



6-1-2001

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Recommended Citation

Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid*, 22 Loy. L.A. Ent. L. Rev. 1 (2001).

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CURRENT DEVELOPMENTS OF PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDINGS TRANSMITTED ONLINE: YOU PUSH PLAY, BUT WHO GETS PAID?

*Joshua P. Binder**

I. INTRODUCTION

New developments in copyright law have had a profound impact on the public performance rights for an owner of a sound recording. A newly enacted exclusive right to publicly perform a sound recording by means of a digital audio transmission has raised numerous questions for copyright lawyers.¹ This Article attempts to demystify the confusion by exploring the present state of a sound recording owner's public performance rights.

Recent advances in multimedia technology have given birth to webcasting, downloads, and digital lockers.² Included in this Article is an analysis of how public performance laws directly impact this new technology. Congressional legislation currently offers webcasters a statutory license to digitally transmit music but maintains a compensation model for those who provide such music.³ Although non-interactive webcasting services can now obtain a compulsory license to stream music to the public by meeting certain requirements, they must still pay public performance fees to sound recording owners.⁴ In addition, a downloading service that delivers music to users on the Internet brings public performance rights in a

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1. Stephen Williams, *MP3/The Curse and the Promise*, NEWSDAY, Mar. 8, 2000, at CO3.

2. See Brad King, *Copyright Act Faces Big Test*, WIRED NEWS (Nov. 29, 2000), at <http://www.wired.com/news/print/0,1294,40378,00.html>.

3. 17 U.S.C. § 106(6) (Supp. V 1999).

4. See *id.* § 106; see also Shannon P. Duffy, *Judge OKs Rule Requiring Royalties for 'Streaming'*, RECORDER, Aug. 7, 2001, at 3.

sound recording into question.⁵ Digital locker services, which allow individuals to listen to their own music online, are now also subject to public performance fees.⁶

By exploring both the amended laws and how the technology operates, this Article sheds light on new sources of income for sound recording owners. Ultimately, the existence of these newly-fashioned public performance rights should reassure record companies that the imminent digital age will not lead to the end of copyright protection.

II. WHY MUST A PUBLIC PERFORMANCE BE COMPENSATED?

As an effective sales tool, music plays an instrumental role for many businesses; namely, helping sell a product or service.⁷ Simply stated, companies use music to generate or increase income.⁸ Radio stations broadcast popular music to draw a listener's attention to the airtime they sell to advertisers.⁹ Movies and television shows utilize music to arouse viewer interest and capture viewer attention.¹⁰ Bars and nightclubs play music to create a desired mood or atmosphere.¹¹ Restaurants use music to create a sense of privacy, thus enabling people to speak without fear of eavesdroppers.¹² Retail stores hire psychologists to carefully select music that increases consumption.¹³ Playing music over the telephone while a person is placed on hold may make the experience more pleasant.¹⁴ Obviously, a benefit is derived from the use of music as a business asset.¹⁵ Therefore, the utilization of music must be compensated, just as other capital investments.

5. See David L. Hayes, *Application of Copyright Rights to Specific Acts on the Internet*, COMPUTER LAWYER, Aug. 1998, at 3.

6. See Brian Krebs, *Appeals Could Bring Uncle Sam into Digital Royalty Disputes*, NEWSBYTES (July 24, 2001), at <http://www.newsbytes.com/news/01/168278.html>.

7. See Charlotte Goddard, *Market Sales Promotion: What's in Store for Music Promotion?*, MARKETING, Dec. 9, 1999, available at 1999 WL 8318375.

8. See *id.*

9. See *Radio as Narrowcasting: Finding a Niche and a Format to Fit*, BROADCASTING, June 12, 1989, at 41.

10. See *Video Geared to Students Aims to Curb Drinking*, HOUSTON CHRON., Sept. 7, 2001, available at 2001 WL 23626632.

11. See Brian Wheeler, *Pubs Race to Find 24-hour Formula*, MARKETING WEEK, Apr. 27, 2000, available at 2000 WL 10578430.

12. *Study Shows Levels of Restaurant Noise Are on the Rise*, KNIGHT RIDDER TRIB. BUS. NEWS, June 16, 2000, available at 2000 WL 22622361.

13. See Helen Jones, *Human Traffic: The Smell of New-Mown Grass, the Subliminal Sound of White Noise*, GUARDIAN, Mar. 9, 2000, available at 2000 WL 15586647.

14. See Gerald Belcher, *Are You "Holding" Up the Growth of Your Bank*, KY. BANKER, Feb. 1, 2001, at 17.

15. See Goddard, *supra* note 7.

The exponential growth of the Internet has enabled numerous online companies to offer music to the public.¹⁶ Consequently, many e-businesses capture consumer attention by providing the opportunity to listen to other people's music.¹⁷ Buying and "sharing" music online is the newest mode of acquiring music and has gained the attention of the record companies, as well as most of the "wired" world.¹⁸ This new online dimension began as an experiment but has grown into a big business.¹⁹ How this new dimension will impact the traditional ways artists, record companies, and composers sell and control their music is unclear.

A. Musical Work vs. Sound Recording

A song written in 1971, but recorded by the same artist on four separate occasions, can be treated as four different copyrightable works.²⁰ The Copyright Act of 1976²¹ ("Copyright Act") extends protection to certain fixed expressions, such as books, movies, and sculptures.²² Musical works and sound recordings are two other fixed expressions that are protected by the Copyright Act.²³ Copyright laws grant numerous rights to authors of creative and original works that are fixed in a tangible form.²⁴ The Copyright Act delineates five exclusive rights: the right to reproduce, adapt, distribute, publicly display, and publicly perform a copyrighted work.²⁵

There are two copyrights contained within one phonorecord: one for the musical work and one for the sound recording itself.²⁶ Although the two copyrights seem similar, critical distinctions exist. A musical work is the underlying song—the written notes and lyrics as they might appear on a sheet of paper.²⁷ They have no audible sound and are treated legally like

16. See Jan Brzeski, *Let Web Police Its Own Traffic*, ELECTRONIC MEDIA, Feb. 21, 2000, at 9; see also Williams, *supra* note 1.

17. See Dawn C. Chmielewski, *Online Music Trades Are Hotter Than Ever*, SEATTLE TIMES, Sept. 7, 2001, at C2.

18. See *id.*

19. See Patrick Keane, *Music Media: Revenue Diversity*, INTERACTIVE CONTENT, Aug. 1, 1997, available at 1997 WL 9642526.

20. See *infra* text accompanying notes 26–31.

21. 17 U.S.C. §§ 101–1332 (1994 & Supp. V 1999).

22. *Id.* § 102(a) (1994).

23. *Id.*

24. *Id.*; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.05[A] (2001).

25. 17 U.S.C. § 106 (1994 & Supp. V 1999).

26. T.B. Harms Co. v. Jem Records, Inc., 655 F. Supp. 1575, 1576 n.1 (D.N.J. 1987) (quoting H.R. REP. NO. 94-1476, at 63 (1976)).

27. See 1 NIMMER, *supra* note 24, § 2.05[A].

words in a book.²⁸ A composer or author owns the musical work he or she created.²⁹ For instance, a guitarist might read John Lennon's musical work (*i.e.*, the notes and lyrics) in order to strum the chords and sing the lyrics of the song *Imagine*. When a song is publicly performed, triggering one of the exclusive rights, the Copyright Act mandates that the composer receive a royalty.³⁰ The copyright in a musical work prevents anyone from publicly performing a particular song without paying the appropriate licensing fee to the copyright holder.³¹

Typically, an artist will grant a nonexclusive license of the copyrighted musical work to one of three primary Performing Rights Societies ("PRS") to collect public performance royalties on his or her behalf.³² The leading PRSs are the American Society of Composers Authors and Publishers ("ASCAP"), Broadcast Music Inc. ("BMI"), and Society of European Stage Authors and Composers ("SESAC").³³ In exchange for an administration fee, a PRS monitors businesses, collects royalties for the public performance of musical works, and distributes those fees to the proper artist or copyright holder.³⁴

Alternatively, a sound recording brings the musical work to life. Legally, this recording is referred to as a derivative work.³⁵ A sound recording copyright protects the actual sounds captured when a song is recorded.³⁶ This right only covers the fixed sounds as they were recorded in the studio (or anywhere else).³⁷ Section 101 of the Copyright Act defines a sound recording as a work resulting from the fixation of sounds.³⁸ For example, John Lennon's sound recording of *Imagine* is captured on track one

28. *See id.* § 2.05[B].

29. *See* Standard Music Roll Co. v. F.A. Mills, Inc., 241 F. 360, 362 (3d Cir. 1917).

30. 17 U.S.C. § 115(c)(2) (1994 & Supp. V 1999).

31. *Broad. Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 486 (7th Cir. 1995).

32. *Id.*

33. *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1147 (7th Cir. 1982).

34. *See Nat'l Cable Television Ass'n, Inc., v. Broad. Music, Inc.*, 772 F. Supp. 614, 617 (D.D.C. 1991).

35. *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 324 (2d Cir. 1995) (citing 17 U.S.C. § 101).

36. *See id.*

37. *Id.*

38. 17 U.S.C. § 101 (1994 & Supp. V 1999).

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

of the album also entitled *Imagine*.³⁹ He then recorded at least four other versions of *Imagine*, which are on four separate albums.⁴⁰ Each sound recording is covered by its own copyright.⁴¹ Thus, four different sound recording copyrights stem from four different recorded performances of one musical work.⁴²

A sound recording, as a copyrightable work, is unique because it lacks several exclusive rights that other copyrightable works retain.⁴³ First, it lacks the right of public display as it is not possible to “display” a sound.⁴⁴ Second, an owner cannot prevent others from making a separate sound recording that imitates or adapts the original.⁴⁵ Lastly, and perhaps most importantly, a sound recording lacks the right of public performance under most circumstances.⁴⁶

B. What Is Not a Sound Recording?

Beyond understanding what is considered a sound recording, it is equally important to focus on what is not. As defined by the Copyright Act, a sound recording is not just any recording of sound.⁴⁷ For example, recorded music that plays during a motion picture or other audiovisual work is not considered a “sound recording” by statute.⁴⁸ Likewise, the recorded sound used in a music video on MTV, played during a movie, or used in a commercial is also not a sound recording because it is accompanied by an audiovisual work.⁴⁹ To play music in synchronization with moving images requires a different license called a synchronization (“sync”) license that must be negotiated directly with its owner.⁵⁰

39. JOHN LENNON, *Imagine*, on *IMAGINE* (EMD/Capitol 1971).

40. JOHN LENNON, *JOHN LENNON ANTHOLOGY* (EMD/Capitol 1998); JOHN LENNON, *LENNON LEGEND: THE VERY BEST OF JOHN LENNON* (EMD/Capitol 1997); JOHN LENNON, *LIVE IN NEW YORK CITY* (EMD/Capitol 1986); JOHN LENNON, *SHAVED FISH* (EMD/Capitol 1975).

