THE REGULATION OF SHRINK-WRAPPED RADIO: IMPLICATIONS OF COPYRIGHT ON PODCASTING

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I. INTRODUCTION

While the expansion of the Internet has been a boon to subscribers of digital audio services, the Recording Industry Association of America ("RIAA") has remained extremely occupied with affirmative litigation against consumers of illegal or "pirated" music in an attempt to stem the losses of flagging recording sales.[1] The introduction of digital audio recording in the late 1980s spawned a whole new arena for digital recording and playback technology.[2] Today's technologies provide consumers with the means and opportunities to record, receive, copy, and distribute audio segments of original recordings without the readily apparent loss of quality previously experienced through analog recording devices.[3] A corresponding increase in piracy accompanied the increase in digital audio use as technology enabled the production and distribution of exact copies of commercially prepared works without licensed copyrights or

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1 Press Release, Recording Indus. Ass'n of Am., RIAA Brings New Round of Lawsuits Against 751 Online Music Thieves (Dec. 15, 2005), http://www.riaa.com/news/newsletter/121505.asp; *see* Steve Knopper, *RIAA's Christmas Crackdown*, ROLLING STONE, Jan. 22, 2004, at 22. Knopper details the RIAA's efforts to combat serial copyright infringement resulting from online copying and unauthorized Internet distribution of protected digital content. *See also* John C. Dvorak, *The New Music Download Battle*, PC MAG., Oct. 18, 2005, at 53.

2 *See* Recording Industry Association of America, History of Recordings, http://www.riaa.com/issues/audio/history.asp#digital (last visited Mar. 3, 2006).

3 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1073 (9th Cir. 1999) (highlighting litigation by the recording industry to combat digital piracy stemming from digital audio technological innovation).

authorization.[4]

Among these technological innovations are what news outlets and technology observers are heralding as the latest advance in digital audio (and video) content delivery—podcasting.[5] According to research conducted by the Pew Internet and Life Project in April 2005, more than 22 million American adults own portable digital audio players and 29% of them have downloaded podcasts—totaling more than 6 million Americans.[6] This technology is so pervasive that the editors of the New Oxford American Dictionary named "podcast" its "Word of the Year for 2005."[7]

This Comment examines the increasing popularity of podcasting and the growing implications of podcasting violations of U.S. copyright law through the unauthorized reproduction and transmission of copyright-protected works. Part II provides an overview of podcasting, how it works, and a general look at the creators and subscribers of this new medium. Part III examines the prior law affecting podcasting, charting the evolution of U.S. copyright law from the Copyright Act of 1976 through the Digital Millennium Copyright Act of 1998, and looks at how developments in digital audio technologies have forced revisions to today's copyright laws. Part III also addresses statutory licensing legislation established through more recent legislation and explains how the technical distinctions of podcasting disqualifies it from the regimes developed for other digital audio media delivery mechanisms. Parts IV and V discuss the other types of licenses and rights implicated, along with the current players in licensing today, such as performing rights organizations and mechanical rights licensing agencies, like the Harry Fox Agency. In addition, these sections discuss the archaic framework a podcast creator ("podcaster") must follow to avoid copyright infringement in his or her podcasts. Part VI highlights the difficulties of granting podcasts a blanket licensing exemption through the "fair use doctrine" because of the array of content available in existing podcasts. This Comment concludes in Part VII by highlighting the necessity for congressional action and calls for a statutory revision or amendment to existing copyright regimes to expand current blanket-licensing schemes to include podcasts.

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4 *Id.*

5 *See generally* Laura Gordon-Murnane, *Saying "I Do" to Podcasting*, SEARCHER, June 2005, at 44; Jan Norman, *Podcasting Sprout in Cyberspace*, ORANGE COUNTY REG., Jan. 29, 2005, at B1.

6 Memorandum on Podcasting from Lee Rainie, Project Director, Pew Internet and Life Project, and Mary Madden, Research Specialist (Apr. 3, 2005), http://www.pewinternet.org/PPF/r/154/report_display.asp.

7 *"Podcast" Is the Word of the Year*, YAHOO! FINANCE (Dec. 5, 2005), http://prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/12-05-2005/0004228195&EDATE=. "Podcast" will be added in the next online update to the dictionary in 2006. It will be defined as "a digital recording of a radio broadcast or similar program, made available on the Internet for downloading to a personal audio player." *Id.*

It also discusses two elements Congress must take into account: digital rights management systems and the rise of less restrictive licensing options. Both have the potential to mitigate copyright infringement resulting from the incorporation of unauthorized protected content into podcasts.

II. AN OVERVIEW OF PODCASTING

Described as "TiVo for radio,"[8] podcasting is a digital audio file, usually in mp3 format,[9] that can be downloaded to a subscriber's personal computer for the subscriber's on-demand listening.[10] Podcasting, a combination of iPod[11] and broadcasting, is something of a misnomer since any digital audio player can be used.[12] After downloading, podcasts can be played on any computer equipped with speakers and supporting software or transferred to a digital audio player for "portable listening."[13] The result allows consumers to listen to refreshable audio content on their computers or portable devices instead of limiting the playability of the new content to a computer.[14] A podcast thus provides subscribers with the ability to listen to specifically selected audio content on-demand without the confines of a radio or a computer.[15]

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8 CARLY DIDDEN, COLLEGIATE BROADCASTERS, INC., A AND B'S OF PODCASTING (TOO EARLY FOR C'S?) (2005), http://www.collegebroadcasters.org/podcast.shtml (comparing podcasting to TiVo, a consumer video device that allows users to record television programs onto internal hard disk storage for later viewing).

9 An "mp3" is a popular digital audio encoding and compression format invented and standardized in 1992 by a team of engineers. The format was designed to greatly reduce the amount of data required to represent audio, yet still sounded like a faithful reproduction of the original uncompressed audio. In popular usage, "mp3" also refers to audio files or music recordings stored in the mp3 format on computers in a highly compressed format, thus allowing greater storing and transferability. *See* Robert Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 350 (2004).

10 DIDDEN, *supra* note 8.

11 The iPod is Apple's popular portable mp3 device. *See* Apple iPod, http://www.apple.com/ipod/ipod.html (last visited Feb. 1, 2006).

12 Gordone-Murnane, *supra* note 5.

13 DIDDEN, *supra* note 8; *see also Yahoo Launches Search Functions For Podcasts*, WALL ST. J., Oct. 11, 2005, at D2.

14 Posting of Dave Winder to iPodder.org (Oct. 21, 2004), http://www.ipodder.org/whatIsPodcasting. Podcasting incorporates much of the same technology as "blogging," or web-logging, such as RSS. Essentially, "bloggers" may post written entries to a specific online address that is systematically updated for its readers. Will Richardson, *Blogging and RSS—The "What's It?" and "How To" of Powerful New Web Tools for Educators*, MULTIMEDIA & INTERNET @ SCHOOLS (Jan. 2004), http://www.onlineinc.com/MMSchools/jan04/richardson.shtml.

15 Apple iTunes Podcasts, Your Favorite Shows to Go, http://www.apple.com/itunes/podcasts (last visited Jan. 6, 2006).

A. The Origins of Podcasting

Podcasting developed during the summer of 2004 and is the product of the efforts of Dave Winer, the developer of Really Simple Syndication ("RSS"), and Adam Curry, a former Music Television ("MTV") host.[16] The two took existing RSS software and added the ability to attach files to the RSS feeds.[17] Curry created "iPodder," a program allowing subscribers to search and subscribe to specific RSS feeds.[18] iPodder was released to the public in September 2004, coupled with Curry's invitation for open-feedback of the program by the software industry.[19]

B. The Nuts and Bolts of Podcasting

Podcasting works by synthesizing three different pieces of technology.[20] First, podcasting uses digital audio technology to digitally record content.[21] Podcasting then incorporates RSS technology to distribute the audio files.[22] Lastly, podcasting incorporates is the use of portable digital audio players or computers as a final download destination.[23]

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[16] Gordon-Murnane, *supra* note 5. RSS programming is used in website programming that automatically refreshes information on subscribing websites. One of the most recognizable examples of previous applications of RSS technology is the updated newscripts on major television network Internet sites. A desktop aggregator is the application that works by "subscribing" to feeds (sources) of new information, from which the user can view all the new information from those feeds either separately or in their entirety. *Id.*

[17] *Id.* RSS enclosures are similar to e-mail attachments. The RSS enclosure feature allows the programming feed to not just transmit text, but also to package an enclosure, such as an audio or video file. The consumer can read the text that describes the enclosure, or the enclosure may somehow be related to the item. *See* Sean Michael Kerner, *The RSS Enclosure Exposure*, INTERNETNEWS.COM (Nov. 5, 2004), http://www.internetnews.com/bus-news/article.php/3431901. For example:

> a news source, like the New York Times runs a movie review. It might make sense to enclose a trailer for the movie along with the review. Or a band might use RSS to keep their fans informed of what they're up to [and] an enclosure could include a bit of music to illustrate a point.

RSS at Harvard Law, http://blogs.law.harvard.edu/tech/enclosuresAggregators (last visited Jan. 6, 2006).

[18] Gordon-Murnane, *supra* note 5.

[19] *Id.*

[20] Doug Mohney, *Ipodder Good Fodder For MP3 Heads*, INQUIRER, http://www.theinquirer.net/?article=18152 (last visited Feb. 10, 2006).

[21] *Id.*

[22] *Id.*; *see also* Sean Michael Kerner, *The RSS Enclosure Exposure*, INTERNETNEWS.COM (Nov. 5, 2004), http://www.internetnews.com/bus-news/article.php/3431901; RSS at Harvard Law, *supra* note 17.

[23] Mohney, *supra* note 20.

Podcasts are inexpensive to produce and their content is only limited by the imaginations of those who produce them.[24] Podcasts are created with bandwidth, a microphone, a computer, and RSS software.[25] RSS software is easy to download and with a layman's knowledge of its operation podcasters can easily create their desired programs.[26] Once the program is created, the podcaster posts the podcast to an online directory, which links podcast subscribers to the specific uniform resource locator ("URL") on the Internet.[27]

Podcasting is based on open-source computing standards, which makes it possible for subscribers with a wide range of platform and software solutions to download and listen to digital and audio content.[28] Subscribers use the podcasting software to search for and download RSS feeds that contain podcast files. The podcasting software, called a "media aggregator," automatically downloads new files as they become available.[29] Once subscribed, the software automatically detects and downloads updated content.[30] Because the podcasts are created by a remote third party and then made available, subscribers are unable to directly control the podcasts' content. However, because the downloaded podcast is in a digital audio file format, subscribers may exercise control of what content they actually listen to on the podcast. As such, subscribers can use their digital audio player or computer to manually scan the program by rewind or fast-forward functions to determine where in the file to begin listening or repeating.[31]

C. iTunes and the Podcasting Explosion

Prior to Apple Computer, Inc.'s ("Apple") entry into the podcasting world in the summer of 2004, accessing podcasts was a time-consuming and tedious process.[32] No major centralized directory existed for the different available

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24 *See generally* Gordon-Murnane, *supra* note 5.

25 *Id.*

26 Susan Whitall, *iPods Offer Radio With No Rules*, DETROIT NEWS, Feb. 20, 2005, at 1A.

27 *See* Podfeed.net: The Podcast Directory, http://www.podfeed.net/add_podcast.asp (last visited Feb. 8, 2006) (depicting the posting steps, in this case by filling out a form, podcasters must take to post their podcast to a larger directory); Definition of URL, http://www.sharpened.net/glossary/definition.php?url (last visited Jan. 13, 2006). The uniform resource locator, or URL, is a standardized address for resources, such as documents or images, accessible on the Internet. *Id.*

28 DIDDEN, *supra* note 8.

29 *See* Gordon-Murnane, *supra* note 5.

30 *Id.*

31 *See* Michelle Kessler, *Storm Clouds Gather over Podcasting*, USA TODAY, Aug. 4, 2005, at 3B.

