

## Futures for Webcasting: Regulatory Approaches in Australia and the U.S.

Dr Axel Bruns

Media & Communication

Creative Industries Faculty

Queensland University of Technology

All we hear is radio gaga, radio googoo, radio blahblah

Radio, what's new? Radio, someone still loves you

– Queen, “Radio Gaga”

In the history of the still-fledgling media form of online radio, the year 2002 will come to be seen as a time of drawn-out legal and legislative battles over sound recording royalties which seemed to spell the end for U.S. Webcasters at a number of points during the conflict. Protagonists in this trench warfare were a loose and increasingly fragmented coalition of online radio operators from the very small to the very large, and including Net-only Webcasters as well as the rebroadcasters of terrestrial stations, and on the other side the Recording Industry Association of America (RIAA) and its SoundExchange royalty collection agency as the representatives of performance copyright holders (yet following a wider agenda which remains the subject of intense guesswork). Also appearing in a story which at times began to resemble an episode of *The West Wing* were a motley crew including the Librarian of Congress, an ugly CARP, and – in an unlikely role as saviour of the industry – veteran Republican Senator Jesse Helms.

The battlelines for this fight had been drawn long before, however. When the grandly named Digital Millennium Copyright Act (DMCA) became law in the U.S. in late October 1998, it introduced, *inter alia*, a requirement for royalties to be paid by online stations. Rates for such fees were to be determined according to a ‘willing buyer/willing seller’ model: “in establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller” (DMCA, 1998, p. 37) – in other words, they were expected to reflect what were standard fees in the digital media market. The DMCA itself did

not set such rates, however, but left this task to an independent Copyright Arbitration Royalty Panel (CARP), made up of members temporarily appointed by the U.S. Copyright Office. Once set, royalties dating back to the date of passage of the DMCA were then to be paid retroactively by Webcasters. While agreements with ASCAP and other relevant bodies over performing rights (royalties due to the authors of copyrighted material) were reached soon – and resulted in an average rate of around 3% of a Webcaster’s annual revenue required to be paid (ASCAP, 2001) –, no decision had yet been made about royalties for sound recordings (due to the actual performers of a specific piece) as late as 2001, raising fears of a significant backlog of accumulated fees for at least three years suddenly burdening an industry which had yet to prove its profitability. Some Webcasters even preemptively began pulling the plug on their channels: in April 2001, for example, the ClearChannel network of on- and offline stations shut down its 150 Webcasters (Borland, 2001).

#### A Brief Overview of the 2002 Skirmishes

The Copyright Arbitration Royalty Panel (CARP) on Webcasting held its deliberations on a royalty fee structure during the second half of 2001. Central to its decision-making were the contrasting models proposed in submissions from interested parties:

- the RIAA demanded a payment of around 0.4¢ for each song and listener – in other words, a Webcaster playing ten songs per hour, with an average 100 listeners at any one time, would have to pay  $10 \times 100 \times 0.4¢ = \$4$  per hour. For a Webcaster like Spinner.com with its then around 150 channels of continuous content, therefore, yearly fees would come to a cool \$5.25 million (plus retroactive payments back to 1998, of course). The RIAA based this suggestion on a variety of deals it had already struck with operators like Yahoo!, thereby suggesting that such rates were indeed based on real-life ‘willing buyer/willing seller’ examples.
- the Digital Music Association (DiMA), on behalf of Webcasters, suggested 0.14¢ for each song per hour (leaving out the number of listeners altogether), giving the much smaller rate of  $10 \times 0.14¢ = 1.4¢$  per hour for a Webcaster

playing ten songs in the hour, or yearly fees of around \$18,000 for the likes of Spinner.com. (The DiMA had originally considered suggesting a percentage-of-revenue solution similar to the royalty agreement with the performing rights bodies, but apparently felt it needed to match the per-song approach espoused by the RIAA. This would prove a costly error of judgment.) (DiMA, 2001)

It is also worth noting that the parties involved in the CARP process were by no means representative of all Webcasters, due in part to the set-up of CARPs in general: participants in CARPs commit to paying an unspecified share of the costs of the process (which are themselves unknown until the CARP process is concluded, of course), making participation unaffordable for anyone but well-financed organisations and thus shutting out a large portion of the still-emerging Webcasting market. Especially as regards digital media copyright issues, therefore (where smaller startups are predominant), this form of essentially outsourcing U.S. Copyright Office deliberations to independent panels may be seriously flawed.