41. *See id.*

42. *See id.*

43. *See* 17 U.S.C. § 114(a) (1994 & Supp. V 1999).

44. *See id.* § 101 (1994).

45. *See id.* § 114(b).

46. *Id.* § 114(a). *See generally* discussion *infra* Part IV (identifying the unique circumstances under which the public performance right attaches to a sound recording).

47. *See* 17 U.S.C. § 101.

48. *Id.*

49. *See id.*

50. *Agee*, 853 F. Supp. at 786 (stating that “the Copyright Act does not expressly confer a ‘synchronization right’ [a right to use background music to accompany a visual image] on either music copyright owners or sound recording copyright owners”), *rev’d in part*, 59 F.3d 317 (2d Cir. 1995).

Generally, a sound recording is owned by the record company that financed it.⁵¹ The five major record companies that own most of the world's sound recordings are BMG, EMI, Sony Music, Universal Music Group, and Warner Music Group.⁵² These companies invest in artists by paying them to record an album in a studio.⁵³ In exchange, artists grant a record company the copyright of the sound recording.⁵⁴ However, such a grant does not transfer ownership rights of the musical work.⁵⁵ This grant only gives a record company the copyright of the actual sounds that were recorded at a given recording studio on that day, not the written words or composed music.⁵⁶

III. WHAT IS A PUBLIC PERFORMANCE RIGHT?

From a legal perspective, the rights of a music copyright owner are implicated when that music is publicly performed.⁵⁷ If this legal standard is met, the person or entity using or performing the music is required to pay a licensing fee for such public use.⁵⁸ With respect to a musical work, the public performance right is one of the exclusive rights granted to the author of a musical work by section 106(4) of the Copyright Act.⁵⁹ By statute, a copyright owner of a musical work has the sole right to perform and authorize the public performance of his or her work.⁶⁰

With respect to a sound recording, a second public performance right was added to the Copyright Act in 1995.⁶¹ In § 106(6), Congress added a

51. RIAA | *Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001) (“The rights to the sound recording are usually owned by the record company that produces, manufactures and distributes it.”).

52. Matt Richtel, *Record Labels Sending Napster List of 135,000 Songs to Block*, N.Y. TIMES, Mar. 10, 2001, at C14.

53. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 4 (Billboard Books, 7th ed. 1995) (describing how a record company will typically pay all costs of recording, mixing, processing, etc. up front based on the earnings expectations of the artist).

54. See *id.* at 39 (“Virtually every recording agreement between a record company and an artist provides that the sound recordings are created for the company as works for hire.”).

55. Mark Halloran, *Copyrights: The Law and You*, in THE MUSICIAN’S BUSINESS & LEGAL GUIDE 60, 61–63 (Mark Halloran ed., 2001) (describing how the Copyright Act legislates authorship and ownership in sound recordings).

56. See KRASILOVSKY & SHEMEL, *supra* note 53, at 40 (explaining that the copyright owner of a sound recording has only the right to reproduce, distribute, and make derivative works based thereon).

57. See 17 U.S.C. § 106(4) (1994 & Supp. V 1999).

58. See generally *id.* § 114 (1994 & Supp. V 1999) (explaining when a licensing fee is owed and the basis for fee).

59. *Id.* § 106(4).

60. *Id.*

61. *Id.* § 106(6) (Supp. V 1999); see *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763,

sixth exclusive right—the right to publicly perform a sound recording “by means of a digital audio transmission.”⁶² Prior to this amendment, the public performance of a sound recording was beyond the scope of the copyright protection of its owner.⁶³ Nonetheless, this new right is quite narrow and does not extend broad protection to a sound recording.⁶⁴ A sound recording is not entitled to the same public performance protection that a musical work enjoys.⁶⁵ An owner can only control the public performance of a sound recording that is digitally transmitted.⁶⁶

A. What Is a Performance and Who Is the Public?

For a given activity to be a public performance, the activity must fall within the statutory language of both *public* and *performance*.⁶⁷ Analytically, these are two separate concepts. For the benefit of clarity, performance is addressed first, and public is addressed second.

1. Performance

Three ways of performing music are singing a song, playing a song on a compact disc (“CD”) player, and transmitting a song via a radio broadcast. As defined in section 101 of the Copyright Act, to perform “means to recite, render, play, dance, or act” a musical work or a sound recording.⁶⁸ One can perform a song “either directly or by means of any device or process.”⁶⁹ Although *directly* limits the performance of a song to an actual person who sings it, the statute incorporates much more.⁷⁰ By using the language “any device or process,” Congress intended to include a wide range of items capable of performing music.⁷¹ A turntable, tape cassette

766 (E.D. Pa. 2001).

62. 17 U.S.C. § 106(6).

63. *Bonneville*, 153 F. Supp. 2d at 766 (stating that “[u]ntil 1995, the sound recording copyright did not include any right in public performances of sound recordings”).

64. *See id.* (illustrating that the new public performance right conferred on sound recordings applies only to “digital audio transmissions”).

65. 17 U.S.C. § 114(a) (Supp. V 1999) (stating that rights of a copyright owner in a sound recording are limited “and do not include any right of performance under [17 U.S.C. §] 106(4)”; *id.* § 106(4)).

66. *Id.* § 106; *see Bonneville*, 153 F. Supp. 2d at 766–67. *See generally* discussion *infra* Part IV (explaining digital transmission of a sound recording more fully).

67. *See* H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677; *see also* 2 NIMMER, *supra* note 24, § 8.14[C].

68. 17 U.S.C. § 101 (1994 & Supp. V 1999).

69. *Id.*

70. *See* H.R. REP. NO. 94-1476, at 63.

71. *See id.*; *see also* 2 NIMMER, *supra* note 24, § 8.14[B][1].

player, and CD player each qualify as devices that can perform music.⁷² Furthermore, any device or process now known or later developed that can be used to perform music will fall within the scope of this definition.⁷³

2. Public

A performance is public if the performance of music falls within either of the two clauses that define public under the statute.⁷⁴ The first clause is commonly referred to as the “public place clause,” while the second is known as the “transmit clause.”⁷⁵

Under the public place clause, there are two ways to meet the definition of public.⁷⁶ First, music performed at any place that is open to the public is publicly performed.⁷⁷ For example, when a song is played in a bar, club, or restaurant, it is clearly a public performance because these spots are open to the public.⁷⁸ However, if a song is played in a private home during a family dinner, there is no public performance.⁷⁹

Second, music performed “at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” is publicly performed under the public place clause.⁸⁰ For instance, if a song is played in a private home during a PTA meeting, it is a public performance.⁸¹ This is true even though the PTA meeting is located in a family home (*i.e.*, a non-public place) because the people gathered are outside of the family and its social unit and a substantial number of persons could attend.⁸² In contrast, if a song is performed at the PTA meeting, but no members attended, no public performance rights would arise.⁸³ People outside the family circle and its social acquaintances must gather in a private place to bring into question public performance rights.⁸⁴

72. See H.R. REP. NO. 94-1476, at 63.

73. *Id.*

74. 17 U.S.C. § 101 (1994 & Supp. V 1999).

75. *Columbia Pictures Indus., Inc. v. Prof. Real Estate Investors, Inc.*, 866 F.2d 278, 280 (9th Cir. 1989); see also *On Command Video Corp. v. Columbia Pictures Indus., Inc.*, 777 F. Supp. 787, 789 (N.D. Cal. 1991).

76. See *id.*

77. 17 U.S.C. § 101.

78. *Id.*

79. See *id.*

80. *Id.*

81. See 2 NIMMER, *supra* note 24, § 8.14[C][1].

82. *Id.*

83. See *id.*

84. *Id.*

If the performance does not qualify as public under the public place clause, it can still be considered public under the transmit clause.⁸⁵ A performance can be considered public under the transmit clause in one of two ways.⁸⁶ First, a transmission of a song is a public performance if it is transmitted to any place open to the public or any non-public place a substantial number of people other than family members and their social acquaintances are gathered.⁸⁷ This rule broadens the scope of a public performance by extending it to transmissions.⁸⁸ For example, a radio station that transmits a song to a bar (*i.e.*, a public place) or a PTA meeting at a house with attendees present (*i.e.*, a private place with non-private guests) is still a public performance.⁸⁹

Second, a public performance occurs if a song is transmitted to the general public, whether the listeners receive it from different places and/or at different times.⁹⁰ This ensures that a radio broadcast is still public even if every listener is alone at home.⁹¹

B. In Depth: Transmissions

The transmission of a song is defined as a communication by any device “whereby . . . sounds are received beyond the place from which they are sent.”⁹² A song transmission qualifies as a public performance if any of the following tests are met:

- (1) the place receiving the transmission is open to the public;⁹³
- (2) the place receiving the transmission is a non-public place that has a substantial number of persons outside of the family circle and its social acquaintances;⁹⁴ or
- (3) a song is transmitted to the public, using any device or process, irrespective of whether listeners receive it at different places or different times.⁹⁵

Under the first test, a song transmitted over the radio and played in a

85. 17 U.S.C. § 101 (1994 & Supp. V 1999).

86. *Id.*

87. *Id.*

88. *See Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 12 (2d Cir. 2000).

89. *See, e.g., On Command*, 777 F. Supp. at 790.

90. 17 U.S.C. § 101 (1994 & Supp. V 1999).

91. *See Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925).

92. 17 U.S.C. § 101.

