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ABSTRACT

*Questions about the allocation of dwindling music profits have come to define the modern music business. The shift away from controlled forms of physical media like records and CDs has allowed many new distribution entities (like Pandora and Spotify) to enter the industry and compete for increasingly scarce resources. While musicians demanding "just compensation" have become the most visible manifestation of this crisis, more and more hands are reaching into a quickly shrinking pot of revenue.*

*Litigation over these resources is fierce, pitting various players in the music industry against each other in the pursuit of a larger slice of the revenue pie. Under numerous regulatory schemes, courts and one government arbitral body (together, the "rate tribunals") have been forced to make decisions about the value of music. Unfortunately, rate tribunals are poorly equipped to make these determinations, often producing fluctuating, contradictory, and untenable results. The purpose of this Article is to delve deeper into the fight over music profits by exploring current rate determination procedures and proposing a useful tool for determining musical value. Specifically, I suggest that foreign benchmark agreements would help rate tribunals come to determinations that more accurately reflect the fair market value for music.*

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## INTRODUCTION

"Hey Apple, we don't ask you for free iPhones. Don't ask us for free music."[1] Taylor Swift's now infamous quip embodies what many artists feel to be the crux of the compensation issue in the music industry.[2] Swift's open letter to Apple is the latest in musicians' long-running campaign to bring awareness to what they feel is unjust compensation for their work.[3] However, what exactly

1. Nina Ulloa. *Taylor Swift: "Hey Apple, We Don't Ask You for Free iPhones. Don't Ask Us for Free Music"*, DIGITAL MUSIC NEWS (June 21, 2015), http://www.digitalmusicnews.com/2015/06/21/taylor-swift-hey-apple-we-dont-ask-you-for-free-iphones-dont-ask-us-for-free-music/.

2. *See id.*

3. *See* Steve Knopper, *Taylor Swift Pulled Music From Spotify for 'Superfan Who Wants to Invest,' Says Rep*, ROLLING STONE (Nov. 8, 2014), http://www.rollingstone.com/music/news/taylor-swift-scott-borchetta-spotify-20141108; Maya Kosof, *Pharrell Made Only $2,700 In Songwriter Royalties From 43 Million Plays Of 'Happy' On Pandora*, TECH DIRT (Dec. 23, 2014), http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12; Randal Roberts, *Joanna Newsom calls Spotify 'a Villainous Cabal' and 'a Garbage System'*, L.A. TIMES (Oct. 18, 2015), http://www.latimes.com/entertainment/music/posts/la-et-ms-joanna-newsom-spotify-villainous-cabal-garbage-system-20151015-story.html.

constitutes "just compensation" is a puzzling question. Traditionally, the value of art is determined simply by how much a buyer is willing to pay for it.[4] In the United States, Congress has implemented an alternative method of defining the value of music: rate tribunals.[5]

The Copyright Act[6] provides music distributors like Pandora with "compulsory licenses" which give distributors the right to broadcast music without the owner's permission as long as they pay the compulsory licensing rate.[7] The complex task of determining the compulsory (also known as "statutory") rate is assigned to the rate tribunals. The tribunals are tasked with finding the hypothetical price that large-scale purchasers of music (e.g., Pandora) would pay record labels or publishers for the rights to use their music in a free market. However, because these companies can take advantage of the compulsory license, they rarely negotiate deals with the rights holders themselves. This makes actual examples of freely negotiated deals for the rights at issue virtually non-existent. With only vague notions of the rates to which these companies would agree on their own accord, rate tribunals are left with speculative and unreliable methods for determining the value of music in a free market. Unsurprisingly, the rate tribunals have struggled to find rates that both parties believe are fair. The tribunals have determined wildly fluctuating rates for identical rights, indicating a severe problem with the accuracy of their determinations.[8] In fact, two of the proceedings in the last decade have led to congressional intervention because the tribunals fixed rates that would have required music distribution services to pay essentially their entire revenue in licensing costs.[9]

This Article examines the procedures that lead tribunals to make such problematic decisions. Currently, rate tribunals rely on scattered examples of free-market transactions among record labels, publishers, and digital streaming services in the United States. The tribunals use these transactions as guides to establish a price for licensing certain rights. They then employ adjustment

4. *See, e.g.*, Daniel McDermon, *Are You Smarter Than a Billionaire?*, N.Y. TIMES (Nov. 10, 2015), http://www.nytimes.com/interactive/2015/11/10/arts/design/art-auction-quiz.html (illustrating the subjective nature of art pricing by quizzing readers on the value of high-priced artwork and revealing recent auction values).

5. The term "rate tribunals" refers to the Copyright Royalty Board (the "CRB," a panel of three judges appointed by the Librarian of Congress) and the district court for the Southern District of New York.

6. 17 U.S.C. § 106 (2015).

7. Although there is technically no compulsory license for the public performance of musical works, the consent decrees governing the PROs act similarly to a compulsory license for the public performance right in sound recordings. For both sound recordings and musical works, a prospective licensee is legally entitled pursuant to the consent decrees to certain rights and can obtain the rights through regulated pricing mechanisms. *See infra* Part I(c). For purposes of this Article, the guaranteed ability to publicly perform musical works for a reasonable rate under the consent decrees is included as a part of the overall compulsory licensing scheme in the United States.

8. *See infra* Part II(a).

9. *See infra* Part II(b)(i).

techniques to produce a new rate that reflects differences between the comparator agreement and the rate they are determining.

To illustrate this concept, imagine a court tasked with deciding the price at which Safeway could purchase yellow corn from farmers. Lacking some cosmic calculator to measure yellow corn's intrinsic value, courts must refer to existing agreements between other grocery stores and yellow corn farmers to determine what constitutes a fair market price. These analogous agreements are called "benchmarks." While there is little dispute that analyzing benchmarks is the best heuristic for determining rates, exactly *which* benchmarks to analyze is a source of contention that has generated extensive litigation.[10]

If the court in the foregoing example suggests using a similar agreement between another grocery retailer such as Whole Foods and yellow corn farmers as a benchmark, Safeway would almost certainly object. Because Safeway is much larger and has more purchasing power than many of its competitors, it could likely negotiate a lower price for corn than a store like Whole Foods. To support this argument, Safeway might point to similar products (like potatoes) for which it has negotiated comparatively low prices. Safeway would argue that such a comparison is superior to comparing agreements with grocery stores that differ from Safeway in material ways (e.g., their purchasing power). However, corn farmers, trying to obtain the highest price for their product, would counter that comparing corn to potatoes is inequitable because they are different products. Both sides would offer various agreements, Safeway vying for a rate that saves them money, and the farmers looking to make a higher profit. Based on this information, the court would then make a determination about the fair market price of yellow corn.

This is the same process that music distribution services, like Pandora, engage in with the entities that own musical rights, *viz.*, record labels and publishers. Each side offers benchmarks that purport to demonstrate how high or low the licensing rate for a certain right should be. After lengthy and expensive expert testimony about the similarities and differences between these agreements, the court ultimately decides a rate at which the service can license the right.[11]

Experts at these rate proceedings seem to agree that analyzing domestic benchmarks—agreements between similar entities for similar rights negotiated in the United States—is the best way to define the contours of a hypothetical market. However, the tribunals have yet to consider a single *foreign* benchmark—an agreement negotiated on foreign soil, subject to different constraints than those that exist in the American market. This Article suggests that tribunals would be able to define the hypothetical American market more accurately by considering foreign benchmarks.

Part of the reason American rate courts have trouble defining rates is that

10. *See* discussion *infra* Part II.
11. *See* discussion *infra* Parts II(a)–(b).

U.S. rates are often judicially mandated rather than freely negotiated.[12] In many foreign jurisdictions, however, laws that require judicially created rates do not exist.[13] This allows companies and rights-holders to freely bargain for the rights. Accordingly, many countries have a much richer market of freely negotiated, analogous agreements than the United States. Considering benchmarks outside the United States would ultimately help capture something closer to the "true" price of music.

This Article proceeds in five Parts. Part I gives background on the current legal framework governing music copyright. Part II investigates more closely the rate tribunal proceedings and how rate decisions have been formulated since the rise of webcasting as a form of music distribution. Part III describes the current and prior benchmarks used in the rate tribunal proceedings. Part IV discusses international benchmarks, how they can help, and why they are within the scope of the tribunals' review. Finally, Part V discusses potential objections to foreign benchmarks in American rate proceedings and responds to those objections.

## I. THE CURRENT STATE OF MUSIC COPYRIGHT LAW

Part I attempts to give a brief overview of the legal framework governing music licensing. This framework is especially complex because a single piece of music is accorded numerous rights, often held by different entities. One song is like a television set: the screen, frame, remote control, speakers, and LED lights all have different patents attached to them. To build that television, a manufacturer has to negotiate the use of each individual right through different organizations or with different parties. However, the rights to a song are arguably more complex because a different statutory framework governs each copyright in a song. The following summarizes the aspects of music licensing necessary to understand the role of the rate tribunals and the recommendations in this Article.

### *I(a) Two different copyrights*

When a listener hears a song on the radio, that song is protected by two basic copyrights. First, every song has an underlying musical composition made up of an arrangement of notes and lyrics.[14] Sheet music is an example of a musical composition. Second, every song is also a sound recording—the

12. As discussed previously, when rates are judicially mandated they do not provide a benchmark for future rate proceedings because they are not freely negotiated. In the United States, the fact that so many rates are judicially mandated leads to a dearth of benchmarks.

13. *See infra* text accompanying note 152.

14. REG. OF COPYRIGHTS, U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 17–18 (2015), *available at* http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [hereinafter COPYRIGHT OFFICE REPORT].

actual audible manifestation of that musical work.[15] These sound recordings can be broadcast or held on an mp3 player, but are distinct from the underlying musical work used to create the sound recording. Accordingly, to obtain the rights to use a song, prospective users must acquire rights to both the sound recording and the underlying musical composition.[16]

The standard practice today is to allow entities familiar with the music business to own and manage the various rights attached to sound recordings and musical works.[17] Thus, publishing companies (e.g., Warner/Chappell, Sony/ATV) usually own the rights to musical works, while record labels (e.g., Sony BMG, Universal, Warner Music Group) generally own the rights to sound recordings.[18]

### *I(b) The scope of the copyrights*

Musical works and sound recording copyrights both confer roughly the same protection for the copyright holder or licensee. The copyrights give the owner the exclusive right to reproduce, distribute to the public, make derivative works from, and publicly perform or display the copyrighted material.[19] Each of these rights can be selectively licensed, as rights-holders are not obligated to license all rights at once. While the meaning of these rights with respect to physical formats is relatively straightforward, it has not always been entirely clear how the rights apply in the digital age. While updates to the Copyright Act in 1995 and 1998 attempted to define the application of these rights to digital music providers, many questions remain unanswered.[20]

One gray area relates to the rights webcasters (i.e., online radio services like Pandora) must obtain before they may legally broadcast content. After disputes over this issue, it is now clear that the main right implicated in webcaster licensing is the "public performance" right. The Copyright Act defines a "public performance" as the transmission of a work, regardless of whether that transmission occurs at different times, places, or for distinct audiences.[21] Digital streams of music thus fall into the "public performance" category.[22] Since the performance right is the main right relevant to

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15. *See id.*

16. This, of course, is an oversimplification with regards to webcasting. However, it is necessary at the outset in order to ease into this area of law.

17. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 19, 22.

18. *See id.*

19. 17 U.S.C. § 106 (2015).

20. U.S. Copyright Off., Digital Millennium Copyright Act, Section 104 Report, Executive Summary (Aug. 2001), *available at* http://www.copyright.gov/reports/studies/dmca/dmca_executive.html.

21. § 101 (To publicly perform a work is to "transmit or otherwise communicate a performance or display of the work . . . by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.").

22. *Id.*

webcasting, this Article will expand on it in more detail.[23]

*I(c) Public performance right*

A public performance includes any audible manifestation of the musical work that occurs "in a public place where people gather (other than a small circle of family or social acquaintances)" or "is transmitted to the public, for example, radio or TV broadcasts, and via the Internet."[24] Accordingly, a broad range of users, from health clubs to hotels to radio stations, all require licenses to legally broadcast or play music at their facilities.[25] The performance right must be licensed separately for musical works and sound recordings.

The public performance right for musical works was first recognized in 1897.[26] The right provided an important medium through which composers could derive value from their work, but it also presented licensees with the enormous challenge of negotiating individual licenses with every potential performer lest they risk copyright infringement.[27] As a result, performance rights organizations ("PROs") such as the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") were formed and began compiling licenses.[28] The PROs benefited both licensees and

23. The reproduction right is also implicated by webcasting, but is relatively unimportant. For any streamed song, a webcaster must obtain reproduction rights for both the sound recording and the musical work. The current scope of the reproduction right for musical works for webcasters is still unsettled. For purposes of this Article, it is only necessary to know that the reproduction right for musical works is not implicated in webcasting in the United States. *See* Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 431 (2008). This means that for webcasters like Pandora, the rights-holders in musical works have not demanded a reproduction license for streaming activity. *See* PANDORA MEDIA, INC., QUARTERLY REPORT (Jul. 29, 2014), *available at* http://investor.pandora.com/Cache/24634863.pdf. However, there has not been a definitive legal determination stating that digital streams are *not* reproductions of musical works, leading to unease on the part of webcasters that the PROs may one day come to collect. *Id.* Conversely, all webcasters must obtain the reproduction rights for sound recordings. Digital streams create "ephemeral" reproductions of the sound recording when they make a temporary buffering copy on the listener's server. For most digital music providers, the right to make ephemeral recordings must be individually negotiated with rights-holders (usually a record label) because there is no statutory license. For specific types of services, including webcasting, the 1998 Digital Millennium Copyright Act provides a statutory license for ephemeral recordings and tasks the CRB with determining their rates. *See* 17 U.S.C. § 112 (2015); Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 405–07 (2003). In practice, the ephemeral rate has become a nominal 5% segment of the overall performance rate. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026–01, at 65 (Mar. 9 2011), *available at* http://www.loc.gov/crb/proceedings/2009-1/docs/final-determination-rates-terms.pdf [hereinafter *Web III*]. Since the ephemeral right is always an essential component of the performance right, the CRB "bundles" the ephemeral rate along with the public performance rate. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 179 n.900.

24. *ASCAP Licensing, Frequently Asked Questions, Do I Need an ASCAP License?*, ASCAP, http://www.ascap.com/licensing/ licensingfaq.aspx#general (last visited May 18, 2017).

25. *Id*.

26. COPYRIGHT OFFICE REPORT, *supra* note 14, at 17.

27. *See id.* at 32.

28. *See* Jeff Lunden, *Collecting Money for Songwriters, a 100-Year Tug of War.*, NAT'L

copyright owners by minimizing transaction costs through the use of a centralized mechanism for licensing and enforcing copyright restrictions on public performances of copyrighted musical works.[29]

The licenses for public performance rights of musical works are unique in that they have never been compulsory, meaning that rights-holders were never legally obligated to license their work for public performance. Accordingly, rights holders in the early twentieth century could charge whatever they wanted for the right to publicly perform their works. As ASCAP and BMI became increasingly popular, they controlled an increasing segment of popular music rights, and were able to exert extreme market leverage over potential licensees for the right to use the musical works in their repertoires.[30] Realizing that the PROs had an unfair market position, the DOJ began investigating them in the late 1930s for antitrust violations.[31] As a result, in 1941 ASCAP and BMI signed consent decrees promising to license the music in their collections to any entity that sought a license for a "reasonable" rate.[32] In later iterations of the decrees, the PROs conceded that, if they were unable to agree with a licensee on rates for musical works, the two parties would submit to binding determination by a district court judge in the Southern District of New York (the "rate court").[33] To this day, this court maintains sole jurisdiction over disputes between the PROs and licensees over licensing rates.[34]

Although there is technically no compulsory license for the public performance of musical works, the consent decrees governing the PROs serve a similar function to the compulsory license regimes governing the public performance right in sound recordings. For both sound recordings and musical works, a prospective licensee is legally entitled to certain rights that can be obtained through regulated pricing mechanisms. For purposes of this Article, the guaranteed ability to publicly perform musical works for a reasonable rate under the consent decrees is included as a part of the overall compulsory licensing scheme in the United States.

The public performance right for sound recordings has a similarly complex evolution. Until the 1976 Copyright Act, sound recordings did not have a federally recognized copyright.[35] The musical composition of a song

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PUB. RADIO MUSIC (Feb. 13, 2014), http://www.npr.org/2014/02/13/275920416/collecting-money-for-songwriters-a-100-year-tug-of-war.

29. *Collective Management of Copyright and Related Rights*, WORLD INTELL. PROP. ORG, http://www.wipo.int/copyright/en/management/ (last visited May 18, 2017).

30. COPYRIGHT OFFICE REPORT, *supra* note 14, at 36.

31. *See id.*

32. *Id.*

33. *Id.* at 37.

34. SESAC and GMR, two smaller PROs, were formed later and are still not governed by consent decrees. However, ASCAP and BMI combined continue to hold the vast majority of publishing rights for U.S.-based music. *See infra* note 49 and accompanying text.

35. COPYRIGHT OFFICE REPORT, *supra* note 14, at 43.

was the only federally recognized form of copyrightable music before 1972.[36] This meant that whoever broadcasted the music had to compensate the musicians that *wrote* it, but not the musicians that *played* it. As new technologies emerged for listening to music in the early twentieth century, Congress recognized that federal copyright should protect the sound recording in addition to the underlying composition.[37] However, Congress limited this right to sound recordings made after 1972 and exempted terrestrial radio.[38] Therefore, sound recordings made prior to 1972 remain unprotected by federal copyright law.[39] Additionally, traditional terrestrial radio stations remain exempted from the requirement to pay for the sound recordings they broadcast.[40]

Congress finally recognized a limited public performance right in sound recordings in 1995, when it conferred public performance rights only via "digital audio transmissions" by passing the Digital Performance Right in Sound Recordings Act.[41] Accordingly, while terrestrial radio stations (AM/FM stations), bars, hotels, clubs, etc., do not need to pay for their performance of sound recordings, webcasters and other online services do. Musicians have decried Congress's failure to implement an equal public performance right for other mediums of broadcast, namely terrestrial radio, because they feel as though they are giving their music away for free.[42]

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36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.* However, companies such as Pandora and Sirius XM have been embroiled in litigation over whether state common-law copyright protects pre-1972 sound recordings, and hence whether those companies may be forced to pay for their use of that content. For a description of this litigation from the perspective of the rights-holders, see *Protecting Pre-72 Sound Recordings*, SOUND EXCHANGE http://www.soundexchange.com/advocacy/pre-1972-copyright/ (last visited May 18, 2017).

40. *Public Performance Right in Sound Recordings*, FUTURE MUSIC COALITION (Nov. 5, 2013), https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings.

41. Jeffrey A. Eisenach, *The Sound Recording Performance Right at A Crossroads: Will Market Rates Prevail?*, 22 COMMLAW CONSPECTUS 1, 7 n.42 (2014).

42. John Villasenior, *Why Artists Should Always Get Paid By Broadcasters Who Play Their Songs*, FORBES (Jul. 2, 2012), http://www.forbes.com/sites/johnvillasenor/2012/07/02/why-artists-should-always-get-paid-by-broadcasters-who-play-their-songs/#2d5985fe1d28. There is scant evidence evincing congressional intent for exempting terrestrial radio from the public performance copyright of sound recordings in the 1976 Copyright Act, or why they doubled down on that exemption in the 1995 DMCA. However, broadcast radio's strong lobbying presence in the second half of the twentieth century provides a common-sense explanation. Consider this: according to the Senate Report from the passage of the DMCA, terrestrial broadcasts "promote, and appear to pose no threat to, the distribution of sound recordings." S. REP. NO. 104-128, at 14–15 (1995). This finding comports with broadcasters' traditional argument that radio and record sales have a symbiotic relationship: artists get free promotion for their albums and concerts, while broadcasters attract listeners. *See Public Performance Right in Sound Recordings*, *supra* note 40. This argument has lost persuasive force in an age when record sales have plummeted due to the rise of digital media. *See* Melanie Jolson, *Congress Killed the Radio Star: Revisiting the Terrestrial Radio Sound Recording Exemption in 2015*, 2 COLUM. BUS. L. REV. 764, 785–88

To further complicate matters, the Act only provides a "compulsory license" to so-called "non-interactive" digital music streaming services like Pandora.[43] The distinction between "interactive" and "non-interactive" was explored in *Arista Records LLC v. Launch Media, Inc.*[44] where the Second Circuit held that services, such as Pandora precursor LAUNCHcast, that provide listeners with limited influence over the content they receive, are "non-interactive." Conversely, on-demand services such as Spotify that give the consumer control over what specific song or album is played are considered "interactive."[45]

Without a compulsory license regime, interactive services like Spotify must negotiate directly with the owners of the sound recordings they wish to use. Non-interactive services, however, are statutorily entitled to use any published sound recording available, as long as they pay the appropriate fee. This is why artists like Taylor Swift are easily able to remove their music from Spotify, but not Pandora.[46] Per section 114 of the Copyright Act, the Copyright Royalty Board ("CRB") determines the cost of the compulsory license for non-interactive streaming services.[47]

In sum, the public performance right for digital music providers is extremely complex. For this Article, it is important simply to know that webcasters like Pandora are entitled to broadcast both the sound recording and musical works embodied therein. The next section discusses the rate tribunals, which determine the rates webcasters pay to broadcast this music.

