

Musicians, Record Labels, and Webcasters: In Need of an International Royalties Collection Society

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I. INTRODUCTION

From Applemusic.com¹ to XM Radio² to Live365,³ digital music is everywhere. A profound negative externality of the music industry's evolution from analog to digital is the ease with which digital music can be pirated,⁴ but, as famed music attorney Donald Passman⁵ says, "The Digital Tunnel Will Yield Light."⁶ For artists and copyright owners a light has shown through the recognition of a digital public performance right.⁷ The United States adopted the Digital Performance Right in

¹ See Larry Magid, *High Praise for Apple's Music Service*, CBS NEWS (May 1, 2003), at <http://www.cbsnews.com/stories/2003/05/01/scitech/pcanswer/main551951.shtml> (last visited Apr. 12, 2004) (praising Apple Computer's iTunes Music Store which provides single music track downloads for ninety-nine cents (U.S.) and has reached agreements that allow it to legally sell hundreds of thousands of tracks, including current top hit songs).

² See *Satellite Radio Employs Full Spectrum of Promotional Tie-Ins in Pursuit of Customers*, 15 ENT. MKT. LETTER 9 (May 15, 2002), available at 2002 WL 7176857 (noting the battle for supremacy in the burgeoning satellite radio market between XM Satellite Radio and Sirius Satellite Radio). The article continues to note that satellite radios are now available at virtually all major retailers, such as Wal-Mart, Best Buy and Circuit City, and from numerous automobile manufacturers such as BMW, General Motors, Nissan, and Volkswagen of America. *Id.*

³ See John C. Dvorak, *Net Radio, No Net Profits*, FORBES ONLINE (Oct. 2, 2000), available at <http://www.forbes.com/2000/10/02/1002dvorak.html> (last visited April 12, 2004) (observing that there are thousands of small intriguing webcast stations on Live365, whose website acts as a host for such transmissions).

⁴ See Jon Healey, *Record Labels Send Flurry of Subpoenas*, L.A. TIMES, July 19, 2003, at C1 (reacting to the filing of over 800 subpoenas by the Recording Industry Association of America (RIAA) against individuals suspected of online piracy of music). The article estimates that over 60 million people are guilty of online music copyright infringement. *Id.*

⁵ See Interview by Michael Laskow with Donald Passman, Music Attorney, at http://www.aandronline.com/reading-room/donald_passman.html (last visited Apr. 12, 2004) (recognizing Passman as the attorney that "wrote the book" on music law, in reference to Passman's well received text *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* (Simon & Schuster, Inc., 4th ed. 2002)). Passman has represented some of the largest names in music and has closed many of the largest record deals, including a seventy million dollar (U.S.) contract for Janet Jackson and an eighty million dollar (U.S.) contract for R.E.M. *Id.*

⁶ Donald Passman, *The Digital Tunnel Will Yield Light*, BILLBOARD MAGAZINE June 21, 2003, at 15.

⁷ See Digital Millennium Copyright Act of 1998, Pub L. No. 105-304, 112 Stat. 2860 (1998) (codified in several sections of 17 U.S.C.) (broadening the scope of the Digital Performance Right in Sound Recordings Act of 1995 to include non-subscription digital transmissions of music); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109

Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998,⁸ a late and partial attempt to jump onto the sound recording performance rights bandwagon long supported internationally.⁹ The U.S. is particularly important and is a principal focus of this article because it is the largest music market in the world.¹⁰

Performance royalties are owed to both artists and copyright owners (i.e., record labels) for all performances exploited publicly via digital means.¹¹ These “digital means” typically mirror non-digital means of distribution. For example, digital cable and satellite television mirror analog television, and satellite radio mirrors traditional radio. One digital medium, however, does not have a virtually identical vintage twin—Internet webcasting.¹²

Webcasting is a relatively new advancement in technology that allows websites to play (“stream”) music to website visitors.¹³ In simplified terms, it is radio broadcast over the Internet.¹⁴ Unlike illegal file sharing, webcasting does not allow users to save the music files to their personal computer hard drives. Thus copyright infringement problems are avoided.¹⁵

Stat. 336 (1995) (codified in several sections of 17 U.S.C.) (establishing the first public performance royalty right for performers and rights-holders in the U.S.).

⁸ *Id.*

⁹ See INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS AND BROADCASTING ORGANIZATIONS, Oct. 26, 1961, 496 U.N.T.S. 43, art. 12 (mandating compensation for artists and/or producers of sound recordings from public performances of their works) [hereinafter *ROME CONVENTION*].

¹⁰ See, e.g., National Music Publishers Association, *International Year in Review: 2000*, at <http://www.nmpa.org/nmpa/survey10/review1.pdf> (last visited Apr. 12, 2004) (recognizing even with a stark decline in sales, the U.S. is still the world’s biggest music market).

¹¹ See Digital Millennium Copyright Act of 1998, *supra* note 7, and accompanying text (providing the relevant portions of U.S. law under which public performances of copyrighted materials via digital transmission are protected).

¹² See discussion *supra* Part II.C (describing webcasting).

¹³ See Joseph E. Magri, *Internet Radio and the Future of Music, The Streaming of Digital Music is Creating a Host of New Challenges for Attorneys*, L.A. LAWYER, May 2003, at 60 (explaining briefly the streaming technology on the Internet and the potential for an explosion in the use of Internet radio due to its future availability on laptops, PDAs, and cell phones via wireless advancements).

¹⁴ See *id.* (inferring the potential for Internet radio to even pass traditional radio in market share in the future, pending new technological advancements). The author continues to note the additional stimuli available with Internet radio versus traditional radio, specifically in its ability to combine “audio, visual and text-based content to enhance the individual listening experience.” *Id.*

¹⁵ See Jonathan Campbell, *Webcasting: A Vehicle for Revival of the American Music Industry Faces an Uncertain Future*, Cyberlaw Seminar, University of Iowa College of Law, Part IV (Spring 2003), at <http://www.uiowa.edu/~cyberlaw/cls03/jcfinfin.html> (last visited Apr. 12, 2004) (finding that copyright owners “not so paralyzed by fears of piracy as to be unable to see the potential created by new technology”).

Unique royalties distribution issues arise because webcasting crosses borders and cultures. For example, which nation's royalty rates are applicable? Should a user in Germany be considered more valuable than one in Senegal? How can one guarantee that payment is being collected and distributed fairly worldwide when dealing with over two hundred countries and numerous collection societies? And so on. This article deals with these various issues and recommends that an international clearinghouse be formed to collect and distribute Internet webcasting royalties for sound recordings.

Part II discusses copyright law relevant to music, the history of royalties collection and collection societies, and the development of webcasting. Part III analyzes the international market for Internet royalties distribution, recognizes the flaws in a domestically-oriented collection scheme for Internet radio and proposes more efficient structural adjustments. Part IV recommends an international collection and distribution society, specifically designed and implemented for webcast performance royalties, in order to avoid many of the pitfalls of the current systems. This proposed society would operate on an exclusive basis worldwide, and would be adaptable to different types of artists, broadcasters and nations.

II. BACKGROUND

A. *Copyrights in Music*

In terms of copyright protection, a song is not merely a song.¹⁶ Under copyright law a song has two copyrightable aspects, the "musical work" and the "sound recording."¹⁷ The musical work consists of the lyrics and the musical composition.¹⁸ The sound recording is the actual recorded performance of the musical work.¹⁹ Thus, the musical work may have no connection to the performer of the song whatsoever.²⁰

¹⁶ See Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: the Story of The Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 4 (2001) (entitling one section of the piece "Two Copyrights Embodied in One Musical Recording: A Formula for Conflict").

¹⁷ See 17 U.S.C. § 102(a) (2004) (defining the scope of subject matter covered under U.S. copyright law).

¹⁸ See *id.* (distinguishing between the two types of copyrightable work within a musical recording).

¹⁹ See 17 U.S.C. § 101 (providing the statutory definition of a sound recording as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied").

²⁰ See Craft, *supra* note 16, at 19-26 (noting that the musical composition can be sold or licensed separately for use in sheet music or performance by other musicians).

To use a musical work in public, one must either negotiate a licensing agreement with the party owed royalties or qualify for a compulsory license under the law.²¹ Compulsory licenses are usually the preferred route because it is not economically feasible to negotiate separate agreements for each sound recording. Under U.S. law, compulsory licenses are available to the vast majority of the public, with the rate determined by the U.S. Copyright Office.²²

U.S. copyright law affords widespread protection of the rights held under the musical work and mandates royalties for the majority of public performances.²³ Copyright law, however, limits the protection for sound recording copyrights to digital public performances,²⁴ meaning that the sound recording performer and copyright owner remain uncompensated for the use of their creative works for all non-digital performances (e.g., traditional radio).²⁵

Conversely, international law protects rights holders and musicians for public performances regardless of the performance's digital or analog nature.²⁶ Thus, foreign collection societies distribute a wider spec-

²¹ *Copyright Law – Congress Responds to Copyright Arbitration Royalty Panel's Webcasting Rates – Small Webcaster Settlement Act of 2002*, Pub. L. No. 107-321, 116 Stat. 2780 (to be codified at 17 U.S.C. § 114(f)-(g)), 116 HARV. L. REV. 1920, 1921 (2003) (noting the compulsory licensing right of broadcasters for the use of musical recordings).