32 David Pogue, *In One Stroke, Podcasting Hits Mainstream*, N.Y. TIMES, July 28, 2005, at C1.

podcasts.[33] First, podcasting subscribers had to find and locate podcasts through early search directories that were limited in scope.[34] Subscribers then had to find a podcast-management program, like Curry's iPodder, which were not always user-friendly.[35] However, in June 2005, the podcasting world received a tremendous boost when Apple announced that the latest version of iTunes included a searchable, one-stop podcasting directory for iTunes users.[36] Apple has expanded podcasting to the mainstream with over 10 million iTunes users.[37]

Podcasting's content encompasses every conceivable category and interest.[38] A glance at the "Top Podcasts" listing posted daily on iTunes shows its breadth with programs such as "This Week in Tech," the "Story of the Day" published by National Public Radio, new music shows, and news updates published by the major television networks.[39] The list even highlights talk radio shows, like one podcast from political commentator Al Franken.[40] Radio stations and content providers have also entered the podcasting arena by packaging their on-air programming into podcasts in an attempt to draw listeners to their broadcasts and websites.[41] Politicians, such as Senator Barak Obama and former vice-presidential candidate John Edwards, have their own podcasts.[42] There are also religious sermons, or "godcasts," offered across the country.[43]

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33 *Id.*

34 *Id.*; *see* Podcast.net, http://www.podcast.net (last visited Jan. 28, 2006) (showing an example of early podcasting directories still in existence); Podcastalley.com, http://www.podcastalley.com (last visited Jan. 28, 2006); iTunes, http://www.apple.com/itunes/podcasts (last visited Jan. 29, 2006) (showing an extensive podcasting directory that is one of the most-used podcast directories); Yahoo! Podcast, http://podcasts.yahoo.com (last visited Jan. 29, 2006).

35 Pogue, *supra* note 32.

36 Press Release, Apple Computer, Inc., Apple Takes Podasting Mainstream (June 28, 2005), http://www.apple.com/pr/library/2005/jun/28podcast.html. iTunes is a digital media player application, developed by Apple, for playing and organizing digital music and video files. The program is also the interface to manage the music on Apple's popular iPod digital audio player. Additionally, iTunes can connect to the iTunes Music Store, which allows users to purchase digital music and movie files that can be played by iPod players and iTunes. Apple iTunes, http://www.apple.com/itunes/overview (last visited Feb. 15, 2006); *see* Pogue, *supra* note 32.

37 Pogue, *supra* note 32; *see* Apple iTunes, http://www.apple.com/itunes/overview (last visited Jan. 29, 2006) (showing additional information about iTunes and its users).

38 *See* iTunes' "Featured Podcasts" Listing, iTunes Podcasts http://www.apple.com/itunes/podcasts (last visited Jan. 29, 2006).

39 *Id.*; *see* "Top Podcasts," Apple iTunes Podcasts, http://www.apple.com/itunes/podcasts (last visited Feb. 14, 2006).

40 *Id.*

41 DIDDEN, *supra* note 8.

42 Barak O'Bama, Senator from Illinois: Podcasts, http://obama.senate.gov/podcast (last visited Jan. 29, 2006); One America Committee, http://www.oneamericacommittee.com/home.asp (last visited Jan. 29, 2006).

43 Tom Heinen, *Podcasting Becomes Another Pulpit Churches Use New Technology to*

Podcasting has even managed to cover sex, with pornographic and adult-oriented podcasts gaining in popularity.[44] In response to the adult nature of many podcasts, Apple has incorporated content filters into the iTunes that allow parents to control their children's podcast listeners.[45]

D. Podcasting and Copyright

The rapid growth of podcasting has brought scrutiny to the medium and a new focus for regulators who are concerned with online digital media content.[46] Because podcasting is an open-source medium, many of the problems that arise in broadcasting, such as defamation or indecency also affect podcasting.[47] The largest legal implication facing podcasters today, however, is copyright infringement.[48] Current copyright law recognizes two major types of protected work: the work's performance preserved in the sound recording and the actual sound recording.[49] The incorporation of unauthorized protected content into podcasts infringes upon copyright laws in both ways. First, it violates the copyright of a composition's actual content (the song or original material). Second, it violates the copyright in the recording of the content known as the sound recording copyright (the recording).[50]

Reach out, MILWAUKEE J. SENTINEL, June 12, 2005, at B; *Godcasting May Be the Podcast's "First Killer App"*, NAT'L CATHOLIC REP., July 1, 2005, at 3; *Church to Go*, CHRISTIAN CENTURY, Sept. 20, 2005, at 7.

44 Nick Summers, *Podcasting: Talking Dirty on Your iPod*, NEWSWEEK, Aug. 1, 2005, at 10.

45 Press Release, Apple Computer, Inc., Apple Introduced iTunes 5 (Sept. 7, 2005), http://www.apple.com/pr/library/2005/sep/07itunes.html (highlighting the parental controls available to iTunes 5 users). Because podcasts are distributed over the Internet, they have so far escaped regulation by the Federal Communications Commission ("FCC"). *See generally* Andrew Shapiro, *The 'Principles in Context' Approach to Internet Policymaking*, 1 COLUM. SCI. & TECH. L. REV. 1 (2000); Ari Staiman, *Shielding Internet Users from Undesirable Content: The Advantages of a PICS Based Rating System*, 20 FORDHAM INT. L.J. 866 (1997) (discussing the possibilities and difficulties regulating Internet content worldwide).

46 *See* Michelle Kessler, *Storm Clouds Gather over Podcasting*, USA TODAY, Aug. 4, 2005, at 3B; *see also* Sam Whitmore, *Podcasting: Making Waves*, FORBES.COM, Apr. 21, 2005, http://www.forbes.com/2005/04/21/cz_sw_0421whitmore.html; Anthony Bruno, *Control Issues: Struggle to Regulate Content Slowing Digital Advances*, BILLBOARD, Dec. 10, 2005, Vol. 117, Issue 50, at 10; Angela Yeager, *Few People Who Still Buy CDs Punished For It*, STATESMAN J., Dec. 8, 2005, § C; DIDDEN, *supra* note 8.

47 DIDDEN, *supra* note 8.

48 *Id.*

49 *Id.*

50 *See* Mark F. Radcliffe, *Music on the Internet, Understanding the New Rights and Solving New Problems*, *in* USING MUSIC ON THE WEB 241, 244. (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. GO-00PP, 2001). Podcasting may also violate the copyright holder's exclusive reproduction rights. 17 U.S.C. § 106 (2000); DIDDEN, *supra* note 8 (noting that unauthorized incorporation of protected content violates § 106).

In general, there is not a uniformly-accepted license that is specifically tailored for podcasters wishing to avoid copyright infringement as there are for similar technologies such as streaming media.[51] This is because podcasts are technologically dissimilar to earlier Internet media innovations like webcasting or streaming media.[52] Podcasting does not qualify for available licensing regimes, like compulsory licensing, established by Congress to address streaming or webcasting copyright infringement.[53] Congress and copyright holders, mainly the music industry, have not yet developed an efficient way for podcasters to legally incorporate copyrighted material into their work.[54] Podcasters must currently obtain individual licenses for each protected work contained in their podcasts, avoid liability for copyright infringement.[55] To understand specifically how podcasting implicates these copyrights, it is necessary to review the historical development of the public performance right in sound recording and the current copyright schemes available for other forms of digital audio.

III. THE DEVELOPMENT OF COPYRIGHT LAW

A. An Overview of the Public Performance Right in Sound Recordings

In 1971, Congress extended copyright protection to sound recordings by passing the Sound Recordings Act of 1971. The protection required radio stations to pay a fee for the underlying musical composition, but not for the public performance of the actual recording of the song.[56] In 1976, Congress enacted

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[51] *See* BMI and Performing Rights, http://www.bmi.com/licensing/business/rights.asp (last visited Feb. 10, 2006) (showing performance rights and BMI's attempt to deliver podcasters a podcasting licensing scheme); Broadcast Music International ("BMI"), a music performing rights organization, has developed a "podcasting license" available for podcasters. However, the license grants only performance rights to artists under BMI's catalogue, leaving podcasters to still seek out the remaining mechanical licenses necessary to podcast "legally." *See also* BMI and Podcasting, http://www.bmi.com/licensing/podcasting/index.asp (hyperlink to BMI's Website Music Performance Agreement) (last visited Feb. 10, 2006).

[52] DIDDEN, *supra* note 8. "Webcasting is an Internet stream of a live or online simulcast of a broadcast signal . . . . Streaming is one technology for downloading and accessing a stream of electronic information at the same time." *Id.*

[53] *Id.* Unlike streaming media, podcasting involves the complete download of the audio file prior to listening, which occurs at any time following the download.

[54] Jennifer Jenkins, Professor, Duke University Law School, Duke Podcasting Symposium (Sept. 28, 2005), http://isis.duke.edu/events/podcasting/webcast.php. The negotiations surrounding music licensing involved in web broadcasting and streaming media were extremely lengthy and contentious. *Id.*

[55] *See* DIDDEN, *supra* note 8. This assertion, however, does not extend to the use of works in the public domain—works for which the podcasters have been granted permission for their use—or the podcaster's own original work. *See* Jenkins, *supra* note 54.

[56] While the 1971 Act was intended to protect record companies from the illegal copy-

the landmark statute in U.S. copyright legislation, the 1976 Copyright Act ("Copyright Act"). The Copyright Act broadened the scope of federal statutory copyright protection from "published" works to works that are "fixed."[57] However, despite Congress' overhaul of the 1971 Act, the 1976 Act still did not recognize a comparable right of public performance for the radio broadcast of sound recordings, despite the recommendations of the U.S. Copyright Office.[58]

Nearly fifteen years later, the absence of a performance right in sound recordings, paired with the rapidly evolving state of sound recording technology, threatened the traditional domains of the recording industry.[59] Despite changes to U.S. copyright law promulgated in the early 1990s through international agreements and congressional amendments to the Copyright Act, the performance rights of digital audio recordings were still unprotected by regulation.[60]

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ing of tapes and records, it did not recognize the exclusive performance right in sound recordings. *See* Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 736–37 (1996).

[57] *See generally* H. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659. Prior to 1976, the 1909 Copyright Act represented the last major revision to statutory copyright law in the United States. Congress noted that extensive technological advances had occurred since its adoption. Television, motion pictures, sound recordings, and radio were all cited as examples. The deliberations over the 1976 Act focused on the intellectual property questions raised by the spawning of new industries and methods encircling these new forms of communication. *Id.* at 47, 1976 U.S.C.C.A.N. at 5660.

[58] David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 190 (2000).

[59] *Performers' and Performance Rights in Sound Recordings: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103d Cong. 18 (1993) [hereinafter *Performers and Performance Rights Hearing*] (statement of Ralph Oman, Registrar of Copyrights and Associate Librarian for Copyright Services, Library of Congress) (describing the rationale behind a performance right in sound recordings).

[60] *See* 17 U.S.C. § 1101 (2000) (prohibiting the unauthorized fixation of sounds or sounds and images of a musical performance in a copy or phonorecord as well as the transmission or communication to the public of sounds or sounds and images of a live musical performance); Recording Industry Association of America, Issues, Copyright Law, http://www.riaa.com/issues/copyright/laws.asp (last visited Jan. 29, 2006) (displaying commentary on the history and evolution of U.S. copyright law and, in particular, the statutory omissions of the Copyright Act that necessitated the Digital Performance Right in Sound Recordings Act). The international agreements include the General Agreement on Tariffs and Trade ("GATT"), which remains in force today and functions as the foundation of the World Trade Organization is ("WTO") trading system. From 1948 to 1994, the GATT provided the rules for a majority of world trade and presided over periods that saw some of the highest growth rates in international commerce. It seemed well-established, but throughout those forty-seven years, it was a provisional agreement and organization. *See* World Trade Organization, Understanding the WTO, The GATT Years: From Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 29, 2005).

1. Section 106 of the Copyright Act

Section 106 is a critical provision of the Copyright Act because it specifies the rights a copyright owner has with regard to that work.[61] Once a copyright in a musical composition or a sound recording has been created, its owners receive a bundle of exclusive rights under § 106 of the Copyright Act. This section grants copyright owners the right to:

> (1) *reproduce the work in copies* or phonorecords; (2) prepare derivative works based upon the work; (3) *distribute copies or phonorecords* of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion picture and other audiovisual works; (5) display the work publicly; and (6) *in the case of sound recordings, to perform the work publicly by means of an audio transmission*.[62]

The concepts of public performance cover not only the initial rendition of the work, but also any further act by which that rendition or showing is transmitted or communicated to the public.[63] A broadcaster "performs" when he or she transmits the network broadcast; a cable television system "performs" when it retransmits the broadcast to its subscribers; and an individual "performs" when he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.[64] The definition is also ambiguously drafted to cover technological advancement by defining "transmit" as "to communicate a performance or display by any device or process whereby images or sound are received beyond the place from which they are sent" in a manner broad enough to include all "conceivable forms and combinations of wired or wireless communications media, *including but by no means limited to radio and television broadcasting as we know them*."[65] Codified in 1976, the "public performance right"[66] was enjoyed by musical works

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[61] *See generally* 17 U.S.C. § 106.