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(2015). Yet, Congress has failed to implement a public performance right for sound recordings in traditional broadcasting despite numerous attempts to do so. *Id.* This is strong evidence that lobbying efforts by the National Association of Broadcasters, rather than a desire to provide artists with fair compensation, has been the true motivation for the unequal treatment between terrestrial and digital media.

43. COPYRIGHT OFFICE REPORT, *supra* note 14, at 46. The Digital Millennium Copyright Act provided that both ad-supported and subscription internet-radio services were entitled to a statutory license as well. *See* Eisenach, *supra* note 41, at 8. The DPRA had only provided a compulsory license for subscription services. *See id.* at 9.

44. *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148 (2d. Cir. 2009). The Copyright Act states that 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 . . . which is selected by the recipient." 17 U.S.C. § 114(j)(7).

45. *See generally Arista*, 578 F.3d 148 (holding that "predictability" is the touchstone of the interactivity analysis and finding that LAUNCHCast, a predecessor service similar to Pandora, was non-interactive); *see also* Eisenach, *supra* note 41, at 7.

46. Knopper, *supra* note 3. Technically, an artist could withdraw the rights to their music from a PRO altogether and refuse to license it to whomever they please. Practically speaking, however, that would be very difficult because the artist would lose the other benefits of membership in the PRO, including all the fees collected from blanket licenses sold to venues that wish to perform their musical work.

47. 17 U.S.C. § 114(d)(2) (2015).

## II. THE RATE TRIBUNALS: THE COPYRIGHT ROYALTY BOARD AND THE RATE COURTS

Webcasters must acquire multiple licenses before they are able to operate without infringing any copyrights in today's legal landscape. Although a webcaster is able to take advantage of compulsory licensing for the various rights, it still must navigate a labyrinthine system of procedures in order to operate. A webcaster must acquire (1) a public performance license for the musical work from each of the three to four PROs, (2) a reproduction ("ephemeral") license for the sound recording,[48] and (3) a public performance license for the sound recordings (which can be acquired through an organization called SoundExchange).

First, in order to secure the performance rights to a musical work, the webcaster must negotiate licenses with each PRO: ASCAP, BMI and two other independents.[49] If the webcaster and the PROs are unable to reach an agreement, they must take their dispute to the rate courts.[50] Second, in order to secure the public performance right for the sound recording, the webcaster must pay royalties to SoundExchange, a subsidiary of the Recording Industry Association of America ("RIAA") responsible for collecting sound recording royalties.[51] Although these rates can be negotiated directly with individual rights-holders, the public performance right compulsory license allows webcasters to use sound recordings at a rate determined every five years by the CRB without having to negotiate directly with the record labels.

As it currently stands, webcasters are able to operate upon a system of compulsory licenses with rates decided almost completely by judicial bodies.[52] This means that for virtually all of the rights relevant to webcasting, the price of music has been removed from a free-market system and placed into the hands of the rate tribunals. This gives the tribunals enormous power to affect the profitability of both the recorded music and webcasting industries. The zero-sum nature of these determinations makes the precision with which the tribunals carry out their mandate extremely important. Accordingly, the methods that the tribunals use to determine prices for streaming services

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48. Since the ephemeral right is bundled into the public performance right for sound recordings, this Paper treats the ephemeral right as included in the public performance right. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 179 n.900.

49. The two smaller PROs, SESAC and GMR, only hold the rights to about 10% of the current music market and are not subject to the consent decrees. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 20.

50. If the rights are held by SESAC or GMR, the service may not appeal to the rate courts because those entities are not governed by consent decrees. *See id.*

51. *Id.* at 22–23.

52. Although Pandora currently operates under one of the Webcaster Settlement Act's "pureplay" agreements—which was determined congressionally rather than judicially, see Eisenach, *supra* note 41, at 26–27—the Copyright Act contemplates that such services will follow the CRB-determined rate. An additional caveat is that PROs that are not governed by the consent decrees are allowed to negotiate rates privately with webcasters for the right to publicly perform musical works. *See* 17 U.S.C. § 114.

warrant close examination. The following sections describe the standards used by the rate courts and the CRB to determine the price webcasters must pay to use music.

### *II(a) The Rate Courts*

The rate courts must simultaneously enforce the spirit of the consent decrees (i.e., antitrust regulation) while also setting licensing rates that comply with the consent decree mandate of "fair market value."[53] This hybrid role has led the courts to a "mixture of competition and ratesetting considerations, without a satisfying analysis of either."[54] This section focuses on the rate courts' role in determining the fair market value of the public performance right for *musical works* (as opposed to the performance right for *sound recordings*, which is decided by the CRB).

In the most recent proceedings, the rate courts directly determined the percentage of webcaster revenue to which the PRO is entitled.[55] Two recent decisions, *In re Pandora Media* and *BMI v. Pandora*,[56] demonstrate how the rate courts determine applicable rates.

Together, BMI and ASCAP control public performance rights of roughly ninety percent of musical works.[57] In both *In re Pandora Media* and *BMI v. Pandora*, the courts provided succinct summaries of the standards used to determine the rate that a non-interactive webcaster (Pandora, in these cases) had to pay for blanket licenses to ASCAP and BMI.[58] According to the consent decrees, the rate courts must determine whether each organization's proffered rate is "reasonable" for the requested license.[59] While the consent decrees do not define reasonableness, governing precedent dictates that the courts must "attempt to approximate the fair market value of a license,"[60] defined as "the price that a willing buyer and a willing seller would agree to in an arm's length transaction."[61] This formula seeks to approximate "the rates that would be set in a competitive market."[62]

These vague standards do not provide the courts with concrete steps to follow in order to determine accurate rates. Hence, the rate courts have

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53. COPYRIGHT OFFICE REPORT, *supra* note 14, at 155.

54. *Id*.

55. *See* In re Pandora Media, Inc., 6 F. Supp. 3d 317, 343–50 (S.D.N.Y. 2014) *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

56. *Id.*; Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 272 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016).

57. COPYRIGHT OFFICE REPORT, *supra* note 14, at 20.

58. *In re Pandora*, 6 F. Supp. 3d at 353; *Broad. Music, Inc*., 140 F. Supp. 3d at 272.

59. *In re Pandora*, 6 F. Supp. 3d at 353.

60. *Id.* (internal quotation marks omitted).

61. *Broad. Music, Inc*., 140 F. Supp. 3d at 270. This is the same standard codified in § 114 for determining sound recording performance rates by the CRB.

62. *In re Pandora*, 6 F. Supp. 3d at 354 (quoting Am. Soc'y of Composers, Authors & Publishers, v. Showtime/The Movie Channel, Inc., 912 F.2d 563 (2d Cir. 1990).

traditionally looked to benchmark rates drawn from other similarly situated entities licensing comparable rights.[63] These rates allow courts to reason by analogy to help establish industry norms and give the court a sense of what a fair market rate would be in the actual marketplace.[64]

In *In re Pandora Media* (the "ASCAP" case), each side proposed various benchmarks that the court could use in determining a rate. The court analyzed each benchmark to determine whether it was analogous to the rate sought by the proffering party. Ultimately, after dismissing various benchmarks as unrepresentative of what would have been agreed to in a hypothetical free-market, the court decided on a rate of 1.85% of Pandora's revenue for the ASCAP works played by Pandora for a term of five years.[65] This was based mainly on the fact that 1.85% had been the prevailing rate between the entities since 2005, when ASCAP and Pandora voluntarily agreed to that rate under the ASCAP Experimental License Agreement for Internet Sites & Services.[66] The court also used one benchmark that both parties agreed was accurate: a license between Pandora and EMI[67] for a pro rata share of the prevailing ASCAP rate of 1.85% for 2011-2012.[68] Although both parties suggested other benchmarks and theoretical arguments for various rates ranging from 1.70% to 3.00%,[69] the court ultimately held that 1.85% for ASCAP works was reasonable for the 2010-15 period.[70]

In *BMI v. Pandora*, the court considered a much broader range of benchmarks than the ASCAP court relied on in determining the appropriate rate. The *BMI* court diverged from the ASCAP court in finding that numerous direct deals done between music publishers and Pandora *were* good benchmarks and supported BMI's proposed rate of 2.5%.[71] It also found that deals done between similar[72] companies such as iTunes Radio, Spotify, Rdio and Rhapsody were "confirmatory" of this this higher rate.[73] The court rejected Pandora's argument that its direct deals were coercively negotiated under the

63. *In re Pandora*, 6 F. Supp. 3d at 354; *Broad. Music, Inc.*, 140 F. Supp. 3d at 270.

64. *In re Pandora*, 6 F. Supp. 3d at 354; *Broad. Music, Inc.*, 140 F. Supp. 3d at 270.

65. *In re Pandora*, 6 F. Supp. 3d at 355.

66. *Id.* at 330.

67. EMI, now owned by Sony/ATV, is a publisher that withdrew its electronic rights from ASCAP in order to deal independently with Pandora. *See id.* at 339 (describing the ASCAP-EMI license negotiations).

68. *In re Pandora*, 6 F. Supp. 3d at 354.

69. *Id.* at 355.

70. *Id.* at 372.

71. Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 284 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016).

72. *Id.* at 283. The BMI consent decree prohibits BMI from "discriminating" in rates among similarly situated companies. *Id.* at 272. Because the court did not recognize many of Pandora's competitors as "similarly situated" (mainly because they are on-demand services), the rates for those companies are merely "confirmatory rates" rather than benchmarks. The court did not reveal the extent of its consideration of these rates or its processes for adjusting based on differences between the companies.

73. *Id.* at 291.

specter of mass copyright infringement liability if the parties failed to reach an agreement.[74] The ASCAP court was receptive to this argument. Finding that the Pandora negotiators did not factor in copyright liability as a primary motive,[75] the court ultimately held that the four-year, 2.5% rate offered by BMI reasonably reflected competitive market rates for the BMI license and was therefore consistent with the consent decree.[76] The *BMI* court held in favor of the 2.5% rate despite the fact that just one year earlier, the ASCAP court had decided on a rate of 1.85% for virtually identical rights—a decision affirmed by the Second Circuit weeks before the *BMI* decision issued. The *BMI* court disregarded the ASCAP decision because it claimed the ASCAP court did not have a chance to consider as many benchmarks as the *BMI* court.[77]

While the rates were relatively similar— 2.5% and 1.85% are less than than a percentage point apart—when taken in context, this disparity is significant. Pandora's gross revenues exceeded $900 million in 2014,[78] making this .65% difference amount to almost six million dollars annually for this license alone. The discrepancy in rates for ASCAP and BMI—nearly identical organizations licensing identical rights decided by courts within the same jurisdiction—is problematic. The fact that the ASCAP court rejected 2.5% as unreasonable while the *BMI* court welcomed a rate of 2.5% indicates that the rate courts have a problem assessing reasonableness accurately. Vast differences in rates like the one seen in the recent proceedings illustrate the need for new methodologies in rate setting that promote consistency in the determinations.

