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DIGITAL

PERFORMANCE ROYALTIES: SHOULD RADIO PAY?

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It is a controversy that has been brewing for nearly a century: whether radio broadcasters should pay royalties to copyright owners. In the dawn of this new century, however, the dispute concerns something likely not envisioned at the beginning of the debate—the digital transmissions of sound recordings. In a recent decision,[1] the Copyright Office ruled that the broadcasting of signals over a digital communications network such as the Internet is not exempt from copyright laws. This decision has fanned the flames of controversy by raising a number of ancillary issues, both old and new, such as whether there should be a performance right for sound recordings, whether broadcasters need licenses to make Internet and other digital transmissions, and what fees, if any, should be paid for such transmissions.

THE DEVELOPMENT OF AN AGE-OLD DEBATE

Copyright owners and broadcasters have been at odds with each other since 1915, when audio broadcast first became feasible.[2] But the war has not always had legal grounds on which to stage its battles. As a matter of fact, neither sound recordings nor broadcasts were considered during the adoption of the Copyright Act of 1909.[3] While it is possible that Congress did not consider sound recordings to be "writings" as set forth in the Constitutional provision for copyrights,[4] it is equally likely given the technical difficulty of copying such recordings in 1909 that Congress—and the recording industry—did not consider such protection necessary. After all, even some thirty years later, it remained much easier to record a live performance and render it on vinyl than to copy a record.[5]

By the 1920s, with radio quickly becoming the dominant form of entertainment,[6] the lines between broadcasters and copyright owners started to take shape. While broadcasting records worked no better than copying them, radio stations could and did broadcast live performances without the extraneous surface noise and tin-can sound inherent in early records. As a result, it was also during this period that copyright owners first began to assert their rights against broadcasters. Founded in 1914 to collect licensing fees for for-profit public performances of compositions, the American Society of Composers, Authors, and Publishers (ASCAP) provided much of the support for these early efforts.[7] One federal district court described ASCAP's development:

> Prior to the organization of ASCAP, authors, composers, and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringements by public performance for profit, and to give users ready access to a substantial repertoire of music for such purposes, that ASCAP was organized.[8]

The rivalry between broadcasters and ASCAP has an epic, confrontational character. Some publishers believed that the free broadcast of music would reduce the demand[9] for sheet music and piano rolls, and thus simply opposed broadcast *per se*. Ultimately, however, the issue came down to licensing and royalties. Copyright owners claimed that radio broadcasting constitutes a public performance for profit—one of the exclusive rights of copyright—and that broadcasters owed the copyright owners for such use of their works.[10] Broadcasters disagreed, of course, claiming that a performance made by a band in the radio studio was not a public event. A 1931 decision by the Supreme Court essentially put an end to broadcasters' argument that radio broadcasts do not constitute public performances.[11] The Court's language, although *dicta*, stated quite explicitly, "the

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transmitting of a musical composition by a commercial broadcasting station is a public performance . . . ."[12]

The success of ASCAP in courts led to the enactment of numerous state laws designed to break up the Society, often based on antitrust principles. However, these state statutes could not preempt federal copyright law and were eventually declared unconstitutional for a variety of reasons.[13] At about the same time, broadcasters tried another tack, claiming that their broadcasts were not "for profit."[14] Again, the courts offered little help, holding that the broadcast of music on any station that also plays commercials is "for profit."[15]

The obvious next question involved the broadcasting of recorded, rather than live, performances. During the 1920s, the poor quality of both records and radio broadcasts made it infeasible to broadcast recordings. But the electric microphone, developed in 1925, combined with the introduction of vinyl records in 1929 and the lower-noise 33-rpm speed in 1933, lent an all-new viability to the broadcasting of recorded music.[16] While the recordings still lacked the level of sound quality produced by bands performing in the radio station studios themselves, such advances marked a period of drastic change for both the recording and broadcasting industries.[17]

When radio began broadcasting recordings, therefore, one would have expected the recording industry to cry foul, claiming that such broadcasts interfered with the sale of records. Perhaps surprisingly, however, it did not. Rather, the recording industry explicitly pitched the idea to broadcasters, encouraging them to play records on the air.[18] Two reasons for this apparent anomaly can be offered. First, as mentioned above, the Copyright Act of 1909 gave sound recordings no statutory copyright protection.[19] This deficiency both produced and reflected the fact that record companies lacked not only the legal basis for lawsuits to stop the broadcast of recordings, but also the lobbying clout necessary to overcome the broadcast lobby—which, ironically, was well-organized primarily as a result of its battles with ASCAP.[20] Secondly, consumers wanted high sound-quality in records, and no one doubted that when the quality reached a certain level, radio would supplement its live performances with recordings to cut costs. The recording industry thus had no real choice but to embrace radio as a means of promoting its product.

The industry looked less favorably on the copyright implications of magnetic tape. Developed in the late 1940s,[21] magnetic tape made it possible to copy a sound recording.[22] As a result, the recording industry began to push for a separate copyright in sound recordings in the mid 1950s. While it did not ultimately succeed until 1971,[23] its victory proved durable, finding a place in the next major revision of copyright law, Copyright Act of 1976.[24]

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Under the 1976 Act, a song receives copyright protection once fixed in a tangible means of expression.[25] That protection in turn grants the owner several exclusive rights, including the right to perform a work publicly,[26] which no one other than the owner may exploit without first purchasing a license.[27] In addition, there are actually two separate copyrights in a recording—one for the sound recording itself, one for the underlying composition[28]—each of which grants its owner unique rights.

Perhaps more important than what *is* included in the copyright grant for sound recordings is what *is not* included. While the initial draft of the 1976 Act included a performance right for sound recordings,[29] fierce lobbying[30] by a broad coalition of broadcasters, club owners, and restaurateurs convinced Congress to exclude the right.[31] Thus, while the public performance of a sound recording requires a license from the owner of the copyright in the musical composition embodied on the sound recording and results in a royalty payment to the writer and publisher, the same performance does not require a license from the owner of the copyright in the sound recording and does not result in any payment of royalties.

