" enjoy a general public performance right. 17 U.S.C. § 106(4).

sound recording copyright owners. Even during the expansion of copyright protection in the 1990s that occurred in response to digitization and Internet communication, Congress did not require AM and FM radio stations to pay sound recording copyright owners.[49] Many bills have been proposed to change this situation, accompanied by strong lobbying efforts by record labels and organizations that represent recording artists, but no such bill has achieved passage – not yet, anyway.[50]

Thus, the current state of copyright law as applied to AM and FM radio's use of music is as follows: AM and FM radio stations must pay musical work copyright owners if they use any music from the PROs' vast catalogs. By contrast, AM and FM radio stations need not pay sound recording copyright owners at all.

B. *Satellite Radio*

As a result of a 2008 merger between Sirius Satellite Radio and XM Satellite Radio, Sirius XM is the only satellite radio company in operation today.[51] Before the merger, it was not clear that satellite radio would ever achieve financial success. After decades of regulatory and technological preparation, the two former competitors engaged in a costly bidding war for celebrity programming while adoption rates and revenue did not increase fast enough. Financial difficulties continued after the merger, but the stock price has begun to rebound slowly in recent months.[52]

Sirius XM, like traditional AM and FM radio, must license the rights to perform musical works publicly on its service. As with AM and FM radio, these rights are administered by the PROs: ASCAP, BMI, and SESAC. As of 2008, Sirius XM was paying a total of 2.35% of its revenue to ASCAP and BMI.[53] The royalty rates in the more recent agreements between Sirius XM and the PROs do not appear to be publicly available.

The interesting action occurs on the sound recording side of the industry. During the 1990s, Congress began to amend the Copyright Act of 1976 in earnest as it anticipated the proliferation of digital technologies. The requirement that cable music services pay sound recording copyright owners comes from § 106(6) of the Copyright Code, added by the Digital Performance

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[49] *See infra* Part I.B.

[50] *See infra* Part IV.B.

[51] The two entities that became Sirius and XM (and later merged) used to be known as CD Radio and American Mobile Satellite Corporation, respectively.

[52] *See* Paul Shea, *Sirius XM Radio Inc (SIRI): The Best Is Yet to Come*, VALUEWALK (Feb. 7, 2013), http://www.valuewalk.com/2013/02/sirius-xm-radio-inc-siri-the-best-is-yet-to-come.

[53] Final Order: Designation as a Preexisting Subscription Service, 71 Fed. Reg. 64,639 (Nov. 3, 2006) (to be codified at 37 C.F.R. pt. 201). The royalty rate paid to SESAC is not available.

Right in Sound Recordings Act of 1995 (DPRSRA).[54] This section does not establish a general performance right in sound recordings – in other words, the DPRSRA did not affect traditional AM and FM radio.[55] But the Act did create a new, limited, digital performance right.[56] Anyone who uses music for a "digital audio transmission" must pay royalties to the sound recording copyright owner.[57] The result is that, unlike traditional AM and FM radio, Sirius XM must pay royalties to the copyright owners of sound recordings in addition to their payments to the PROs for the right to perform musical works.

Section 114(f)(1) of the Copyright Code creates a special statutory license for "preexisting satellite digital radio audio services." The legislative history names the two specific companies to which Congress granted a more favorable standard for determining their rate structure, with the goal of avoiding undue disruption of their business.[58] The statutory rate that Sirius XM must pay is set by the Copyright Royalty Board according to the four-factor test of § 801(b):

> The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

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54 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified in pertinent part at 17 U.S.C. § 106(6) (2012)).

55 *See* 17 U.S.C. § 114(d)(1)(A) (exempting "nonsubscription broadcast transmission[s]" from the digital performance right for sound recordings); *id.* § 114(j)(3) ("A 'broadcast' transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.").

56 Sound recording copyrights are limited in other ways. For instance, there is no protection against "sound-alike" recordings. *See id.* § 114(b) (describing this and other limitations).

57 The Copyright Act defines a "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format." 17 U.S.C. § 101. More specifically, a "digital audio transmission" is "a digital transmission as defined in § 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work." *Id.* § 114(j)(5).

58 NIMMER & NIMMER, *supra* note 34, § 8.22[D][1][b] (discussing Congress's goal to prevent the disruption of CD Radio and American Mobile Radio Corporation and their existing operations); *see also* 17 U.S.C. § 114(j)(10) (defining "preexisting satellite digital audio radio service").

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[59]

This standard ends up being more favorable than the "willing buyer/willing seller" standard that is used to set the royalty rate for webcasting.[60] Sirius XM will pay sound recording copyright owners nine percent of its revenue in 2013, with the rate increasing gradually until it reaches eleven percent of revenue in 2017.[61] In effect, § 114 explicitly protects incumbent satellite services at the expense of copyright owners, any new entrants to the satellite radio industry, and firms in other distribution industries.

There are, however, strings attached to the § 114 statutory license. Three general requirements must be met by any § 114 statutory licensee: its service must not be interactive,[62] must not allow switching channels to avoid restrictions on programming within a single channel,[63] and must pass along any copyright-status information embedded in the sound recording's digital file.[64] In addition, Sirius XM as a preexisting satellite digital fradio audio service must not preannounce the recordings it plays.[65] Finally, it must also abide by a set of rules called the "sound recording performance complement,"[66] which essentially prevents too many selections from the same recording from being broadcast in too short of a period.[67] These regulations may seem arcane. Yet webcasters face seven additional requirements beyond the five with which Sirius XM must comply.[68]

Finally, one innovation of § 114's statutory license is important to mention. It applies to satellite radio, cable music services, and webcasters. Section 114(g) specifies the division of payments from the performance royalties from

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[59] 17 U.S.C. § 801(b)(1).

[60] *See infra* Part I.D (describing § 114's willing buyer/willing seller standard for determining royalties paid by webcasters).

[61] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,054 (Apr. 17, 2013) (to be codified at 37 C.F.R. pt. 382) ("The Section 114(f)(1) rates for Sirius XM are 9% of *Gross Revenues* for 2013, 9.5% for 2014, 10.0% for 2015, 10.5% for 2016, and 11.0% for 2017.").

[62] 17 U.S.C. § 114(d)(2)(A)(i).

[63] *Id.* § 114(d)(2)(A)(ii).

[64] *Id.* § 114(d)(2)(A)(iii).

[65] *Id.* § 114(d)(2)(B)(ii).

[66] *Id.* § 114(d)(2)(B)(i).

[67] In particular, staying within the performance complement means that Sirius XM must refrain from the following: playing more than two tracks in a row from the same album, playing more than three tracks in a row by the same recording artist, playing more than three tracks in a row from the same compilation album, playing more than three tracks in total from the same album within a three-hour period, playing more than four tracks in total by the same recording artist within a three-hour period, and playing more than four tracks in total from the same compilation album within a three-hour period. *Id.* § 114(j)(13).

[68] *Compare id.* § 114(d)(2)(B) (containing two requirements beyond the three generally applicable requirements), *with id.* § 114(d)(2)(C) (containing nine additional requirements).

digital audio transmissions: 50% to the record label, 45% paid directly to the featured artist, 2.5% to the American Federation of Musicians (on behalf of backing musicians who play on recordings), and 2.5% to the American Federation of Television and Radio Artists (on behalf of backing vocalists who sing on recordings).[69] Direct payment to recording artists is important by comparison to what happens with record sales. Usually, the record label treats royalties as credits against the debt incurred in producing, recording, and marketing the recordings made under the artist's contract. But § 114(g)(2) denies record labels the opportunity to charge digital performance royalties against expenses; instead, the money goes directly from SoundExchange, which is tasked with distributing the funds, to the artists and does not pass through the record label. Direct payment to artists becomes especially significant in light of the possibility that a distributor might opt out of the statutory license and make a direct deal with a record label.[70]

C. *Cable Music Services*

Music channels included in cable and satellite television packages (cable music services) are perhaps the least successful and least known of the distribution media discussed in this Part. In fact, only one firm, Music Choice, remains active in the industry.[71] A consortium of cable television providers and major record labels owns the company.[72] For subscribers to cable television, Music Choice offers forty-six channels of music programming.[73] While the music plays, the television screen displays information about the track being played, often including album covers or images of the recording artist.

Licenses for the performances of musical works, as with traditional radio, come from ASCAP, BMI, and SESAC. Music Choice pays ASCAP and BMI each 2.5% of its gross revenue in royalties; the percentage paid to SESAC has

[69] *Id.* § 114(g)(2).

[70] Direct deals between record labels and webcasters have, in fact, emerged. *See, e.g.*, Ed Christman, *Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARDBIZ (June 5, 2012, 7:00 AM), http://www.billboard.com/biz/articles/news/1094776/exclusive-clear-channel-big-machine-strike-deal-to-pay-sound-recording (describing the first such deal to draw significant public attention). For for a description of the deal between Clear Channel and Big Machine and its potential industry-wide ramifications, see Garcia, *supra* note 23 (manuscript at 21-28).

[71] Here, I am referring only to cable television, not satellite television. A company now rebranded as Mood (formerly DMX) does offer the Sonic Tap service on DirecTV satellite television. Sirius XM, the satellite radio company, offers service on the DiSH network.

[72] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,061 (Apr. 17, 2013) (to be codified at 37 C.F.R. pt. 382) ("[T]he affiliated cable systems represent a third of Music Choice ownership whereas Music Choice's record company partners own one quarter of the company.").

[73] *Music Choice Music Channels*, MUSIC CHOICE, http://corporate.musicchoice.com/about-us/products/music-choice-music (last visited Sept. 20, 2013).

a similar structure but the rate is not publicly known.[74] Cable music services thus pay a higher rate for the same musical content than their AM and FM radio peers: 2.5% of revenues as opposed to 1.7%.

The digital performance right of § 106(6) described above covers music services for cable and satellite television because such services are digital. The § 114 statutory license treats "preexisting subscription services" in a similar fashion to preexisting satellite digital radio audio services. Originally, this provision applied to three incumbent firms: Music Choice, DMX, and Muzak. DMX went bankrupt several years ago, came under new ownership, and was recently rebranded as Mood.[75] The Copyright Royalty Board has implied that Mood does not stand in the shoes of its predecessor for purposes of § 114's statutory license.[76] But the Copyright Office has declined to decide that issue when asked about the contours of who counts as "preexisting."[77] In any event, classification as a preexisting subscription service means that the five requirements about programming apply.[78] It also includes the direct payment provision.[79]

The Copyright Royalty Board has recently made its initial determination of the rate that Music Choice will pay to sound recording copyright owners over the next five years. The rate starts at 8.0% of gross revenue in 2013 but moves to 8.5% for 2014 through 2017.[80] These rates reflect an increase over the previous rate. The Copyright Royalty Judges' rationale for this increase was Music Choice's proposed expansion of its service from forty-six to as many as three-hundred channels.[81] Still, the rate Music Choice pays for the use of sound recordings in its business is lower than that paid by Sirius XM for satellite radio.

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[74] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,056 & n.7.

[75] Muzak went through bankruptcy as well, with Mood eventually purchasing its assets and announcing plans to retire the Muzak brand name. *See* Ben Sisario, *Muzak, Background Music to Life, to Lose Its Name*, N.Y. TIMES, Feb. 5, 2013, at B3 (describing the acquisition).

[76] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,077 n.54 (noting that DMX "ceased operation").

[77] *See* Designation as a Preexisting Subscription Service, 71 Fed. Reg. 64,639, 64,646 (Nov. 3, 2006) (to be codified at 37 C.F.R. pt. 201) ("While there is a debate among the parties as to whether DMX today is the same business entity as it was in 1998, the Office declines to reach this question because it would involve the interpretation of facts that go beyond the scope of this inquiry.").

[78] *See supra* notes 62-67 and accompanying text (detailing the five requirements of § 114 licensees).

[79] *See supra* note 69 and accompanying text (describing § 114(g)'s payment provision).

[80] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,061.

[81] *Id.* at 23,059-60.

Other music services for cable and satellite television – that is, services that do not qualify as preexisting under the statute – are eligible for a distinct statutory license under § 114(f)(2), which involves setting the rate under the willing buyer/willing seller standard.[82] This standard has so far resulted in much higher effective rates than the § 801(b) four-factor standard. In addition, any music service is free to negotiate a direct deal and opt out of the statutory licensing process.[83]

D. *Webcasting*

The rate setting scheme created by Congress in the mid-1990s to address new digital forms of radio also covered Internet radio, usually known as webcasting. Originally, the digital performance right in sound recordings, created by the DPRSRA in 1995, did not cover webcasting that was supported by advertising; it only covered services that collected subscription fees from their users.[84] But the Digital Millennium Copyright Act of 1998 (DMCA) expanded the digital performance right in sound recordings to cover nonsubscription webcasters as well.[85] Section 114 of the Copyright Code now creates a compulsory license available only to what are known, in copyright parlance, as "noninteractive" webcasting services. Unfortunately, this bit of jargon is highly misleading. Webcasting services like Pandora, Last.fm, and iHeartRadio each allow users to customize their listening experience. Users can choose one or a few artists to serve as inputs for the services' recommendation engines, which then provide similar songs or songs from similar artists. Other webcasting services like SHOUTcast and Live365 allow users to create radio stations to share with other listeners. Customization and participation seem like forms of interactivity, but that is not what "interactive" means in § 114.[86]

Roughly speaking, an interactive music service is one where individual users can choose what songs they wish to hear on demand.[87] Conversely, a

[82] *See infra* Part I.D (describing § 114's willing buyer/willing seller standard for determining royalties paid by webcasters).

[83] *See, e.g.*, Designation as a Preexisting Subscription Service, 71 Fed. Reg. 64.639, 64,645 (Nov. 3, 2006) ("Section 114(e) specifically authorizes copyright owners of sound recordings and the entities performing the sound recordings to negotiate the rates and terms for use of the sound recordings under § 114.").

[84] NIMMER & NIMMER, *supra* note 34, § 8.22[B][1][a] (explaining that the DPRSRA originally exempted nonsubscription transmissions).

[85] Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860, 2890 (1998) (amending § 114 of the Copyright Code to include "a nonsubscription broadcast transmission").

[86] *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 164 (2d Cir. 2009) (interpreting the term "interactive" as tied to the concept of predictability and allowing Launch's individually customizable service to count as noninteractive).

[87] *See* 17 U.S.C. § 114(j)(7) (2012) ("An 'interactive service' is one that enables a member of the public to receive a transmission of a program specially created for the

service can qualify as noninteractive as long as songs cannot be heard on demand.[88] Webcasters must comply with the three general requirements on programming in order to remain eligible for the statutory license, one of which is being noninteractive.[89] Section 114(d)(2)(C) then adds nine additional requirements for new services, which apply regardless of whether they are qualifying nonsubscription services, subscription services, or new services offered by the preexisting players. The first two are analogous to the two additional requirements faced by preexisting satellite and cable music services: the performance complement and the ban on preannouncing songs.[90]

The next seven requirements represent the additional regulatory and administrative burden faced by webcasters as compared to the incumbent satellite radio and cable music services. These requirements (1) limit the ability to offer archived programs or programs that play in a continuous loop;[91] (2) forbid any suggestion of connections to advertising unrelated products;[92] (3) require cooperation with efforts to prevent scanning webcasts for particular recordings;[93] (4) forbid any inducement for users to make recordings of webcasts and mandate the implementation of technology to prevent such recording;[94] (5) require specific permission to play recordings that have yet to be released publicly;[95] (6) require compliance with technological protection measures embedded in the digital files containing sound recordings;[96] and (7) require the transmission of identifying information about the recording,

recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.").

[88] Users can request that certain songs appear on the service, but the request cannot be satisfied within an hour or less; moreover, a noninteractive webcaster may not announce the timing of a song in advance, such that a listener might be able to prepare recording equipment to capture a copy of the recording. *See id.* (explaining that a service can remain noninteractive "if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request").

[89] *See supra* notes 62-64 and accompanying text (discussing the three generally applicable requirements for § 114 statutory licensees).

[90] 17 U.S.C. § 114(d)(2)(C)(i)-(ix) (listing nine requirements to maintain eligibility for a statutory license, including both that "the transmission does not exceed the sound recording performance complement . . . [and that it] does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement").

[91] *Id.* § 114(d)(2)(C)(iii).

[92] *Id.* § 114(d)(2)(C)(iv).

[93] *Id.* § 114(d)(2)(C)(v). This technology was only hypothetical at the time of passage. NIMMER & NIMMER, *supra* note 34, § 8.22[D][1][c](5) ("The purpose of this provision is geared towards future development of technology." (footnote omitted)).