²² See 17 U.S.C. § 114(d)(2) (allowing the statutory licensing of sound recordings to qualifying users of the music for public performance).

²³ See 17 U.S.C. § 101 (explaining that “[t]o perform or display a work ‘‘publicly’’ means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, 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.”); but see James Ware & Rodney Bellamy-Wood, *Classical Music: What Do We Mean by ‘‘Classical Music’’?*, in COLLECTIVE LICENSING—PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 77, 80 (James M. Kendrick ed., 2002) (noting that unlike Europe, the U.S. does not require payment of performance royalties for the use of music as background for a commercial enterprise (e.g., music play in a clothing store)).

²⁴ See *supra* notes 7-9 and accompanying text (noting the development of legislation providing the right to public performance compensation for artists and sound recording copyright holders).

²⁵ *Id.*

²⁶ See ROME CONVENTION, *supra* note 9, art. 12 (requiring that “[I]f a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.”). The ignorance of this article on the part of the United States has created agitation in the communities of music and the international law. In fact, since the U.S. does not have a reciprocal right for musicians and copyright

trum of royalties than their American counterparts.²⁷ Despite international recognition, the U.S. refuses to reciprocate the foreign right with respect to traditional media outlets.²⁸ By restricting public performance rights in sound recordings to digital mediums, Congress is allowing powerful radio broadcasters to maintain a monopoly on “free” music.²⁹ This has caused quite a controversy internationally, resulting in a refusal by foreign societies to distribute collected monies to American artists and labels for non-digital performances.³⁰ Fortunately, webcasting is unaffected by this situation, and because of its digital nature, it is one of the few music outlets equally protected worldwide.

The Digital Performance in Sound Recordings Act of 1995³¹ and the Digital Millennium Copyright Act of 1998³² both established this digital right in the United States.³³ Artists and copyright owners in sound recordings can now collect royalties from any and eventually all digital media outlets.³⁴

If an individual, company, or organization wishes to stream music as part of their website, a statutory license to use such music may be granted by the U.S. Copyright Office. There are only limited requirements to obtain a statutory license, such as not allowing interactive play

owners, collection agencies abroad have withheld the monies owed to American musicians and copyright owners. These actions by foreign collection societies cost the American music industry hundreds of millions of U.S. dollars every year.

²⁷ See discussion *infra* Part II.B (recognizing the territorial divided collection societies and the U.S. organizations only represent owners of the musical work, not owners of the sound recording).

²⁸ See discussion *supra* Part I (discussing the new digital sound recording public performance rights).

²⁹ See Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 403 (2003) (discussing the limited nature of the DPSRA, stating that exempt parties include AM/FM radio broadcasts and CD play as background music).

³⁰ See Kimberly Hancock, *Canadian Copyright Act Revisions*, 13 BERKELEY TECH. L.J. 517, 524 (1998) (identifying changes in Canadian law which brought the nation in line with the 1961 Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“The Rome Convention”). The Rome Convention requires signatories to provide minimum protection of sound recording performance rights (also known as neighboring rights) to its citizens and the citizens of other member states. *Id.* The U.S. is not a party to the Rome Convention, which allows collection societies to withhold monies without being in violation of international law. *Id.*

³¹ Digital Performance Right in Sound Recordings Act of 1995, *supra* note 7.

³² Digital Millennium Copyright Act of 1998, *supra* note 7.

³³ See Fessler, *supra* note 29, at 399 (noting the effect that the Digital Performance in Sound Recordings Act and Digital Millennium Copyright Act had on the ability of the recording industry to control distribution and use of music on the Internet).

³⁴ See *supra* note 7 (codifying the coverage of webcasting public performance sound recording rights in U.S. law). All digital performances are seemingly protected under these Acts, however, distribution logistically has not been feasible for certain broadcasters as of yet.

services (*i.e.*, not allowing users to select which songs will play and not allowing users to download songs). Abroad, collection societies have established similar systems to allow for Internet-based performance royalties collection and distribution.³⁵

B. *Collection Societies*

The first collection society was created in France in the 19th Century to represent the rights of musical composers and lyricists.³⁶ In the United States, composers and lyricists began to collect royalties decades later through the European group, the Society of European Stage Authors and Composers (SESAC), and through its American counterparts, the American Society of Composers, Authors and Publishers (ASCAP),³⁷ and, later, Broadcast Music, Incorporated (BMI).³⁸ These entities collect royalties for public use of musical works on behalf of the songwriters, composers, and music publishers.³⁹ However, they do not collect royalties on behalf of performers of the works, due to the aforementioned inequality under American law.⁴⁰ This means that when a radio station plays a track, ASCAP/BMI/SESAC pays their members, the lyricists, composers and their publishers.⁴¹ The artists singing and

³⁵ See, e.g., Villie Oksanen & Mikko Välimäki, *Music Collecting Societies and Webcasting*, HELSINKI INSTITUTE FOR TECHNOLOGY, at http://www.hiit.fi/u/valimaki/serci_2003.pdf (last visited Apr. 12, 2004) (exploring the Finnish system for the distribution of Internet royalties, concluding that it is essentially flawed). Cf. William Sloan Coats, et al., *Hot Issues in Copyright and Trademark Licensing*, 20 No. 2 COMPUTER & INTERNET LAW., Feb. 2003, at 16 (noting that BMI has also entered into an international agreement with the foreign collection agencies BUMA (Holland), GEMA (Germany), PRS (U.K.), and SACEM (France) to provide for the granting of online music licenses on a global scale).

³⁶ See Crispin Evans, *The Future of Collective Licensing*, in COLLECTIVE LICENSING – PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 207-210 (James M. Kendrick ed., 2002) (describing the historical development of collection societies and finding that the procedurally, the collection societies have not changed significantly since their inception in the nineteenth century).

³⁷ See The American Society of Composers, Authors and Publishers, *About ASCAP*, at <http://www.ascap.com/about/> (last visited Apr. 12, 2004) (explaining the services provided by ASCAP, as well as describing its expansive customer base).

³⁸ See Broadcast Music Incorporated, *BMI Backgrounder*, at <http://www.bmi.com/about/backgrounder.asp> (last visited Apr. 12, 2004) (recounting the history of BMI, as well as the current prevalence of the company in the collection and distribution of musical work royalties, in its representation of approximately 300,000 songwriters, composers, and music publishers).

³⁹ See Fessler, *supra* note 29, at 401 (explaining the difference between the copyrightable “musical composition” and the copyrightable “sound recording” and the lack of protection for the sound recording in broadcast play).

⁴⁰ See discussion *supra* Part II.A (reviewing U.S. copyright law and its lack of comprehensive protection).

⁴¹ See Fessler, *supra* note 29, at 401 (articulating the presence of a performance right for lyricists and composers, but not for performers).

playing the piece receive no compensation for the performance, unless, in addition to performing the piece, they also wrote the lyrics or composed the score.⁴²

In its development of digital sound recordings rights protection, the Library of Congress did not defer to the existing collection agencies. Instead it allowed the Recording Industry Association of America (“RIAA”) to create a separate entity for the collection and distribution of performance monies. The RIAA in turn created SoundExchange, which collects and distributes royalties for all digital sound recordings and has been the leader in addressing the webcasting royalty issue.⁴³

C. *Webcasting*

Internet radio, or webcasting, is at the forefront of the progression of music technology.⁴⁴ An increasing number of users and stations enter the digital market each day.⁴⁵ In the United States, growth is especially rapid.⁴⁶ In 1999, twenty-seven percent of Internet users had already listened to a webcasting channel.⁴⁷

There are several benefits of online radio versus traditional radio.⁴⁸ First, there are no geographic barriers; consumers can access the same channel whether in Newcastle, New York, or New Zealand.⁴⁹ Second, a variety of channels can be found on the Internet that is not available via traditional radio.⁵⁰ Despite Clear Channel Communica-

⁴² *Id.*

⁴³ See discussion *infra* Part III.B.2.a. (acknowledging the significant negotiations of SoundExchange with webcasters in its attempt to set equitable rates).

⁴⁴ See Bill Reynolds, *Analysis: The Future of Radio, and Now, for Your Listening Pleasure . . . The Superior Sound of Digital Reception and the Eclectic Realm of Web Broadcasting are Ushering in the Next Generation of Radio*, GLOBE AND MAIL (TORONTO, CAN.), Aug. 9, 2003 at R1 (predicting that webcasting and satellite radio will lead a new generation of radio listening, due to their quality and breadth of broadcasting).

⁴⁵ See Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 340 (2003) (discussing the growth of the webcasting industry, and its popularity with a high volume of American Internet users).

⁴⁶ See Joan Fitzgerald & Larry Rosin, *The Arbitron Listening Study II: Radio and E-commerce* (1999), at <http://www.arbitron.com/downloads/E-Commerce.pdf> (last visited Apr. 12, 2004) (noting the results of a joint Arbitron and Edison Media Research study).

⁴⁷ *Id.*

⁴⁸ See Reynolds, *supra* note 44 (acclaiming the benefits of digital transmissions via satellite and web channels).