This inconsistency is not solely the fault of the respective courts. Rather, it is largely due to the courts' lack of information—specifically, a dearth of appropriate benchmarks on which to base their decisions. Since the court is unable to do its own independent fact-finding, it is limited by the benchmarks presented by the parties. If the parties do not present certain benchmarks to the courts, the courts lose the opportunity to determine accurately what constitutes a fair market rate. To date, no litigants have presented the court with international benchmarks. Part III discusses how broadening the rate courts' scope of inquiry to include international agreements in marketplaces free of the consent decrees would allow the courts to make more accurate assessments of fair market value.

### *II(b) The CRB*

The Copyright Royalty Board ("CRB") has a similar task to the rate courts. However, rather than determining whether the PRO rates are

74. *Id.* at 290–91. *See also* discussion *infra* Part V(c).
75. *Broad. Music*, 140 F. Supp. 3d at 290.
76. *Id.* at 283–84.
77. *Id.* at 285.
78. *Annual Financials for Pandora Media Inc.*, MARKET WATCH, http://www.marketwatch.com/investing/stock/p/financials (last visited May 18, 2017).

"reasonable," it instead must manufacture a licensing rate from scratch using a statutorily mandated procedure. Where the rate courts must only determine whether a given rate falls within a range of reasonableness, the CRB must determine precisely the rate at which a willing buyer and willing seller would transact in a hypothetical market void of the compulsory license.[79]

*II(b)(i) A brief history of the CRB rate decisions*

The CRB (known as the Copyright Arbitration Royalty Panel until 2004) has been deciding the statutory rate for public performances in sound recordings between webcasters and rights holders since 1998. In that year, Congress passed the Digital Millennium Copyright Act and gave non-interactive services (webcasters) a compulsory license for the right of online public performance.[80] The CRB has determined the rate for sound recordings on four occasions (known as *Webcaster I, II, III,* & *IV*).[81] After the first two CRB determinations set exceedingly high rates, some webcasters petitioned Congress to intervene because they claimed the proposed rates would have made it impossible to operate.[82] Congress responded by passing two laws, the Small Webcasters Settlement Act of 2002 and the Webcaster Settlement Acts of 2008 and 2009, which essentially forced the royalty collection agency (SoundExchange) to negotiate lower rates.[83] Pandora took advantage of this congressional intervention and operated on a "pureplay" license agreement lower than the rate set by the CRB through the end of 2015.[84] Thus, many have pointed out that Pandora historically has taken advantage of below-market rates.[85]

*II(b)(ii) The Willing Buyer, Willing Seller (WBWS) Standard*

Section 114 of the Copyright Act specifies the CRB standard for determining the rate for the public performance of sound recordings:

> "[T]he 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

79. *See* 17 U.S.C. § 114. The CRB has a particularly difficult task considering its inquiry is limited to the benchmarks and arguments that the interested parties present. Like the rate courts, it is not allowed to subpoena records *sua sponte* or conduct fact finding on its own. *Discovery in Royalty Rate Proceedings*, 37 CFR § 351.5.

80. *See* Eisenach, *supra* note 41, at 10–11.

81. *See id.* at 13; Ryan Faughnder, *Copyright Royalty Board Hikes Rates Pandora Must Pay*, L.A. TIMES (Dec. 16, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-pandora-royalty-rates-20151216-story.html.

82. Eisenach, *supra* note 41, at 11–12.

83. *Id.*

84. *Id.* at 26–27. The "Pureplay" agreement is the settlement agreement reached as a result of the congressional intervention. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 52. "Pureplay rate" refers to the rates agreed to in that agreement.

85. *Id.* at 16.

> willing buyer and a willing seller. . . the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties . . . 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. . .'[86]

Based on these guidelines, each proceeding has involved scores of economic and industry experts, packed briefing schedules, and a full written opinion and appeals process for each decision.[87] During *Webcaster* I, the CRB made difficult decisions about how to construe the willing buyer, willing seller ("WBWS") standard. Although the parties agreed that the hypothetical buyers were the webcasters, the identity of the "sellers" generated controversy.[88] The CRB ultimately decided that the hypothetical sellers consisted of record companies competing to offer blanket licenses to their repertoires.[89] This decision has remained in effect through the current *Web IV* proceedings.[90] Importantly, the CRB also determined that a benchmark based on the rate for musical works (about one twelfth of what webcasters pay for sound recordings[91]) was insufficiently analogous to be helpful in determining the rate.[92] Finally, the *Web I* court picked a per-play fee model over the percentage-of-revenue model used in the musical-work licensing rate.[93] Though the

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86. 17 U.S.C. § 114(f)(2)(b) (2015). This section sets out additional considerations:

> ". . . **(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."

*Id.* However, the CRB in *Webcaster I* determined that these factors were fully incorporated into any relevant benchmarks it was going to consider, so it did not need to make any further adjustments based on these additional factors. *See* Eisenach, *supra* note 41, at 19.

87. Eisenach, *supra* note 41, at 16.

88. *Id.* at 18.

89. *Id.* An organization's "repertoire" is their collection of songs and albums to which they have licensing rights.

90. *See* Introductory Mem. to the Written Direct Statement of Pandora Media, Inc., In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings, No. 14-CRB-0001-WR (2016-2020), *available at* http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/Pandora/1_Introductory_Memorandum_PUBLIC_pdf.pdf [hereinafter Pandora *Web IV* Intro Memo].

91. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 92.

92. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240–01, § IV(a)(3) [hereinafter *Web I*]; *see* Eisenach, *supra* note 41, at 19.

93. Eisenach, *supra* note 41, at 20. Many other countries use a system of "equitable remuneration," similar to a percentage-of-revenue model, for compensating artists for the use of sound recording performance rights. *See* Annabelle Gauberti, *Neighboring Rights in the Digital Era: How the Music Industry can Cash In*, CREFOVI (July 26, 2015),

Librarian of Congress made an adjustment to the initial CRB rates, the ruling was upheld on appeal and remained in effect until the *Web II* proceedings.[94]

The *Web II* decision in 2007 confirmed many conclusions from the *Web I* court and further elucidated the WBWS model for determining sound recording rates. This decision was particularly noteworthy because SoundExchange introduced the "Interactive Webcasting Market Benchmark."[95] This was the first time the CRB used a benchmark based on interactive services instead of non-interactive services, like Pandora.[96] This shift was significant because the CRB stepped outside the bounds of strictly analogous services and determined the rate based on a different sort of webcasting service. *Web II* was affirmed on appeal, and the D.C. Circuit supported the CRB's determination of the per-play rate and its use of the interactive service benchmark.[97] The D.C. Circuit also agreed with the CRB that the per-play rate did not have to guarantee that webcasters could make a profit, signifying that the market rate analysis does not take into account the effect of high licensing rates on webcasters.[98] Subsequently, the webcasters (including Pandora, which had not participated in *Web II*) petitioned Congress for relief from the CRB's determination and were provided alternative, lower rates under the Webcaster Settlement Acts ("WSAs") to ensure they could remain viable.[99]

The *Web III* decision in 2011 involved a similarly rigorous approach to determining fair market value, but the decision had a minimal impact on the market because the major webcasters were still subject to the lower rates mandated by the WSAs.[100] Therefore, many webcasters, including Pandora (which by that time had grown to be the largest U.S. webcaster), did not even participate in the proceedings. The CRB's decision once again set rates on a per-play basis, with the rate largely based on the interactive services benchmark.[101]

The *Web IV* decision, issued in December 2015,[102] set the current rates for

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http://crefovi.com/articles/intellectual-property/neighbouring-rights-in-the-digital-era-how-the-music-industry-can-cash-in/ (comparing copyright systems in the UK, France, Germany, and the United States).

94. Eisenach, *supra* note 41, at 21–22. Even though these rates were in effect, small webcasters were exempt under the Small Webcaster Settlement Act and did not have to pay the CRB-determined rate.

95. *Id.* at 22–23.

96. Interactive services allow consumers to have on-demand access to streaming music rather than having no control over the songs played or being able to partially influence the broadcast. *See Arista Records*, *supra* notes 44–45 and accompanying text.

97. *Id.*

98. *Id.*

99. Eisenach, *supra* note 41, at 24–25.

100. *Id.* at 27.

101. *Id.*

102. Ryan Faughnder, *Copyright Royalty Board Hikes Rates Pandora Must Pay*, L.A. TIMES (Dec. 16, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-pandora-royalty-rates-20151216-story.html.

digital webcasters, which will remain in force through 2020.[103] Pandora, participating in the proceedings for the first time ever, was particularly interested in the outcome: up until that time, the company was paying over 47% of their revenue in content acquisition.[104] Some industry analysts claimed the company's future was riding on the CRB decision.[105] The outcome was largely heralded as a victory for webcasters.[106] Commercial webcasters now pay a rate of .17 cents per stream, which is only a slight jump for Pandora from what it was paying under the Pureplay agreement.[107] Pandora, which was requesting .11 cents per stream, displayed enthusiasm.[108] SoundExchange, which was proposing a rate of .25 cents per play, expressed disappointment over the ruling.[109] The CRB also rejected SoundExchange's proposed linear annual rate increases, which the court had previously accepted.[110]

## III. BENCHMARKS

The following section gives a brief summary of which benchmarks the rate tribunals have used to determine a fair price for music.

### *III(a) Benchmarks in the rate court proceedings*

With respect to rate determinations for musical works in webcasting, the most recent proceedings involving Pandora, ASCAP, and BMI provide helpful insights into the current state of benchmark analysis by webcaster rate courts.[111]

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103. *Id*.

104. *See Two Scenarios That Can Impact Pandora's Valuation Greatly*, FORBES (Jun. 11, 2015), http://www.forbes.com/sites/greatspeculations/2015/06/11/two-scenarios-that-can-impact-pandoras-valuation-significantly/.

105. *Id*.