[94] 17 U.S.C. § 114(d)(2)(C)(vi).

[95] *Id.* § 114(d)(2)(C)(vii).

[96] *Id.* § 114(d)(2)(C)(viii).

regardless of whether there is copyright status information.[97] These provisions are deep in the weeds of § 114. But it is important to explain them in brief to illustrate the way they shape the nature of webcasting services. The list also highlights the inequality in treatment between webcasters and the preexisting satellite and cable services.

As mentioned previously,[98] § 114 sets a different standard for determining the royalties that webcasters – as compared to preexisting satellite radio and cable music services – must pay to sound recording copyright owners. The Copyright Royalty Judges set webcasting royalty rates for five-year periods, unless the parties agree otherwise.[99] The willing buyer/willing seller standard is defined as follows:

> In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges *shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller*. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including—
>
> (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.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).[100]

In addition, the rate structure must distinguish among different kinds of webcasting services and include a minimum fee for each kind.[101] The distinctions among nonsubscription webcasting services are to be "based on criteria including, but not limited to, the quantity and nature of the use of

[97] *Id.* § 114(d)(2)(C)(ix).

[98] *See supra* notes 58-59 and accompanying text (highlighting the special statutory rate structure afforded to Sirius XM).

[99] 17 U.S.C. § 114(f)(2)(B).

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

[101] *Id.* § 114(f)(2)(A) (requiring a distinction between subscription and nonsubscription webcasting services); *id.* § 114(f)(2)(B) (requiring a distinction among different kinds of nonsubscription webcasting services).

sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers."[102] The statute also includes an antitrust exemption that allows each side – sound recording copyright owners and webcasters – to negotiate collectively and designate common agents.[103]

The process for determining webcasting royalty rates under this standard has been a policy disaster.[104] Congress has designed and redesigned the process five times since 1995.[105] For purposes of this Article, the most important aspect of this flawed process is the rate structure it has produced. The current rate structure is actually bifurcated between the "Webcasting III" rates decided by the Copyright Royalty Judges and a privately negotiated alternative called the "PurePlay Settlement." The Webcasting III rates for 2013 stand at $0.0021 per play of a sound recording.[106] This rate applies to commercial webcasters and noncommercial webcasters beyond a certain allowance of programming hours.[107] Most importantly, the Webcasting III proceeding left in place an aspect of the previous "Webcasting II" rate structure: a per-station minimum fee of $500, which applies even to noncommercial webcasters.[108] The per-

[102] *Id.* The term "phonorecord" is the Copyright Code's word for a copy of a sound recording, whether in the form of a compact disc, vinyl record, or digital file. *Id.* § 101 ("'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[103] *Id.* § 114(e)(1) ("Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.").

[104] *See* DiCola & Sag, *supra* note 11, at 238 ("No one can look back at the successive incarnations of the webcasting agree-or-arbitrate model with satisfaction. Even if one regards the PurePlay Settlement as a positive outcome, the years between the DMCA in 1998 and the settlement in 2009 amount to over a decade of lost opportunity.").

[105] The process was set up in the DPRSRA in 1995 and the amended by the DMCA in 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998), the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, the Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974, and the Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926. DiCola & Sag, *supra* note 11, at 221-38 (providing a comprehensive history of the webcasting rate setting process).

[106] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,036, 13,048 (Mar. 9, 2011) (to be codified at 37 C.F.R. pt. 380).

[107] *Id.* at 13,040 (describing SoundExchange's proposal for rates, which was adopted by the Copyright Royalty Judges).

[108] *Id.* at 13,041-42.

station fee presented an enormous financial burden to webcasters that allow their users to create an arbitrarily large number of customized (but remember, not interactive) stations, as Pandora does. The PurePlay Settlement was a temporary compromise to ease those burdens.

Under the PurePlay Settlement framework, webcasters with significant advertising revenue pay the maximum of (a) twenty-five percent of their gross revenue to sound recording copyright owners or (b) per-play rates, which for 2013 are $0.00120 for plays by nonsubscription users and $0.0022 for plays by subscription users.[109] The settlement also includes a minimum fee of $25,000, deductible from the ultimate royalty bill.[110] The PurePlay rate structure is more favorable to commercial webcasters than the arbitrated Webcasting III rates, but the settlement nonetheless produces a high royalty rate when translated into percentage-of-revenue terms. Pandora, the largest and most successful webcaster in terms of consumer adoption,[111] paid fifty-six percent of its revenue in music royalties in the third quarter of 2013.[112] Because the royalties Pandora pays to musical work copyright owners are fairly low (as described in the following paragraph), one can deduce that the lion's share of Pandora's royalty payments have been going to sound recording copyright owners. The PurePlay Settlement's 2015 expiration date means that the Settlement is an unstable solution to the ongoing dispute over webcasting royalties.[113]

All of the preceding discussion in this Section pertains to the performance royalties owed by webcasters to sound recording copyright owners. It is crucial to remember the other side of the music industry: the musical work copyright owners, usually represented by the performing rights organizations ASCAP, BMI, and SESAC.[114] Webcasters' deals with ASCAP and BMI can require

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[109] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,799 (July 17, 2009).

[110] *Id.*

[111] *See, e.g.*, Henry Blodget & Pascal-Emmanuel Gobry, *Pandora Still Growing Like Gangbusters – Now 4% of Total US Radio Listening*, BUS. INSIDER (Nov. 23, 2011, 12:53 AM), http://www.businessinsider.com/pandora-q3-earnings-2011-11.

[112] *See Detailed Historical Financials: Q2FY14*, PANDORA INTERNET RADIO 3, http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTI5NjA3fENoaWxkSUQ9LTF8VHlwZT0z&t=1 (last visited Sept. 26, 2013) (reporting Pandora's content-acquisition costs as $65,713 out of $117,836 in total costs and expenses in the third quarter of its 2013 fiscal year).

[113] *See* Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,798 (July 17, 2009) (specifying rates only through 2015). The small webcaster designation in the settlement is only available through 2014. *Id.* at 34,798-99.

[114] Congress has clearly expressed its intent that sound recording performance royalties are not to diminish musical work performance royalties. *See* 17 U.S.C. § 114(c) (2012) ("This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)."); *id.* § 114(d)(4)(B)(iii) ("Nothing in this section annuls or limits in any way the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4).");

paying as much as 2.5% of revenue, although this rate cannot be applied uniformly.[115] It has been reported that Pandora pays a total of 4% of its revenue to musical work copyright owners.[116] Seeking lower fees, Pandora has recently sued ASCAP in the U.S. District Court for the Southern District of New York, which supervises ASCAP's consent decree.[117] Some large publishers have begun to opt out of the performing rights organizations; this complication may necessitate an adjustment of rates. It also threatens the direct payment provision of § 114(g)(2) that benefits recording artists and members of the music unions.

E. *On-Demand Streaming*

On-demand streaming refers to music services that are, by the Copyright Code's definition, interactive.[118] In other words, these services are the obverse of the noninteractive webcasting services described in the previous Section. Users of these services can choose to hear a particular recording of a particular song at any time. The services offer only a real-time performance, not a download of the music requested.[119] The most prominent of these services include Spotify, Rhapsody, Last.fm, Slacker, Rdio, and MOG. The line between noninteractive and interactive services is blurred in practice because many companies in this category are hybrids, offering Internet radio as part of their service in addition to on-demand streaming. Thus, users of these services

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id. § 114(i) ("It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).").

[115] *See* United States v. Am. Soc'y of Composers, Authors & Publishers (*ASCAP*), 627 F.3d 64, 75-76 (2d Cir. 2010) (discussing the 2.5% rate and rejecting the uniform application of that rate).

[116] Ben Sisario, *Pandora Opens a New Front in Its Royalty War*, N.Y. TIMES (Nov. 6, 2012, 5:25 PM), http://mediadecoder.blogs.nytimes.com/2012/11/06/pandora-opens-a-new-front-in-its-royalty-war ("Radio stations pay 1.7 percent of their revenue in publishing royalties, minus deductions for advertising commissions; Pandora pays 4 percent, and does not get the same deductions . . . .").

[117] Don Jeffrey, *Pandora Media Sues ASCAP Seeking Lower Songwriter Fees*, BLOOMBERG (Nov. 5, 2012, 5:30 PM), http://www.bloomberg.com/news/2012-11-05/pandora-media-sues-ascap-seeking-lower-songwriter-fees.html; Paul Maloney, *Top Webcaster Sues Songwriter/Publisher Group ASCAP for Lower Fees*, RADIO & INTERNET NEWSL., http://www.kurthanson.com/news/top-webcaster-sues-songwriterpublisher-group-ascap-lower-fees (last visited Oct. 24, 2013).

[118] 17 U.S.C. § 114(j)(7) ("An 'interactive service' is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.").

[119] *See ASCAP*, 627 F.3d at 73-75 (holding that downloads are not considered public performances); *cf. In re* Cellco P'ship, 663 F. Supp. 2d 363, 372 (S.D.N.Y. 2009) (rejecting a claim that ringtones are both performances and downloads).

can either choose the exact sequence of recordings they wish to hear, or listen to streams in which an algorithm chooses a sequence of recordings for them based on the user's profile or on general parameters set by the user. For purposes of this Article, what distinguishes a service as an on-demand streaming service is that its users have *at least the option* to choose a specific sequence of recordings for themselves at any time they wish.[120] This is the "celestial jukebox" that people started writing about in the mid-1990s as unauthorized file-sharing websites suggested the possibilities ahead.[121] The celestial jukebox arrived roughly ten years later (ten years late?) but it is here.

As interactive services under copyright law, the on-demand streaming services require voluntarily negotiated licenses. They do not benefit from the statutory license of § 114,[122] but they can benefit by negotiating to offer different features.[123] Thus, on-demand streaming services face a different type of process for determining the royalty payments owed to copyright owners – not the § 801(b) factors used for the preexisting satellite and cable music services, and not the willing buyer/willing seller standard used for webcasters. The interactive services do not deal with SoundExchange, as webcasters do, at least for the on-demand aspect of their services. Instead, they must obtain voluntarily negotiated licenses from the individual owners of sound recordings: the record labels, in most cases.[124]

[120] The statute provides that "the noninteractive component shall not be treated as part of an interactive service." 17 U.S.C. § 114(j)(7).

[121] *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 199-202 (1994) ("The metaphor that best expresses the possibilities of the future is the celestial jukebox, a technology-packed satellite orbiting thousands of miles above Earth, awaiting a subscriber's order – like a nickel in the old jukebox, and the punch of a button – to connect him to any number of selections . . . ."); Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY, Sept. 2000, at 39, 40, *available at* http://www.theatlantic.com/past/docs/issues/2000/09/mann.htm ("[B]y 2003 . . . listeners will rarely if ever drive to Tower Records for their music. Instead they will tap into a vast cloud of music on the net. This heavenly jukebox, as it is sometimes called, will hold the contents of every record store in the world . . . .").

[122] *See supra* Part I.D (describing the treatment of webcasters under the DPRSRA, the DMCA, and § 114 of the Copyright Code).

[123] *See, e.g.*, Eliot Van Buskirk, *Why Slacker Has Offline Playback and Pandora Doesn't*, EVOLVER.FM (Feb. 24, 2012, 3:50 PM), http://evolver.fm/2012/02/24/why-slacker-has-offline-playback-and-pandora-doesnt (concluding that Pandora does not have offline playback both because it does not have the required license from copyright holders and it does not view offline playback as a requisite feature).

[124] There is a residual category of services that are noninteractive but violate some requirement to qualify for the statutory license, such as the performance complement. *See supra* note 90 and accompanying text. Such services are generally treated similarly to interactive services, but owners of sound recording copyrights must comply with a most-favored-nation provision, 17 U.S.C. § 114(h)(1), when licensing their own affiliates. *See* NIMMER & NIMMER, *supra* note 34, § 8.22[E][2][a] ("To promote competitive licensing, that residual category [of voluntary licenses outside the interactive context] is subject to a

Section 114 does, however, place a few regulations on the process by which on-demand streaming services may obtain these private licenses. It limits the duration of exclusive licenses to interactive services to twelve months, with a thirteen-month waiting period required after one twelve-month contract term.[125] As with webcasters,[126] there is an antitrust exemption that allows collective negotiations of voluntary licenses for on-demand streaming services.[127] The negotiations may occur collectively or through a common agent, but the licenses ultimately resulting from those negotiations must be unilateral.[128] Finally, in contrast to the provisions for webcasters, there are no provisions about how royalties must be allocated among record labels, recording artists, and union members and no requirement of direct payment.[129]

The royalty rates that on-demand streaming services pay to sound recording copyright owners are not uniform because the licenses are negotiated voluntarily and privately.[130] They vary from record label to record label (especially between the three large major labels and smaller, independent labels) and from service to service. One can, however, characterize a range of typical royalty rates to get an idea of how they stack up to the rates paid by satellite radio, cable music services, and webcasters.[131] According to one report, Rhapsody pays $0.0050 per stream – that is, half a penny – while

statutory 'most-favored nation clause' in the realm of permissible scope of licensing affiliates." (footnotes omitted)). Interactive services are not subject to the most-favored-nation provision. *See id.* § 8.22[E][2][b] ("The primary category of voluntary licenses to interactive services is immune from the most-favored nation clause.").

[125] 17 U.S.C. § 114(d)(3)(A). A firm that owns fewer than 1000 sound recordings may grant an exclusive license for twenty-four months. *Id.* An otherwise noninteractive service that violates some aspect of § 114(d)(2), such as a webcaster that exceeds the performance complement, is not subject to these time restrictions. *See* NIMMER & NIMMER, *supra* note 34, § 8.22[E][1][b]-[c] (describing "time-bound" limitations on interactive and noninteractive services).

[126] *See supra* note 103 and accompanying text (discussing 17 U.S.C. § 114(e)(1)).

[127] 17 U.S.C. § 114(e)(2).

[128] *Id*. Both copyright owners and interactive services are allowed to designate common agents to collect and pay royalties. *Id.*; *see also* NIMMER & NIMMER, *supra* note 34, § 8.22[E][3] (observing that the common law of agency would also have permitted the designation of common agents, meaning that the focus of § 114(e)(2) is to prohibit the common agents from engaging in rate setting).

[129] *See* 17 U.S.C. § 114(g)(1) (specifying only that royalty payments from voluntarily licensed interactive services must be allocated according to existing contracts, in contrast to the parallel provision for noninteractive services in § 114(g)(2)).

[130] For more on the licensing process itself, see DiCola & Touve, *supra* note 5, which reports on qualitative interviews with professionals from on-demand streaming services and music attorneys who negotiate licensing deals.

[131] Remember that traditional AM and FM radio stations pay nothing to sound recording copyright owners. *See supra* Part I.A.

Spotify pays about one-third of that, or $0.0017, per stream.[132] Another source suggests that Spotify's royalty payments are on par with Rhapsody's, or perhaps even greater: $0.0051 per stream to a user of the ad-supported version of the service; $0.0078 per stream to a user of the $4.99-per-month unlimited, ad-free version; and $0.0153 per stream to a user of the $9.99-per-month premium version.[133] According to that same source, Rdio pays even more than Spotify's premium rate, at least in the United Kingdom.[134] More recent data suggest that Spotify is paying rates between $0.0042 and $0.0047 per stream.[135] The payments for a particular sound recording do appear to vary based on what class of users (ad supported or paid subscription) is listening to it.

Royalty rates for on-demand streaming have come under increased scrutiny in the media, based largely on complaints from artists. For instance, the avant garde cellist Zoë Keating, who retained ownership of her sound recording copyrights (unlike artists who sign with a label), has written about the inability of either on-demand streaming royalties or webcasting royalties to match her digital-download royalties.[136] In response, a well-known industry commentator offered a more optimistic view of streaming's long-term potential for artists.[137]

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[132] David McCandless, *How Much Do Music Artists Earn Online?*, INFO. IS BEAUTIFUL (Apr. 13, 2010), http://www.informationisbeautiful.net/2010/how-much-do-music-artists-earn-online (providing a graph displaying what musicians must sell in order to meet the United States monthly minimum wage and a link to a Google spreadsheet with the detailed figures used to create the graph).

[133] Lee Parsons, *Infographic: Is Your Music a Hobby or a Profession?*, DITTO MUSIC, http://www.dittomusic.com/dittomusic/blogpost.aspx?228&title=infographic:-is-your-music-a-hobby-or-a-profession (last visited Sept. 27, 2013) (describing a graph with royalty figures on how much musicians are paid for their music depending on where it is purchased or streamed); *see also How Much Will I Get Paid*, METAL INSIDER, http://www.metalinsider.net/site/wp-content/uploads/2012/07/howmuchwilligetpaid1.jpg (last visited Sept. 27, 2013) (hosting a copy of the infographic, which is no longer available on the Ditto website).