[62] *Id*. §§ 106(1)–(6) (emphasis added). Podcasting implicates listed-rights (1), (3), and (6). While the digital transmission of music or sound recordings over the Internet may implicate many of § 106's listed rights at some point, the key provisions implicating podcasting are the exclusive rights to reproduction and the distribution and performance of copyright owners. *See* DIDDEN, *supra* note 8. While the digital transmission of music or sound recordings over the Internet may implicate § 106's listed rights at some point, the key provisions implicating podcasting are the exclusive rights to reproduction and the distribution and public performance of copyright owners. *Id.*

[63] H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

[64] *Id.*

[65] 17 U.S.C. § 106; H.R. REP. NO. 94-1476, at 52–53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 (emphasis added).

[66] To "perform" a work means to "recite, render, play, dance, or act it, either directly or by means of any device or process . . . ." 17 U.S.C. § 101. To perform a work "publicly" means

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance . . . of the work to

copyright owners but not by sound recording copyright owners.[67]

2. The Audio Home Recording Act

As previously noted, during the early 1990s, the rise of unauthorized digital copying and transmission of protected recordings in conjunction with the new technologies in home recording and digital playback concerned the recording industry.[68] In 1992, Congress passed the Audio Home Recording Act ("AHRA"), which served as an attempted compromise between digital audio hardware makers and the music industry—providing consumers with access to new digital audio technology while still compensating artists and copyright holders for lost royalties due to home recording.[69] The AHRA requires makers and importers of digital audio recording devices to make royalty payments into the Sound Recordings Fund and the Musical Works Fund for distribution.[70]

The AHRA was significant because it provided the first statutory definition for digital audio recordings. That definition continues to affect digital audio

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> a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . in the same place or in separate places and at the same time or at different times.

Id. § 101.

[67] *Id.* § 106(4) (listing various works of authorship in which public performance rights existed, but displaying sound recordings did not exist).

[68] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1074 (9th Cir. 1999). "Such rampant unauthorized copying obviously and significantly injures sound recording copyright owners, as well as the artists, songwriters, and background musicians and vocalists, and music publishers who are paid by record companies based on sales of legitimate recordings." Plaintiff's Reply in Support of Order to Show Cause Re Preliminary Injunction at 3:20–24, *Recording Indus. Ass'n of Am.*, 180 F.3d 1072.

[69] Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. § 1001); *see also* The Alliance of Artists and Recording Companies, http://www.aarcroyalties.com/ahra.html (last visited Feb. 10, 2006) (discussing the AHRA and its impact to consumers and digital audio copyright holders).

[70] 17 U.S.C. §§ 1006(b)(1)–(2). The Act provides that the royalties are to be divided into two funds: the Sound Recordings Fund, which accounts for 66 2/3% of the royalties, and the Musical Works Fund, which accounts for 33 1/3% of the royalties. Within each fund, the Act establishes subfunds. The Sound Recordings Fund consists of four subfunds: the first of these—the Nonfeatured Musicians Subfund—is allocated 2 5/8% of the Sound Recordings Fund, and the second subfund—the Nonfeatured Vocalists Subfund—gets a 1 3/8% percent share. After the shares of these two subfunds are subtracted, two other subfunds—the Featured Recording Artist Subfund and the Sound Recording Owners Subfund receive fourty percent and sixty percent respectively, of the remainder. In the Musical Works Fund, there are two subfunds—the Publishers Subfund and the Writers Subfund—which each receive 50% of that Fund. Thus, the Act establishes the percentages for each fund and subfund, but directs the Copyright Arbitration Royalty Panels ("CARPs") through the process of a proper distribution of the royalties in their fund and/or subfund. *See* Ascertainment of Controversy for 1994 Digital Audio Recording Royalty Funds, 60 Fed. Reg. 12,251, 12,251–53 (Mar. 6, 1995).

mediums today, like podcasting.[71] The AHRA states that a copied digital audio recording is a digital reproduction of a musical recording, whether that reproduction was made directly from another digital musical recording or indirectly from a transmission.[72]

The AHRA's purpose was "to ensure the rights of consumers to make analog or digital audio recordings of copyrighted music for their private and noncommercial use."[73] Several years after the AHRA's passage, the U.S. Court of Appeals for the Ninth Circuit decided the *RIAA v. Diamond Multimedia Sys.* ("*Rio*") case. Today, the *Rio* decision is regarded as one of the seminal cases for interpreting the AHRA's provisions.[74] *Rio* also provided the framework and much of the judicial language associated with the modern claims of digital audio copyright infringement.[75]

In *Rio*, the Ninth Circuit acknowledged the AHRA's provision for a private recording right through the "home taping exemption,"[76] which allows portable digital audio recording devices—like the Rio device being litigated—to make copies of digital content on computer hard drives by merely "space-shifting" the files, rendering them portable.[77] However, the court also asserted, "Even though [the Rio device] cannot directly reproduce a digital music recording, the Rio would nevertheless be a digital audio recording device if it could reproduce a digital music recording 'from a transmission.'"[78] Because the relative

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71 17 U.S.C. § 1001(1).

72 *Id.*

73 S. REP. No. 102-294, at 30 (1992).

74 *See* Alex Allemann, *Manifestation of an AHRA Malfunction: The Uncertain Status of MP3 Under* Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 79 TEX. L. REV. 189, 206–07, 220 (2000) (describing that the Ninth Circuit's decision in the *Rio* case suggests that by excluding hard drives from the definition of a digital music recording, the AHRA effectively ensures that the illegal copying of computer programs would not be protected from liability, while also noting the detrimental market effects of widespread, unauthorized mp3 distribution).

75 *See id.* Evidence in more recent cases involving file-sharing indicated that an "overwhelming majority of college students owned less than a quarter of the songs they downloaded." *Id.* at 218.

76 *See* 17 U.S.C. § 1008 (protecting all non-commercial copying by consumers of digital and analog musical recordings).

77 The Rio was one of Diamond Multimedia Systems' first digital audio playing devices capable of mp3 playback similar to digital audio devices available today, like the iPod. The Rio device, however, was significantly smaller in the amount of content it could store in comparison with today's digital audio recording devices. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999).

78 *See id.* at 1079; 17 U.S.C. § 101. In copyright law, to "transmit" a performance is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent. The legislative history corroborates the statutory language, originally defining a transmission as "any audio or audiovisual transmission, now known or later developed, whether by a broadcast station, cable system, multipoint distribution service, *subscription service*, direct broadcast satellite, or *other form of analog or digital com-*

ease of sharing both protected and unprotected digital audio content has increased, the primary focus of the copyright-holding community has shifted to Internet distribution and the piracy of protected content.[79]

3. The Digital Performance Right in Sound Recordings Act of 1995

Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") to protect copyright holders from the threats of the unauthorized digital transmission of sound recordings.[80] At the time of the DPRA's passage, online distribution of digital audio was just beginning to show widespread use in the public domain.[81] Concerned by the increasingly common ability of music listeners to copy and reproduce digital audio transmissions that would displace a consumer's need to purchase music conventionally,[82] Congress passed the DPRA.[83]

In response to the rise of webcasting, the DPRA made two significant but distinct changes to the copyright laws affecting the licensing of musical works.[84] First, the DPRA created a new digital public performance right for sound recordings.[85] Second, the DPRA addressed the questions raised by downloadable music files by broadening the definition of compulsory mechanical licensing for digital content.[86] The passage of the DPRA enabled

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munication." *Id.* (emphasis added); *see also* S. REP. 102-294 (1992).

79 *See* Allemann, *supra* note 74, at 189–205. *See generally* UMG Recordings, Inc. v. MP3.COM, Inc., 109 F. Supp. 2d 223 (S.D.N.Y. 2000) (involving a suit brought by UMG against MP3.COM, awarding UMG $53.4 million in statutory damages for willful copyright infringement because MP3.COM knew that copying of UMG's compact discs were unlawful without any sufficient legal fair use justification).

80 S. REP. NO. 104-128, at 14–15 (1995); H.R. REP. NO. 104-274, at 5–9, 12–13 (1995).

81 AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1295–99 (3d ed. 2003). When the DPRA was drafted, Congress and the recording industry were chiefly concerned with piracy stemming from interactive cable and satellite subscription broadcasts. Not wanting to disturb the outstanding relationships between broadcasters, publishers, and composers, the DPRA's limitations on the right to public performance were restricted to certain audio transmissions. *See* Delchin, *supra* note 9, at 352.

82 *See Performers' and Performance Rights Hearings*, *supra* note 59, at 1 (statement of William J. Hughes, Chairman of the Subcomm. on Intellectual Property and Judicial Admin.) ("[T]he near-perfect quality of digital reproductions has led to significant piracy problems.").

83 *See* S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 357. "The purpose of S. 227[, the Senate bill that would become the DPRA,] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used." *Id.*

84 KOHN & KOHN, *supra* note 81, at 1295–99.

85 *See* Delchin, *supra* note 9, at 352.

86 Webcasting uses the Internet to transmit sound (radio) or video. A webcast is like a broadcast that projects to a wide potential audience that can include anyone with access to

copyright holders to retain the right to control certain digital performances of their sound recordings and to receive royalties for usage of their song.[87] The DPRA granted copyright holders an exclusive performance right in the public performance of the sound recordings in their works through digital audio transmission.[88]

The legislative history indicates that radio representatives supported the legislation because it held conventional radio operators liable for copyright infringement.[89] When Congress drafted the DPRA, it was more concerned that Internet-based, subscription audio services would eventually compete with radio stations.[90] Whether the DPRA granted exclusive rights to copyright owners for any digital transmissions depended on whether the method of transmission was "interactive."[91]

4. Classifying Interactive and Non-Interactive Transmissions Under the Digital Performance Right in Sound Recordings Act of 1995

The DPRA granted exclusive rights to copyright owners for any digital transmission that is part of an "interactive service."[92] The statute defined interactive service as "one that enables a member of the public to receive . . . on request . . . a transmission of a particular sound recording . . . selected by or on behalf of the recipient."[93] A digital transmission might constitute the download of a sought-after song once the consumer had located it on a particular online location. It may be the subscription to an online link or feed activating the song's transmission. In contrast, a non-interactive transmission would be the transmission of a work to the public, whether over the airwaves, cable, or tele-

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the Internet. A webcast can also simultaneously transmit a broadcast over the Internet. *See* The World Intellectual Property Organization, Digital Glossary, http://www.wipo.int/about-wipo/en/info_center/digital_age/glossary.htm (last visited Dec. 23, 2005); KOHN & KOHN, *supra* note 81, at 1296. "[The DPRA] broadened the Copyright Act's existing compulsory mechanical licensing provision to include the reproduction and delivery of musical works in sound recordings by digital transmission." *Id.*

87 KOHN & KOHN, *supra* note 81, at 1297–98.

88 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. § 114 (2000)).

89 KOHN & KOHN, *supra* note 81, at 1297.

90 Steve Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadband Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 315 (2000).

91 *See, e.g.*, 17 U.S.C. § 114(d)(1); *id.* § 114(d)(2)(A) (stating that for statutory licensing eligibility for this section, the transmission is not part of an interactive service).

92 Marks, *supra* note 90, at 313; *see, e.g.*, 17 U.S.C. § 114(d)(1) (stating that exemptions described apply if transmissions are "other than as part of an interactive service"); *id.* § 114(d)(2)(A) (stating requirement for statutory license that "the transmission is not part of an interactive service").