93. *Id.*

94. *Id.*

95. *Id.*

house during a garage sale is a public performance because it is transmitted to a place open to the public.⁹⁶ Under the second test, the performance of live music-radio during a break at a PTA meeting hosted in a private house also constitutes a public performance.⁹⁷ This is true because, in this context, the private home is a place that is open to a substantial number of people outside of the family and its social acquaintances.⁹⁸

Under the third test, the non-public character of the venue will not affect whether the transmission qualifies as a public performance.⁹⁹ For example, a song transmitted to the public via digital cable is still a public performance, even if each person who hears it is located at home or another non-public place.¹⁰⁰ Likewise, a radio transmission of a song at 4:00 A.M. is still a public performance because the performance was transmitted to the public, regardless of whether the disc jockey was the only person who heard it.¹⁰¹ By the same token, a song played over the phone while a customer waits on hold is a public performance—even if the customer is alone in a private place.¹⁰² The fact that a public performance does not have to be received by the entire public at the same time¹⁰³ is a matter that will resurface in the subsequent discussion of online technologies.

Nevertheless, not every digital audio transmission qualifies as a public performance.¹⁰⁴ For example, a copy of a song can be digitally transmitted via e-mail from one listener to another.¹⁰⁵ Although a transmission is a performance, an e-mail from one person to another is not public.¹⁰⁶ There is no public performance unless the performance qualifies as public under the statute.¹⁰⁷ Although such an e-mail does not require a license, it might, nevertheless, constitute infringement.¹⁰⁸ However, in this specific case, even if the e-mailed song was still under copyright protection, the exclusive

96. *See id.*

97. *See id.*

98. *See* 17 U.S.C. § 101 (1994 & Supp. V 1999).

99. *See id.*; *Remick*, 5 F.2d at 412.

100. *See On Command*, 777 F. Supp. at 790.

101. *See id.*

102. *See id.*

103. *See* 17 U.S.C. § 101.

104. *See id.*

105. Sara Steetle, *UMG Recordings, Inc. v. MP3.com, Inc.: Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings*, 21 LOY. L.A. ENT. L. REV. 31, 34 (2000).

106. *See* 18 AM. JUR. 2D *Copyright and Literary Property* § 74 (1985).

107. *See* David J. Loundy, *Revising the Copyright Law for Electronic Publishing*, 14 J. MARSHALL J. COMPUTER & INFO. L. 1, 29 (1995).

108. *See* Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2450 (2000).

right of reproduction would not be infringed. The fair use doctrine would serve as a legitimate defense for an owner of a phonorecord who made one copy of one song and e-mailed it to a friend.¹⁰⁹

C. Pre-1995 History of the Public Performance Right

Prior to 1995, a sound recording had no public performance right for digital transmissions.¹¹⁰ As such, the income of sound recording owners (*i.e.*, record companies) was limited to sales revenue from phonorecords (*e.g.*, CDs, cassettes, or records). Conversely, an owner of a musical work has the right to demand royalties every time the song is performed publicly.¹¹¹ Non-digital public performances of sound recordings only require a licensing fee for the musical work.¹¹² A musical work license may be obtained directly from the artist or through a PRS.¹¹³ This licensing fee is essentially the royalty paid to the composer of the copyrighted musical work.¹¹⁴ Thus, only the composer of a musical work is entitled to a fee when there is a public performance of a sound recording.¹¹⁵ Absent a digital audio transmission, the owner of a sound recording need not be consulted or compensated when the sound recording is performed publicly.¹¹⁶

Industry insiders generally concur that “income derived from the public performance of music is the largest single source of income for most songwriters and publishers.”¹¹⁷ Typically, the owner of a copyrighted musical work grants a nonexclusive license to the ASCAP, BMI, or SESAC.¹¹⁸ This permits these organizations to collect public performance fees on the copyright holder’s behalf from businesses utilizing the music.¹¹⁹ This is known as a “small” rights license because it includes rights for only non-dramatic performances of music, thereby excluding operas, musicals, and similar performances.¹²⁰

109. *See id.* at 2458–59.

110. *Id.* at 2454.

111. *See* 17 U.S.C. § 106 (1994 & Supp. V 1999).

112. *See* Pollack, *supra* note 108, at 2455.

113. *See* *Broad. Music, Inc., v. Claire’s Boutiques, Inc.*, 949 F.2d 1482, 1484 (7th Cir. 1991).

114. PRS, at <http://www.thebandagency.com/cp-prs.html> (last visited Sept. 28, 2001).

115. *See* 17 U.S.C. § 102 (1994).

116. *Id.* § 110 (Supp. V 1999).

117. J. Scott Rudsenske, *MusicContracts.com—The Importance of Performance Rights Societies to Songwriters*, at <http://www.musiccontracts.com/legal/performance.htm> (last visited Sept. 24, 2001).

118. *See* *Claire’s Boutiques*, 949 F.2d at 1484.

119. *See id.* at 1485–86.

120. Connie C. Davis, *Copyright and Antitrust: The Effects of the Digital Performance*

To be eligible for membership in a PRS, a composer must write or compose a musical work.¹²¹ A PRS will accept a musical work as being published if it is recorded and sold, or performed publicly via radio airplay or live show.¹²² The PRS will then negotiate blanket licenses with businesses based on a variety of factors, including the type of business, how much the business relies on music for its income, the number of listeners, and the net revenue of the business.¹²³

Although a PRS negotiates the rights for the music of its member composers,¹²⁴ it generally will not license the following rights of the copyright holder:

- (1) most “dramatic” rights, also called “grand” rights;¹²⁵
- (2) the right to record music on a CD or cassette,¹²⁶ or as part of a multimedia or an audio-visual work, such as a motion picture, video, or television program;¹²⁷
- (3) the right to print copies of musical works, or the right to make adaptations or arrangements;¹²⁸ or
- (4) the rights of recording artists, musicians, singers or record labels.¹²⁹

In the music business, only the composers of published songs have a right to be paid when there is a public performance of a phonorecord.¹³⁰

Rights in Sound Recordings Act of 1995 in Foreign Markets, 52 FED. COMM. L.J. 412, 417 (2000).

121. See, e.g., *Interested in Joining BMI?*, at <http://bmi.com/joining> (last visited Sept. 28, 2001).

122. See *ASCAP Writer Membership Application*, at http://www.ascap.com/membership/writer-app_mp3.html (last visited Oct. 13, 2001); *Songwriter/Publisher/Composer: Resources: Songwriters and Copyright*, at <http://www.bmi.com/songwriter/resources/pubs/copyright.asp> (last visited Oct. 13, 2001).

123. See Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y 332, 358–59 (1986).

124. See *id.*

125. See Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 290 (1999).

126. See KRASILOVSKY & SHEMEL, *supra* note 53, at 40. These rights, known in the music industry as mechanical rights, are licensed by writers or publishers. *Id.*

127. *Id.*

128. See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 780 (1997).

129. See *About ASCAP: Who Is ASCAP?*, at <http://www.ascap.com/about/whois.html> (last visited Oct. 17, 2001) (describing its membership exclusively as songwriters); *Songwriter/Publisher/Composer: About BMI: Backgrounder*, at <http://www.bmi.com/songwriter/about/bkgmd.asp> (last visited Oct. 17, 2001) (offering membership only to “songwriters, composers and music publishers”).

130. See Charles R. McManis, *The Privatization (or “Shrink-Wrapping”) of American*

The PRSs administer the performance rights of their member composers.¹³¹ The sound recording owners, however, receive no royalties when their sound recording is publicly performed.¹³² Not until 1995 did Congress create a narrow exception for the public performance of a sound recording by means of a digital audio transmission.¹³³

D. Is There a Public Performance When a Song Is Transmitted Online?

The statutory definition of perform is broad enough to include any song that is played or rendered using “any device or process.”¹³⁴ The Internet is a series of interrelated computers that transfer data.¹³⁵ As a result, the Internet is considered a device.¹³⁶ Because a song can be played or rendered to a listener using the Internet, that song is performed under the Copyright Act.¹³⁷ Yet, a complete analysis also requires a determination as to whether that performance is public.¹³⁸ For the performance to be public, listeners must be able to receive a transmission of the song.¹³⁹ Therefore, an Internet website that renders online music to the public will constitute a public performance if it permits the public to gain access to online music.

IV. NEW PUBLIC PERFORMANCE RIGHT: WHEN A SOUND RECORDING IS PUBLICLY PERFORMED VIA DIGITAL AUDIO TRANSMISSION, SOUND RECORDING OWNER COLLECTS!

Prior to 1995, technology was introduced that allowed homes to receive digital audio transmissions.¹⁴⁰ This technology enabled listeners to

Copyright Law, 87 CAL. L. REV. 173, 186 (1999) (stating that “only owners of copyright in the underlying musical or literary work are entitled to royalties for public performances of sound recording”).

131. See Davis, *supra* note 120, at 417.

132. See McManis, *supra* note 130, at 186.

133. 17 U.S.C. § 106(6) (Supp. V 1999).

134. *Id.* § 101 (1994); see also discussion *supra* Part III.A.1.

135. See generally Michael B. Rutner, *The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV. 1061, 1064–65 (1998) (describing how the Internet functions).

136. See *id.*; see also 17 U.S.C. § 101 (defining *device*).

137. See discussion *supra* Part III.A.1. (discussing the definition of *performance* under the Copyright Act). See generally *Real.com—Guide*, at <http://realguide.real.com> (last visited Sept. 28, 2001) (offering music downloads over the Internet).

