MUSICAL COPYRIGHT LAW: PAST, PRESENT AND FUTURE OF ONLINE MUSIC DISTRIBUTION

ROBERT J. DELCHIN, J.D.

TABLE OF CONTENTS

INTRODUCTION

Music, while often characterized as ageless, is nonetheless a creature of technology. From the invention of the piano, to electricity and amplification, and to the gramophone for recording, technology has altered the way music is both performed and delivered. For instance, as little as one hundred years ago, the gramophone, with its limited recording time, forced music to become shorter; and the distribution of phonographs forced music to be more precise, no longer changing with each performance.[1] Today, the Internet is the new crossroads, changing the way music is delivered to people. The more that music is available, the more people want it; and as is often the case with emerging technologies, copyright law has not been able to keep pace. The result, therefore, has been a rising ethic among people that is out of sync with the restrictions of musical copyright.

This paper argues that it is in both the public's and musical artists' interests to increase the available distribution of music through Internet technologies rather than suppress it as present copyright law does. Congress should bring copyright law back in tune with the beliefs and practices of individuals by acknowledging changing currents and allowing for freer statutory licensing. The two primary and most controversial technologies discussed are webcasting and MP3 file-sharing.

Part II begins by tracing the development of musical copyright law from its origins to its present incarnation and discusses how the law has constantly evolved in response to emerging technologies such as magnetic tape and the Internet. Part III focuses on webcasting and discusses how the Digital Millennium Copyright Act (DMCA) serves to hinder Internet radio at the expense of independent artists and suppresses individual choice in favor of conglomerate corporate radio. Part IV analyzes the MP3 file-sharing debate and argues that conventional methods to combat illegal file-sharing are ineffective because people believe that while file-sharing is illegal, it is not unethical; therefore, markets must be adjusted to conform to this new ethos. Finally, Part V concludes with a reiteration that the public interest will be served by an increased distribution of music as a result of loosened statutory licensing.

---

[1] *See* Kevin Kelly, *Where Music Will Be Coming From*, N.Y. TIMES, Mar. 17, 2002, at 32.

I. BACKGROUND

A. *History of Musical Copyright*

1. Origins

The United States Constitution provides that "the Congress shall have 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."[2] As the text denotes, its purpose is not to reward authors and inventors for their achievements merely for the sake of rewarding them, but rather, to provide an incentive for continued creation so that society as a whole may benefit.[3]

American copyright traces its roots to the introduction of the printing press in fifteenth century England.[4] In order to control the publication of books, the English government passed the Licensing Act of 1662, which granted printers a near monopoly on publishing and the authority to censor publications.[5] Following an eventual relaxation of government censorship, Parliament in 1710 enacted the Statute of Anne in order to address the concerns of English booksellers. The statute established the principle of authors' ownership and prevented monopolies on the part of booksellers by creating a "public domain" after a fixed term of fourteen years of protection.[6] Thus, the United States Constitution and the first Copyright Act passed by Congress in 1790 are patterned after the Statute of Anne, which sought to prevent "the evil of state-sanctioned monopoly."[7]

Copyright law in the United States has changed repeatedly since its first incarnation in 1790, but its basic underpinnings remain the same. Copyright protection subsists "in original works of authorship fixed in any tangible medium of expression . . . ."[8] It also requires a minimum degree of creativity.[9] Protection lies not in ideas, but in *expression* of ideas. Accordingly, an idea for a song would not be protected until the song is actually committed to

---

2 U.S. CONST. art. I, § 8.

3 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03A (2003).

4 Association of Research Libraries, *A History of Copyright in the United States*, *at* http://arl.cni.org/info/frn/copy/timeline.html (last visited Oct. 4, 2004).

5 *Id.*

6 *Id.*

7 Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001).

8 17 U.S.C. § 102 (2000).

9 For example, alphabetically compiling phone numbers in a telephone directory has been held not to constitute a necessary degree of creativity to warrant copyright protection. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

notes on a paper or recorded onto an audio tape (but even then, the *idea* is not protected).

At its most fundamental level, copyright gives the author of a creative work the right to exclude others from using it without the owner's permission.[10] This includes the exclusive rights to reproduce, distribute, and display the work; perform the work publicly; and prepare derivatives of the work.[11] While sound recordings such as music necessarily implicate most of these rights today, historically, neither sound recordings nor broadcasts were considered during the adoption of the Copyright Act of 1909.

2. Copyright Protection for Sound Recordings

At the time of the debate over the 1909 Act, broadcasting of audio transmissions had not yet become a widespread technology. Although sound recordings in the form of records had become more prevalent, the inability to copy such recordings did not mandate that Congress extend copyright protection to this emerging form of technology.[12] Aside from the technological impediments to potential infringement, Congress also did not likely consider sound recordings to be "writings" as provided for in the Constitution. Congress was mostly concerned with providing protection for musical compositions (i.e., notes) on a written page. As noted in the legislative history, "[t]he main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition . . . ."[13] Congress, still echoing the underlying rationale for the Statute of Anne, was primarily concerned with "securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies . . . ."[14] As a result, copyright protection extended only to the written compositions and not to the recording of the compositions onto a tangible medium.

3. The Right of Public Performance

Thus, the Act established that composers – and composers only – possess the bundle of rights in their musical works as out-

---

10 STEPHEN ELIAS & RICHARD STIM, PATENT, COPYRIGHT, & TRADEMARK 74 (4th ed. 2000).

11 17 U.S.C. § 106 (2000).

12 Even thirty years later, it was easier to record a live performance onto vinyl than to copy a record. *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2195 (2000).

13 H.R. REP. NO. 60-2222, at 7 (1909).

14 *Id.*

lined in the Act, one of which was the exclusive right to perform the work publicly.[15] Consequently, the issue became whether broadcasting songs over the radio constituted a public performance. However, the discussion was limited to whether a *live* performance over the radio (i.e., a live band in the studio) – and not whether a *recording* of a band played over the radio – constituted a public performance.[16] Technological limitations were responsible for this odd development.

By the 1920s, radio had become the dominant form of entertainment, but stations did not broadcast recorded performances because of the hollow, "tinny" sound associated with early album recordings. Instead, radio stations resorted only to live performances.[17] It was at this time that the American Society of Composers, Authors, and Publishers (ASCAP), originally founded in 1914, began working on behalf of composers to collect royalties for public performances of their works.[18] Broadcasters resisted, arguing that a band performing in a studio was not a public event and thus did not implicate the exclusive right to "perform the copyrighted work publicly."[19] The copyright holders won in 1931 when the Supreme Court stated that "the transmitting of a musical composition by a commercial broadcasting station is a public performance."[20]

Although dicta, this statement reinforced a composer's performance rights in musical works. Surprisingly, however, even into the 1940s when technology eventually allowed for a higher quality of broadcast of actual recordings, record producers did not insist on equal protections for their recorded works.[21] Even if the industry conceded that sound recordings were not legally protected under the Copyright Act of 1909, they did little to lobby Congress for a change.[22] In fact, the record companies encouraged broadcasters to play recordings over the air to help promote their product.[23] This attitude soon changed with the introduction of the magnetic tape.

---

15 17 U.S.C. § 106(4) (2000).

16 *See* Bruce H. Phillips & Carl R. Moore, *Digital Performance Royalties: Should Radio Pay?: Digital Broadcasting: The Cost of Copyright*, 3 VAND. J. ENT. L. & PRAC. 168, 170 (2001).

17 *Id.*

18 *Id.*

19 17 U.S.C. § 106(4) (2000).

20 Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 197 (1931).

21 Phillips & Moore, *supra* note 16, at 171.

22 *Id.*

23 *Id.*

4. Sound Recordings Earn Limited Copyright Protection

With the ability to more easily copy recordings with magnetic tape, the recording industry began lobbying Congress heavily in the 1950s to create a separate copyright in sound recordings. Its efforts proved partially successful with the passage of the Sound Recordings Act of 1971,[24] which was retained in the major revision of the Copyright Act of 1976.[25] Congress finally recognized a right in sound recordings; however, this right benefited primarily composers and publishers, not the musicians who made the actual recordings. Recalling the "bundle of rights" generally granted with a copyright (reproduction, distribution, display, performance of the work publicly, and preparation of derivatives), the Act granted sound recordings most of these rights but not the right to perform the work publicly.[26] To be sure, the Act was beneficial in that it prevented pirated copying and distribution of music recordings; but excluding the right of public performance, omitted purposely by Congress, meant that radio stations did not have to pay royalties to the creators of the recordings for broadcasting them.[27] Instead, only composers and publishers were entitled to royalties from radio broadcasts.[28]

This is a critical distinction when one considers how the music industry generally operates. As noted, there are two separate copyrights in a song: 1) the underlying composition, and 2) the physical recording.[29] Contrary to general public understanding, many popular artists, such as The Beatles or Britney Spears, do not compose all the songs that they perform. The artist and/or record company purchase or license the composition from the author and then record their own rendition of the work. As such, when a song is broadcast over radio, only the owner of the composition is entitled to royalties. Because public performance rights remain only in compositions and not in sound recordings, the performers are entitled to nothing for that song.[30] Instead, they rely on sales of albums for their compensation. In one sense, the system worked

---

24 Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102).

25 To date, the Copyright Act of 1976 is the last major revision of copyright law in the United States.

26 Azine Farzami, Bonneville v. Register of Copyrights: *Broadcasters' Upstream Battle Over Streaming Rights*, 1 COMMLAW CONSPECTUS 203, 206 (2003).

27 Record labels generally are owners of sound recordings, while publishing companies generally control the rights to the compositions.

28 Farzami, *supra* note 26.

29 *See* Bob Kohn, *A Primer On The Law of Webcasting and Digital Music Delivery*, 20 ENT. LAW REP. 4 (2001).

30 *Id.*

because artists encouraged radio play in order to increase sales, which benefited both parties. In another sense, however, it proved confusing to owners of businesses like stores, hotels, and restaurants that played music publicly and were asked to pay royalties.[31] Small businesses were eventually exempt from paying royalties under the Fairness in Music Licensing Act of 1998,[32] leaving the music industry none too pleased.[33]

The music industry, in the meantime, had continually lobbied Congress since the 1976 Act to create a performance right in sound recordings. Congress resisted because the music industry was steadily prospering.[34] This all changed in the 1990s, however, with the burgeoning Internet and various digital technologies.

B. *Technological Advances*

1. The Internet and Decentralization

The Internet is a global network of millions of host computers linking tens of millions of people in approximately one hundred and fifty countries.[35] Its origin traces back to the height of the Cold War in the 1960s. The Rand Corporation, one of America's leading military think tanks, was given the task of devising a communications network that would allow authorities to continue to communicate in the event of a nuclear attack.[36] Networks then were chained point-to-point, meaning if one point in the network was blown up, the whole chain would break and communication would be thwarted.[37] One of the researchers on the project, Paul Baran, conceived of a network that was set up like a fishnet; if one link was cut, the network would continue. The design lacked a hub, central switching station, and governing authority.[38] Information sent from one end would randomly find its way to its destination on the other end. The system was based on the assumption that the links connecting cities were unreliable.[39]

The Department of Defense expanded on this idea in 1969 when it created ARPANET, a small decentralized network connect-

---

31 AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 864 (2d ed. 1996).

32 Pub. L. No. 105-298, 112 Stat. 2827 (1998).

33 KOHN & KOHN, *supra* note 31, at 864-66.

34 Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS INT'L TRADE L.J. 31, 35 (1999).

35 Kenneth D. Suzan, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 798, 791 (1995).

36 Public Broadcasting System (PBS), *Life on the Internet: Net Timeline*, *at* http://www.pbs.org/internet/timeline (last visited Mar. 15, 2004).

37 *Id.*

38 Suzan, *supra* note 35.

39 *Id.*

ing computers at four university campuses around the United States.[40] By the 1980s, the National Science Foundation (NSF) had built the long-distance data lines referred to as the Internet's "backbone."[41] It was used primarily as an e-mail communications system among students and researchers until 1991, when the NSF lifted the restrictions on commercial use, and paved the way for the Internet as we know it today.[42]

This decentralized nature of the Internet is significant, for it makes it difficult to track and police online copyright infringement. There is no central authority, there is no "off" switch, and its constantly expanding scope eviscerated any informal codes of behavior that existed when the online community was relatively small.[43] This, coupled with the perceived virtual anonymity of the Internet, contributes to the constant infringement of copyrights, most notably music sharing. To be sure, not all online music is shared illicitly. There are many services, such as Internet radio, that exist for the seemingly benign purpose of entertaining and promoting artists. Nevertheless, the Internet provided a means for the distribution of music exponentially beyond with what the music industry – and Congress, for that matter – were historically comfortable. The Internet by itself, however, was not the sole problem. It was the emerging ease of making perfect digital copies and digital transmissions of songs that finally caught the attention of Congress.

2. MP3 and Webcasting

The two primary ways online music is shared are through webcasting and MP3 (Moving Picture Experts Group, Audio Layer III). MP3 is a compression format which compresses audio files so they may be more easily stored and transferred.[44] While a standard music CD may be able to hold a maximum of ten songs, a CD of MP3-format songs would be able to hold ten entire albums. Of course, the more a song is compressed, the lower the quality. The general compression standard is a 10:1 ratio, yielding a file approximately four megabytes for a three-minute track.[45] Development of the technology began in 1987 at the Fraunhofer Institut in Erlangen, Germany; researchers worked to create a high-quality, low bit-rate

---

40 PBS, *supra* note 36.
41 Suzan, *supra* note 35.
42 *Id.*
43 *Id.*
44 Christopher Jones, *MP3 Overview, at* http://hotwired.lycos.com/webmonkey/00/31/index3a.html?tw=multimedia (last visited Oct. 4, 2004).
45 *Id.*

audio coding device that would allow music to be compressed (for storage) and then decompressed (for listening) without suffering any reduction in sound quality. In 1989, Fraunhofer received a patent in Germany, and then submitted the compression/decompression algorithm (codec) to the International Standards Organization. The algorithm was then approved by the Moving Picture Experts Group (MPEG) in 1992 as the standard for audio compression.[46]

Soon thereafter, other programmers began making new software for MP3 users, including new encoders such as "rippers" that allowed people to copy original music CDs onto their computer song by song, and new MP3 players such as Rio which let people listen to their MP3s anywhere using portable headphones.[47] One of the advantages of songs ripped to MP3 is that there are few security or tracking features attached to them; people can download, upload, and otherwise swap files, making it difficult to determine where the original file came from or how many unauthorized copies were made.[48]

This same technology generally is used for webstreaming (i.e., Internet radio). With streaming, music is transmitted in real time. The major difference, however, is that unlike MP3 trading, no permanent copies of the music are made on the user's system. The popularity of streaming surged when companies such as Nullsoft, Real Networks, and Microsoft offered streaming software free to the public.[49] Real Networks' Real Player, for example, has been downloaded from its site nearly one hundred million times and allows the stream to be encoded to prevent users from copying the stream. It is often used by artists and record companies to allow people to listen to sample songs before purchasing. It is still not completely copy-proof, however, as listeners can freely download software that allows them to capture the stream and save it into MP3 format for later use.[50]

Despite these emerging technologies, Internet music in the early 1990s remained analogous to the "tin can" days of the 1920s.[51] That is, the quality of digital audio recordings was so marginal and Internet transfer rates so slow that Congress and the mu-

---

46 Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 314 (2002).