93 Marks, *supra* note 90, at 313 (quoting 17 U.S.C. § 114(j)(7)).

phone lines.[94]

This interactive versus non-interactive classification addressed the potential for certain services to adversely impact the sales of the recording industry.[95] While drafting the DPRA, Congress reported, "Of all of the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales."[96] The ability to request the performance of a particular sound recording does not necessarily render a service interactive.[97] Under the DPRA, if an entity offers both interactive and non-interactive services, the non-interactive component is not automatically considered part of the interactive service.[98] Congress designated the right to negotiate the licenses granted to interactive services to the copyright owners, recognizing that the owners are in the best position to determine what economic conditions may or may not be beneficial through the varied uses of their works.[99]

While the DPRA did introduce the public performance right for the first time, it was ultimately inadequate because its regulatory provisions excluded live performances and their transmissions.[100] At the time of the DPRA's passage, the only generally available means for consumers to enjoy uninterrupted content playback was to download an entire copy of the material from the Internet, which could only then be listened to from start to finish.[101] Congress anticipated the economic impact that online subscription and interactive audio services would have on record sales when drafting the DPRA and did not address free "over-the-air" broadcasts.[102] This is largely because Congress did not anticipate the surge of newly popular online non-subscription music services, and as a result, the defects of the DPRA soon became apparent.[103]

With the advent of "broadband" technology, it became possible to "stream" media over the Internet without actually having to produce a copy of the material.[104] Streaming media capitalizes on the download speeds of broadband, al-

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94 *See generally* KOHN & KOHN, *supra* note 81, at 1372–73.

95 *See* H.R. REP. NO. 104-274, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356.

96 *Id.*

97 17 U.S.C. § 114(j)(7).

98 *Id.*

99 S. REP. NO. 104-128, at 24 (1995).

100 GABRIELLE C. BOZZA, HOLLAND & KNIGHT LLP, INTELLECTUAL PROPERTY AND TECHNOLOGY LAW UPDATE, RADIO BROADCASTERS BEWARE: WEBCASTING COMES AT A HIGHER PRICE 3 (2001), http://www.hklaw.com/content/Newsletters/IPTech/4IPTech01.pdf; *see also* KOHN & KOHN, *supra* note 81, at 1299.

101 *See* BOZZA, *supra* note 100.

102 Miriam A. Smith, *Seven Cases That Shaped the Internet in 2001, or "The First Thing We Do, Let's Kill All the Lawyers" Part III*, 15 UTAH B.J. 22, 23–25 (2002).

103 BOZZA, *supra* note 100.

104 "Broadband" and "narrowband" describe the nature of the Internet connection ac-

lowing consumers to listen to content directly from a host-website without making a copy and thus without violating the DPRA's focus on the reproduction of protected works.[105] As a result, webcasting, the ability to stream radio-like content over the Internet, flourished and substantially challenged the DPRA's provisions as webcasters sought to exploit the narrow congressional definition of "interactivity."[106] Further, with webcasters posting archived material online, it was easier for consumers to locate specific content—particularly with the advent of rewind and fast-forward features.[107]

The DPRA was the first modern attempt by Congress to regulate the digital transmission of audio content.[108] Despite granting copyright owners broad rights under the DPRA, the 1995 Act left a large loophole for technological advances in interactive media services to circumvent the DPRA's attempts to stem the losses from subscription digital audio transmission.[109] Moreover, Congress' failure to address the advance of digital audio file transfers, particularly mp3 transfers, and delivery technology proved insufficient to achieve this goal, forcing Congress to revisit the issue three years later in the Digital Millennium Copyright Act.[110]

5. The Digital Millennium Copyright Act

Streaming media, or webcasting, soon began offering consumer control and programming "tailor-made" for the consumer based on their input, blurring the lines of interactivity that the DPRA previously sought to regulate.[111] In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"), which in

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cording to their connection speeds. A broadband connection is usually a high-speed connection of 200Kbps or higher, while a narrowband connection is usually less than 200Kbps, like a regular phone line. For more information on streaming media and broadband technology, see RealNetworks, Streaming Media F.A.Q., http://www.realnetworks.com/resources/startingout/get_started_faq.html (last visited Jan. 30, 2006) (describing information on streaming media and its technical specifications).

[105] The quality of the digital audio music available online to consumers in the early 1990s was so marginal, and the online transfer rates so slow, that when drafting the DPRA, Congress and recording industry representatives paid little attention to addressing it. *See* Delchin, *supra* note 9, at 350.

[106] *Id.*

[107] This concept was addressed by the DMCA, which required the streamcaster to prevent recipients from scanning digital transmissions to extract a particular sound recording. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. 2860, 2893 (1998) (codified as amended at 17 U.S.C. § 114(d)(2)(C)(v) (2000)).

[108] *See* Delchin, *supra* note 9, at 352.

[109] *See* 17 U.S.C. §114.

[110] *See* Delchin, *supra* note 9, at 352, 354–55.

[111] *See id.* at 354. For example, some websites designed personalized audio programming based on consumer feedback, while others provided archived material that could be called up on demand by the consumer. *See* Marks, *supra* note 90, at 314.

part addressed the DPRA's interactivity loopholes exploited by technological advances in digital audio technology.[112] Provisions of the DMCA amended the DPRA by granting webcasters a statutory licensing scheme to use sound recordings in their streamed programming, extending the DPRA to give copyright owners exclusive rights for interactive services.[113]

The DMCA also adds some restrictions on digital audio transmissions that were ambiguously drafted in the DPRA.[114] Recognizing the performance rights of recording companies and addressing the continuing problem of the illegal downloading of musical and copyrighted material over the Internet, the DMCA set forth a list of play restrictions, referred to as the "sound recording performance complement."[115] The DMCA also amended § 114 of the Copyright Act, exempting certain transmissions from the exclusive public performance rights of sound recordings.[116] The DMCA further revised § 114 by "adding programming and technological requirements for all Internet-based radio transmissions that were eligible for a statutory license."[117] The DMCA expanded the rights of sound recording copyright holders, enabling them to control the performance of their protected works on the Internet.[118] However, the DMCA's provisions specifically exclude non-interactive music transmissions from its coverage.[119]

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[112] Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. 2860, 2893 (1998) (codified as amended at 17 U.S.C. § 114(d)(2)(C)(v)); *see* KOHN & KOHN, *supra* note 81, at 1299.

[113] *See id.* at 1304–05. The DMCA also made several other changes to the Copyright Act, including anti-circumvention prohibitions that bar consumers from hurdling preventative measures enacted by the content owners to deter unauthorized copying. *See* 17 U.S.C. §§ 114(d)(2)(c)(vi)–(viii).

[114] *See* KOHN & KOHN, *supra* note 81, at 1299–305.

[115] *Id.*; *see also* 17 U.S.C. § 114(j)(13).

> The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or (B) 4 different selections of sound recordings—(i) by the same featured recording artist; or (ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: Provided, that the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

Id.

[116] *See generally* 17 U.S.C. §§ 114 (a)–(d) (stating the limitations on the exclusive rights in sound recordings and those entities that are exempted).

[117] Azine Farzami, Bonneville v. Register of Copyrights*: Broadcasts' Upstream Battle Over Streaming Rights*, 11 COMMLAW CONSPECTUS 203, 209 (2003).

[118] *See* KOHN & KOHN, *supra* note 81, at 1305.

[119] 17 U.S.C. § 1201.

6. Interactive Transmissions Under the Digital Millennium Copyright Act

The DMCA addressed the ambiguities of the DPRA by amending §§ 112 and 114 of the Copyright Act.[120] These amendments took aim at two specific concerns: (1) to ensure protection for recording artists and companies from advancing technologies incorporating their protected works in an unauthorized manner that Congress envisioned in the flawed DPRA;[121] and (2) to develop a fair and efficient licensing mechanism to address the complex copyright issues facing copyright owners and consumers in the digital age.[122]

The DMCA also altered the statutory classifications of interactivity.[123] Under the DMCA, interactivity is more easily envisioned as a spectrum that encompasses various types of online audio instead of merely "on-demand" programming.[124] The DMCA altered the DPRA provisions by ruling that digital audio programming permitting a choice of recordings within a predetermined program should be considered interactive, though they may not have the same degree of interactivity as an online service that permits a choice of particular recordings from an exhaustive database.[125] Second, the DMCA focused on the predictability of a service playing an important role in determining interactivity.[126] While the artist and music publisher's information must be displayed on the media player being utilized, the webcaster is barred from publishing an advanced "playlist" of the material to be broadcast.[127]

In the DMCA, Congress altered the definition of what constitutes an interactive service, illustrating newfound conclusions that interactivity does not rest solely upon the manual selection of particular recordings:

> An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive if the programming on each channel of service does not consist of sound recordings that are performed within 1 hour of the request or at a time designated by the transmitting entity or the individual making the request . . . [i]f an entity offers both interactive and non-interactive services . . . the

[120] *Cf.* S. REP. NO. 105-190 (1998) (discussing the regulatory impacts and changes to existing copyright law).

[121] *Id.* at 2.

[122] *Id.* at 3.

[123] *See* Marks, *supra* note 90, at 315.

[124] *Id.*

[125] H.R. REP. NO. 105-796, at 41 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639.

[126] *See id.* at 87; 1998 U.S.C.C.A.N. at 662–63.

[127] The webcasting regulations are found in 17 U.S.C. §§ 114(d)(2)(B)(ii), (C)(ii), and (C)(ix) (2000). *See also* Delchin, *supra* note 9, at 358–59.

non-interactive component shall not be treated as part of an interactive service.[128]

The legislative history clarifies that a program is interactive, despite the lack of personal choice by the content user, so long as the user has influenced the program in such way that the "recipient might identify certain artists that become the basis of the personal program."[129] The DMCA reversed the DPRA, refusing to generalize non-interactive services into an interactive category characterization if programming had divided interactive and non-interactive functions.[130] The DMCA further provides that copyright owners maintain the exclusive right of archived programming.[131] Amending the Copyright Act, the DMCA characterizes a service that allows users of a program to locate content within the program by rewinding, fast-forwarding, or by other manipulation, as an interactive service.[132] The result of the DMCA provides two distinct concepts of interactive services: (1) programming "specially created for the recipient" is interactive; and (2) requesting or selecting recordings by individuals, in particular archived programming, are considered interactive.[133]

By detailing what actions in digital music playback render a service interactive, Congress provided a clearer picture specifying which technologies fall into the interactive category.[134] Though the DMCA's specifications do not explicitly provide unequivocal guidance as to whether a digital technology falls within the bounds of an interactive classification, they provide certain rules for webcasters and judicial touchstones for determining licensing eligibility for online digital audio services.[135]

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[128] 17 U.S.C. § 114(j)(7).

> This language clarifies that if a transmission recipient is permitted to select particular sound recordings in a prerecorded or predetermined program, the transmission is considered interactive. For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs the compromise the program. Additionally, a program consisting only of one sound recording would be considered interactive.

David Nimmer, *Ignoring the Public Part I: On the Absurd Complexity of the Digital Audio Transmissions Right*, 7 UCLA ENT. L. REV. 189, 247 n.411 (2000).

[129] H.R. REP. NO. 105-796, at 87 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639.

[130] *See* 17 U.S.C. § 114(j)(7).

[131] *See id.* § 114(d)(2)(C)(iii) (stating that a new term of the statutory license requires that an "archived program" be at least five hours in duration and available for no more than two weeks).

[132] *See id.* § 114(j)(7). "An 'interactive service' is one that enables a member to receive . . . on request, a transmission of a particular sound recording, whether or not as part of a program." *Id.*

[133] *See id.*

[134] *See* S. REP. 105-190, at 2 (1998) (quoting the purpose for the DMCA was to provide "clarity" in the copyright regime); *see also* Delchin, *supra* note 9, at 358.

[135] *See* Daisy Whitney, *Interactive Music Under Attack*, STREAMINGMEDIA.COM (Aug. 3, 2001), http://www.streamingmedia.com/article.asp?id=7769; Arista Records v. Launch

7. Statutory Licensing Under the Digital Millennium Copyright Act

Compulsory licenses, also known as statutory licenses, are particular types of licenses that, when granted, bar the copyright owner from preventing the third party from using the work, as long as that party has paid requisite royalty fees.[136] The DMCA provided a statutory license for digital mediums that transmit digital audio sound recordings if those mediums may be considered one of the following services: (1) a subscription digital audio transmission; (2) eligible nonsubscription transmission; or (3) a pre-existing satellite digital audio radio service.[137] "Eligible nonsubscription" transmissions identified include noninteractive transmissions, specific webcasts, and live broadcast radio streamed through the Internet.[138] In order to receive the license, webcasters must comply with the DMCA's performance complement restrictions.[139] As a benefit, however, the DMCA grants webcasters a blanket-licensing scheme covering all copyrighted content, allowing webcasters to forgo the negotiation of each work in their program separately.[140]

B. Does Podcasting Qualify for Statutory Licensing?

Podcasting's eligibility for statutory licensing depends on its classification as an interactive or non-interactive transmission specified by the DMCA.[141] Whether the transmission is "specially created for the recipient" is the central focus in making the interactive determination.[142] The plain language of the statute suggests that if a consumer is able to control the content of the service, or provide input that is reflected in the content, then it is interactive.[143] Such input is not limited to selecting recordings, but can consist of any consumer choice.[144] As such, the DMCA's legislative history states that the recipient "need not select the particular recordings in the program for it to be considered personalized."[145]

Media, Inc., No. 01 Civ. 4450 (S.D.N.Y. filed May 24, 2001) (concerning a pending copyright infringement lawsuit brought by several major record labels seeking damages and injunctive relief based on defendant's operation of its Launchcast webcasting service).