106. *See, e.g.*, Leon Lazaroff, *Pandora Can Claim Big Victory with Streaming Rate Decision*, STREET (Dec. 16, 2015) https://www.thestreet.com/story/13398099/1/pandora-hit-with-higher-costs-as-royalty-board-hikes-streaming-rates.html; *see also* Jeff John Roberts, *Pandora's Shares Soar After Favorable Music Royalty Ruling*, FORTUNE (Dec. 16, 2015), http://fortune.com/2015/12/16/pandora-royalty-decisions/.

107. *See* Ben Sisario, *Streaming Royalties Rise, but Not as High as Music Industry Wanted*, N.Y. TIMES (Dec. 16, 2015), http://www.nytimes.com/2015/12/17/business/media/streaming-royalties-rise-but-not-as-high-as-music-industry-wanted.html?_r=0; Kevin Erickson, *10 Important Things To Know About The Recent Copyright Royalty Board Decision*, HYPE BOT (Dec. 28, 2015), http://www.hypebot.com/hypebot/2015/12/10-important-things-to-know-about-the-copyright-royalty-board-decision.html.

108. *Id*.

109. *See* Sisario, *supra* note 107.

110. *See* In re Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings, at 83, *available at* https://www.loc.gov/crb/web-iv/web-iv-determination.pdf [hereinafter *Web IV*] ("The Judges find that SoundExchange has failed to make a sufficient factual showing that would support the linear $0.00008 annual rate increase proposed by Dr. Rubinfeld. The Judges find it dispositive that Dr. Rubinfeld acknowledged that his opinion in this regard was neither based on theory nor on empirical analysis.").

111. *See supra* Part II(a)(i)–(ii).

Due to a flurry of "publisher withdrawals" around 2011, where major music publishers retracted their digital rights (as opposed to terrestrial broadcasting rights) from ASCAP and BMI, the rate courts had a fairly broad selection of direct-deal benchmarks between Pandora and numerous publishers.[112] The two rate courts assigned different weights to these deals, which ultimately resulted in the different rates, but the respective courts confined their benchmark inquiry mainly to the direct publisher deals and historic agreements between the parties. While the courts considered the publisher deals and the previous agreements to be the most probative, they also considered (1) rates between terrestrial radio stations and the PROs,[113] (2) a privately negotiated deal between a smaller, third PRO ("SESAC") and Pandora,[114] and (3) deals between competitors such as Spotify, Rdio, iTunes Radio and Rhapsody and the PROs.[115] However, assuming the unique circumstances surrounding the 2011 publisher withdrawals do not recur, future rate court proceedings are likely to encounter a massive dearth of benchmark agreements. This will likely exacerbate the rate courts' difficulty in determining consistent rates for similar rights.

### *III(b) Historical CRB Benchmarks*

From *Web I* to *Web III*, the webcasters battled with SoundExchange[116] (or the RIAA, in earlier proceedings) over what rates constituted adequate benchmarks. Over these three proceedings, there were roughly six different categories of benchmarks offered and discussed: (1) the public performance licensing rate for musical works (rates paid to ASCAP, BMI, etc.);[117] (2) voluntarily negotiated domestic agreements between SoundExchange (or the RIAA) and non-interactive webcasters;[118] (3) the interactive services benchmark;[119] (4) agreements between satellite radio companies and SoundExchange under the Webcaster Settlement Acts;[120] (5) agreements between terrestrial radio companies with online streaming content and

112. *Id.*

113. *See* In re Pandora Media, Inc., 6 F. Supp. 3d 317, 371 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015); Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 289 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016).

114. *In re Pandora*, 6 F. Supp. 3d at 351.

115. *See id.*; *Broad. Music*, 140 F. Supp. 3d at 283–84.

116. The webcasters litigated against the RIAA itself in earlier proceedings before SoundExchange was created. *See Web I*, *supra* note 92 (where the RIAA is the litigant rather than SoundExchange).

117. *See, e.g.*, *Web I*, *supra* note 92, § IV(a)(3).

118. *See, e.g., id.*

119. *See, e.g.*, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084–01, § IV(C)(1)(B)(i)–(ii) [hereinafter *Web II*].

120. *See, e.g.*, *Web III*, *supra* note 23, § II(B)(3)(b)(ii). Although the court characterized these agreements as "useful gauge[s] of the weight to be assigned to the rates suggested by the interactive webcasting benchmark" rather than "benchmarks" *per se*, this Article considers these agreements "benchmarks" within the broader definition of the term.

SoundExchange negotiated under the WSAs;[121] (6) "corroborative data" benchmarks of different types of musical rights licensing such as music "clip" licensing and permanent download costs.[122]

*III(c) Web IV proceedings*

The recent *Web IV* proceedings were arguably the most contentious in history because they involved Pandora, now America's largest webcaster,[123] for the first time. Pandora offered a new benchmark it claimed was "of a kind not presented in the [previous] proceedings": a direct agreement between Pandora and Merlin B.V., a global rights agency that represents thousands of independent record labels.[124] Pandora was excited about this benchmark because it was an example of what a willing buyer and seller actually transacted for outside of the statutory license for the exact rights at issue in the CRB proceedings. Similarly, iHeartMedia offered a privately negotiated deal between themselves and Warner Music Group, a major record label.[125] SoundExchange, representing the interests of the record labels, heavily criticized the services' proposed benchmarks,[126] countering that its interactivity benchmark was more appropriate than ever given the "convergence" of interactive and non-interactive services.[127] SoundExchange also offered some of its own examples of licensing deals between labels and supposedly non-interactive services.[128]

The CRB began its analysis by discussing SoundExchange's interactive

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121. *See id.*

122. *See Web II*, *supra* note 119, § IV(C)(1)(b)(ii).

123. See *Web IV*, *supra* note 110, at 17.

124. *See* Pandora *Web IV* Intro Memo, *supra* note 90, at 3–4. *See also* Anna Washenko, *Pandora's Merlin Deal Affirmed as Admissible Benchmark for CRB Rate-setting*, RAIN NEWS (Sept. 21, 2015), http://rainnews.com/pandoras-merlin-deal-affirmed-as-admissible-benchmark-for-crb-rate-setting/.

125. *See* Introductory Memorandum to the Written Direct Case of iHeartMedia, Inc., In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV), No. 14-CRB-0001-WR (2016–2020), at 2, *available at* http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/iHeartMedia/Vol%201_Introductory%20Documents/Vol_1_01_2014_10_07_Introductory_Memo.pdf. Additionally, Sirius XM offered the rate it agreed to in 2009 as a result of the Webcaster Settlement Acts, as its sole benchmark. *See Web IV*, *supra* note 110, at 173.

126. *See generally Web IV*, *supra* note 110, at 42–43 (describing the adversarial process between economic experts who present varying pictures of the hypothetical market to the CRB). The decision explains and discusses nine different objections to Pandora's Merlin benchmark. *Id.* at 106–115. It also discusses and explains four different objections to the iHeart/Warner benchmark. *Id.* at 146–153.

127. *See* Introductory Memorandum to the Written Direct Statement of SoundExchange, Inc., In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV), No. 14-CRB-0001-WR (2016–2020), at 2, *available at* http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/SX/1A_Introductory_Memorandum.pdf. Briefly, the "convergence" argument is that interactive and non-interactive services are becoming closer substitutes for one another, so the Interactive Services Benchmark is more analogous now than it was when the services were not considered substitutes.

128. *See Web IV*, *supra* note 110, at 57.

service benchmark. The judges considered both sides' extensive arguments for and against the benchmark,[129] and ultimately decided to significantly curb the applicability of the interactive services benchmark.[130] The judges held that the interactive services benchmark only applied to the market for *subscription* services (which constitutes less than 5% of Pandora's listeners[131]), since consumers for non-subscription webcasting services comprise a different market than the consumers who pay for subscription services.[132] The decision to limit the interactivity benchmark likely played a large part in the low per-play rates compared to what SoundExchange proposed.[133] The CRB also wholly discounted SoundExchange's "corroborative" benchmark agreements between Apple Music, various other services, and the labels.[134]

The judges next turned to Pandora's Merlin benchmark. They found the Merlin rate to be instructive for two reasons. Not only did it provide a "headline" benchmark rate for per-stream licenses the court could use in its analysis, it also introduced the concept of "steering."[135] Pandora claimed that steering—the ability to increase the number of times certain songs are played on Pandora Radio in exchange for a discounted rate for those songs—gave them unprecedented market power.[136] This newfound market power allowed Pandora to command much lower licensing rates in the hypothetical marketplace than it had been able to in the past.[137] SoundExchange levied considerable criticisms against the Merlin benchmark.[138] But, by and large, the judges were receptive to the benchmark and viewed the steering argument as useful in setting the rate used for indie labels.[139]

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129. The *Web IV* decision dedicates over forty pages to discussing arguments for and against the interactivity benchmark. *See id.* at 44-87.

130. *Id.* at 67.

131. Trefis Team, *Why the Subscription Business is Important for Pandora and Where is it Going?*, FORBES (Sept. 4, 2015), http://www.forbes.com/sites/greatspeculations/2015/09/04/why-the-subscription-business-is-important-for-pandora-and-where-is-it-going/#48be685b65ce.

132. *Web IV*, *supra* note 110, at 67–71.

133. SoundExchange had initially proposed a per-stream rate of $.0025 which progressed to $.0029 over the course of five years, *id.* at 44, but the CRB ultimately mandated a flat rate of $.0017 for commercial webcasters. *Id.* at 187.

134. *Id.* at 83. With respect to the Apple Music deal, the judges did not believe there was enough evidence to isolate the portion of the deal that was focused exclusively on its non-interactive music service, as opposed to other services it provided. *Id.* at 83–84. As for the deals with other services—such as Nokia MixRadio, Rhapsody UnRadio, and Beats The Sentence—the judges concluded that none of them were appropriately analogous to webcasting services like Pandora and iHeartRadio. *Id.* at 85–87.

135. *Id.* at 92–95.

136. *Id*.

137. *Id*.

138. *See id.* at 57.

139. "Therefore, the Judges consider the rate established by the Pandora/Merlin Agreement to establish only one guidepost (*i.e.*, a relevant financial point of reference) to a statutory rate. The Judges are informed as to the limited weight of this rate in the ultimate statutory rate they shall set, by the fact that Indie sound recordings reflect approximately [redacted]% of the sound recordings played on Pandora." *Id.* at 133.

As for a major-label benchmark, the judges concluded the iHeartRadio deal with Warner, which included steering arrangements, was a "useful benchmark that, after adjustment, is probative of the rate that would be paid by a Major, as a willing seller/licensor, to a non-interactive service, as a willing buyer/licensee."[140] Again, SoundExchange objected vociferously to the use of this benchmark.[141] But an actual deal negotiated for the exact rights at issue was too instructive for the judges to ignore. In the end, the judges seemed to weigh the iHeart/Warner and Pandora/Merlin deals heavily, while SoundExchange's interactivity benchmark was limited to its usefulness in determining a rate for subscription services. Though it is impossible to discern exactly how much each of these rates influenced the judges' ultimate decision (the benchmark rates are all redacted from public view), the judges gave useful guidance to future litigants on the court's preferred benchmarks and how to effectively present these benchmarks in court.