138. See discussion *supra* Part III.A.

139. See 17 U.S.C. § 101 (defining *public*).

140. See N. Jansen Calamita, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age*, 74 B.U. L. REV. 505, 517–18 (1994) (highlighting the two major digital cable music providers, Digital Cable Radio (DCR) and Digital Music Express (DMX) and their ability to “offer up to fifty-seven channels of commercial-free,

receive and record top-quality digital sound recordings.¹⁴¹ Generally, these digital transmissions were delivered to listeners via cable, satellite, or other interactive hookups.¹⁴² In addition to copying music, there was growing concern that interactive audio services would allow subscribers to call up individual songs on-demand, similar to a pay-per-view or unlimited access system, but for music.¹⁴³ Instead of buying CDs or cassettes, consumers could acquire music through a subscription-based system.¹⁴⁴ Congress and the recording industry feared listeners would forego buying retail phonorecords and instead engage in the home taping of these transmissions.¹⁴⁵

Without purchasing an actual phonorecord, the owner of a sound recording copyright would not be compensated because record companies depended on the revenue from album sales as their primary source of income.¹⁴⁶ In light of the situation, Congress was interested in preventing the uncompensated transfer of music.¹⁴⁷ In an attempt to avoid the total destruction of the phonorecord market and the subsequent downfall of the record companies, Congress revisited the Copyright Act in 1995 and made significant changes.¹⁴⁸

Congress amended the Copyright Act by passing the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRSRA").¹⁴⁹ The DPRSRA added a sixth exclusive right to § 106.¹⁵⁰ This new section gave copyright owners of sound recordings the right to publicly perform their

disc jockey-free, compact disc-quality music programming"); see also Phyllis Stark, 3 *Digital Audio Services Bud on Cable Systems*, BILLBOARD, Feb. 8, 1992, at 1, 66 (further describing digital audio services).

141. Calamita, *supra* note 140, at 515 (explaining how the quality and recordability of digital broadcasts far exceed that of analog broadcasts such as FM radio).

142. *Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Judiciary Subcomm. on Courts and Intellectual Prop.*, 104th Cong. 34 (1995) [hereinafter *Hearings*] (testimony of Jason S. Berman, Chairman and Chief Executive Officer of the Recording Industry Association of America).

143. *Id.* at 39. The possibility of pay-per-view type music services has the effect of enabling "listeners to obtain a direct, time certain transmission of an album of their choice with a pricing structure likely to be cheaper than that of record stores." *Id.* at 38-39.

144. *Id.* at 39.

145. See *id.* (illustrating how this concern over lost profit was only boosted by the fact that prior to 1995, recordings were the record industry's only source of revenue).

146. 1 NIMMER, *supra* note 24, § 4.05[B][4].

147. Joshua D. Levine, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 628-29 (1996) (illustrating how Congress was worried about the sales of records being threatened by the advances in digital technology and its ability to reproduce "near perfect versions of songs and albums").

148. See 17 U.S.C. §§ 106(6), 114 (1994 & Supp. V 1999).

149. Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in scattered sections of 17 U.S.C.).

150. 17 U.S.C. § 106(6) (Supp. V 1999).

copyrighted works by means of a digital audio transmission.¹⁵¹ This section covers transmissions in digital and other non-analog formats.¹⁵² Prior to this amendment, sound recording owners received no payment when their songs were publicly performed.¹⁵³ Now, they are entitled to a licensing fee only if their sound recording is transmitted digitally via devices like the Internet, cable, or satellite.¹⁵⁴

As previously mentioned,¹⁵⁵ within one phonorecord lies two separate copyrights.¹⁵⁶ Consider that an online digital audio transmission to the public is a public performance for both the musical work and the sound recording.¹⁵⁷ Therefore, online transmissions trigger two separate public performance rights.¹⁵⁸ This poses the question of who must be paid when a song is transmitted to the public online. The Copyright Act states that in this narrow situation, both the copyright owner of the musical work (for its public performance) and the copyright owner of the sound recording (for its public performance) should receive compensation.¹⁵⁹

A. Webcasting: The "New Frontier"

While a traditional analog radio transmission can only be received in a limited geographical area, an Internet stream can be heard anywhere around the globe.¹⁶⁰ The strength of the broadcast signal limits the maximum target audience for a radio station.¹⁶¹ Webcasting has no such geo-

151. *Id.*; see also Levine, *supra* note 147, at 649 (discussing how the DPRSRA meets the "challenges" of the digital birth by making sure the record industry profits from performance of its "blood, sweat, and tears").

152. 17 U.S.C. § 106(6); *id.* § 101 (defining *digital transmission* as a "transmission in whole or in part in a digital or other non-analog format" for purposes of § 106(6)).

153. *Hearings, supra* note 142, at 34–35 (testimony of Jason S. Berman).

154. 17 U.S.C. § 114(d)–(j) (1994 & Supp. V 1999) (outlining a maze of limitations and requirements for licenses under the DPRSRA); see Levine, *supra* note 147, at 643 (stating that "the [DPRSRA] allows copyright owners in sound recordings to negotiate their licensing contracts with subscription services").

155. See discussion *supra* Part II.A.

156. Levine, *supra* note 147, at 627–28 (elaborating on why recording of songs encompasses two different copyrights: one for the music, and another for the actual recording).

157. *Id.* Historically, the Copyright Act denied sound recording copyright owners the right to receive royalties for a public performance. *Id.* However, as digital transmissions themselves are the mere playing of sound recordings across digital capabilities, they should trigger royalty payments for both copyright holders. *Id.*

158. See 17 U.S.C. § 102 (a)(2), (7) (1994).

159. See *id.* § 106 (Supp. V 1999).

160. See Debra Beller, *How Internet Radio Works*, Marshall Brain's How Stuff Works, at <http://www.howstuffworks.com/internet-radio.htm> (last visited Sept. 14, 2001).

161. *Id.*

graphic limit and can potentially target the world's population.¹⁶² The difference between the two media is monumental, especially as wireless technology becomes more prevalent. Webcasting, also referred to as streaming radio or Internet radio, offers listeners a large variety of channels and artists.¹⁶³ Thus, it could displace the phonorecord market as listeners gain access to many more stations beyond the reception of their traditional radios.¹⁶⁴ For example, while most major cities only broadcast three to five "Top 40" radio stations,¹⁶⁵ one Internet service could transmit so many Top 40 stations that the most popular songs during any given week could be played simultaneously on separate channels.¹⁶⁶

With the advent of the Internet and online music services, listeners are faced with many more sources for music. The DPRSRA failed to adequately address alternative methods of broadcasting music over the Internet.¹⁶⁷ Clearly, webcasting was the primary concern prompting the next round of amendments created in 1998.¹⁶⁸ The Digital Millennium Copyright Act ("DMCA")¹⁶⁹ extended § 114 to cover alternative digital audio transmissions in the form of a stream.¹⁷⁰

B. What Is Webcasting?

Webcasting is the digital audio transmission of a sound recording or live performance over the Internet where no permanent copy of an audio file is created on a listener's computer.¹⁷¹ Instead, relatively small packets of data are transmitted to a listener's computer where a software media player (e.g., Winamp, RealPlayer, or Windows Media Player) converts

162. *Id.*

163. *See id.*

164. *See id.*

165. *See, e.g., Los Angeles Radio Guide*, at <http://www.radioguide.com/cities/la.html> (last visited Sept. 14, 2001) (indicating that Los Angeles has one "Top 40" and three "uptempo hits" stations).

166. *See, e.g., Live365—Listen*, <http://www.live365.com/cgi-bin/directory.cgi> (last visited Sept. 14, 2001).

167. *See, e.g., Heather D. Rafter et al., Streaming into the Future: Music and Video Online*, in 20TH ANNUAL INSTITUTE ON COMPUTER LAW, at 556 (PLI Intellectual Property Course Handbook Series No. G-590, 2000).

168. *See id.*

169. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

170. Robert A. Gorman, Copyright Liability of Broadcasters for Webcasting Their AM/FM Radio Signals, at 2-3 (Apr. 13, 2000), available at <http://www.riaa.org/pdf/nab2.pdf> (memorandum prepared for the Recording Industry Association of America, Inc.).

171. *See Beller, supra* note 160.

them into sound that is played through the computer's speakers.¹⁷² By consuming each packet of data individually, streaming technology makes the data not only difficult to copy, but also more efficient on bandwidth resources.¹⁷³ Although webcasting is quite similar to a radio broadcast,¹⁷⁴ there is no easy way to record it digitally.¹⁷⁵ The digital element is key because it is possible to make an analog copy of a digital stream by using a tape recorder.¹⁷⁶ In order to listen to a webcast, a user must be connected to the Internet.¹⁷⁷ The slower the connection, the more likely the song will be interrupted due to lack of bandwidth.¹⁷⁸ Once a connection is terminated, so is the stream of incoming music. One should keep in mind that the sound quality of webcasted music is generally lower than that of a CD.¹⁷⁹

Although no material copy of webcasted music is supposed to remain on a listener's computer after streaming one or many songs, some effort has been made to circumvent this restriction.¹⁸⁰ Streambox, for instance, is a software company that created a program called VCR.¹⁸¹ The purpose of VCR was to circumvent RealNetwork's copy protection, or encoding, by permitting customers to make a permanent copy of an incoming audio stream.¹⁸² RealNetworks, a streaming media company, was able to enjoin Streambox's VCR under the anti-circumvention sections of the DMCA.¹⁸³ In finding a violation of the DMCA, the court held that Streambox's product was primarily designed to bypass copyright protection measures and had no other significant commercial purposes.¹⁸⁴

172. *See id.*

173. Stan Koenigsberg & Stephan Mentzer, *Music, the Internet, and the Music Industry*, in PLI'S SIXTH ANNUAL INSTITUTE FOR INTELLECTUAL PROPERTY LAW, at 117 (PLI Pat. Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G0-00CW, 2000).

174. *Id.*

175. *See Will MP3.com Survive?* (Sept. 7, 2000), at <http://radio.about.com/library/weekly/aa090700b.htm>.

176. *See* Marshall Brain, *How Internet Radio Works*, Marshall Brain's How Stuff Works, at <http://www.howstuffworks.com/analog-digital.htm> (last visited Sept. 29, 2001).

177. *See* RIAA | *Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

178. *See Data Network Services—Resnet: The Basics*, at <http://resnet.indiana.edu/info/basics.html> (last visited Sept. 13, 2001).

179. Wendy M. Pollack, *Turning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2449 (2000).

180. *See* RealNetworks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *4, *11 (W.D. Wash. Jan. 18, 2000).

181. *Id.* at *10.

182. *Id.* at *11.

183. *Id.* at *34-35.

184. *Id.* at *20.