136 *See, e.g.*, 17 U.S.C. §§ 115(a)–(c) (describing the compulsory licensing process for reproducing and distributing recordings of non-dramatic musical works).

137 *See id.* §§ 114(j)(8)–(10).

138 *See id.* § 114(j)(6).

139 *See id.*

140 *Id.*

141 *See id.* (defining "interactive service").

142 *Id.*

143 *See id.*

144 *See* KOHN & KOHN, *supra* note 81, at 1327.

145 144 CONG. REC. H10071, H10049 (daily ed. Oct. 8, 1998).

Consideration of the factors noted above shows that a podcast falls into the category of an interactive transmission.[146] The clearest indication of podcasting's classification as an interactive or non-interactive medium comes from the plain language of the DMCA:

> [A]n "interactive service" is one that enables a member of the public to receive a transmission of a program specifically created for the recipient, or *on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.*[147]

Podcasting subscribers can search for specific content through the Internet.[148] To access the content, users must subscribe to the available RSS streams.[149] Podcasting subscribers' role in determining the content of their subscriptions is extremely proactive. First, subscribers have to actually search for and subscribe to the podcast. Following the podcast's download, subscribers are able to physically manipulate the audio file by rewinding or fast-forwarding the sound file as many times as they choose.[150] Podcast subscribers not only select the particular podcast for subscription, but also specifically select where they would like to listen—an ability that renders podcasts' transmission interactive.[151]

IV. LICENSES, RIGHTS, AND ROYALTIES

Copyright holders generally exercise the exclusive rights granted in the Copyright Act through contractual agreements called licenses, which allow third parties to "borrow" these rights in exchange for consideration, usually in the form of royalties.[152] Copyright law protects musical and spoken compositions or "works," the performance of a work in a sound recording, and the sound recording itself.[153]

A. Performing Rights Societies and Royalties

"The performance right in copyrighted work is the exclusive right to perform or authorize the performance of the music publicly."[154] Permission to use

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146 *See* 17 U.S.C. § 114(j)(7).
147 *Id.* (emphasis added).
148 *See* Apple iTunes Podcasts, http://www.apple.com/itunes/podcasts (last visited Feb. 10, 2006).
149 *See* discussion *supra* Part II.A–B; *see also* Gordon-Murnane, *supra* note 5, at 28.
150 *See* Nimmer, *supra* note 128.
151 *Id.* at 245 n.411.
152 *Id.* at 208–09.
153 *Id.* at 189; *see also* 17 U.S.C. § 106 (2000) (listing the "bundle" of rights found in a protected work).
154 KOHN & KOHN, *supra* note 81, at 908.

a song or copyrighted work through transmission on the Internet requires obtaining the correct license from either the owner of the copyright or the licensing agent.[155] Today, performing rights societies are responsible for the copyright licenses of the performance of works—including the performance of a work in a podcast.[156] Nearly all licensing of music performances in the United States today is conducted under the auspices of the following three performance rights societies: (1) the American Society of Composers, Authors, and Publishers ("ASCAP"); (2) Broadcast Music, Inc. ("BMI"); and (3) the Society of European Stage Actors and Composers ("SESAC").[157] The performance rights societies represent artists and creators of copyrighted material and collect license fees for public performances of the copyrighted material in their repertoire.[158] While performance rights societies can technically offer podcasters individual licenses on an ad hoc basis to cover each individual musical work in a podcast, the industry has yet to produce a licensing scheme covering the copyrighted sound recordings implicated by podcasting.[159]

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155 Individuals seeking public performance licenses pay performance rights societies an annual fee for the privilege to "perform" an unlimited number of performances of one or more of any of the works derived from the societies' respective catalogues. This type of licensing arrangement is called a "blanket license," referring to the broad coverage these licensing schemes provide. Performance rights seekers may also seek a *per program* license from the performing rights societies. A per program license is considered a modified blanket license, available only to the catalogues of specific performance rights organizations. Instead of paying a flat rate for the use of any song in the society's catalogue, whether used or not, individuals or entities pay only for the work contained in the performance. Per programming license fees are paid on a monthly basis and require extensive documentation of specific works used. *Id.* at 922.

156 A music user may "publicly perform" music or copyrighted material by a transmission of the recorded performance by the conventional and digital means stipulated by §§ 101 and 106 of the Copyright Act and the DPRA. 17 U.S.C. §§ 101, 106; *see also id.* § 114. To perform music publicly means:

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered or (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or different times.

KOHN & KOHN, *supra* note 81, at 909 (quoting 17 U.S.C. § 101).

157 *See* KOHN & KOHN, *supra* note 81, at 912, 918–19. Anyone seeking a performing license must note that separate licenses are required from each organization as each performing rights society represents a different group of composers and publishers of musical and protected works. *See id*.

158 *See, e.g.*, BMI Backgrounder, http://www.bmi.com/about/backgrounder.asp (last visited Feb. 10, 2006). Because enforcing the exclusive rights to public performance are impractical, artists and copyright holders generally become members of a performance rights society, granting the society a license to sublicense the public performances of their works. *See* KOHN & KOHN, *supra* note 81, at 911–16.

159 DIDDEN, *supra* note 8.

B. Musical Composition Licenses

Copyright consists of bundle of rights.[160] There are two sets of rights found in a protected musical work: (1) those held by the songwriters and publishers; and (2) the right of the actual sound recording, owned by either the musician or the musician's label, depending on the terms of the recording contract between the two parties.[161] The Copyright Act contains compulsory licensing provisions governing the digital transmission of musical works and sound recordings.[162] Once copies of "a musical work have been publicly distributed in the United States with the copyright owner's consent, anyone else may, under certain circumstances and subject to limited conditions, obtain a "compulsory license" to make and distribute phonorecords of the work without express permission from the copyright owner."[163]

1. Reproduction Licenses for Sound Recordings

The reproduction right derived from the Copyright Act gives the copyright owner the right to record, reproduce, and distribute the work.[164] While the performing rights organizations offer licenses that cover the musical works in broadcasts and webcasts, there is no licensing system in place to cover the sound recording.[165] Reproduction licenses can be obtained through a licensing agent, such as the Harry Fox Agency or Copyright Management Services, on behalf of the publisher or granted through direct contact with the publishers themselves.[166] Today, licensing agents require parties who stream audio to obtain a mechanical license for the ephemeral copy that is created during the work's transmission from computer server to consumer.[167]

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[160] *See* 17 U.S.C. § 106.

[161] DIDDEN, *supra* note 8.

[162] *Id.*

[163] U.S. COPYRIGHT OFFICE, CIRCULAR 73: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS (2003), http://www.copyright.gov/circs/circ73.pdf; *see also* 17 U.S.C. § 115.

[164] *See* 17 U.S.C. § 106.

[165] *See* KOHN & KOHN, *supra* note 81, at 1328, 1332–33; *see also* DIDDEN, *supra* note 8.

[166] *See, e.g.*, HFA Online, http://www.harryfox.com/index.jsp (last visited Feb. 10, 2006).

[167] In transmitting digital media online, webcasters must also make copies of sound recordings on their hard drives. This temporary copy is referred to as an ephemeral copy and was originally included in the Copyright Act. The DMCA expanded the definition of ephemeral recordings to cover those digital audio services that meet the statutory guidelines and pay royalties under a statutory license. The DMCA grants ephemeral recording exemptions when: (1) the webcasting service making the recordings is licensed, statutorily or otherwise, to transmit the recordings; and (2) the webcaster meets certain conditions of the ephemeral recording exemption. Richard Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 335 (2002);

2. Compulsory Licensing Under the Copyright Act

United States copyright law established compulsory licenses as a method for purchasing sound recordings in the recording industry, such as playing popular music on a radio station or webcasting.[168] Because the recipient of an interactive service can choose "on request a particular recording," it is quite possible that the recipient will never need to purchase a tangible or digital recording of the work conventionally.[169] Therefore, the Copyright Act extends the statutory licensing scheme only to transmissions that are part of a non-interactive service.[170] Under the terms of the compulsory license, the transmission must identify the recording's title and artist[171] and webcasters may not alert their listeners in advance of the content in store.[172] Similarly, the DMCA's sound performance complement also limits the amount of predetermined content or archived activity that allows listeners to determine at what point a particular work is played before granting the license.[173]

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see 17 U.S.C. § 112.

[168] *See* KOHN & KOHN, *supra* note 81, at 687–89.

[169] *See id.* at 1332–33.

[170] 17 U.S.C. § 114(d)(1)(C); *see also* KOHN & KOHN, *supra* note 81, at 1332–33. The law specifically gives copyright holders of sound recordings the exclusive right to license digital audio transmissions that are part of an interactive service. This means that the rights holders are free to charge whatever they want in terms of licensing fees for interactive transmissions or refuse to provide a license period. *Id.*

[171] 17 U.S.C. § 114(d)(2)(A)(iii) ("[T]he transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.").

[172] *Id.* § 114(d)(2)(c)(ii) ("The transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted . . . .").

[173] *Id.* § 114(d)(2)(B)(i). The complement refers to the number of songs from the same album, or the same recording artist, that can be played back-to-back within a particular time period. *Id.* § 114(d)(2)(C)(ii).

> (ii) [T]he transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or

V. LICENSING PODCASTS

How is podcasting related to the steps involved in avoiding copyright infringement?[174] Podcasters must acknowledge the bundle of rights afforded to copyright holders under the law and two important rights upon which podcasting may infringe in particular: the copyright holder's exclusive rights of public performance and reproduction.[175] Incorporating music into podcasts makes matters even more complex because of the two rights incorporated into a copyrighted musical work: the right to the musical composition and the right to the actual song recording.[176] Podcasting is the performance of the work, the playing of a sound recording, and the reproduction of the sound recording by including the work in a podcast.[177] The reproduction of a protected work in a podcast requires a license for the sound recording and, in the event of a musical podcast, for the musical work as well.[178] With the increase of commercialization and advertising in podcasting as a means of revenue generation for their creators, the expectation of copyright holders to be compensated for the profits garnered by the incorporation of their protected works into podcasting programming is increasingly likely.[179]

The difficulty in licensing podcasts is that the regimes and mechanisms established for licensing other mediums are not available for podcasts. Podcasts are statutorily ineligible for current licensing regimes and a statutory frame-

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> facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station . . . ."

Id. § 114(d)(2)(C)(ii); *see also id.* § 114(d)(2)(C)(viii). As part of the eligibility requirements for obtaining a performance license, the DMCA also requires webcasters to implement technological devices to prevent listeners from illegally downloading songs. *Id.*

174 *See* Lionel Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3 (Nov. 1995) ("The Internal Revenue Code is 'complex'; the Digital Performance Right in Sound Recordings Act of 1995 is something else. 'Incomprehensible' perhaps, though 'You had to be there to appreciate it' may be fairer, because the convoluted language of the new [DPRA] appears to have been required by a number of very specific problems which the Act attempts to address with precision.").

175 Jenkins, *supra* note 54.

176 *Id.*

177 To perform music or any protected work means to "recite, render, [or] play . . . it, either directly or by means of any device or process . . . . " 17 U.S.C. § 101. Examples of performances include a singer's performance, the transmission of a network news broadcast, cable transmissions of programming to subscribers, a playing of a recording on the radio. KOHN & KOHN, *supra* note 81, at 908.