⁴⁹ See Kidd, *supra* note 45, at 343 (noting the accessibility of online stations worldwide).

⁵⁰ See Reynolds, *supra* note 44 (finding that an Internet search brings up thousands of channels from around the world, with an eclectic mix of genres).

tions being one of the most visited webcasting channels,⁵¹ it does not monopolize the dial as in the FM variety.⁵²

In traditional radio, Clear Channel Communications owns such a large volume of stations (over 1200 in the United States) and programs them with such a limited play list that unique, varying musical expression is no longer found in traditional analog radio.⁵³ Even the major labels, despite the fact that their records are the only albums still receiving radio coverage, have rejected this proliferation of such a limited play list.⁵⁴ The localized, creative independent music that the music industry and its customers crave is found on the Internet.⁵⁵

From the broadcasters' perspective, starting an Internet radio station is much easier than opening up shop in the traditional radio market.⁵⁶ In fact, no major equipment is required and services are already available to facilitate Internet radio broadcasts at very low costs.⁵⁷ Furthermore, starting an Internet radio station is unregulated, in contrast to the heavy regulation imposed by the Federal Communications Commission on traditional radio.⁵⁸

⁵¹ See Jack Myers, *Arbitron Issues First Weekly 'Measurecast' Ratings*, JACK MYERS REPORT, Nov. 2002, at 1, at <http://www.arbitron.com/downloads/jackmyersreport.pdf> (last visited Apr. 12, 2004) (ranking the volume of use in the top ten Internet radio networks).

⁵² Randy Dotinga, *Clear-Cutting the Radio Forest*, WIRED NEWS, Aug. 5, 2002, at <http://www.wired.com/news/business/0,1367,54036,00.html> (last visited Apr. 12, 2004) (stating "From Honolulu (seven stations) to Des Moines, Iowa (six), and Ft. Myers, Florida (eight), Clear Channel Communications dominates the dial across the country.").

⁵³ See Eric Boehlert, *Radio's Big Bully*, at http://dir.salon.com/ent/feature/2001/04/30/clear_channel/index.html (last visited Apr. 12, 2004) (outlining the stranglehold that Clear Channel Communications holds on American radio play and noting its national programming schedule—which prevent any local artist from receiving airplay, as the programmer and disc jockey may be setting the play list from hundreds or thousands of miles away).

⁵⁴ See *id.* (speaking to the high costs now associated with gaining airplay); see also Mark Pollack, *Creative Collaboration Destined to Duet—Music and Marketing*, ADVERTISING AGE, July 28, 2003, at 1 (recognizing that even major labels are having difficulties with radio play, and all music owners have been forced to find other outlets to advertise their music, for traditional radio is no longer a feasible option for the vast majority of artists).

⁵⁵ See Reynolds, *supra* note 44 (applauding the benefits of Internet-based radio).

⁵⁶ See Kidd, *supra* note 45, at 343-44 (noting the ease of operation of an Internet radio station, and the lack of high regulation of Internet radio in comparison to traditional radio); see also Oksanen & Välimäki, *supra* note 35 (speaking to the inexpensive investment required to setup a webcasting channel which in fact delivers higher quality audio than its FM counterpart).

⁵⁷ See, e.g., Live365 website, at <http://www.Live365.com> (last visited Apr. 12, 2003) (facilitating online broadcasting with full service packages for under ten U.S. dollars per month).

⁵⁸ See, e.g., Kidd, *supra* note 45 at 343-44 (giving the sample of Live365 to demonstrate the lack of regulation of Internet radio). No similar corporation exists to facilitate the setup of traditional radio stations, simply because it would be unfeasible under the law.

The problem webcasters face is an uneven playing field domestically and internationally. On the domestic side, webcasters are subject to making royalty payments to the sound recording rights owners and the musicians, whereas traditional radio stations pay no such duty.⁵⁹ Internationally, Internet radio stations must compete with a growing number of stations around the world, who, as with traditional radio in America, may potentially pay no royalty, or may pay a lower royalty as set by their local governments.⁶⁰ The establishment of an international clearinghouse for collection and distribution would provide an even playing field for webcasters and all-encompassing protection of digital public performance royalty rights.⁶¹

III. ANALYSIS

A. *The Current System Lacks Efficiency in Collection and Distribution*

No economic justification exists for splitting duties of the collection and distribution of webcasting royalties between multiple agencies. Using one agency, on the other hand, would limit administrative costs while ensuring that artists and labels are fairly compensated for the licensing of their works.

Under the current system, artists and labels must register their works with domestic entities in every nation that requires royalties payments for public performances. This is time intensive work on the front-end because artists and labels must file contact information, tax forms, and repertoires with each entity.⁶² The same is true on the back end, as statements and payments come in from numerous collection agencies. A more efficient system would provide for one filing by the artist and label, and one invoice per pay period from the collection society to each rights-holder.

One international collection agency, granting global compulsory licenses to webcasters could ensure that payments are received from all corners of the globe. Additionally, broadcasters would benefit from

⁵⁹ See *supra* notes 7, 9 and accompanying text (discussing the legislation that created royalty payments for digital performances, but exempted AM/FM radio from any such royalty).

⁶⁰ See *infra* note 81 and accompanying text (noting that varying royalty rates will exist and that financially webcasters would have a propensity to "forum shop" for the cheapest national royalty rates).

⁶¹ See discussion *infra* Part III (analyzing the current royalties collection system, and the feasibility of establishing a functional international webcasting collection society).

⁶² See SoundExchange, *How to Become a Member*, at http://www.soundexchange.com/members/become_member.html (last visited Apr. 12, 2004) (listing the forms required to become a member, including a sound recording copyright owner authorization letter, a repertoire chart, and tax identification form).

the ability to file with one company for all licensing rights. An international licensing agreement saves users significant time and money by avoiding having to address domestic licensing laws in every nation in which the webcast is received. Moreover, historical territorial concerns are not an issue for a webcasting society.

Collection societies traditionally have been restricted geographically. Their responsibilities resided within their country, and their duties revolved around tracking performances that took place domestically. Whether live, on radio, on television, or via satellite, a performance could only reach one region at a time. This is not the case for Internet broadcasts. Licensing of Internet broadcasts does not necessitate physical monitoring.⁶³ Monitoring can take place from any location with minimal negative effect. Thus, there is no significant economic justification for segregating the collection based on geographic location. In fact, such a dissection would only increase administration costs.⁶⁴

B. *The Market Demands More*

“Copyright users want ONE license agreement with ONE entity to obtain GLOBAL license.”⁶⁵

The marketplace is simply different for webcasting compared to any other realm of music distribution because Internet radio deals with one global customer base.⁶⁶ Anyone with a computer and Internet access can listen to the wide variety of non-subscription webcasters.⁶⁷ Internet radio stations, however, face different rates and laws regarding

⁶³ See Commission Decision 2003/300/EC, 2003 O.J. (L 107) 59, ¶ 61, available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38014/en.pdf> (this Commission Decision of August 10, 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case No. COMP/C2/38.014- IFPI “Simulcasting” makes a distinction between online licensing environment and traditional licensing based on the lack of geographic physicality to the performance).

⁶⁴ If the royalty distribution was segmented geographically artists would be forced to pay administrative costs for each of these geographically localized bodies, whereas, one agency could benefit from its economy of scale, and deduct a lower percentage as its administrative fee to cover its costs.

⁶⁵ See David Uwemedimo, *WCT and WPPT: Opportunities and Challenges* (May 15, 2002), at http://www.wipo.org/eng/meetings/2002/sccr/seminar_05/ppt/cisac_16-05-2002.ppt (last visited Apr. 12, 2004) (recommending a ‘global village’ for licensing). David Uwemedimo is Director of Legal Affairs for the International Confederation of Societies of Authors and Composers (CISAC). *Id.*

⁶⁶ See, e.g., Oksanen & Välimäki, *supra* note 35, at 8 (expressing the great potential of Internet radio due to its global reach).

⁶⁷ *Id.*

their service, depending on the customer downloading the music.⁶⁸ As discussed more fully below, there is a need for uniformity in this new marketplace in order to fairly represent all parties involved and create a royalty system that is both all encompassing and efficient to use.⁶⁹

1. The International Federation of the Phonographic Industry (IFPI)⁷⁰ Model Reciprocal Agreement

The IFPI, an organization representing the international recording industry, has begun to answer webcasting's call for a more uniform system for royalty collection and distribution with its Model Reciprocal Agreement ("Agreement").⁷¹ The Agreement is the first of its kind, and provides a platform for countries to allow for reciprocity between their collection societies for Internet-based simulcasting.⁷² With reciprocity, collection agencies that are party to the Agreement can create a "one-stop" shop for all member territories.⁷³ The functionality of this one-stop shop is limited to the ability to issue multi-territory licenses.⁷⁴

The Agreement is a framework for developing a global collection system. It allows local simulcasters to register and pay licensing fees to its local society for works performed/streamed in all member states.⁷⁵ The key portion of the Agreement, which could be applied to any

⁶⁸ See *id.* (finding that "[u]nfortunately, the current music licensing schemes do not support the development of truly global services").

