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Free User-created Internet Radio

Television, tape recorders, CD burners, Napster and other free file-sharing services, iPods and its imitators, Satellite radio, iPhones, music via cellular phone, streaming radio, and Internet user-created radios have not killed radio as a medium; and they will most likely not kill the music industry either. Similar to the newspaper and television industries, terrestrial radio has adapted itself to cyberspace. However, over-the-air radio functions differently online from Internet-native radio; the first one remains as an information provider, while the latter acts more as an communication facilitator.¹ The online listener of terrestrial radio receives all the commercials from the radio, plus the commercials on the web site. Regular over-the-air radio plays commercials about everything—from groceries to public service announcements—and only in a few instances it directly promotes the purchase of the music it plays. In contrast, Internet-native radios display fewer ads not related to music and more links for buying the music they play. My concern here focuses more on Internet user-created radio services, the copyrights involved in the act of listening to these radios, and the Webcasters Settlement Act of 2008. I will argue that the services by webcasters like Yahoo! Radio—Yahoo! for short--, Last.fm, and Pandora.com should remain free to users, and that the fees paid by the webcasters should be much lower than they are now.

¹ Ren and Chan-Olmsted's study found out that terrestrial radios use their online presence as an extension of regular marketing tools.

When I am in Williamsburg, Virginia, I am able to listen clearly to at least 21 over-the-air radio stations; 17 of them also stream their programming. These stations broadcast from several towns and cities around Williamsburg. Just six of them claim to broadcast from here: one commercial AM, two commercial FMs, two Low-Power FMs (LPFM) that are actually one, and the College of William and Mary's FM radio. In fact, according to radio-locator.com only the AM, the LPFMs and the College's FM are from Williamsburg. The signals are not very strong and only the college station offers a variety of music. With the exception of Norfolk's NPR, the spectrum of music and news offered by all the radios covering this town does not look that broad either. It includes adult contemporary, classic rock, country, urban, Christian, Gospel, and classical music; as well as national news from Fox, ABC, or Christian networks. There are no kids, jazz, alternative, or world music, neither one can hear commercial non-Christian, liberal or left-leaning talk shows or news, sports, or foreign language programming.² The choices become even more limited because two or three of the stations re-broadcast programs originated in other cities or states; and most stations sound like they repeat their playlists daily. Williamsburg's radio situation is not different from other places. Fortunately, the Internet offers more free legal choices, thousands of national and international stations, plus Yahoo!, Last.fm, and Pandora.com.

Common business strategies dictate that a station must play what its audience wants to listen to, or that it has to target a certain demographic group. In actuality, the purpose of commercial radio is to promote music and advertise companies. Listeners benefit from the free performances—recorded or live; but they must also listen to

² Richmond's radios cover sports and they offer a few hours in Spanish, and there was also an independent LPFM radio that offered some hours of left-wing talk.

commercials. Standard terrestrial and satellite commercial radio stations survey their audience and aim to predict what the audience will like to hear. Listeners cannot change instantly what the radio plays, unless they call into the show, change the station, or –worse—turn off the receiver. Internet users have four options when they listen to radio, 1) choose standard terrestrial or satellite radios that stream their signal online, 2) listen to news and music segments offered by the radio conglomerates and public radio, 3) hear archived reports and shows, and 4) user-created radios. The reason the user-created radio websites are popular may be the same reason Starbucks' customers have made this company an icon: they have the illusion of consuming a customer-created product.

Pandora.com, Last.fm, and Yahoo! let the user create a radio based on their personal taste.³ After registration, the user enters the name of a singer, band, or type of music, next the intuitive keyword-search like programs compile or retrieve a list of songs and musicians similar to the one input by the user. Once the radio is created, the user may rate the music, share the station with other members of the service and their friends in Facebook or MySpace, invite friends to join the sites in order to see each other's radio, or buy music and music related merchandise. Performers may provide free play-only videos, or offer free downloads of pictures and music files to promote new materials. The range of music that can be accessed differs from site to site. Another difference is the type of metadata used to produce the stations.

Yahoo! Music's radio services represent an amalgamation of rival Internet companies. First, Yahoo! acquired broadcast.com from Mark Cuban and partners in

³ There are other services like slacker.com and shoutcast.com. AOL Radio is powered by CBS Radio, in the same way Yahoo! will be soon.