[134] Parsons, *supra* note 133 (reporting that Rdio pays £0.011 per stream, not differentiated by premium versus ad-supported streaming, compared to Spotify's £0.009 per premium stream).

[135] Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, N.Y. TIMES, Jan. 29, 2013, at A1 ("After [Zoë Keating's] songs had been played more than 1.5 million times on Pandora over six months, she earned $1,652.74. On Spotify, 131,000 plays last year netted just $547.71, or an average of 0.42 cent a play."); Damon Krukowski, *Making Cents*, PITCHFORK (Nov. 14, 2012), http://pitchfork.com/features/articles/8993-the-cloud (stating that Spotify is paying Krukowski's record label at a rate of $0.004611 per play).

[136] Zoë Keating, *A Blog About an Email About a Blog About a News Article About Music Streaming*, ZOËKEATING.TUMBLR (Jan. 31, 2013), http://zoekeating.tumblr.com/post/41955905309/a-blog-about-an-email-about-a-blog-about-a-news-article (explaining that while Keating does not oppose streaming, she seeks reform of the streaming services' business models to incorporate the interests of artists).

[137] Bob Lefsetz, New York Times *on Streaming*, LEFSETZ LETTER (Jan. 29, 2013), http://lefsetz.com/wordpress/index.php/archives/2013/01/29/new-york-times-on-streaming ("Once

Damon Krukowski, of the group Damon & Naomi and formerly of Galaxie 500, has also written thoughtfully about the small royalty payments he receives.[138] A music-industry professional responded by emphasizing the need to keep units of measurement consistent (that is, dollars versus cents), to distinguish between sound recording and musical work royalties, and to differentiate among types of distribution media.[139] But in addition to confirming the range of royalty rates that on-demand streaming services appear to be paying, the artists are raising issues about royalty levels that copyright policy must address.

As with all the other modes of music distribution discussed in this Part, royalties for the owners of musical works are separate and distinct. The on-demand streaming services have reached a private agreement to pay two different kinds of royalties on the publishing side.[140] First, they pay performance royalties to ASCAP, BMI, and SESAC, just as other kinds of radio do. Second, they pay mechanical royalties – which is the music industry's term for payments to reproduce and distribute a musical work – to the Harry Fox Agency.[141] Why must on-demand streaming services pay for implicating the reproduction right? Partly because buffer copies might count as infringing copies,[142] and partly because many on-demand streaming services allow a degree of offline access, sometimes known as "limited downloads" or "tethered downloads."[143] The combined royalty rate is 10.5% of revenue; Harry Fox Agency collects 10.5% minus whatever rate is paid to the PROs (a rate which is not publically available).[144] Because of the mechanical-royalties

everybody has a subscription, there's TONS of money involved. As for who's gonna get it . . . The lion's share of revenue for streaming services is paid to rights holders. Assuming you own your rights, that will be a lot." (elipsis in original)).

[138] Krukowski, *supra* note 135.

[139] David Macias, *Making Dollars: Clearing up Spotify Payment Confusion*, THIS INDUSTRY THING OURS (Nov. 28, 2012), http://thisindustrythingofours.wordpress.com/2012/11/28/making-dollars-clearing-up-spotify-payment-confusion.

[140] *Agreement Royale*, FUTURE OF MUSIC COAL. (Oct. 1, 2008, 1:00 AM), http://futureofmusic.org/blog/2008/10/01/agreement-royale (describing an agreement in which "limited download and interactive streaming services will pay a mechanical royalty of 10.5 percent of revenue, less any amounts owed for performance royalties").

[141] *Id.*

[142] *Compare* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994) (holding in a landmark decision that RAM copies were fixed and infringe the reproduction right), *with* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008) (holding that a cable provider's buffer copies in the context of operating a digital video recording (DVR) service were not fixed and therefore did not infringe the reproduction right).

[143] *Agreement Royale*, *supra* note 140 (explaining that limited or tethered downloads let a user download music that will continue to play for the duration of his subscription).

[144] *Id.* (explaining that the agreement "cap[s] the rate paid to publishers at 10.5 percent").

component, interactive streaming services pay more than twice as much to publishers, songwriters, and composers than the other forms of radio.[145]

F. *Other Modes of Distribution*

This Section closes the survey of music distribution media with a class of services that are not covered by § 114 yet must pay both sound recording copyright owners and musical work copyright owners. This category includes podcasting, which requires voluntary licenses to distribute copyrighted music (unless it is public domain or otherwise "podsafe" music).[146] Because podcasts are a "hybrid" of streams and downloads – many podcasts are both streamed live and available for download – they require both performance licenses and reproduction and distribution licenses.[147] As with on-demand streaming, the performance and distribution rights in the sound recording require a voluntary negotiation.[148] For reproduction and distribution of the musical work, Harry Fox Agency offers a digital license,[149] although the rates get complicated for podcasts with a large audience.[150] Digital licenses that allow podcasters to perform musical works are available from ASCAP[151] and BMI.[152] SESAC used to offer such licenses, but no longer does so.[153]

This catch-all category of music distribution services that require voluntary licenses but are not covered by § 114 also includes user-generated video sites like YouTube,[154] cloud storage services, cloud matching services like Apple's

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[145] These royalties paid to owners of musical works are determined independently of the § 114 royalty arbitration process, which pertains only to sound recording copyrights.

[146] *See* Colette Vogele et al., PODCASTING LEGAL GUIDE: RULES FOR THE REVOLUTION, CREATIVE COMMONS (2006), http://mirrors.creativecommons.org/Podcasting_Legal_Guide.pdf (surveying legal issues related to podcasting).

[147] Coe Ramsey, *Copyright 101: Licenses Required for Common Uses of Music on the Internet*, DJCOUNSEL (Jan. 15, 2010), http://www.djcounsel.com/?p=275 ("Because 'podcasting' results in a copy, master use and mechanical licenses are required for 'podcasting' songs.").

[148] *Id.* ("A master use license for a podcast must be voluntarily negotiated.").

[149] *Digital Licensing*, HARRY FOX AGENCY, http://www.harryfox.com/public/DigitalLicenseslic.jsp (last visited Sept. 27, 2013) ("HFA offers statutory rate licensing for permanent digital downloads, limited downloads, interactive streaming, and ringtones.").

[150] Press Release, Harry Fox Agency, HFA Ready to Implement New Digital Era Mechanical Royalty Rates 2 (Oct. 2, 2008), *available at* http://www.harryfox.com/docs/HFARoyaltyRatePR10-2-08.pdf.

[151] *Get an ASCAP License – Website & Mobile Apps*, ASCAP, http://www.ascap.com/licensing/types/web-mobile.aspx (last visited Sept. 27, 2013).

[152] *Music Licensing for Websites*, BMI, http://www.bmi.com/licensing/entry/website (last visited Feb. 12, 2013).

[153] *Internet License*, SESAC, INC., http://www.sesac.com/Licensing/internet.aspx (last visited Oct. 10, 2013).

[154] *See, e.g.*, Brian Leary, Note, *Safe Harbor Startups: Liability Rulemaking Under the DMCA*, 87 N.Y.U. L. REV. 1135, 1165-66 (2012) (describing YouTube's Content ID system

Music Match, and simple sales of digital downloads. The sound recording copyright owners' share of revenue from these services tends to be 60% to 70%.[155] The artists' share of the revenue from these services is about 7% to 10%, depending on the specific contractual provisions.[156]

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This Part has surveyed the current field of music distribution services. Copyright law treats different distribution technologies differently, especially on the sound recording side of the music industry. Traditional radio stations do not pay royalties to sound recording copyright owners. Satellite radio, cable music services, and webcasters do pay royalties to sound recording copyright owners but benefit from a statutory, compulsory license. But there are two different standards for determining the rates: one for preexisting satellite radio and cable music services and one for webcasters and any new satellite radio or cable music services. Moreover, the substantive rates that have resulted from these processes are different for satellite, cable, and webcasting; the rates that webcasters pay, especially, represent a high percentage of their revenue. On-demand streaming services must also pay royalties to sound recording copyright owners. They must obtain voluntary licenses to perform copyrighted recordings on their services, although the process is still subject to a few regulations. Podcasters, user-generated video sites, cloud services, and digital-download services also operate under voluntary licenses. Depending on the particular distribution technology, a service may need licenses to cover reproduction and distribution, performance, synchronization, or some combination of two or three. Meanwhile, on the musical work side of the industry, the PROs, Harry Fox Agency, or the publishers themselves also collect royalties from music distributors. The royalty rates charged by the PROs, especially, vary across types of distribution methods, although there is less variation as on the sound recording side.

II. ECONOMIC ARGUMENTS FOR AND AGAINST EQUALITY

The fact of unequal treatment across music distribution technologies is really just the beginning of the inquiry. It is possible that this unequal treatment has a sound justification. Of course, the presence of special deals for incumbent companies – with a legislative history that explicitly names the companies benefiting from Congress's largesse – does not bode well for such a

for compensating copyright owners).

155 For example, Apple earns \$0.29 from a \$0.99 download. *See* Megan Gibson, *Happy 10th Birthday iTunes!*, TIME (Apr. 28, 2013), http://entertainment.time.com/2013/04/28/happy-10th-birthday-itunes. If one deducts the \$0.091 mechanical royalty paid to the composition copyright owner under a statutory license, 17 U.S.C. § 115(a)(2) (2012), this leaves 61.5% of the revenue for the record label.

156 *See* Sisario, *supra* note 135, at A1 ("On a 99-cent download, a typical artist may earn 7 to 10 cents after deductions for the retailer, the record company and the songwriter, music executives say.").

justification. Nor does a survey of royalty rates across the industry in which some companies pay nothing and some pay more than half of their revenue for the same input. The lobbyist-dominated process of making copyright law and the byzantine nature of the resulting regulations signal – maybe scream – that there is a problem. And it is now apparent that Internet distribution has created a new opportunity for intermediaries to take a large share of the profits at the expense of the actual creators. So I expect that most readers will already doubt that the legislative and regulatory scheme detailed in Part I is optimal or even rational. Still, the existing system for handling Internet distribution of music may have its reasons for unequal treatment. Moreover, equality is not its own justification. An argument for equality must specify equality of what and why equality is desirable.

Toward that end, this Part explores the economic reasons for and against unequal treatment of different music distribution technologies. After considering the strongest arguments for regulations tailored and individualized for each distribution technology, I argue that the economic argument for equal treatment is stronger. Part III bolsters this argument with a First Amendment analysis that points toward equal treatment as well. At the outset, I want to emphasize that equal treatment is not equivalent to higher or lower rates. The level of compensation for copyright owners can be logically separated from the concept of regulatory parity.

A. *Interconnected Industries*

To begin the economic analysis, it is important to establish that the various music distribution technologies are interconnected. The legislative process has often considered each technology in isolation. This is partly driven by the historical force of technological change – AM and FM radio emerged before cable, which emerged before satellite radio, which emerged before the commercial Internet. Moreover, the tendency to isolate industries is a function of lobbying power. Incumbents ask for special treatment with respect to new entrants. Economically, however, different technologies for distributing music must be viewed as interconnected.

Many commentators have also discussed content-technology disputes in isolation. For example, one might say that a property rule would be a good idea in a dispute between the movie industry and VCR manufacturers. Another might laud the adoption of a liability rule in a dispute between song publishers and piano-roll manufacturers. Dotan Oliar recently catalogued the permutations of property- and liability-rule regimes in this context, characterizing the efficient outcomes.[157] I have taken this one-dispute-at-a-time

[157] Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Inflictions of Harm*, 64 STAN. L. REV. 951, 957, 966-93 (2012) (describing how various property and liability rules "affect copyright owners' and innovators' incentives to invest in their respective economic activities and in reducing the interference between them").

approach myself in case studies discussed in my previous work. It is a useful lens as far as it lets one see.

But whatever its value, the approach of analyzing content-technology disputes in isolation deemphasizes the important fact that content-technology disputes do not occur in a vacuum. New technologies battle with copyright owners first, but eventually become industries that compete with each other to distribute music. For instance, phonographs competed with AM radio, which competed with FM radio, which competed with cassette players, which competed with compact disc players, which competed with MP3s, and so on. Old technologies and new technologies often coexist and compete with each other. This means that the solution to one content-technology dispute will often affect the next content-technology dispute, and perhaps several more disputes down the line. So we need a theory for the interconnected technologies that compete with each other. We cannot solve radio separately from solving MP3s. It is natural and interesting to consider each new technology as it comes. But we have to think about the legacy technologies that are not completely replaced, just pushed into a new, smaller role. And we need to think about what existing copyright law and communications law have done to settle the disputes between the copyright owners and the legacy technologies when we confront the disputes between the same copyright owners and the new technologies.

Other commentators have addressed the broad sweep of content-technology disputes.[158] These scholars make claims along the lines of saying we should always shift to a compulsory licensing regime, or we should always have strong property rights in the copyright owner, and so on. Such claims carry the usual difficulties of generalization. Implicitly, they reject tailoring just as the one-dispute-at-a-time approach embraces tailoring.[159] The broad-sweeping theories instead favor putting a thumb on the scale for property rights[160] or for technology.[161] But these are umbrella theories, not theories of the interconnected nature of competing distribution technologies. The latter is what I intend to offer here.

[158] *See* Ammori, *supra* note 9, at 366; Wu, *supra* note 9, at 279.

[159] *See generally* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006) (providing the foundational treatment of the issue of tailoring versus uniformity).

[160] RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 31 (2013) ("[A] utilitarian, or cost-benefit, analysis provides both a coherent analytical framework and a basis for assessing empirical claims respecting specific property rights and existing property regimes.").

[161] Wu, *supra* note 9, at 279 ("As the pace of technological change accelerates, copyright's role in setting the conditions for competition is quickly becoming more important, even challenging for primacy the significance of copyright's encouragement of authorship.").

Often, scholars have applied the framework of property rules and liability rules.[162] Thus, taking each new distribution technology as it comes, scholars have asked: Should the copyright owners have a property right? Should the distribution technology benefit from a compulsory license? Should the distribution technology operate freely?[163] Along with Matthew Sag, I have argued that the property rules/liability rules framework must be augmented by considering the complexity of the regulatory environment, the multiplicity of government institutions that become involved in settling content-technology disputes, and the central role of information in optimal regulation.[164]

Now, in this Article, I consider the collection of the government's choices across a variety of scenarios in which a new distribution technology firm seeks to use copyrighted works owned by large aggregator firms. Economically, the different methods of music distribution are related, and this Part offers a framework to understand the relationships.

B. *A Simple Model of Music Distribution*

This Section outlines a model of music distribution, starting from the product characteristics of each type of service. It then considers consumers' preferences and argues that music distribution services are imperfect substitutes for each other. Copyright owners' revenue will depend in part on the degree of substitution among media as well as the prices consumers face.

1. Product Characteristics

This Subsection provides a comparison of the different ways to experience Internet music by surveying the product characteristics of four categories of music-based offerings: sales of copies (which includes digital downloads, as one would purchase on iTunes or Amazon), on-demand streaming, customized webcasting, and other forms of radio. Each category is analyzed along several dimensions. This analysis lays the groundwork for understanding how consumers might view these products as substitutes for, or even complements to, each other.

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[162] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

[163] Merges, *supra* note 38, at 1300 ("[Congress should] stay away from compulsory licensing for new media! Society and the industry will be better off if Congress exercises restraint, creating an environment in which private organizations can flourish."); Oliar, *supra* note 157, at 997 ("Lawmakers concerned with improving copyright owners' and innovators' incentives to invest should, of course, choose the entitlement that generates, in their view, the best mix of such incentives.").

[164] DiCola & Sag, *supra* note 11, at 241-42 ("Instead of thinking of content-technology disputes as a two-player game with fixed rules, scholars and policymakers should pay attention to the broader game about what the rules will be. This game has at least three players – content, technology, and the state. Even when a content-technology dispute becomes more or less settled . . . the government often remains involved as a monitor.").

Consumers have choices about how to consume music. One key choice is whether to own copies of music – to purchase CDs, vinyl records, or digital downloads. Owning copies allows complete control over the content and the timing of one's music listening, at least within the set of recordings for which one owns copies. As a result, ownership also presents the opportunity to design the sequence in which one listens to various recordings or parts of recordings (self-sequencing). To some extent, ownership of a copy allows portability from format to format and from device to device, but this bumps up against technological and contractual constraints. Finally, ownership provides the option to listen to a particular recording an unlimited number of times, particularly in the case of digital files (option value). The option value in this case must be discounted slightly to account for the possibility that a physical copy is misplaced or damaged, or a file is lost or corrupted.