In February 2002, then, the first major bombshells hit the Webcast scene. On 7 February, with the CARP decision still pending, the U.S. Copyright Office largely followed the RIAA's recommendations for how the broadcasting of copyrighted material had to be reported to the RIAA's SoundExchange agency. It not only required Webcasters to submit a total of 18 items of data for each song played, but also asked for the keeping of an 'ephemeral phonorecord log' (tracking ephemeral copies such as MP3 files made to facilitate the Webcast itself but not used for other purposes), as well as for seven further data points about a station's listeners:

- (i) The name of the Service or entity;
- (ii) The channel or program, using an identifier corresponding to that in the Intended Playlist;
- (iii) The date and time that the user logged in (local time at user's location);
- (iv) The date and time that the user logged out (local time at the user's location);
- (v) The time zone of the place at which the user received transmissions (as an offset from Greenwich Mean Time);
- (vi) The unique user identifier assigned to a particular user or session; and
- (vii) The country in which the user received transmissions.

(Copyright Office, 2002a)

If – in addition to questions over the legality of such extensive user tracking – this had already raised operators’ worries about their ability to meet new regulations, worse was to come less than a fortnight later, when the Webcasting CARP handed down its recommendations (to be acted on by the Librarian of Congress on behalf of the U.S. Copyright Office). Here, too, the decision was much closer to the RIAA’s recommendations than to the Webcasters’ suggestions, especially as the CARP chose to endorse a per-song/per-listener model rather than the alternative per-hour or per-revenue solutions (CARP, 2002). While noting that “because many webcasters are currently generating very little revenue, use of a percentage-of-revenue royalty ... could result in a situation in which copyright owners are forced to allow extensive use of their property with little or no compensation”, and that “this potentiality was something Congress specifically cautioned against in enacting DMCA” (CARP, 2002, p. 37), this ignores another stated aim of the Digital Millennium Copyright Act: to promote the use of digital media and grow that market. As Rep. Klug stated in the final House debate before the passage of the DMCA, for example, through the Act Congress aimed to protect copyright “in a thoughtful, balanced manner that promotes product development and information usage, indeed the very ‘progress of Science and the useful arts’ set forth in the Constitution” (*Congressional Record*, 1998, H10621). The CARP recommendations, being still prohibitively high for many Webcasters, failed to stay true to such aims, then, by setting rates of:

- 0.07¢ per song and per listener for commercial Webcasters rebroadcasting content from terrestrial stations,
- 0.14¢ per song/listener for Net-only commercial Webcasts,
- a further 9% of these royalties for ephemeral recordings;
  
- 0.02¢ per song/listener for a tightly defined category of non-commercial Webcasters rebroadcasting terrestrial content,
- 0.05¢ per song/listener for Net-only non-commercial Webcasters with up to two side channels (plus 0.14¢ for any other side channels).

Once again, thus, ten songs per hour streamed to an average of 100 listeners would cost a Net-only Webcaster \$1.4 per hour, or upwards of \$12,000 per year and per channel if they operated continuously every day – with fees retroactively payable from late 1998 (Spinner.com with its 150 would still owe over \$1.8 million per year under these assumptions). Most hobbyist operators, it should be noted, would *not* fall under the non-commercial category here, which addresses a narrow form of public broadcasting only.

Almost immediately after the release of these recommendations, the battle began in earnest. On 5 March 2002, the Webcasters launched SaveInternetRadio.org, in a late attempt to coordinate their lobbying efforts – while the Librarian of Congress was legally bound to ignore any public representations in his ongoing consideration of the CARP report, moves were soon underway to appeal for help to the Subcommittee on Courts, the Internet, and Intellectual Property at the House of Representatives, the immediately responsible body in the federal U.S. legislature (see e.g. RAIN, 2002).