Digital audio services, which supply streaming music through the Internet to the general public, usually do not charge for this service.¹⁸⁵ Instead, they offer visual advertising and the option of purchasing phonorecords.¹⁸⁶ There are a variety of digital audio services, which transmit different channels of uninterrupted music.¹⁸⁷ It is common for webcasters to stream music in targeted genres, such as “Essential Alternative,” “Conscious Rap/Hip-Hop,” “50’s Rock ‘n’ Roll,” or “Jungle/Drum ‘n’ Bass.”¹⁸⁸ Additionally, a variety of traditional radio broadcasters also provide a stream of webcasted music by re-transmitting their radio signal programming over the Internet.¹⁸⁹ The rules for re-transmissions are not further discussed herein.

C. Does Webcasting Constitute a Public Performance?

For a webcast to be a public performance, it must fall within the statutory language of both *public* and *performance*.¹⁹⁰ Performance requires a song to be rendered or played.¹⁹¹ Just as a traditional radio broadcast plays a song for listeners, so does a webcast.¹⁹² However, there is no rendering because a listener does not retain a copy of the audio file.¹⁹³ A webcast must also be public to qualify as a public performance under the statute.¹⁹⁴ By permitting all Internet users to receive a transmission of streaming music, webcasting is clearly directed to the public.¹⁹⁵ Hence, webcasting a sound recording to the general public via the Internet triggers the public performance rights of both a sound recording and a musical work.¹⁹⁶

185. See, e.g., *MTV.com*, at <http://www.mtv.com/mtvradio/> (last visited Oct. 13, 2001).

186. *Webcasting and Webcast Advertising*, at <http://www.maniactive.com/webcasting.htm> (last visited Sept. 14, 2001); see Bob Kohn, *Bittersweet Symphony: A Primer on the Law of Webcasting and Digital Music Delivery*, Kohn on Music Licensing, at <http://www.kohnmusic.com/articles/primer.html> (1998) [hereinafter *Bittersweet Symphony*].

187. See, e.g., *Listen*, at <http://www.listen.com/> (last visited Oct. 13, 2001).

188. See *RIAA | Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

189. See *id.*

190. See 17 U.S.C. § 101 (1994 & Supp. V 1999); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789 (N.D. Cal. 1991).

191. 17 U.S.C. § 101 (1994 & Supp. V 1999).

192. *RIAA | Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

193. See discussion *supra* Part IV.B.

194. *On Command*, 777 F. Supp. at 789.

195. Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 No. 4 ENT. L. REP. 4 (1988), LEXIS, News Group File, All.

196. See *Bonneville Int'l. Corp. v. Peters*, 153 F. Supp. 2d 763, 766 (E.D. Pa. 2001).

As stated earlier, Congress decided to compensate sound recording owners when their music is webcasted over the Internet because of the fear that consumers would no longer purchase phonorecords.¹⁹⁷ Additionally, they wanted to create an efficient system that would allow a webcaster to obtain a single license covering public performance rights for all sound recordings.¹⁹⁸ Thus, Congress created a statutory license for webcasting instead of a voluntary license.¹⁹⁹

To qualify for a statutory license, a webcaster needs to meet a number of strict requirements.²⁰⁰ The law mandates that a royalty rate be set based on voluntary negotiations or by the Library of Congress by convening a royalty arbitration panel.²⁰¹ Moreover, if any statutory requirement is not met, a webcaster cannot utilize the statutory royalty rate.²⁰² Instead, a webcaster must negotiate directly with the individual copyright holder in order to stream each sound recording online.²⁰³

While the Library of Congress has not yet set the webcasting royalty rate, contrasting plans have been laid out.²⁰⁴ The Digital Media Association (“DiMA”) represents webcasters and the Recording Industry Association of America (“RIAA”) represents record companies and artists.²⁰⁵ As part of the continuing negotiations, DiMA is currently offering \$.00015 per song, while the RIAA is offering \$.004 per song.²⁰⁶ The three-member Copyright Arbitration royalty Panel is required to make a decision by January 28, 2002.²⁰⁷

As a practical matter, the public performance right in a sound recording requires a digital audio service to obtain a license in order to legally webcast a sound recording over the Internet.²⁰⁸ Additionally, a webcaster must get a license from the owner of the musical work,²⁰⁹ which is

197. See *id.* at 778–79.

198. Gorman, *supra* note 170.

199. 17 U.S.C. § 114(d)(2) (Supp. V 1999); see RIAA | *Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

200. *Bonneville*, 153 F. Supp. 2d at 768 n.5.

201. 17 U.S.C. § 114 (f) (1994 & Supp. V 1999); *Bonneville*, 153 F. Supp. 2d at 767–68.

202. See David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 U.C.L.A. ENT. L. REV. 189, 241–44 (2000).

203. *Id.*

204. See Ronna Abramson, *Court Deals Webcasters a Royal(ty) Blow*, INDUSTRY STANDARD (Aug. 2, 2001), <http://www.thestandard.com/article/0,1902,28450,00.html> (on file with Loyola of Los Angeles Entertainment Law Review).

205. *Id.*

206. *Id.*

207. *Id.*

208. See *Bonneville*, 153 F. Supp. 2d at 766.

209. 17 U.S.C. § 106 (4) (1994 & Supp. V 1999); see *Bonneville*, 153 F. Supp. 2d at 766.

usually obtained from a PRS.²¹⁰ This extra step implicates a dual licensing scheme.²¹¹

D. How to Obtain a Non-Interactive Statutory License

In basic terms, a digital audio service must be non-interactive to qualify for a statutory license that allows the service to publicly perform a sound recording via the Internet.²¹² An interactive service enables a member of the public to receive a transmission of a program specially created for that recipient.²¹³ The rules laid out in the following sections²¹⁴ only apply to non-interactive services that were established after July 31, 1998.²¹⁵ These sections discuss the statutory requirements set forth by the DMCA.

1. Pay Licensing Fees²¹⁶

Licenses can be obtained from SoundExchange, Inc. through their website at www.soundexchange.com.²¹⁷

2. Prohibition from Automatically Switching Channels²¹⁸

Webcasters generally must not intentionally cause any device receiving their transmission to automatically switch from one program channel to another.²¹⁹ For example, if a user is listening to the classic music channel, a webcaster is prohibited from switching the channel to another genre of music, such as rap or country.²²⁰ This requirement, however, may be hard to enforce because SoundExchange would have to monitor a webcast's day-to-day operations. Additionally, a listener might receive streamed music from a similar genre without realizing the genre has changed. For instance, one webcaster may transmit two different streams such as alternative rock and essential rock, which may play similar songs. For technical

210. Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. Rev. 93, 113 (2000).

211. See 17 U.S.C. § 106(4), (6) (1994 & Supp. V 1999).

212. 17 U.S.C. § 114 (d)(2)(A)(i) (Supp. V 1999).

213. *Id.* § 114(j)(7).

214. See discussion *infra* Part IV.D.1–14.

215. 17 U.S.C. § 114(d)(2).

216. *Id.* § 115(c)(2) (1994 & Supp. V 1999).

217. See *SoundExchange: Licensing*, at <http://www.soundexchange.com/licenses.cfm> (last visited Sept. 26, 2001).

218. 17 U.S.C. § 114(d)(2)(A)(ii) (Supp. V 1999).

219. *Id.* Transmissions to a business establishment are exempt from the prohibition on automatic channel switching. *Id.*

220. See *id.*

or operational reasons, the alternative rock stream might be cut off and replaced with a back-up stream of essential rock without the listener knowing, resulting in an unintentional statutory violation.²²¹ Further scrutiny of webcasters' daily operations may make these problems more apparent.

3. Copyright Information Must Be Identified²²²

If technically feasible, information encoded in a sound recording transmission must identify the title of the song, the featured recording artist and information concerning the underlying musical work and its author.²²³ A media player such as Winamp²²⁴ will convert an incoming stream from a webcaster into audible music.²²⁵ The presence of other media players in the marketplace, such as RealPlayer²²⁶ and Windows Media Player,²²⁷ makes it difficult to establish an industry standard for displaying copyright status information. Additionally, a media player often displays copyright information on the player itself while playing a song.²²⁸ In most cases, the copyright information displayed is controlled by the media player software a listener has installed, not by the webcaster.²²⁹ As media players are not distributed by webcasters, problems are bound to arise. Moreover, companies that produce media players are not directly bound by these statutory requirements.²³⁰ Nonetheless, the DMCA would best serve to prevent media player companies from circumventing such copyright controls.

221. *See id.*

222. *Id.* § 114(d)(2)(A)(iii).

223. *Id.* A statutory license is available if:

[E]xcept as provided in section 1002 (e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

Id.

224. Jon Luini & Allen Whitman, *Streaming Audio Tutorial*, Webmonkey, at <http://hotwired.lycos.com/webmonkey/00/45/index3a.html> (Nov. 2, 2000).

225. *See id.*

226. *Download RealPlayer 8 Plus or RealPlayer 8 Basic*, at http://www.real.com/player/index.html?src=011011realhome_1 (last visited Oct. 13, 2001).

227. *See Welcome to Windows Media Player 7.1*, at <http://www.microsoft.com/Windows/windowsmedia/software/Playerv7.asp> (last visited Sept. 28, 2001) (providing an overview of Media Player features).

228. *See id.*

229. *See id.*

230. *See* 17 U.S.C. § 114(d)(1) (Supp. V 1999).

4. Prohibition Against Prior Announcements²³¹

Webcasters may not publish or cause others to publish a list of songs (by title, album or artist) that they plan to play online.²³² However, webcasters can identify an artist that they will play in an “unspecified future time period.”²³³ It is also possible to identify the sound recording immediately before it is played.²³⁴

5. Archived Programming²³⁵

An archived program is a predetermined set of songs available on a website for listeners to hear on-demand and repeatedly.²³⁶ The stream is individualized so a user will be able to start listening to an archived program from the beginning but not from in the middle.²³⁷ Archived programming is permissible if two conditions are satisfied.²³⁸ First, the set must be greater than five hours in duration and offered on the webcaster’s or a related website for less than two-weeks.²³⁹ Second, the two-week limitation must be construed “in a reasonable manner.”²⁴⁰ Thus, an archived program cannot qualify for the statutory license simply because it is briefly unavailable every two weeks, nor because after two weeks the webcaster makes minor alterations to the program, *e.g.*, by replacing or reordering some of the program’s songs.²⁴¹

231. *Id.* § 114(d)(2)(C)(ii).

232. *Id.*

233. *Id.* A statutory license is available if:

[T]he transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period

Id.