## IV. IMPROVEMENTS TO RATE PROCEEDINGS: AN INTERNATIONAL PERSPECTIVE

This section outlines a simple suggestion to improve the accuracy of rate determinations by increasing the number of benchmarks courts can consider. Recall the Safeway corn example from the introduction. If the court determining corn prices had only one benchmark to use in determining a rate, it is unlikely to consistently produce a fair, accurate price for corn. However, with many benchmarks showing a range of rates, the court could more accurately decide a fair price. The same is true in the music rate determination context. Without these benchmarks, both parties are forced to make strained comparisons to dissimilar services and products and then convince the court that their benchmarks are in fact accurate. With the right adjustments, benchmarks from foreign countries offer an untapped resource to the rate tribunals for use in determining the price of music.

### *IV(a) How foreign benchmarks can help*

In proceedings before the rate courts and the CRB, both sides offer benchmarks that fit their narratives and try to frame the other side's benchmarks as being unrepresentative.[142] The rate tribunals then try to dig through the rhetoric and economic analyses to decide on a rate they believe is consistent with the law.[143] This system is costly[144], confusing, and widely criticized.[145] It has fixed disparate rates for identical rights[146] and elicited two

140. *Id.* at 157.
141. *Id.* at 57.
142. *See id.* at 42–43.
143. *See id.*
144. *See, e.g.*, *Web IV*, which produced tens of thousands of pages of briefing on benchmark analysis and resulted in a written CRB decision spanning over 200 pages.
145. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 81–83, 92–95, 102, 155, 170–72, 197–98.

separate appeals to Congress for relief from high rate determinations.[147] While there may be some problems that only Congress can address adequately, the legal, business, and music communities must work together to find practical solutions for rate setting within the current statutory framework.[148]

A consistent theme in the rate proceedings is that too few benchmarks are presented for consideration, leaving the courts with a shrouded view of the hypothetical market.[149] Expanding the field of benchmarks presented to these bodies would give the courts a more comprehensive set of guideposts to assist in making their decisions. Although it is impossible to pinpoint the exact rate at which real buyers and sellers would transact, presenting a broad range of rates is the best way to reach accurate decisions.[150]

Introducing privately negotiated licensing deals between both American and international webcasters and *foreign* licensing bodies and record labels would help American rate decisions more accurately reflect the value of rights in a hypothetical market. By focusing exclusively on the American market, courts ignore a whole universe of benchmarks from countries with comparable markets that may offer insight into American market rates.[151] Many countries follow music copyright systems without compulsory licensing.[152] This means

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146. *See supra* Part II(a)(iii).

147. Vanessa Van Cleaf, *A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 364–71 (2010).

148. One of these solutions may be for the respective parties to simply come to a workable arrangement amongst themselves because the rate tribunals are so unpredictable. In fact, the PROs may pursue this strategy more aggressively going forward. Recently, in exchange for Pandora's withdrawal of their appeal of the rate court's *BMI* decision, both ASCAP and BMI privately negotiated long-term licensing deals with Pandora. *See* Ed Christman, *Pandora Signs Mutually Beneficial Licensing Deals With ASCAP, BMI*, BILLBOARD (Dec. 22, 2015), http://www.billboard.com/articles/business/6820722/pandora-licensing-deals-ascap-bmi.

149. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 172 (referring to the search for adequate benchmarks as an "elusive enterprise").

150. *See id.* (suggesting that "copyright policy . . . will be better served by a greater opportunity to establish rates with reference to real market transactions").

151. *See id.* (recommending that the CRB consider "all potentially informative benchmarks").

152. For example the United Kingdom and Australia lack compulsory licensing for most types of commercial services, including webcasting. For the U.K., see Copyright, Designs and Patents Act, 1988 c. 48, §§ 20, 116–23 (Eng.) (describing the exclusive right to broadcast sound recordings and musical works, and the option of appeal to the Copyright Tribunal in the event the parties cannot negotiate a rate, respectively); *see also About Us*, COPYRIGHT TRIBUNAL, https://www.gov.uk/government/organisations/copyright-tribunal/about (last visited May 18, 2018) (describing how the Copyright Tribunal can intervene if the PROs refuse to license certain organizations, implying a lack of any sort of compulsory license). For Australia, see *Copyright Act 1968* §§ 31, 85, 97 (Austrl.) *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id= 226340 (describing an exclusive right of public performance for owners of a musical work or sound recording without an exception for compulsory licensing). Germany is another example of a country without a statutory licensing scheme. *See* Annabelle Gauberti, *Neighboring Rights in the Digital Era: How the Music Industry Can Cash in*, CREFOVI (Jul. 26, 2015), http://crefovi.com/articles/intellectual-property/neighbouring-rights-in-the-digital-era-how-the-music-industry-can-cash-in/ (comparing copyright systems in the UK, France, Germany, and the

that there are many more real-world examples of rates negotiated between willing buyers and willing sellers than the tribunals have traditionally considered. By adopting a straightforward comparative strategy, the tribunals can avoid the "crazy acrobatics"[153] of comparing interactive and non-interactive rates, determining the influence of the statutory rate in privately negotiated deals,[154] and assessing the level of coercion present in a given deal due to the threat of copyright infringement for failure to deal.[155] If economic adjustments were made for market differences, webcaster licensing deals from countries without a statutory license would provide helpful comparisons.

To solve similar problems, courts in other contexts have turned to foreign markets for guidance. For example, when courts make damages calculations for antitrust violations, they sometimes turn to foreign markets where the antitrust violations were not present for an indication of how the violation affected pricing.[156] Using a so-called "yardstick approach," courts look to similar product markets for how a product was priced in the absence of the anticompetitive conduct to determine damages for that conduct.[157] Once a suitable yardstick is found, adjustments are made to account for market differences in that country compared to the United States.[158] Professor Rubinfeld, who has written about the yardstick approach in the context of antitrust damages, suggests that adjustments based on the number of firms and the degree of competitiveness in the foreign market could make the yardstick market rate comparable to the American market.[159]

This sort of comparison is certainly possible with music licensing rates. Determining antitrust damages by creating a hypothetical "but for" market is analogous to the CRB and rate courts' goal of setting market rates that would exist but for the complications associated with compulsory licensing regimes and consent decrees. The fact that a foreign country has a different market environment simply means that adjustments to the rate must be made. It does not mean foreign rates should be discounted completely. For example, if a court

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United States). Note that a right of equitable remuneration, which allows performers or producers a right to collect revenue from record labels that license out their rights, may be available in some countries without statutory licensing schemes. *Id.*; *see also* email correspondence with Kevin Montler, Legal Director of Global Music at Google (on file with author) (confirming that many other countries do not have compulsory licensing schemes).

153. Pandora *Web IV* Intro Memo, *supra* note 90, at 5.

154. *See generally Web IV*, *supra* note 110, at 32 (SoundExchange has argued that the statutory rate influenced the Merlin deal in *Webcaster IV* and claimed that it was below-market-rate as a result.).

155. Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 271 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016) (describing how the services argued before the rate courts that the direct deals with the publishers were coerced).

156. Daniel L. Rubinfeld, *Antitrust Damages*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 379–81 (Einer Elhague ed. 2012), *available at* https://www.law.berkeley.edu/files/Antitrust_Damages_Rubinfeld(1).pdf.

157. *Id.*

158. *Id.*

159. *Id.*

were using a licensing deal between a Japanese record label and webcaster as a benchmark, they could adjust the rate based on the webcaster's popularity, number of competitors, and any substitute products that exist in that market to make it comparable to the American rate.

Further, the CRB in the *Web IV* decision indicated a strong preference for benchmark agreements negotiated between parties for the *specific* rights at issue.[160] The judges in *Web IV* were persuaded by actual deals between webcasters and labels as opposed to interactive service deals (e.g., between Spotify and Warner) that required complicated adjustments. The diminished role of the interactive services benchmark in providing useful guidance to the CRB judges leaves a tremendous void in the pool of available benchmarks. This is especially true for SoundExchange, who relied heavily on the interactive services benchmark and whose only other "corroborative" benchmarks were disregarded entirely.[161] The recent *Web IV* decision makes the next CRB proceeding, scheduled for 2020, an opportune time to explore other benchmarks between non-interactive webcasters and labels. The dearth of relevant benchmarks available in the United States (Pandora/Merlin and iHeart/ Warner) in the last proceedings indicates that turning abroad for benchmarks is critical.

*IV(b) The rate tribunals have the authority to review foreign benchmarks*

The consideration of foreign benchmarks is within the CRB's scope of review. In the *Web I* proceedings, the webcasters offered examples of government-imposed rates in foreign countries, but the CRB quickly dismissed those rates.[162] On appeal to the Library of Congress ("LOC"), the broadcasters challenged the CRB's failure to consider these foreign benchmarks.[163] The LOC held that the benchmarks were "equitable" rate determinations and were not comparable to the American market rate assessments, therefore affirming the CRB's dismissal of the foreign benchmarks.[164]

However, the LOC's summary affirmation of the court's dismissal of the foreign rates does not provide a strong indication of the court's willingness to consider foreign benchmarks in the future. The foreign rates previously offered were not privately negotiated agreements like the ones this Article suggests. Rather, they consisted of equitable licensing rates between government licensing bodies and webcasters.[165] Equitable determinations—which seek to

160. *See supra* Part III(c).

161. *See Web IV*, *supra* note 110, at 92–95.

162. *See Web I*, *supra* note 92, § IV(A)(3).

163. *Id.*

164. *Id.* "Equitable" rate determinations are different than fair market determinations in that they seek to provide fair compensation to all parties involved. Fair market rates are those that would be agreed upon between a willing buyer and willing seller without regard to the equitable distribution of resources between those parties.

165. *Id.*

allocate licensing revenue to all parties involved based on principles of fairness—are not probative of what prices a willing buyer and willing seller would negotiate in a free market. Further, the LOC did not forbid the consideration of foreign benchmarks; it merely upheld one tribunal's decision to disregard them.[166] There is no language in the Copyright Act limiting the types of benchmarks the CRB can consider.[167] The statute simply directs the CRB to "consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements[,]" without limiting "comparable" benchmarks to domestic ones.[168] Given the consistent lack of reliable benchmarks, litigants in CRB litigation should consider evaluating the usefulness of foreign benchmarks.

