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Internet Killed the Radio Star: Preventing Digital Broadcasters from Exploiting the Radio Music License Committee Rate to the Detriment of Songwriters

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INTERNET KILLED THE RADIO STAR:
PREVENTING DIGITAL BROADCASTERS FROM
EXPLOITING THE RADIO MUSIC LICENSE
COMMITTEE RATE TO THE DETRIMENT OF
SONGWRITERS

Alexander Reed Speer

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encouragement.
I. INTRODUCTION

On June 24, 2013, David Lowery—frontman and a principal songwriter for the alternative rock band Cracker—posted on The Trichordist, a blog dedicated to promoting sustainable business models for artists in the Internet era. Within hours, major media outlets and small blogs alike discovered the post and commented extensively on its message. The post’s title, My Song Got Played on Pandora 1 Million Times and All I Got Was $16.89, Less Than What I Make From a Single T-Shirt Sale, remains a succinct summary of the post’s contents. Aided with photographic evidence, Lowery revealed he received $16.89 in compensation from Pandora Media, Inc. (Pandora) for streaming “Low” 1,159,000 times—a song he co-wrote.

To put Lowery’s compensation into proper perspective, it is worth noting that “Low” reached number three on Billboard’s Alternative Songs Chart on November 6, 1993, appeared on a major motion picture soundtrack, and was described as “a ubiquitous signpost of the alternative-as-the-new-mainstream era.” While other commentators claimed Lowery’s post skewed information to disfavor Pandora, the attention given to the article demonstrated an important point: The general public appears ready to admit that current business models of Internet broadcasting and streaming services do not provide sustainable income for songwriters to make a living from their craft.

2 See Marc Hogan, Pandora Users Played David Lowery’s Song a Million Times and All He Got Was $16.89, SPIN (June 24, 2013), http://www.spin.com/2013/06/pandora-david-lowery-cracker-low-royalties-debate-streaming/ (discussing David Lowery’s blog post in the context of other musicians who believe Pandora does not pay enough to rights holders).
3 David Lowery, My Song Got Played on Pandora 1 Million Times and All I Got Was $16.89, Less Than What I Make From a Single T-Shirt Sale, The Trichordist (June 24, 2013), http://thetrichordist.com/2013/06/24/my-song-got-played-on-pandora-1-million-times-and-all-i-got-was-16-89-less-than-what-i-make-from-a-single-t-shirt-sale/.
4 Cracker, Low, on Kerosene Hat (Virgin Records 1993).
5 Lowery, supra note 3.
7 Various Artists, The Perks of Being a Wallflower Original Motion Picture Soundtrack (Atlantic Records 2012).
8 David Menconi, Cracker Look Back at 20 Years of 'Low,' SPIN (Jan. 29, 2013), http://www.spin.com/2013/01/cracker-low-david-lowery-oral-history/.
9 See Michael Degusta, Pandora Paid Over $1,300 for 1 Million Plays, Not $16.89, The Understatement (June 25, 2013), http://theunderstatement.com/post/5386765082/pandora-pays-far-more-than-16-dollars (explaining that because Lowery only owned 40% of the copyright in the song and Pandora has to pay royalties for the sound recording of “Low,” Pandora actually paid $1,370 for 1,159,000 streams).
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Thirteen days prior to David Lowery's blog post, Pandora announced its agreement to purchase KXMS-FM (KXMS), an FM radio station located in Rapid City, South Dakota. Radio and music industry experts recognized that Pandora possessed no interest in purchasing the station to initiate an entrance into the terrestrial radio market; KXMS attracts an average audience of only 18,000. Pandora purchased KXMS in an attempt to pay less to Performing Rights Organizations (PROs) such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)—organizations which license songwriters' catalogs, collect monies, and pay member songwriters for public performances of their songs.

Pandora's attempt to secure lower royalty rates hinges on KXMS's association with the Radio Music Licensing Committee (RMLC). The RMLC represents the vast majority of broadcast radio stations in the United States regarding "music licensing matters." Radio broadcasters represented by the RMLC pay ASCAP and BMI blanket license rates negotiated between the RMLC and those individual PROs. These blanket license rates cover RMLC members' over-the-air terrestrial broadcasts, as well as simultaneous non-interactive Internet broadcasts—either simulcasts of the terrestrial station or non-interactive streaming services, similar to Pandora, which do not allow listeners to choose specific songs to play. Importantly for Pandora,
"terrestrial broadcasters [represented by the RMCL] who also operate webcasts pay performing rights organizations (PROs) far less than companies who only deliver content online."  

