

Fight for Survival: The RIAA's Sustained Attack on Streaming Media

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All we hear is radio gaga, radio googoo, radio blahblah
Radio, what's new? Radio, someone still loves you
Queen, "Radio Gaga"

Someone still loves radio—and more people are beginning to discover its online form, Webcasting, as an alternative to terrestrial radio stations. Online radio allows listeners to swap local radio fare for more exotic programming, turning everyday PCs into world receivers, and offers a large variety of special-interest Webcasts catering to very genre-specific tastes. ([Spinner.com](#), one of the largest commercial Webcasters, offers some 175 channels from Abstract Beats to Zydeco, for example.) For independent music labels whose content would never be played on mainstream terrestrial radio, Webcasting has become a major source of exposure. Unlike filesharing, however, Webcasts remain largely ephemeral: no permanent copy of radio content can be created on the user's computer unless authorised by the Webcaster, or unless users specifically seek out software like [Streambox VCR](#) which circumvents such restrictions.

Yet in the U.S. the year 2002 saw a protracted battle for the future of webcasting, waged between the [Recording Industry Association of America](#) (RIAA) and its royalty collection agency [SoundExchange](#) on one side, and a loose coalition of Webcasters on the other. Mirroring the sustained attack on filesharing services, the battle over Webcasting demonstrates once again the hardline position the RIAA has adopted in its dealings with new media music services. In the filesharing arena, we have seen the demise of early services such as [Napster](#) and their replacement with deliberately crippled, recording industry-run alternatives or more powerful underground services. In its approach to Webcasting, the RIAA similarly attempted to push through a solution that would have made Internet radio unaffordable to any but the major players in the industry. Its involvement in this fight provides a useful illustration of the shortcomings of the music industry's strategy for dealing with new, Internet-based media.

Casus Belli

Prior to 2002, the battlelines had been drawn already. When the grandly named Digital Millennium Copyright Act (DMCA) became law in the U.S. in late October 1998, it introduced 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 other words, they were expected to reflect what would be 'standard' fees in an established digital media market, as determined by an independent Copyright Arbitration Royalty Panel (CARP). Once set, royalties dating back to the date of passage of the DMCA were then to be paid retroactively by Webcasters. While agreements over performing rights (royalties due to the authors of copyrighted material) resulted in a requirement for Webcasters to pay an average rate of around 3% of their annual revenue, 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 pre-emptively began pulling the plug on their channels (see e.g. Borland).

The Copyright Arbitration Royalty Panel (CARP) on Webcasting held its deliberations on a royalty fee structure during the second half of 2001, with submissions by the key parties. The RIAA demanded a payment of around 0.4¢ per song/ per listener. By contrast the [Digital Media Association](#), on behalf of Webcasters, offered 0.14¢ per song/per hour (regardless of the number of listeners). The CARP recommendation markedly reduced the RIAA's proposed fees, but retained the suggested per song/per listener royalty structure. Librarian of Congress James H. Billington rejected this recommendation but replaced it with a virtually identical model of 0.07¢ per song/per listener for commercial Webcasters, or about 18% of the original RIAA rate (Copyright Office).

This still meant significant royalty fees for Webcasters: assuming an average of 10 songs per hour and 100 listeners per channel at any one time, Webcasters broadcasting only one channel, 24 hours a day, would have to pay around \$6,100 per year (and this retroactively back to 1998), even though this small audience would be unlikely to generate any income. This fee punished stations for becoming moderately popular, as increasing average audience to 1000 would increase payable royalties to \$61,000, while profit might still prove elusive. This was prohibitively expensive for smaller, start-up players, and contributed to [a growing list of Webcasters](#) switching off their streams in the belief that they had lost their fight for survival. By contrast U.S. terrestrial radio stations are exempt altogether from paying *any* royalties to the RIAA because their work is seen as providing a 'promotional service' to the music industry.

Examining the RIAA Strategy and Its Motives

Any negotiator worth their salt will make an opening offer aimed at maximising the eventual outcome of the negotiation, so the initial RIAA demand of 0.4¢ per song/per listener should perhaps be seen as ambitious. Nonetheless, the RIAA's entire strategy in this conflict seemed geared more towards the terminal frustration of hopeful Webcaster aspirations. The strongest evidence to suggest that the RIAA never negotiated in good faith stems from June 2002 comments by erstwhile [Broadcast.com](#) founder Mark Cuban, who in 1999 was involved in negotiating a deal between his company (then newly acquired by [Yahoo!](#)) and the RIAA to set royalty rates for Broadcast.com streams. Cuban revealed that buyer and seller in this case were willing first and foremost to price out of the market any potential competition to Broadcast.com from smaller, start-up Webcast operators—this was the reason for choosing the per-song/per-listener fee structure over a percentage-of-revenue approach:

I hated the [per-song/listener] 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)

Therefore, the RIAA *consciously* presented to the CARP a pricing structure which was *not* representative of an agreement between willing buyer and seller, but rather an agreement designed to achieve specific objectives: to punish very small operators for becoming more popular, hence discouraging hobbyists from turning professional; make Webcasting unaffordable for independent, small to medium operations; open the market only to major players with significant revenue streams; encourage amalgamation of independent stations into larger networks, and incorporate networks into the bigger media organisations.