Similarly, there is no indication that the rate courts, which decide the musical works licensing rates, cannot seriously consider foreign benchmarks. The consent decrees do not prevent the rate courts from considering any specific types of benchmarks.[169] In fact, the Copyright Act implicitly condones their use. In the entire text of the Copyright Act, Congress specified a single guideline governing appropriate benchmarks: the rate courts may not consider rates for the public performance of sound recordings.[170] A principle of statutory interpretation, *expressio unius est exclusio alterius*, suggests that a specific exclusion listed in a statute implies a lack of other such exclusions.[171] Thus, the rate courts are free under the applicable statute to consider any benchmarks presented to them except for sound recording rates.

*IV(c) Finding adequate foreign benchmarks and adjusting them properly*

A potential strategy for determining comparable music markets is to examine major international music markets outside of the United States. The top ten biggest recorded music markets in the world, by music-based revenue, are the United States, Japan, Germany, the U.K., France, Australia, Canada, South Korea, Brazil and Italy.[172] Of these countries, only the U.K., Canada, Australia, and South Korea have markets comprising a majority of digital music sales in 2014 as opposed to physical sales.[173] . Markets with high levels of digital music sales are more likely to be analogous to the American market,

166. *Id.*

167. 17 U.S.C. § 114(f)(2)(b) (2015).

168. *Id.*

169. *See generally*, Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 196–98 (S.D.N.Y. Mar. 3, 2014) (providing background and summary of the most modern iteration of the consent decree with Pandora).

170. § 114(i).

171. *See* 73 AM. JUR. 2D *Statutes* § 120 ("When a statute specifically provides for exceptions, items not excluded are covered by the statute."); West's ALR Digest Statutes k1377, ALRDG 361K1377 ("The express mention in a statute of one exemption precludes reading others into the statute.").

172. RECORDING INDUS. ASS'N JAPAN, STATISTICS AND TRENDS, RIAJ Yearbook 24 (2015) *available at* http://www.riaj.or.jp/f/pdf/issue/industry/RIAJ2015E.pdf.

173. *See id.*

making benchmarks from those areas more analogous and thus useful in rate proceedings. While this is by no means a perfect process for identifying markets on which to focus, it provides a useful starting point. Additionally, countries such as Canada and Australia have robust webcasting markets that would provide American litigants with useful benchmarks based on analogous services.[174]

A party searching for a foreign benchmark must consider several potential adjustments to the foreign rate that would make it useful as a benchmark in American proceedings. The more distinct the country's music market and licensing laws, the more difficult it becomes to adjust a foreign rate to reflect potential differences. For this reason, foreign benchmarks must be drawn from countries with similar music markets that place similar weights on analogous rights.

One of the biggest challenges in finding a suitable foreign benchmark is finding foreign systems that parallel the United States' allocation of licensing fees among different rights-holders. This is because rates for one right affect and put pressure on rates for other rights. On the one hand, if acquisition of certain rights is very expensive, rights-holders may not be able to reasonably demand compensation for other rights, since there is only so much the webcaster can pay before going out of business.[175] On the other hand, rights-holders can view high rates for one right as an indicator that their right is worth more. In fact, during the Pandora-publisher negotiations of 2011, one of the rights-holders' principle reasons for demanding higher musical-work rates was that record labels were already demanding high rates for sound recording rights.[176]

In both scenarios, a litigant searching for foreign benchmarks must consider the costs for each right *relative to other rights* implicated in

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174. For Canada, see Vanessa Azzoli, *The Definitive Guide to Streaming Music Services in Canada*, GEEKS & BEATS (Aug. 31, 2014), http://www.geeksandbeats.com/2014/08/the-definitive-guide-to-streaming-music-services-in-canada/; *see also Digital Music*, MUSIC CANADA, http://musiccanada.com/digital-music/ (last visited May 18, 2017). For Australia, *see* Luke Hopewell, *The Best Music Streaming Services for Australia*, GIZMODO (Oct. 19, 2015), http://www.gizmodo.com.au/2015/10/the-best-music-streaming-services-for-australia/; *see also* Glenn Peoples, *Australia's Music Streaming Market is Jam-Packed—But Likely Not for Long*, BILLBOARD (Sept. 19. 2014), http://www.billboard.com/articles/6258929/australia-streaming-services-uphill-battles.

175. If a webcaster tells a certain rights-holder that they are already paying X% of their revenue for licensing rights, regardless of who they are paying it to, any large increase could potentially put them out of business. Thus, since there are already certain deals in place, the last rights-holder to secure a deal with the webcaster is stuck between charging low rates for their rights or charging high rates and forcing the webcaster out of business (at which point the rights-holder gets no revenue).

176. *See* In re Pandora Media, Inc., 6 F. Supp. 3d 317, 342–50 (S.D.N.Y. 2014) (describing rate negotiations between Sony, UPMG and Pandora, which largely focused on the disparity between rates for the public performance of sound recordings versus musical works.). A Sony executive even admitted that if Pandora were paying less for the public performance of sound recordings, Sony would correspondingly request a lower rate for musical works. *Id.*

webcasting. It would not make sense to select a benchmark from a country where webcasters are paying a huge amount for, say, the reproduction right in sound recordings, but where they pay a minimal amount for the public performance right in sound recordings. In that case, the fact that webcasters are paying so much for the reproduction right very likely affects the rate for the public performance right. Rates are intimately connected to each other, which makes comparing foreign rates to American ones inherently difficult unless services are paying for each right in roughly the same proportions as they do in America. Therefore, finding rates from countries where licensing revenue is allocated similarly to how it is distributed in the American system is important.

Further, foreign benchmarks must be adjusted for certain idiosyncrasies in the United States' licensing regime. One such idiosyncrasy is the CRB's decision to bundle the reproduction and public performance rights in sound recordings. Many other countries have kept these rights separate because they have different rate-deciding procedures for the two rights. For instance in Canada, the reproduction right in sound recordings is actually more valuable than the public performance right in sound recordings.[177] This is one reason why Canadian benchmarks might be difficult to use in American rate proceedings.[178]

While the reasons behind the unique development of the American licensing regime are beyond the scope of this Article, it is important to note that finding foreign systems that allocate revenue similarly and function under a framework similar to the United States may be crucial to finding acceptable foreign benchmarks.[179] Once these sorts of agreements are found, adjusting the benchmarks for market differences is a relatively straightforward process that has been used and explored in other areas of the law.[180] As described above, there are many potential marketplaces similar to the United States in the world, making the search for adequate foreign benchmarks a manageable task.

## V. OPPOSING VIEWPOINTS

Several potential obstacles exist that might bar consideration of foreign benchmarks in American proceedings: (a) differences in foreign markets and legal systems; (b) difficulty of foreign discovery; and (c) the availability of extreme statutory damages for copyright infringement in the United States. The following section attempts to address these objections.

### *V(a) Differences in foreign markets and legal systems*

The most obvious objection, hinted at in the previous section, is the complex differences between the American music market and licensing

177. *See infra* note 191.
178. *Id*.
179. *See* discussion *infra* Part V(a).
180. *See infra* Part V(a).

structure and the systems in every other country in the world. An argument could be made that these differences should bar *any* foreign benchmark from being considered in the rate tribunals. The United States is by far the biggest music market in the world. In 2012, the United States accounted for nearly a third of the entire global music industry revenue,[181] and some have called the United States "the most innovative and influential music culture in the world."[182] Perhaps because of the unique market, aspects of music copyright law in the United States have developed into a morass of carve-outs, exceptions, additions, withdrawals, and exemptions that no other country precisely replicates.[183] Some might argue that the U.S. market and its copyright laws are so unique that any benchmark from another country is inherently unusable.

This argument does not withstand scrutiny. While it would by no means be justifiable to look at a rate in a comparable market and summarily adopt that rate without further thought, it would be equally unwise to quickly cast aside guideposts from other countries that could help direct the American statutory rates. Economic experts in rate-setting litigation should more closely examine the peculiarities of the US market and articulate appropriate methods for rate adjustments rather than merely settling for the limited benchmarks the tribunals have considered previously.

Such adjustments would be no more complex or abstract than the ones the rate tribunals currently consider. In the *Web IV* proceedings, scores of expert witnesses argued over adjustments to the interactive services benchmark based on highly abstract principles. The experts attempted to derive a per-song value difference between a song a listener can directly choose (an interactive stream) and one that the listener can at most influence but cannot predict (a non-interactive stream).[184] The interactive benchmark has been criticized for its complexity and ambiguity.[185] But the CRB judges have refused to reject it outright because "[t]he Judges are more concerned with the importance, or weight, of any given criticism of a benchmark than they are with the number of

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181. *Statistics and Facts About Music Industry in the U.S.*, STATISTA, http://www.statista.com/topics/1639/music/ (last visited May 18, 2017).

182. COPYRIGHT OFFICE REPORT, *supra* note 14, at 1.

183. *See id.* at 113; *see also* Daniel Gervais, *Keynote: The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 591, 612 (2011) ("[T]here are large chunks of section 114 that are utterly incomprehensible to most people, because over the years Congress has spliced and diced them, and then hemstitched them back together.").

184. *See supra* Part III(c).

185. *See, e.g.*, Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 271 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016) (referring to the interactivity adjustment as "crazy acrobatics"); COPYRIGHT OFFICE REPORT, *supra* note 14, at 172 (referring to the search for adequate benchmarks as an "elusive enterprise"); Matt Schruers, *Competition, Regulation, and Market-based Prices in Copyright Rate Setting*, PROJECT DISCO (Aug. 17, 2015), http://www.project-disco.org/competition/081715-competition-regulation-and-market-based-prices-in-copyright-rate-setting/ ("When all relevant apples are left inadmissible, we're left referring to oranges.").

potential adjustments."[186] The judges have specifically rejected the argument that a benchmark requiring numerous adjustments is not probative simply because it is complicated.[187] Basic principles of market analysis, used in other contexts such as antitrust damages calculations, are a potentially less burdensome substitute for determining the value of interactivity, which is a novel concept found only in music licensing rate determinations. At the very least, even if the adjustment is more complicated, foreign rates could complement the rates currently considered to provide a thicker market of benchmarks.

As for the differences in licensing laws, the various American rate-deciders should try to adjust for potential differences rather than dismissing foreign rates as inherently useless. For example, Australia does not recognize an ephemeral right in sound recordings,[188] while the United States does. One might argue that since webcasters and sound recording copyright holders are ultimately exchanging different rights in the two countries, the two benchmarks are not comparable. However, the CRB has expressly stated that the portion of the rates paid in the section 112 and 114 rate determinations for ephemeral rights is five percent of the overall rate per stream.[189] Australian rates can simply be reduced by five percent to account for their lack of ephemeral rights, and the rates instantly become comparable.