Pandora purchased KXMZ—a radio station represented by the RMLC—in an attempt to avail itself of the station’s RMLC rate for digital broadcasts.  

In recent litigation between Pandora and BMI, Judge Louis Stanton of the United States District Court for the Southern District of New York set Pandora’s blanket payment rate to BMI at 2.5% of Pandora’s total revenue—substantially higher than the 1.7% of total revenue RMLC members pay. Pandora contested the ruling, stating its purchase of KXMZ—an RMLC member—qualified Pandora for the 1.7% blanket license rate as an assignee of KXMZ’s RMLC license.  

Recent settlements between Pandora and ASCAP and BMI created privately negotiated blanket licensing rates and took the issue of Pandora’s entitlement to the RMLC rate out of the Second Circuit Court of Appeals. While Pandora may no longer attempt to exploit the RMLC rate, other digital broadcasters might pursue a similar strategy to establish lower licensing rates. Examining the history of Pandora’s purchase of KXMZ and its use of the radio station to try and achieve lower licensing rates provides guidance as to how other digital broadcasters might pursue a similar strategy. The importance of creating a sustainable market for artists grows every day. Songwriters like David Lowery exemplify how current payment structures from digital broadcasters do not allow artists to earn a living which enables them to continue creating. An extensive solution to this issue remains outside the scope of this Note. What can be said, however, is allowing digital broadcasters to pay the RMLC rate as a result of purchasing a single terrestrial radio station would set dangerous precedent. While on-demand services like Spotify grow in popularity daily, the 

internet by terrestrial broadcasting RMLC members but also to programmed and customized internet radio stations owned by RMLC members.”); Peoples, supra note 10 (“A broadcaster . . . is able to also offer a standalone, non-interactive Internet radio service that is covered by the RMLC rates and deductions.”).  


18 Peoples, supra note 10.  


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continued use of non-interactive streaming services similar to Pandora, such as Spotify Radio and Beats One means non-interactive streaming services remain an important avenue of exposure for songwriters. Allowing digital broadcasters to benefit from a bad-faith purchase of an FM radio station and exploit a lower royalty rate would not only halt development of a sustainable streaming culture, but would directly impede it.

The first part of this Note explores songwriters’ statutory right to public performance royalties, the partnership between PROs and songwriters, and the mechanism ASCAP and BMI utilize to determine the rates private broadcasters pay to stream songs. The second part of this Note provides a brief history of Pandora’s acquisition of KXMX-FM, how the Southern District of New York concluded Pandora should pay 2.5% of its revenue to BMI, Pandora’s reasons why its purchase entitles it to pay PROs the lower RMLC rate, and the resolution of the controversy. The final part of the Note examines the dangers of allowing digital broadcasters to utilize the RMLC rate—a rate designed for broadcasters specializing in terrestrial radio who engage in minimal digital broadcasting—and the need for Congress to promulgate regulations to prevent other non-interactive streaming services from engaging in similar bad faith purchases to exploit lower public performance rates.

II. BACKGROUND

For songwriters at any level of success, public performance royalties remain a substantial, and most importantly, consistent source of revenue throughout

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23 See Get the Facts: Pandora Buys FM Radio Station in Bid to Undercut Songwriters, AM. SOCY OF COMPOSERS, AUTHORS AND PUBLISHERS (May 29, 2015), http://www.ascap.com/playback/2013/06/action/pandora-buys-fm-radio-station-in-a-bid-to-undercut-songwriters.aspx (comparing terrestrial FM radio broadcasts with online streaming services such as Pandora to explain why streaming services should pay greater public performance royalties to songwriters).