This disparate treatment of music publishers and record labels embodies one of the compromises that permitted the passage of the 1976 Act—and one of the features of copyright law that sound recording copyright

owners have criticized ever since. It is unfair, they say, to give the owner of the copyright in the underlying work royalties, but to give the owner of the copyright in the recording nothing.[32] Others have defended the compromise, however, by making the familiar argument that radio play increases the number of sales of records. In other words, this latter group claims, the record labels (and through them, the artists) are in fact rewarded, not robbed, when a song is played on the radio.

As it turns out, radio play *has* traditionally been one of the most important factors contributing to the sales success of a given record—so much so that record companies have spent billions of dollars over the years attempting to get their recordings played on the radio.[33] At times, the recording industry has literally bribed disk jockeys to play their recordings, a practice exposed years ago and dubbed "payola."[34] Factors like increased sales and payola thus beg the question: why pay the record company for the right to make broadcasts when the record company is so understandably willing to pay just to get the song on the radio in the first place? From this perspective, it would be unfair to require broadcasters to pay record companies for the privilege of playing records.[35]

So, the argument goes, the 1976 Act probably struck the right balance—at least for 1976. Sound recordings were given protection from copying, and broadcasters were not required to pay to play records, as airplay was itself sufficient reward for the record companies. But the balance of equities may have shifted in the 1980s with the introduction of digital technology.[36] As a result, the recording industry lobbied for, and Congress passed, the Audio Home Recording Act (AHRA) to tax blank cassettes, digital audio tape (DAT), CD-Rs, and certain recording devices, then distribute the proceeds to owners of copyrights in sound recordings.[37] The AHRA also mandated that certain technological copy protections be incorporated into the digital recording devices that existed at the time.

When it further appeared that technology would permit the *broadcast* of digital signals, copyright owners lobbied fiercely to prevent it. They claimed the recipient of a digital signal could easily record it and come away with sound quality identical to that of the product sold in stores. These copyright owners further contended that the old arguments about radio play enhancing record sales went out the window with the advent of digital broadcasting technology. After all, they asserted, where consumers can receive and record perfect digital copies of recorded music, the result is unlikely to be increased demand for the records themselves.

MAKING SENSE OF NEW LEGISLATION

Congress addressed the issue of digital transmissions with two basic amendments to the copyright law—the 1995 Digital Performance Right in Sound Recordings Act (DPRA)[38] and the 1998 Digital Millennium Copyright Act (DMCA).[39] The DPRA granted owners of copyrights in sound recordings the exclusive right to the digital public performance of their works.[40] When Congress adopted the DPRA, however, it was concerned mainly with DAT copies and digital satellite and/or cable broadcasts.[41] At that time, Internet connections were simply not fast enough to transmit music effectively.[42] But with the incredible development of computer technology, speed, and innovation, it became feasible both to upload and download digital music on the Internet—particularly when the music was first "compressed" into the MP3 format. Taken along with the tremendous wave of computer sales and Internet subscriptions that characterized a booming 1990s economy, these developments caused endless headaches for copyright owners.[43]

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With the DMCA, Congress attempted to resolve a number of copyright issues raised by newly overwhelming impact of the Internet. For example, ostensibly in recognition of the impossibility of policing endless content, it removed liability for Internet service providers whose servers transfer potentially infringing data.[44] Therefore, with any Internet transmission, the only parties the copyright owners may look to are those who make material available on the Internet, and those who access it.

But both the DPRA and DMCA made a number of complex, sometimes arcane changes in the copyright law, so it is not surprising that broadcasters and record companies differ as to their interpretation. Granted, both sides must start from identical statutory definitions. A "digital transmission" is a transmission that is in whole or in part in digital or non-analog format.[45] A work is "transmitted" if it is communicated by any process or device whereby sounds or images are received beyond the place from which they are sent.[46] But those starting points do not necessarily dictate a specific answer to the fundamental questions. What does it mean to have an exclusive right to "perform the work publicly by digital audio transmission"?[47] Should radio pay to broadcast sound recordings? If so, then under what circumstances, and in what amount?

But both the DPRA and DMCA made a number of complex, sometimes arcane changes in the copyright law, so it is not surprising that broadcasters and record companies differ as to their interpretation. What does it mean to have an exclusive right to "perform the work publicly by digital audio transmission"? Should radio pay to broadcast sound recordings? If so, then under what circumstances, and in what amount?

For instance, there are potentially four licenses required for a digital transmission. The first of these would be a performance license. Since the Copyright Act reserves the exclusive right to perform a work publicly for the copyright owner, those wishing to execute such public performances must normally obtain a license from the owner.[48] Each of the three United States performing rights organizations (PROs) offers blanket licenses for this right encompassing each PRO's entire catalogue.[49]

The second possibility is a digital performance license. According to law, a digital public performance also requires a license from the owner of the sound recording.[50] A narrow compulsory license, subject to numerous restrictions (discussed in greater detail below), exists for this right with respect to "noninteractive"[51] transmissions.[52] In the event a use does not qualify for the statutory license, the user must obtain a license directly from the owner, as there are at present no PROs offering blanket licenses for any kind of digital public performance licensing of sound recording copyrights. In fact, if the existing PROs did administer sound recording copyrights, they would have to radically change the way they do business. The PROs currently license restaurants, department stores, bars, clubs, stadiums, radio stations—essentially any commercial setting that makes use of music. They do not attempt to distinguish between whether songs are performed live or via recording, and they pay based on a sampling of what songs are played (through a formula which varies by PRO). Obviously, a sound recording copyright owner is not entitled to royalties when someone plays the song live because there has been no public performance of the sound recording itself. Thus, in order to accurately survey these copyrights, PROs would have to distinguish between public performance of a song and public performance of a recording. For this and other reasons, it is unlikely that the existing three United States PROs will administer sound recording copyrights—in fact, the existing PROs opposed the creation of the digital public performance right in sound recordings.[53]