47 Jones, *supra* note 44.

48 *Id.*

49 Rose, *supra* note 46.

50 *Id.*

51 Recorded music in the 1920s was of such poor quality that it sounded as if it were being played in a tin can.

sic industry delayed paying attention to it.[52] Instead, it was a similar yet different creature that first caught their attention – digital cable and satellite music broadcasts. And after nearly one hundred years, sound recordings finally gained performance copyrights.

C. *Digital Performance Rights in Sound Recordings Act of 1995*

While the eventual threat of the Internet to the recording industry was still at least a year away, there was a present and immediate danger in the form of cable and satellite interactive broadcasts. These paid services allowed users to retrieve any song on demand.[53] Therefore, Congress and the industry feared that people would simply record the transmissions and forego the purchase of CDs.[54] This was a significant threat because the creators of sound recordings are dependent on record sales for revenues, receiving no royalty compensation for digital transmissions under the current system.

Congress responded by passing the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA").[55] The Act gave owners of sound recordings the exclusive right of public performance, albeit only through certain digital audio transmissions. It was limited in this manner so as not to upset the longstanding business and contractual relationships between record producers, composers, publishers, and broadcasters.[56] Only new subscription services such as cable, satellite, and eventually Internet providers were targeted by the Act. Live performances, movies, and traditional radio and television broadcasts were excluded.[57]

The DPRA distinguished between interactive and non-interactive services. An interactive service is "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[58] This includes such services as pay-per-listen and audio on-demand. These must be licensed under the DPRA because the ability to lis-

---

52 Few Internet users had connections faster than 56k modems, making it arduously slow to transfer songs of even mediocre quality. In contrast, today there are broadband technologies in homes and universities that allow users to transfer perfect-quality songs in minutes.

53 *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Judiciary Subcomm. on Courts and Intellectual Prop.*, 104th Cong. 34 (1995).

54 *Id.* at 39.

55 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as various amendments to 17 U.S.C.).

56 S. REP. NO. 104-128, at 13 (1995).

57 109 Stat. at 336.

58 *Id.* at 343.

ten to a song at a person's choosing was thought by Congress to possibly displace physical album sales.[59]

By contrast, non-interactive transmissions involve those transmissions where the user cannot request particular songs at particular times. The DPRA distinguished between two types of non-interactive transmissions – subscription and non-subscription. A subscription transmission is "controlled and limited to particular recipients, and for which consideration is required to be paid."[60] These required a license from the copyright owners before music was transmitted. For voluntary subscription services, the copyright owners are free to refuse to offer a license if they choose. For compulsory subscription services, record companies are required to grant compulsory licenses, either negotiated individually or using rates to be determined by the Copyright Office.[61] The final category, non-subscription non-interactive transmissions, was considered by Congress to pose the least threat to record sales, and therefore did not require a license under the DPRA.[62] This included pure "Internet radio station" and traditional radio stations that simulcast their over-the-air programming over the Internet. These were exempt from paying digital public performance fees.

The DPRA represented a compromise between the powerful recording industry lobby and the equally powerful radio broadcasting lobby by maintaining the status quo between labels and traditional radio stations. The recording industry was satisfied because the Act targeted new subscription services that could potentially harm record sales. Similarly, broadcasters were satisfied because it did not impose liability on FCC-licensed stations and, in fact, helped them by targeting Internet-based digital subscription services that might compete with commercial radio.[63]

Nevertheless, the DPRA has been accused of cutting the baby in half and not doing enough.[64] For example, it did not "provide sound recordings with the full performance rights extended to other creative works."[65] In addition to audio transmissions, it provided exemptions for audiovisual and analog transmissions. De-

---

59 H.R. REP. NO. 104-274 (1995).

60 109 Stat. at 344.

61 *Id.* at 338. *See also* David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235 (2001).

62 109 Stat. at 336-37.

63 Farzami, *supra* note 26, at 205.

64 *See, e.g.*, Summer, *supra* note 34, at 35.

65 Lisa E. Davis & Rhonda Adams Medina, *The Piper Must Be Paid; New Law Grants Performance Rights for Digital Age*, N.Y.L.J., April 8, 1996, at S1.

scribed as ranging from "complex" to "incomprehensible,"[66] the Act left many gaps and inconsistencies. While partially designed to prevent online Internet downloading of music, it apparently ignored bulletin board services that allowed uploading and downloading of music for free.[67] Although Internet webcasting was spared under the Act (for the moment), it nonetheless left the burden of paying royalties for on-demand audio to Internet companies who, at the time, still lacked a powerful lobby in Washington.[68]

The DPRA was the first modern attempt at regulating the digital transmission of music. Through it, Congress thought it had stemmed the tide of unauthorized music transfers. However, the DPRA would soon prove insufficient since Congress did not anticipate the exponential growth of both webcasting and MP3 file-sharing. As a result, within three years Congress would again revisit the issue, this time striking a severe and perhaps inadvertent blow to Internet radio.

II. WEBCASTING

A. *The Rise of Webcasting*

In 1995, the same year the DPRA was passed, Progressive Networks released RealAudio, the first technology for streaming audio.[69] As a result, webcasting spread rapidly, since anyone with a personal computer could set up their own Internet "radio station," and anyone with free RealAudio software could tune in. While the DPRA protected sound recording copyright holders against interactive services, "pure" webcasting is not interactive and was not implicated. However, webcasters soon began offering unique quasi-interactive services that blurred the line as to what qualified as interactive under the Act. For example, some websites created personalized programs based on user-inputted tastes and preferences, while other sites offered archives of previous webcast shows that could be called up "on-demand".[70] To be sure, the DPRA failed to specifically address the issue of webcasting and other nonsubscrip-

---

66 *See, e.g.*, Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3 (1995).

67 Summer, *supra* note 34.

68 Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1 (2001).

69 *Id.* at 12.

70 Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 314 (2000).

tion services on the Internet.[71] Therefore, webcasters continued to claim that their service was analogous to traditional radio broadcasts and did not have to pay performance royalties. The recording industry, unsurprisingly, argued the opposite, claiming webcasters were required to obtain licenses.[72] The first step in resolving the issue came in 1998 with the passage of the Digital Millennium Copyright Act.

B. *Digital Millennium Copyright Act of 1998*

On October 28, 1998, President Clinton signed into law the Digital Millennium Copyright Act (DMCA).[73] Passing without much debate, the DMCA is a massive and complex piece of legislation designed to keep United States copyright law in step with constant technological developments. Title I of the DMCA brings the United States into conformance with the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performance and Phonograms Treaty. Compliance was required in order to create and extend copyright protection for United States works throughout the world. Primarily, these treaties require member states to (1) protect against circumvention of technical measures used by copyright owners to protect their works and (2) protect against tampering with copyright management information.[74]

Regarding the prohibition against circumvention of technical measures, section 103 distinguishes between circumventing technical measures used to prevent unauthorized *access* to a work and circumventing measures that prevent unauthorized *copying* of a work.[75] These distinctions are made in order to still allow the public fair use of protected works. Concerning access, the act of circumventing is prohibited because fair use is not, nor ever was, a defense to gaining unauthorized access to a protected work. This access restriction can be contrasted with copying, where the DMCA allows the circumvention of technological anti-copy measures "to ensure that the public will have the continued ability to make fair use of copyrighted works."[76] However, devices or services that would be used to "capture" webstreams that are otherwise not

---

71 *See* Rose, *supra* note 46.

72 *Id.*

73 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending title 17 of U.S.C.).

74 COPYRIGHT OFFICE, U.S. LIBRARY OF CONGRESS, SUMMARY, THE DIGITAL MILLENNIUM COPYRIGHT ACT 1 (1998).

75 *Id.*

76 *Id.*

meant to be saved would not be protected under the DMCA, as it proscribes devices whose "only limited commercially significant purpose" is to circumvent or are marketed for use in circumvention.[77] A company called Streambox, for example, created a software program called VCR which allowed users to circumvent copy protection in webstreaming software and make permanent copies of the stream on their computers. RealNetworks, the leading provider of audio streaming software, successfully enjoined Streambox under section 103 of the DMCA on the grounds that VCR had no significant commercial purposes and was primarily designed to circumvent copyright protection measures.[78]

Section 103 also prohibits the removal, alteration, or falsification of copyright management information (CMI). The Act defines CMI as "identifying information about the work, the author, the copyright owner, and in certain cases, the performer, writer or director of the work, as well as terms and conditions for use of the work."[79] This information is embedded in the digital work and is used by owners to keep track of their works in cyberspace. The recording industry and the Copyright Office require webcasters to report this information on all songs they transmit; however, the tampering of CMI has yet to become an issue within the realm of online music, particularly because the current nature of embedded CMI is limited with respect to music CDs and MP3s.

Title II of the DMCA, codified as new section 512 of the Copyright Act, creates safe havens for online service providers (OSPs) to shield them against liability resulting from users involved in online copyright infringement.[80] This section protects them against money damages and limits injunctions when users traffic in infringing material, such as unlicensed webstreaming or MP3 storage. In addition, Title II establishes a procedure through which the copyright owner can obtain a subpoena in federal court requiring the OSP to reveal the identity of a potentially infringing user.[81] It is a "turbocharged" procedure that is much faster and cheaper than filing a "John Doe" lawsuit to identify infringers. This has posed a contentious issue recently, with the recording industry demanding the identities of online infringers, and OSPs not wishing to reveal

---

77 *Id.*

78 *See* Real Networks, Inc. v. Streambox, Inc., 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000).

79 COPYRIGHT OFFICE, *supra* note 74.

80 *See* 17 U.S.C. § 512 (2000) (Title II of the DMCA is also known as The Fairness in Musical Licensing Act).

81 *See* COPYRIGHT OFFICE, *supra* note 74.

them for reasons of privacy and customer relations.[82] However, this section also "contains a provision that ensures service providers are not placed in the position of having to choose between limitations on liability on the one hand and preserving the privacy of their subscribers on the other."[83] Subsection (m) of section 512 explicitly provides that nothing in the Act requires a service provider to monitor its service or access material in violation of law in order to be eligible for any liability limitations.[84] Therefore, while users still retain a certain degree of privacy, the DMCA provides a new mechanism for obtaining the identities of individuals who may potentially trade music illegally or set up an Internet radio station without paying necessary royalties.

Title IV of the DMCA – entitled "Miscellaneous Provisions" – contains a highly significant and controversial amendment to the DPRA. A last minute insertion by Congress, the amendment brings webcasting under the umbrella of sound performance licensing. This provision was never intended to be in the final draft of the DMCA, but threats of lawsuits and withholding of music content by the Recording Industry Association of America (RIAA) forced Congress to convene a last-minute hearing on the matter.[85] The representative for webcasters – the Digital Media Association (DiMA) – had only a few days to prepare for the hastily-convened meeting. However, even if DiMA was somehow successful in defeating the proposed amendment, it could not afford the threatened litigation by the RIAA. Therefore, instead of fighting the amendment, DiMA negotiated a simpler compulsory licensing process – paying royalties to a single entity, the RIAA, and not having to negotiate individually with each individual copyright holder.[86] One other group present at the hearing is worth noting. The National Association of Broadcasters (NAB), while powerful enough to challenge the RIAA, did little to help DiMA. NAB represents traditional analog radio broadcasters, and it was their understanding that the new licensing provisions did not apply to FCC-licensed radio stations that simulcast their signals over the Internet.[87] That miscalculation would later come back to sting radio broadcasters and generate

82 *See* Recording Indus. of Am. v. Verizon Internet Servs., 2003 U.S. Dist. LEXIS 6778 (D.C. Cir. 2003) (requiring Verizon to reveal the identity of an infringer under the DMCA).

83 COPYRIGHT OFFICE, *supra* note 74.

84 *Id.*

85 Craft, *supra* note 68, at 13.

86 *Id.*

87 *Id.*

strong controversy, especially among low-budget college radio stations.