The Webcasters' efforts were hampered by their failure to present a completely united front, however: while a majority of their numbers participated in lobbying initiatives, those stations which mainly constituted the online wings of established terrestrial broadcasters pursued a different course through their peak body, the National Association of Broadcasters (NAB). Given that AM and FM radio stations were exempt from sound recording royalties altogether (with their broadcasting of music considered as beneficial promotion for copyright holders), they argued that they should not need to pay for Webcasting music if they did not have to pay for *broadcasting* the same content offline (see e.g. NAB, 2002). By contrast, many of the smaller operators who could scarcely hope to scrape together the cash to pay backlog royalties, let alone future fees, simply began to wind up their operations in this apparently hopeless situation.

By contrast, the RIAA was unhappy, too, and demanded even higher royalty rates, reiterating its 0.4¢ per song and listener target and introducing new demands of higher royalties for longer songs (an additional 20% for each minute after the first five) and a minimum licence fee of \$5000 (Maloney, 2002a). In response to serious concerns over the legality of snooping out user information, it did drop its demands for a listener log as part of the reporting process, however.

If the DMCA had indeed aimed to promote the growth of digital media, the CARP recommendations clearly began to have a contrary effect. Increasingly, however, it

also became obvious that the root of the problem in good part lay with the DMCA itself, which set out the CARP process and required the ‘willing buyer/willing seller’ model. The CARP’s own recommendations contain a record of its deliberations on what existing ‘willing buyer/willing seller’ agreements it could base its decision on, and indicate that a 1999 deal between the RIAA and Yahoo!’s Broadcast.com service served as its main model; in fact, they state that “the Yahoo!-RIAA negotiation was the only one to reflect a truly arms-length bargaining process on a level playing field between two major players of comparable skill, size, and economic power” (CARP, 2002, p. 61), and that “the elements of this agreement, its economic significance, and the matching strengths of the parties who negotiated it, all support its use as the most reliable benchmark for what a willing buyer and a willing seller would agree to in the marketplace” (CARP, 2002, p. 70). Not only does this not take into account the very significantly changed marketplace of 2002 (after the dotcom crash, and amidst the post-9/11 advertising slump and general recession) in comparison to the dotcom euphoria of the late 1990s – adding insult to injury, statements by Broadcast.com founder Mark Cuban later also revealed that the deal had indeed been drawn up by the two parties with the specific aim to stifle competition:

When I was still there (the final deal was signed after I left Yahoo!), I hated the price points and explained why they were too high. HOWEVER, ... I, as Broadcast.com, didn't want percent-of-revenue pricing.

Why? Because it meant every "Tom, Dick, and Harry" webcaster could come in and undercut our pricing because we had revenue and they didn't. ...

The Yahoo! deal I worked on, if it resembles the deal the CARP ruling was built on, was designed so that there would be less competition, and so that small webcasters who needed to live off of a "percentage-of-revenue" to survive, couldn't.

(qtd. in Maloney & Hanson, 2002)

Buyer and seller, in other words, were only too willing to come to an agreement on royalty rates – but the deal struck here most likely does not represent the best rates to be negotiated in a free market, but rather is the result of collusion to close the market to the entry of new players.

Finally, some press coverage also began to emerge, and by the end of April around 20 members of the House of Representatives had agreed that the CARP proposal in its present form was contrary to the intent of the DMCA and standing Congress policy (Maloney, 2002b). On the wave of such recognition, Webcasters staged a ‘Day of Silence’ on 1 May 2002, which saw some stations shut off their streams altogether for the day, others interrupting their programme with support messages or periods of dead air, and some syndicating a 12-hour talk show about the issue produced at the one-man Webcaster WOLF FM. The event itself sparked further significant press coverage.

Congress was slowly beginning to recognise this problem. On 10 May, the Copyright Office held a roundtable on the recordkeeping requirements; on 15 May, the Senate Judiciary Committee convened a hearing on Net royalty rates. Both seemed clearly timed to affect the impending decision on how to proceed from the CARP recommendations, due from Librarian of Congress James H. Billington by 21 May – and indeed, Billington rejected the CARP recommendations, in turn sparking a review of the CARP model by the House of Representatives which later produced a highly critical report (see Subcommittee, 2002). Though under siege and dwindling in numbers (to a point where industry newsletter *RAIN* had begun to keep a [list of stations gone offline](#) in response to the likely fee structures), the Webcasters, it appeared, had finally won a battle – but not yet the war.