Next comes the mechanical license.[54] Since copying is one of the exclusive rights of copyright, all uses of music that result in a copy being made require a mechanical license from the owner of the underlying work. Again, a compulsory license is available for this right, subject to certain restrictions. For instance, once a song has been commercially released, the publisher may not prevent a website operator from making and distributing copies so long as the operator complies with the requirements set forth in the statute[55] and pays the statutory licensing fee. The statute explicitly states that this license applies to both the manufacture of records and "digital phonorecord delivery."[56] The current rate (per composition) as of March 2001 is 7.55 cents or 1.45 cents per minute or fraction thereof, whichever amount is larger.[57]

Lastly, there is the master use license. As with the underlying work, the owner of copyright in a sound recording has an exclusive right to control copying of the sound recording. Therefore, any copying of a sound recording requires a master use license from the owner. No compulsory license exists for this right, and record companies have been quite reluctant to grant a license of their own, even at the full retail price of a recording—

in part because there is nothing to prevent the recipient from making additional unauthorized copies. Further, the price the market will bear for such transmissions is extremely low, in part because of sites such as Napster which until recently offered sound recordings at no charge.

Even once the issue of licensing has been covered, the method of digital transmission remains critically complex. At present, there are three popular methods for transmitting sound recordings on the Internet: (1) digital phonorecord delivery, commonly called "digital downloading;" (2) interactive "streaming;" and (3) "webcasting." The distinctions among the three are critical, because each method involves different rights and requires different licenses available on different terms from different parties. As such, each is discussed in greater detail below.

DIGITAL DOWNLOADING

Digital downloading of sound recordings involves two online users separated by time, space, and action. The first user uploads the file containing the sound recording to a web server, which is connected to thousands of other web servers. Then, through an unseen maze of numerous servers, the second user downloads the file to his or her computer. From there, the user can do any number of things with the file, including creating a CD copy (which would be a separate instance of copying on the user's part). Typically, digital downloads occur through a website; users click a link on the website to begin the data transfer, which ultimately results in the data being saved on the hard drive of the recipient computer.[58]

In this way, a digital download constitutes a distribution of a copy of the work, or a "digital phonorecord delivery." This distribution differs from a sale of a tangible recording through a traditional "brick and mortar" record store because it is implicit in the downloading context that the recipient will make a *copy* of the work in some tangible form, either on the hard drive of the computer or on CD. Unlike the purchase of a tangible recording, this form of transmission should require licenses for copying—both a master use license for the sound recording and a mechanical license for the underlying composition. If the digital phonorecord delivery happens pursuant to valid licenses, the work will be legally embodied in a tangible physical object that the licensee owns—and the first sale doctrine will arguably apply.[59] However, the scope of the licensing scheme is unlikely to go so far as authorizing further copying.

If a song is accessible for digital downloading through a website, it can be accessed by any computer connected to the Internet. The record companies and PROs argue that Internet transmissions that result in a digital phonorecord delivery are public performances per se[60] and as such require a separate performance license. However, owners of websites that make this type of transmission claim the fact that users cannot listen to the songs while they are being downloaded prevents the transmission from being a public performance. This issue has not, as yet, been definitively settled.

Napster presented a difficult situation for copyright owners as a result of the decentralized nature of the Internet. While it is clear that most if not all users of Napster engaged in unauthorized copying (and potentially digital public performance), it was not economically feasible to sue each of the thousands of users—many of whom copied only three or four songs. More importantly, Napster itself arguably was not engaged in copyright infringement, because it was not involved in the copying, but rather only in helping individuals find others who were willing to permit copying. It appears a recent court decision will shut the service down for facilitating copyright infringement; also, an injunction has issued which requires Napster to police its users to prevent copyright infringement.[61]

INTERACTIVE STREAMING

Another popular method of transmitting music[62] on the Internet is interactive streaming. Streaming describes a process by which music can be played while it is being transmitted; in other words, it does not require or even ordinarily result in any copy being saved to the listener's hard drive.[63] The process is effectuated by breaking audio (and video) signals into smaller chunks, which are then transmitted across the Internet and arranged and decoded (through a process called "buffering") without necessarily keeping a copy of the data in the computer's memory. As with a digital download, the material must first be loaded into the transmitting computer's memory, uploaded to the server, and transferred through a number of servers to the recipient. And again, the process normally occurs via a website; the user clicks a link, which starts the process of transferring chunks of the data file comprising the

song.

A streaming transmission clearly constitutes a digital public performance of the work, because the work is transmitted digitally to numerous members of the public. As mentioned above, such a transmission (interactive or otherwise) requires both a performance license from the PRO and a digital public performance license. Since currently no PROs administer digital public performance licenses, website operators engaging in interactive streaming must negotiate digital public performance royalties directly with the record companies whose works they stream. For interactive streaming, where he user selects which song or album (or video) will be accessed, no compulsory licensing is available.

Given the nature of the buffering process, some have argued that streaming also involves copying.[64] It is unclear under the current copyright laws whether a transfer of data comprising a sound recording[65] to the RAM of a computer constitutes copying—if so, streaming constitutes actionable infringement against both the person who streams the music and all people who access it. Further, while it is theoretically possible to stream music directly from a CD-ROM drive, most computers are not set up to do so. It is far easier to copy the song from a CD onto the hard drive of a computer, where it can be loaded to RAM more efficiently.

WEBCASTING

Webcasting uses buffering technology identical to that used in interactive streaming. Audio files are broken into chunks, arranged, decoded, and transmitted over the Internet. The music then plays as it is downloaded. The primary difference from streaming lies in the fact that instead of choosing a specific song or album, the user merely taps into a continuous feed, closely equivalent to radio—except that it is digital rather than analog and arrives without atmospheric degradation.