⁶⁹ See discussion *supra* Part III.A.

⁷⁰ See International Federation of the Phonographic Industry, *What is IFPI?*, at <http://www.ifpi.org/site-content/about/mission.html> (last visited Apr. 12, 2004) (providing an overview of IFPI, noting that it is an organization with 1500 member record producers and distributors in 76 countries).

⁷¹ See International Federation of the Phonographic Industry, *Major Step Forward for Internet Licensing*, at <http://www.ifpi.org/site-content/press/20021008b.html> (last modified Oct. 8, 2002) (announcing the European Commission's approval of the IFPI Reciprocal Agreement).

⁷² See Commission Decision 2003/300/EC *supra* note 63, ¶ 14 (noting that the Reciprocal Agreement intends "to facilitate the grant of a multi-territorial license for [the] simulcasting activity").

⁷³ See *id.* ¶ 17 (acknowledging the ability of the Reciprocal Agreement to create a "one-stop" shop for artists, for all local webcasters within the territory and effectively protect music producers' rights "in the face of global internet exploitation").

⁷⁴ See *id.* ¶ 19-20 (indicating the powers granted to collection societies in the Reciprocal Agreement); see also discussion *infra* Part III.B.1.a (describing the limitations of the Reciprocal Agreement, including its lack of rate determination guidance).

⁷⁵ See Commission Decision 2003/300/EC *supra* note 63, ¶ 17 (addressing the reciprocity inherent in the Agreement and applicable to all members); see also discussion *infra* Part II.B.a.i (recommending the country-of-destination principle of the Reciprocal Agreement).

global webcasting royalty collection system is the “Country-of-Destination” principle.⁷⁶

a. Country-of-Destination Principle

In determining applicable licensing fees, a country-of-destination principle is critical to Internet-based music royalties.⁷⁷ The country-of-destination principle is to charge rates based on the location of the listener, not the broadcaster.⁷⁸ A webcaster under this principle would pay based on the number of listeners the station receives in each location for each song.⁷⁹

Using a country-of-destination principle allows the webcaster to pay based on the market it is reaching. Thus, if the station is a hit in Germany, it pays royalties that are appropriately set for that market.⁸⁰ The alternative option would be a country-of-origin royalty rate. The country-of-origin rate though, would have the unfortunate consequence of forum shopping by webcasters.⁸¹ Webcasters could simply move to the country offering the lowest royalty rate, which would most likely be a lesser-developed nation, lacking significant copyright protection, in which minimal or no licensing royalties are enforced.⁸² If such a cir-

⁷⁶ See Commission Decision 2003/300/EC *supra* note 63, ¶ 16 (noting the necessity of multi-territory licenses for Internet performances and the applicability of the country-of-destination principle to such a license).

⁷⁷ See *id.* ¶ 22 (conditioning membership in the Reciprocal Agreement on the application of the country-of-destination principle).

⁷⁸ See David Wood, *Commissioning in the Digital Age—Simulcasting 2*, Howrey Simon Arnold & White Antitrust Client Alert (Oct. 2002), at <http://www.howrey.com/news/attachments/ClientAlert20021011.pdf> (last visited Apr. 12, 2004) (announcing the European Commission’s adoption of the proposal by the IFPI for a reciprocal agreement for the simulcasting by the European Union and discussing the country of destination principle) (on file with the author).

⁷⁹ See Wood, *supra* note 78 (explaining the country-of-destination principle).

⁸⁰ See discussion *infra* Part III.B.2.b (distinguishing between the value of customers in developed versus less-developed nations and the concurrent need for separate licensing rates).

⁸¹ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 63 (supporting the country-of-destination principle with the expert opinion of Dr. Thomas Dreier of the Max Planck Institut, who noted that even with proper legal protection of copyrights worldwide, simulcasters would still migrate to the jurisdiction with the lowest possible remuneration level).

⁸² See Ang Kwee Tiang, *Developing Countries: Asia and the Pacific, An Overview of Collective Administration of Copyrights*, in COLLECTIVE LICENSING – PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 39, 41 (James M. Kendrick ed., 2002) (discussing the challenge of royalties collection in Asian countries). The author provides the example of a popular Vietnamese artist who stated, “[n]o musician in Vietnam lives by his music alone. Music is for giving to other people.” *Id.* at 41. This artist in fact won a suit in Vietnam for copyright infringement; however, the court awarded no damages, only an apology. *Id.*

cumstance arose, musicians and sound recording copyright owners would receive no compensation for use of their works whatsoever.

b. Flaws in the IFPI Reciprocal Agreement

Although the Reciprocal Agreement establishes the foundation for facilitating global webcasting royalties, holes exist in the Agreement.⁸³ In developing a one-stop shop for performance royalty rights, alterations and additions to the document would have to be made.

The Reciprocal Agreement only discusses royalties in terms of “simulcasting.”⁸⁴ All webcasting is not encompassed in simulcasting.⁸⁵ Simulcasting only covers webcasters whose content is traditional radio or television feeds being simultaneously re-transmitted via the Internet.⁸⁶ Exclusively Internet-based webcasting is thus barred from such an agreement.⁸⁷ Simulcasting and web-exclusive broadcasting provide the same benefits to users and exploit the sound recordings in a similar manner.⁸⁸ Distinguishing between simulcasting and other webcasting simply protects the turf of current radio and television broadcasters (who wish to enter the online market) and has no beneficial effect to the market as a whole.⁸⁹ In forming an international collection society for webcasting, both types of online broadcasters should be included in order to ensure equity in the marketplace.⁹⁰

⁸³ See *infra* text accompanying notes 84-91 (recognizing that the Reciprocal Agreement is limited to simulcasting of broadcasts and that no methodology of rate calculation has been set).

⁸⁴ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 14 (noting that according to the parties of the Reciprocal Agreement the Agreement is “intended to facilitate the grant of a multi-territorial licen[s]e for the simulcasting activity”).

⁸⁵ See Commission Decision 2003/300/EC, *supra* note 63, at n.6 (defining simulcasting as “the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals, in compliance with the respective regulations on provision of broadcasting services”).

⁸⁶ *Id.*

⁸⁷ See Jacqueline M.B. Seignette, *Collective Licensing in the Digital World: Licensing Online Music After the EU Copyright Directive*, in COLLECTIVE LICENSING – PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 124,129 (James M. Kendrick ed., 2002) (remarking that the Reciprocal Agreement only creates reciprocity in the treatment of simultaneous transmissions of traditional media outlets via the Internet).

⁸⁸ See Campbell, *supra* note 15 (explaining the two types of broadcasting on the Internet, simulcasting and Internet-only broadcasting, noting that the regardless of the nature, the listener accesses and is afforded the same services with both broadcasts).

⁸⁹ Cf. *Global Internet Licensing Offered*, IFPI NEWSLETTER (Int’l Fed’n of the Phonographic Indus., Zurich, Switzerland), Oct. 2001, at <http://www.ifpi.org/site-content/library/newsletter8.pdf> (last visited Apr. 12, 2004) (heralding the Reciprocal Agreement for its ability to protect traditional broadcasters) (on file with the author).

⁹⁰ Distinguishing between competitors in the same market, and facilitating easier, cheaper licensing capabilities for one group of companies clearly creates an unbalanced market.

The Agreement also does not set actual rates or a manner of calculating rates.⁹¹ The Agreement merely specifies that rates will be set on either a percentage of revenue generated from the simulcast, or a rate per song system.⁹² Despite the lack of rates, the two manners of calculation are valuable and, as discussed below, these proposed options in rate setting, in fact, have both been incorporated into the U.S. webcasting royalties scheme.⁹³

The Reciprocal Agreement also defers to national collection societies to negotiate their own rates regarding rate determinations.⁹⁴ This deference detrimentally affects an attempt at uniformity, and allows collection agencies to exploit their individual territories. Webcasters under the Agreement still find themselves subjected to varying licensing costs depending on who listens to their broadcast on any given day. The European Commission, in its support of the Agreement, considered this independence in rate setting a positive aspect of the Reciprocal Agreement because it prevents attempts at anti-competitive price-fixing.⁹⁵ Strangely, as discussed below, this is directly contradictory to the view of the European Commission's Directorate General of Competition and its European Court of Justice, both of which recognize the positive effect of allowing monopoly control of royalty collection.⁹⁶

c. Widespread support exists for the Reciprocal Agreement

Despite the flaws in the Reciprocal Agreement, it has received widespread support, possibly due to its positive mission of creating reciprocity among collection agencies throughout the world.⁹⁷ Parties to the Reciprocal Agreement include over 30 countries' record producer

⁹¹ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 25 (admitting that: “[I]n light of the experimental nature of the Reciprocal Agreement, the parties declare that the individual collecting societies have not yet definitively decided how to structure the aggregate tariff.”).

⁹² See *id.* (listing the two options for setting prices); see also *supra* text accompanying notes 110-115 (discussing the rates set forth in the U.S. collection system).

⁹³ See discussion *infra* Part III.B.2.a (outlining the comprehensive webcasting rate scheme orchestrated by SoundExchange for the U.S. market).