With this framework for understanding the value of a copy of recorded music, one can compare the product characteristics of digital downloads and on-demand streaming. The latter generally offers a larger library of recordings than what consumers themselves own in copies, but this is contingent on a given service's ability to secure sound recording and musical work licenses. On-demand streaming provides control over timing and the possibility of self-sequenced playlists, just like ownership. Several software applications now allow consumers to switch seamlessly between recordings they own and recordings they can stream on-demand. On-demand streaming offers fairly similar portability, too, although the technological and contractual limits may differ from those placed upon digital downloads. The option value of on-demand streaming, however, differs in potentially important ways. As a baseline, on-demand streaming services allow consumers to hear recordings an unlimited number of times. On the other hand, the service itself might cease to exist. Moreover, unlimited access may depend on a continued subscription payment. And the service could lose its license for a particular sound recording or the underlying musical work at any time. In sum, the possibility of losing access to the whole service, or to a particular sound recording, works against the prospect of unlimited quantity of listens. The option value of on-demand streaming is different than that of ownership.

One can go further and bring customized webcasts, such as those available through Pandora, into the comparison. Customized webcasts draw from a large library of music, perhaps even larger than the library for on-demand streaming, because some copyright owners have withheld certain recordings from interactive services. With customized webcasts, consumers have less control over which recordings they will hear and when. The webcasts are not self-sequenced but instead sequenced by an algorithm into which the consumer can provide input to guide the algorithm's choices for the playlist (custom sequencing). The loss of control is traded off for the benefits of assistance in discovering new music. Custom sequencing also saves consumers the effort involved in choosing a sequence of music, which is not equally enjoyable to all consumers. In sum, the degree of control over the playlist is not zero, but it is less than it is for ownership or on-demand streaming. The degree of portability, as before, depends on the technological and contractual limitations of the service, but is similar to ownership and on-demand streaming. Consumers do not enjoy the option value of unlimited listens to a particular recording with customized webcasts – a major difference between ownership and on-demand streaming as compared to webcasting and other forms of radio.

Traditional AM and FM radio, satellite radio, and cable music services can be treated in common for this analysis. The set of recordings that consumers hear on these services can be quite limited, as with the short playlists of contemporary top-forty radio stations. But these forms of radio also have the potential to draw from large libraries of music. In the case of AM and FM radio, this includes recordings that have not been licensed to the new digital and Internet services. Consumers do not have any control over timing of what recordings they hear on the radio, unless they call in a request that a DJ decides to honor. Programming directors, DJs, or both select in tandem the sequence of recordings consumers hear on music radio (programmed sequencing). Consumers have no choice over the specific sequence of recordings, but they can choose stations or channels based on format names – top forty, country, rock, jazz, and so on – that signal the types of music that the consumer will likely hear. By curating the music played, these forms of radio offer a way to discover new music (and also do the work of choosing recordings on consumers' behalf). As for portability, AM and FM radio are highly accessible, thanks to inexpensive and nearly ubiquitous receivers, in the car, at work, or at home. Satellite radio depends on a more expensive receiver, but has the advantage of nationwide coverage. Cable music services are available only in the home. Finally, as with webcasting, other forms of radio do not offer consumers the option value of unlimited listens to particular recordings. The value to consumers – willingness to pay – of these product characteristics will be different for each consumer and each type of music distribution service. But, as the next Subsection describes, economics offers a way to analyze the connections between the ways consumers value one service versus another.

2. Substitution and Complementarity

One way to think about the different ways to consume music is to think of them as pure substitutes. This is certainly true at a single moment in time: a minute spent listening to a digital download is a minute spent not listening to an on-demand streaming service, a webcast, or an FM-radio broadcast. But it will be more useful to think about consumption over longer periods of time, like a week or a month. From this standpoint, the various types of music distribution are imperfect substitutes; in other words, they are substitutes to a degree that is less than one-for-one substitution.[165] The reason is that the four product categories surveyed in the preceding Subsection each have advantages

[165] *See* HAL R. VARIAN, MICROECONOMIC ANALYSIS 116-24 (3d ed. 1992) (discussing the technicalities of substitution between goods).

and disadvantages relative to each other. Webcasting and other forms of radio assist in music discovery, but offer less control than on-demand streaming or owning copies. On-demand streaming has less option value than owning copies, but can offer access to a larger or different library. Thus, a typical consumer might enjoy a mix of these music products and services, depending of course on their relative prices and associated advertising.

It is also possible, even commonplace, that using one music product or service will spark interest in using another. For instance, listening to the radio might lead to more purchases of copies. Likewise, purchasing a copy of a particular artist's song or album might lead a consumer to an on-demand streaming service to hear the rest of that artist's catalog. In short, listening to music in one medium can beget listening to music in another medium. So there is a possibility that the various music distribution services can be complements rather than substitutes. This could be true of an individual consumer's preferences, even if it is not true across the aggregate of all consumers. At a minimum, the reasons that different music services might be complements counteract to some degree the reasons that they might be substitutes.

In the end, it is best to think of the different music services as imperfect or partial substitutes in terms of their value to consumers. In fact, it is not hard to imagine a subset of consumers who touch on all four categories in a single month: purchasing digital downloads, using an on-demand streaming service, listening to a webcasting service that allows customization, and listening to FM radio.[166] In the context of music products and services that are imperfect substitutes, it will be helpful to keep a representative consumer in mind who does in fact consume some amount of music from each distribution method.

3. Cannibalization and Promotion

An issue related to substitution is the concept known in the music industry as cannibalization (also known as displacement). The concept comes from the copyright owners' perspective. Think of selling copies of recordings as the baseline moneymaker for record labels and publishers. Now, the copyright owners are considering whether to license a new technology – say, allowing webcasters to perform their recordings online.[167] Cannibalization refers to the idea that a new technology or distribution model, like webcasting, might hurt revenue from an older one, like record sales. To continue with the webcasting example, the concern is that the new webcasting royalties will not offset the lost profits from the decrease in record sales. Hence, webcasting would be said to cannibalize record sales. Another possible form of cannibalization, especially from the perspective of recording artists, would occur when a new

[166] I can say for certain that there is at least one consumer who fits this particular description.

[167] Imagine this as the baseline, as in the usual case with derivative works, performances, and so on. In other words, pretend for a moment that music copyright does not feature several compulsory licenses.

distribution medium decreases revenue and profits in a market that is ancillary to record sales, such as ticket sales for live performances or sales of merchandise.

But there is also the possibility that plays over a new distribution medium will promote record sales or ancillary revenue sources.[168] This has long been the argument of traditional AM and FM radio stations when they seek to justify their exemption from paying royalties to sound recording copyright owners. There is some econometric evidence for their claim.[169] There is also a law and economics argument that the existence of illegal "payola" shows that record labels get more value from radio stations than radio stations get from record labels.[170] If the money tends to flow toward radio stations, should copyright law try to reverse that flow? The record labels, recording artists, and members of the music unions say yes. I return to this debate and the question of a general public-performance right in sound recordings.[171] For now, the only point is that promotional value is the obverse possibility to cannibalization.

Just as one could attempt to estimate the degree of substitution (or even complementarity) between distribution media, one might also try to measure the degree of cannibalization versus promotion that a particular distribution medium has with respect to record sales or other revenue sources. The cannibalization-versus-promotion question is an empirical one. But like many empirical questions, it is difficult to study, and no one agrees about the answer.[172] Oftentimes, copyright policy toward a new distribution medium – say, on-demand streaming – is made based on theoretical arguments or preconceived notions about whether cannibalization or promotion dominates.

In connection to the concept of cannibalization, one must mention the sordid underbelly of the music industry: unauthorized file sharing, known to many of

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[168] This is analogous to the previous Subection's discussion of substitutes and complements. *See supra* Part II.B.2. In both cases, all the economic analysis is saying is that a particular elasticity theoretically could be positive or negative.

[169] *See* Stan J. Liebowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 93, 103-04 (2004) (discussing the supposedly symbiotic relationship between radio plays and record sales, and arguing that radio plays actually harm record sales).

[170] R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 286-87 (1979) ("[I]t soon became apparent that the playing of a record by a disc jockey increased the sales of that record and the desire of record companies to have their records played on disc jockey programs led naturally to payola."); *see also* Thomas W. Hazlett, *Pay-for-Play Can Help Music*, FIN. TIMES, Aug. 14, 2005, at 15, *available at* http://www.ft.com/cms/s/2/61a388f6-0ce3-11da-ba02-00000e2511c8.html ("Ronald Coase, the Nobel Prize winning economist, explained the practice in 1979. Radio stations own something valuable: songs played more tend to sell more.").

[171] *See infra* Part II.D.5.

[172] *See, e.g.*, JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 12-15 (2009) (describing the problem of selection bias as an example of the challenges in empirical work).

its detractors as piracy. File-sharing software and file-hosting sites could plausibly be included with the other, licensed methods of music distribution in the framework outlined above.[173] By doing so, it becomes easy to think of the argument about the harm from piracy in terms of cannibalization versus promotion. Initially, it is important to remember that the product characteristics of unauthorized downloading can include cumbersome processes to obtain the files as well as unreliable or insecure files.[174] So there are reasons that consumers who download files without authorization would still engage in any or all of the licensed methods; in short, illegal copies are an imperfect substitute for legal copies and other methods of listening to music. In theory, unauthorized file sharing might even promote sales for the recording artist whose song or album was downloaded. It might promote ancillary products, like concerts, for that artist. Or it might at least stimulate demand for music in general. But the effect of unauthorized file sharing appears to be that it either cannibalizes record sales to some extent or has no effect.[175] Less research has been done on file-sharing's effect on other distribution media like on-demand streaming, webcasting, and the various forms of radio, or its effect on ancillary revenue streams.[176]

4. Consumer Prices

Next, this Subection considers the effect of prices on distribution media. Each mode of music distribution is priced in different ways. Sales of copies have straightforward per-unit prices. On-demand streaming services and webcasters provide options. A typical pricing model is to offer unlimited, no-advertising access on personal computers for a subscription fee of $4.99 per month, premium access that includes access on mobile devices for $9.99 per month, and finally a "free" version supported by ads. Sirius XM charges for equipment as well as a monthly subscription fee, and also has advertising. Music Choice (currently the only cable music service) comes bundled with cable television packages – it is not priced separately – and also includes advertising. Traditional radio is supported by advertising alone.

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173 *See supra* Part II.B.1.

174 *See* Rob Reid, *What to Do when Attacked by Pirates*, WALL ST. J., June 1, 2012, http://online.wsj.com/news/articles/SB10001424052702303552104577438212250619458 ("Most Kindle, iPad and Nook owners seem to view piracy as a low-rent and time-consuming experience compared with the sanctioned alternatives.").

175 *See* Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, *in* 10 INNOVATION POLICY AND THE ECONOMY 19, 34-43 (Josh Lerner & Scott Stern eds., 2010).

176 A recent paper using European data on Internet use suggests that clicks on legal streaming websites have a small, positive correlation with clicks on download websites. Luis Aguiar & Bertin Martens, *Digital Music Consumption on the Internet: Evidence from Clickstream Data* 16-17 (Eur. Comm'n Joint Research Ctr., Working Paper No. 2013/04), *available at* http://ftp.jrc.es/EURdoc/JRC79605.pdf.

To analyze the music distribution market, one must be able to compare prices in an apples-to-apples way. One can think of the cost of advertising to consumers purely in terms of time: thirty seconds spent listening to an ad is simply thirty seconds wasted. But implying that ads result in exactly zero utility is too strong and simple of an assumption. Depending on the particular ad and the particular consumer exposed to it, ads could carry negative or positive utility.[177] So the price of an advertising-supported music distribution service could be understood in utility terms: sometimes ads have a positive price (corresponding to negative utility) and sometimes a negative price (corresponding to positive utility). Standard economic theory suggests that dollars, time spent, and delight or annoyance with advertising can all be converted into a measure of utility. The specific measure – "utils" – is imaginary, but the idea is that consumers behave in response to these implicit utility-metric prices and reveal their preferences through their behavior.

C. *Distortions, or the Picking-Winners Aspect of Copyright Law*

With the machinery of product characteristics, consumer preferences, and prices in place, it is now possible to describe more precisely the pathologies of copyright law's handling of music distribution. Copyright royalties enter the economic analysis as a significant cost to distributors. For instance, royalties comprise about 70% of the revenue that iTunes and Amazon collect per digital download. They represent a similar share of on-demand streaming services' revenue.[178] Pandora has been paying 50% to 60% of its revenue in performance royalties.[179] Sirius XM, if the Copyright Royalty Judges' decision holds, will move toward paying around 14% of its revenue to copyright owners by 2017.[180] Music Choice will move toward paying 15% to 16% of its revenue to copyright owners by 2017.[181] Traditional radio pays an estimated 4% to 5% of its revenue to copyright owners.[182] Royalty bills vary substantially across music distributors.[183]

[177] This refers to a long debate in economics about informational versus annoying advertising. *See* Kyle Bagwell, *The Economic Analysis of Advertising*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701, 1705 (Mark Armstrong & Robert Porter eds., 2007) (analyzing and summarizing various approaches and studies on consumer perceptions of advertising).

[178] Parsons, *supra* note 133.

[179] *See supra* notes 111-12 and accompanying text.

[180] This figure represents 11.0% to sound recording copyright owners under § 114(f)(1), 2.35% to ASCAP and BMI, and a rough guess at SESAC's share based on its smaller catalog.

[181] This figure represents 8.5% to sound recording copyright owners under § 114(f)(1), 2.5% each to ASCAP and BMI, and another guess at SESAC's share.

[182] This is 1.7% times two, plus a guess at SESAC's unknown rate.

[183] *See supra* Part I.

The basic argument of this Section is that unequal royalty costs will lead the different music services to charge consumers different prices than the services would have otherwise charged. Consumers, in turn, will change their behavior in response to those price changes. Without a sound justification for the unequal treatment of different distribution methods,[184] this amounts to a distortion of the market outcome that would otherwise occur. This claim will come with important caveats. Put simply, this is a partial equilibrium analysis, but general equilibrium forces could, in theory, counteract or even reverse the impact of unequal treatment.[185] But even the possibility of serious distortions from unequal treatment, without satisfying justifications, means that copyright policy should give strong consideration to equal treatment of music distributors.

For the sake of the analysis in this Section, I treat each recording as an intermediate product that can be distributed as a final product for consumption in many different forms. Moreover, I assume that each recording – in the model, the intermediate product being sold as an input to music distribution services – has the same character regardless of the distributor to which it is licensed. This assumption is required in order to compare royalty costs across music distributors.[186]

Royalty costs for music are not imposed in the context of perfectly competitive markets.[187] Take the supply side first, which is characterized by well-known oligopoly players along with many smaller firms. The three major record labels have about eighty-percent market share worldwide in the market for sound recordings. Moreover, each major label owns a large publishing house with a large market share in the market for musical works. There is also concentration of ownership on the demand side; for example, satellite radio and cable music service are monopolies, although not in the sense that they can charge monopoly prices. It is best to think of the various music distributors as operating in a monopolistically competitive market.[188] This concept goes along with the idea of imperfect substitutes.

[184] See *infra* Part II.D for consideration of possible justifications.

[185] Partial equilibrium analysis considers one market and one main effect of price changes at a time. General equilibrium analysis deals with the full set of indirect effects as a price change ripples through the economy. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC ANALYSIS (1995).

[186] A later Subection addresses criticisms of this assumption's characterization of the input being sold. *See infra* Part II.D.1.

[187] Economists define perfect competition as a market with an arbitrarily large number of buyers and sellers such that each one is a price taker. *See* MAS-COLELL ET AL., *supra* note 185.

[188] Economists define monopolistic competition as characterized by product differentiation, which allows some profits but not unlimited profit. *See, e.g.*, Michael Spence, *Product Selection, Fixed Costs, and Monopolistic Competition*, 43 REV. ECON. STUD. 217, 221 (1976).

Under imperfect competition, the relationship between consumer prices and supplier costs is not as simple as with perfect competition. An increase in distributors' marginal cost will not increase prices one for one, as it would in a perfectly competitive market. But it is unlikely that prices will not respond at all. Most likely, an increase in royalty costs will increase prices and reduce quantity sold to some extent; the magnitudes will depend on the elasticities of supply and demand.[189] Here, it also matters whether the royalties are imposed on a lump-sum basis; an ad valorem, percentage-of-revenue basis; a specific, per-play basis; or some combination of the three approaches. In a context of imperfect competition, prices and quantities will respond differently to different royalty schemes.[190] Thus, one would have to undertake a complicated calculation, based on dozens of estimated elasticities, to assess the exact effect of existing royalty costs on the market for music.