What was in this amendment? First, recall that the DPRA addressed three categories of transmissions: 1) traditional *FCC broadcast transmissions* which were specifically exempt from paying royalties, 2) *subscription digital audio transmissions* which were subject to a statutory license, and 3) *on-demand transmissions* in which a copyright holder can refuse a license outright. Because webcasting fell under none of these three categories, the DMCA amended the DPRA by adding a new category: "eligible non-subscription transmissions."[88] The Act defined an eligible non-subscription transmission as a:

> noninteractive non-subscription digital audio transmission not exempt . . . that . . . provides audio programming consisting . . . of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings . . . .[89]

This definition encompassed webcasting and subjected it to the same statutory licensing requirement as subscription digital audio transmissions. Thus, if the parties cannot agree on an amount, the Copyright Arbitration Royalty Panel will be convened to set it at its fair market value.[90]

In addition to expanding the scope of the statutory license, and perhaps establishing a regime that is more arduous than having to pay royalties, the DMCA includes an extensive laundry list of requirements that programmers must meet in order to be eligible for the license. For example:[91] (1) Webcasters must adhere to the "sound recording performance complement" originally established under the DPRA. This prohibits a webcaster from playing in any three-hour period more than three songs from the same album and more than two songs consecutively, or more than four different songs from the same artist or from any compilation. (2) The song, album, and featured artist must be textually identified on the user's software program while the song is being played; however, (3) advanced song or artist playlists may not be published. DJs can

---

88 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2889 (1998).
89 *Id.* at 2898.
90 *See id.* at 2896.
91 *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 344 (1995) (codified as various amendments to 17 U.S.C.).

use "teasers" to identify which artists will be played, but they cannot specify the time a particular song will be played. (4) If the program is archived on the webcaster's website and made on-demand, it must be at least five hours in duration. The rationale is that a user is not willing to sit through a five hour re-broadcast in order to hear a particular song repeated again. Also, the archive may be made available only for a period of two weeks. (5) If the program is continuously looped (i.e., immediately re-played upon conclusion), it must be at least three hours in duration. This makes it more difficult to repeatedly tune in to particular songs. (6) Scheduled programs (i.e., songs announced in advance) of less than one hour in duration can only be transmitted three times in any two-week period, or four times for programs longer than one hour in duration. (7) The webcaster cannot suggest a connection in any way between the artist and any particular product or service (i.e., deceptive advertising). For example, the same advertisement displayed every time a particular song is played may suggest a misleading connection. (8) Webcasters have to take proactive steps to defeat copyright infringement if they are aware of such copying and have the technological capacity to prevent it, such as disabling copying features available through the service. (9) A webcaster may not intentionally switch channels from one program to another. For example, if a user is listening to one genre of music, the webcaster is prohibited from switching the channel to another genre.[92]

If these conditions are not met, the passive license to transmit music is denied. The conditions are imposed to ensure that the webcaster does not facilitate a user's forgoing of purchasing a CD. In effect, the Act makes webcasting function like traditional over-the-air radio broadcasts, which then begs the question: If FCC-licensed broadcasters are exempt under the DMCA from paying performance royalties, and the above conditions make webcasting functionally equivalent to broadcasting, why then should webcasters have to pay performance royalties? This defeats the purpose of the DPRA, which was to compensate performers for potential lost sales due to on-demand and digital subscription services that might allow users to record music instead of purchasing CDs. However, unlike a subscription cable or a satellite broadcast system which is commonly connected to a home stereo receiver and can easily be recorded, a webcast program cannot typically be recorded. The

92 *See* 112 Stat. at 2891-95.

DMCA requirements require proactive steps to prevent copying,[93] and the DMCA programming content restrictions prevent on-demand requests or anticipation of particular songs. The result is that the performance royalty is not used to offset lost album sales, but rather, becomes an independent source of revenue.[94]

One of the rationales for this new royalty is that with the potential for unlimited new outlets for music created by webcasting, "*having* the recorded performance is likely to matter less to consumers than *hearing* it, and the digital environment may well make it as easy for the user to hear the desired performance via transmission as to play her own copy of it."[95] However, the DMCA requirements listed above are specifically designed to prevent the availability of particular songs, thus requiring the user to actually purchase the album. Furthermore, this rationale is premised on the erroneous notion that webcasting will spawn clones of broadcast radio, thus upsetting the market. To the contrary, web radio will create new and different markets for new and different music; and just like traditional radio broadcasting, it will act as advertising for these artists and promote album sales. To appreciate this requires an understanding of the current state of the radio music market.

C. *Radio Market Hinders Public Choice*

The current radio market is often characterized by the term *conglomerate*.[96] National media companies are continually purchasing local stations and placing all management and programming decisions under one umbrella. This behavior dates back to the 1996 Telecommunications Act, which loosened restrictions on ownership of multiple stations.[97] As a result, each subsequent year has seen less independently-owned radio outlets. For example, Clear Channel Communications, the largest radio conglomerate in the U.S., has grown from sixty stations before the 1996 Act to over 1200 today.[98] Deregulation has also allowed conglomerates that own radio stations to own live music venues, agencies, and promotional companies, which one recording artist's representative re-

---

93 *See* 109 Stat. at 344.

94 *See* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"*, 23 COLUM.-VLA J.L. & ARTS 137, 169 (1999).

95 *Id.* at 170.

96 *See, e.g.*, Andrew Dansby, *Henley Rips Radio: Senate Commerce Committee Discusses Regulation, at* http://www.rollingstone.com/news/newsarticle.asp?nid=17471 (Jan. 31, 2003).

97 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

98 *See* Dansby, *supra* note 96, at 1.

ferred to as an "institutionalized conflict of interest."[99] These companies "have an economic interest in promoting only the musical groups that agree to play at their concert venues or use their promotion companies."[100]

Conglomeration has especially served to reduce the diversity of programming on local radio stations, resulting in centralized "play lists" made at the national level, leading to stations across the country playing the same songs.[101] This uniformity occurs because conglomerates rely on market research to determine which songs get played. First, listeners are polled nationally about songs using eight-second sound bites. They are asked to rate twenty to thirty songs, based on whether they like the song, recognize the song, or are tired of hearing the song.[102] These poll results then determine programming content. Second, a collection of songs aired daily on over one thousand radio stations are compiled by name, and time of day played. This information is sold to recording companies, which track the popularity of songs and recognize trends.[103] Third, Clear Channel charges record labels up to twenty-thousand dollars per song to test unreleased music on its nationwide network; this data lets records labels test a band's promise among consumers.[104]

Radio executives claim that this is the most democratic form of programming because it gives the people what they want. However, these practices result in radio stations repeating the same tested songs over and over in order to maximize ratings. As the program director for one Clear Channel affiliate conceded, the loss of even one rating percentage point could cost his station as much as ten million dollars a year. "I feel the pressure day to day. There is too much at stake."[105] Other critics the outcome is biased because the number of songs is tested is limited. "If your band is not among the thirty songs a radio station tests each week, you effectively do not exist," notes one professor who follows the music industry. "If it's not on the menu you are not going to order it."[106] This system makes it harder for unrecognized new bands to get

---

99 *Id.*

100 *Resources: The Competition in Radio and Concert Industries Act, at* http://www.aftra.org/resources/pr/0303/fact.html (last visited Mar. 15, 2004).

101 *Id.*

102 Laura M. Holson, *With By-The-Numbers Radio, Requests Are a Dying Breed*, N.Y. TIMES, July 11, 2002, at C1.

103 *Id.*

104 *Id. See also Radio - Music Research, at* http://www.cofc.edu/~ferguson/bcp/updates/chap11/no-requests.txt (last visited Oct. 4, 2004).

105 Holson, *supra* note 102.

106 *Id.*

their songs played on traditional radio stations. Furthermore, it gives the advantage to big name stars with promoters, and impacts American culture because all stations begin to sound the same.[107]

These practices have caught the attention of at least one Congressman. Senator Russ Feingold of Wisconsin has introduced legislation which would curb these practices. Entitled "The Competition in Radio and Concert Industries Act," the bill would prohibit anti-competitive business practices that have harmed individual artists, independent radio stations, concert promoters, and the public, and would prevent the further conglomeration of radio stations.[108] To date, however, Senator Feingold's bill has not gained momentum, and the current radio practices continue.

How does this affect webcasting? Internet radio will not saturate the current commercial radio market by adding more of the same music, but rather, it will complement the market by opening up new opportunities for genres and artists that are not among the privileged "thirty" to get tested each week on the air. For example, web stations offering music ranging from reggae,[109] heavy metal,[110] blues,[111] jazz,[112] techno,[113] Latino,[114] and countless others, have sprung up. These genres and their artists are rarely, if ever, heard on top-forty commercial radio. Therefore, these new stations would act as advertising for obscure artists and *promote* album sales, not harm them as is claimed by the RIAA. Ironically, the RIAA also opposes radio conglomerates, claiming they force record companies to pay more money to promote fewer artists.[115] Yet, the RIAA fails to realize that webcasting lessens the impact of the very evil it opposes. The notion that radio equals advertising has been the rationale used for the past eighty years in exempting radio stations from paying royalties. Because webcasting serves the same function as traditional radio, it should share the same exemption from paying performance royalties.[116] An exemption would increase

---

107 *See Radio - Music Research, supra* note 104.

108 *See* Office of Senator Russ Feingold, *Feingold Introduces "Competition in Radio and Concert Industries Act"*, *at* http://feingold.senate.gov/~feingold/releases/02/06/062702medcon.html (last visited Oct. 4, 2004).

109 *See, e.g.*, IReggae, *at* http://www.ireggae.com or UnityWorks.com, *at* http://www.unity-works.com (both sites last visited Oct. 4, 2004).

110 *See* www.snakemetalradio.com (last visited Oct. 4, 2004).

111 *See* Internet Radio Plaza, *at* http://www.webradiolist.com/pages/station.asp?Radio=4420 (last visited Oct. 4, 2004).

112 *Id.*

113 *Id.*

114 *Id.*

115 *See Marketplace* (June 27, 2002), *at* http://marketplace.publicradio.org/shows/2002/06/27_mpp.html (last visited Oct. 4, 2004).

116 *See* 17 U.S.C. § 114(a)(1) (2000).

start-up Internet stations, serve the public interest by increasing the distribution of music, and in turn, promote lesser-known artists, and encourage the sale of their music.

Despite the benefits of free webcasting, webcasters were resigned to paying performance royalties. They were left to negotiate a licensing fee with the RIAA, or a DMCA-mandated Copyright Arbitration Royalty Panel would be convened to do so.[117] However, one lingering question remained: although section 114(d)(1)(A) of the DMCA specifically exempted traditional AM/FM radio stations from paying performance royalties, did this exemption also apply to those same broadcast signals which were simulcast over the Internet? The NAB argued that simulcasts were exempted under the Act, while the RIAA argued the opposite.[118] Less than two weeks after the passage of the DMCA, royalty negotiations broke down and the NAB filed a petition with the Copyright Office for intervention.[119] The RIAA countered with its own petition, asking the Copyright Office to engage in rulemaking on the issue, and to make a final determination of whether AM/FM simulcasts are exempt. Essentially, its position was that because stations play new songs every hour on the hour, labels do not want people to have increased access to this predictable diet of music.[120] According to the RIAA, increased access and increased frequency would translate into fewer sales.

On December 11, 2000, the Copyright Office promulgated its rule that "AM/FM webcasters" are *not* exempt from the digital performance right.[121] It determined that the exemption for "broadcast transmissions" under section 114(d)(1)(A) of the Copyright Act is limited to over-the-air transmissions by FCC-licensed broadcasters for reasons discussed below, and therefore, stations that simulcast their signals must pay performance royalties.[122] The rule was immediately challenged in federal court by radio broadcasters all over the country, in what would become a controversial and groundbreaking decision.

---

117 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2895-96 (1998) ("[U]pon . . . petition [and after notice is published in the Federal Register], the Librarian of Congress shall . . . convene a . . . panel to determine . . . a schedule of rates . . . [that] shall be binding on all copyright owners[.]"). In determining rates, the Librarian shall rely on comparable rates had the license agreements been voluntarily negotiated.

118 Craft, *supra* note 68, at 19.

119 *Id.*

120 *Id.*

121 65 Fed. Reg. 77,292 (Nov. 21, 2000) (to be codified at 37 C.F.R. pt. 201).

122 *Id.* at 77,301.

D. Bonneville Int'l Corp. v. Peters

1. AM/FM Simulcasters Must Pay Royalties

In *Bonneville Int'l Corp. v. Peters*,[123] owners and operators of hundreds of AM/FM stations argued that the Copyright Office's December 11, 2000 Rulemaking exceeded the agency's statutory authority. They also sought a declaratory judgment, stating that section 114(d)(1)(A) of the Act exempts FCC-licensed broadcasters from the digital performance right of section 106(6) of the Act. In reviewing the agency's action, the court employed the two-prong test established by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat'l Resource Defense Council, Inc.*[124] That test says that when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, the court must ascertain whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, then the matter is settled. However, if Congress has not addressed the precise question, and the statute is silent or ambiguous with respect to the specific issue, the question becomes whether the agency's answer is based on a permissible construction of the statute.[125]

Under the first prong, the court examined if Congress directly addressed the issue of whether FCC-licensed AM/FM broadcasters engaged in streaming were exempted from the performance right in section 106 of the Act.[126] Section 114(d)(1)(A) establishes an exemption to the performance right for "a nonsubscription broadcast transmission," defined in section 114(j) as "any transmission that is not a subscription transmission."[127] A subscription transmission is defined under the Act as "a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission."[128] Lastly, a broadcast transmission is defined as "a transmission made by a terrestrial broadcast station licensed as such by the [FCC]."[129]

Radio broadcasters argued that Internet simulcasting falls under the category of a nonsubcription broadcast transmission, because AM/FM streaming is not a subscription broadcast, it is not

---

123 153 F. Supp. 2d 763 (E.D. Pa. 2001).
124 467 U.S. 837 (1984).
125 *Id.* at 842-45.
126 *Bonneville*, 153 F. Supp. 2d at 774.
127 17 U.S.C. § 114(j)(5) (2000).
128 17 U.S.C. § 119(j) (2000).
129 17 U.S.C. § 114(j)(2) (2000).

limited to particular recipients, and consideration is not required to be paid in order to receive the transmission. More plainly, they argued that because the statute defines broadcast transmission as any transmission made by an AM/FM terrestrial station, simulcast transmissions fall under the exemption.[130]

In response, the RIAA argued that it is long-settled that, unlike an Internet transmission, a radio broadcast does not involve a point-to-point communication.[131] It asserted that a traditional, over-the-air transmission, gains an exemption to the public performance right because it runs one way, is free of charge, and is "broadcast in the open air for all to receive."[132] "Streaming, on the other hand . . . involves a signal sent over closed transmission lines to [a user's specified address based on his] 'hitting' of the transmitter's website."[133] The Copyright Office, arguing alongside the RIAA, maintained that the terms "terrestrial," and "licensed as such by the [FCC]" in the Copyright Act, showed that the exemption was not intended to encompass stations engaged in streaming.[134] The main difference, according to the agency, was that "terrestrial" refers to local stations grounded by antennae and limited to a defined geographic region, whereas webcasting signals are made by computer and instantly relayed anywhere in the world.[135]

The court acknowledged that the term "broadcast" was broad enough to encompass streaming activities.[136] However, it found it problematic that Congress would exempt AM/FM streaming and not pure webcasting.[137] Furthermore, the phrase "licensed as such by the [FCC]," within the definition of broadcast transmission, implies that the broadcast station is engaging in activities licensed by the FCC. "The idea that Congress intended FCC-licensed entities to be exempt from the public performance right while in engaging in activities the FCC does not regulate, without some explicit reference in the statute saying so, is extremely unlikely."[138] Therefore, the court found a facial reading of the statute to be ambiguous as to whether AM/FM streaming was exempted.