Indeed, Levy cites the “testimony of an RIAA-backed economist who told the government fee panel [CARP] that a dramatic shakeout in Webcasting is ‘inevitable and desirable because it will bring about market consolidation’”—and ‘consolidation’ (thus excluding small business from the Webcasting market) was clearly the underlying motive of RIAA strategy during the fights of 2002. Reasons for such anti-competitive policies are speculative but the conduct suggests that it represents the interests of an oligopoly of major entertainment producers, defending their interests from independent and alternative upstarts emerging with the information age, whilst claiming to protect the entire music community from exploitation by digital media operators.

For three years running music industry sales have been in decline, and “forecasts see sales sliding another six percent in 2003—a fall felt most by the big five music giants—Universal, Sony, Warner, EMI and BMG—which account for 70 percent of sales” (Warner & Marr). The transnationals have consistently attributed this decline to the impact of CD burning, filesharing and other Internet technologies for music transmission. Yet the RIAA was *successful* in shutting down Napster, and there are a host of other reasons for the downturn:

- There have been no major musical trends to emerge as major drivers of music sales since the advent of grunge in the early 1990s--“while record sales are dropping, they are also spreading into diverse genres” (Childress),
- Western economies have continued to skirt recession with a marked decrease in consumer spending,
- 15 years after the introduction of the CD medium, the initial waves of listeners replacing their vinyl records with CD re-releases and remasters (once a major source of income for labels) have subsided,
- CD prices remain high, even compared to DVD movie releases, and
- There is a growing backlash against the practices of an “industry founded on exploitation, oiled by deceit, riven with theft and fuelled by greed” (Fripp 9) and there are calls to [boycott major labels altogether](#), and increased political scrutiny.

Hence some observers have read the RIAA’s attacks on filesharing and Webcasts as the actions of an industry fighting for *its own* survival. [Wired](#) quotes former *Billboard* editor Timothy White as saying that 2003 “could determine whether the music business as we know it survives” (reported in Maloney, “Wired”), and this sentiment is echoed in other reports on the state of the music industry. Alternatively, analysts have noted “the industry released around 27,000 titles in 2001, down from a peak of 38,900 in 1999. Since year-on-year unit sales have dropped a mere 10.3 per cent, it’s clear that demand has held up extremely well: despite higher prices, consumers retain the CD buying habit” (Orlowski).

Whether signs of an industry in decline or not, the RIAA’s uncompromising policies in its fight against unpoliced Internet music technologies have caused headaches amongst its own supporters. (A recent *Wired* article speaks of “civil war inside Sony” over such issues—see Rose.) The Time-Warner-Netscape-AOL conglomerate might find the benefits from its support of the RIAA will be negated by the new royalty fees required of Spinner.com in its new incarnation as ‘[Radio@Netscape Plus](#)’, or by the downturn in AOL Broadband’s ability to sign up customers as incentives such as access to filesharing and Web radio dry up.

Postscript: Conflict Resolution in the Webcast Wars (?)

Without significant policy shifts by the RIAA it has fallen to U.S. politicians to force an uneasy truce in the Webcast conflict. This intervention was prompted by dissatisfaction with the industry’s disregard for the stated aim of the Digital Millennium Copyright Act to cultivate not hinder business in new Internet technologies and the view that CARP had been tricked into

accepting a flawed Yahoo!/RIAA deal as the basis for its fee structure recommendations. Following several attempts at legislation and emergency negotiations small Webcasters won a reprieve from the per song/per listener royalty structure which they had been threatened with, and will now pay a percentage of their revenue. This agreement is built on the "Small Webcaster Settlement Act," which acknowledges that small Webcasters "have expressed their desire for a fee based on a percentage of revenue," it rejects the CARP recommendations and the Librarian's rulings as unsuitable for small operators, and instead requires the RIAA and small commercial Webcasters to develop their own structures in the spirit of this bill.

While this solution generates division of the Webcast market into smaller and larger operators (and possibly makes the move from the first to the second group, who do pay per song/per listener royalties, all the more daunting), the new structure should be able to ensure its aim of protecting content diversity in Webcasting. That is until the industry finds a new battleground on which to engage Internet-based music technologies.

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