24 See Pandora Radio Station Buy Doesn’t Guarantee Lower Rights Rate, Lawyers Say, WASH. INTERNET DAILY, May 1, 2015, at LEXIS ADVANCE (“[An ASCAP spokeswoman] said the RMLC ‘was designed for businesses that earn more than 95 percent of revenue from traditional AM/FM radio advertising, not a huge online music company that buys a radio station with 18,000 listeners.’ ”).
The allocation of public performance royalties, which compensate songwriters when businesses or individuals play their songs in public locations, evolved through a combination of free market commerce and court doctrine. These royalty calculation mechanisms reflect many factors, including how many listeners a broadcast reaches and how many songs a broadcaster plays in a given day. Due to settlement, the court will not have an opportunity to decide whether Pandora’s purchase of an FM radio station entitles it to the lower public performance rate paid by terrestrial broadcasters. Without a clear legal standard, other digital broadcasters might attempt similar bad faith purchases to avail themselves of a lower terrestrial radio rate designed for AM and FM radio stations, which play substantially less music and reach far fewer people than digital broadcasters.

A. SONGWRITER PUBLIC PERFORMANCE RIGHTS AND PERFORMING RIGHTS ORGANIZATIONS

Under the Copyright Act of 1976 (Copyright Act), a terrestrial broadcaster (such as KXIMZ-FM) or a web-based broadcaster (such as Pandora) publicly performs a song when it plays the song over-the-air or streams it online. Public performance of a song implicates two separate and legally protectable copyrights. The first copyright covers the song arrangement itself: the song’s underlying music and lyrics. This copyright defaults to the songwriter or songwriters, who typically license the composition to a publisher to administer. The second copyright covers the sound recording of the musical

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26 See generally FIELD & SLOTNICK, supra note 15 (providing a brief history of PROs).
28 17 U.S.C. § 101 (2012) (“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible . . . . To perform or display a work ‘publicly’ means . . . . (2) to transmit or otherwise communicate a performance or display of the work . . . .”).
29 See COREY FIELD & BARRY I. SLOTNICK, Copyright Ownership in the Music Industry, in ENTERTAINMENT LAW: FORMS & ANALYSIS, supra note 15, § 4.02 (“Any music transaction involving sound recordings requires the lawyer to peel back the layers of copyright ownership in sound recording and to identify its two main components . . . .”).
31 ENTERTAINMENT LAW: FORMS & ANALYSIS, supra note 15.
This copyright defaults to the artists creating the recording and typically gets assigned to the artists’ record label. Although the Digital Performance Right in Sound Recordings Act of 1995 amended the Copyright Act to acknowledge public performance rights in sound recordings broadcast over digital transmission, Pandora’s purchase of KXMZ and its negotiations with BMI implicates the songwriters’ public performance interests, since it involves licensing rates paid to PROs. The Copyright Royalty Board oversees the statutory rate Pandora pays to sound recording owners, a topic outside the scope of this Note.

The Copyright Act grants songwriters the right to control public performances of their compositions. Although songwriters reserve the right to negotiate public performance royalty rates with individual broadcasters, the volume of broadcasters within the United States prevents this from being a practical option.

Commercial songwriters overcome the difficulty, if not impossibility, of directly licensing their songs for public performance by engaging PROs. Songwriters, typically represented by their publisher, enroll with a particular PRO. Each PRO then negotiates with broadcasters (or their representatives) that publicly perform its songs. The most common type of agreement reached is the nonexclusive blanket license. Blanket licenses allow terrestrial and digital broadcasters—or other public performers of songs—to play any of the licensor PRO’s registered songs for an annual fee. The PROs examine broadcasters’ play logs and music detection data to allocate funds among registered songwriters in proportion with the number of times their songs get

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33 ENTERTAINMENT LAW: FORMS & ANALYSIS, supra note 15.
35 Bruce H. Kobayashi, Opening Pandora’s Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014, 22 GEO. MASON J. REV. 925, 929–30 (2015) (“Non-interactive transmission services, where users can tailor by genre the songs that are streamed to them, but cannot choose a specific sound recording, are required to pay a statutory license fee . . . determined by a schedule set by the Copyright Royalty Board (‘CRB’).”).
37 FIELD & SLOTNICK, supra note 15 (“There are 15,196 AM/FM Terrestrial stations in the United States and many more [digital radio] services. No copyright owner has the resources or time to conclude licensing agreements with thousands of individual radio services for each song performed.”); PASSMAN, supra note 12, at 238.
38 See generally Kobayashi, supra note 35, at 926–28 for a discussion of the necessities of PROs and whether they are still necessary for all types of media.
39 PASSMAN, supra note 12, at 238.
40 FIELD & SLOTNICK, supra note 15; PASSMAN, supra note 12, at 238.
41 PASSMORE, supra note 12, at 238–39.
played. In the United States, the three major PROs are ASCAP, BMI, and SESAC (which formerly stood for Society of European Stage Authors and Composers). ASCAP and BMI represent approximately 97% of songwriters registered with a PRO; SESAC represents the remaining 3% of songwriters registered with a PRO.