To speak in terms of an effect of existing royalty costs, one must specify a baseline. One possibility for a baseline is an industry with no royalty costs at all. It seems safe to assert that royalty costs ranging from five to seventy percent of revenue have an effect on the price and quantity of each music distribution service relative to a world with no royalties. If this effect on relative prices was unjustified – say it came from a completely arbitrary taxation system, in which the royalty rates were chosen by throwing darts – such an effect would be a distortion. In other words, it would imply inefficiency in allocation, compared to the optimal market outcome that would occur if music distributors faced no royalty obligations. Of course, copyright law allows copyright owners to impose royalty costs for a reason: to address the inefficiency of an under-supplied public good, namely, creative works.[191] So the real question would be whether the distortion from unequal royalty costs is better than the distortion that would result from too little music, perhaps accounting for quality, being produced.

Another baseline for comparison would be a counterfactual regime in which royalty rates were equal across music distribution services. This is a much more difficult comparison to make. For one thing, the change caused by unequal royalty rates would depend on the exact level of the hypothetical uniform royalty rate.[192] Moreover, the change in royalty rates for each

[189] *See* VARIAN, *supra* note 165.

[190] This draws on mathematical results from the public finance literature on the effects of different modes of taxation. Ad valorem (percent of revenue) versus specific taxes (tax per quantity) – if it is not perfect competition, then the choice matters. RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY 287-306 (1959) (comparing unit taxes and ad valorem taxes mathematically). Copyright royalties function like taxes on this abstract level.

[191] The incentive theory of copyright, or other theories of intellectual property that justify rewards to copyright owners, are controversial. But that debate is outside the scope of this Article. I will take as given that society wants some financial reward to flow to copyright owners.

[192] Put another way, the effect of moving from five percent of revenue for all distributors

distributor is likely to be less stark than the difference between zero and their current rate – making estimation of the effect more sensitive to the complicated considerations about elasticities outlined above. It may be fair to say that the relative prices between each type of service are different than they would be under a regime of equal royalty rates. But it would be hard to draw policy conclusions from this.[193]

In economic parlance, the existence of imperfect competition and copyright law's effort to solve the public goods problem[194] means that the music industry is a "second-best" context to begin with.[195] This leaves us unable to draw strong conclusions.[196] This is an important caveat to the strong intuition that distortions are bad. When distortions are piled upon other distortions, the path to efficiency is obscured. The theory of the second best means that any conclusions must be tentative or speculative. Copyright law's unequal treatment of music distributors probably causes changes in the prices that services would have charged. But it would be difficult to say whether those changes are desirable, let alone to what extent this is the case.

With that caveat in mind, it is still worth outlining the undesirable result of inefficiency in allocation in music distribution. Going back to the public good issue, the marginal cost of copyrighted works is zero, so copyright starts by creating a static cost.[197] Unequal royalty rates change what consumers do,

to today's system will differ from the effect of moving from seventy-five percent of revenue for all distributors.

[193] Identifying a potential distortion does not make the effects predictable. In general equilibrium, anything can happen. *See* Glynn S. Lunney, *Copyright's Price Discrimination Panacea*, 21 HARV. J.L. & TECH. 387, 404-39 (applying general equilibrium thinking to the copyright context).

[194] Public goods are defined as nonrival. *See* JEAN-JACQUES LAFFONT, FUNDAMENTALS OF PUBLIC ECONOMICS 33-59 (1988) ("A good is considered *public* if its use by one agent does not prevent other agents from using it; that is, individual consumption does not exhaust the good as is the case for a private good . . . ."). For a simple application to the music industry, see Peter DiCola, *The Economics of Recorded Music: From Free Market to Just Plain Free*, FUTURE MUSIC COALITION (July 16, 2000), http://futureofmusic.org/article/economics-recorded-music.

[195] The theory of the second best proposes that imperfections in one part of the economy render it incredibly difficult to predict how policymakers should respond, and essentially impossible to draw conclusions about social welfare. R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 17 (1956) ("To apply to only a small part of an economy welfare rules which would lead to a Paretian optimum if they were applied everywhere, may move the economy away from, not toward, a second best optimum position.").

[196] *Id.*; *see also* LAFFONT, *supra* note 194, at 167-90 (providing a mathematical introduction to the theory of the second best).

[197] *See* CASS & HYLTON, *supra* note 160, at 218 ("[T]he social cost of protecting property increases as the total cost of using it approaches the marginal cost (which is close to zero). It's not just that the next copy of *Despicable Me* or *The Da Vinci Code* costs nothing to the author or producer once the initial creative work has been produced; the perfect copy itself

possibly in a direction that moves away from what would be optimal. Consider an analogy to farm subsidies that keep corn cheap and create incentives to maximize food production; consumers eat differently than they would under a different agriculture policy, and there are society-level effects on the ecosystem and public health.[198] Altering consumer behavior also has distributional consequences – if the particular music distribution service that a consumer uses is disfavored, then that consumer may be worse off. Potential new entrants will be deterred from creating music distribution services in disfavored categories; for example, it is a major concern that the structure and uncertainty of webcasting royalties has hindered the development of more significant commercial firms in that medium. Venture capital, according to some, has stayed on the sidelines as a result of royalty costs.[199] Finally, a tailored system of unequal royalty rates comes with a great many costs.

All this is to say: in copyright law, the government tips the scales. The U.S. government has an industrial policy for the music industry.[200] It is a regulated industry like electricity, natural gas, or water. It would be difficult to quantify the economic loss from Congress's choice of unequal treatment of music distributors or even to say for certain that there is a net loss. But the question lingers: Is Congress arbitrarily picking winners in the music distribution industry? Is there some justification for tipping the scales? Is Congress counterbalancing economic forces that call for such intervention?

D. *Possible Justifications*

This Section considers the most common – as well as what I consider to be the strongest – justifications for unequal treatment of different types of music distribution services.

1. Price Discrimination

The previous Section assumes that recorded music is the same input regardless of the medium of distribution, and thus should have the same cost

now costs next to nothing.").

[198] *See, e.g.*, MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 121-24 (2008) (asserting that "[a]gricultural policies were rewritten to encourage farmers to plant crops like corn, soy, and wheat" and that these policies have contributed to "a destructive feedback loop" of overeating and undernutrition).

[199] *See* Glenn Peoples, *Business Matters: Where Venture Capital Money Is Flowing in Music*, BILLBOARDBIZ (Aug. 10, 2012, 8:40 PM), http://www.billboard.com/biz/articles/news/1084191/business-matters-where-venture-capital-money-is-flowing-in-music ("There's no doubt many investors have steered clear of this class of company while putting money into license-free startups."); Paul Resnikoff, *This Is a UMG Executive Defending the Huge Upfront Licensing Fee*, DIGITAL MUSIC NEWS (Feb. 14, 2012), http://www.digitalmusicnews.com/permalink/2012/120214huge.

[200] Industrial policy is associated with governments that do a degree of central planning, such as Japan. Among economists, industrial policy is something like a curse word.

for all distributors. But are the different kinds of distributors really buying the same thing from copyright owners? In a very general sense, they are. Every type of distribution – including downloads, streams, and radio in all its forms – allows consumers to listen to music. In that light, the input provided by copyright owners to distributors appears to be the same regardless of the medium of distribution. But as discussed above,[201] each distribution medium has its own product characteristics, resulting from differences in technologies and business models. Does making a different use of a recording by performing it over a different medium mean that, for example, a webcaster is purchasing a different input to production than an on-demand streaming service? If so, it would not be surprising that different inputs carry different costs. Here, the thing to remember is copyright law itself decides which uses count as infringing. And so this justification ends up being pathetically circular: copyright law can treat different uses as different because copyright law treats them differently. The better view is that a recording is a recording, no matter who distributes it.

A related question exists as to why the copyright system prevents the copyright owner from deciding whether to treat different kinds of uses as different (intermediate) products. Copyright owners generally enjoy the prerogative of engaging in price discrimination. Under this view, copyright owners should be able to charge different prices to different customers. Price discrimination can benefit both producers and consumers. But price discrimination in an intermediate market has other negative consequences because by definition the consumers of intermediate goods are also producers of consumer goods. Disadvantaging one distributor versus another distorts capital investment and the entry of new firms. In particular, this is where copyright law ends up implicitly tilting the playing field. Ultimately, copyright law's goal in allowing price discrimination is to send a larger surplus to copyright owners and to ensure more widespread access to copyrighted works. These goals would be better accomplished by increasing the level of an equalized royalty rate and by promoting more entry into the distribution categories that are currently disadvantaged.

2. Cost Differentials and Universal Service

The most frequent defense of copyright law's unequal treatment of music distributors is that royalty rates should reflect differences in distributors' costs. Some distribution media have "legacy" costs that continue to burden them. A prime example is that satellite radio continues to argue that it has yet to earn enough revenue to offset the costs it sunk into launching satellites, attracting on-air talent, securing regulatory approval, and so on. This argument is related to a common argument in telecommunications regulation, in which incumbent communications firms need various forms of favorable regulatory treatment in order to stay in business. This falls under the heading of maintaining "universal

[201] *See supra* Part II.B.1.

service" in a given medium; the Federal Communications Commission (FCC) is being asked to help a particular industry or firm survive.[202]

The weakness of these arguments stems from their backward-looking nature. While it is certainly true that Sirius and XM spent a great deal of money launching their services before they merged, those costs have now been sunk. Static efficiency requires us to ignore them. Dynamically, rewarding the construction of high-cost distribution media with lower royalty rates creates a moral hazard problem. The fact that a particular distribution medium, or a particular firm, cannot compete with newer firms because their costs are so high is not an argument for rescuing the high-cost medium. Rather, the high-cost medium needs to alter its business model to reduce costs or enhance revenue. Copyright law should not be designed around such a justification for unequal treatment unless there are particular reasons, outside the realm of efficiency, that call for the preservation of a medium.[203]

3. Different Contributions to Value

Another defense of unequal treatment looks at the revenue side – the sources of consumers' valuations of music services. What is Congress doing when it sets up a rate setting process? Ultimately it is engaged in an exercise of allocation. Congress is choosing the process for allocating the surplus from music distribution; that is, the value that consumers experience from listening to music over and above the costs of creating and distributing it. How much of the value of a radio broadcast of a recording comes from the radio station and how much comes from the owners of the sound recording and musical work copyrights? One could pose this question for every category of music distribution. If the answers differ, this could be a justification for unequal royalty rates. For example, one might try to justify the status quo by arguing that radio companies like Clear Channel contribute roughly 95% of the value of the radio-listening experience, whereas companies like Spotify contribute only 30% of the value of the on-demand streaming experience. If true, this would justify royalty rates of 5% for traditional radio and 70% for on-demand streaming.

Every distribution medium contributes value to the consumer's overall music-listening experience. But one can plausibly sustain this line of argument as a defense of the current royalty rates. Each medium has developed several positive product characteristics, from designing the user interface for webcasting or on-demand streaming to curating the music selections heard on FM radio. It seems odd for Congress, Copyright Royalty Judges, courts, and other government institutions to assess which distribution medium contributed

[202] *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 368-83 (3d ed. 2012) (introducing the concept of universal service in telecommunications regulation).

[203] To my knowledge, neither Congress nor anyone else has presented a preservationist argument for satellite radio or cable music services.

the highest percentage of value to its customers – and then enshrine that assessment in differential royalty rates. It would be better to have equal treatment of music distributors and allow consumers to express their preferences by purchasing some services and not others, and by using some services more often and using others less frequently.

4. Legitimacy of Bargained Rates

Another possible justification of unequal treatment is that the rates have been reached through a bargaining process among the relevant parties. Copyright policymaking is a hybrid of private and public mechanisms. Many of the policy tools of copyright law involve government institutions – sometimes multiple institutions at once – pushing the private parties to reach a licensing deal in order to come up with the right royalty rate. One could see the webcasting saga and also the Copyright Royalty Judges' determinations with respect to satellite radio and cable music services in this light. If all the relevant parties were at the bargaining table, then one might defend the existing royalty rates for different music services as being almost like market prices. The problem is that the relevant parties are never at the bargaining table, because consumer advocates, artists' representatives, and other stakeholders are generally left out.[204] Moreover, it is a mistake to consider each distribution medium in isolation, as though different music services are not imperfect substitutes for each other.

5. Cannibalization and Promotion

As explained above,[205] cannibalization can refer to either sales of recordings or other revenue sources that are ancillary to recordings. The argument is that a particular distribution medium might be especially harmful to record sales or other revenue sources, and should therefore pay a higher royalty rate to compensate copyright owners for the harm. This conception of digital music services – especially webcasting and on-demand streaming – strongly shaped the provisions of § 114 reviewed above.[206] For example, the performance complement seeks to ensure that webcasting will not have the same option value of repeated listens that copy ownership does. This protects the market for selling copies. To take another example, the ban on preannouncing songs and the mandate for supporting webcast-pirating technologies that prevent capturing a webcast in a copy are both attempts to protect the sales of copies.

[204] *See* JESSICA LITMAN, DIGITAL COPYRIGHT 126 (2001) ("The 'serious' negotiations . . . involve[] the motion picture industry, the music recording industry, the book publishers and the software publishing industry on behalf of the 'content owners,' and the online and Internet service provider industry, the telephone companies, the television and radio broadcasters, computer and consumer electronics manufacturers, and libraries representing the 'user interests.'").

[205] *See supra* Part II.B.3.

[206] *See supra* Part I.D-E.

The anticannibalization justification goes along with the promotion justification. If a distribution medium ends up augmenting sales and ancillary revenue, then firms in that medium deserve to pay lower royalty rates. This has long been one explanation for the absence of a requirement for traditional radio to pay sound recording copyright owners.

The logical problem with these justifications is that they presuppose an entitlement on the part of copyright owners to a specific amount of monetary rewards. But copyright incentives are not so finely calibrated. And any deficiencies in compensation could occur through equalized royalty rates of a high enough level, which would have the benefit of avoiding the many economic distortions discussed above. Moreover, the arguments from cannibalization or promotion have a strange feature; they hark back to an imaginary time during which purchasing copies of recordings was the only way to experience them. But there have always been multiple ways to experience the underlying musical works, and radio has long broadcasted sound recordings. So there is no way to figure out how many recordings would be sold in a vacuum. Thus, the baseline for these arguments cannot be measured, and the appropriate degree of unequal treatment cannot be calibrated. This elucidates another reason why the music industry's hodgepodge of wildly different royalty rates exists: the differences in rates have no empirical basis.

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To summarize, copyright law's unequal treatment of different music distribution methods distorts the music marketplace. This limits innovation and harms potential entrants to the music distribution industry. It also skews consumers' choices. Rather than a black-and-white difference between, say, on-demand streaming and FM radio, there is instead just distance on a multidimensional continuum of valuable product characteristics. In plainer language, to consumers, FM radio is good for some uses and some contexts while on-demand streaming is good for others. Economic analysis suggests there is a need for an equality principle in copyright law that ends discrimination against new media and brings all the different forms of radio under the same regulatory umbrella.

III. Equality as a First Amendment Requirement

Unequal treatment of music distributors is not just an economic problem; it is also a First Amendment problem. Music distributors are communications media, conduits for constitutionally protected speech and musical expression. Copyright law disfavors certain types of music distributors both procedurally and substantively by instituting different processes for determining royalty rates and by imposing vastly different royalty rates. The burdens have reached the point of silencing many speakers who cannot overcome the barriers to entry that copyright law has erected.

As Part II demonstrates, copyright law lacks justification to burden speech in this way. Most of the reasons trotted out to defend the status quo are illogical, and none have sufficient evidence to support discrimination. The strong form of my argument is that provisions like § 114, which establish unequal treatment, should be declared facially unconstitutional for violating the First Amendment. The weak form, more nuanced but still powerful and meaningful, is that Congress must at least justify copyright law's regulatory function under First Amendment scrutiny. Copyright's regime for determining and assessing the royalties that music distribution platforms must pay has little rhyme, reason, or empirical basis. Viewing music distribution as part of our nation's sphere of public discourse and subjecting the regulations on music distributors to First Amendment scrutiny might be a fruitful avenue to push Congress toward a more economically and empirically justified copyright policy.[207]

This Part begins with First Amendment case law with a focus on the media regulation cases. I identify the principles from earlier cases that should be applied to the music distribution context. Next, I bring in the existing scholarship and case law on the relationship between copyright law and the First Amendment, which judges and scholars have increasingly recognized in recent decades. Finally, I discuss the many benefits of bringing the First Amendment to the regulatory aspect of music copyright.