As with broadcast radio and interactive streaming, webcasting constitutes a public performance and requires a public performance license (available from a PRO). If the webcast includes sound recordings, it also requires a digital performance license. Due to the non-interactive nature of webcasting, however, certain webcasts qualify for statutory compulsory licensing[66] for the digital public performance right. Such a license comes subject to a number of statutory requirements, including the "sound recording performance complement," which restricts the webcaster from playing more than three selections from a given phonorecord in a three-hour period, and no more than two of these selections consecutively.[67] Similarly, webcasters may not issue prior announcements of the content of sound recordings.[68] In the event a webcast does not qualify for the compulsory license, the webcaster must negotiate a license directly with the sound recording copyright owner.

Because it is possible to capture webcasts digitally and save them to disk or CD-ROM,[69] it is unclear whether webcasting constitutes copying. However, because capturing a webcast requires a special program on the user's computer, it is certainly arguable that the webcaster itself is not engaged in any potential copying. Nevertheless, conduct on the part of the webcaster that assists or facilitates unauthorized copying might still give rise to liability.

In any case, webcasting remains extremely popular,[70] particularly among terrestrial radio stations that find they can digitally transmit their regular programming over the Internet.[71] It is a relatively simple matter for a broadcaster (which already has a steady signal to broadcast at no additional expense or overhead) to link its broadcast signal to a computer and stream all of its broadcasts onto the Internet. By placing the radio signal on the Web, broadcasters can reach a wider audience, as well as keep existing listeners who leave the station's broadcast area.

However, copyright disputes arise when webcasters (regardless of whether they are also broadcasters) operate without arranging proper licenses with copyright owners. For example, broadcasters who also engage in webcasting have sometimes refused to obtain licenses from sound recording copyright owners[72] to transmit their signals on the Internet, claiming their FCC licenses made them exempt.[73]

THE COPYRIGHT OFFICE RULING

Recently, the Recording Industry Association of America (RIAA) presented arguments to the Copyright Office that the practice of digitally transmitting radio broadcasts onto the Internet constitutes a digital public performance of copyrighted material—for which the broadcaster must pay royalties. Since the DPRA and DMCA left the law unclear, the Copyright Office initiat-

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Extending the Copyright Office's Ruling: Satellite Transmissions

The Telecommunications Act of 1996 produced massive changes throughout the entire music industry. Among other things, the Act removed the rules limiting the number of radio stations any one company could own,[1] sparking an unprecedented wave of consolidation. This trend towards consolidation has led to considerable homogenization of radio—many commonly owned stations broadcast the same programming, with the same radio personalities, at the same time throughout the United States. These "chain" radio stations are able to simultaneously broadcast with no reduction in sound quality because each station is linked via digital satellite to a common source.

It is fairly certain that radio stations beaming digital signals to one another engage in digital transmissions—i.e., sounds are sent from one place to another in a non-analog format. Sound recording copyright owners could thus claim that unlicensed transmissions violate their exclusive rights of copyright. Since digital satellite transmissions between "chain" radio stations do not appear to fit Congress's mold for subscription transmissions, which have compulsory license rights, such transmissions require individual licenses from copyright owners that most (if not all) broadcasters have not as of yet obtained.

However, radio's appetite for songs is too great for a system of individual song licensing to be economically feasible—and such a system would likely produce undesirable results.[2] For instance, if broadcasters and record labels were required to negotiate individually, the result would likely be a monopolistic coalition between specific broadcasters and record labels. Record labels with favorable terms would be able to get their songs onto more stations, and stations with favorable terms would find it easier to obtain popular songs. Further, such a system would be inherently subject to abuses. For example, a record company could refuse to permit a station to play its catalog of standards unless the station also adds its new pop single into heavy rotation.

The recent Copyright Office rulemaking action discussed another exception to the digital public performance right for certain digital broadcasts. Unfortunately for broadcasters, however, this exception appears to apply to over-the-air transmissions from terrestrial transmitters and within the FCC-mandated 150 mile range from the transmitter or retransmitter.[3] In other words, it appears to be designed to permit FCC-licensed broadcasters to convert to a digital broadcast format, but does not appear to authorize anything more.[4] Further, the specific limitations in this exception will effectively prohibit conversion to terrestrial digital broadcast for chain stations whose towers are more than 150 miles apart.[5]

Of course, the broadcasters also argue that the transmission is not public. When Congress created the digital performance right, it used the language, "in the case of sound recordings, to perform the copyrighted work *publicly* by means of a digital audio transmission."[6] Is a satellite transmission which is received by two hundred radio stations (all with common ownership) a public performance? Possibly, and possibly not—the distinction would depend on whether the stations themselves constitute members of the public, and whether their subsequent analog rebroadcast makes the digital transmission public. Another exception to copyright involves digital transmissions confined to the premises of a business.[7] Of course, while a satellite transmission would be "within a business" in the sense of the common ownership of the stations, it is clearly not confined to the premises, and does not fit the specific wording of the exception (which also explicitly prohibits rebroadcast). It is possible that a court would take the existence of a specific exception as evincing Congressional intent to make all other non-public digital transmissions require licensing. Then again, were that Congress's intent, it might well have amended 17 U.S.C. 106(6) and its requirement that the digital performance be public.

What about a digital satellite transmission to a radio station which instantly retransmits the signal to the public in analog format? Again, reasonable minds can differ. Some may argue that the analog retransmission makes the digital transmission public; others will certainly argue that the ultimate transmission to the public is analog—and analog transmissions to the public were well understood when Congress enacted the Copyright Act of 1976, which created the limitation on public performance rights in sound recordings in the first place. In the end, however, perhaps only further Congressional guidance will settle the endless questions.