⁹⁴ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 80 (acknowledging that collection societies are free to determine their own pricing schedules, and consider such freedom as correspondent to the concept inherent in the Agreement).

⁹⁵ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 79-80 (respecting the independence of collection societies and seeing this independence as beneficial in terms of competitive rate setting).

⁹⁶ See *infra* text accompanying notes 153-157 (explaining the need for monopolistic power for collection agencies in order to effectively collect and distribute royalties).

⁹⁷ See *supra* text accompanying notes 73-79 (testifying to the positive attributes of the Reciprocal Agreement, especially in its ability to unify a segregated marketplace).

collection agencies.⁹⁸ Moreover, the IFPI as an organization represents over 1,300 music producers in over 70 countries worldwide.⁹⁹ The five major record labels also support the work of the IFPA.¹⁰⁰ With the backing of the majority of the music industry, it may only be a matter of time before the Reciprocal Agreement grows in scope geographically and procedurally, in order to fulfill the needs of the industry globally.¹⁰¹ Such expansion of scope could come through the development of an international system to further the ideals initially established in the Reciprocal Agreement. This system would require a flexible framework, allowing adaptability to different cultures, musicians, and broadcasters.¹⁰²

2. Creating a Multi-Faceted Rate System

a. Tiers of Webcasters

The nature of the webcasting business creates a challenging environment for establishing a royalty rate schedule for different types of entities. For example, determining rates for webcasters presents many hurdles, such as charging non-commercial and commercial websites different rates and determining rates for websites that are operating at a net loss.¹⁰³

⁹⁸ See *Simulcasting System Endorsed by European Commission*, IFPI NETWORK (Int'l Fed'n of the Phonographic Indus., Zurich, Switzerland), Dec. 2002, at 4, at <http://www.ifpi.org/site-content/library/newsletter10.pdf> (last visited Apr. 12, 2004) (noting the signatory countries to the Reciprocal Agreement: Argentina, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hong Kong, Hungary, Iceland, India, Ireland, Italy, Malaysia, Mexico, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Singapore, Sweden, Taiwan, Thailand, UK and Switzerland) (on file with the author).

⁹⁹ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 77 (focusing on the breadth of support for the IFPI by record producers, labels, and national music industry associations).

¹⁰⁰ See *id.* (commenting that Electric and Musical Industries (EMI), Bertelsmann Music Group (BMG), Vivendi/Universal, AOL/Time Warner and Sony belong to collection societies that support the Reciprocal Agreement).

¹⁰¹ See Oksanen & Välimäki, *supra* note 35, at 8 (demonstrating the borderless nature of webcasting, and the need for the construction of a system capable of supporting such a global industry).

¹⁰² See, e.g., discussion *infra* Part III.B.2.b (describing the varying types of webcasters and the fluctuating value of advertising in developed versus lesser developed nations). These factors demonstrate the need for economic flexibility; furthermore cultural differences may play a role in creating nationally acceptable fees, especially in states less receptive to copyright protection.

¹⁰³ See Ryan Naraine, *Webcasting Royalty Rates Sliced in Half* (June 20, 2002), at <http://siliconvalley.internet.com/news/article.php/1369281> (last visited Apr. 12, 2004) (discussing the Copyright Arbitration Royalty Panel's (CARP) decision to cut the per performance webcasting rate by 50 percent). The author continues to note that the rates, even with the heavy discounting by the CARP, are still unaffordable for many webcasters. *Id.* This article highlights the some of the difficulties in setting rates that accommodate all webcasters.

The U.S. has made the most progress in setting these rates,¹⁰⁴ through the combined actions of American webcasters, SoundExchange,¹⁰⁵ and the U.S. Copyright Office.¹⁰⁶ Initially, the U.S. Library of Congress set a general rate of \$0.0007 U.S.D. per performance for commercial webcasters.¹⁰⁷ Should a webcaster wish to negotiate its own rates, however, an amendment to the determination allows for individualized negotiations with SoundExchange.¹⁰⁸

Through a plethora of such negotiations, SoundExchange has reached supplemental agreements with small webcasters¹⁰⁹ and non-commercial webcasters.¹¹⁰ Most recently, the non-commercial webcas-

¹⁰⁴ See Oksanen & Välimäki, *supra* note 35, at 12-13 (admitting that the U.S. has succeeded in addressing the concerns of different types of webcasters and has created a hierarchy of fees which addresses the needs of the different users of online music).

¹⁰⁵ See John Borland, *RIAA Dubs Webcasting group "SoundExchange,"* CNET NEWS.COM (Oct. 6, 2000), at <http://news.com.com/2100-1023-246721.html> (last visited Apr. 23, 2004) (announcing the naming of SoundExchange and discussing its appointed role as the collection agency for digital sound recording performance royalties in the U.S.).

¹⁰⁶ See, e.g., *Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings* (Copyright Office Feb. 24, 2003), available at http://www.copyright.gov/carp/webcasting_rates_final.html (last visited Apr. 12, 2004) (providing a background to the negotiations process for webcasting, including a discussion of the negotiations between the RIAA (now the SoundExchange branch) and Yahoo! in addition to a comparison of the rates recommended by the Copyright Arbitration Royalties Panel and those adopted by the Library of Congress); see also *SoundExchange Reaches Agreement on Webcasting Rates and Terms, Avoids CARP* (Apr. 3, 2003), at http://www.soundexchange.com/news/2003_04_03.html (last visited Apr. 12, 2004) (announcing the initial SoundExchange agreement for commercial webcasters which provided webcasters with an option of 0.0762 cents per performance; 1.17 cents per aggregate tuning hour; or 10.9 percent of gross revenues).

¹⁰⁷ See 37 C.F.R. § 261.3(1) (setting the rate for commercial webcaster performance royalties); see also 37 C.F.R. § 261.2 (defining a performance as each time any portion of a sound recording is publicly transmitted to a listener via the Internet). It should be noted that this performance definition is on a per user basis; thus, if 1,000 users here a song on a webcast then the webcaster owes a royalty of 7.00 U.S. dollars. *Id.*

¹⁰⁸ See S. Amend. 4955, 107th Cong. § 5 (2002) (allowing for tiers of webcasters, commercial, small commercial, and non-commercial, each with different potential royalty rates); see also Kidd, *supra* note 45, at 356-59 (discussing the background of the aforementioned amendment, and critiquing its affect on webcasting hobbyists).

¹⁰⁹ See SoundExchange, *Rates and Terms Available to Certain Small Commercial Webcasters*, at http://www.soundexchange.com/licensee/forms/Rates_Terms.pdf (last visited Apr. 12, 2004) (noting the terms reached through negotiations between SoundExchange and the Voice of Webcasters organization).

¹¹⁰ See Press Release, RIAA, *Recording Industry Reaches Pact with Non-Commercial Webcasters* (June 3, 2003), at http://www.soundexchange.com/press/PressRelease_Noncomm%20webcast%20agrmt%206-03.pdf (last visited July 9, 2003) (acknowledging the negotiated agreement between non-commercial webcasters and SoundExchange). Thomas F. Lee, President of the American Federation of Musicians was quoted as saying: "Musicians applauded the agreement with non-commercial webcasters, which will meet the twin goals of fostering the innovative programming that noncommercial webcasters often develop around little known recordings, while also contributing to the much-needed income to the starving

ters agreement allowed these webcasters, such as university-sponsored webcasters, to pay a significantly lower rate, allowing them to continue operating without a concern for paying commercial level royalty rates.¹¹¹ Separate rates have been set for three groups: large commercial, small commercial, and non-commercial broadcasters.¹¹² Broadcasters were also given the choice of paying on a per performance basis

artists whose recordings they pay in their webcasts.” *Id.* See also *Notification of Agreement Under the Small Webcasters Act of 2002*, 68 Fed. Reg. 35008 (Copyright Office June 11, 2003), available at <http://www.copyright.gov/fedreg/2003/68fr35008.pdf> (last visited Apr. 12, 2004) (reporting the results of the non-commercial webcasters agreement to the Copyright Office of the Library of Congress and requesting publication).