The court also stated that the broadcasters' reading of the statute conflicts with other portions of the Copyright Act, and is incon-

130 *Bonneville*, 153 F. Supp. 2d at 774-75.
131 *Id.* at 775.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Bonneville*, 153 F. Supp. 2d at 775.
137 *Id.* at 776.
138 *Id.*

sistent with the goal of reading the Act as a harmonious whole.[139] For example, exempting AM/FM broadcasters from the section 106 performance right would conflict with the retransmission limits of section 114(d)(1)(B). That section allows for retransmission of over-the-air broadcasts only if the transmission remains within 150 miles of the original broadcast, is limited to local communities, or is carried by a noncommercial station.[140] The court argued that it "strains credulity" to suggest Congress intended to exempt global simulcasting, while simultaneously limiting retransmissions to geographic areas, despite the broadcasters' argument that section 114(d)(1)(B) was intended to apply to third-party *re*-transmissions and not simultaneous transmissions.[141]

Another conflict, according to the court, arises with the ephemeral recording right of section 112.[142] Section 112(a)(1) allows broadcast stations to make one ephemeral copy of a work to facilitate transmissions within its "local service area."[143] The general use of the term "local service area" is inconsistent with the broadcasters' reading of section 114(d)(1)(A). It is undisputed that an AM/FM simulcast reaches almost anywhere in the world. However, referring to a "local service area" that is global in scope constitutes an unusual reading, the court argued.

> If Congress had intended the section 112 ephemeral recording provisions to cover AM/FM streaming over the Internet, it would have either referred to its intention to do so explicitly in section 112, or possibly referred to the area reached by streaming transmissions merely as a 'service area' as opposed to a 'local service area.'[144]

Including the term "local service area" in the section 114(d)(1)A exception leads to the conclusion that either the exemption was never meant to cover simulcasting, or Congress failed to consider the issue, thus accounting for the inconsistencies.[145] Therefore, the court determined it was impossible to conclude that Congress spoke directly to the issue of whether AM/FM simulcasts were exempt.[146]

---

139 *Id.*
140 17 U.S.C. § 114(d)(1)(B) (2000).
141 *Bonneville*, 153 F. Supp. 2d at 777.
142 *Id.*
143 17 U.S.C. § 112 (2000). An ephemeral copy is a temporary reproduction of a work produced solely for the purpose of legally transmitting the work. It is destroyed after the broadcast is made.
144 *Bonneville*, 153 F. Supp. 2d at 777.
145 *Id.* at 778.
146 *Id.*

Addressing the legislative history behind the performance right, the court discounted the broadcasters' claim that Congress intended to exempt simulcasting. The court quoted the 1995 Senate Report that accompanied the enactment of the DPRA, which stated, "[t]his legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[147] The court found that while broadcasters have never traditionally been subject to any performance right for playing recordings, "the streaming of broadcasts over the Internet is not part of the traditional practices of AM/FM broadcasters [who] form the basis of their traditional relationship with the recording industry."[148] The court reasoned that since Internet streaming is global and digital in nature – as opposed to the analog nature of traditional radio broadcasts – there was a greater possibility to create high-quality copies and thus, increase the likelihood that record sales could be affected.[149]

In addition, the court relied on the House Manager's Report to bolster its ruling.[150] The Report states the purpose of the 1998 amendment was to clarify that "the digital sound recording performance right applies to nonsubscription digital audio services such as webcasting, addresses unique programming, and other issues raised by Internet transmissions, and creates statutory licensing to ease the administrative and legal burdens of constructing efficient licensing systems."[151] The court found that this demonstrated congressional concern for protecting record companies and artists from the dangers of reduced sales due to technological advances in copying.[152] Given this concern, and the absence of any explicit mention of AM/FM streaming in the legislative history of either the DPRA or DMCA, the court would not conclude that Congress intended to exempt simulcasting from the performance right.[153] Therefore, under the first prong of the *Chevron* doctrine, the court concluded that the statute was either silent, or at best, ambiguous, on the issue of whether AM/FM streaming was exempted from or subject to the section 106 performance right.[154]

Having determined the Copyright Act was ambiguous regarding simulcasting, and the Copyright Office was entitled to engage

147 *Id.*
148 *Id.*
149 *Id.*
150 *Bonneville*, 153 F. Supp. 2d at 778.
151 *Id.*
152 *Id.* at 779.
153 *Id.*
154 *Id.*

in rulemaking, the court then addressed the second prong of the *Chevron* test: whether the agency's interpretation that AM/FM simulcasting was not exempt was a reasonable construction of the statute.[155] The court noted that the Copyright Office began by looking at legislative history and other signs of congressional intent to interpret the statute.[156] The 1995 House Report stated:

> [F]ree over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' license. The committee has considered these factors in concluding not to include free over-the-air broadcast services in the legislation.[157]

The agency also examined other sections of the legislative history, noting that the exemption was enacted in the 1995 DPRA, prior to the advent of AM/FM webcasting, and at a time when Congress did not likely foresee the advent of such activity, (despite the fact that at least fifty AM/FM stations were simulcasting their broadcasts in 1995).[158] Additionally, the agency found that Congress' use of the phrase, "terrestrial broadcast station licensed as such by the [FCC]" involved more than a mere designation of a particular entity,[159] and this phrase was chosen in order to circumscribe which actions the entity may legally undertake within the scope of the section 114 exemption.[160] Therefore, the court found the agency's determinations regarding legislative intent to be reasonable, and stated that it would have reached the same conclusion even in the absence of *Chevron's* deference to reasonable agency interpretations.[161]

Finally, the court retreated to the policy considerations underlying the agency's determination, which it claimed militated in favor of finding that the section 114(d)(1)(A) exemption did not apply to AM/FM simulcasting.[162] It would be illogical to permit broadcasters to stream under an exemption, but impose liability on

---

155 *Id.*; Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 845 (1984).

156 *Bonneville*, 153 F. Supp. 2d at 780.

157 *Id.*

158 *Id.*

159 *See id.*

160 *See id.* at 781.

161 *See id.* The court noted that the copyright officials' conclusion that broadcasters' interpretation would be inconsistent with other provisions of the Copyright Act was "extremely convincing." *Id.* at 782.

162 *Bonneville*, 153 F. Supp. 2d at 780.

a third party, when it retransmits the very same programming.[163] Furthermore, allowing broadcasters to stream programming over the Internet would give them a free pass to engage in the same activity that the DPRA and DMCA were enacted to counter.[164] Permitting AM/FM broadcasters to webcast their signals without restrictions would thus be the equivalent of giving them an unfair advantage in the webcasting market.[165] The Copyright Office found, and the court agreed, that since the DMCA and DPRA were enacted to prevent dangers to copyright holders posed by webcasting, and because AM/FM stations engaged in webcasting posed those same dangers, there was no reason to create such a disparity in the webcasting market.[166]

Thus, the court found that the Copyright Office's Rulemaking met the requirement of reasonableness set by *Chevron.* AM/FM stations are now required to pay additional royalties if they wished to continue simulcasting their signals over the Internet.

2. Implications of *Bonneville*

Despite representing the view of a single district judge, the *Bonneville* decision has been heralded by scholars as groundbreaking.[167] The decision upset the radio industry waters in two primary ways. First, AM/FM simulcasters must now adhere to the DMCA sound recording performance complement during their over-the-air broadcasts. That is, the content restrictions enacted to prevent the copying of webcasts affect what DJs may or may not play during traditional programming. For example, AM/FM stations that simulcast over the Internet are prohibited from playing in any three-hour period more than three songs from the same album and can broadcast no more than two songs consecutively, or no more than four different songs from the same artist, or from any compilation. Also, the song, album, and featured artist broadcast over the air must be textually identified on the Internet user's software program while the song is being played.[168] Second, and arguably more important, the thousands of radio stations across

---

163 *See id.*

164 *See id.* The broadcasters countered with their own policy arguments, claiming that just as radio broadcasts on a local scale benefit the recording industry through increased sales, the same activity is even more beneficial on a global scale.

165 *Id.*

166 *Id.*

167 *See* Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in* Bonneville International Corp. v. Peters, 2002 BYU L. REV. 1155, 1155 n.6 (2002).

168 *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 344 (1995) (codified as various amendments to 17 U.S.C.).

the country that had been innocently simulcasting their AM/FM signals for years must not only start paying royalties currently, they are also liable for thousands of dollars in back royalties retroactive to 1998![169] Unlike pure webcasters, who knew from the beginning that they owed royalties, simulcasters were caught off guard by *Bonneville*, especially when the Copyright Office announced the enormity of the rates. Nevertheless, the decision was never correct.

3. *Bonneville* Court Misguided

The district court's *Chevron* analysis in *Bonneville* was misguided. It misread the plain text of the statute, misinterpreted legislative history, and was not reasonable when examining policy considerations. While any examination of a statute should begin with a textual reading, the DMCA webcasting provisions are generally regarded as being "among the most opaque ever added to the Copyright Act."[170] Therefore, it is important to understand the context underlying the language of the Act. Knowing the differences between standard Internet webcasting and AM/FM simulcasting is key to understanding the problems the DMCA drafters attempted to address.

Webcasting arguably facilitates copying more than simulcasting. With AM/FM simulcasting, a live person plays actual CDs and albums one by one, using CD players and turntables. The resultant raw, analog signal is simultaneously broadcast over the air and patched into a computer which then sends the signal over the Internet. Webcasting, on the other hand, involves a digital library of thousands of MP3 songs stored on the host's computer. The webcaster can then create an automated playlist which cycles music constantly. Unlike simulcasters, webcasters can embed identifying information such as the name of the artist, song, and album title, on these MP3s. This information is always present on the user's computer screen. Having this information arguably facilitates copying because the listener is aware of and knows *what* he is copying and can thus catalogue it.

Simulcasters and webcasters are subject to different regulatory regimes. Simulcasters are first and foremost broadcasters, and thus occupy single channels regulated by the Federal Communications Commission. Their formats and business models must be in com-

---

169 *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2900 (1998) (amended title 17 of U.S.C.).

170 *See* David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 932 (2002).

pliance with their FCC licenses.[171] Webcasters, on the other hand, transmit their signals over what the House Manager referred to as "highly-themed genre channels."[172] These genre channels are not regulated by the FCC and are subject to the listener's preference.

Most important, broadcasters have powerful regulatory and economic incentives to interrupt their broadcast with localized programming. All broadcasters are required by the terms of their broadcasting licenses to intersperse public affairs programming catered specifically to their local community in their broadcasts. Broadcasters must pause periodically to announce the weather, traffic, and other local events. Webcasters, by contrast, are free to play music continuously. In addition, a broadcaster's main source of revenue is advertising. Commercials, which are locally targeted and interrupt music broadcasts, sometimes consume as much as twenty minutes of every hour. This contrasts starkly with webcasts, where commercials are nationally or internationally marketed and appear as "banners" on the user's computer, never interrupting the continuity of the music.

With the "nationalizing" of music formats and playlists due to radio conglomeration as discussed above, there is no reason for individuals to seek AM/FM music programming from distant broadcast markets when the same music is available locally. Indeed, the only reason why someone outside the AM/FM station's broadcast radius may wish to tune into an Internet simulcast of music is if the person is a former local resident and wishes to maintain a "slice of home." In that case, he would be tuning in not for the music that is broadcast, but for the local interludes. To be sure, the primary function served by AM/FM simulcasts is to act as a replacement for typical AM/FM radio reception. That is, with nearly every major office building in the U.S. wired for Internet access, workers simply choose to listen to local radio through their computers instead of over their portable office radios. This does nothing to upset "the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters" which Congress was committed to preserving.[173]

With this context and despite the muddy nature of the DMCA itself, it is arguable that the plain language of the Copyright Act excludes AM/FM streaming from the performance right. The

171 Farzami, *supra* note 63, at 215.
172 *Bonneville*, 153 F. Supp. 2d at 769.
173 *See* S. REP. NO. 104-128, at 13 (1995).

Bonneville decision focused primarily on whether the exemption for AM/FM broadcasting also applied to AM/FM simulcasting. However, one need not even reach that far, because simulcasting does not even fall under the statutory definition of those webcasting activities which are subject to the performance right.

In expanding the scope of the digital performance right first established in 1995, the DMCA added the category of "eligible nonsubscription transmissions," which was intended to bring webcasting under the umbrella of the performance right.[174] The Act defines an eligible nonsubscription transmission as a transmission whose "primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events."[175] AM/FM simulcasts generally do not fall under this definition. Regarding commercial radio stations, their primary purpose is not to *promote* sound recordings, but rather, to *exploit* them in order to "sell, advertise, or promote particular products or services" for purposes of generating revenue. The main objective is to maximize the bottom line through non-music-related advertising promotion.

There is also the issue of college AM/FM radio stations that simulcast over the Internet. The general "purpose" of most noncommercial college radio stations is not to entertain as the Act conditions, but rather, to educate students in the ways of broadcasting and the arts. Thus, educational broadcasters would not fall under the definition of "eligible nonsubscription transmissions." The *Bonneville* court, unfortunately, failed to draw any distinction between commercial and noncommercial educational broadcasting, essentially determining that they, too, must pay royalties and be subject to on-air programming restrictions. In addition to the plain language, however, the legislative history of the Copyright Act suggests that nonprofit educational broadcasters should be treated differently than commercial broadcasters:

> The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act of November 7, 1967 (47 U.S.C. 390 et seq.), that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the

174 112 Stat. at 2889.
175 17 U.S.C. § 114(j)(6) (2000).