Because ASCAP and BMI held a majority of the public performance rights, the United States government, concerned about a monopoly on performing rights, brought suits against ASCAP and BMI in 1941. These suits resulted in the creation of consent decrees: mechanisms established by the Department of Justice which regulate the rates ASCAP and BMI charge for their catalogues. The ASCAP and BMI consent decrees were amended in 2001 and 1994, respectively. SESAC currently operates without any consent decree.

These decrees mandate ASCAP and BMI to offer public performance licenses to any entity, such as the RMLC or a PRO, which requests them at fair and non-discriminatory rates. Should negotiations between the PRO and any entity fail, either party may call upon a rate court designated in the PRO's consent decree to establish a fair rate following litigation. At trial, the PRO bears the burden of proof to show it offered an appropriate rate. The ASCAP and BMI consent decrees both name the United States District Court for the Southern District of New York as the rate setting court. If the PRO fails to meet its burden of proof, "the rate court judge seeks to set a reasonable royalty rate that reflects the outcome of a hypothetical negotiation, taking into account the fact that the rate court hearings exist as a result of the [PROs'] position as 'monopolies exercising disproportionate power over the market for music...

42 Id. at 239–40.
43 Id. at 238–39.
44 Id. at 238.
46 Id.
This system, although complex, assures that broadcasters pay a rate that fairly compensates songwriters based on a broadcaster’s size, outreach, and the total number of songs it plays, while remaining reasonable enough to incentivize broadcasters to continue their business operations.

B. PANDORA’S ACQUISITION OF KXMZ-FM AND ITS STRATEGY TO ADJUST PUBLIC PERFORMANCE ROYALTY RATES

Pandora publicly announced its purchase of KXMZ-FM on June 11, 2013. FCC laws, however, prevented finalizing the purchase for almost two years. Specifically, Pandora faced strict FCC regulations regarding when companies with “significant” foreign ownership can purchase radio stations. On May 4, 2015, the FCC issued a declaratory ruling holding that Pandora could remain up to 49.99% foreign owned and purchase KXMZ if it continued to meet FCC established qualifications. In spite of ASCAP’s public protests against the purchase, the FCC chose to focus solely on the issue of foreign ownership, stating that copyright and licensing issues raised by the purchase are “more appropriately resolved through Congress, the courts and other government agencies.”

The first litigation following Pandora’s announcement that it planned to purchase KXMZ occurred between ASCAP and Pandora. Following litigation, District Judge Denise Cote of the Southern District of New York set the licensing rate between ASCAP and Pandora at 1.85% of Pandora’s revenue. During litigation, Pandora attempted to utilize its deal with KXMZ to attain a 1.7% licensing fee, the rate RMLC affiliated broadcasters like KXMZ pay PROs. However, Cote did not factor Pandora’s purchase of KXMZ into his holding as the purchase remained under FCC investigation at the time.

Peoples, supra note 10.
Id.
Id.; see generally In re Pandora Radio LLC, 30 FCC Rcd. 5094, 5099 (promulgating the conditions upon which Pandora may purchase KXMZ-FM).
In re Pandora Radio LLC, 30 FCC Rcd. 5094, 5099.
See generally In re Pandora Media, Inc., 6 F. Supp. 3d 317 (S.D.N.Y. 2014) (detailing the licensing rates between ASCAP and Pandora through the end of 2015).
Id. at 320.
Id. at 349 n.52 (“Pandora’s purchase of KXMZ-FM remains pending. ASCAP has petitioned the FCC to deny the transfer of the station’s FCC license to Pandora.”).