[1] See generally, 47 C.F.R § 73 (1996).
[2] If broadcasters and record labels were required to negotiate individually, the result would likely be a monopolistic coalition between specific broadcasters and record labels: record labels with favorable terms would be able to get their songs onto more stations, and stations with favorable terms would find it easier to obtain popular songs. Further, such a system would be inherently subject to abuses: for example, a record company could refuse to permit a station to play its catalog of standards unless the station also adds its new pop single into heavy rotation.
[3] 17 U.S.C. § 114(d)(1)(B) (2000).
[4] See id.
[5] Id.
[6] 17 U.S.C. § 106(6) (emphasis added).
[7] 17 U.S.C. § 114(d)(1)(C)(iv).

ed a rulemaking proceeding and ultimately issued a rule stating that broadcast signals over a digital communications network, such as the Internet, are not exempt from copyright law.[74]

This ruling has created a furor among broadcasters, who have relied for years on the performance right compromise contained in the Copyright Act of 1976. They claim that Congress never intended them to pay royalties for broadcasting sound recordings, and they point to several exemptions for radio in the statutes. One such exemption is for a "broadcast transmission,"[75] which broadcasters interpret as applying to all transmissions made by an FCC-licensed broadcaster.[76]

Obviously, however, the Copyright Office interpreted the statutes differently. Its ruling stated, "[W]e believe that Congress defined discrete categories of transmissions (rather than transmitters), then evaluated the potential for displacement of record sales on the basis of the characteristics of those transmissions and applied the statutory restrictions and exemptions accordingly."[77] It added, "There is certainly nothing in the [statutes] to suggest that the right of a sound recording copyright owner to compensation should turn on whether the same transmission is made by the broadcaster or the broadcaster's agent."[78]

The National Association of Broadcaster (NAB) has filed suit to enjoin the enforcement of the new rule, claiming the decision will "wreak havoc with the relationship between broadcasters and record companies."[79] They claim it is unfair to require them to obtain licenses to transmit their signals onto the Internet,[80] and further complain that statutory compulsory licensing may be unavailable.

But part of the reason that compulsory licensing may be unavailable stems from the broadcasters' own refusal to adhere to the sound recording performance complement, and to their insistence on announcing songs they plan to play. In this light, the reasoning in the Copyright Office's decision remains persuasive: by making transmissions in a new medium, broadcasters should be bound by the same restrictions as everyone else using that medium. After all, there is no evidence to suggest that Congress intended to restrict everyone but FCC-licensed stations in Internet transmissions. Further, the Copyright Office ruling did nothing to the relationship between the recording industry and broadcasters who do not webcast—and no one forces radio stations to transmit their signals onto the Internet. Thus, as it apparently now stands, if broadcasters wish to qualify for statutory licensing for webcasting, they will have to abide by the rules. Otherwise, they must negotiate individual licenses directly with each copyright owner—a prohibitively expensive proposition.

> Will the recent Copyright Office action be a watershed development in United States copyright law? Or will the broadcasters and their well-funded and powerful lobbying arm, the NAB, prevail in the end—if not in the courts, then in Congress? The only clear answer is simply this: not if the RIAA, the record labels' own well-funded and powerful lobbying arm, has anything to do with it.

General Policy Considerations

Ultimately, given the ambiguity of the statutes and the potent lobbying influences of both the NAB and the RIAA, many of these issues will likely wind up before Congress—either before or after a court decides what the current law means. The question remains whether it is fair that the owner of one copyright receives payment for the public performance of its work, but the owner of another copyright does not—whether it is fair, in other words, that radio not pay for sound recordings.

Traditionally, a relatively small number of policies have determined the path of the copyright law. One of these policies is to reward and protect creativity by requiring payment for use of its products and prohibiting unauthorized copying.[81] Another policy has been to minimize the payment required, so that the public can afford to make use of the authors' creations.[82] Applying the logic of these policies to the disparate treatment of sound recordings and musical compositions may yield a better assessment of the propriety and/or utility of such a distinction.

For instance, one of the primary justifications for the distinction, payola, does not carry the same force now that it did in the 1970s. Payola was most prominent in pop music, where record companies vied to break new artists. Today, the bulk of the music on radio is not from new artists, but from long-established mainstream

artists who do not need to spend exorbitant sums to get their recordings on the air.[83]

Furthermore, if radio is required to pay royalties for digital transmissions, both artists and record companies will benefit. Although typically the record company is the sole owner of the copyright in the sound recording, major label record companies almost always require the record label to split digital royalties evenly with the artist. Besides, even if the record company is not contractually obliged to share digital royalty proceeds with the recording artist, it will be required to do so by statute.[84] In addition, the old argument that songwriters and publishers are unable to earn income from radio performance, while record companies and artists are, is not true today. The roles of songwriters and artists are almost identical, because both receive compensation in the form of royalties when records are sold.[85] Yet songwriters' efforts are rewarded by payments from the PROs, while artists' efforts are not. Not only does this distinction seem unfair under normal circumstances, but also it is doubly unfair if it is extended to digital transmissions, because a digital transmission is more likely to result in unauthorized copying than an analog broadcast, and that copying is more likely to reduce demand for recordings.

All of these concerns play a role in determining the appropriate licensing scheme as well. For instance, uses Congress determines likely to damage the owner of the sound recording require licensing, and typically no compulsory license is available once Congress has made such a determination. In the past, Congress has determined that interactive digital transmissions are likely to result in copying; thus, there is no compulsory licensing for them. Further, Congress determined that non-interactive digital transmissions in which the user can find out in advance which songs will be played, or in which more than three performances by a particular artist are played in an hour, will likely to result in copying—so there is no compulsory license for them either. On the other hand, where the user can neither control nor find out in advance which songs will be played, Congress—performing as always the long-standing balancing act required by the competing policies of copyright set forth above—evidently determined that the risk of harm to sound recording copyright owners is sufficiently low that a statutory compulsory licensing at a statutory royalty rate is an adequate protection.