1999. Next, it bought LAUNCHcast Media in 2001. Three years later, it purchased Musicmatch. In 2005 it started its premium service, which allowed the user to pay five dollars per month for the radio, plus unlimited downloads of a limited music catalogue with heavy digital music managed rights. On September 30th of 2008, Yahoo! finished its merge with RealNetworks' Rhapsody service. Two months later—December 3rd--, citing a 70% of its profits going to royalties, Yahoo! announced that its music service will be managed by CBS Radio. Yahoo! software writers will provide the code and CBS Radio will sell advertising, manage royalties, and use Yahoo! to promote its terrestrial radios. As of December 1st, 2008 free Yahoo! has 2.2 million subscribers. It offers 1,000 songs for free a month, after this amount, the user needs to wait until the next month or purchase the premium service. The "Help" section explains that Yahoo! actually has only 140 stations based on genres and artists; about 130 of the stations are free. It seems that when a user chooses an artist or a type of music, the service provides him or her with one of the 130 "stations" or playlists. Users influence the updates of playlists every time they rate a song. In other words, the radios are not based on the user's taste, but on the most popular searches of a plain music search engine. Yahoo! mixes popular singers with unknown or starting performers, and only a constant rating activity makes the "unwanted" songs disappear from the radio.

Last.fm started in 2002 in London. Since its inception, it was a music service and an online community. Last.fm uses special software to make recommendations based on what the user likes and clicks on its pages. It claims to be "Largest people-powered music catalogue online." According to Anders A. Griffen, Last.fm's metadata has been build from bottom to top, since it relies on what people input. Whatever the

result, it represents what hundreds, probably millions of users like or dislike. From this point of view, it seems fair to compare Last.fm with Wikipedia—both have been built by their users. However, the main difference between the two sites is that Last.fm does not belong to the public, but rather to CBS Radio.⁴ Last.fm offers free and premium based services. The free service tries to convince the user to sign up for the premium service by providing 20-second snippets of songs from certain performers, which is the equivalent of “gourmet music”. After searching the Association for Computing Machinery database of journals and conferences proceedings, I found out that one of the strongest features of Last.fm is that software writers and computer professionals from Europe have theorized and proposed applications for Last.fm, but not for Yahoo! or Pandora.com. The logic behind may be that Last.fm behaves almost like open-source software, and Pandora and Yahoo! eagerly guard their code. One application created about two years ago in Sweden lets the user hear Last.fm in his or her cellular phone’s Bluetooth. One great feature unique to Last.fm is that the recommendations do not feel like being imposed on the user, they just appear on the page and it is the user’s decision to click or not on those recommendations. Here, the rating system does not become an annoyance as it does in Yahoo!.

Pandora.com works in the opposite way of Last.fm’s metadata, the first one is more authoritative. The builders of Pandora, the Music Genome Project, mirrored or “copied” the idea for their software model from the Human Genome Project. Since 2000, the Pandora team listens to a song and then classifies it according to a paradigm of 400 characteristics. According to the site, it takes about 20 minutes to classify each song. The service is similar to the other, but here the user rates the songs, and if one

⁴ CBS Radio acquired Last.fm in May of 2007.

gets a “thumb down” it stops playing immediately. There is a limited number of daily vetoes, otherwise the list of songs would be very short. This activity generates data used to match users with songs in the system. The user does not have several recommendations around the page like in Last.fm. Similar to the other two services, Pandora does not charge for its radios, but the ads displayed on the site are more discrete, or at least they blend better with the white and blue colors distinctive of the site. In general, the site’s layout is better; for example, the page does not require to much scrolling down to uncover more information. Contrary to Last.fm and the now defunct social.fm, Pandora includes less targeted marketing. Pandora.com’s main founder, Tim Westergren, is a classical trained musician and a software writer, which explains why Pandora offers more musical terms to define each song than the other services. Those terms are part of the 400 characteristics that can be found in a song, according to company founders. The ultimate mission of Pandora is to classify all the music, in the same way that Google aims to classify all human knowledge.