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Judge Cote concluded Pandora’s operations, on their face, did not show enough similarity to other RMLC licensees to support the 1.7% RMLC rate.62

The next round of rate court litigation occurred between BMI and Pandora.63 As it had in the ASCAP litigation, Pandora asserted that “it is comparable, and should receive treatment similar to, that afforded thousands of broadcast radio stations who are represented by the Radio Music Licensing Committee and pay a rate of 1.7%.”64 Yet, like Judge Cote’s holding in the ASCAP litigation, Judge Stanton did not factor Pandora’s purchase of KXMZ into his holding. Instead, he held Pandora users’ ability to customize stations based on artists or songs and Pandora’s relative lack of disc jockey commentary and advertisements compared to AM and FM radio separated it from traditional terrestrial radio stations represented by the RMLC—even stations who maintain non-interactive web broadcasts similar to Pandora.65 Judge Stanton utilized these factors and set the licensing rate between BMI and Pandora at 2.5% of Pandora’s revenue.66

Just weeks before the litigation between BMI and Pandora ended, the FCC approved Pandora’s purchase of KXMZ.67 The purchase closed on June 9, 2015,68 barely a week after Judge Stanton’s decision. With its purchase of KXMZ approved by the FCC and finalized, Pandora filed a Motion to Alter Judgment.69 In the motion, Pandora stated it now stood as assignee of KXMZ’s RMLC negotiated licensing rate with BMI for terrestrial and new media transmissions.70 Pandora asserted that—as a result of its status as assignee—its web broadcasts are entitled to the 1.7% RMLC rate KXIMZ pays to perform BMI’s catalogue.71 A month later, Justice Stanton responded to Pandora’s motion stating only, “Pandora’s motion to alter or amend the

62 Id. at 371 (“In light of these similarities, the question that is fairly presented by Pandora’s application is whether it is entitled . . . to the RMLC rate. The answer to that question, while close, is no.” (footnotes omitted)).
64 Id. at *52.
65 Id. at *53–55.
66 Id. at *4.
67 In re Pandora Radio LLC, 30 FCC Rcd. 5094.
69 Id.
70 Id. (“Pandora is now the assignee of Connoisseur Media, LLC’s 2012 Radio Statement License Agreement for KXMZ (the ‘BMI-KXMZ License’),”).
71 Id. (“Under the plain language of the RMLC agreement, Pandora’s non-simulcast internet radio transmission are thus licensed under the BMI-KXMZ License through December 31, 2016, the end of the term of the BMI-KXMZ License.”).
judgment dated June 29, 2015 (Dkt. No. 246) is denied.\(^\text{72}\) Pandora then submitted a motion for appeal.\(^\text{73}\) Before the appeal could be heard, however, Pandora reached settlements with ASCAP and BMI. While both settlements remain confidential, spokespersons for Pandora stated that the broadcaster negotiated flexible licensing rates with ASCAP and BMI, and agreed with withdraw its appeal from the Second Circuit Court of Appeals.\(^\text{74}\)

Although the settlement remains confidential, the act of settling indicates that Pandora, a long-established and well-known digital broadcaster, will not use its purchase of KXMX-FM as collateral to attain the RMLC royalty rate. Other digital broadcasters might interpret Pandora's settlement as a sign that the terrestrial acquisition strategy will not work in the future. The possibility remains, however, that less established digital broadcasters might engage in a similar bad-faith purchase to save money by lowering public performance royalty payments.

III. ANALYSIS

At this time, Congress holds the responsibility of making sure digital broadcasters do not engage in the type of bad faith purchases Pandora attempted in the future. This section proposes two possible plans Congress could implement to address this issue, one based on trademark law and one based on economics. These plans would prevent digital broadcasters from purchasing terrestrial radio stations solely to lower their royalty payment obligations, while assuring that digital broadcasters with legitimate hopes of entering the terrestrial radio market may move forward without fear of complication or legal action. Only when Congress addresses this issue, will PROs and broadcasters be able to negotiate under the conditions of complete honesty and good faith to reach license rates that reflecting the current digital broadcast market.