Having rejected the original CARP recommendations (without further explanation), and after further representations from the parties involved in the CARP process, Billington now designed his own fee structure – and the Webcasters’ joy at having apparently ‘defeated’ the RIAA proved to be short-lived, since his rates did not constitute a marked improvement over the original recommendations, and continued to use the RIAA/Yahoo! deal as a benchmark (the Cuban story had not yet broken): Billington suggested

- abandoning the distinction between Net-only and offline rebroadcasters, and applying the 0.07¢ per song/listener rate to both for the commercial, and
- 0.02¢ per song/listener for the narrow non-commercial category (plus 0.07¢ for each further channel after the first two), as well as

- lowering the ephemeral recordings surcharge from 9% to 8.8%.  
(Copyright Office, 2002b)

At ten songs per hour streamed to an average of 100 listeners, a continuously streaming Net-only Webcaster would therefore pay 70¢ per hour, or more than \$6,000 per year and channel. (Spinner.com with its 150 would still owe over \$900,000 per year). While effectively halving fees for many Webcasters, this was still seen as prohibitively high for many of them. It did further the already obvious fragmentation of the Webcasters' cause: some of the larger operators now felt that rates were in a range they could live with, while the smaller stations continued to oppose it vehemently – and the NAB still maintained its fundamental opposition to paying royalties for their rebroadcasts at all. On the other hand, for very different reasons the RIAA also voiced its strong criticism of the lowered rates.

With a newly formed [Voice of Webcasters](#) organisation now representing some 30 smaller stations, both sides' lobbying efforts in Washington began once again. Time was now running out: the Librarian's ruling would take effect on 1 September, with the first royalty payments due on 20 October. In spite of the lead-up to the November mid-term elections and the overwhelming focus on the 'war on terror' and the likely war against Iraq, a group of three Representatives introduced an "Internet Radio Fairness Act" on 26 July (Inslee, 2002), designed specifically to support the smaller operators by exempting businesses under \$6 million in revenue, and changing from the CARP 'willing buyer/willing seller' model back to 'traditional standards' for fees. This bill, in turn, was dropped in favour of a bill known as HR.5469, and sponsored by House of Representatives member James Sensenbrenner on 27 September (Sensenbrenner, 2002).

Titled "Relief for Small-Business Webcasters Act", this new bill simply aimed to suspend the Librarian's decision for six months, effectively buying some time for the parties involved to devise a more equitable royalty fee structure. Essentially, therefore, Sensenbrenner's bill was a none-too-subtle hint to the warring groups to stop fighting and start talking, and it had almost immediate effect, with RIAA and Webcaster representatives meeting in the Congressman's office to draw up a new fee structure (neither hobbyists nor rebroadcasters of terrestrial content were party to these negotiations, however).

Especially against the backdrop of the preceding months of conflict, the result of these negotiations was phenomenal both with a view to the fact that a compromise was reached within little more than a week, and considering that the new fee structure emerging from the talks constituted a move away from the per-song/listener model to a percentage-of-revenue approach. Passed by the House of Representatives as a revised version of HR.5469 now titled “Small Webcaster Amendments Act”, it proposed that:

- small Webcasters under \$1 million in revenue would pay 8% of revenue or 5% of expenses (whichever was higher), or a minimum of \$2000 per year, with future rates rising to 10-12%, while
  - very small Webcasters could elect to pay the CARP-recommended fees which may be cheaper in some cases
- (“Small Webcaster Amendments Act”, 2002)

The bill, still to be ratified by the Senate, did not address non-commercial stations, rebroadcasters, or larger Webcaster organisations, however, which would still be bound by the Librarian’s ruling – which could be seen as a significant flaw, as many of the ‘smaller’ Webcasters, such as the many college and university Web-radio stations would be regarded as part of their larger parent organisations here.