234. See H.R. REP. NO. 105-796, at 82 (1998), *reprinted in* 1998 U.S.C.A.N. 639, 658.

235. 17 U.S.C. § 114(d)(2)(C)(iii) (Supp. V 1999).

236. *Id.* § 114(j)(2) (“An ‘archived program’ is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning”).

237. See *id.*

238. *Id.* § 114(d)(2)(C)(iii).

239. See *id.* A transmission is subject to statutory licensing if it: “(I) is not part of an archived program of less than 5 hours duration; [or] (II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks” *Id.*

240. H.R. CONF. REP. NO. 105-796, at 82 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 658.

241. See *id.*; see also H.R. CONF. REP. NO. 105-796, at 86 (“A program is considered an ‘archived program’ if it . . . is performed in virtually the same order from the beginning.”).

6. Looped Programming²⁴²

A set of songs continuously played and automatically restarted is called a “loop” or a “continuous program.”²⁴³ Looped programming is not individualized, so listeners can only listen to songs currently being streamed.²⁴⁴ Looped programming is only permitted if the entire segment is at least three hours long.²⁴⁵ It is unclear to what extent alteration of the programming (*e.g.*, reordering the songs) impacts the statutory license.²⁴⁶

7. Other Programming Limitations²⁴⁷

Other than archived or looped programming, no program can be identified in a predetermined order.²⁴⁸ Alternative programs that are played at a scheduled time (*i.e.*, announced or published in advance) that last less than an hour can be played no more than three times every two weeks.²⁴⁹ Additionally, a scheduled program that lasts more than one hour can be played four times every two weeks.²⁵⁰

8. Prohibition Against Suggested Association Between Sound Recording or Artist and Advertisements²⁵¹

This requirement pertains to digital audio services that advertise using visual images while sound recordings are being performed simultane-

242. *See* H.R. CONF. REP. NO. 105-796, at 87.

243. *Id.*; *see* 17 U.S.C. § 114(j)(4) (Supp. V 1999) (“A ‘continuous program’ is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.”).

244. *See* H.R. CONF. REP. NO. 105-796, at 87.

245. 17 U.S.C. § 114(d)(2)(C)(iii)(III).

246. *See* H.R. CONF. REP. NO. 105-796, at 87 (“Minor alterations in the [continuous] program should not render a program outside the definition of ‘continuous program.’”).

247. 17 U.S.C. § 114(d)(2)(C)(iii)(IV).

248. *Id.*

249. *Id.* § 114(d)(2)(C)(iii)(IV)(aa).

250. *Id.* § 114(d)(2)(C)(iii)(IV)(bb). A statutory license is available if the transmission: [I]s not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration

....

Id. § 114(d)(2)(C)(iii)(IV).

251. *Id.* § 114(d)(2)(C)(iv).

ously.²⁵² A webcaster is prohibited from causing consumer confusion such as an “association” or “connection”²⁵³ between the particular product or service and the sound recording owner or recording artist.²⁵⁴ This section does not prohibit contemporaneous advertising. Rather, the burden is on a webcaster to prevent listener confusion.²⁵⁵ For example, consumers could be confused if the same advertisement appeared every time a particular song was streamed. Nevertheless, webcasters can select advertisements that are random or based on demographics.²⁵⁶

9. Requirement to Prevent Listeners from Using Scanning Devices²⁵⁷

Scanners allow listeners to browse through current transmissions, enabling them to locate particular artists or recordings.²⁵⁸ To prevent listeners from selecting a particular song at any time, a webcaster must cooperate by preventing the use of scanning devices by themselves.²⁵⁹ Again, this requirement is limited to the extent that it is feasible without imposing substantial costs or burdens on a webcaster.²⁶⁰

10. Requirement to Defeat Copying by Listener²⁶¹

A webcaster cannot encourage or assist a listener in making copies of

252. *See id.* § 114(d)(2)(C)(iv); H.R. CONF. REP. NO. 105-796, at 83.

253. 17 U.S.C. § 114(d)(2)(C)(iv) (Supp. V 1999).

254. *Id.*

255. *See id.*

256. *See* H.R. CONF. REP. NO. 105-796, at 83. A statutory license is available if:

[T]he transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself

17 U.S.C. § 114(d)(2)(C)(iv).

257. 17 U.S.C. § 114(d)(2)(C)(v).

258. *See id.*

259. *Id.* § 114(d)(2)(C)(v).

260. *Id.* A statutory license is available if:

[T]he transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient

Id.

261. *Id.* § 114(d)(2)(C)(vi).

the webcasted music.²⁶² If technically possible, a webcaster must also disable all copying features available to listeners through their service.²⁶³

11. Transmission of Bootlegs Not Covered by the Statutory License²⁶⁴

The statutory license only covers transmissions of lawfully authorized copies of sound recordings.²⁶⁵ Authorized copies include songs that are distributed through commercial channels or songs provided by the copyright owner.²⁶⁶ Bootlegs or pre-released recordings not authorized by the copyright owner are not covered.²⁶⁷ However, some bands encourage their fans to make bootleg sound recordings of their concerts.²⁶⁸ The band Phish is a perfect example.²⁶⁹ It is unclear whether a webcaster can transmit a bootleg of a Phish concert if the band authorized the recording.

12. Requirement to Accommodate Technical Protection Measures²⁷⁰

If the technical protection measures are feasible and do not impose substantial burdens, a digital audio service must accommodate these measures.²⁷¹ The technical measures in question are “widely used by sound recording copyright owners to identify or protect copyrighted works”²⁷² A substantial burden is met if the measure would create a material financial

262. *Id.*

263. 17 U.S.C. § 114(d)(2)(C)(vi) (Supp. V 1999). A statutory license is available if: [T]he transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology

Id.

264. *Id.* § 114(d)(2)(C)(vii).

265. *Id.*

266. *Id.*; H.R. CONF. REP. NO. 105-796, at 83–84.

267. *See* H.R. CONF. REP. NO. 105-796, at 83–84. A statutory license is available if: [P]honorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner

17 U.S.C. § 114(d)(2)(C)(vii).

268. *See, e.g., Phish Audio Recording and Transfer Policy*, at <http://www.phish.com> (last visited Oct. 4, 2001).

269. *Id.*

270. 17 U.S.C. § 114(d)(2)(C)(viii) (Supp. V 1999).

271. *Id.*

272. *Id.*

cost or cause the digital signal to be degraded (*i.e.*, aurally or visually).²⁷³

13. Identify Artist, Song, and Album²⁷⁴

During the performance of a sound recording, webcasters must display the featured artist's name, song title, and album title (if applicable) on which it appears.²⁷⁵ This information must be in text that is identifiable by listeners.²⁷⁶ These identity requirements became effective as of October 28, 1999.²⁷⁷

To what extent does language become a factor? Many artists' song titles and album titles are written in foreign languages.²⁷⁸ Should a webcaster display foreign words by transliterating them, translating them, or displaying them in their original tongue? What happens when a media player is not able to display a word using foreign letters?

14. Sound Recording Performance Complement²⁷⁹

This section of the Copyright Act is designed to prevent a webcaster from playing an album in its entirety or several works by a single artist successively over a short period of time.²⁸⁰ Basically, record companies are protected from the overrepresentation of their artists or albums.²⁸¹ Specifically, in any three-hour period, a webcaster may not play more than: 1) three songs from any one particular album, as long as no more than two songs are played consecutively; or 2) four songs by a particular artist, or from a single boxed set, as long as no more than three songs are played consecutively.²⁸²

273. *Id.* A statutory license is available if:

[T]he transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal.

Id.

274. *See id.* § 114(d)(2)(A)(iii).

275. *See id.* § 114(d)(2)(A)(iii).

276. 17 U.S.C. § 114(d)(2)(C)(ii) (Supp. V 1999).

277. *Id.* § 114(d)(2)(C)(ix). The Digital Millennium Copyright Act was enacted October 28, 1998. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

278. *See, e.g.*, RICKY MARTIN, *Ella Es, on ME AMARAS* (Sony Discos 1993).

279. *See* 17 U.S.C. § 114(j)(13).

280. *See id.*

281. *See Bittersweet Symphony, supra* note 186.

282. 17 U.S.C. § 114(j)(13)(A) (Supp. V 1999).

E. To Whom Must a Webcaster Pay Licensing Fees?

Unlike traditional radio broadcasts, webradio requires a dual licensing arrangement by webcasters before transmitting a sound recording online.²⁸³ The first one is a blanket license to publicly perform the copyrighted musical work, which can be obtained from a PRS.²⁸⁴ The second is a statutory license to publicly perform a sound recording, which can be obtained through SoundExchange, Inc.²⁸⁵

SoundExchange is an organization that is comprised of over 280 companies and their 2,100 respective record labels.²⁸⁶ SoundExchange serves the same administrative function for the owner of a sound recording (usually a record company) as does a PRS for the owner of the musical work (usually an artist or publishing company).²⁸⁷ It administers royalty fees by collecting payments from webcasters and other licensees²⁸⁸ based on the number of times each sound recording is played online.²⁸⁹ Digital audio services pay licensing fees to SoundExchange, which then makes annual distributions of performance rights royalties on the copyright owner's behalf.²⁹⁰

The Library of Congress has set the distribution schedule for sound recording royalty payments.²⁹¹ Receipts collected by SoundExchange from statutory licenses are distributed in the following percentages:

- (1) 50% to the copyright holder;²⁹²
- (2) 45% to the recording artist featured on the sound recording;²⁹³

283. See *Bittersweet Symphony*, *supra* note 186; 17 U.S.C. § 114(d)(3)(C).

284. *Bittersweet Symphony*, *supra* note 186.

285. See *SoundExchange: Licensing*, at <http://www.soundexchange.com/licenses.cfm> (last visited Sept. 26, 2001).

286. *Membership*, at <http://www.soundexchange.com/membership.cfm> (last visited Sept. 26, 2001).

287. See *RIAA | Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

288. See *SoundExchange: Licensing*, at <http://www.soundexchange.com/licenses.cfm> (last visited Sept. 26, 2001); see also Joshua H. Foley, Comment, *Enter the Library: Creating a Distant Lending Right*, 16 CONN. J. INT'L L. 369, 394 (2001).