> special nature of programming, repeated use of programs, and, of course, limited financial resources.[176]

Furthermore, after the *Bonneville* decision, congressmen who were involved in the passage of the DMCA had sought to persuade the Copyright Office to exempt noncommercial educational stations from the royalty, record-keeping, and content restrictions imposed by the DMCA.[177] Indeed, educational stations are situated differently than commercial stations, requiring different treatment. They have smaller budgets, signals, and audiences, making it difficult to raise royalty funding requirements. Additionally, educational formats specialize in diversity and innovation.[178] The DMCA, however, imposes strict content restrictions such as the number of selections by a given artist at any time. These restrictions "would put an end to programs which explore the musical and historical legacies of given artists or shows which address racial frontiers or interpret the works of historical figures."[179] Because the plain language of the Act, legislative history, and policy considerations suggest that noncommercial educational broadcasters were never intended to be subject to the performance right, and because the DMCA makes absolutely no distinction between commercial and noncommercial AM/FM broadcasters, the only conclusion to be drawn is that *all* AM/FM broadcasters were meant to be excluded.

Additionally, even assuming that AM/FM streaming does, in fact, fall under the definition of an "eligible nonsubscription transmission," streaming would still be covered under the broadcast exemption. Section 114(d)(1)(A) exempts "nonsubscription broadcast transmissions" from the performance royalty. The *Bonneville* court conceded that the term "broadcast" is broad enough to encompass streaming activities. Nevertheless, the court found it problematic that Congress would not choose to exempt pure webcasting but choose to exempt AM/FM streaming, despite the reading of the plain language.[180] However, as commentators observe, the term "nonsubscription broadcast transmission" must be read to include simulcasts; if the exemption was limited to over-the-air transmissions, there would be no need for the additional term "nonsubscription" since the notion of subscription has never

---

176 *See* 17 U.S.C. § 118 *note* (2000).

177 *See, e.g.*, Notice and Recordkeeping for Use of Sound Recordings under Statutory License, 67 Fed. Reg. 10,652, cmt. No. 39 (Apr. 5. 2002) (cmt. by Dennis J. Kucinich).

178 *Id.* at 2.

179 *Id.*

180 *Bonneville*, 153 F. Supp. 2d at 776.

been applied to traditional transmissions.[181] Thus, "[t]he only reason to include the subscription concept would be if not only over-the-air, but also Internet 'transmissions' by broadcasters were contemplated as being within the exemption."[182]

The court also argued that exempting AM/FM broadcasters would be inharmonious with the retransmission limits of section 114(d)(1)(B), which allows for retransmission of over-the-air broadcasts only if the transmission remains within one hundred and fifty miles of the original broadcast, is limited to local communities, or is carried by a noncommercial station.[183] However, section 114(d)(1)(B) deals not with same-party simulcasts, but with *third-party* retransmissions—that is, signals "obtained by the retransmitter over the air," as the Act specifies.[184] Internet simulcasts, unlike retransmissions, are not obtained "over the air" and *re*-transmitted, but broadcast as a first-run, simultaneous transmission.[185] Furthermore, with retransmissions, listeners are more likely to copy content because they may have heard the transmission at least once before and can anticipate programming, unlike an original broadcast where the order of programming has not been disclosed.[186] Congress premised the section 114 amendments on the need to offset the increased potential for copying music. However, because AM/FM simulcasts do not pose the same threat that non-contemporaneous retransmissions pose, Congress likely intended to impose restrictions only on retransmissions and not simulcasts.

Another conflict identified by the court is the ephemeral recording right of section 112, which allows broadcast stations to make one ephemeral copy of a work to facilitate its transmissions within its "local service area."[187] Including the term "*local* service area" led the court to conclude that either the section 114(d)(1)(A) exemption was never meant to cover global simulcasting or that Congress failed to consider the issue. However, several factors explain this apparent oversight. First, the DMCA webcasting provisions are considered by observers to be an "opaque" law filled with incomprehensible "gobbledygook."[188] Ad-

---

181 Samuel Fifer & Gregory R. Naron, *Changing Horses in Mid-Stream: The Copyright Office's New Rule Makes Broadcasters Pay for "Streaming" their Signals over the Internet*, 3 VAND J. ENT. L. & PRAC. 182 (2001).

182 *Id.* at 187.

183 17 U.S.C. § 114(d)(1)(B) (2000).

184 *See* 17 U.S.C. § 114(d)(1)(B)(ii) (2000).

185 *See also* Fifer & Naron, *supra* note 181, at 188.

186 Carter, *supra* note 167, at 1173.

187 117 U.S.C. § 112 (2000).

188 Consider, as an example of "gobbledygook," section 114(d)(2)(B):

ditionally, the DMCA webcasting amendments were hastily added "days and perhaps hours" before its passage as a result of last minute lobbying by the RIAA.[189] Therefore, it is no surprise that Congress may have overlooked perfecting the language of the ephemeral recording right exception.

At the very least, if the court found the statute ambiguous, it should have also found the Copyright Office determination unreasonable when considering the differences between webcasting and AM/FM simulcasting, and the traditional relationship between broadcasters and the recording industry that Congress has historically insisted in upholding. This involved exempting broadcasters from paying performance royalties because of the free promotional benefits they provide to the industry. Indeed, the history of the sound recording performance right makes clear that Congress took pains not to disrupt this longstanding relationship.[190] However, the *Bonneville* decision did, in fact, cause such a disruption. After all, not only are broadcasters required to pay new royalties and alter their business strategies, but they must also alter their on-air programming in order to comply with the DMCA. The alternative would be to sit on the sidelines of the digital revolution and pull their streams altogether. Congress could not have, nor did, intend this.

4. Aftermath of *Bonneville*

The aftermath, of course, was that many stations did pull their streams, including KPIG of Watsonville, California, the first commercial station to stream its signal over the Internet in 1995.[191] Primarily, however, most of the stations shutting down were noncommercial college stations, whose flat budgets come not from tuition but from student fees. The problem was that royalty rates were based on per song, per listener fees. That is, the more listeners a station attracts, the more it pays, even though its budget remains fixed.[192] Nevertheless, despite the uproar caused by

> The performance of a sound recording publicly by means of a subscription digital audio transmission . . . that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing . . . in the case of a subscription . . . that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998.

See Nimmer, *supra* note 170, at 955.

189 Fifer & Naron, *supra* note 181, at 190.

190 *See* S. REP. No. 104-128, at 13 (1995).

191 Jefferson Graham, *Royalty Fees Killing Most Internet Radio Stations*, USA TODAY, July 21, 2002, http://www.usatoday.com/tech/news/techpolicy/2002-07-21-radio_x.htm (last visited Oct. 4, 2004).

192 *Id.*

Bonneville, Congress implicitly ratified the decision when it passed the Small Webcaster Settlement Act of 2002 (SWCA),[193] which postponed the payment of royalties and established a mechanism for reduced rates, albeit only for small webcasters.[194] However, although the *Bonneville* decision has been accepted, a continuing critique is warranted because it highlights the folly of the entire law and process underlying webcasting royalties, beginning from the DMCA all the way to the ludicrous determinations of the Copyright Arbitration Royalty Panel.

E. *The Battle over Webcasting Rates*

On February 20, 2002, the Copyright Arbitration Royalty Panel (CARP) delivered its conclusion as to what the statutory rate should be, based on marketplace equivalents.[195] Apparently, CARP's determination of the webcasting marketplace, based on the willing buyer/willing seller standard, envisioned most webcasters completely shutting down except for rich conglomerates like Yahoo!, AOL, and Microsoft. Indeed, CARP based its determination on a voluntary agreement reached between the RIAA and Yahoo!, Inc., which it incorrectly assumed was what small and medium sized webcasters would be able to afford. The RIAA/Yahoo! agreement provided for a lump sum payment of $1.25 million dollars for the first one and a half billion transmissions (including both Internet-only transmissions and radio retransmissions). Based on this breakdown, CARP recommended a royalty rate of seven cents per performance per listener for radio retransmissions, and fourteen cents for Internet-only transmissions.[196] CARP based this disparate price treatment on the conclusion that radio retransmissions provide a promotional value that Internet-only transmissions do not provide. The Librarian of Congress, however, correctly found this distinction arbitrary and rejected CARP's recommendation, ultimately settling on a rate of 0.07 cents for both types of transmissions.[197] As to noncommercial broadcasts (e.g., college radio), the Librarian settled on a rate of two cents per performance per listener.[198]

The Librarian, however, made the same mistake as CARP by

---

193 Pub. L. No. 107-321, 116 Stat. 2780 (2002).

194 The SWCA does not define "small webcaster."

195 Copyright Office, U.S. Library of Congress, *Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings*, *at* http://www.copyright.gov/carp/webcasting_rates_final.html (last visited Oct. 4, 2004).

196 *Id.*

197 *Id.*

198 *Id.*

assuming that a voluntary rate agreement between RIAA and one of the largest webcasters in the market would also be appropriate for the smallest webcasters in the market. The problem for small commercial webcasters is that their revenues are much smaller on a per performance basis than those of large webcasting entities.[199] Compounded by the fact that small webcasters typically play independent artists and are in smaller markets, they become unable to secure advertisers willing to pay the attractive advertising fees that the larger webcasters such as Yahoo! and Microsoft are able to secure.[200]

The result was that smaller webcasters began shutting down in droves. Immediately after the Librarian's order, hundreds of Internet radio stations shut down in anticipation of the royalty fee which was expected to go into effect in September of 2002. Indeed, most of the estimated 10,000 webcasters were expected to follow suit.[201] For example, one station which existed on listener donations and received approximately $3000 per month in revenues was expected to pay royalties in excess of $10,000 per month.[202] Moreover, because the rate was retroactive to 1998, the station was looking at an upfront payment of $60,000 to $80,000 – all for running a small Internet radio site out of one's garage.[203] Said an unsympathetic RIAA spokesperson: "If you don't have a business model that sustains your costs, it sounds harsh, but that's real life."[204]

Fortunately for webcasters, Congress did prove sympathetic, immediately passing the Small Webcasters Settlement Act of 2002 (SWSA)[205] in direct response to the Copyright Office's rate determinations. Signed by President Bush on December 4, 2002, the Act allows the recording industry and small webcasters to negotiate smaller licensing fees than those published by the agency.[206] The Act does not specify rates, nor does it define what qualifies as a "small webcaster," but it does specify that any such agreements

199 Letter from Perry J. Narancic, Webcaster Alliance, Inc., to Steven M. Marks, Esq., Vice President, Business and Legal Affairs, Recording Industry Association of America (RIAA) (July 8, 2003), *at* http://www.mp3newswire.net/stories/2003/webcaster.html (last visited Oct. 4, 2004) [hereinafter Webcaster Alliance letter to RIAA].

200 *Id.*

201 Graham, *supra* note 191.

202 Jefferson Graham, *Mourning the End of Small Net Radio Sites*, USA TODAY, July 21, 2002, http://www.usatoday.com/life/music/news/2002-07-21-net-radio_x.htm (last visited Oct. 4, 2004).

203 *Id.*

204 Graham, *supra* note 191.

205 Small Webcasting Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

206 *Id.*

must base royalty payments on a percentage of revenue or expenses, or both, and include a minimum fee.[207] It also includes a small grace period for back payments of royalties due from 1998. Primarily, the Act abandons the willing buyer/willing seller marketplace standard and replaces it with what Congress considers "a compromise motivated by the unique business, economic and political circumstances of small webcasters."[208]

The SWSA was a victory for small webcasters because it based fees on a percentage of revenues instead of performance – a suggestion previously rejected by the Librarian of Congress. However, nothing in the Act compelled the recording industry to negotiate new agreements, and if none were reached, the rates established by the Librarian of Congress would govern.[209] This would be true for all webcasters, not just those targeted by the Act. Fortunately, all parties did come to terms with each other, thus avoiding the Copyright Office rates. Three separate agreements were made involving: 1) standard commercial broadcasters, 2) small commercial broadcasters, and 3) noncommercial broadcasters.

1. Standard Commercial Broadcaster Agreement

SoundExchange, the receiving agent designated by the Librarian of Congress for collection of royalty payments and negotiator of rates on behalf of the recording industry, reached an April 2003 agreement with commercial Internet broadcasters, represented by DiMA. SoundExchange agreed to rates lower than those that would be paid in a free market in order to avoid a protracted and costly arbitration and so it could finally begin receiving royalties – payments needed in order to sustain its operation.[210] The agreement allows nonsubscription commercial webcasters (excluding AM/FM simulcasters) to pay on a per performance or aggregate tuning hour basis.[211] The rates are 0.0762 cents per performance (the same rate established by the Librarian of Congress after the

---

207 *Id.*

208 § 4, 116 Stat. at 2782.

209 *See id.*

210 SoundExchange, *SoundExchange Reaches Agreement on Webcasting Rates and Terms, Avoids CARP, at* http://www.soundexchange.com/press/SE%20Webcast%20Deal%204_03.doc (last visited Mar. 15, 2004).

211 "Aggregate Tuning Hours" is defined as the total hours of programming that the service has transmitted during a month to all listeners in the U.S. from all channels and stations, less actual running time of sound recordings for which the service has obtained a direct license or which do not require a license. SoundExchange, *Summary of RIAA/DiMA Negotiated Agreement for Commercial Webcaster Rates & Terms, at* http://www.soundexchange.com/Summary%20Rates%20&%20Terms%20for%20Webcasters%202003-04%20-%2037%20CFR%20262.doc (last visited Mar. 15, 2004).

last CARP) or 1.17 cents per aggregate tuning hour. Subscription Internet webcasters also have the additional option of choosing to pay 10.9 percent of gross revenues.[212] The agreement runs through 2004 and does not impact the ability of eligible small commercial webcasters to elect rates adopted under the Small Webcasters Settlement Act.