CONCLUSION

Even here at the end of our journey, we must acknowledge that some questions remain unanswered. Have we entered an era in which record labels, recording artists, record producers, and musicians will finally earn royalties for the public performance of their creations? Will the recent Copyright Office action be a watershed development in United States copyright law? Or will the broadcasters and their well-funded and powerful lobbying arm, the NAB, prevail in the end—if not in the courts, then in Congress? The only clear answer is simply this: not if the RIAA, the record labels' own well-funded and powerful lobbying arm, has anything to do with it. It seems the only thing certain in the digital age is uncertainty, and it is likely we will have to wait for the last man standing to find out whether radio will ultimately have to pay for the digitally transmitted public performance of sound recordings.

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[1] Initial Notice of Digital Transmission of Sound Recordings under Statutory License, 37 C.F.R. § 201.35 (2000).

[2] In the earliest years of both the recording industry and radio, the industries coexisted peaceably—the radio and the record did not at first appear to be competitors. Edison filed a patent for the phonograph on December 15, 1877. U.S. Patent No. 200,521. Marconi invented radio in 1895. http://www.alpcom.it/hamradio/marconi.html (last visited February 28, 2001). Evidently no one considered the possibility that Morse code transmissions might have anything to do with record sales. Audio broadcast was not feasible prior to the invention of the vacuum tube transmitter around 1915. Thomas H. White, United States Early Radio History, at http://www.angelfire.com/nc/whitetho/ (last visited March 20, 2001).

[3] Copyright Act of 1909, 35 Stat. 1075 (1909) (codified at 17 U.S.C. §§ 101-810 (1978)). That radio was not considered is easy to understand in historical context: early broadcasts of Morse code transmissions posed little threat to copyright owners. Congress's failure to consider the recording is more difficult to understand: by 1909 the phonograph, the Gramophone, and the Victrola were all on the market in the United States. Steve Schoenherr, Recording Technology History, at http://history.acusd.edu/gen/recording/notes.html (last visited March 1, 2001).

[4] Article 1, section 8 gives Congress the power "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

[5] See Robert P. Merges, One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000, 88 Calif. L. Rev. 2187, 2195 (2000).

[6] The first commercial radio station was erected in 1920. Early AM Radio History, at http://www.owlnet.rice.edu/~elec301/Projects99/amcomm/ (last visited March 20, 2001).

[7] ASCAP Licensing, at http://www.ascap.com/licensing/licensing.html (last visited March 20, 2001). Since ASCAP was formed prior to commercial broadcasts, see *supra* note 6, its initial purpose was to license clubs and theatres.

[8] Buck v. Harton, 33 F. Supp. 1014, 1017 (D.C. Tenn. 1940).

[9] For claims that radio reduces sheet music sales, see, e.g., Buck, 33 F. Supp at 1019.

[10] See 17 U.S.C. § 102 (2000).

[11] Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 51 S.Ct. 410 (1931).

[12] Id. at 197.

[13] See, e.g., Buck, 33 F. Supp 1014.

[14] See Associated Music Publishers v. Debs Memorial Radio Fund, 141 F.2d 852 (2d Cir. 1944).

[15] "It seems clear that an important radio station which allots one-third of its time to paying advertisers and thus supports a musical program in which a substantial part of a copyrighted musical work is rendered is engaged in a performance for profit, as to which the copyright owner has an exclusive monopoly." Id. at 855.

[16] Shoenherr, *supra* note 3.

[17] Some of the most noteworthy early radio broadcasts of recordings were broadcasts during the second world war of Hitler's speeches, using the German Magnetophon, captured during the latter part of the war. These recordings so far surpassed all previous recordings in quality that the Nazis used them to confuse the Allies as to Hitler's whereabouts. John T. Mullin, Adventures in Cybersound: The U.S. Development of the Tape Recorder, at http://www.cinemedia.net/SFCV-RMIT-Annex/rnaughton/MULLIN.html (last visited March 20, 2001).

[18] In 1929 RCA began making "transcription" discs of vinyl "Vitrolac" from optical soundtracks for radio stations to play on the air. Shoenherr, *supra* note 3.

[19] The Register's 1961 Report on revision of the Copyright law stated "It is important to an understanding of the problems involved here to distinguish between: (1) the literary or musical composition of an author embodied in a recording, (2) the recorded rendition of the performer, and (3) the recording as a work in itself. All three of these elements are present in most recordings, but only the author's composition is given statutory copyright protection in the United States." Register's Report on the General Revision of the U.S. Copyright Law, reprinted in Melville B. Nimmer & David Nimmer, Nimmer on Copyright 14-32 (1963).

[20] The conflict between ASCAP and the broadcasters led to the 1940 formation of Broadcast Music Incorporated (BMI) to compete with ASCAP and to attempt to keep licensing fees low. Today, both ASCAP and BMI compete with a third group, the Society of European Stage Authors and Composers (SESAC) for the licensing of compositions. Collectively, these entities are referred to as Performing Rights Organizations (PROs). Robert Meitus, Interpreting the Copyright Act's Section 201(c) Revision Privelege With Respect to Electronic Media, 52 Fed. Comm. L.J. 749 (May, 2000).

[21] Magnetic tape was first manufactured in the United States by 3M in 1948. Bing Crosby was the first recording artist to embrace magnetic tape, which he used to record masters from which vinyl records were manufactured. Shoenherr, *supra* note 3.

[22] The introduction of the 8-track, and then the cassette, made copying by individual consumers not only feasible, but easy. In the early 1970s, it was reported that as much as one-third of the recordings distributed in the United States were pirated copies. H.R. Rep. No. 92-487 (1971), reprinted in 5 Melville Nimmer & David Nimmer, Nimmer on Copyright (1998), app. 18, at 18-3 (statement of Rep. Kastenmeier).