Copyright Issues

The copyrights involved in free Internet based radio are almost the same as those of terrestrial radio: both broadcasters and webcasters play music supported by commercial ads (no discussion needed here), both help recording artists to sell music, and both media may promote creativity, contrary to what the Copyright Arbitration Royalty Panel (CARP) expressed in 1998.⁵ In my opinion, the differences are a few. Internet radio has to be allowed to grow, because it is legal and even though it has damaged commercial regular radio, it is beneficial to listeners since regular radio now

⁵ Mentioned by the United States Copyright Royalty Judges in the “FINAL DETERMINATION OF RATES AND TERMS” for digital music of 2006.

has real competition. It should pay fewer royalties because it eventually may sell more music than regular radio, therefore creating more income for copyright owners. It is better because the benefit of the innovations it produces surpasses the “damage” caused. Also, in general the Internet radio industry complies with the copyright statutory standards for establishing fees.

Historically, the United States has favored competition, and it must let Pandora.com compete with the new monopoly--CBS Radio. The consolidation at Yahoo! demonstrates that Internet radio changes quickly and that if there is no real innovation, a service may die fast. “Wired” magazine reported on December 3rd that “41 percent of music sales will be digital by 2013,” a number that may help raise expectations for iTunes, Amazon, and CBS Radio and at the same time make the Recording Industry Association of America think twice about lobbying to ridiculously raise rates for webcasters in general and user-created radio services in particular. An increase on users and innovation will mean more creators receiving royalties, a broader pool of composers, resulting on better income for the copyright owners and income for composers that are usually not included in playlists by radios in Williamsburg, for example. The applications for Pandora.com will soon catch up with Last.fm’s, mainly because Pandora remains a free service and it is slowly becoming a staple similar to Wikipedia, Google, or Facebook.

Just the educational value of Pandora.com in foreign language classes is invaluable. Thanks to Pandora.com, students may learn more about culture, increase their vocabulary, and practice their pronunciation.

When the United States Copyright Royalty Judges explained their reasons to

increment the rates for webcaster and digital music providers in general,⁶ they pointed out that the standards had as objectives,

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his or

her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and

the copyright user in the product made available to the public with respect to relative creative contribution,

technological contribution, capital investment, cost, risk,

and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of

the industries involved and on generally prevailing industry practices. (7, emphasis added)

High rates will reduce the number of available works instead of providing more. User-created radios may end up including only brand new works being promoted by the performers. Lower rates may make Pandora.com's mission come true, give the user what he or she actually wants to hear. As mentioned before, the more competition the better. Pandora.com and CBS Radio (aka Last.fm/Yahoo!/AOL) should not be the only choices online. Otherwise, this situation may contribute to the increase of illegal music sharing and the stagnation of online-native radio. When rates are lower and the

⁶ Muzack and satellite radio are also considered digital music providers.

options increase, copyright owners may get more income than ever. The only problem is part D, because the RIAA has a history of manipulating copyright ownership. Lessig points out that the fine for downloading a song is larger than the fine a surgeon has to pay operating a patient's wrong leg, all because of the way the RIAA and other content producers guard their products. However, webcasters are willing to settle and continue working on technological advances. In the case of public radio and news organizations, the fees should be almost zero, since most they generate most of their content and do not use as much copyrighted recorded performances.

Lawrence Lessig argues in Free Culture that Congress has not been very kind to online music. He is right. On July 8th, 2002 the Librarian of Congress established rates and fees for Internet broadcasters—or webcasters—to pay back royalties to copyright owners from 1998 to December of 2002. The fees were 8% of the revenue or 5% of expenses during that period of time. The proposed fees for the next year were a 10% of the first \$250,000, and 12% of the gross earnings after that. On December 4th of 2002, Congress voted in favor of the Small Webcasters Act of 2002, in which small companies were able “to negotiate a fee based on a percentage of revenue.” At the end, the fee posted by the Librarian of Congress was of 7 cents per performance for AM and FM radios that retransmit their programming online as well as for Internet-only radios. It did not matter if the radio belonged to a big or small company. The non-commercial radios paid a fee of only 2 cents per performance. Broadcasters and webcasters also needed to pay in advance an annual fee of \$500 for each radio. Basically, each radio had to pay a minimum of \$500 per year. Under these circumstances, a terrestrial commercial radio that streamed only one performance had to pay from 70 cents to \$1.40 per hour, and

the annual fee may have been from \$6,132 to \$12,000 if the radio did not include that many commercials. Yahoo! had to pay a fee for every song listened by a user, which resulted on thousands of times more expensive than FMs and AMs online re-transmissions. Eventually, Yahoo! settled with the RIAA for an undisclosed amount.