A. *First Amendment Case Law*

Music is protected speech.[208] Some music contains lyrics with overtly political content, such as the work of U2[209] or Public Enemy.[210] Some songs

[207] One scholar has argued that the performance complement, 17 U.S.C. § 114(d)(2)(B), (j)(13) (2012), violates the First Amendment. *See* Amanda Reid, *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233, 274-78 (2012) ("This mechanism not only burdens more speech than necessary to prevent unrestricted exploitation of digital music, but there is no evidence that the Sound Recording Performance Complement in fact remedies the problem."). A student note makes a constitutional argument for regulatory parity under the Intellectual Property Clause rather than the First Amendment. *See* Stockment, *supra* note 12, at 2166-70 ("Disfavoring one technology over another can hardly be said to 'promote the progress of science and useful arts.' Copyright policy should not discriminate on the basis of technology by imposing higher royalties for digital radio delivered by the internet than when the same music is delivered by a satellite transmission." (quoting U.S. CONST. art. I, § 8, cl. 8)).

[208] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression. . . . Music, as a form of expression and communication, is protected under the First Amendment.").

[209] *See* U2, *Bullet the Blue Sky*, *on* THE JOSHUA TREE (Island Records 1987) (criticizing the U.S. military involvement in the civil war in El Salvador during the 1980s).

[210] *See* PUBLIC ENEMY, *Fight the Power*, *on* FEAR OF A BLACK PLANET (Def Jam Recordings 1989) (advocating pride and social awareness among African-Americans in the fight for civil rights).

have implicitly political content because of separate statements made by the songwriters or recording artists. For example, the Dixie Chicks criticized President George W. Bush in 2003, an incident that led some radio stations to withhold the group's music from rotation, including those songs that were not political.[211] But even musical compositions without lyrics count as speech for First Amendment purposes, although scholars are more likely to call it protected "expression." Even though its meaning might not be obvious in every context, wordless music in classical, jazz, or other genres can make enormous social and political statements in certain contexts.[212]

Music distribution services are speakers that enjoy the First Amendment freedom of the press.[213] Like cable television providers, which have been held to be speakers with constitutional rights,[214] music distribution services select and distribute content created by third parties. The intermediaries' claim to First Amendment protection is not derivative of the free speech rights of the composers, songwriters, and recording artists whose works are broadcasted or streamed. Rather, music distribution services should be viewed as akin to newspaper editors with their own First Amendment standing. Because music is speech and carries social and political messages, the selectors and distributors of this speech are also speakers. Thus, Congress should take their First Amendment interests seriously and must justify any burdens on those interests.[215]

1. Media Tax Cases

A line of First Amendment cases concerns differential tax treatment of media companies. The leading case concerned a special tax provision in the state of Minnesota, which exempted newspapers from a sales tax but instead

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[211] *See, e.g.*, Phyllis Stark, *Programmers Say Dixie Chicks Still Not Welcome on Their Airwaves*, RADIO-INFO (Sept. 20, 2011), http://www.freerepublic.com/focus/f-chat/2783424/posts.

[212] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." (citations omitted)).

[213] *Cf.* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463-65 (2012) (arguing that the First Amendment protects the press as a "communications technology").

[214] Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

[215] Speech-related regulation of the Internet does not receive lowered scrutiny, as broadcast regulation does. Reno v. ACLU, 521 U.S. 844, 870 (1997) (pointing out that the Internet, unlike the broadcast spectrum, provides relatively unlimited capacity for communication and thus refusing to qualify the level of First Amendment scrutiny).

levied a use tax on the cost of paper and ink, with an exemption for the first $100,000.[216] In one year, only eleven newspapers paid any tax at all; only the five largest newspapers paid $8000 or more.[217] The Court applied strict scrutiny, requiring a compelling interest to justify differential treatment for newspapers and a demonstration that the tax scheme was the least restrictive means to achieve that interest.[218] The State's justification for the tax scheme was the collection of revenue.[219] Minnesota argued that the ink-and-paper tax was a substitute for the sales tax, one that would prove less burdensome because the tax applied only to portion of newspapers' costs rather than their total sales.[220] The Court rejected that argument, declining to evaluate the State's economic claims.[221]

Ultimately, the Court in *Minneapolis Star* held that the tax scheme violated the First Amendment for two key reasons. First, the government may not place special financial burdens – or bestow special benefits whose revocation could constitute a looming threat that amounts to censorship – on media companies.[222] Second, "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers."[223] This second rationale for overturning the tax scheme is most relevant to evaluating copyright's unequal treatment of music distribution services.

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[216] Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 578 (1983) (reversing the Minnesota Supreme Court which had upheld the tax).

[217] *Id.* at 591 n.15 (providing figures for 1974). The figures for 1975 do not differ much. *Id.* As the largest newspaper in the state, the *Minneapolis Star and Tribune* owed over $600,000 under the ink-and-paper tax in both 1974 and 1975. *Id.*

[218] "Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585; *see also id*. at 585 n.7 ("Under a long line of precedents, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly.").

[219] *Id.* at 586.

[220] *Id.* at 587-88 ("The State asserts that this scheme actually favors the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price.").

[221] The Court expressed reluctance to engage with the complexities of the analysis of tax incidence; that is, with trying to understand where the burdens of a tax ultimately fell among consumers and firms. *See id.* at 590 n.14 ("Taking the chance that these calculations or others like them are erroneous is a risk that the First Amendment forbids.").

[222] The Court stated that "the very selection of the press for special treatment threatens the press not only with the current differential treatment, but also with the possibility of subsequent differentially more burdensome treatment." *Id.* at 588.

[223] *Id.* at 591.

The next case in this line is *Arkansas Writers' Project, Inc. v. Ragland*.[224] The plaintiff in that case published the *Arkansas Times*, a general-interest monthly magazine. Arkansas instituted a sales tax that applied to general interest magazines but created exemptions for: (1) newspapers and (2) religious, professional, trade, and sports journals.[225] The Arkansas Commissioner of Revenue asserted that only three magazines, including the *Arkansas Times*, paid the tax.[226] The Court treated the tax scheme as content based and applied strict scrutiny.[227] The State's justifications were raising revenue and encouraging communication by subsidizing the exempted categories of publications. The Court rejected both justifications because there were other, less discriminatory ways to raise revenue. Moreover, the exemptions were content based, not based on financial need. *Arkansas Writers' Project* is relevant to the unequal treatment of music distribution services because it deals with differential treatment among different organizations, albeit within one type of media (magazines).

A later case dealt with differential treatment of different media. In *Leathers v. Medlock*,[228] the Court held that applying a sales tax to cable television services while exempting print media did not violate the First Amendment. The Court did not view the tax as content based.[229] In contrast to the taxes in *Minneapolis Star* and *Arkansas Writers' Project*, this tax applied to a large number of firms that provided cable television service.[230] The Court also

[224] Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that Arkansas's sales tax on general-interest magazines but not on newspapers and other journals violated the First Amendment).

[225] *Id.* at 224 ("Numerous items are exempt from the state sales tax, however. These include '[g]ross receipts or gross proceeds derived from the sale of newspapers,' . . . and 'religious, professional, trade and sports journals and/or publications printed and published within this State . . . when sold through regular subscriptions.'" (second elipsis in original) (citation omitted)). After a dispute about the breadth of the second exemption, the Arkansas Supreme Court eventually held that it did not apply to general interest magazines. *Id.* at 226 (reversing the chancery court's application of the exemption); *see also* Ragland v. Ark. Writers' Project, Inc., 697 S.W.2d 94, 95 (Ark. 1985) ("We think instead that the lawmakers had a single purpose in mind. That was to exempt the enumerated periodicals if printed and published in Arkansas and sold by subscription . . . . Under that reading of the statute the *Times* is not exempt, for it is admittedly not a religious, professional, trade, or sports periodical."), *rev'd*, 481 U.S. 221 (1987).

[226] *Ark. Writers' Project, Inc.*, 481 U.S. at 229 n.4.

[227] "Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 231.

[228] Leathers v. Medlock, 499 U.S. 439 (1991).

[229] *Id.* at 449.

[230] *Id.* at 448-49 ("[T]he fact remains that the tax affected approximately 100 suppliers of cable television services. This is not a tax structure that resembles a penalty for particular

observed in its majority opinion that there was no evidence of a purpose to interfere with cable, stating, "[t]he tax does not single out the press."[231] But this is confusing because *Minneapolis Star* does not depend on Congress having an illicit purpose to suppress particular speech.[232]

Justice Marshall dissented in *Leathers v. Medlock*, with Justice Blackmun joining his opinion. It is Justice Marshall's dissent that properly extends *Minneapolis Star* and *Arkansas Writers' Project* into a First Amendment principle forbidding differential treatment of different media.[233] Justice Marshall identified "a nondiscrimination principle for like-situated members of the press" from this line of First Amendment case law.[234] He argued that even the majority's reading of *Minneapolis Star* "presupposes some baseline establishing that medium's entitlement to equality of treatment with other media," but "never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too 'small' a number of media actors."[235] One problem with this numerical view, as Justice Marshall points out, is that it would still allow a state legislature to protect an established industry, like the newspaper industry, from competition offered by cable companies.

Justice Marshall's dissent explains how differential treatment of different media ultimately harms the public:

> Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness. Clearly, this is true of disproportionate taxation of cable television. Under the First Amendment, government simply has no

speakers or particular ideas.").

[231] *Id.* at 447.

[232] Other Supreme Court opinions have addressed this aspect of *Minneapolis Star*, observing that the decision did not rely on congressional intent. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) ("The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983))). What is truly puzzling about the mischaracterization of *Minneapolis Star* in *Leathers* is that Justice O'Connor wrote the majority opinion in both cases.

[233] At least some contemporaneous commentary saw *Leathers* as a shift in the Court's jurisprudence. *See* Robert M. Howie, Note, Leathers v. Medlock*: The Supreme Court Changes Course on Taxing the Press*, 49 WASH. & LEE L. REV. 1053, 1053 (1992) ("*Leathers* drastically changed the landscape of the First Amendment's Freedom of the Press Clause in the area of taxation of the media.").

[234] *Leathers*, 499 U.S. at 454 (Marshall, J., dissenting).

[235] *Id.* at 461.

> business interfering with the process by which citizens' preferences for information formats evolve.[236]

Justice Marshall had a broad and factually grounded view of the First Amendment in a world of expanding media. He saw how the Arkansas legislature was tilting the playing field against new entrants and potentially changing the informational and cultural environment. Substitute the word "royalty" for "tax," and the First Amendment problems with copyright law's treatment of webcasting and on-demand streaming become evident.

Congress has singled out particular categories of music distribution services for different rate setting processes that produce vastly different royalty rates. Congress thus implicitly discriminates against whatever messages that webcasters and on-demand streaming services – and the would-be services that have been deterred from entry by the whole scheme – are conveying. These messages are likely to reflect different choices and values than the choices of other speakers in more established media. All types of media convey different messages in different ways, just as all speakers convey different messages in different ways. Justice Marshall's dissent in *Leathers* explains perfectly why copyright law's royalty differentials violate the First Amendment.

2. Required Programming Cases

An additional line of cases concerns another significant area of policy toward media companies besides taxation: FCC's communications regulations. A core issue in the intersection of First Amendment jurisprudence and communications regulation has been whether broadcast outlets in television and radio can be more heavily regulated than newspapers. Congress and FCC have justified statutes and regulations that apply to broadcast content based on the scarcity of available broadcast spectrum. For example, in *Red Lion Broadcasting Co. v. FCC*, the Supreme Court considered the constitutionality of the fairness doctrine, which required equal airtime for opposing political viewpoints. The Court upheld the regulation based on the scarcity rationale.[237] Yet in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down an analogous Florida state statute that applied an equal-space rule to newspapers.[238] With these contrasting results, the Court sanctioned discrimination among media when it came to content regulation. But the Court

[236] *Id.* at 465.

[237] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

[238] Miami Herald Publ'g Co. v. Torrillo, 418 U.S. 241, 258 (1974) ("Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.").

did so mainly because broadcast media are subject to government licensing, which severely limits entry.[239]

The differential treatment of broadcast media has come under pressure over time.[240] Many legal scholars and judicial opinions have questioned the continuing viability of *Red Lion*'s holding (this uncertainty was part of FCC's rationale for abandoning the fairness doctrine back in the 1980s).[241] This tension came to the fore when the Court considered the constitutionality of the "must-carry" provisions of the Communications Act, which require cable television providers to carry local television stations.[242] A five-to-four majority in *Turner I* held that only "heightened" (intermediate) scrutiny applied to the statute because, in the majority's view, the statute was not content based.[243] Justice O'Connor dissented, arguing that strict scrutiny should apply because Congress's stated "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."[244] After remand, a similarly divided court upheld the statute.[245] According to the majority in *Turner II*, the government was able to demonstrate that "substantial evidence"[246] supported its policy judgment that "the must-carry provisions were designed to address a real harm" and that "those provisions will alleviate it in a material way."[247]

To be clear, one can oppose differential burdens while still supporting regulations that support a beneficial media environment for culture and public discourse.[248] I agree with recent scholarship that defends this aspect of *Red*

[239] *See Red Lion*, 395 U.S. at 394 (1999) ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.").

[240] *See* Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1105 (1999) (expressing doubt that "public debate will be enriched more by the expression of the broadcast outlet as by an excluded cable channel").

[241] *See generally* BENJAMIN ET AL., *supra* note 202, at 191 ("Although the Supreme Court has not abandoned *Red Lion*, the FCC did abandon the fairness doctrine. The path to that abandonment was a complicated one, in the course of which the FCC rejected most of the justifications asserted in the *Red Lion* opinion.").

[242] *Turner I*, 512 U.S. 622, 630-31 (1994) (describing the must-carry provisions).

[243] *Id.* at 640-46 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (citation omitted)).

[244] *Id.* at 677 (O'Connor, J., dissenting).

[245] Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 185 (1997) ("[T]he must-carry provisions are consistent with the First Amendment . . . .").

[246] *Id.* at 196.

[247] *Id.* at 195-96.

[248] Leathers v. Medlock, 499 U.S. 439, 464 (1991) (Marshall, J., dissenting) ("[T]he government does not invariably violate the Free Speech Clause when it selectively

Lion.[249] But I view copyright law's discrimination in rate setting processes and royalty rates as meaningfully different from the sort of media policies that such scholarship advocates. The suspicion with which Justice Marshall in *Leathers* and Justice O'Connor in *Turner I* and *Turner II* viewed discriminatory treatment across different types of media represents the appropriate philosophy of freedom of the press. The government should not try to steer citizens toward old media and away from new media without a compelling justification.

B. *The First Amendment's Role in Copyright Law*

None of the three lines of First Amendment cases discussed in the previous Section address copyright law directly. The principle of nondiscrimination among different media that these cases elucidate, however, should be extended and applied to copyright's unequal treatment of distribution companies. This Section provides background on the relationship between copyright law and the First Amendment and situate this Article's proposed ban on differential treatment of music distribution services within that relationship.

Copyright law and the First Amendment have a complex relationship because they both conflict with and complement each other. Copyright law constrains what people can say and in what context. Sadly, this is the mode in which most people experience copyright law: as a hurdle or brick wall when they encounter text, images, or music that they must obtain permission to use.[250] But copyright can also operate in tandem with the First Amendment to promote freedom of speech, working as "the engine of free expression."[251] As the Supreme Court has stated it, "[t]he Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression."[252] In addition, to ease any sense of conflict, the Court has

subsidizes one group of speakers according to content-neutral criteria. This power, when exercised with appropriate restraint, inheres in government's legitimate authority to tap the energy of expressive activity to promote the public welfare."). Thus, Justice Marshall distinguished between limited subsidies for expression and "'invidious discrimination'" through differential taxation of different media. *Id.* (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-20, at 963 (2d ed. 1988)).

249 *See, e.g.*, Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 283 (2009) ("[F]ree speech doctrine does and should explicitly distinguish between laws meant to promote favored content (particularly the content necessary for an informed citizenry) and those meant to suppress disfavored content.").

250 *See* NETANEL, *supra* note 29, at 13-29 (providing several disturbing examples of judicial decisions in copyright law that have restricted speech).