289. *RIAA | Webcasting FAQ*, at <http://www.riaa.com/licensing-licen-3a.cfm> (last visited Sept. 13, 2001).

290. See *Royalty Administration*, at <http://www.soundexchange.com/royalty.cfm> (last visited Sept. 28, 2001).

291. See 17 U.S.C. § 114(f)(2)(A) (Supp. V 1999).

292. See *Royalty Administration*, at <http://www.soundexchange.com/royalty.cfm> (last visited Sept. 28, 2001).

293. 17 U.S.C. § 114(g)(2)(C).

(3) 2.5% to American Federation of Musicians (“AFM”) for non-featured musicians;²⁹⁴ and

(4) 2.5% to American Federation of Television and Radio Artists (AFTRA) for non-featured vocalists.²⁹⁵

If, for any reason, a webcaster does not qualify for a statutory license, a voluntary license must be obtained directly from the copyright owner.²⁹⁶ A voluntary license permits copyright owners to freely negotiate detailed terms for the right to stream their music.²⁹⁷ Furthermore, record companies may license out the right to publicly perform their music.²⁹⁸ Nonetheless, sound recording owners are subject to a few statutory time limitations if they transact an exclusive license with only one interactive service.²⁹⁹

F. Interactive Services

Notwithstanding the failure to qualify for a non-interactive statutory license, an interactive service is still protected on some level.³⁰⁰ Simply stated, an interactive service permits a listener to order a song on-demand.³⁰¹ As defined by the Copyright Act, an interactive service is “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”³⁰² Yet, allowing listeners to *request* songs will not transform a non-interactive service into an interactive one.³⁰³

A sound recording owner is free to negotiate the terms of an interactive license, subject to a few conditions designed to prevent sound recording owners from monopolizing the world’s performances.³⁰⁴ The Copyright Act places a time restriction on exclusive licenses to ensure that digital transmissions of sound recordings are not within the control of any one party for a significant period of time.³⁰⁵ Consequently, exclusive li-

294. *Id.* § 114(g)(2)(A).

295. *Id.* § 114(g)(2)(B).

296. *See id.* § 114(d)(3)(C).

297. *See id.* § 114(e)(2)(A).

298. *See id.* § 114(e)(2)(B).

299. *See* 17 U.S.C. § 114(d)(3)(A) (Supp. V 1999).

300. *See id.* § 114(d)(3) (listing under what conditions interactive services are protected).

301. *Id.* § 114(j)(7).

302. *Id.*

303. *Id.*

304. *See id.* § 114(e).

305. *See* 17 U.S.C. § 114(d)(3) (Supp. V 1999).

censes granted to interactive services cannot continue beyond twelve months for an owner of more than 1,000 sound recordings and twenty-four months for owner of less than 1,000 recordings.³⁰⁶ Once the maximum twelve or twenty-four month period lapses, a sound recording owner must wait at least thirteen months before granting another exclusive license to the same licensee (*i.e.*, interactive service).³⁰⁷

Nevertheless, there are two exceptions to these time limitations.³⁰⁸ These time restrictions can be ignored if the sound recording owner has granted the right to publicly perform the sound recording to at least five different interactive services.³⁰⁹ Also, the timing rules do not apply to promote the distribution or performance of a sound recording.³¹⁰ More specifically, an owner can grant an interactive service an exclusive license to publicly perform up to forty-five seconds of a sound recording only if the purpose is to promote the sound recording's distribution or performance.³¹¹

V. WHAT IS A DOWNLOAD?

A download, or digital phonorecord delivery (“DPD”),³¹² occurs when a user receives a complete digital audio file onto a hard drive or other media storage device.³¹³ A downloaded file, usually in a compressed format like an MP3, remains on a computer or storage device until it is actively deleted.³¹⁴ Unlike webcasting, a listener does not have to be online to hear a downloaded song.³¹⁵ However, depending on the recording quality, there may be a discernable degradation in sound quality between a downloaded song and its CD counterpart.³¹⁶

The language used in the Copyright Act explains how a DPD could be construed as a public performance.³¹⁷ The Act defines a DPD as “each individual delivery of a phonorecord by digital transmission of a sound re-

306. *Id.* § 114(d)(3)(A).

307. *Id.*

308. *Id.* § 114(d)(3)(B).

309. *Id.* § 114(d)(3)(B)(i).

310. *See id.* § 114(d)(3)(B)(ii).

311. 17 U.S.C. § 114(d)(3)(B)(ii) (Supp. V 1999).

312. *Id.* § 115(d) (1994 & Supp. V 1999).

313. *Id.*

314. *See Bittersweet Symphony*, *supra* note 186.

315. Rafter et al., *supra* note 167.

316. *See Convert CDs to MP3s*, at <http://software.mp3.com/software/guide/convert/index.html> (last visited Sept. 25, 2001).

317. *See* 17 U.S.C. § 115(d).

ording.”³¹⁸ Additionally, a DPD delivery must make a “specifically identifiable reproduction” of the sound recording for a recipient.³¹⁹ After defining a DPD, Congress added that this applied “regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.”³²⁰ With this specification, Congress opened the door for PRSs and record companies to construe a DPD as a public performance.³²¹

A. Can a Download Trigger Public Performance Rights?

One might not see a difference between the purchase of a DPD and a retail CD given that both purchases secure digital copies of a song. However, unlike the purchase of a retail CD, the mere purchase of a DPD might also qualify as a public performance.³²² A recent survey by the Pew Internet and American Life Project reports that six million adults download music every day.³²³ Given this statistic, the number of songs transmitted online is staggering. There are significant ramifications if there is a public performance each time a song is downloaded.³²⁴ If a DPD is considered a public performance, a royalty must be paid on every transmission for both the musical work and the sound recording.³²⁵ Although it is not intuitive that a download is a public performance, the broad statutory language of the Copyright Act justifies this interpretation.³²⁶ Whether or not Congress intended this outcome, it would be imprudent for PRSs and record companies to waive their statutory rights.

For a download to be a public performance, it must fall within the statutory language of both *public* and *performance*.³²⁷ As stated above, performance requires a song to be rendered or played.³²⁸ Whether or not a song is automatically playing while being downloaded, the issue is whether

318. *Id.*

319. *Id.*

320. *Id.*

321. *See id.*

322. *See id.*

323. Mike Graziano & Lee Rainie, *The Music Downloading Deluge: 37 Million American Adults and Youths Have Retrieved Music Files on the Internet*, Pew Internet & American Life Project, available at http://www.pewinternet.org/reports/pdfs/PIP_More_Music_Report.pdf (April 24, 2001).

324. 17 U.S.C. § 114(f)(2)(A) (Supp. V 1999).

325. *Id.*

326. *Id.* § 115(c)(3)(A) (1994 & Supp. V 1999).

327. *Id.* § 101 (1994).

328. *Id.*

downloading renders a song. The Copyright Act does not define *render*.³²⁹ However, Black's Law Dictionary defines render as "to transmit or deliver."³³⁰ Arguably, downloading a song from one computer to another falls within this definition.³³¹ If a download renders a song to a listener, the song is performed under the statutory definition.³³²

A download must also be public to qualify as a public performance under the statute.³³³ A performance is public if a song is transmitted to a place open to the public.³³⁴ This criteria may not be broad enough to include a listener downloading music from home or work—arguably private places. However, a performance is also public if the public is capable of receiving the transmission of a song.³³⁵ An Internet service that allows the public to download songs arguably provides this capability to the public.³³⁶

In addition, the definition of public is expansive enough to cover transmissions that can be received at various times.³³⁷ As a result, a download is public even if a song is downloaded by people who are located in private places and receive the transmission at different times.³³⁸ Therefore, a DPD is a public performance even when it is transmitted to listeners receiving it at different times and in private locations.

B. What Licenses Are Required for Downloading Services?

Statutory construction of public performance rights has left us with the anomalous result of a dual licensing scheme.³³⁹ Like a stream, a download triggers two separate public performance rights.³⁴⁰ If the public can access a download, a service cannot avoid paying for both licenses separately.³⁴¹ One license is for the underlying musical work while the second is for the sound recording.³⁴² First, the musical work is publicly

329. *See id.*

330. BLACK'S LAW DICTIONARY 1298 (7th ed. 1999).

331. *See id.*

332. 17 U.S.C. § 101.

333. *Id.*

334. *See id.*

335. *See id.*

336. Napster is an example of such a downloading service site. *Download Napster Now!*, at <http://www.napster.com/download> (last visited Sept. 28, 2001).

337. 17 U.S.C. § 101 (1994).

338. *Id.*

339. *See id.*

340. *See id.*

341. *See id.*

342. *See id.*

performed under § 106(4) when a download is offered to the public.³⁴³ Second, the sound recording is publicly performed because a song is delivered to the public via a digital audio transmission as required under § 106(6).³⁴⁴ Therefore, downloading services must arrange dual licenses.

These two licenses are not compulsory and can be freely negotiated by interested parties.³⁴⁵ Generally, the musical work can be licensed by a PRS.³⁴⁶ However, there is no organization that licenses the performance rights for downloading.³⁴⁷ The right to publicly perform a sound recording must be licensed directly from the owner, usually a record company.³⁴⁸

C. Author's Take on Downloading and Napster

Because an MP3 is a relatively small and compressed file,³⁴⁹ it is easy to reproduce and distribute a copy of a song via e-mail or through a file sharing service like Napster, Gnutella, Morpheus, or Kazaa.³⁵⁰ In *A & M Records Inc. v. Napster, Inc.*,³⁵¹ the Ninth Circuit held that posting and downloading unauthorized songs infringes two of the six exclusive rights of a copyright owner: the right of distribution and the right of reproduction.

Services that offer digital downloads for free or on a pay-per-download basis must pay public performance fees because their conduct falls within the requirements of the Copyright Act.³⁵² Napster, however, does not offer downloads to the public.³⁵³ Instead, Napster offers a service that facilitates the transmission of sound recordings *between* members of the public.³⁵⁴ Any member of the public can access this service and request sound recordings from another individual.³⁵⁵ Thus, Napster users transmit sound recordings to the public.³⁵⁶ Consequently, Napster's users directly infringe on the public performance rights of a musical work and a sound

343. See 17 U.S.C. § 106(4) (1994 & Supp. V 1999).

344. See *id.* § 106(6).

345. See *id.*

346. Barbara Cohen, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOK. J. INT'L L. 401, 422 (1996).

347. See *id.* at 421–25.

348. 17 U.S.C. § 106(4).