Time was now almost up, with the first royalties under any fee structure due by 20 October 2002. Once again Webcasters’ hopes for a reasonable settlement were disappointed, however, when a last-minute intervention by Senator Jesse Helms put a hold on the passage of HR.5469 through the Senate on 17 October. While Helms was reportedly working with the conflict parties on a better solution than that proposed in the present bill, and while the RIAA’s SoundExchange supported this process by requesting that eligible small Webcasters pay only a temporary minimum fee of \$500 for now, it still meant that the Librarian’s proposed fees were to come into effect within days.

It would take another three weeks until HR.5469 emerged again, now in its third revision and renamed the “Small Webcaster Settlement Act”, sponsored by Helms. After the dramatic events of October, the bill, passed by Senate and House on 14 November and finally signed into law by George W. Bush on 4 December is an

almost anti-climactic document, as it retreats from the new ground charted in its previous version. It contains no definition of what constitutes a ‘small’ Webcaster, and includes no predetermined royalty rates (but acknowledges that small Webcasters “have expressed their desire for a fee based on a percentage of revenue”, and encourages such a fee structure), but throws out the CARP recommendations and the Librarian’s fee structure as not suitable for small operators; instead, it required the RIAA and small commercial Webcasters to develop their own structures by 15 December, based on their current negotiations, and gave small non-commercial Webcasters time until 30 June 2003 to do the same (“Small Webcaster Settlement Act”, 2002).

Perhaps because of this overwhelming vagueness of terms, this final form of HR.5469, now covering small commercial and non-commercial operators only, and extending the definition of ‘non-commercial’ further than previously, met with a very positive reception from all sides, with those sides also promptly resuming their negotiations towards a final deal. The Webcast market was now clearly divided into three sectors: ‘small’ Webcasters, to whom this bill applies, larger Webcasters, who were covered by the Librarian’s fee structure and appear to be able to live with it, and the rebroadcasters of terrestrial radio content, who continue to fight against the Librarian’s ruling using the argument that after all they do not have to pay royalties for sound recordings used in their terrestrial broadcasts.

The smaller commercial Webcasters then went on to reach an agreement with the RIAA’s SoundExchange agency, developing a “Small Commercial Webcaster Licence” which was submitted to the U.S. Copyright Office on 13 December 2002 (SoundExchange, 2002). It largely follows the terms outlined in the previous version of HR.5469, then titled the “Small Webcasters Amendments Act”, and so respects Congress’s clear indication that it expected a move to a percentage-of-revenue fee structure for small operators. Already in December, the first ‘silenced’ stations began to resume their operations as a consequence of this settlement. Similarly, the smaller non-commercial Webcasters developed an agreement by 30 June 2003 (SoundExchange, 2003). This agreement institutes a set of minimum fees of no more than \$500 per annum for as long as stations do not broadcast for more than 146,000 of what the agreement calls ‘aggregate tuning hours’ per month; that is, the sum of the listening durations of all listeners to a station – ten listeners listening for one hour each, simultaneously or consecutively, would accumulate 10 *ath* (146,000 *ath* equate

to just over 200 listeners tuned in continuously to one channel over 30 days). Where that threshold is exceeded, stations can elect to pay either an extra 0.02¢ per song, or 0.25¢ per aggregate tuning hour.

Now What?

It is tempting to consider these settlements a victory for Webcasters, and indeed their persistence against extortionate fee structures must be commended. If the convoluted history of this conflict has shown anything, however, it must be that they should not feel safe too soon. The present licence structure will continue until the end of 2004, and a renewal of the struggle at that point seems not entirely unlikely.

Clearly, a key factor here is the role played by the ever-belligerent Recording Industry Association of America (RIAA), which has established a history of heavy-handed negotiating and lobbying tactics in its fight against what it sees as offences by new media forms against the recording rights interests it represents. At present, Webcasting and filesharing are two of the key battlefields for the RIAA. In spite of RIAA Chairwoman Hilary Rosen's rhetoric of defending the entire music community from exploitation by digital media operators, however, the RIAA's role is today viewed with increasing criticism by many commentators as well as by the artists it nominally represents. The organisation is seen to represent mainly the interests of the oligopoly of major entertainment producers, defending their interests from the independent and alternative upstarts which have started to emerge as we move further into the information age.