¹¹¹ *Id.*

¹¹² See *Rate Information*, at <http://www.soundexchange.com/rates.html> (last visited Apr. 12, 2004) (posting a general graph of webcasting costs). The graph states:

Type of DMCA-Compliant Service	Performance Fee (per performance)	Ephemeral License Fee
1. Webcaster and Commercial Broadcaster		
All Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07 ¢	8.8% of Performance Fees Due
2. Non-CPB, Non-Commercial Broadcaster		
(a) Simultaneous Internet retransmissions of over-the-air AM or FM broadcasts.	0.02¢	8.8% of Performance Fees Due
(b) Other Internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.02¢	8.8% of Performance Fees Due
(c) Transmissions on any other side channels.	0.07¢	8.8% of Performance Fees Due
3. Business Establishment Service		
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. § 114(d)(1)(C)(iv)	Statutorily Exempt	10% of Gross Proceeds
4. Minimum Fee		
(a) Webcasters, commercial broadcasters, and non-CPB, non-commercial broadcasters	\$500 per year per license	
(b) Business Establishment Services		\$10,000

Id.; see also *Rates and Terms Available to Certain Small Commercial Webcasters*, at http://www.soundexchange.com/licensee/forms/Rates_Terms.pdf (last visited Apr. 12, 2004) (covering in detail the terms of the rates set for certain small webcasters); *Noncommercial Webcasters/Broadcast Simulcasters*, at http://www.soundexchange.com/licensee/licensee_nwbs.html#rates (last visited July 25, 2003) (providing the details regarding rates for certain non-commercial webcasters).

or a percentage of revenues (or loss) basis, as discussed in the Reciprocal Agreement.¹¹³

Setting separate rates for different types of broadcasters is a creative and necessary way to address webcasting. Without such separate categories, some webcasters would be forced out of the market. For instance, Finland attempted to set webcasting fees at one level (similar to the rate for U.S. large commercial broadcasters). Although the rates are not yet enforced,¹¹⁴ if enacted, the Finnish rates would have a severe impact, costing small webcasters broadcasting to Finnish consumers approximately twenty times as much as under the SoundExchange negotiated agreement for similar small webcasters broadcasting to American consumers.¹¹⁵

SoundExchange's three-tiered system for webcast royalties in the U.S. is a model that is necessary and adaptable to the international market.¹¹⁶ Similar foreign webcasters should fall into one of the three categories set forth above.¹¹⁷ If a new type of entity were to arise that would not fit into the large commercial, small commercial or non-commercial model group, another agreement could simply be negotiated at that time.¹¹⁸

b. Adaptability to Varying Markets

Webcasters' revenues come mainly through advertising and music sales.¹¹⁹ If advertising and music sales are worth less in certain countries, it is difficult to justify global rates for commercial webcasters. For example, a webcaster whose customers are in Malawi (with a gross net

¹¹³ See discussion *supra* Part III.B.1.b. (noting the rate setting ideas proposed in the Reciprocal Agreement).

¹¹⁴ See Oksanen & Välimäki, *supra* note 35, at 11 (finding that the rates for webcasting are being protested in the Finnish courts by the Association of Finnish Broadcasters, however the courts have yet to rule or set an interim rate schedule).

¹¹⁵ See *id.* at 12 (computing a hypothetical monthly license fee in the U.S. and in Finland for a webcaster with annual revenues of \$120,000 (U.S.) and an audience that peaked at 2500). In the U.S., using the percentage of revenues option, the webcaster would pay \$1,000 per month, whereas using the only option in Finnish music licensing fee would amazingly reach 22,550 Euros per month. *Id.*

¹¹⁶ See, e.g., Oksanen & Välimäki, *supra* note 35, at 13-14 (calling for a similar rate schedule in Finland as used in the U.S.).

¹¹⁷ See *supra* note 112 and accompanying text (distinguishing the three-tiers of webcasters).

¹¹⁸ SoundExchange has already demonstrated the ability to negotiate separate deals quickly, fairly, and efficiently. These positive mannerisms could be translated to an international model.

¹¹⁹ See, e.g., <http://radio.netscape.com/radio/radiosell2.html> (last visited Apr. 12, 2004) (allowing listeners to order music heard on its webcast stations); see also <http://www.launch.yahoo.com> (last visited Apr. 12, 2004) (providing a similar service for its webcast customers).

income per capita of \$570 U.S.D. per year)¹²⁰ could not value advertising space at the same rate as a webcaster whose customers are in the U.S. or European Union. Music sales are a more elusive subject. Although the suggested retail prices for compact discs are in relatively the same range worldwide, far fewer CDs are sold in lesser-developed regions.¹²¹ Also, not all webcasters provide for sales of the music they broadcast.¹²²

In setting the proposed tiers of webcasting licensing rates, an aggregate rate should be determined based on current tariffs, advertising revenues and consumer buying power.¹²³ This aggregate rate could be set based on the aforementioned rates negotiated by SoundExchange, with adjustments to accommodate to other developed nations. Individual webcasters disapproving of the per performance rate still could select a (negotiated) percentage of revenue rate.¹²⁴

To fairly adjust for nations with on-average lesser consumer buying power, a two-tier system of developed and lesser-developed countries (“LDCs”) should be applied in the same way that the United Nations sets forth lesser criteria for LDCs.¹²⁵ The World Intellectual Property Organization (“WIPO”) uses such a system of separating developed nations and LDCs in its furtherance of intellectual property treaty ratification and enforcement.¹²⁶

In creating a similar classification for royalty rates, the same LDC qualification standards are applicable. These standards, as determined by the U.N. are: (1) a low income, as measured by gross domestic prod-

¹²⁰ See World Bank, *GNI per capita 2002* (July 2003), at: <http://www.worldbank.org/data/databytopic/GNIPC.pdf> (last visited Apr. 12, 2004) (providing GDP and income per capita data as of 2002).

¹²¹ See, e.g., *Document de Référence*, 208 (2002), at <http://finance.vivendiuniversal.com/finance/documents/financial/annual-report/2002/docref2002.pdf> (last visited Apr. 12, 2004) (tabulating revenues for Universal Music Group for the years 2000-2002). The graph demonstrates a dramatically lower amount of sales in lesser-developed regions of the world. *Id.* at 93. For instance, in 2002 revenues in North America totaled €2,772,000,000 compared to revenues in Africa of €139,000,000. *Id.* at 162.

¹²² See <http://www.live365.com> (last visited Apr. 29, 2004) (supporting many small webcast stations which do not have ordering capabilities).

¹²³ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 65 (addressing the aggregate rate suggested in the IFPI Reciprocal Agreement, noting that it will chiefly be based on the “advertising revenue stream generated in each jurisdiction”).

¹²⁴ See *supra* note 112 (providing details to the rates for webcasting in the United States). The percentage of revenues option for small webcasters is set on an increasing of 10 percent of the eligible revenues for the first \$250,00 in gross revenues and 12 percent of any gross revenues in excess of \$250,000 (for the calendar years of 2003 and 2004). *Id.*

¹²⁵ See World Intellectual Property Organization, *Evolution of the Least Developed Countries*, at <http://www.wipo.int/lcds/en/statistics/evolution.htm> (last visited Apr. 12, 2004) (providing a brief historical overview of the Lesser Developed Countries classification).

¹²⁶ *Id.*

uct per capita;¹²⁷ (2) weak human resources, as measured by a composite index of Augmented Physical Quality of Life Index;¹²⁸ and (3) a low level of economic diversification, as measured by the composite indexes of the Economic Diversification Index.¹²⁹ Using these standards, two distinct categories can be set and annually adjusted to accommodate to the global webcasting market.

With two categories of developed countries and LDCs, the rates set forth through negotiations would apply to developed countries in a three-tier system, as described above.¹³⁰ The collection agency could then substantially discount these rates for listeners in LDCs. In summary, this proposed structure results in six levels of rates, each with a choice of per performance or percentage of revenues based fees. These tiers are (1) Developed nation listeners of large commercial webcasts; (2) Developed nation listeners of small commercial webcasts; (3) Developed nation listeners of non-commercial webcasts; (4) LDC listeners of large commercial webcasts; (5) LDC listeners of small commercial webcasts, and (6) LDC listeners of non-commercial webcasts.

c. Technology

The system required to maintain this international webcasting society would entail significant structural management and development. It would need to allow webcasters to submit their play lists and generate invoices for payment, allow calculations of royalties based on the multi-tiered rate classifications, effectively divide royalty payments between owed parties (performers and copyright owners), and allow for efficient database entry of necessary collection information by the collection agency staff. The sheer volume of information flowing to and from the collection society would mandate online submission of as many aspects as possible, specifically and most importantly artists' rep-

¹²⁷ See World Intellectual Property Organization, *Criteria for Least Developed Countries*, at <http://www.wipo.int/ldcs/en/criteria.htm> (last modified Aug. 11, 2003) (recognizing the maximum GDP per capita of qualification as a LDC to be \$800).

¹²⁸ See *id.* at n.1 ("APQLI is a composite index comprising of 4 indicators: (i) child mortality, under the age of 5; (ii) calorie supply as a percentage of minimum daily requirements, or percentage of population undernourished; (iii) adult literacy rate; and (iv) combined primary and secondary school enrollment ratio.").

¹²⁹ See *id.* at n.2 ("EDI is a composite index comprising the following indicators: (i) combined indicator of manufacturing and modern services as a share of GDP; (ii) indicator of the concentration of goods and services exports; (iii) per capita electricity consumption per year; and (iv) vulnerability to natural disasters developing and including an indicator in this area is in the process of being carried out.").

¹³⁰ See discussion *supra* Part III.B.2.a (discussing the three-tiered system, as negotiated in the U.S. by its digital sound recording performance royalties society, SoundExchange).

ertoires (including percentage allocations)¹³¹ and webcasters' play lists.¹³² Musical tracking software, using watermarking¹³³ and fingerprinting,¹³⁴ should aid in the tracking of such webcaster information.