A. THE DANGER OF ALLOWING DIGITAL BROADCASTERS’ PURCHASES OF TERRESTRIAL RADIO STATIONS TO ENTITLE THEM TO THE RMLC BROADCAST RATE

Pandora's purchase of KXMX did not, in and of itself, present any troubling issues; rather, concerns arise from the motives behind that purchase. Pandora


\(^{74}\) ALL ACCESS, supra note 21.
purchased the station not out of desire to establish itself as a terrestrial broadcaster, but as a purely strategic move to claim association with the RMLC and avail itself of the RMLC’s more favorable rate for terrestrial broadcasters when negotiating with PROs. An ASCAP press release issued shortly after Pandora announced its plans to purchase KXMZ characterized the purchase accurately: “[A] stunt... [Pandora] hope[s] to use KXMZ as a bargaining chip in their relentless quest to pay lower royalty rates for their online music streams.” Pandora’s recent settlements took out of litigation the issue of whether a solely online broadcaster may purchase a single terrestrial radio station to entitle its digital broadcasts to lower public performance royalty rates. The issue remains an open legal question. While this may seem like an extremely specific, even trivial, issue, an overview of current music industry trends reveal this issue’s great importance.

David Lowery exemplifies the fact that Pandora does not pay enough for artists to sustain their craft professionally. Under current licensing rates, Pandora pays PROs approximately eight cents for every 1,000 plays of a song. This compensation may have been adequate in previous decades, when digital broadcasts of music were a niche market and physical sales and downloads of songs accounted for a majority of a songwriter’s income. Physical sales and downloads of music, however, continue to decline yearly as non-interactive internet based broadcasters such as Pandora evolve into a primary means of music consumption. As consumers move toward web-based broadcasting of music, songwriters’ income from Pandora and similar services should reflect this shift.

Licensing rates that fairly compensate songwriters in accordance with the growing use of web-based broadcasting will occur most efficiently through frequent and continuing negotiations between PROs and broadcasters, such as Pandora, whose income derives solely or predominantly from digital broadcasts. Because negotiations run the risk of failure, the rate courts serve as a last resort mechanism to establish licensing rates that reflect, among other factors, how

77 Id.
78 See Peter Kafka, The Music Business’s Song Is on Repeat: Streaming Is Up, Sales Are Flat, RE/CODE (Sept. 21, 2015), http://recode.net/2015/09/21/the-music-business-song-is-on-repeat-streaming-is-up-sales-are-flat/ (“The more interesting picture comes when you look at the makeup of digital sales, where download sales from Apple are being replaced by subscription revenue from Spotify and other subscription services, as well as revenue from free services like Pandora.”).
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consumers listen to music.79 Allowing a digital broadcaster’s purchase of a single rural radio station to entitle it to the RMLC rate—a rate “designed for businesses that earn more than 95 percent of revenue from traditional AM/FM radio advertising”80—would freeze the public performance license rate at 1.7%. If allowed to utilize that rate, digital broadcasters would pay songwriters the same amount as radio stations that currently play substantially less music than these services,81 in spite of the fact that digital broadcasters gain a larger audience and stream more songs daily. Put simply, Pandora’s purchase of KXMZ exemplified a bad faith purchase that could hamper open and fair negotiations between PROs and web-based broadcasters in the future.

B. CONGRESS CAN ESTABLISH A STANDARD TO PREVENT FUTURE WEB-BASED BROADCASTERS FROM EXPLOITING THE RMLC LICENSING RATE

Because Pandora withdrew its appeal from the rate court’s order in its litigation with BMI, the Second Circuit did not have an opportunity to decide whether the purchase of a single terrestrial radio station entitles a digital broadcaster to the RMLC license rate on its digital broadcasts. In its argument at trial, Pandora argued that its service is analogous to iHeartRadio, a non-interactive web-based broadcast platform maintained by iHeartMedia. Judge Stanton responded to this argument stating that “the analogy fails: iHeartMedia . . . operates hundreds of terrestrial radio stations in addition to its iHeartRadio service.”82 Perhaps the Second Circuit would have reasoned likewise and denied Pandora the RMLC rate, but this remains speculative.

Instead, any policy or regulation on this issue should come from Congress. The imperative question concerns what type of standard should be implemented? A complete bar on digital broadcasters attaining a lower license rate though purchase of terrestrial radio stations creates negative incentives for web broadcasters who may legitimately wish to enter the terrestrial radio broadcast market.