[23] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102 (2000)). Prior to that date, owners of sound recordings were able to convince the courts to give them some of the protections of copyright under the common law theories of literary property rights and unfair competition. See, e.g.,Register's Report, *supra* note 19. For cases employing such theories, see, e.g., Goldstein v. California, 412 U.S. 546 (1973) (upholding California Anti-piracy statute over federal preemption challenge); Capitol Records, Inc. v. Spies, 264 N.E.2d 874 (Ill. App. Ct. 1970) (holding Illinois anti-piracy law not precluded by federal preemption doctrines); Capitol Records v. Erickson, 82 Cal. Rptr. 798 (Cal. Ct. App. 1969) (adopting misappropriation theory); Columbia Broadcasting System, Inc. v. Custom Recording Co., 189 S.E.2d 305 (1972) (adopting misappropriation theory).

[24] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in various sections of 17 U.S.C.).

[25] 17 U.S.C. § 102 (2000).

[26] Id. at § 106(4).

[27] A license could also by granted by the copyright owner's PRO. All three U.S. PROs have the authority to grant "blanket" licenses for all the songs in their respective catalogues.

[28] By the time a song is commercially exploited, these copyrights are usually owned by separate parties—typically the songwriter has assigned his or her rights in the composition to a music publisher, and the recording that is distributed to the public has been created by a producer and professional musicians as a work-for-hire for a record company.

[29] S. 111, 94th Cong. § 1-4 (1975).

[30] Joshua D. Levine, Note, Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995, 20 Seton Hall Legis. J. 624 n. 39 (1996).

[31] 17 U.S.C. § 114(a) (2000).

[32] While the recording industry does not dispute that songwriters deserve compensation for their services when their works are played on the radio, artists and producers (and the record companies for whom they work) claim the work people are interested in is as much the musicianship and tonal qualities in the sound recording as the song itself. One piece of evidence to support this proposition is the level of competition among music publishers to get their songs "cut" by popular artists. The audience cares at least as much about who

recorded a song as who wrote it, and therefore the authors submit the artist and the record label deserve to be paid just as songwriters do.

[33] See generally, Doug Abell, Pay-for-Play, An Old Tactic in a New Environment, 2 Vand. J. Ent. L. & Prac. 52 (2000).

[34] Id. at 53.

[35] Performance royalties for sound recordings have also been opposed by the performing rights organizations, which claim a requirement that users of recordings pay a fee for the recording as well as for the underlying composition would reduce payments to the owners of copyright in the compositions. Levine, *supra* note 30, at 638 n. 95, 648 n. 162. Advertisers are willing to pay only so much for radio ads, and therefore broadcasters can afford to spend only so much on copyright licensing. This, the PROs say, would result in either the existing performing rights organizations splitting their licensing fees between composition and sound recording copyright owners, or a new performing rights organization would be needed to license sound recording copyrights, thus reducing the amount broadcasters could afford to pay for compositions.

[36] With analog tapes, a copy has slightly lower sound quality, and a copy of a copy has audibly inferior quality. Therefore, a person with a pirated cassette copy of a recording would not be able to make high quality copies for friends or for profit. With digital recordings, copies can be made over an unlimited number of generations with no reduction in sound quality.

[37] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237; H.R. 3204, 102d Cong. (1992); S. 1623, 102d Cong. (1992).

[38] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, (codified as amended in 17 U.S.C. §§ 101, 114, 115).

[39] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in 17 U.S.C. §§ 101, 112, 114, 1201). The DMCA was controversial because it prohibits the use of and trafficking in devices designed to disable encryption and other access restrictions and copy protection schemes built into sound recordings. These measures far exceed the traditional purview of Copyright law, and were hotly contested, most by librarians.

[40] The owner of a copyright has the exclusive right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(6) (2000).

[41] Among other things, the Act created a system of compulsory licensing for "subscription" digital transmissions, 17 U.S.C. 114(d)(2), for which the royalty is currently 6.5% of gross revenue resulting from residential services in the United States. Use of sound recordings in a digital performance, 37 C.F.R. § 260.2 (2000). Noninteractive subscription digital sound recording transmissions which do not result in copying are not considered digital phonorecord deliveries. Adjustment of royalty payable under compulsory license for making and distributing phonorecords, 37 C.F.R. § 255.4 (2000).

[42] In 1995, users with a 33.6 kbps modems would have spent over three hours trying to transmit an uncompressed four-minute song file over the Internet. The same process would take today's fastest computers with broadband Internet connections only a few seconds. Christian C.M. Beams, The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . For Now, 51 Fed. Comm. L.J. 823, 840 (1999).

[43] "H.R. 3209 was outdated from its inception." Id.

[44] See 17 U.S.C. § 512 (2000).

[45] 17 U.S.C. § 101 (2000).

[46] Id.

[47] 17 U.S.C. § 106(6) (2000).

[48] 17 U.S.C. § 204(a) (2001); see also Ralph S. Brown & Robert C. Denicola, Copyright 494 (University Casebook Series 1998).

[49] See Marshall Leaffer, Understanding Copyright Law 348 (3d ed. 1999).

[50] 17 U.S.C. § 106(6).

[51] Transmissions where the user controls which sound recordings will be played are called "interactive transmissions." Transmissions where the user does not are called noninteractive transmissions. It is self evident that these different types of transmissions involve different risks of copying. Because of the differing risks of copying, Congress created a narrow system of compulsory licensing for noninteractive transmissions, but not for interactive transmissions. See 17 U.S.C. § 114(j)(7) (2000).

[52] In these cases, the Copyright Arbitration Royalty Panel (CARP) sets the applicable royalty rate. See 17 U.S.C. §§ 801-803 (2000). The Copyright Office felt it necessary to determine which entities would be required to pay the royalty before the panel was to be convened, so that all parties could be adequately represented. See Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201). To date, the CARP has not convened, and no statutory compulsory royalty rate has been set.

[53] See *supra* note 32

[54] "Mechanical license" derives from the Copyright Act of 1909, *supra* note 3, which used the term to refer to the fee paid to publishers by manufacturers of mechanical piano rolls. The term, as used throughout the recording industry, refers to licenses by publishers for the manufacture of recordings.