1. Submitting and Tracking Play Lists

Effectively tracking play is crucial to fairly distributing royalties. ASCAP and BMI use in-depth sampling to track radio play.¹³⁵ Webcasting does not require sampling of play lists and predictions of overall market play. It in fact can potentially be the easiest and most detailed media for collection and distribution. This is because online tracking can automatically register every station's exact play, instead of using a market snapshot based computation.¹³⁶ Tracking every single use of each song ensures that no artist will be left out, and that no artist will be over or under compensated. Online music tracking, however, has been construed by some as anything but easy: "[T]he lack of standards, incompatible systems, inaccurate song information, the cost and complexity of in-house deployments, and the sheer volume of music transactions that need to be managed make this a challenging problem."¹³⁷

Computer software companies have answered this challenge with software systems designed to handle online musical use that fits the specialized needs of "music service providers, content owners and

¹³¹ In many cases the artist's rights are split between band members, with percentage allocations determined by contract. The label copyright ownership split is also often split between labels or a label and its wholly owned subsidiary labels.

¹³² These play lists would require specific details to individual tracks, such as version information (e.g., remixes, cover songs).

¹³³ See Peter Wayner, *Marked Music*, EWEEK, Jan. 29, 2001, at <http://www.eweek.com/article2/0,1759,1243981,00.asp> (last visited Apr. 12, 2004) (describing watermarking technology and its use in protecting digitally transmitted music).

¹³⁴ See discussion *infra* Part III.B.2.c.1. (speaking to the fingerprinting technology developed by Audible Magic, which can effectively trace a high volume of webcasting playlists).

¹³⁵ See Lee Ann Obringer, *How Music Royalties Work*, at <http://entertainment.howstuffworks.com/music-royalties.htm/printable> (last visited Apr. 12, 2004) (describing the system of tracking used by ASCAP, which is indicative of the tracking conducted by BMI and SESAC). The author notes that for radio performances ASCAP takes a sample of the market using a combination of digital tracking, station logs and recording of actual broadcasts. *Id.*

¹³⁶ Compare *id.* (noting the depth and complexity of ASCAP's tracking and payment systems), with *infra* text accompanying note 143 (noting the ability of software to comprehensively track webcasts play lists using fingerprinting technologies).

¹³⁷ See Roy Mark, *Loudeye, Audible Magic Woo the Future*, INTERNETNEWS.COM, Jan. 8, 2002, at http://dc.internet.com/news/article.php/2101_950241 (last visited Apr. 12, 2004) (reporting from the Future of Music Conference regarding the partnership of Loudeye and Audible Magic to provide musical tracking software and content based identification technologies).

global rights organizations.”¹³⁸ One such software system is the creation of a partnership between Loudeye Corporation (“Loudeye”)¹³⁹ and Audible Magic Technologies Corporation (“Audible Magic”)¹⁴⁰

Loudeye, which provides conversion technology for multi-media into digital and streaming formats, provided Audible Magic with its extensive catalog of digitized music, to be updated on a regular basis.¹⁴¹ Audible Magic took this information and created a system that “independently monitors and generates accurate reports of digital music usage and performances; functions across multiple devices, platforms and networks; integrates into existing systems; and scales the high volumes of consumer music usage across all broadcast, peer-to-peer and subscription service models.”¹⁴²

This software program is enabled by digital fingerprinting technology, which reads the individualized ‘fingerprint’ of a digitized song in a matter of seconds, and matches that fingerprint to its database of millions of sound recordings.¹⁴³ Using this technology, the submission and tracking of webcasting play lists becomes an entirely automated operation, cutting costs of administration for webcasters and the collection agency.¹⁴⁴

2. Creating a Comprehensive Collection Database

To compliment advanced tracking technology, a detailed global database must be established to track licensing, payments, and distribution of royalties. Royalties may be split between band members, producers, record labels and their subsidiaries (i.e., Warner Brothers and Warner Brothers U.K.), and even with the Internal Revenue Service

¹³⁸ See *id.* (noting the market wide adaptability of Loudeye and Audible Magic’s integrated system).

¹³⁹ See Loudeye Corporation, *Company Overview*, at <http://www.loudeye.com/common/aboutus/companyoverview.asp> (last visited Apr. 12, 2004) (giving an overview of Loudeye, including its online media services, such as live and on-demand webcasting solutions).

¹⁴⁰ See Audible Magic Corporation, *Monitoring Solutions for Copyrighted and Recorded Media Content*, at http://www.audiblemagic.com/corporate_info.html (last visited Apr. 12, 2004) (describing Audible Magic and its software and services, specifically providing monitoring solutions for online media use).

¹⁴¹ See Mark, *supra* note 137 (discussing the functionality of the Audible Magic tracking software and the breadth of its potential coverage and usage).

¹⁴² *Id.*

¹⁴³ See Audible Magic Corporation, *Content Aware Technology For Next Generation Solutions*, at <http://www.audiblemagic.com/technology.html> (last visited Apr. 12, 2004) (describing Audible Magic’s fingerprinting technology, and noting its comprehensive sound recording database of over 3.5 million recorded songs).

¹⁴⁴ See Mark, *supra* note 137 (noting that Loudeye and Audible Magic estimate savings between 20 and 40 percent as compared to using “multiple point technologies and in-house developed solutions”).

(for liens on wages for owed taxes).¹⁴⁵ Thus, a detailed and flexible system is needed to accommodate a variety of royalty distribution scenarios.

Such a system has been broached by collection agencies through an initiative to develop a global network entitled “The Digital Copyright Network” (“DCN”) (originally known as “Fast Track”).¹⁴⁶ Five major collection organizations are partners in DCN, the collection societies of: BMI; the German society, GEMA (Gesellschaft für musikalische Aufführungs—und mechanische Vervielfältigungsrechte); the French society, SACEM (Société des auteurs compositeurs éditeurs de musique); the Spanish society, SGAE (Sociedad General de Autores y Editores); and, the Italian society, SIAE (Società Italiana degli Autori ed Editori).¹⁴⁷ DCN’s mission is to create a “global network between collecting societies.”¹⁴⁸ DCN has set forth three goals to accomplish its mission: (1) Creating an international document network; (2) providing for online registration; and (3) allowing on-line licensing.¹⁴⁹ These goals are critical in establishing an international webcasting collection agency. Unfortunately, the results of the DCN initiative have not yet been made available to the public. Nevertheless, the goals of DCN help develop a framework for an international collection agency generally.

The proposed international document network is vital for obvious reasons. The database must be adaptable to different platforms and languages, and allow worldwide access.¹⁵⁰ In the international document network, online registration must be available for webcasters, artists, and copyright owners. It is logistically impossible to cater to such a high volume of artists, labels, and webcasters without extensive online capabilities at a reasonable cost. Creating such a system may increase

¹⁴⁵ See Donald Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS: REVISED AND UPDATED FOR THE 21ST CENTURY 317 (2002) (discussing issues in musical groups, such as determining percentage splits in revenues).

¹⁴⁶ See Dr. Juergen Becker, *Santiago Agreement and “Fast Track”*, in GEMA NEWS, June 2001 (outlining the Santiago Agreement, which set forth principles for the global collection society industry to attempt to achieve in the near future, all tuned to the creation of a global music use license). Dr. Becker additionally spoke regarding the DCN initiative, setting forth objectives for an international copyright documentation network. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* (bulleting the goals of the DCN).

¹⁵⁰ See Carl Lindencrona, *The Future of Collective Licensing*, in COLLECTIVE LICENSING—PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 219, 220 (James M. Kendrick ed., 2002) (recognizing the need for collection societies to develop systems capable of recognizing region and language specific letters and distinguishing characteristics).

start-up costs but, on a long-term basis, will provide for efficiency and cost savings for both the webcasters and the artists and copyright owners.

C. *Allowing a Monopolistic Collection Society Benefits Users and is Equitable Under the Law*

1. *An International Clearinghouse Does Not Create Concerns Over Monopolistic Behavior.*

An international webcasting royalties collection agency would have a monopolistic hold on the market. Nevertheless, as with certain regulated monopolies in the United States and the European Union, a monopoly may be the most efficient system for all interested parties. Any argument against a monopoly is ironic given the fact that the collection societies for traditional royalties operate under a similar monopolistic regime.¹⁵¹ In Europe, “[c]ollection societies have a virtual 100% share of their respective territories.”¹⁵² This acceptance of monopolistic societies revolves around a general belief that certain goods and services deserve public use, but private entities may not have the economic incentive to aid in such dissemination into the market without de jure or de facto protection as a territorial monopoly.¹⁵³

The European Court of Justice (ECJ) has in fact recognized the monopolistic nature of national collection societies and held that the monopoly is valid under antitrust law so long as this dominant position is not abused to the detriment of individual society members.¹⁵⁴ The

¹⁵¹ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 45 (finding that European collection societies operate under an admitted monopoly system in their respective territories, and nearly all national sound recordings rights are entrusted to one collection society in each country).

¹⁵² *Id.*

¹⁵³ See David Wood, *Collective Management and EU Competition Law*, in COLLECTIVE LICENSING—PAST, PRESENT AND FUTURE: REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS MIDEM 2002, CANNES 159 (James M. Kendrick ed., 2002) (noting the European Commission’s treatment of acceptance of certain monopolies is necessary in the furtherance of public interest and societal desires) [hereinafter *Collective Management*].