349. MP3, at <http://webopedia.internet.com/term/m/mp3.html> (last modified Apr. 26, 1999) (defining “MP3”).

350. See *id.*

351. 239 F.3d 1004, 1014 (9th Cir. 2001).

352. See 17 U.S.C. §§ 101, 106, 501(a) (1994 & Supp. V 1999).

353. See *Napster*, 239 F.3d at 1011.

354. See *id.*

355. See *id.* at 1011–12.

356. See *id.*

recording.³⁵⁷

Nevertheless, Napster was only sued for contributory and vicarious infringement of the right to distribute and reproduce a copyrighted work.³⁵⁸ As established above, a download is a public performance.³⁵⁹ Thus, Napster could have been sued for contributory and vicarious infringement of two additional exclusive rights: (1) the right to publicly perform a musical work; and (2) the right to publicly perform a sound recording by means of a digital audio transmission.³⁶⁰

Moreover, any owner of a copyright protected musical work or sound recording traded through Napster's system could have sued Napster.³⁶¹ Separate claims could have been filed by the owner of a musical work and by the owner of a sound recording.³⁶² Napster was vulnerable to these lawsuits because it overlooked negotiating with the PRSs that license the public performance rights for musical works.³⁶³ Additionally, Napster failed to negotiate voluntary licenses with the record companies that owned the copyrighted sound recordings.³⁶⁴ Thus, Napster did not have the right to publicly perform them.³⁶⁵

VI. WHAT IS A DIGITAL LOCKER?

A computer server stores computer files in the same manner as a personal computer's hard drive.³⁶⁶ A song or album can be copied onto a computer and stored in a file format such as an MP3 or wav.³⁶⁷ Conceivably, a user could insert a John Lennon CD into a CD-ROM drive and create a fair use copy of the song "Imagine" in a personal hard drive. Then, the user could purchase storage space on a server and upload the newly created file into that server space. At this point, the user can access and listen to the song using any Internet-enabled computer. In fact, the user could go to

357. See 17 U.S.C. §§ 106(4), 501.

358. *Napster*, 239 F.3d at 1011.

359. See discussion *supra* Part V.A.

360. See 17 U.S.C. § 106(4), (6) (1994 & Supp. V 1999).

361. See *generally id.* § 501(b) (giving copyright owners a cause of action against those who infringe on their rights).

362. See *id.* § 106(5), (6) (giving owners of musical works and owners of sound recordings separate exclusive rights).

363. See Cohen, *supra* note 346, at 422.

364. See *Napster*, 239 F.3d at 1026.

365. See 17 U.S.C. §§ 106, 501(a).

366. See *MP3*, at <http://www.webopedia.com/TERMS/s/server.html> (last visited Sept. 14, 2001) (defining *server*).

367. See *Convert CDs to MP3s*, at <http://software.mp3.com/software/guide/convert/index.html> (last visited Sept. 25, 2001).

any online connection and listen to the song "Imagine." A digital locker service facilitates this process for music consumers.³⁶⁸ Rather than having to upload each song onto a server, the user can open a digital locker account that will allow access to the music the user rightfully owns.³⁶⁹

Basically, a digital music locker is an online storage space for a user's personal music collection.³⁷⁰ This service makes it easy for a user to store and listen to his or her music.³⁷¹ Online companies, such as MP3.com and Myplay.com, offer music listeners a chance to stream digital copies of CDs they already own as well as those they have purchased.³⁷² The user must prove ownership of each CD before it can be stored in a locker.³⁷³ After ownership verification, a digital locker service will update the user's account by granting access to lawfully owned CDs.³⁷⁴ This relieves the user of having to upload his or her entire CD collection, one CD at a time, onto a personal server space.³⁷⁵

There are several ways to update a user's personal digital locker.³⁷⁶ First, if a user purchases a CD in a retail store, the shop can notify the user's digital locker service to update his or her account by adding that specific album.³⁷⁷ Second, if a user purchases a CD online, that vendor can notify the user's digital locker service to add that purchase to his or her locker.³⁷⁸ Third, a user may place a previously purchased CD into a CD-ROM drive to prove ownership, so that a locker company can update the user's account by adding that particular album.³⁷⁹ Thus, storing music in an online digital locker permits a user to listen to his or her entire music

368. See Jefferson Graham, 'Music Lockers' Are Open for Business, USA TODAY, Dec. 12, 2001, at D3.

369. *Id.*

370. See *What is My.Mp3?*, at http://help.mp3.com/help/article/what_is_mymp3com.html (last visited Sept. 14, 2001).

371. See *id.*

372. See *id.*; *Locker Services*, at http://www.myplay.com/mp/corp/i.jsp?pname=SV_locker (last visited Sept. 12, 2001).

373. See *How Long Does It Take to Add My CDs to My.MP3?*, at http://help.mp3.com/help/article/beamit_how_long.html (last visited Sept. 14, 2001).

374. See *id.*

375. See *id.*

376. See *How Much Music Can I Add to My Account?*, at http://help.mp3.com/help/article/mymp3_add.html (last visited Sept. 14, 2001).

377. See Graham, *supra* note 368.

378. See *What's Instant Listening?*, at http://help.mp3.com/help/article/instantlistening_what_is.html (last visited Sept. 13, 2001); *What's a NetCD?*, at http://help.mp3.com/help/article/cds_net_what.html (last visited Sept. 13, 2001).

379. See *How Much Music Can I Add to My Account?*, at http://help.mp3.com/help/article/mymp3_add.html (last visited Sept. 14, 2001).

collection from any online connection.³⁸⁰

A. Is Playing Music from a Digital Locker a Public Performance?

If a user wanted to listen to “Imagine” via his or her personal storage server (*i.e.*, not from a digital locker), the user would not have to pay a public performance fee.³⁸¹ Listening to “Imagine” in this manner is not a public performance.³⁸² It can be analogized to listeners playing their own music in their homes or cars.³⁸³

Digital lockers, however, do not work in the same manner.³⁸⁴ When accessing digital locker accounts, users are no longer listening to their own copies of songs but rather to a stream of copies housed, and most likely owned, by the digital locker service.³⁸⁵ Thus in reality, digital locker companies have licensed close to all of the world’s music and have copied it onto their systems.

Like webcasting, a digital locker service streams music to members and is available to the public.³⁸⁶ Thus, public performance rights are brought into question. Just as webcasters must obtain licenses to stream music, so must digital locker companies.³⁸⁷ As such, a digital locker service must obtain two licenses: (1) a license for the underlying musical work,³⁸⁸ and (2) a license for the transmission of a sound recording.³⁸⁹ Therefore, it is understandable that a digital locker service charges its users to listen to their own music from remote locations in order to pass on these royalty fees.

B. Digital Locker Sharing: A Second Public Performance?

By using any of the three methods of updating a user’s digital locker, one can compile a substantial list of songs. Some services allow its mem-

380. See Graham, *supra* note 368.

381. See discussion *supra* Part V.A.

382. See *id.*

383. See *id.*

384. See *Locker Services*, at http://www.myplay.com/mp/corp/i.jsp?pname=SV_locker (last visited Sept. 12, 2001) (explaining that a digital music locker is a web-based music home for a consumer’s personal music collection).

385. See *What is My.Mp3?*, at http://help.mp3.com/help/article/what_is_mymp3com.html (last visited Sept. 14, 2001).

386. See Dan Slonik, *Private Use Out of Control: Disintermediation in the Music Business, While the Bands Play On*, 5 INTELL. PROP. L. BULL. 13, 16 (2000).

387. 17 U.S.C. § 114(d)(3)(C) (Supp. V 1999).

388. See *id.* § 102(a)(2) (1994).

389. See *id.* § 114(d)(3)(C).

bers to share these lists with other members.³⁹⁰ As described above, music streamed from a digital locker service to a user triggers a public performance.³⁹¹ In addition, if a user gives a friend access to a stream of a song that only he or she rightfully owns, another public performance may be triggered.³⁹² In other words, the question raised here is whether the sharing of song lists will cause a second public performance.

If there is a second public performance, an additional license may be required.³⁹³ The determining factor should be whether the lists are available to the public. If two users share lists, a public performance is not likely triggered because the songs are not available to the public.³⁹⁴ There is, however, a distinction between sharing a list with one friend and sharing a list with the entire public.³⁹⁵ The result in *A & M Records Inc. v. Napster, Inc.*³⁹⁶ demonstrates that the line of distinction is unclear.

VII. CONCLUSION

The future of musical distribution is uncertain. While some may believe that traditional phonorecords will continue to dominate the market, others envision that consumers will grow accustomed to listening and purchasing music online. Assuming the latter is more accurate, digital distribution may one day replace traditional forms of acquiring music. The implications of this transition within the music industry are tremendous.

If companies are unable to recoup their investment in artists, then artists will not get an opportunity to share their music on a world-wide scale. Despite all of the problems, recent changes in copyright law serve as an incentive for sound recording companies to continue investing in artists.³⁹⁷ Public performance rights ensure that sound recording companies have a method of earning income on the sale of music in whatever form it may take in the future.³⁹⁸

390. See *Locker Services*, at http://www.myplay.com/mp/corp/i.jsp?pname=SV_locker (last visited Sept. 12, 2001).

391. See 17 U.S.C. § 114(d)(3)(C).

392. See *id.*

393. See *id.*

394. See generally *id.* § 101 (1994 & Supp. V 1999) (defining *public performance*).

395. See Larry Powers, *Bertelsmann Buys Digital Music Locker Service Myplay.com*, at <http://www.newmediamusic.com/articles/NM0160041.html> (June 5, 2001).

396. See generally 239 F.3d 1004 (9th Cir. 2001).

397. See William H. O'Dowd, *The Need For a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 270 n.92 (Apr. 1, 1993) (transcript available at Harvard Law School Library).

398. See 17 U.S.C. § 114(f)(4)(B) (Supp. V 1999) (requiring any person wishing to publicly perform a sound recording to pay royalty fees).