178 DIDDEN, *supra* note 8.

179 For a discussion of how podcasts are becoming commercialized, see David Carr, *Big Media Wants a Piece of Your Pod*, N.Y. TIMES, July 4, 2005, at § C1 (discussing how podcasts are becoming commercialized). *See also Finding Profits in Podcasting*, INFO. WK., Aug. 29, 2005, at 47–48.

work has not yet developed for licensing podcasts.[180] For musical compositions, the performance rights societies provide blanket licensing for the performance of musical compositions.[181] Likewise, the Harry Fox Agency collects and distributes mechanical licenses.[182] Sound Exchange handles the sound recording licenses for webcasts, but the RIAA-created organization does not issue licenses for podcasts.[183]

While it is possible for legally-minded podcasters who wish to use protected content in their podcasts to do so, the process is highly complex, cumbersome, and costly.[184] Podcasters wishing to avoid copyright liability may do so by contacting the holder of the copyright for each individual work they wish to incorporate in their podcasts.[185] Consequently, podcasters must contact performance rights agencies, such as ASCAP, BMI, and SESAC, to receive blanket licenses for the performance of a musical composition.[186] Similarly, for reproduction licensing, podcasters must turn to agencies, such as the Harry Fox Agency, for the mechanical reproduction rights to the works they intend to use.[187] Even after they have obtained the performance and mechanical licenses, the podcasters must still approach each recording label to obtain permission to reproduce the specific sound recording in their catalogue.[188] For the non-commercial podcaster who lacks the knowledge of the necessary steps to podcast legally, the current licensing framework appears monolithic and nearly unworkable.[189]

Podcasts that consist of original, unprotected speech of the podcaster do not infringe upon copyright.[190] However, podcasts that include copyrighted music or other protected content, like recorded speeches or broadcasts outside of the public domain, infringe upon the performance and reproduction rights afforded to protected sound recordings, in addition to the public performance and broadcast rights.[191] As a result, incorporating protected works into podcasts has

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[180] *See* Jenkins, *supra* note 54; *see also* DIDDEN, *supra* note 8.

[181] *Id.*

[182] *Id.*

[183] Jenkins, *supra* note 54. Sound Exchange is the principle administrator of statutory licenses under §§ 112 and 114 of the Copyright Act. Sound Exchange participates in rate-making proceedings to establish rates that appropriately compensate copyright owners and performers for the use of their copyrighted sound recordings. *See* Sound Exchange, http://www.soundexchange.com/about/about.html (last visited Feb. 10, 2006).

[184] Jenkins, *supra* note 54.

[185] DIDDEN, *supra* note 8.

[186] *See* American Society of Composers, Authors, and Publishers, About Us, http://www.ascap.com/licensing (last visited Jan. 20, 2006); BMI Backgrounder, *supra* note 158; Society of European State Authors & Composers, SESAC, About Us, http://www.sesac.com/aboutsesac/about.aspx (last visited Jan. 20, 2006).

[187] *See* KOHN & KOHN, *supra* note 81, at 687–88, 703.

[188] Jenkins, *supra* note 54.

[189] *Id.*

[190] *See id.*

[191] Nicole Dufft, *Podcasting-Profit-Possibilities. Will DRM Invade the Scene?*, INDICARE

apparently limited a significant number of those wishing to steer clear of violating copyright to the talk radio format.[192] However, a substantial number of podcasters either willfully or ignorantly include unlicensed, protected content in their broadcasts.[193] In doing so, the redistribution of privileged content incorporated into podcasts is unlikely to enjoy any form of exemption from the courts for two reasons.[194] First, the possibility exists for tech-savvy subscribers to extract content from podcasts and convert it into separate mp3 or other digital audio file formats for transfer, which fosters concerns of serial copyright infringement and a decrease in fair market value for the conventional purchase of copyrighted works.[195] Second, the incorporation of licensed content of any kind into a podcast does not form an entirely new expression, but rather, a retransmission of a particularized expression in a different medium.[196]

The stakes for infringement of these rights are high. As webcasting was realizing significant commercial success, the U.S. Copyright Office ruled that conventional AM and FM radio stations wanting to stream their broadcasts through the Internet would be liable for infringing the exclusive public per-

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MONITOR, July 29, 2005, http://www.indicare.org/tiki-read_article.php?articleId=122.

192 Jenkins, *supra* note 54.

193 This does not necessarily mean the "radio-like" format of playing a song purely for subscriber listening. It may include using the sound recording as filler or background content during the introduction, or to correspond with other content being introduced in the podcast. Whatever the context, unauthorized use violates the bundle of rights afforded to the copyright holders as specified in 17 U.S.C. § 106 (2000). *See* Benny Evangelista, *Apple Music Program Gets Even Better With Revision*, S.F. CHRON., Jan. 30, 2006, at C1 (describing how Apple has incorporated professional musical clips into audio editing software specifically for podcasters wishing to enhance their podcasts).

194 Given podcasting's large appeal and the recent tenor of copyright litigation, lawsuits enjoining the larger, more popular podcasts that utilize protected content without authorization are certainly possible. *See* discussion *supra* Part II.C (discussing podcasting's increasing popularity); UMG Recordings, Inc. v. MP3.COM, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005). Writing for a unanimous Court, Justice Souter held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement of third parties." *Id.* at 2770, 162 L. Ed. 2d at 790.

195 Software, like Adobe Audition, may edit mp3 content by splicing and combination-type technology. It can be applied to podcasting. *See* Adobe Audition 2.0, Integrated Audio Recording, Mixing, Editing, and Mastering, http://www.adobe.com/products/audition/main.html (last visited Jan. 15, 2006). *See generally Grokster*, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005) (holding the providers of peer-to-peer "file sharing" software liable for contributory copyright infringement of third parties). It is conceivable that podcasters who use unauthorized protected content in their podcasts and then distribute them may become the targets of litigation for contributory infringement.

196 *See UMG Recordings*, 92 F. Supp. 2d at 351 n.2. The Court rejected defendant's reliance on "reverse-engineering" cases. It held that defendant's actions to copy licensed content off of CDs onto online databases did not constitute development of a new product or expression; rather, they were a retransmission of a certain expression in a different medium. *Id.*

formance rights of sound recordings owned by the copyright holders unless they applied for a license.[197] Broadcasters and radio stations filed suit, challenging the U.S. Copyright Office's ruling in *Bonneville International v. Peters*.[198] The court upheld the infringement liability, finding that the ruling was reasonable and consistent with the histories of the DPRA and the DMCA.[199]

VI. DOES PODCASTING FALL UNDER THE FAIR USE EXEMPTION OF THE COPYRIGHT ACT?

Unauthorized use of copyrighted material constitutes infringement. One of the defenses to infringement that podcasters may consider is whether their programs may be exempted under the "doctrine of fair use" established in § 107 of the Copyright Act.[200] Any defense of fair use must satisfy four factors offered by the Copyright Act:[201] (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyright work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[202]

Determining whether podcasts infringe upon copyrights in general is a daunting task considering the breadth of different podcasts currently being offered to subscribers.[203] Podcasting's diverse content, ranging from musical shows to cooking, language classes to talk-radio styled formats, makes it difficult to establish a bright-line general classification for podcasting under copy-

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[197] *See* Initial Notice of Digital Transmission of Sound Recordings Under Statutory License: Definition of a Service, 37 C.F.R. § 201.35(b)(2) (2005). The U.S. Copyright Office provides expert assistance to Congress on intellectual property matters. The U.S. Copyright Office is also an office of record, a place where claims to copyright are registered and where documents relating to copyright may be recorded when the requirements of the copyright law are met. The U.S. Copyright Office furnishes information about the provisions of the copyright law and the procedures for making registration. The Office also administers the mandatory deposit provisions of the copyright laws and the various compulsory licensing provisions of the law, which include collecting royalties. *See* U.S. Copyright Office, Circular 1a, A Brief Introduction History, http://www.copyright.gov/circs/circ1a.html (last visited Nov. 5, 2005).

[198] Bonneville Int'l v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001) (challenging the U.S. Copyright Office's statutory authority to issue a ruling that interpreted 17 U.S.C. § 114 (2000) in the absence of explicit language in the statute or the DMCA).

[199] *Id.*

[200] *See* 17 U.S.C. § 107.

[201] *Id.*

[202] *Id.*

[203] *See* Apple, iTunes Podcasting Directory, http://www.apple.com/itunes/podcasts (last visited Jan. 12, 2006).

right laws.[204] Unquestionably, the "protected content" waters get muddied as a vast number of podcasts are the original spoken words of their creators who enjoy unrestricted licensing rights as the copyright holders.[205] However, as podcasting establishes itself as a profitable medium, it is unlikely that copyright holders, especially large recording companies, would be willing to allow podcasters to garner profits from podcasts interspersed with content they do not have permission to use.[206]

Though podcasting is substantially different from the digital medium at issue in *UMG Recordings v. MP3.COM*, much of the court's logic can be applied to podcasting.[207] UMG Recordings alleged that MP3.COM's online music service constituted copyright infringement.[208] MP3.COM contended that its services were protected by the fair use doctrine.[209] The District Court for the Southern District of New York disagreed, holding that MP3.COM's actions did not satisfy the factors of fair use.[210] Specifically, the court found that a company's unlicensed conversion of copyrighted musical recordings into mp3 files for access by its subscribers over the Internet violated the copyright holder's rights.[211] The court found that MP3.COM's business practice attempted to attract a sufficiently large subscription base in order to raise advertising revenue, which rendered it a for-profit venture.[212] Further, inquiring into whether the "new" use for MP3.COM's service repeated the old function or altered the meaning and understanding, the court found that the creative recordings being transferred to mp3s for the public's enjoyment were "close to the core of the intended copyright protection," while the defendant's use was

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204 *See id.* (showing an exhaustive list of the diverse podcast options available for consumers).

205 *See* U.S. Copyright Office, Copyright Basics, http://www.copyright.gov/circs/circ1.html#wccc (last visited Feb. 17, 2006); *see also* 17 U.S.C. § 102 (addressing the subject matter of copyright).

206 *See* Carr, *supra* note 179.

207 *UMG Recordings* provides succinct judicial analysis on the application of the fair use doctrine to mp3 technology and analogous online digital services. The court's explanation of MP3.COM's copyright infringement is a useful rubric with which to compare similar digital audio when considering qualifications under the doctrine of fair use. *See* UMG Recordings v. MP3.COM, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

208 *Id.* (describing how MP3.COM's service consisted of placing mp3 content online, available to consumers with a paid subscription).

209 *Id*. at 350 n.1. The defendant unsuccessfully argued that mp3 copying did not constitute infringement because the physical reproduction of the mp3s from the original content was not identical to the original copy, despite the inability of the human ear to detect such differences. *Id.*

210 *Id*. at 352 (stating that plaintiff has no objection in principle to license recordings to companies similar to the defendant; they simply wish to get the remuneration reserved for them by law as holders of copyrights for protected works); *see also* 17 U.S.C. § 107.

211 *UMG Recordings*, 92 F. Supp. 2d at 352.

212 *Id.* at 351.

far removed from the factual or descriptive work more amenable to fair use.[213] In addition, the "'amount and substantiality of the portion [of the copyrighted work] used [by the copier] in relation to the copyrighted work as a whole was undisputed as MP3.COM copied and replayed the entirety of the copyrighted works, which negated the claim of fair use.'"[214] Finally, the court found that even if any positive value resulted from MP3.COM's actions, that in no way freed the company to "usurp a further market that directly derive[d] from reproduction of the plaintiff's copyrighted work."[215]

Podcasts may be created for a variety of personal uses, but placing them online for public access shifts the way podcasts should be considered from a legal perspective.[216] The original material in spoken word podcasts obviously does not infringe upon existing copyrights.[217] However, considering the thousands of podcasts that utilize copyrighted works, particularly music, any copying done for the purpose of substituting music in a non-academic setting or replacing already-purchased music clearly violates § 107 of the Copyright Act.[218] The incorporation of licensed content of any kind into a podcast does not form an entirely new expression, but rather, a "retransmission of a particularized expression in a different medium," like that in the *UMG Recordings* case.[219]

Further, the increased commercialization of podcasting through marketing and advertising appears to be jeopardizing the traditional non-profit nature of early podcasts under the marketability prong of fair use.[220] Any fair use argu-

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[213] *Id.* at 351–52.

[214] *Id.* at 351 ("[T]he more of a copyright work that is taken, the less likely the use is to be fair." (quoting Infiniti Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998))).

[215] *Id.* at 352.

[216] The way podcasting is affected by posting online material is fundamentally like posting any other potentially protected work online made available to others without the express consent of the owner or rights-holder. Such action can render the posting party or Internet Service Provider ("ISP") liable for contributory copyright infringement resulting from making unauthorized protected content available. *See* 17 U.S.C. § 512(a) (2000).

[217] *See* DIDDEN, *supra* note 8. If the original talk format includes another person, such as the interview of a guest or third-party, that party's consent is needed. It is usually obtainable through a simple waiver or release. *Id.*; *see also* Jenkins, *supra* note 54.