¹⁵⁴ See Case 395/87, *Ministère public v Jean-Louis Tournier*, 1989 E.C.R. 2521 (“Copy-right-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article 85 unless the contested practice exceeds the limits of what is necessary for the attainment of that aim.”), available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61987J0395 (last visited Apr. 12, 2004); see also Case 127/73, *Belgische Radio en Televisie v. SABAM et NV Fonior*, 1974 E.C.R. 313, ¶ 7 (noting the degree of deference given to collection societies in the European Community and stating: “[I]t is therefore necessary to investigate whether the copyright association, through its statutes or contracts concluded with its members, is impos-

ECJ first recognized in *Belgische Radio en Televisie v. SABAM et NV Fonior* that in order to perform its duties as a collection society, the Belgian collection society must be afforded enough power to effectively represent the rights of its member artists, composers, and publishers.¹⁵⁵ David Wood,¹⁵⁶ on behalf of the Directorate General of Competition for the European Commission reiterated this point, noting that his office would not intervene in collection society business if the result would “increase the overall costs of managing contracts and monitoring the use of protected works.”¹⁵⁷

This European concept of the need for collection societies to maintain a relative monopoly on the territory is reiterated globally, with the majority of countries operating under one domestic agency. Monopolistic control is not entirely accepted in the U.S., where multiple agencies represent composers and publishers (i.e., ASCAP and BMI). Still, even if a monopoly is not present in the U.S., an oligopoly is certainly in place. Additionally, such an oligopoly of agencies could arguably only be maintainable in a media market as pervasive as the one found in the U.S.¹⁵⁸

The concern of many is ensuring fair representation of all parties.¹⁵⁹ Webcasters would not wish to be subjected to unfair rates globally due to an international collection society’s chokehold on the market.¹⁶⁰ The same is true for those owed royalties who do not wish to receive below market compensation for their works from an international clearinghouse heavily influenced by the broadcasting industry. These concerns are well grounded, especially when dealing with one global collection society because, in the current system, competition at

ing, directly or indirectly, unfair conditions on members or third parties in the exploitation of works, the protection of which has been entrusted to it.”), available at [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61973J0127\(01\)](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61973J0127(01)) (last visited Apr. 12, 2004).

¹⁵⁵ See *Belgische Radio en Televisie*, *supra* note 154 at ¶ 10-11 (noting that such power should be limited to that which is necessary to enable the society to conduct its business, and should be limited to prevent excessive encroachment on the rights of its members).

¹⁵⁶ See *Collective Management*, *supra* note 153, at 172 n.1 (giving David Wood’s professional title as Deputy Head of Unit, Media and Music Publishing, Directorate General for Competition, European Commission).

¹⁵⁷ See *id.* at 159 (seeing collection societies as an “absolute necessity” in fairly protecting copyrighted materials).

¹⁵⁸ See, e.g., National Music Publishers Association, *supra* note 10 (expressing the massive size of the U.S. music market).

¹⁵⁹ See *Collective Management*, *supra* note 153, at 159 (listing the traditional concerns in analyzing collection societies under European Union Competition Laws as “the level of fees, the relationship between members and their collection society and the network of relations between collection societies”).

¹⁶⁰ See *id.*

least theoretically exists between nations, and acts as a self-regulating mechanism.

The monopolistic concerns of relevant parties may be addressed with several structural support mechanisms: (1) establishing the entity as a non-profit organization; (2) composing the collection society board of directors of a fair proportion of the different groups owed royalties and the different types of webcasters; (3) creating an oversight committee within WIPO; and (4) allowing for the protection of rights under national laws of member countries.

Establishing the collection society as a non-profit organization prevents any monies being withheld other than to cover the administrative costs of the body.¹⁶¹ This decreases any motivation on the part of the society to overcharge the webmasters or recoup an excessive percentage of the royalties prior to distribution.

Spreading the power of the Board of Directors between all parties gives a voice to each group, from the major labels to independent labels, to artists, to university-based webcasters and large webcasters, and so on. Although a concern exists as to the competing interests of fellow board members, it ensures equitable rate setting and efficient monitoring of the actions of the collection society.¹⁶²

The prevention of exploitation or abuse of power by the collection society is possible given the concurrent powers of WIPO internationally and domestic courts nationally. Current regulation would not likely require reformation, or creative judicial determinations, for the standards would be similar to those that have developed in current antitrust law regarding collection societies.¹⁶³ The addition to current domestic regulatory powers would be the insight provided by WIPO,¹⁶⁴ whose over-

¹⁶¹ See, e.g., 26 U.S.C. § 501(c)(3) (allowing for non profit status in the United States, and providing the requirements for filing for non profit status).

¹⁶² *But see* SoundExchange, *FAQ*, at <http://www.soundexchange.com/faq.html#a1> (last visited Apr. 12, 2004) (indicating that the SoundExchange board of directors is composed of an equal proportion of record label representatives and artists, however, no broadcasters, cable, satellite, or web-based, hold board positions).

¹⁶³ See *supra* text accompanying notes 153-157 (describing the regulation of collection societies within the European Union by the European Court of Justice, and the European Commission's Directorate General for Competition).

¹⁶⁴ See World Intellectual Property Organization, *Vision and Strategic Direction of WIPO* ¶ 7, at http://www.wipo.int/documents/en/document/govobody/wo_gb_ab/doc/a34_3.doc (last visited Apr. 12, 2004) ("As the organization competent and responsible for the formulation of intellectual property policy at the international level, the first challenge for WIPO will be to adjust the existing intellectual property system in order to make it function harmoniously in a global world."). In such a position WIPO would certainly be the most applicable and most willing international body to establish an oversight committee for international web-casting royalties.

sight committee could fairly address cross-border copyright issues and, should it become necessary, offer guidance to domestic courts.¹⁶⁵

Such a non-profit organization, with a board comprised of representatives of all relevant parties, scrutinized by WIPO and national governmental entities is definitively protected against internal exploitation of its customers (broadcasters) or its members (artists and copyright holders). Furthermore, as a regulated monopoly, its users benefit from the economy of scale that it produces.¹⁶⁶

2. A Monopoly Benefits Users.

According to one scholar, “Copyright no longer seems up to the job in a digital environment of mediating between the interests of producers of works in getting paid for them and of their consumers in gaining access at a reasonable cost to what is produced.”¹⁶⁷ This statement is true in many arenas of music protection, including webcasting. An international webcasting monopoly furthers such difficult protection of digital rights. A monopoly benefits from its inherent economy of scale, which saves money, increases systematic ease of use, and ensures comprehensive copyright protection.¹⁶⁸

The larger the society, the less administration costs eat away at royalties to rights-holders and the less they increase costs to users.¹⁶⁹ In a developed system, as proposed in this piece, administration costs would plateau at a certain point following which the percentage of royalties being used by the society for administrative costs would decrease with each incremental increase in monies collected for distribution.

Users and rights-holders would not only save money on administrative costs, but would also save based on the ease of use of a “one-stop” shop. As the sole international collection society, only one registration would be necessary for artists and record labels, and webcasters

¹⁶⁵ See *Collective Management*, *supra* note 153, at 162 (reminding readers that domestic courts, tribunals or administrative bodies may review and scrutinize collection society rates).

¹⁶⁶ See discussion *infra* Part III.C.2 (recognizing the benefits of scale in terms of cost-cutting and systematic ease-of-use).

¹⁶⁷ See Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121 (2003) (addressing the difficulties around copyright protection when digital transference of the media is much easier than traditional illegal distribution of music).

¹⁶⁸ See Commission Decision 2003/300/EC, *supra* note 63, ¶ 31 (cataloging benefits of a ‘one-stop’ shop for multi-territorial licensing). These benefits are discussed in the context of the IFPI Agreement, arguably they would be magnified in the context of an international collection society.

¹⁶⁹ See *id.* (suggesting that in a streamlined licensing process administration costs would decrease, to the benefit of both rights-holders and users of the music).

could gain licenses, submit play lists, and pay royalties to only one entity for all of its music use.¹⁷⁰

Lastly, rights-holders are ensured comprehensive protection and compensation. With one organization setting all rates and policing the entire globe, collecting royalties for distribution, regardless of the status of the user or its place of business, becomes an easier accomplished reality.

IV. CONCLUSION

Artists, labels, and broadcasters deserve a system functionally capable of handling the collection and distribution of webcasting royalties. Segregating a global market by geography benefits neither side of the equation. Allowing the current territory-oriented system to manage webcasting is inefficient and costly. To decrease costs while concurrently ensuring widespread copyright protection, an international collection society must be established.

This collection society should provide for a multi-tiered rate schedule, adaptable to different types of webcasters and national economies. This society must also set forth an equitable structure, beginning with an evenly balanced board of directors consisting of artists, major labels, independent labels, and broadcasters.

With a structure similar to that outlined in this piece and the necessary technological support, the society should gain widespread acceptance. As seen in the support of the IFPI Agreement, most nations appear amenable to a more unified system; an international society provides for the most unified approach possible.

Webcasting is the one media outlet uniquely positioned to further international recognition of musical performance rights. It is time that the international legal community recognizes this and takes action.

¹⁷⁰ Cf. *id.* (noting the advantageous nature of a multi-territorial license).