In the Webcast case, "the smoking gun comes from testimony of an RIAA-backed economist who told the government fee panel that a dramatic shakeout in Webcasting is 'inevitable and desirable because it will bring about market consolidation'" (Levy, 2002, p. 51). This push for market consolidation (the removal of many smaller operators in favour of establishing a manageable number of major companies) would seem to be in line with what Mark Cuban claims was the main aim behind the RIAA/Yahoo! deal – setting a fees precedent which could be used to shut out the startups. It is clearly in conflict with the stated aims of the U.S. Congress as it passed the Digital Millennium Copyright Act in 1998, however, which hoped to support such new industries.

Eventually, the RIAA might also come into conflict with its own corporate backers. What used to be the *music* majors have now transformed into entertainment-telecommunication conglomerates, and in defending the property of one arm of these companies the RIAA might well stifle the commercial viability of other sectors – with filesharing and streaming media as key drivers of broadband uptake, for example, a defence of Warner Bros.’ rights as a music publisher may work against the interests of AOL as a broadband access provider within the overall TimeWarner-AOL concern (not to mention Spinner.com, which has now become Radio@Netscape Plus, and thus another TimeWarner-AOL subsidiary). And even music publishers in themselves might eventually realise that Webcasters (as well as filesharers) in fact provide a useful promotional service for their music (curiously, this view has not translated from terrestrial to online radio, as the NAB’s continued court actions show) – and contrary to filesharing, the lower quality of Webcasts, and the possibility to protect them reasonably well from being saved to disk, actually should make online radio the *preferred* digital music medium for the industry.

In stark contrast to the U.S. Webcast battle, Australian Webcasters and consumers can (so far) take heart that the Australian royalty collection bodies have taken a far more conciliatory stance towards Webcasters than their American brethren. It is difficult to judge whether this is simply due to the relatively underdeveloped Australian Webcasting market, and the therefore rather limited importance of Australian Webcasting to Australian and international recording industry associations, or whether it does in fact reflect a more cooperative attitude as such; at any rate, in the light of U.S. developments Australian Webcasters would be well-advised not to consider themselves overly safe unless they have come to clear and binding royalty arrangements.

In Australia, the Copyright Amendment (Digital Agenda) Act of 2001 regulates royalty payments for digital media forms; it introduces a ‘right of communication to the public’ for which royalties can be claimed (CADA, 2000). For online radio, this right is administered by the Australasian Performing Right Association (APRA) on behalf of both the Australasian Mechanical Copyright Owners Society (AMCOS) and APRA itself. The Webcasting fee structure developed by APRA is relatively straightforward: commercial of any size Webcasters pay 5.5% of their revenue, or a minimum of \$1,100 per quarter year (plus an additional \$550 per additional channel)

– this equates to roughly half of the 10-12% of revenue which small commercial Webcasters in the U.S. are required to pay in 2004 under their agreement with SoundExchange. Further, APRA also introduces a new category of commercial Webcast, ‘active radio’, where listeners have some degree of influence over the playlist of broadcasts – here, the rates are 5.83% of revenue or a minimum of \$1,375 per quarter (APRA, 2001).

Perhaps due to the limited number of Webcasters of any form in Australia, rates for non-commercial Webcasters are not specifically stated by APRA; the association acknowledges that “the use of music on the Net is still developing and we don’t presume to have thought up a licence scheme for every possible permutation”, however (APRA, 2001), and offers case-by-case royalty negotiations with prospective Webcasters. Anecdotal evidence suggests that APRA is willing to grant experimental licences at relatively affordable rates, and the organisation makes clear that its royalty structures are still under development along with music uses on the Internet.

This half-formed state of Australian royalty structures for Webcasting may constitute a chance for Webcasters to make their concerns heard before industry or government intervention closes off opportunities; it could also be seen as perpetuating a certain deal of uncertainty which could become a threat if the RIAA, which has now taken on the role of marshalling recording industry bodies around the world to its cause, were to lean on its Australian counterparts in order to bring royalty rates here to an international (or U.S.) standard. APRA’s so far benevolent stance towards Webcasting, which may be born out of a genuine desire to grow rather than stifle the Australian market, may stand little chance in the face of such interventions.

For now, at least, one battle in the Webcast wars is over. Absent a change of heart at the RIAA, however, it seems unlikely that it will have been the last one.

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