251 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

252 Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (upholding a twenty-year extension of existing and future copyright terms against, among other challenges, a First Amendment challenge).

identified "built-in First Amendment accommodations" in the exceptions and limitations to copyright law.[253] Prime examples include the limitation of copyright protection to specific expression, rather than abstract ideas;[254] specific exceptions to accommodate libraries;[255] and, perhaps most importantly, the fair use doctrine.[256]

The exceptions to copyright law do vindicate free speech values to some extent. A finding of fair use can allow authors, for example, to use characters and plot elements from an earlier novel in order to rework, comment on, or criticize them.[257] This can alleviate the pressure that copyright law puts on creators' freedom of speech. But the Court was overly sanguine to conclude that fair use and other copyright exceptions successfully avert any conflict between copyright law and the First Amendment.[258] The availability of a legal defense on the books does not mean the defense creates sufficient space for commentary in practice.[259] Experience with fair use in the music industry, for instance, shows that it has no practical relevance to musicians in the commercial sector when deciding whether to sample an existing recording.[260] This suggests that there is a residual tension between copyright and free speech values.

The tension between copyright and free speech lies in the structure of copyright law. Structure can be a vague concept. I use it here to refer to the ways in which copyright promotes the organization of record labels, publishers, studios, and other aggregators of copyrights; the concentration of market share between these large firms and independent creators; and the vertical relationship between the large copyright firms and distributors. Copyright protection is a key reason that firms can organize and finance large, ambitious projects like special-effects-laden feature films or meticulously

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[253] *Id.* In the same opinion, the Court added:

> The First Amendment securely protects the freedom to make – or decline to make – one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free-speech safeguards are generally adequate to address them.

Id. at 221.

[254] *See* 17 U.S.C. § 102(b) (2012).

[255] *See id.* § 108.

[256] *See id.* § 107.

[257] Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001) (holding that Alice Randall's *The Wind Done Gone* made fair use of Margaret Mitchell's *Gone with the Wind*).

[258] *Cf.* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 116-22 (2009) (providing a point-by-point critique of the Court's discussion of the First Amendment in *Eldred*).

[259] *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1093-96 (2007) (discussing the uncertainty that "potential fair users" face).

[260] MCLEOD & DICOLA, *supra* note 32, at 238-40 (recounting quotes from several music attorneys who describe fair use as irrelevant to their practice).

crafted albums.[261] But this positive effect of copyright brings several problems, such as increased concentration of media ownership and changes in what kind of content gets produced.[262] Copyright's benefits create a need for policies that avoid both excessive concentration and restraints on innovation in the distribution of copyrighted works. Barriers to entry of this kind threaten the notion of a fair distribution of rewards.[263] My argument here is that copyright has not only set up barriers to entry for independent creators, but also for independent distributors.

The time has come to extend our thinking about the conflict between copyright law and the First Amendment to the way that copyright regulates distributors. As discussed above,[264] the Copyright Code now contains extensive provisions that act as communications regulations. Scholars of the intersection of intellectual property and the First Amendment have focused their attention on the constraints that copyright, patent, and trademark place upon individual creators.[265] Concern has arisen about whether Internet intermediaries are appropriate stand-ins to assert individual free speech rights.[266] This line of scholarship has brought valuable insights to copyright thinking and has provided a way to consider looming policy problems in a new way. This Article takes the next step.

Federal courts should review copyright's regulatory provisions that subject distributors to differential treatment under the same standard of scrutiny that other media regulations receive. In particular, courts should adapt the lines of First Amendment case law covered in the previous Section to copyright law.[267] Justice Marshall explained that "interfering with the process by which citizens' preferences for information formats evolve" violated the Constitution.[268] No

[261] NETANEL, *supra* note 29, at 88 (arguing that without the protection that copyright provides, fewer "sustained works of authorship" would be created).

[262] *Id.* at 119-20, 128-31 (discussing copyright firms' concentration of ownership and concomitant market power).

[263] *Id.* at 144 ("Copyright industries controlling vast inventories of copyrighted works enjoy a disproportionate share of copyright's benefits. And most of copyright's free speech burdens, most of the time, fall on individuals and independent speakers . . . .").

[264] *See supra* notes 9-11, 25-28, and accompanying text.

[265] *See* LANGE & POWELL, *supra* note 258, at 168-91 (explaining their proposal for how intellectual property law could coexist with the First Amendment).

[266] *See* Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 996-1000 (2008) (arguing, with reference to a 2007 incident involving LiveJournal, that Internet intermediaries are often ineffective protectors of free speech due to their profit motive and the vulnerability of their users).

[267] *Cf.* NETANEL, *supra* note 29, at 119 (describing various "speech easements" such as required space within newspapers for the publication of critical responses to editorials and arguing that similar such easements advance the basic First Amendment goal of "broadly distributing speech capacity").

[268] Leathers v. Medlock, 499 U.S. 439, 465 (1991) (Marshall, J., dissenting).

area of law is more engaged in that type of interference than copyright law.[269] For almost two decades, Congress has slowed the growth of Internet music and threatens to do the same for video. It is time for an equality principle to govern how copyright treats the distributors of copyrighted works across different media.

C. *What Equality Principle Would Satisfy the First Amendment?*

Applying the First Amendment to copyright law's regulations of distributors starts with two premises mentioned above: first, music is protected speech; and second, music distribution services, like cable television providers, enjoy freedom of speech and freedom of the press.[270] The next step is to determine the appropriate standard of review for statutes or regulations that treat different communications media unequally. Justice Marshall's opinion in *Leathers* and Justice O'Connor's opinion in *Turner I* both suggest that strict scrutiny should apply, as if such statutes or regulations were content based. This makes sense considering the power of communications media to shape meaning through the selection of content and the design of the user interface. But these are both dissenting opinions.

To take a more conservative approach, I proceed with the premise that heightened or intermediate scrutiny would apply rather than strict scrutiny. The majority of the Court in *Turner I*, for example, applied heightened scrutiny to the must-carry provisions.[271] It defined the standard by stating that "a content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[272] The Court also noted that this standard does not require the government to choose the "least speech-restrictive means," but only "that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[273]

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[269] *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 177-217 (2d ed. 2002) (describing numerous instances in which copyright owners use their ownership rights as leverage to control the stream of content in the market). *See generally* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY (2d ed. 2007) (providing multiple examples in which copyright owners enforced their rights too zealously and failed to respect defenses to infringement like fair use).

[270] *See supra* notes 208-15 and accompanying text (explaining that music is protected speech and comparing music distributors to newspaper editors, selecting and curating playlists as a means of expression).

[271] *Turner I*, 512 U.S. 622, 641 (1994) ("Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.").

[272] *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[273] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

Applying intermediate scrutiny in this context would admittedly be a major step forward in applying the First Amendment to modern copyright law. Moreover, this step is not foreclosed by the Supreme Court's recent copyright cases and may even be supported by them. It is true that First Amendment arguments did not stop the Court from upholding copyright term extension or copyright restoration to foreign works; *Eldred v. Ashcroft* applied rational basis review under the Copyright Clause[274] and, more recently, *Golan v. Holder* did the same.[275] The dissenting Justices[276] and scholars[277] have criticized the Court's level of deference to Congress. But these holdings did not exhaust the Court's discussion of the First Amendment's relationship to copyright. As Neil Netanel has recently argued, "*Eldred* and, especially, *Golan* make clear that courts must construe and apply the idea/expression dichotomy and fair use defense in line with First Amendment strictures."[278] Under this interpretation, courts must actively protect the accommodations contained within copyright law.[279] One can explain the results in these two cases by saying that the idea/expression dichotomy and fair use were not threatened by those particular statutes.[280] Yet other copyright statutes might indeed threaten the ability of these doctrines to be "safety valves" for free speech.[281]

[274] Eldred v. Ashcroft, 537 U.S. 186, 204 (2003) (asking whether the Copyright Term Extension Act of 1998, Pub. L. No. 108-419, 118 Stat. 2361 (1998) (codified as amended at 17 U.S.C. § 112), was a "rational exercise of the legislative authority conferred by the Copyright Clause").

[275] Golan v. Holder, 132 S. Ct. 873, 889-91 (2012). "Given the 'speech-protective purposes and safeguards' embraced by copyright law, we concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case. We reach the same conclusion here." *Id.* at 890 (citation and footnote omitted) (quoting *Eldred*, 537 U.S. at 219).

[276] *Id.* at 907-08 (Breyer, J., dissenting) (agreeing that the restoration statute was not content based but arguing that "such considerations do not exhaust potential First Amendment problems" (citing *Turner I*, 512 U.S. 622 (1994))).

[277] *See, e.g.*, LANGE & POWELL, *supra* note 258, at 116-22 (describing Justice Ginsburg's failure to apply heightened review as "nothing less than bizarre"); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 548 (2004) (describing Justice Ginsburg's argument as "incomplete" insofar as it fails to advance a theory to distinguish copyright law from libel law or other speech regulation); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 934-35 (2004) (arguing that the *Eldred* Court's deference to Congress may lead to international isolation due to Congress's support of stronger copyright protection in disharmony with the larger body of international law).

[278] Neil Weinstock Netanel, *First Amendment Constraints on Copyright After* Golan v. Holder, 60 UCLA L. REV. 1082, 1105 (2013).

[279] *See supra* notes 253-56 and accompanying text.

[280] *Eldred*, 537 U.S. at 221 ("But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.").

[281] NETANEL, *supra* note 29, at 181 (asserting that copyright's built-in safeguards lure

Regulatory disparities among distributors prevent the fair use doctrine from achieving its purpose. Music distributors, as this Article has argued, are part of the press. Yet the regulatory disparities limit the ability of certain music distributors (but not others) to select the creative works they wish to disseminate. This calls for judicial scrutiny under the First Amendment. Of course, intermediate scrutiny does not mean that all regulatory disparities in the copyright statute would be invalidated.[282] Congress could argue that it has a substantial interest in treating different types of music distribution services unequally and would likely offer the five justifications considered previously.[283] All of those justifications, however, are either logically or empirically wanting. If one or more of the justifications for differential treatment received sufficient empirical support, then Congress and the Copyright Royalty Board could deviate from equality of treatment. The evidentiary requirement I have in mind is similar to what the Court required to uphold the must-carry rules in *Turner II*.[284] Without empirical evidence, equal treatment for music distributors would become the baseline.[285]

IV. IMPLEMENTING AN EQUALITY PRINCIPLE FOR COPYRIGHT

Music distribution services of different types face different rate setting processes, different royalty rates, and even different programming limitations. An equality principle takes shape based on the economic analysis of Part II and the First Amendment analysis of Part III. This Part begins by briefly stating the central reforms necessary to satisfy the equality principle in music-industry regulation. Next, this Part compares my proposal to recent legislative proposals. Finally, this Part discusses several open questions that remain about specifics in the equality principle's implementation, including the problem of transition from the existing regime of differential treatment.

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courts into the mistake of failing to "evaluate whether today's bloated copyright comports with First Amendment constraints").

[282] *See* Netanel, *supra* note 278, at 1118 ("Granted, simply because government regulation of communication technology gives rise to First Amendment scrutiny does not mean that it is always stricken down, particularly when the government regulation is content neutral.").

[283] *See supra* Part II.D.

[284] *Turner II*, 520 U.S. 180, 189-224 (1997) (reviewing congressional findings at length).

[285] The First Amendment scholar Ed Baker considered this idea briefly, on his way to a different proposal. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 919-22 (2002). He expressed concern that intermediate scrutiny would be a giveaway to large distribution companies, because it would provide an unwarranted second bite at the apple for players that lost out in the legislative process. *Id.* Yet the facts outlined in Part I, *supra*, show that differential treatment of music distribution services has disadvantaged small entrant distributors more than large incumbent distributors.

A. *Core Components of a Proposal to Satisfy the Equality Principle*

The three major components are as follows. First, copyright should contain a general performance right in sound recordings to require AM and FM radio to pay royalties to sound recording copyright owners.[286] This legislative change is necessary to achieve parity with all the other music distribution services.[287] Second, Congress should direct the Copyright Royalty Board to determine the sound recording royalty rates for different types of radio – AM, FM, satellite, cable, webcasting, and on-demand streaming – under the same process and based on the same standard.[288] Congress mandating equality of the process would not necessarily produce equal royalty rates, but it would ensure that any deviations from equality are justified. Finally, differences in substantive royalty rates resulting from this process should have a basis in substantial evidence that could survive heightened First Amendment scrutiny.[289] This reform relies on the federal courts for implementation. Its goal is to provide strong incentives to both Congress and the Copyright Royalty Board to justify any deviations from equal treatment with sound theories and empirical evidence.

B. *Comparison to Recent Legislative Proposals*

This Article's Introduction briefly discusses two draft bills, the IRFA and the Interim FIRST Act, which members of Congress proposed in 2012 to deal with rate setting and radio royalties.[290] The IRFA has been the most prominent, partly because it is more detailed, partly because it has sponsors in the Senate[291] and the House,[292] and partly as a result of Pandora's public advocacy

[286] The reform legislation would strike the existing § 106(6), 17 U.S.C. § 106(6) (2012), and add the words "sound recordings" and a comma after the word "pantomimes" in § 106(4). It would also eliminate existing § 114(a), which refers to sound recordings' lack of a general performance right. Finally, various conforming amendments would be necessary to change any references to § 106(6) to reference instead § 106(4).

[287] There has been a longstanding controversy over instituting a public performance right applicable to traditional radio. *See, e.g.*, Lauren E. Kilgore, Note, *Guerilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549 (2010) (chronicling the history of the Performance Rights Act, H.R. 848, 111th Cong. (2009), and arguing that Congress should adopt the legislation subject to the author's proposed amendments).

[288] This would require rewriting § 114 substantially.

[289] Recall that heightened, or intermediate, scrutiny was applied in both *Turner I*, 512 U.S. 622, 662 (1994), and *Turner II*, 520 U.S. 180, 189 (1997).

[290] *See* Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. § 3(a)(2) (2012); Interim Fairness in Radio Starting Today Act of 2012, 112th Cong. § 3 (Discussion Draft Aug. 7, 2012), *available at* http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf; *see also supra* notes 30-31 and accompanying text.

[291] Internet Radio Fairness Act of 2012, S. 3609, 112th Cong. (listing Senator Ron Wyden as the bill's sponsor).

[292] H.R. 6480 (listing Representative Jason Chaffetz as the bill's sponsor).

for the bill.[293] This Section discusses the key provisions of both bills and relates them to the equality principle discussed above.

The IRFA's central provision would eliminate § 114(f)(2)'s existing rate setting process for noninteractive webcasters and merge it into § 114(f)(1)'s rate setting process for preexisting satellite and cable music services.[294] This would move webcasting from the willing buyer/willing seller standard for determining royalty rates to the multifactor standard of § 801(b).[295] The evident goal is to drastically reduce royalty rates for webcasters, given the current discrepancy between what webcasters currently pay under either Webcasting III or the PurePlay settlement and what satellite and cable providers pay. This has spawned a great deal of criticism from the copyright owners' and musicians' side of the public debate, given Pandora's success, the wealth of its executives, and what have been portrayed as small royalty payouts to musicians.[296]

In response to a recent D.C. Circuit ruling that a provision of the Copyright Act violated the Appointments Clause,[297] the IRFA would also change the process for appointing Copyright Royalty Judges.[298] The bill would also relax some of the programming strictures that apply to webcasters, such as the rules about preannouncing songs.[299] But the bill would not eliminate the differences in treatment on this front between webcasters and the preexisting satellite and cable services. More controversially, the IRFA would significantly alter the antitrust exemption in § 114 that allows copyright owners and webcasters to discuss royalty rates.[300] Some critics have warned that the IRFA's new

[293] Eric Savitz, *Pandora Asks Users to Lobby Congress on Royalty Rates (Updated)*, FORBES (Sept. 24, 2012, 5:03 PM), http://www.forbes.com/sites/ericsavitz/2012/09/24/pandora-asks-users-to-lobby-congress-on-royalty-rates.

[294] *See* H.R. 6480 § 3(a)(2)(A).

[295] For a discussion of these two standards, see *supra* notes 59-60, 100-02, and accompanying text.

[296] *See* Paul Resnikoff, *It Gets Worse: Pandora Executives Have Dumped $63 Million in Stock in the Last Year Alone* . . ., DIGITAL MUSIC NEWS (Nov. 2, 2012), http://www.digitalmusicnews.com/permalink/2012/121102pandora#I605i1xaOzscc6uR1BdEfw.

[297] Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1340 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013) ("[T]he CRJs as currently constituted are principal officers who must be appointed by the President and confirmed by the Senate, and . . . the structure of the Board therefore violates the Appointments Clause.").

[298] H.R. 6480 § 2 (proposing an amendment requiring the President to appoint Copyright Royalty Judges and requiring all judges to have at least seven years of experience adjudicating civil trials).