2. Small Commercial Webcaster Agreement

On December 13, 2002, SoundExchange and the Voice of Webcasters (VOW), a coalition of small commercial webcasters, reached a rate agreement under the terms of the SWSA. Pursuant to the Act, the Copyright Office published the terms in the Federal Register, making the rates and terms in the agreement available to any small commercial webcasters meeting the eligibility conditions of the agreement.[213] Under the agreement, an "eligible small webcaster" is one whose revenues from itself and its affiliates did not exceed $1,000,000 from 1998 to 2002, do not exceed $500,000 in 2003, and do not exceed $1,250,000 in 2004.[214] As for the rates, from 1998 through 2002 the royalty rate is eight percent of the webcaster's gross revenues during that period, or five percent of the webcaster's expenses, whichever is greater.[215] For the period 2002 through 2004, the rate is ten percent of the webcaster's first $250,000 in gross revenues and twelve percent of any gross revenues in excess of $250,000 during the applicable year, or seven percent of the webcaster's expenses during the applicable year, whichever is greater.[216] For 2003 and 2004, the minimum payment is $2000 if revenues are below $50,000, and $5000 if revenues exceed $50,000.[217]

In addition, each webcaster is required to maintain and provide arduous and extensive notice and recordkeeping regarding the songs that they broadcast. These include: 1) the name of the featured artist; 2) the sound recording title; 3) the album title; 4) the marketing label; 5) the International Standard Recording Code ("ISRC") embedded in the sound recording (if available); 6) the copyright owner information; 7) the aggregate tuning hours; 8) the channel for each transmission; and 9) the start date and

212 *Id.*
213 Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002), *at* http://www.copyright.gov/fedreg/2002/67fr78510.html (last visited Oct. 4, 2004).
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*

time of each transmission of each sound recording.[218] Such reporting requirements are not a new concept, but have been suggested and required since the first CARP reports, thus highlighting the continuing folly and short-sightedness of the entire process. For example, under the current agreement, a webcaster can earn up to $1,000,000 in revenues in 2004 and still be considered a "small" webcaster. These larger entities would certainly be able to afford the recordkeeping requirements. However, for the smallest of the "small" webcasters such requirements are unduly burdensome, because the webcasters do not have budgets for either automated systems or the manpower to do it manually. One proposed alternative is to structure the recordkeeping similar to that found in 37 C.F.R. § 253.5, which regulates over-the-air music royalties for college and university stations.[219] Under those rules, stations are required to furnish to ASCAP, BMI, and SESAC, upon request, a music-use report during one week of each calendar year. However, ASCAP, BMI, and SESAC may not in any one calendar year request more than ten stations to furnish such reports.[220] These reporting rules would not only be reasonable for small webcasters, but would also reduce the processing costs of SoundExchange.[221] As it stands now, however, the recordkeeping requirements under the VOW agreement (and validated by CARP) are a burden which threaten to shut down the "mom and pop" Internet radio sites which have sprung up in recent years – royalty rates notwithstanding.

As a result, while the SWSA was intended to help small webcasters, not all small webcasters truly benefit under the VOW agreement. Indeed, the VOW was a breakaway group of eight webcasters who negotiated directly with the RIAA purportedly on behalf of themselves.[222] The Copyright Office then published the agreement in the Federal Register, making it the only alternative to CARP for the estimated tens of thousands of small webcasters who were not represented in the negotiations. Unfortunately, the agreement actually harms many, if not most, of those webcasters.[223]

The key issue revolves around the minimum rates established in the VOW agreement. At first glance, the VOW agreement would seem superior to the determination by the Librarian of Congress because the VOW agreement determines rates on total percentage

---

218 *Id.*
219 *See* Kucinich, *supra* note 177, at 2.
220 37 C.F.R. § 253.5(e) (2002).
221 Kucinich, *supra* note 177, at 2.
222 *See* Andrew Orlowski, *RIAA Faces Antitrust Suit*, THE REGISTER, Aug. 9, 2003, *available at* http://theregister.co.uk/content/6/31649.html (last visited Oct. 4, 2004).
223 *See* Webcaster Alliance letter to RIAA, *supra* note 199.

of revenue, instead of the per performance rate set by the Librarian. In this sense, the VOW agreement better serves small webcasters. However, unlike the Librarian's determination, which sets minimum rates at $500, the VOW agreement sets minimum rates at $2000. As a result, back payments for the period 1999-2002 would be $8000, a four-fold increase over the Librarian's "reasonable rates." Given that most small webcasters do not generate a profit, this minimum payment would arguably warrant that many webcasters forego operation.[224] The alternative would be to elect the Librarian's rates which set the minimum payment at five hundred dollars, but then the webcaster would be bound to pay seven cents per performance per listener, which could still amount to thousands of dollars depending on the number of listeners. Small commercial webcasters are essentially placed "in an untenable no-win situation."[225]

Granted, in a free market, there is nothing untoward about weeding out small webcasters that cannot sustain a profitable business model. "If a grocery store can't afford to pay for the vegetables, they can't keep their doors open."[226] However, small webcasters are claiming an uneven battlefield, arguing that the agreement between the RIAA and the Voice of Webcasters violates antitrust and anti-competition laws. The Webcaster Alliance, a leading association of small webcasters in the United States, argues that the Voice of Webcasters (represented by only eight entities) entered into an agreement amongst themselves and with the RIAA which established minimum rates that would raise the cost of doing business for most small commercial webcasters, thus eliminating much of the VOW Eight's competition.[227] It also contends that the RIAA supports eliminating small webcasters because small webcasters are the primary purveyors of independent music, which poses a threat to the RIAA's monopolistic control of mainstream material.[228] The Webcaster Alliance's contention is strongly buttressed by a comment from an RIAA attorney who stated that he didn't care if 25,000 webcasters went out of business because AOL would soon be offering hundreds of streaming channels.[229] AOL, of course, would pay its bill to the RIAA at "large webcaster" rates.

A proposed solution is to restore the $500 minimum fee

224 *Id.*
225 *Id.*
226 Graham, *supra* note 191 (quoting RIAA spokesperson Hilary Rosen).
227 Webcaster Alliance letter to RIAA, *supra* note 199.
228 *Id.*
229 Orlowski, *supra* note 222.

adopted by the Librarian of Congress and maintain the percentage-of-revenue fee structure contained within the VOW agreement. This would allow for the commercial distribution of both mainstream and independent material.[230] To date, the RIAA has refused to negotiate a change, thus leaving many small webcasters in noncompliance with either the Librarian or the VOW rates. Therefore, the result may be lawsuits from both sides – by the RIAA against webcasters for non-payment, and by webcasters against the RIAA for anticompetitive practices in the way it adopted the VOW agreement.[231] Five years after the passage of the Digital Millennium Copyright Act and subsequent passage of the SWSA, the fight over commercial webcasting still remains unresolved.

3. Noncommercial Webcasting Agreement

On June 2, 2003, SoundExchange and representatives for various collegiate and religious noncommercial broadcasters submitted an agreement to the Copyright Office for publication in the Federal Register.[232] Unlike the ongoing flap over commercial webcasting rates, the noncommercial agreement set relatively reasonable rates and conditions which acknowledge the unique mission of educational broadcasters while still compensate performers for their work. The royalty rate is $200 in back-royalties for 1998 through 1999, $250 per year for 2000 through 2003, and $500 per year in 2004. However, for school-affiliated stations with an enrollment of less than 10,000, the cost will be $250 per year in 2004, provided that the stations average less than two hundred concurrent listeners during a month. For each and every listener above two hundred, the station will need to pay a usage fee, roughly equivalent to what was published last June 2002 by the Librarian of Congress.[233] Most importantly, the arduous recordkeeping requirements established under CARP have been eliminated. Instead, stations will pay an additional fee in 2003 of fifty dollars in lieu of conducting recordkeeping. For 2004, the cost is twenty-five dollars.[234] In light of earlier CARP determinations, most noncommercial broadcasters regard the agreement as a victory in keeping streams from shutting down.[235]

---

230 *See* Webcaster Alliance letter to RIAA, *supra* note 199.

231 *Id.*

232 *See* COPYRIGHT OFFICE, U.S. LIBRARY OF CONGRESS, NOTIFICATION OF AGREEMENT UNDER THE SMALL WEBCASTER SETTLEMENT ACT OF 2002 (June 2, 2003).

233 *Id.* at 2-5.

234 *Id.* at 7-8.

235 *See, e.g., Save Our Streams, at* http://www.ruf.rice.edu/~willr/cb/sos/index2.shtml (last visited Oct. 4, 2004) (referring to webcasts as "saved" by the agreement).

F. *Final Note on Webcasting*

Despite partial resolution over rate issues – most notably by noncommercial broadcasters – there is still much left unresolved and more work to be done. First, the current agreements are valid only through 2004, and a new CARP is set to convene if new agreements are not reached. Second, many small commercial webcasters remain noncompliant due to the questionable VOW agreement, not to mention the recordkeeping requirements imposed upon them. Additionally, even if the rate and recordkeeping issues are resolved, as they have been with noncommercial stations, the DMCA content restrictions still remain in place (i.e., limiting the number of songs per recording or artist that may be played in a given time, etc.). Also, the DMCA requirement to display the artist, song title and album title to the end user is still in place. Many stations with limited resources do not possess this capability. Therefore, they will be noncompliant absent a waiver.

To be sure, Congress was mistaken in rushing the DMCA webcasting provisions in 1998. Congress assumed that the market would determine reasonable rates and the recording industry and webcasters would enter into mutually beneficial agreements, as had been done with radio broadcasting over the past one hundred years. However, unlike the finite nature of terrestrial broadcasting as compared to webcasting, the two proved to be different species entirely in the eyes of the recording industry, thus warranting different approaches. Fortunately, Congress is aware of the imperfections in the current rate-setting process. The House of Representatives is currently debating a bill entitled the Copyright Royalty and Distribution Reform Act of 2003, which would call for the appointment of three Copyright Royalty Judges to oversee the process.[236] The judges would be empowered to carry out proceedings; one of the stated purposes is to "maximize the availability of creative works to the public."[237] In the meantime, webcasters are continuing to stream under the current agreements due to expire at the end of 2004, at which time they may find themselves back at the CARP drawing board.

While a more effective rate-setting process is demanded, it is ultimately in the best interests not just of webcasters, but also the public and recording artists, for Congress to reduce or eliminate outright the performance royalty for all webcasters and put them

---

[236] Copyright Royalty and Distribution Reform Act of 2003, H.R. 1417, 108th Cong. § 3(a) (2003).

[237] *Id.* at 2.

on a level playing field with traditional AM/FM broadcasters. Reduced impediments will result in increased outlets for music, which, in turn, will result in greater individual choice and break the stranglehold that the current industry has on broadcasting and culture. Increased distribution would especially help to promote all artists, particularly obscure and independent artists, thereby increasing sales. From 1998 until recently, many webcasters who have been streaming had yet to make a single performance royalty payment because of the continual uncertainty hovering over the rate-setting process. Yet, in those five years, there have been no suggestions by artists that webcasting was a detriment to their livelihood. On the contrary, the industry survived the past five years just fine without royalty collection in place. Therefore, it can continue to do so indefinitely. Nevertheless, if there has in fact been any detriment, the industry should not blame it on *legal* webcasting, but rather *illegal* MP3 file-sharing.

III. MP3 File-Sharing

In addition to webcasting, the other controversial area in the online music revolution is the illicit sharing of copyrighted MP3 songs. However, unlike the webcasting imbroglio, MP3 file-sharing is garnering all of the mainstream headlines – not surprising given the RIAA's recent string of lawsuits against individual infringers, including twelve-year-old children.[238] Indeed, there are reasons for the RIAA's recent deliberate actions. For one, whereas the threats to music sales caused by webcasting are disputed and theoretical, the threats to record sales caused by online file-sharing are, according to the RIAA, actual and quantifiable. For example, the music industry claims it has suffered a thirty percent loss in album sales over the last several years, blamed primarily on everyday computer users.[239] Additionally, whereas webcasters who know they are contravening of the law ultimately choose to cease operations, file-sharers by the millions continue trading music, often justifying their actions by claiming they are merely sampling before purchasing.[240]

This next section will begin with a brief overview of how MP3 file-sharing works, and will then discuss the key cases which have

238 In 2003, the RIAA filed suit against hundreds of file-sharers in an attempt to discourage others from continuing their activities. *See* Soni Sangha & Phyllis Furman, *Sued for a Song*, N.Y. Daily News, Sept. 9, 2003, *available at* http://www.nydailynews.com/front/story/116117-p104761c.html (last visited Mar. 15, 2004).

239 *Id.*

240 An estimated forty-three million Americans – half of those connected to the Internet – use file-sharing software every month. *See* Amy Harmon, *In Fight over Online Music, Industry Now Offers a Carrot*, N.Y. Times, June 6, 2003, at 1.

fashioned the current state of the law. Finally, it will discuss the legal, technological, and marketplace alternatives available to combating illegal file-sharing under the current marketplace system, while at the same time, arguing for an increased distribution of music.

A. *How File-Sharing Works*

Peer-to-peer (P2P) technology allows users all across the Internet to communicate directly with one another as if their computers were directly connected to each other over a network. Each user connected to the Internet is recognized by a unique Internet Protocol (IP), a series of numbers which identifies each user and allows others to connect to that address. Users who wish to set up websites, for example, rely on a domain name system (DNS) and can attach "friendly" names to an IP numbered address. For instance, typing "www.microsoft.com" actually directs the user to the IP of 207.46.245.222. Free file-sharing software allows users to connect directly to anyone else using the same software through their IP and trade music at will.

The process begins with one single user anywhere in the world taking an original music CD and "ripping" it onto his computer. That is, the user converts each individual track into an MP3 file and stores it on his computer hard drive.[241] Using P2P software, anyone can connect directly to that original user and download the file directly off his computer. The downloaded copy may then be downloaded by another user, multiplying exponentially the copying and illegal distribution of the copyrighted work.

The reliance upon and ready availability of individual user IPs highlights the fallacy and misconception of Internet privacy. Although Internet surfers and P2P users who trade "anonymously" are recognized only by their esoteric user name and numeric IP, anyone can instantly trace that IP to the online service provider (OSP) from which it originates – for example, America Online. Through subscription records, the OSP is then able to identify by name to whom that IP belongs.

Despite the best efforts of OSPs, however, to keep Internet user identification private,[242] section 512(h) of the Copyright Act

---

[241] Under the Audio Home Recording Act of 2002, the copying of a validly owned CD onto one's computer is permissible, provided it is used only for personal use. *See* 17 U.S.C. § 1001 (2000).

[242] *See* Recording Indus. of Am. v. Verizon Internet Servs., 2003 U.S. Dist. LEXIS 6778 (D.C. Cir. 2003) (Verizon fruitlessly resisting attempts to reveal the identity of a copyright infringer under the DMCA on privacy grounds).