[55] 17 U.S.C. § 115 (2000).

[56] Id. A "digital phonorecord delivery" is defined as an individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient.

[57] 37 C.F.R. § 255.3 (2000).

[58] It is beyond question that saving a composition onto the harddrive of a computer is copying, since the magnetic coding of the drive constitutes a tangible form of expression. However, it is not clear whether merely "copying" a sound recording to the RAM of a computer would legally constitute copying, and therefore infringement. Under the statute, "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, repro-

duced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed." 17 U.S.C. § 101(2000). Analytically, a sound recording in the RAM of a computer could be considered a copy: it can be played any number of times, copied to other computers, or modified by the user. However, it is certainly arguable that something is not a copy unless it would survive after the machine in which it is embodied is turned off. RAM is intangible, because if you pull the plug on the computer, the information in RAM is gone. As noted above, even if loading materials to RAM is copying, the owners of webservers are not liable for the materials that pass through their servers.

[59] The first sale doctrine states that the exclusive right to distribute copies of a work is of no effect once a copy has been first sold with the copyright owner's consent. Therefore, the owner of copyright cannot sue for infringement based on the resale of a copy it has sold. See Melville B. Nimmer & David S. Nimmer, Nimmer on Copyright § 8.12[B][1] (Matthew Bender & Co., Inc. 2000).

[60] While the practice has not as yet received media attention, it would also be possible to effectuate a digital transmission of a sound recording as an attachment to an email message. Since email messages are typically stored automatically on both the sender and the recipient's harddrive, such a transmission would constitute at least two instances of copying. However, it is unclear whether transmission of such an email to a single recipient would constitute a public performance. The definition of public performance in 17 U.S.C. § 101 refers to transmissions to public places "or to the public." Therefore, such a transmission is arguably not a public performance.

[61] A&M Records, Inc. v. Napster, Inc., No. 99-05183 (N.D. Cal. Mar. 6, 2001). The injunction also required the plaintiffs to provide Napster with a list of titles which they own, so that Napster can prevent trading of those titles. However, Napster users have begun using a program called Aimster, which puts their song titles into pig latin so that they will not be picked up by Napster's computer filtering system as conflicting with the Plaintiffs' songs. Ironically, use of a decoding device or program to bypass the Aimster "encryption" of song titles would violate the DMCA. Napster's Legal Barrier, Musicrow 60 (March 9, 2001).

[62] The process is also used for audiovisual works. See, e.g., http://www.real.com (last visited Mar. 31, 2001).

[63] A number of computer programs can capture a streamed transmission and save it in digital format. Among these are the Shareware programs "The Virtual Audio Cable," currently $19.00, available at http://www.hitsquad.com/smm/music-softstore/VirtualAudioCable/ (last visited Mar. 31, 2001) and "RealPlayer 8 Plus", currently $29.70, available at http://www.real.com (last visited Mar. 31, 2001). It is quite likely that other programs which will do this, or pirated versions of these, are available at no cost online.

[64] The most notable proponent of this theory is the Harry Fox Agency. See Bruce H. Phillips and David M. Cutler, Obtaining Internet Music Licenses For Digital Downloads and Streaming, 16 no. 4, Ent. L. & Fin. 1, 6 (2000).

[65] Regardless whether the transfer of a computer program to a computer's RAM constitutes "copying," such copying is necessary to use the program. As such, this kind of use is protected either by actual or implied license, or as a fair use.

[66] See 17 U.S.C. § 114(d)(2)(A)(i) (2000).

[67] 17 U.S.C. § 114(j)(13) (2000).

[68] 17 U.S.C. § 114(d)(2)(B)(ii) (2000).

[69] See *supra* note 56.

[70] It is unclear how many webcasters are currently online. The web radio directory Web-Radio.com currently boasts over 4,800 stations. Web-Radio.com, at http://www.web-radio.fm/ (last visited Mar. 31, 2001). Of course, there are also many webcasting operations unrelated to broadcast radio.

[71] Id.

[72] Broadcasters already uniformly hold licenses from the performing rights organizations with respect to the underlying compositions. These licenses may or may not be broad enough to include Internet transmissions, but given the vast degree of precedent and the bargaining power of the performing rights organizations, broadcasters who also webcast will have no choice but to obtain blanket licenses for the underlying compositions.

[73] See Public Performance of Sound Recordings: Definition of a Service, *supra* note 52.

[74] 37 C.F.R. § 201.35.

[75] 17 U.S.C. § 114(d)(1)(A) (2000).

[76] This interpretation is apparently based on the definition in 17 U.S.C. 114(j)(3)(2000) of a "broadcast" transmission as one made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

[77] Public Performance of Sound Recordings: Definition of a Service, *supra* note 52, at 77,301.

[78] Id. at 77,300.

[79] Elizabeth Wasserman, U.S. Broadcasters Sue Over Web Royalties, The Industry Standard, Jan. 26, 2001, at http://www.the-standard.com/ article/display/0,1151,21709,00.html (last visited Mar. 31, 2001).

[80] The NAB evidently did not anticipate that so many broadcasters would engage in webcasting when Congress adopted the DPRA.

[81] See generally Leaffer, *supra* note 49.

[82] See generally id. at 299.

[83] See, e.g., Bradley Bambarger, Lemper Throws Decca a "Kiss", Billboard, Mar. 18, 2000, available at LEXIS, Entertainment & Arts.

[84] The current statute mandates the royalties be distributed as follows: 50 percent to the copyright owner, 45 percent to the recording artist, 2.5 percent to the American Federation of Musicians, and 2.5 percent to the American Federation of Television and Radio Artists. See 17 U.S.C. § 114(g).

[85] See generally, Joel Brooks, Coming to Terms on Songwritwer Collaberations, Entertainment Law & Finance, Dec. 1994, available at LEXIS, Entertainment & Arts.