[299] *Id.* § 4(c) (proposing amendments allowing distributors to transmit song identification information via textual data, providing a program schedule identifying performers and recordings within a period of time no shorter than three hours, and providing an advance program of classical music programming).

[300] *Id.* § 5 (proposing amendment such that "any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition

provision would subject independent record labels and even third-party commentators to liability.[301] Finally, a number of provisions deal with the precedents and evidence that the Copyright Royalty Board can consider when deciding on the royalty rates.[302]

The IRFA does not address AM and FM radio. Nor does it address the notion of First Amendment scrutiny or the underlying goal of improving the theories and evidence used in copyright royalty rate setting. Its main focus does align, however, with the second component of my proposal for implementing the equality principle. Bringing satellite radio, cable music services, and webcasting into the same process with the same standard does move copyright law closer to regulatory parity. But the IRFA falls short by omitting traditional radio and on-demand streaming from its purview. Moreover, switching to the § 801(b) standard is not a mere move toward equality, but an attempt to drastically lower royalty rates for webcasters – the largest webcaster, Pandora, in particular.[303] This misses the point of reforming § 114 entirely. Equal treatment has economic benefits that have nothing to do with reducing the level of royalties, which is a separate policy choice. Instead, it is imperative to end the special treatment that benefits only "preexisting" satellite radio stations and cable music services, such as Sirius XM and Music Choice. It is worth considering how to implement an equal process with a unified standard. But the standard proposed by the IRFA, which would produce royalty rates below ten percent for Sirius XM and Music Choice, is not the answer. Pandora could still be highly profitable under current economic conditions with royalty rates four to five times greater than what satellite and cable are paying.[304]

with licensing by any agent or collective . . . shall be deemed a contract, combination or conspiracy in restraint of trade").

[301] David Lowery, *Muzzling Free Speech by Artists: IRFA Section 5 Analysis*, TRICHORDIST (Nov. 8, 2012), http://thetrichordist.com/2012/11/08/irfa-section-5 (claiming that IRFA would prohibit artist advocacy organizations from publicly communicating concern over the direct licensing program).

[302] H.R. 6480 §§ 3(b), 6(a) (proposing amendments extending settlement rates from the Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009), and limiting consideration of precedent to the objectives of the act set forth in 17 U.S.C. § 801(b) (2012)).

[303] Recall that Pandora currently pays 50% to 55% of its revenue to sound recording copyright owners, in contrast to Sirius XM, which pays 9% of revenue to the same group, and Music Choice, which pays 8%. *See supra* Part I.B-D (detailing the royalties paid to sound recording copyright owners by cable, satellite, and webcasting services).

[304] For example, Pandora would have had a profit margin of 10% during fiscal year 2012 if it had paid 40% of its revenue in performance royalties rather than 55%. *Detailed Historical Financials: Q2FY14*, *supra* note 112. The caveat about "under current economic conditions" is, of course, a significant one, since Pandora could face more competition or other challenges in the future. This back-of-the-envelope calculation is only meant to give a sense of the relatively small changes needed for Pandora to avoid operating losses.

The Interim FIRST Act, in contrast to the IRFA, focuses almost entirely on forcing AM and FM radio to compensate sound recording copyright owners.[305] Almost half the draft bill's text is devoted to findings of fact, stating that "[t]errestrial broadcasting is the only industry in America that can use another's intellectual property without permission or compensation,"[306] and "[a]ll other radio formats, such as satellite, cable and Internet radio, compensate recording artists and copyright owners for their music."[307] The bill proposes only an interim remedy, aimed as an impetus toward permanent reform.[308] That interim remedy augments the royalties that traditional radio companies currently pay under § 112 and § 114 for simultaneously broadcasting over the Internet and their existing AM or FM signal.[309] One section of the draft bill emphasizes that paying more to sound recording copyright owners must not mean that radio stations pay less to musical work copyright owners.[310] The final section of the Interim FIRST Act would perform the reverse operation from the IRFA with regard to rate setting standards: it would move satellite and cable to the willing buyer/willing seller standard that webcasters currently face.[311]

Ultimately, the Interim FIRST Act is a rough draft with some ideas that line up with the equality principle advocated in this Article. Only lobbying, negotiation, and politics – not principle – can explain why the bill does not simply institute a general public performance right for sound recordings, rather than creating a penalty rate for traditional radio's simulcasts. In the mirror image to the critique of the IRFA's choice of standard, one must point out that the use of the willing buyer/willing seller standard, as applied to webcasters, has been a failure. It is hopeless to seek examples of market outcomes in an industry that features so many compulsory licenses and that has experienced so much government intervention. The notion of bringing satellite, cable, and webcasting under the same standard is a good idea, but a new standard is probably necessary. Moreover, this standard should apply to traditional radio and on-demand streaming as well. Finally, the Interim FIRST Act does nothing

305 Interim Fairness in Radio Starting Today Act of 2012, 112th Cong. § 3 (Discussion Draft 2012), *available at* http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf.

306 *Id.* § 2(10).

307 *Id.* § 2(11).

308 *See id.* § 2(17)-(18) (expressing "hope that broadcast radio will soon compensate artists" and that in the interim all broadcasters increase compensation to artists).

309 *Id.* § 3 (proposing an amendment that would multiply all existing royalty rates by a factor to be determined by the Copyright Royalty Judges with the goal of estimating the royalty fee that would have been negotiated in the market).

310 *Id.* § 4 (proposing a prohibition on the consideration of licensing fees paid to sound recording copyright owners when negotiating licensing fees paid to copyright owners of musical works). This admonishment targets the rate setting court that supervises the ASCAP and BMI consent decrees, which govern performance royalties for musical works.

311 *Id.* § 5(a) (eliminating the reference to 17 U.S.C. § 801(b) (2012) in § 114(f)(1)(B)).

to create incentives for Congress and the Copyright Royalty Board to properly justify their decisions, especially if those institutions adopt unequal treatment of music distribution services.

Although both the IRFA and Interim FIRST Act have serious flaws, they each contain some of the essential components of equality. These elements suggest it may be possible to implement an equality principle as legislators recognize the need for regulatory parity and the appeal of equal treatment of the different types of radio.

C. *Open Questions Under the Equality Principle*

The three core components of my proposal for satisfying the equality principle leave several open questions. This Section addresses more specifics regarding the most important dimensions of implementing regulatory parity for music distribution services.

For participants in the music industry, the obvious question is: what will happen to royalty rates? Current royalty rates range from five percent all the way up to seventy percent of revenue paid to all copyright owners.[312] A suggestion of equal treatment implies that many music distributors' rates could change a great deal. As a preliminary matter, I emphasize that implementing the equality principle does not necessarily mean equal rates. My proposal distinguishes between equality of regulatory process (here, the forum and standard of rate setting) and equality of substantive outcomes (the royalty rates ultimately reached). Recognizing a principle of equality should mean, at a minimum, procedural equality. Substantive equality of outcomes would become the baseline. But with a coherent economic theory and substantial evidence, either Congress or the Copyright Royalty Board could justify an adjustment in rates.[313]

With that said, I expect that an equality principle would mean that the substantive rates would converge. Royalty rates for traditional radio, satellite radio, and cable music services should increase on the sound recording side, in my personal view, because their current royalty obligations reflect unwarranted special deals from decades past. Webcasting rates should probably decrease, given that the most successful webcaster to date cannot afford the current rates. But a relatively small decrease would render Pandora quite profitable; it is not necessary to drop the rate into single digits as the IRFA suggests.[314] The

[312] *See supra* Part I.

[313] For example, if evidence showed distribution via a certain medium rendered copyrighted works significantly more susceptible to unauthorized file sharing, a higher royalty rate for distribution services in that medium could be justified. *See supra* Part II.D.5. I do not believe that strong evidence exists about different distribution channels being more or less to blame for facilitating unauthorized file sharing. My point here merely provides an example showing that justifications from equality of royalty rates are possible under my proposal.

[314] *See supra* note 304 (providing a rough calculation of profitability based on a fifteen

royalties that on-demand streaming services pay would also decrease, although the option value of listening to any song at any time might justify a higher rate if this were shown to harm sales more than other channels. Meanwhile, the rates paid to musical work copyright owners are already roughly equal. I do not envision a major disruption to the current negotiations that ASCAP, BMI, and SESAC conduct, at least not at the beginning of instituting an equality principle. The first-order problem is to deal with royalty rates for sound recordings.

My proposal for equal treatment involves bringing traditional radio and on-demand streaming into a revised § 114 statutory rate setting process. This is a significant change. On-demand streaming services currently negotiate voluntary licenses. This raises a question: why not move every distributor to voluntary licensing, instead of bringing each of them into the compulsory-licensing regime? There is a distinction between equality in the rate setting process and equality of substantive rates. The debate between these two policy choices has been long and vigorous. This Article does not address the issue fully. My view is that concerns about vertical integration recommend against the voluntary-licensing approach. Copyright owners also own shares in some of the prominent distribution services, such as Music Choice and Spotify. A compulsory license available to all distributors avoids the prospect of copyright owners dictating the results of competition by favoring their affiliates. This is a familiar function of telecommunications regulation.[315] Concerns about barriers to entry should lead Congress to give safeguards against vertical integration a similar place in copyright law. Furthermore, the statutory license of § 114 is a default rule rather than a mandatory rule, serving as a fallback option for distributors in negotiations with copyright owners.

The question of default versus mandatory rules raises the issue of direct payment. A major advantage of bringing traditional radio and on-demand streaming into the § 114 statutory licensing scheme is that the scheme provides for direct payment to artists.[316] But copyright law generally allows parties to contract around the compulsory license if they wish. The possibility of contracting around the compulsory license does put direct payment in some peril. Questions about compensation for musicians, music-industry contracts, and the justifications for direct payment are important, but outside the scope of this Article. Here, I say only that I favor direct payment. Further research must investigate whether a default rule of direct payment is enough to provide the intended benefits to recording artists and union musicians, or whether further measures are appropriate.

My proposal for regulatory parity requires some adjustments in light of the set of exclusive rights that copyright owners receive.[317] Under the current

percent decrease in the share of revenue consumed by licensing and royalty fees).

[315] *See* BENJAMIN ET AL., *supra* note 202, at 479-531.

[316] *See* 17 U.S.C. § 114(g) (2012).

[317] *See id.* § 106 (enumerating the exclusive rights associated with copyright ownership).

regime, on-demand streaming services must acquire reproduction and distribution licenses in addition to performance licenses (recall that the other forms of radio pay only performance royalties). Thus, bringing on-demand streaming services into the § 114 scheme would require an exception to the exclusive rights in § 106. Given that § 112 already creates a statutory license for ephemeral copies, it is certainly possible to do the same for the copies created as part of the process of on-demand streaming.[318]

The bigger question is how to handle other music distribution services that implicate the performance, reproduction, and distribution rights, such as podcasting, user-generated video, cloud services, and even digital downloads.[319] Bringing all music distribution services into the same scheme would have advantages for innovation, for avoiding economic distortions, and for free speech, especially from the perspective of new entrants in these media and their potential users. I have focused on the services that most closely resemble each other – the range from AM and FM radio to on-demand streaming. But other music distribution services could and should be included as well. For instance, podcasting, user-generated video, and cloud services should be part of § 114. With podcasting, in particular, there is a need to create affordable ways for podcasters to use music in their podcasts while still compensating copyright owners. Currently, most podcasters are either avoiding copyrighted music or trying to fly under the radar. The specific provisions to deal with each service deserve much more space than I have in this Article, but it is important to make clear that the benefits of regulatory parity only work if all the radio-like media are included.

There are, however, theoretical and practical reasons that copyright law should continue to treat digital downloads differently than radio. Economically, ownership comes with significant option value. Ownership of music files also allows for greater privacy.[320] Moreover, practically speaking, digital downloads still provide the most significant Internet-music revenue for record labels and recording artists.[321] Disrupting this category of services

[318] Various technical limitations would be necessary to ensure that an exception to allow statutory licensing for on-demand streaming would not swallow the rule that sales of copies are governed by § 106.

[319] *See supra* Part I.F (describing copyright's regulatory scheme with regard to podcasting and other distribution media that receive similar treatment under copyright law).

[320] This is not to say that digital rights management measures have not and will not continue to threaten privacy with respect to owned music files. Rather, the point is that on-demand streaming, user-generated video sites, and other distribution media allow for much greater tracking of user behavior.

[321] *See* Andy Fixmer, *Apple's 10-Year-Old iTunes Loses Ground to Streaming*, BLOOMBERG BUSINESSWEEK (Apr. 25, 2013), http://www.businessweek.com/articles/2013-04-25/apples-10-year-old-itunes-loses-ground-to-streaming (stating that Apple's iTunes's share of the market for digital music is sixty-three percent, which necessarily implies that downloads currently have larger market share than streams, but observing that streaming is gaining market share).

might lead to uncertainty or harm copyright incentives for some subsets of the musician population.[322] My proposal in this Article is designed as a reform that is achievable in the short term. Creating a compulsory license for digital downloads has been the subject of many proposals with appealing features,[323] but these proposals would require a longer legislative debate than the reforms I propose here.

Finally, implementing an equality principle for copyright would require a sufficient transition period and process from the existing regulatory scheme. Investor expectations would be upset; though, to some extent, this is unavoidable when reversing the legislative and regulatory largesse of the past. Traditional radio, as well as preexisting satellite radio and cable music, will face greater royalty obligations, which will disrupt their businesses. This may seem unduly harsh in light of the chronic financial difficulties these industries seem to face. It could also lead some traditional radio stations to deemphasize or even abandon music programming. But eliminating barriers to entry, ending protectionism for incumbents, and spurring innovation are worth these transition costs. Moreover, phasing in the new royalty rates can ameliorate the transition. There is precedent for gradual transition in the decisions of the Copyright Royalty Board, which typically phase in a target rate over the course of a five-year period.[324] Although the transition would be costly, the end result of regulatory parity would have greater benefits.

CONCLUSION

The rise of new methods of distribution in the absence of a coherent regulatory scheme across music distribution technologies has produced discrimination and inefficiency. Policymakers should recognize that copyright is just as much concerned with communications regulation as it is with the provision of incentives for creation. Conflicts over royalties have arisen with increasing frequency between copyright owners and distribution technology firms. In the absence of a well-developed theory of how to regulate the communications media that distribute copyrighted works, a patchwork of ad hoc solutions to isolated disputes has accreted into a bloated copyright statute. The influence of lobbying for special treatment is unmistakable in provisions like § 114, which explicitly protects incumbent firms like Sirius XM from

[322] *See generally* Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons for Copyright Incentives*, 55 ARIZONA L. REV. 301 (2013).

[323] *See, e.g.*, WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-258 (2004) (detailing a proposed "alternative compensation system" that would allow unlimited file-sharing but tax Internet access to provide a pool of revenue for copyright owners).

[324] *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,071 (Apr. 17, 2013) (to be codified at 37 C.F.R. pt. 382) ("To minimize any potential disruptive impact of the rate increase, the Judges phase it in over the license period.").

competition from both inside and outside of their specific industry. The disparities in treatment of traditional radio, satellite radio, cable music services, webcasting, on-demand streaming, podcasting, and other media are striking.

There is no economic justification for the lack of regulatory parity. This unjustified unequal treatment distorts consumers' choices with respect to the media through which they experience music. This ends up affecting not only how people listen to music, but also what music reaches them, given the vast differences in the catalogs of songs that different media play. The unequal treatment of different music distribution services has also slowed or even completely deterred innovation. The lack of regulatory parity can be remedied in part by requiring traditional radio stations to pay royalties to sound recording copyright owners. Even more importantly, the various music distribution services need to be brought into the same royalty rate setting process. Within that process, equal rates would be the baseline, with deviations possible only if justified by substantial evidence.

The disparities in the regulation of music distribution services described in this Article represent a problem for the freedom of speech and freedom of the press. Applying the First Amendment as a constraint on the unequal treatment of music distributors would have many benefits. Practically speaking, it would require Congress and the Copyright Royalty Board to collect and rely on better evidence for any tailoring of royalty rates. First Amendment scrutiny would also reinforce the economic arguments in favor of regulatory parity. Both theories suggest that society should have grave concerns about barriers to entry for new media. Those concerns are not just for the sake of the innovators; the public values music as part of its information environment and benefits from having a wide range of options in distribution media. Copyright law should stop steering the future of music distribution away from new distribution technologies, but it should seek to ensure compensation for copyright owners and creators. In this way, the public will benefit most fully from what music has to offer, socially, politically, and culturally.