(DMCA) contains a procedure whereby copyright holders can compel an OSP to reveal the identity of a potential infringer before a lawsuit is ever filed.[243] While suing specific individuals was always an option for the RIAA, at first such a strategy appeared impractical, as well as likely to act as a lightning rod for bad public relations. Therefore, instead of dealing with each bee one at a time, the RIAA tried to destroy the entire nest all at once – suing the makers and distributors of P2P software. The three primary cases which inform this debate are the *Napster*, *Aimster*, and *Grokster* cases.

B. *Case Law: Suing The Makers of P2P Software*

1. *A&M Records, Inc. v. Napster, Inc.*

Napster was the preeminent pioneer among peer-to-peer file-sharing software providers. Napster's MusicShare software – available as a free download from Napster's website – allowed users to search for and trade MP3 music files among anyone else using the software.[244] To use the system, a user would register on the Napster system with a user name and password. The user would next log-on to the system, whereby the software would search his designated music library and upload the names of the MP3 files on the user's computer to the Napster servers. The servers would then create a search index for all connected users. Once a user finds a song he wishes to download from another user, the Napster servers would then negotiate a direct connection among the two, facilitating the transmission.[245] In addition, Napster provided other services which aided the transfer of files, such as technical support for indexing and searching of MP3 files, as well as providing a "chat room" where users could discuss music.[246]

On December 6, 1999, several record companies filed an action against Napster for vicarious and contributory copyright infringement.[247] However, in order to prove vicarious and contributory infringement by Napster, it was necessary for the plaintiffs to first prove that individual users who engaged in MP3 file-sharing were, in fact, primary infringers of copyright. The Ninth Circuit agreed that Napster users violated the copyright

---

243 17 U.S.C. § 512(h) (2000). A copyright owner may obtain a subpoena from a federal court ordering a service provider to reveal the identity of a subscriber who is allegedly engaging in infringing activities. It is a procedure more simplified than filing a "John Doe" suit.

244 *See* A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004, 1011 (9th Cir. 2001).

245 *Id.* at 1012.

246 *Id.* at 1011.

247 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 898, 900 (N.D. Cal. 2000).

holders' exclusive rights of reproduction and distribution by uploading and downloading files.[248] Napster, however, contended that the users were engaged in fair use by virtue of sampling, space-shifting, and permissive distribution. The court dismissed the general fair use argument, first holding that file-sharers were engaged in commercial use because they were getting something for free that they would ordinarily have to buy.[249] Furthermore, the fact that users were engaged in wholesale copying of entire songs, and not merely portions, militated against a finding of fair use. Finally, the court determined that Napster harmed the marketability of the copied works by reducing CD sales among college students and by raising barriers to the plaintiffs' entry in the market for the digital downloading of music. Having the downloads available for free, according to the Court, harmed the copyright holders' attempts to charge for the same downloads.[250] This prevented a general finding of fair use.

The court also rejected Napster's specific claims of fair use. Napster claimed that users were sampling music in order to decide whether to purchase the recording. The court rejected this fair use argument because free promotional downloads are regulated by the industry, and record companies collect royalties for thirty-to-sixty second song samples available on retail Internet sites. By contrast, Napster users download a full; free, and permanent copy of the recording.[251] Additionally, Napster claimed that users were merely space-shifting – downloading MP3 files that they already owned on CD, an act deemed permissible under prior Ninth Circuit decisions.[252] However, the "shifting" analysis was inapplicable because permissible space-shifting does not simultaneously involve the distribution of copyrighted material to the general public.[253] Napster's final fair use claim involved permissive reproduction by artists. However, because the plaintiffs did not seek to enjoin permissive use, this argument was inapplicable.

Having settled in the affirmative the easy question of whether individual MP3 file-sharers were infringing copyright, the court then addressed whether Napster was secondarily liable and could be enjoined, thus shutting the pipeline for *all* infringers. The

---

248 *Napster*, 239 F. 3d at 1014.
249 *Id.* at 1015.
250 *Id.* at 1017.
251 *Id.* at 1018.
252 *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., *180 F.3d 1072* (9th Cir. 1999) (holding the Rio portable MP3 player permissibly allows a user to make copies in order to render portable files already on a person's computer hard drive).
253 *Napster*, 239 F.3d at 1019.

court found contributory liability on the part of Napster because it knew, or had reason to know, of direct infringement.[254] However, in a key set of reasoning, the Ninth Circuit failed to impute the requisite level of knowledge needed for contributory infringement merely because peer-to-peer file-sharing technology *may* be used to infringe copyrights.[255] So long as the software is capable of substantial noninfringing uses, knowledge will not be imputed. However, if a computer operator learns of specific infringing material and fails to purge the system of it, the operator knows of and contributes to the infringement, as was the case in Napster. The court also found the contribution to be material because without its integrated support services, users would not be able to locate music as easily.[256]

The court also found Napster vicariously liable for copyright infringement because it had a right to supervise, and also had a direct financial interest in, the activities. Napster had the right and ability to supervise the infringing activity by blocking user access and it had the right to refuse service for any reason. It also had the ability to locate infringing material listed on its search indices. Finally, Napster had a direct financial interest because its future revenue was directly dependent on increases in its user-base.[257]

The modified injunction did not place the entire burden upon Napster to police and purge infringing works on its system. The court required Napster to remove any user file from the system's music index if Napster had reasonable knowledge that the file contained the plaintiffs' copyrighted works. The plaintiffs, in turn, were required to give Napster notice of specific infringing files.[258] After three months of monitoring by the district court, it determined that Napster was not in satisfactory compliance with the modified preliminary injunction. In a victory for the recording industry, the court ordered Napster to shut down.[259]

2. *In re: Aimster Copyright Litigation*

Similarly, although less infamous than Napster, Aimster was a

---

254 *Id.* at 1020.

255 The Ninth Circuit followed Supreme Court precedent in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (refusing to hold the manufacturer and retailers of video tape recorders liable for contributory infringement despite evidence that such machines could be and were used to infringe plaintiffs' copyrighted television shows, and refusing to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and "substantial noninfringing uses").

256 *Napster*, 239 F.3d at 1022.

257 *Id.* at 1022-24.

258 *Id.* at 1028.

259 A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

free software service that allowed registered users to trade files amongst one another. The "A," "I," "M," in Aimster stood for America Online's popular instant messaging service. Aimster piggy-backed onto that service, allowing users of the service to designate and trade only with "buddies," or to configure their systems to trade with anyone online with the service. When a user wished to search for a particular file, Aimster's server would search the computers of all online users and then instruct the host computer to transmit the file.[260]

In June 2003, the Seventh Circuit upheld an injunction forcing Aimster to shut down.[261] The Seventh Circuit's reasoning, however, did not go as far as the Ninth Circuit's, thus leaving open the possibility that future software makers could not be enjoined if people used their software for legal file-sharing. Judge Posner, writing for the Seventh Circuit, began by essentially taking judicial notice that file-swappers infringed copyright[262] (unlike the *Napster* court, which made that determination after a multi-page analysis). The court focused primarily on Aimster's potential liability as a contributory infringer, relying on the Supreme Court's analysis in *Sony Corp. of America v. Universal City Studios, Inc.*[263] In *Sony*, the Court held that the sale of Sony's betamax video recorder could not be enjoined; the producer of a product having substantial noninfringing uses was not a contributory infringer merely because some actual uses of the product were infringing.[264] The betamax video recorder had three principle purposes: 1) time-shifting a recording to watch at a later time, 2) making copies of programs to retain permanently (library-building), and 3) skipping commercials while watching a tape. The Court determined that the second and third uses were infringing uses; however, if copying equipment was merely *capable* of substantial noninfringing uses, its sale could not constitute contributory infringement.[265] Furthermore, knowledge of infringing uses was insufficient. It was on this point that the *Aimster* court said that the Ninth Circuit in *Napster* erred; actual knowledge of specific infringing uses was not a sufficient condition for deeming a facilitator to be a contributory infringer.[266] Thus, openings were being created for future legal file-trading software.

Nevertheless, despite these openings, the Seventh Circuit still

260 *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003).
261 *Id.*
262 *Id.* at 645.
263 464 U.S. 417 (1984).
264 *Sony*, 464 U.S. 417.
265 *Id.* at 438.
266 *In re Aimster*, 334 F.3d at 14.

found Aimster to be a contributory infringer based on the facts of the case, holding that it was not necessarily enough for a product or service to be physically capable of noninfringing uses. For example, in explaining how to use its software, the Aimster tutorial provided the sharing of copyrighted music as the only example of file-sharing.[267] Furthermore, membership in Club Aimster for $4.95 per month allowed members to download with a single click the copyrighted music most often shared by users with a single click. Moreover, just like Napster, Aimster's servers actively searched users' computers on behalf of other users for songs available for sharing.[268] Aimster provided no evidence that its service was actually used for any noninfringing purpose whatsoever.

The court also rejected Aimster's defense under section 512 of the DMCA, the Online Copyright Infringement Liability Act, which creates a safe harbor for online service providers from copyright infringement by their subscribers. To fall within its protection, an OSP must do what it reasonably can to prevent the use of its service by repeat infringers.[269] Aimster, however, did nothing to discourage repeat infringers and, in fact, invited them to do so through its tutorials and encryption of transmissions.[270] As a result, the court found Aimster liable as a contributory infringer and upheld the injunction, forcing it to shut down.

3. *MGM Studios v. Grokster, Ltd.*

Hot off the successes of *Napster* and *Aimster*, the recording industry next took aim at the remaining popular file-sharing software distributors, Grokster and StreamCast (formerly or alternatively branded under the popular KaZaa, Gnutella, and Morpheus names, among others).[271] The defendants distributed free software which allowed users to connect directly to one another (peer-to-peer) and share files, particularly copyrighted music. Like Napster, the defendants' software was downloaded from servers operated by the defendants. However, unlike Napster, the defendants did not operate a centralized file-sharing network which facilitated searches for music among users or established the connection between them. Search requests on StreamCast, for example, are sent directly over the Internet to other users of the software until a match is found. The two users then share files

---

267 *Id.* at 22.
268 *Id.*
269 *Id.* at 33.
270 *Id.*
271 *See* MGM Studios v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1031-33 (C.D. Cal. 2003).

without the assistance of any third party such as Napster. It is a *true* peer-to-peer transfer, meaning that even if the defendants deactivated their computers, those people who already have the software would still be able to trade copyrighted music.[272]

The recording industry nevertheless argued that Grokster and StreamCast were still liable as contributory infringers because 1) they had knowledge that their software was being used primarily for illicit music sharing, and 2) creating and distributing the software materially contributed to the infringement.[273] Because there were substantial noninfringing uses for the software (e.g., sharing movie trailers, public domain materials, independent artists), constructive knowledge of infringing activity was insufficient to warrant liability based on the mere distribution of the software.[274] Nevertheless, the defendants clearly knew that most of the individuals who downloaded their software would subsequently use it to infringe copyrights. Indeed, both Grokster and StreamCast even marketed themselves as "the next Napster."[275] However, the court held that to be liable under contributory infringement, they must have had actual knowledge at a time when they could have used that knowledge to stop the particular infringement. Unlike Napster, Grokster and StreamCast do not materially contribute to infringement because they do not provide the site, facilities, and support for infringement. They are no different than companies that sell home video recorders and copy machines, like Sony or Xerox. While Grokster and StreamCast know their products will be used illegally by many users and provide future refinements, absent evidence of active and substantial contribution to the infringement itself contributory infringement does not lie.[276] Similarly, because the defendants do not have the right or ability to supervise the infringing conduct, the doctrine of vicarious liability also did not apply.[277] As a result, the recording industry suffered a major defeat in its attempt to cut off the pipeline of illegal file-sharing at its source, for makers of peer-to-peer software could continue distributing their products to millions of people despite having full knowledge that they would be used primarily for illicit music sharing.

---

272 *See id.* at 1040-43.
273 *Id.* at 1035.
274 *Id.*
275 *Id.* at 1036-37.
276 *Id.* at 1042-43.
277 *MGM Studios*, 259 F. Supp. 2d at 1045.

C. *Suing Individual Infringers Directly*

Following its failure to halt the distribution of file-sharing applications, the recording industry found itself at a difficult crossroads. It had the choice of embracing new technologies and adjusting its market model in response to consumer complaints, or fighting to maintain the status quo. To be sure, many consumers claimed they resorted to file-sharing because of their discontent with the industry; such discontent was caused by, for example, labels charging upwards of twenty dollars per album, which often contain only two or three "hit" songs and "filler" material as the remainder. The industry did, in the end, choose to be more responsive to consumers, although not in the way consumers had hoped. The industry sued them.

Over the course of several weeks in July 2003, the industry sent out close to one thousand subpoenas to more than a dozen Internet service providers and several universities, seeking to identify the names of individuals based on their IP addresses.[278] The industry relied upon the controversial subpoena provision of the DMCA which compels OSPs to turn over subscriber information without first requiring copyright holders to file a lawsuit.

D. *DMCA's Supercharged John Doe Rule*

Section 512(h) of the DMCA states that "a copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer . . . ."[279] The major benefit is that it saves a great deal of time and money compared to filing an entire John Doe suit, thus allowing copyright holders to target infringers en masse in an action that might otherwise be prohibitively costly. However, the negative consequences of such empowerment outweigh any benefits gained in policing online infringement. For instance, section 512(h) creates a form of "self help" ripe for abuse by exposing individuals' ever-fleeting privacy assurances, as well as creating documented episodes of mistaken identity in singling out the wrong individuals. As an example, the ACLU has recently filed a suit seeking to prevent universities from revealing the identities of students.[280] It argued that the subpoenas, which can be issued by a clerk with no judicial over-

---

[278] Amy Harmon, *Subpoenas Sent to File-Sharers Prompt Anger and Remorse*, N.Y. TIMES, July 28, 2003, at C1.

[279] 17 U.S.C. § 512(h) (2000).