[218] 17 U.S.C. § 107; *see also* H. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, at 5678 (stating that the criteria for fair use can be reduced into four standards: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work).

[219] *See UMG Recordings*, 92 F. Supp. 2d at 351 n.2 The court rejected the defendant's reliance on "reverse-engineering" cases, holding that the defendant's copying of CDs onto online databases did not constitute development of a new product or expression. Rather, they were retransmissions of a certain expression in a different medium. *Id.*

[220] *See* Heather Green et al., *The New Radio Revolution*, BUS. WK., Mar. 14, 2005, at 32;

ment understandably goes by the wayside when podcasters are financially compensated for advertising.[221] If podcasters are being remunerated for advertising, they should also be obligated to seek permission and licensing for use of the copyrighted material for drawing subscribers to podcasts in the first place. This, in turn, diminishes the fair market value for the protected work.[222]

So what solutions remain for podcasters wishing to stay "legal?" In terms of licensing options for the "infringing-adverse," there are currently only four options: (1) attempt to obtain the licenses for each individual work contained in the podcast, which means going to each individual rights holding company or organization to negotiate each license individually; (2) use less restrictively-protected content; (3) limit the podcasts to unprotected sound recordings; or (4) eliminate sound recordings entirely from the podcast.[223]

VII. THE LICENSING VOID FACING PODCASTING DEMANDS CONGRESSIONAL ACTION

Today, the complexity of copyright laws have given ample fire to groups advocating that the existing copyright regimes and actions of Congress promote a chilling effect on creativity and technology, serving to stifle innovation and the free-exchange of ideas.[224] Groups, such as the Electronic Frontier Foundation ("EFF") even go so far as to declare today's copyright law "broken."[225] The EFF is assailing RIAA lawsuits against copyright infringers, or condemning recent rulings like *A&M Records v. Napster*[226] and *Metro-Goldwyn-Mayer Studios v. Grokster.*[227] Congress and recording companies

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17 U.S.C. § 107(4).

[221] *See* United Video v. FCC, 890 F.2d 1173, 1191–92 (D.C. Cir. 1989) (holding that retransmission of another's copyrighted work for commercial profit in a way that diminished the potential value of that work was not a "fair use" under copyright law).

[222] *See generally id.*; *Performances' and Performance Rights Hearings, supra* note 59, at 1 (concerning the displacement of the retail market sales of protected content as a result of digital technology).

[223] *See* DIDDEN, *supra* note 8.

[224] The Electronic Frontier Foundation ("EFF") is one of the most vocal advocates of this counter-current-copyright framework philosophy. Founded in 1980, the EFF declares itself the first line of defense protecting civil liberties in the networked world. *See* Electronic Frontier Foundation, About EFF, http://www.eff.org/about (last visited Jan. 14, 2006); *see also* Our Media, http://www.ourmedia.org (last visited Jan. 14, 2006). Ourmedia.org is a "grassroots" website promoting open standards for content use of the Internet as an alternative to the "restrictive" nature of works protected under the current copyright regimes. *Id.*

[225] Electronic Frontier Foundation, File-Sharing: It's Music to Our Ears, http://www.eff.org/share (last visited Jan. 14, 2006).

[226] 284 F.3d 1091 (9th Cir. 2002) (holding the defendant, Napster, liable for contributory copyright infringement and shutting down its peer-to-peer file sharing service).

[227] 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005) (also shutting down a peer-to-peer file sharing system, similar to the holding in *Napster*).

alike should be alerted to the consequences of trying to stem the groundswell of support of groups who are taking advantage of legal and legislative inaction to advocate the lowering of copyright restrictions while turning a blind eye to the problems of serial infringement.[228]

One of the main problems with developing a coherent licensing structure for any new digital medium—not simply podcasting—is that the copyright law lags far behind current digital audio technology, while failing to address the near-future developments that may impact the current licensing regimes.[229] While current copyright statutes were passed with the best of intentions, the reality today is that recent legislation, specifically the DMCA, is seen as a generally flawed piece of legislation.[230] Its critics lament that the DMCA both failed to predict the future technologies that fearfully instigated its passage and further confused the hopelessly complex system of copyright laws already in existence.[231] Commentators have jeeringly referred to the statute as "nonsensical" and "proleptic."[232]

Nonetheless, in order to solve the current licensing problems faced by podcasting, a statutory approach is needed.[233] Despite the shortcomings of the legislative responses of the DPRA and DMCA, today's existing copyright regimes, however flawed, are not going away anytime soon.[234] Congress is thus faced with two options: (1) either ignore the blaring need for a statutory revision to today's copyright laws; or (2) draft similarly-focused legislation addressing the needs and benefits of podcasting by expanding the statutory licensing-structure to include podcasting's specifications under the DMCA's compulsory licensing scheme.

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[228] *Id.* Both *Napster* and *Grokster* are examples of how quickly file-sharing expanded in certain parts of society (college-aged students primarily, but certainly not exclusively, come to mind) and the immense problems, both economic and legal, that these technologies have posed to rights holders trying to protect the fair-market values of their copyrighted works. *Id.*

[229] *See* DIDDEN, *supra* note 8; Jenkins, *supra* note 54.

[230] *See* David Nimmer, *Back from the Future*: *A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKLEY TECH. L.J. 855, 868–70 (2001).

[231] *Id.* at 857–60. *See generally* Jenkins, *supra* note 54.

[232] David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 409–12 (1999) (noting the absurdity of several of the DMCA's provisions); Nimmer, *supra* note 230, at 858. Prolepsis is "the representation or assumption of a future act or development as if presently existing or accomplished." OXFORD AMERICAN DICTIONARY 1355 (2d ed. 2005).

[233] *See generally* Jenkins, *supra* note 54 (explaining that copyright regimes exist as part of a democratic process and it is up to Congress and subscribers to decide what rules would be best to govern podcasting).

[234] *See* Stephen Shankland, *Lawyer Lessig Raps New Copyright Laws*, CNET NEWS.COM (Aug. 29, 2001), http://news.com.com/2100-1001-272352.html; Negativland's Intellectual Property Issues, http://www.negativland.com/intprop.html (last visited Jan. 15, 2006) (stating a decidedly more critical viewpoint of "entrenched" copyright regimes).

With regard to the former suggestion, congressional inaction would force the U.S. Copyright Office, authorized to establish regulations consistent with the provisions of the Copyright Act, to shoe-horn podcasting into the DMCA's existing compulsory licensing regime for webcasting, a role for which podcasting does not fit.[235] The better solution for licensing podcasts hinges on congressional action.

What specifically must to be done? Prior to any statutory revision, Congress must take into account the following podcast-specific issues when drafting legislation: (1) the solution must be efficient, providing the podcaster with the fewest amount of required licensing "stops" in order to podcast;[236] (2) the licenses must be affordable, taking into account the character of use, such that a non-commercial podcast should be weighed differently than a commercial podcast;[237] and (3) the Copyright Act's exclusion doctrine of fair use should extend to podcasting.[238]

Congress should draft legislation that honors the preservation of fair market value for existing protected works, while also avoiding endorsing an overly severe regulatory scheme that could hamper podcasting.[239] Despite this tension, a compromise is definitely possible, as exhibited through the efforts in the 1990s to develop a compulsory licensing scheme for streaming media.[240] Record and radio companies lobbied Congress to develop statutorily established blanket-licensing agreements for streaming media, which resulted in the creation of Sound Exchange by the RIAA.[241] Despite the complexity, intensity, and contentiousness of past negotiations in developing licensing regimes for other forms of digital media, there have been statutory solutions enacted for clarifi-

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235 *See* 17 U.S.C. § 114(d)(2)–(3) (2000) (establishing rules and regulations for licensing eligibility); *see also id.* §§ 701, 702 (recognizing the statutory authority and function of the Copyright Office).

236 Jenkins, *supra* note 54.

237 *Id.* The rates and terms webcasting licenses administered by Sound Exchange vary greatly depending on the character of the webcast. For example, there are nine categories in which webcasters may be classified: (1) commercial; (2) small commercial; (3) noncommercial; (4) noncommercial educational entities; (5) National Public Radio stations; (6) news subscription services; (7) preexisting subscription services; (8) preexisting satellite digital radio services; and (9) business establishment services. Determination of classification often depends on the tax statuses of these entities under the Internal Revenue Service Code. This rationale should be extended to podcasts in light of the expansion of commercialization with declared non-commercial podcasters enjoying lower rates and terms than those who are commercial, educational, and so on. *See* Sound Exchanges, Statutory Licensees, http://www.soundexchange.com/licensee/licensee_nwbs.html (last visited Jan. 14, 2006); *see also* 37 C.F.R. § 263.2 (2005) (establishing rates for noncommercial webcasters).

238 Jenkins, *supra* note 54.

239 *Id.*

240 *See* 37 C.F.R. § 260 (describing the negotiations surrounding the creations of Sound Exchange).

241 *Id.*; *see* Sound Exchange, http://www.soundexchange.com (last visited Jan. 15, 2006).

cation.[242]

Congress should amend the DMCA to include statutory licensing for the sound recordings found in podcasts. Congress can temper many of the concerns generated by the technological differences between podcasts and webcasts by drafting a specific set of rules, similar to the sound recording complement for webcasts, which podcasters must follow in order to receive the benefits of a compulsory license.[243] Many of the same provisions guiding what content webcasters may legally incorporate are equally applicable to podcasting as well. For example, when incorporating a sound recording into a podcast, first and foremost, podcasters should lawfully possess the sound recording.[244] Podcasters should be required to identify the title of the work, the artist of the work, and the album including the work.[245] Podcasters ought to be barred from pre-publishing or announcing songs or content forthcoming or when exactly during the podcast the content will be played.[246] Restrictions should prevent podcasters from playing more than three songs from any one particular album, and to play only two songs consecutively.[247] This restriction would allow podcast subscribers to enjoy certain content, while also precluding them from relying on a podcast instead of purchasing the album. Podcasters should be required to make a good-faith effort not to link any licensed recording such that the performer would be linked to any advertising scheme.[248] If the podcaster wants to leave archived material on the website or location where the podcasts were stored, he or she should be allowed to do so, but only for a limited period of time.[249] These restrictions will ensure that copyright holders are protected,

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[242] KOHN & KOHN, *supra* note 81.

[243] These ideas are partial adaptations to the provisions found in 17 U.S.C. §§ 114(d)(2)(C)(i)–(ix), 114(j)(13) (2000) known as the "sound recording performance complement." *Id.*

[244] *See* 17 U.S.C. § 114(d)(2)(C)(i).

[245] *See id.* § 114(d)(2)(C)(ix). The identifying information should be incorporated during or after the performance of the sound recording, so as to dissuade consumers from seeking out that specific performance within the podcast.

[246] This would not disqualify podcasters who simply announce that their podcasts will include certain performers, as long as they do not identify the specific time or location within the mp3 stream. It would also not prevent podcasters from providing a brief "sample" of what was forthcoming, so long as they refrained from providing specific details. *See id.* § 114(d)(2)(C)(ix).

[247] *Id.* § 114(j)(13)(a) (precluding subscribers from using podcasts as substitutes for buying the actual content conventionally).

[248] *Id.* § 114(d)(2)(C)(iv) (protecting the performers from having their works used to promote a cause or idea absent their consent).

[249] *Id.* § 114(d)(2)(C)(iii). For webcasting, the statutorily allotted period is two weeks. Congress should explore the idea of restricting archived material by the number of episodes available, in addition to the amount of time the archived material should be made accessible. If the time period between podcasts is substantial, Congress should rely on a calendar-based limitation, like webcasting's two weeks. However, if the podcast is posted more frequently,

while the public receives the benefits of podcasting without overly burdening podcasting with restrictions that hamper the creative choices available to podcasters.