In 2006, the Copyright Royalty Board—or CRB, the Library of Congress organization that oversees and ultimately sets the payments, has proposed new rates for the 2006-2010 period. They are based on the number of users subscribed to a service. Under the new rates, an Internet webcaster with 9 million subscribers or less needs to pay 8% to 23% of its annual gross revenues, or pay a per subscriber fee of 85 cents as suggested by the non-profit SoundExchange.com—the agency that collects the royalties for the RIAA online. At the SoundExchange.com rate, Yahoo! needs to pay almost 2 millions in royalties in 2008 because it has 2.2 million subscribers. For a webcaster that accounts for 19 or more millions of subscribers, like Last.fm, the fee goes up to more than 16 million dollars or up to \$3 for paid subscribers.

SoundExchange.com has proposed a table of fees based on subscribers and number of recordings played. The table may sound fair, but it complicates the calculation of fees. According to the Associated Press, Pandora would need to pay around 18 million dollars just for the 2008 fiscal year. Even with all the advertising that online radios sell, it may not be enough to be profitable, since Internet advertising usually depends on how many hits and sales an ad generates.

In 2007 NPR and other webcasters protested the set fees established for the 2006-2010 period. As a result, on September 30th of 2008, Congress passed the Webcaster Settlement Act of 2008 to amend the Small Webcaster Act of 2002. The act

became law in October 16th. The bill came from the Judiciary Committee and it was introduced and sponsored Jay Inslee, a Democrat representative from Washington State. The bill was co-sponsored by other four representatives, two Democrats and two Republicans. The new law lets all webcasters, commercial and non-commercial, that provide news or music services to negotiate the fees instead of paying according to the table established by the CRB. The news was well received by bloggers in the US and overseas, and of course by radios owners, according to RAIN, the Radio and Internet Newsletter. Kurt Hanson from RAIN, explains that this law solves a problem created by the Digital Millennium Copyright Act of 1998. The DMCA allowed SoundExchange.com to negotiate only on behalf copyright owners members of the SoundExchange collective. Hanson adds that the new law also emphasizes another problem. SoundExchange's board should be filled with half musicians representatives and half music level representatives, but the current board members are record label executives because they were chosen by the RIAA.

Aside from the competition in the copyright negotiating collective, this new settlement differs from the 2002 settlement, not only because of the way the fees will be paid, but also because the music industry finds itself in a very different situation. Regular music sales are down and every year they drop more, webcasters are legal and they promote the legal acquisition of music. iTunes cannot produce all the buzz about a new CD by itself. iTunes and all the other digital music sellers get help from sites like Last.fm and Pandora.com.

The effect that Napster may have had in 2002 is so-too-many-years- ago in

Internet years,⁷ that it may not have any effect in the new settlement. User-created radio services may solve soon their copyright issues with the RIAA and SoundExchange.com in part because CBS Radio is dealing with itself and the performers it represents. The brand new monopoly represented by CBS will probably be the issue of the next act.

User Rights

I believe that users should not pay for online radio services because they helped on the creation and improvement of the software. If over-the-air radio costs nothing to listeners, Internet user-created radios should be free including premium music.

Copyright refers to the ideas attached to a tangible medium; the radios should be declared public domain, while the medium (the site and service) should remain the property of a company Last.fm/CBS. The lists mirror the list of ingredients of a recipe and therefore cannot be copyrighted anyway. Since the targeted ads are more related to the music business, copyright owners do not need to receive a higher amount from online companies; therefore users should not pay for the service.

Internet radio may be one more marketing tool for CBS, which owns radio, television, a recording company, record distribution, and other entertainment outlets. CBS may even give away the music in order to sell more and not allow access to some of its competitors. If this happens, Pandora.com may survive but become smaller. Under these circumstances, the creative works list may also shrink and the copyright owners may receive even less income.

If the last Frequency Modulated radio was acquired by a conglomerate, the only

⁷ I believe that an Internet year is comparable with a dog year, six or seven human years.

hope for free digital, play-only music remains at the bottom of Pandora's box.

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