[280] John Schwartz, *A.C.L.U. Challenges Music Industry in Court*, N.Y. TIMES, Sept. 29, 2003, at C4.

sight or involvement, not only go beyond what the law allows, but that the law itself is unconstitutional because it does not provide for the judicial review of requests or notification of the target of the investigation.[281] Additionally, some OSP's have currently refused to turn over user identities on public policy and privacy grounds.[282] Because many OSP's are telecommunications companies, they possess unlisted and other confidential information that their industry has traditionally safeguarded.[283] Indeed, the RIAA itself admits that the suits and subpoenas are primarily a scare tactic intended to intimidate others from distributing copyrighted works.[284]

Unfortunately, this scare tactic has resulted in cases of mistaken identity in which innocent people who purportedly have never dealt in online file-sharing have been sued. One example is a sixty-six year-old retired schoolteacher who was sued even though her computer was not even capable of running file-sharing software.[285] Often, members of the household other than the named defendant might have had access to the machines. Additionally, many service providers issue their IP numbers dynamically, meaning the numbers shift each time a user goes online. Service providers and the recording industry group say they can accurately trace a dynamic IP number back to a single user; however, identifying a particular user becomes tricky and more difficult.[286] Nevertheless, mistaken lawsuits still serve the purpose of the RIAA, since these lawsuits are a deterrent for average people who may fear they may be next. However, while lawsuits for corporations like the RIAA are a cost of doing business, the average person does not have a cadre of attorneys on hand to defend against the current rash of lawsuits, many of which are arguably against the wrong person.[287] Therefore, more judicial oversight should be required over the subpoenas issued under the DMCA.

Eliminating the subpoena provision will not greatly affect a copyright owner's ability to generally protect against online copyright infringement. Section 512(d) of the DMCA already contains a provision requiring an OSP to remove alleged infringing material

---

281 *Id.*

282 Seth Schiesel, *SBC Won't Name Names in File-Sharing Cases*, N.Y. TIMES, Sept. 16, 2003, at C1.

283 *Id.*

284 *See* Harmon, *supra* note 278.

285 *See* John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES , Sept. 25, 2003, at C1.

286 *Id.*

287 *Id.*

immediately upon the mere written request of the copyright owner, without even requiring a subpoena.[288] If the owner then wishes to sue the infringer, he may do so through a normal John Doe lawsuit. The section 512(h) subpoena provision, on the other hand, is not necessary to accomplish this. The section 512(d) take-down protections properly balance the rights of the copyright owner by allowing for an immediate take-down of infringing material while simultaneously protecting the privacy and rights of the alleged infringer against a false accusation. Conversely, the subpoena provision does nothing to balance the rights of the alleged infringer. P2P file-sharing is beyond the scope of the section 512(d) protections because they deal only with infringing material which currently resides on OSP servers, unlike in file-sharing. In this regard, the subpoena provision is helpful to the entertainment industry (both music and movie) in tracking down infringers as quickly as possible and policing the Internet. However, allowing for a blanket subpoena provision which may be used in *any* instance of alleged infringement, and which does not require the subscriber to be informed of the subpoena against him, tramples upon the privacy expectations which users have come to expect from their Internet providers. More importantly, it makes it easy for anyone to unscrupulously obtain an anonymous user's name and address and use it for nefarious purposes.

The controversial DMCA subpoena provision has not gone unnoticed in Congress. Senator Sam Brownback of Kansas introduced a bill that would provide limited protection for Internet providers from the controversial subpoenas.[289] Unfortunately, the bill does not go far enough. His proposal would block subpoenas, except in pending civil lawsuits and in cases where unauthorized copies were stored on Web sites. The bill is more of a "pro-P2P" or "anti-RIAA" provision rather than a provision which addresses the fundamental problems underlying the current DMCA subpoena. For example, the proposed bill still allows any person to immediately obtain the identity of any other person without judicial supervision, simply by claiming that the person has posted copyrighted material on the Internet. However, as stated earlier, this is unnecessary because section 512(d) already provides a cheap and effective mechanism for the expeditious removal of copyrighted material from Web sites without requiring Internet providers to re-

288 *See* 17 U.S.C. § 512(d) (2000).

289 *See* Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S.1621, 108th Cong. § 5. Legislative information on the Act can be searched through the U.S. Library of Congress, *at* http://thomas.loc.gov (last visited Oct. 4, 2004).

veal confidential information about their subscribers. If anything, the subpoena provision would be most useful in P2P situations where take-down provisions are inapplicable, not in situations where material is posted to Web sites. In essence, the Brownback bill provides nothing more than a free pass for music file-sharers while doing little to prevent the potential abuses the DMCA subpoena provision presents.

Nevertheless, even with this powerful subpoena ability in the hands of the music industry, the resulting flood of subpoenas and lawsuits by the RIAA has failed to prove even marginally effective in curbing file-sharing. The week after the highly publicized lawsuits were filed, KaZaa, the most popular file-sharing software, suffered only a five percent reduction in users. Meanwhile, some of the smaller file-sharing services experienced increases in users.[290] Polls also found that among the thirty-five million adults that downloaded music, twenty-three million said they did not care much about the copyright on the files they copied onto their computers. As legal experts argued, legal prohibition alone is rarely effective in getting people to behave differently if it runs counter to strong societal beliefs.[291] Such societal beliefs run even stronger in European and Asian countries, where sales of music have plunged even more steeply. In Europe, a combination of file-sharing, home CD burning, and mass production of knock-offs have resulted in music sales falling one-third. Additionally, despite strict intellectual property laws in many Asian countries, piracy remains both prevalent and culturally accepted.[292] In China, nine out of ten recordings are pirated. Similar levels of cultural acceptance have since permeated the United States. Therefore, absent a change in the product delivered by the industry or a re-education campaign which appeals to people's sense of conscience, a few hundred lawsuits against casual file-sharers alone is unlikely to have any significant lasting impact.

E. *Legislative Attempts to Combat File-Sharing*

Cognizant that current and conventional available remedies to combat file-sharing – such as individual lawsuits – are largely insufficient, Congress has jumped in with its own attempted solutions. The most recent is the Author, Consumer, and Computer Owner

290 Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, at A1.

291 *Id.*

292 *See* Mark Landler, *For Music Industry, U.S. Is Only the Tip of a Piracy Iceberg*, N.Y. TIMES, Sept. 26, 2003, at A1.

Protection and Security Act of 2003 (ACCOPS).[293] Introduced by Representative John Conyers, the bill requires that providers of P2P software clearly and conspicuously warn that the software could create a security and privacy risk for the user's computer, and the provider must obtain prior consent from the user before the downloading. Section 301 of the bill makes it a crime to place any copyrighted work on a public computer network without the authorization of the copyright owner.[294]

The first portion, regarding warnings of security and privacy risks, is apparently intended to dissuade users from downloading P2P software in the first place, thus reducing the potential universe of file-sharers. However, concerns for the end user's security and privacy as written in the bill are disingenuous at best because the Act limits the warning requirement discriminatorily to providers of P2P software and ignores providers of potentially equally invasive software, such as chat-room software. Further, there have yet to be any publicized incidents of grave security breaches from common P2P software.[295]

While the warning provision is unduly narrow, the section 301 consent provision is unduly broad because it restricts the uploading of *any* copyrighted work without the copyright owner's authorization. This runs contrary to one of the DMCA's principally stated goals of allowing for the electronic dissemination of copyrighted material for purposes of fair use.[296] The language of the Conyers bill, unfortunately, would restrict unauthorized uploading of any work, even if intended for education, criticism, or news reporting. Moreover, this bill would do little to discourage illicit music sharing and only reiterates that which is already covered under existing copyright law – that uploading unauthorized copyrighted material is prohibited.

Another bill, the Piracy Deterrence and Education Act of 2003, introduced in the House in June 2003, seeks to establish an Internet Use Education Program within the Department of Justice.[297] Its purpose, among other things, is to "educate the general public concerning the value of copyrighted works and the effects of the theft of such works on those who create them."[298] While this

---

293 H.R. 2752, 108th Cong. (2004).

294 *Id.*

295 *See* P2P United's position on H.R. 2752, *at* http://www.p2punited.org/modules.php?op=modload&name=News&file=article&sid=16&mode=thread&order=0&thold=0 (last visited Oct. 4, 2004).

296 *See* COPYRIGHT OFFICE, *supra* note 74, at 1.

297 *See* H.R. 2517, 108th Cong. (2003).

298 *Id.* § 5(b).

seems like a noble idea, there are two problems with this bill: the entertainment industry is already privately financing its own "education" campaign, and surveys show that people already know they are violating copyrights but do not care.[299] As such, a taxpayer-funded education program is unlikely to have the desired effect.

One such bill which *would* have the desired effect of curtailing illicit P2P sharing was introduced by Rep. Howard Berman. The bill would allow copyright owners to legally hack into and disable or impair P2P networks in order to prevent their works from being traded.[300] Extending this bill, Senator Orin Hatch went so far as to suggest that record companies should be able to "destroy" the computers of people who illegally downloaded songs.[301] He eventually backed off his suggestion, realizing that such a remedy is contrary to federal anti-hacking laws, not to mention the liberty and due process implications this remedy would create.[302] Yet, while legally sanctioned "self-help" solutions such as the Berman bill are unlikely to see passage anytime soon, this has not stopped the recording industry from quietly financing the development of its own sabotage programs.[303] Such methods include clogging the Internet connections of P2P users as well as disabling their computers. It is a risky proposition, to be sure, because of potential liability for mistaken identity or unintended damage. Instead, the industry would be better served by investing that money in other anti-piracy tools such as musical encryption. For example, aware that future digital television signals may be intercepted and distributed illegally over the Internet, the FCC has recently mandated to makers of digital televisions that their receivers must recognize digital markers that broadcasters can imbed in their programs to limit piracy.[304] Similarly, the music industry could work with Congress in developing standards for music playback devices that might recognize digital markers in music CDs. Although such technology is many years off, it is a better strategy and investment for the music industry than suing users or sabotaging their computers.

---

299 *See* Rob Walker, *The Way We Live Now*, N.Y. TIMES, Sept. 21, 2003, at 15.

300 H.R. 5211, 107th Cong. (2002).

301 *Hatch Backs Off 'Cure' For Piracy*, SEATTLE TIMES, June 23, 2003, *available at* http://seattletimes.nwsource.com/html/businesstechnology/135053750_btdownload23.html (last visited Mar. 15, 2004).

302 *Id.*

303 *See* Andrew Ross Sorkin, *Software Bullet is Sought to Kill Music Piracy*, N.Y. TIMES, May 4, 2003, at 1.

304 Jonathon D. Salant, *FCC Approves Internet Anti-Piracy Tool*, ASSOCIATED PRESS, Nov. 4, 2003, *available at* http://story.news.yahoo.com/news?tmpl=story&cid=528&ncid=528&e=1&u=/ap/20031104/ap_on_go_ot/digital_tv_piracy (last visited Mar. 15, 2004).

F. *Congress Should Promote Music, Not Suppress It*

As many experts have argued, legal prohibition alone is ineffective in getting people to change behaviors when it runs counter to strong societal beliefs.[305] As such, instead of trying to suppress music distribution and return the industry to status quo, Congress and the music industry should embrace models that foster distribution, which is ultimately in the public's interest. One possibility is to extend compulsory licensing to music distribution. Broadcasting, webcasting, and other instances of the public performance of songs, such as "cover songs," are examples of compulsory licensing; people are entitled to use the creative work without the copyright owner's permission so long as the user pays the statutory fee. The fees are set by Copyright Arbitration Royalty Panels at fair rate determinations.[306] With a compulsory music distribution model, listeners would have access to all the music a record company possesses and could have it streamed to them at any time. Not only would it increase the distribution of music, but it would lower the cost to users.

The current CD distribution model is costly to the industry. In addition to packaging, the industry must deals with intermediaries such as distributors and promoters, all of which raise the cost of getting music to the end listener.[307] Direct streaming, on the other hand, could result in statutory rates far lower than the current cost of getting music, thus benefiting the public greatly. The increased distribution would also benefit smaller independent music labels, who ironically, as a result of illegal P2P sharing, are already seeing the benefits of increased distribution. Owners of independent labels have claimed that file-sharing helps their companies compete against conglomerates for advertising and access to radio programmers.[308] With reduced overhead costs, smaller labels are then able to split profits evenly with artists (as contrasted with major label artists, who often earn about ten percent).[309]

The key issue, of course, is how to collect money and fairly divide it among labels, performers, and songwriters.[310] The webcasting collection agency SoundExchange serves as a model. Simi-

---

305 *See* Harmon & Schwartz, *supra* note 290, at A1.

306 *See* 17 U.S.C. § 801(b) (2000) (outlining the requirements by CARP in setting reasonable rates).

307 *See* Don Tapscott, *New Economy; To Stay Viable, Record Companies Should Make All Their Music Available Online, Some Experts Say.* N.Y. TIMES, Sept. 15, 2003, at C3.

308 *See* Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe,* N.Y. TIMES, Sept. 22, 2003, at C1.

309 *Id.*

310 *See* Tapscott, *supra* note 307.

lar to webcasting, Internet users could be taxed, with the fee being placed in a revenue pool and then distributed according to song popularity.[311] The SoundExchange system is still in its infancy and is thus not properly tested; but if it succeeds, its business model could be adapted to on-demand Internet music distribution.

As Senator Norm Coleman accurately stated, "[l]aw, technology and ethics are not in sync right now."[312] Indeed, as surveys have indicated and downloading patterns have shown, user ethics regarding music downloading are unlikely to change soon, despite lawsuits from the industry. Furthermore, the technology needed to stifle MP3 sharing has not arrived yet. Therefore, the music industry faces three alternatives: just as software companies have dealt with illegal software piracy for the past twenty years, the music industry can live with it and chalk it up to part of doing business, or it can assist in developing new technologies to stifle music copying, or it can alter its business model and embrace the Internet. The third option is the most likely solution.

IV. CONCLUSION

One of the purposes of copyright under the Constitution is the promotion of the arts while benefiting both artists and the public.[313] This purpose would be accomplished through increased distribution of music to the public. Increased distribution by means of both webcasting and on-demand music downloads is not only in the public interest, but it would also translate into increased compensation for artists. For instance, among current market models, webcasting increases awareness of new artists and thus increases album sales. Also, among alternative market models such as compulsory licensing of on-demand downloads, Internet streaming would reduce overhead and leave more money towards compensating artists. All parties would benefit. The music industry is clinging to a market model which began nearly one hundred years ago. Ultimately, to remain viable in the twenty-first century, it will have to adapt to and embrace new technologies, most particularly the Internet.

---

311 *Id.*
312 Harmon & Schwartz, *supra* note 290.
313 U.S. CONST. art. I, § 8.