Or, one could argue that the lack of ephemeral rights makes no difference whatsoever on how parties transact, so the rates require no adjustments to account for the differences in rights. The Copyright Office has admitted that the ephemeral right is basically a legal vestige and may have no independent value outside of the public performance right.[190] If that is the case, its non-existence in a foreign market is of little concern when comparing rates.

Either way, a rigid, formalistic approach to differences in copyright law would deprive the rate tribunals of the benefits of foreign benchmarks.[191] While

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186. *Web IV*, *supra* note 110, at 82.

187. *Id*.

188. *See* Copyright Act 1968 §§ 43A, 46, 107, 111A. (Austrl.).

189. *See* COPYRIGHT OFFICE REPORT, *supra* note 14, at 19, 22

190. *See* U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT COPYRIGHT OFFICE REPORT 139–141 (Aug. 2001) ("The buffer copy has no independent value independent of the performance it enables. . . [T]here appears to be some truth to the allegation made by some commenters that copyright owners are seeking to be paid twice for the same activity . . . On balance, we find the case that the making of temporary buffer copies to enable a licensed performance of a musical work by streaming technology is a fair use to be a strong one.").

191. On the other hand, some foreign countries have laws that are so drastically different that benchmarks from there may be too difficult to compare to American rates. For example, Canada still recognizes a robust reproduction right for both sound recording and musical works in digital performances. Additionally, its Copyright Board—which operates on a "fairness" rather than market-rate standard—has a heavy hand in the domestic music-licensing arena. *See 5 Things You Need to Know About the Copyright Board of Canada's Ruling on Digital Streaming Services*, CIMA MUSIC, http://cimamusic.ca/advocacy/issues- affecting-the-independent-music-industry/i-stand-for-music/5-things-you-need-to-know-about-the-copyright-board-of-canadas-ruling-on-digital-streaming-services/ (last visited May 18, 2017).

some countries may have copyright systems that are too distinct to compare,[192] a closer analysis of what makes a foreign country's laws distinct is necessary before discounting a foreign benchmark.

*V(b) Difficulty of foreign discovery*

Another objection to the use of foreign benchmarks relates to difficulties in procuring deal information from foreign entities. It may indeed be difficult or expensive to obtain the terms of licensing deals involving foreign companies in foreign countries or from foreign collective licensing agencies. However, many of the webcasting services that operate abroad also operate in the United States.[193] It is well settled that when judicial bodies have personal jurisdiction over a company, they may, in their discretion, compel discovery from that company.[194] Additionally, this objection is more of a practical inconvenience than a true barrier to the use of foreign benchmarks. While the terms of some deals may raise complicated foreign discovery issues, other foreign deals may be readily within the grasp of American courts or parties in the rate proceedings. Therefore, this objection should not detract from the overall force of the argument that international benchmarks should at least be considered in American rate proceedings. Once that notion is accepted, the case-specific challenges of procuring such information are best left to the individual litigants who decide to search for foreign benchmarks.

*IV(c) American statutory damages*

The Copyright Act provides for statutory damages that a copyright owner can collect in the event of infringement. For inadvertent infringement, the Act provides for $750 to $30,000 per work, depending on what the judge or jury deems "just"; for willful infringement, damages are "limited" to $150,000 per work.[195] No other country with a comparable music market subjects webcasters to such extreme damages if it so much as accidentally broadcasts a work for which it has not secured licensing.[196] This unique attribute of the American

192. *See, e.g.*, *infra* note 191.

193. *See, e.g.*, MIXRADIO, http://www.mixradiomusic.com/en-us/homepage (last visited May 18, 2017) (a U.K.-based company that operates in the United States); SLACKER RADIO, http://thenextweb.com/ca/2011/01/08/slacker-radio-for-now-unlimited-for-canadian-listeners/ (last visited May 18, 2017) (an American company operating in Canada); MILK MUSIC, http://www.cnet.com/au/news/ samsung-milk-music-launches-in-australia-for-galaxy-devices/ (last visited May 18, 2017) (a service available only in the United States except for also on Galaxy phones in Australia).

194. United States v. First Nat. City Bank, 396 F.2d 897, 900–01 (2d Cir. 1968) ("It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material."). Of course, a court deciding whether to compel foreign discovery would have to weigh multiple other factors, but it is certainly not impossible to obtain foreign documents in the right circumstances.

195. Copyright Act of 1976, 17 U.S.C. § 504(c) (2012).

196. Pamela Samuelson, et al., *Statutory Damages: A Rarity in Copyright Laws*

copyright regime, one might argue, changes the prices at which a willing buyer and willing seller would agree to transact.

Putting aside the argument that these differences could simply be factored into any adjustments made to the foreign benchmarks, there is persuasive evidence that high statutory damages for infringement are not a large factor in arms-length licensing negotiations. First, the *BMI* rate-court definitively concluded that the businesspeople representing Pandora in the rate negotiations with publishers did not consider the potential statutory damages to be a major factor in the negotiations.[197] The *BMI* court came to that conclusion on what it claimed was a "more extensive" record [198] than the ASCAP court before it, which had refused to consider certain publisher deals as benchmarks because of the coercive influence of statutory damages.[199] While not conclusive, this decision is compelling evidence that high-level negotiations between webcasters and publishers do not actually consider copyright infringement to be a key factor in the rate to which the parties ultimately agree.[200]

Second, it is unclear if and when webcasters would actually be exposed to high statutory statutory damages for broadcasting copyrighted material without a license. While there is precedent for individuals,[201] file-sharing companies,[202] and experimental music services[203] being forced to pay high statutory rates for infringement, there is virtually no precedent for an established webcaster paying a large judgment for copyright infringement because they broadcasted unlicensed works (especially after good faith negotiation attempts with rights holders). Pamela Samuelson, an expert in intellectual property law, has noted the fluctuating and seemingly arbitrary statutory damages awards for copyright

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*Internationally, But for how Long?* J. COPYRIGHT SOC'Y USA § I(b) (May 2013 *forthcoming*) (U.C. Berkeley, Public Law Research Paper No. 2240569 [hereinafter "Samuelson, Statutory Damages"]).

197. *See* Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 272 (S.D.N.Y. 2015), *appeal withdrawn* (Jan. 6, 2016).

198. *See id.*

199. *See* In re Pandora Media, Inc., 6 F. Supp. 3d 317, 358–59 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

200. In addition, these negotiations were taking place at the eleventh hour, nearing an impending deadline that presented Pandora with a difficult ultimatum if it did not reach an agreement: broadcast thousands of unlicensed works and risk statutory damages, or basically shut down the business. *See id.* If statutory damages where going to be discussed in the negotiations, they would have, presumably, been discussed at that time. While it would be unfair to use this single opinion to conclude that webcasters do not heavily factor in the potential for statutory damages in negotiations with publishers, it is certainly probative of their effect on negotiations.

201. *See, e.g.*, Capitol Records, Inc. v. Thomas-Rassett, 692 F.3d 899 (8th Cir. 2012) (holding that a damages award of over $220,000 for possessing twenty-four illegally downloaded music files on a home computer did not violate due process); Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011) (affirming a district court award of $675,000 in statutory damages for an individual who downloaded thirty files over Napster).

202. Samuelson, Statutory Damages, *supra* note 196, § IV(F).

203. *Id.*

infringement in the United States.[204] Without controlling precedent to indicate when courts are willing to award statutory damages, and the size of any such awards, it is difficult to conclude with certainty whether American statutory damages have any sort of impact on ordinary, non-coercive licensing negotiations.

Third, the United States is far and away the biggest consumer of pirated music in the world.[205] Despite the threat of liability for possessing a handful of illegally downloaded songs, Americans consume as much pirated music as the next three countries on the "biggest pirates" list combined.[206] This is not merely due to America's large population: Americans consume more pirated music than countries with more active Internet users.[207] These numbers indicate that the deterrent effect of statutory damages on individuals is negligible.[208] Criminal sentencing research lends credence to this theory. Research about the effects of harsh mandatory minimum sentences for certain crimes suggests that the severity of the punishment for these acts is only weakly correlated to general deterrence.[209] Thus, while a threat of high damage awards might theoretically influence rate determinations, evidence suggests that in practice, this threat plays a minor role in negotiations for licensing deals.

In sum, it is entirely unclear that high statutory damages have any effect whatsoever on standard, arm's-length rate negotiations. Thus, an argument for disregarding foreign benchmarks because a particular country has less extreme statutory damages provisions is not particularly convincing.

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204. Pamela Samuelson, Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009); Samuelson, Statutory Damages, *supra* note 196, INTRODUCTION.

205. Daniel Tencer, *Music Piracy: Canada Among Top Countries For Unauthorized Downloading Of Music*, HUFFINGTON POST (Sept. 20, 2012), http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html.

206. Hisham Dahud, *Top 20 Countries With The Most Illegal Music Downloads*, HYPEBOT, http://www.hypebot.com/hypebot/2012/09/the-top-20-countries-that-illegally-share-the-most-music.html (last visited May 18, 2017).

207. *Asia*: *Asia Marketing Research, Internet Usage, Population Statistics and Facebook Information*, INTERNET WORLD STATS, http://www.internetworldstats.com/asia.htm#id (last visited May 18, 2017).

208. While this is certainly one possible way to view the effect of statutory damages, without further empirical research, the author would be hesitant to claim that American statutory damages have no effect whatsoever on people's behavior. The point is simply made as part of a number of factors tending to negate the argument that high statutory damages make American rate negotiations incomparably unique.

209. *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y. 13, 37–38 (2011) (finding strong evidence that certainty of punishment has a large deterrent effect, but finding relatively little reliable evidence that severity of punishment results in a substantial deterrent effect); *see also* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 187 (2003) ("We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence.").

## CONCLUSION

The purpose of this Article is not to support either side of the rate proceedings by pointing to specific benchmarks they can use to establish favorable rates. Rather, the purpose is to get both the music industry—represented by the PROs and SoundExchange—and the webcasters to expand beyond American borders for benchmarks. Incorporating these benchmarks into rate proceedings would ultimately support the tribunals in fulfilling their responsibility to determine appropriate market rates, and may be highly beneficial for either side in the dispute.

Most importantly, foreign benchmarks would provide the tribunals with a more complete picture of what a willing seller and willing buyer would agree to in an unconstrained market. The rate tribunals' ultimate goal is to ensure that both the rights holders and licensees have access to music at a rate that would exist in a competitive marketplace. This goal can be realized by including foreign benchmarks in the rate tribunal proceedings. Bringing in international benchmarks may not benefit either side of the argument, or it may benefit one side enormously. Either way, the rate tribunals' job is simply to interpret and apply the law without regard to whom it may benefit. This Article argues that doing so accurately includes looking beyond U.S. borders.