Without congressional action, however, a worse alternative would occur. Digital broadcasters will continue to engage in bad faith acquisitions of terrestrial broadcasting entities in an attempt to save money. In this environment, PROs and digital broadcaster will feel hesitant to negotiate

80 Pandora Radio Station Buy Doesn’t Guarantee Lower Rights Rate, Lawyers Say, supra note 24.
81 See Get the Facts: Pandora Buys FM Radio Station in Bid to Undercut Songwriters, supra note 23 (“By 10 am every morning, Pandora has already performed 200 million songs, as compared to the hundreds of songs played by the average radio station in an entire day.”).
directly, and will rely on already overburdened courts to mandate licensing rates. These court mandated rates do not allow for the flexibility that results from direct negotiations between parties. In this situation, the songwriters will suffer most, since they will continue to receive sub-standard payments for the broadcast of their work to millions of listeners around the world.

One potential solution lies in trademark law. Under the Lanham Act, an individual may file an application for a trademark given a good-faith intention to utilize the mark in commerce and willingness to provide, at later times, continued evidence of such use. Utilizing this model, a digital broadcaster, upon purchase of a terrestrial radio station broadcasting under an RMLC license, may be entitled to the RMLC rate under the condition it shows a good faith intention to enter the terrestrial broadcast market and will continue to show attempts to enter the terrestrial broadcast market. Failure to meet these standards would result in the digital broadcaster defaulting to a higher PRO blanket license rate designed for primarily digital broadcasters.

A second standard could allow web-based broadcasters to lower their negotiated or court ordered PRO licensing fees in proportion to the percent of their audience that listens to the acquired AM/FM terrestrial radio stations. Using Pandora's acquisition of KXMX as an example, KXMX would lower Pandora's license rates to ASCAP and BMI by the percent KXMX's average audience—approximately 18,000—comprises Pandora's total audience of approximately 80 million. The more terrestrial stations a digital broadcaster acquires, the more its rate will lower. Additionally, amassing terrestrial radio stations would give digital broadcasters a more even split of terrestrial and digital listeners, making these broadcasters more analogous to entities like iHeartRadio and justifying the lower licensing rates.

The ways consumers access music changes rapidly as the trend towards digital consumption continues. To ensure that songwriters receive adequate compensation for their craft, PROs and digital broadcasters must be in a relationship that supports quick and honest negotiations to account for changing listener habits. By promulgating one, or both, or these proposed

83 15 U.S.C. § 1051(b) (2012) ("A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark . . . .").
84 Id. § 1051(d).
85 Chew, supra note 11.
86 See Ed Christman, U.S. Recording Industry Sees Sight Uptick in Revenue Last Year, Streaming Dominates Digital, BILLBOARD (Mar. 22, 2016), http://www.billboard.com/articles/business/7271729/riaa-us-recording-2015-revenue-numbers ("The RIAA notes that, for the first time, streaming revenue accounted for 34.3 percent of the industry’s revenue last year. Compare that to download sales, which made up 34 percent of revenues, physical with 28.8 percent, and synch at 2.9 percent, and the primacy of streaming starts to become clear.")
standards, Congress would eliminate another loophole digital broadcasters might seek to lower royalty payments designed for terrestrial broadcasts. As Congress fills more of these loopholes, PROs and digital broadcasters will have no desire to turn to rate court to establish licensing rates, and will engage in direct, good faithful negotiations. If PROs and digital broadcasters feel more comfortable negotiating frequently, songwriters will not suffer unfair royalty payments during this time of change in the music industry.

IV. CONCLUSION

Creation of a good faith standard or lowering web-broadcasters’ negotiated or court ordered licensing fee in proportion to the audience it gains from terrestrial purchases provides benefits for songwriters and the broadcasting industry in general. Web-based broadcasters receive clear guidance regarding what actions they need to take to qualify for the RMLC rate, thereby eliminating the motivation for web broadcasters to initiate bad faith purchases of small terrestrial broadcasters in hopes of exploiting the RMLC rate. Additionally, broadcasters may engage in cost-benefit analysis, determining whether the outlay of capital to purchase terrestrial stations can be recouped by savings gained through licensing fee reductions.

With clear guidelines established, negotiations between PROs and web-based broadcasters will become more transparent and less combative, resulting in less cases being sent to rate court and lowering the burden on an already loaded docket. Most importantly, these standards assure that songwriters receive fair compensation based upon broadcasting medium and audience as the transition to digital consumption of music continues. Finally, songwriters like David Lowery will receive fair compensation when their songs are broadcast to millions of listeners around the country.