Additionally, the DMCA contains specific anti-circumvention requirements for webcasting to prevent the unauthorized copying of protected sound recordings.[250] However pertinent, the anti-circumvention requirement of compulsory licensing for webcasters could be borrowed by podcasting because the majority of podcasts are still transmitted in mp3 format, a format specifically designed for easy copying.[251] Obviously, Congress cannot explicitly restrict the copying of podcasts because the podcast is copied when downloaded from the original source.[252] However, Congress should mandate the restriction of any subsequent copying of the podcast and require podcasters to give a warning, either within the podcast or on the host site where the podcast is accessed, forcing the subscriber to acknowledge that the content contained within is protected and further reproduction, extraction, or distribution is prohibited without additional authorization.[253]

There are other requirements for podcasters that Congress could also incorporate into a statutory revision of the DMCA that would preserve a protected sound recording's fair market value. Congress could impose quality restrictions on the actual sound recordings incorporated into the podcast, requiring the copy of all non-original content to be entered at a lower audio quality than the original parts of the program, which would serve as a means to dissuade technologically-savvy subscribers from extracting specific portions of the podcast for redistribution.[254] Or, instead of allowing the audio *quality* of the pro-

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Congress should consider limiting the number of podcasts available by archive. For example, for a daily podcast, the podcaster may only have the previous two or three episodes available to consumers for download. *See generally* § 114(d)(2)(C)(iii); Matt May, Presenting the Portland License (Sept. 5, 2005), http://www.corante.com/podcasting/2005/09/07/presenting_the_portland_license.php.

250 17 U.S.C. § 114(d)(2)(C)(viii) (stating the anti-circumvention provision governing webcasters).

251 *See* Delchin, *supra* note 9.

252 *See* Gordon-Murname, *supra* note 5; DIDDEN, *supra* note 8 (describing the downloadable quality of podcasting).

253 As long as podcasts remain in pure mp3 format, which is unable to include any digital rights management restrictions, serial copyright infringement through unauthorized retransmission, copying, and distribution will remain a real concern. However, new audio formats are already being utilized online, such as Apple's AAC format on iTunes, or the WMA format produced by Microsoft, which are able to include play-restricting technology. *See* Evangelista, *supra* note 193 (discussing the formatting opportunities being explored with Apple's iTunes .aau music format). Podcasts produced in these formats may be able to reintroduce the anti-circumvention intention found at 17 U.S.C. § 114(d)(2)(C)(v)–(viii).

254 Instead of leading the tempted subscriber down the primrose path to copyright infringement, resulting in the significant piracy problems litigated by the RIAA today, a slight reduction in quality may make it unworthy of the infringer's effort to extract the protected

tected sound recording to be limited while incorporated into a podcast, Congress could limit the *quantity* of the protected work that would be available under a compulsory licensing scheme. Podcasters wishing to remain eligible for the scheme would only be permitted to use a specific percentage of the recording for incorporation into their shows.[255]

Similar to what is currently in use for webcasting, an appointed agent for digital collections must be designated to include a consortium operated or rotated between the three major performing rights societies: ASCAP, BMI, and SESAC.[256] Digital technologies exist that monitor webcast performances while toggling streamcounts.[257] Because podcasting involves a new spin on several existing technologies, the monitoring mechanisms already available should be applied to monitoring podcasts.[258] Podcasting would be offered as a "prepackaged" stream of media and monitoring of their contents could be done by a nominated or an independent third-party, like Sound Exchange.[259]

These prescriptions are just a starting point for the vital need of congressional action to provide workable and manageable licensing solutions for podcasts. There is a significant challenge in bringing the numerous vested interests of subscribers, rights holders, and digital audio supports to the negotiating table in search of a tenable licensing compromise for podcasting.[260] However, it is critical that Congress act to revise the existing licensing schemes to incorporate podcasts or face a subscriber that rejects a fair and just compensation for the creators and supporters of sound recordings because the current licensing scheme is too complex and not practicable.[261]

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sound recording from the podcast. Comically, this approach takes a page from the "worst possible scenario" playbook of the recording industry around the time that analog recording was giving way to digital content of superior quality. By mandating a *lower* quality than the rest of the stream, it might be dissuasive.

[255] May, *supra* note 249.

[256] *See* Michael A. Einhorn & Lewis Kurlantzick, *Traffic Jam on the Musical Highway: Is It a Reproduction or a Performance?*, 49 J. COPYRIGHT SOC'Y U.S.A. 417, 438 (2001).

[257] *Id.*

[258] *See* discussion *supra* Part II.A–B (describing the technologies behind podcasting).

[259] Einhorn & Kurlantzick, *supra* note 256, at 438. That is not to suggest that a statutory solution will be easily achievable. Sound Exchange was created to address the radio-like experience of webcasting, which podcasting does not emulate due to the interactive nature of the technology. *See* discussion *supra* Part III.A.5–7 (describing the interactivity requirements of certain digital technologies); Sound Exchange, About Sound Exchange, http://www.soundexchange.com/about/about.html (last visited Jan. 30, 2006).

[260] *See generally* Jenkins, *supra* note 54.

[261] It is certainly not fatalistic to say that when given the opportunity, consumers will use new audio technology to exploit the copyrights of protected works without giving so much as a passing glance to fair and just compensation for the works' creators. *See generally* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

A. Digital Rights Management Technologies and Podcasting

A significant challenge facing Congress and rights holders in considering how to draft statutory solutions to combat copyright infringement is that podcasting is still evolving and subject to larger issues facing digital audio content distribution.[262] Innovations like digital rights management ("DRM") technology will greatly affect podcasting's development. Congress must pay close attention to the recording industry's incorporation of DRM technologies into its recordings when drafting the requirements for a licensing structure.[263] DRM technology could be both a boon and a burden to podcasting for two main reasons. First, because of the open-sourced nature of podcasting, seamless integration from podcaster to subscriber is a vital part of the medium's success.[264] In-

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262 A prime example is webcasting and the advent of broadband technology, which exposed the gaping deficiencies of the DPRA almost as soon as it was enacted. In other words, advancing technology and practices will make it difficult to nail down one statutory interpretation that is sufficient to address the future evolutions of podcasting. Another good indication is to look at podcasting in its early stages, where it was predominantly an audio content delivery technology. Regulations enacted to deal with podcasting in its infancy would have missed its evolution into a digital video content mechanism, which would have been incomplete or deficient as a result. *See generally* Eric D. Leach, *Everything You Always Wanted to Know About Digital Performance Rights But Were Afraid to Ask*, 48 J. COPYRIGHT SOC'Y U.S.A. 191, 201 (2000) (providing a base view of copyright regimes, while noting the concerns of participants involved in the processes that developed current copyright law).

263 DRM technology is an effective but controversial tool used to limit the transmission and distribution of protected digital content. DRM is an umbrella term referring to any of the several technical methods used to control or restrict the use of digital media content on electronic devices. The media most often restricted by DRM techniques include music, visual artwork, computer and video games, and movies. *See* Electronic Frontier Foundation, The Customer Is Always Wrong: A User's Guide to DRM in Online Music, http://www.eff.org/IP/DRM/guide (last visited Dec. 23, 2005); A classical DRM-system is one in which a client obtains content in a protected (typically encrypted) form, with a license that specifies the uses to which the content may be put. Examples of licensing terms that are being explored by the industry are "play on these three hosts," "play once," and "use computer program for one hour." The license and the wrapped content are presented to the DRM system whose responsibility is to ensure that: (1) the client cannot remove the encryption from the file and send it to a peer; (2) the client cannot "clone" its DRM system to make it run on another host; (3) the client obeys the rules set out in the DRM license; and (4) the client cannot separate the rules from the payload. More advanced DRM systems may even go further than the previously mentioned restrictions. *See also* Peter Biddle et al., The Darknet and the Future of Content Distribution, *in* Proceedings of the 2002 ACM Workshop on Digital Rights Management (2002), http://crypto.stanford.edu/DRM2002/darknet5.doc; Stephen Wildstrom, *Just Let Us Play the Movie*, BUS. WK., Dec. 19, 2005, at 18 (commenting on Sony BMG's recent attempts at DRM insertion, which involved including a defective, aggressive DRM technology, written to hide itself from the CD's user, but which ultimately rendered consumers susceptible to security breaches of their computer systems online); Cory Doctorow, *Vaudeville Offers a Music Lesson for Sony BMG*, FIN. TIMES (London), Dec. 11, 2005, at 19.

264 Fundamentally, a podcasting consumer must be able to download and play the con-

sertion of any form of DRM technology that affects a podcast's playability is of vital importance.[265]

Given the recording industry's trepidation with unrestricted content and piracy concerns, it is likely that most music labels will reject licensing non-DRM protected music for podcasts since single sound recordings could be extracted.[266] However, the use of DRM technology also presents a unique opportunity for licensing podcasts that may allay some of the recording industry's fair market value concerns. DRM-protected content could be inserted into a podcast with a specific number of play restrictions, say once or twice, to limit the number of plays or prevent the extractions of a single work. Because of podcasting's "regular updates," average podcasting subscribers are unlikely to replay podcasts many times or on different devices. Even so, as an extra precaution, DRM-restricted podcasts would prevent a subscriber from listening to the program over-and-over, substituting a podcast for a purchased sound recording.[267]

B. The Rise of Creative Commons

One of the newer alternatives to conventional licensing of which Congress should also be aware that corresponds with the open-sourced nature of podcasting is the less-restrictive licensing scheme promoted by Creative Commons.[268] Creative Commons' licenses offer to mitigate the difficulties consumers encounter when seeking licenses through the traditional, burdensome process of applying for rights established statutorily.[269] These sources offer a less-restrictive alternative to conventional licenses that allows authors to retain copyright privileges over their creations while authorizing how their works may be used.[270] Since its birth in 2001, Creative Commons has spread internationally and has made inroads into the online communities with Creative

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tent provided by the podcaster without hitch. *See* discussion *supra* Part II.B.

[265] Mp3 formatting is used precisely because it is common and easily compatible or convertible into a format recognized by nearly all digital audio players. *See* Mary Frisby, *Rockin' Down the Highway: Forging a Path for the Lawful Use of Mp3 Digital Music Files*, 33 IND. L. REV. 317, 318–20 (1999); *see also* Jenkins, *supra* note 54 (discussing the importance of DRM and podcasting compatibility).

[266] *See* Dufft, *supra* note 191; UMG Recordings, Inc. v. MP3.COM, Inc. 92 F. Supp. 2d 349, 351–52 (S.D.N.Y. 2000) (discussing the negative ramifications of copyright infringement).

[267] *See* discussion *supra* Part II.A–B.

[268] About Creative Commons, http://creativecommons.org/about/history (last visited Jan. 3, 2005).

[269] *Id.*

[270] Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 390 (2005); Jenkins, *supra* note 54.

Commons-licensed content now searchable through Yahoo! and Google.[271] Current estimates for the number of online objects that are licensed under a Creative Common license are 42 million.[272] This number has been growing ever since the license was first released in 2001, and expectations for the future Creative Commons licensing of works are optimistic.[273]

Despite the increasing popularity of Creative Commons and the flexibility that such licenses afford their works' authors and consequent users, those licenses currently amount for a small number of the total licenses issued.[274] The farthest-reaching and most viable potential solution is a statutory revision that must be addressed by Congress.[275]

VIII. CONCLUSION

It is important to keep in mind that podcasting is still in the very early stages of its development and some commentators have suggested that as it develops, it will carve out a symbiotic relationship with mainstream media.[276] Podcasting is an entirely new medium through which individuals worldwide can produce, copy, distribute, and enjoy digital audio material. However it is not unique because advances in almost every audio technology are challenging traditional notions of copyright and licensing schemes. Podcasters and podcasting subscribers, either unaware or unconcerned about the legal implications of their actions, are challenging these notions. While licensing protected content has been historically streamlined for analog and digital innovation, today's statutory framework has failed to adapt to the podcasting advance. The challenge

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[271] *See* Press Release, Creative Commons, Creative Commons Unveils Machine-Readable Copyright Licenses (Dec. 12, 2002), http://creativecommons.org/press-releases/archive/2002/12; Creative Commons, Press Webpage, http://creativecommons.org/press-releases/ (last visited Jan. 3, 2005); *see also* Google Advanced Search Webpage, http://www.google.com/advanced_search?hl=en (last visited Jan. 3, 2005) (allowing searcher to select generically the level of licenses to be returned during a websearch); Yahoo! Advanced Search, http://search.yahoo.com/search/options?fr=fp-top&p= (last visited Jan. 3, 2005) (showing an explicit searchable function for a Creative Commons licensed content).

[272] E-mail from Mia Garlick, General Counsel, Creative Commons, to Michael Lang, Comment Author (Jan. 3, 2005) (on file with author).

[273] *Id.*

[274] *Id.*

[275] Because the DPRA was concerned with digital satellite radio, the DMCA was written to close loopholes addressed by technologies not realized in earlier statutes adopted by Congress. Given the disparate parties involved, the wide array of contents, interested parties, and the financial consequences at stake, the strongest option available is an authoritative act of Congress to channel these elements in a direction that is both positive for the rights holders, creators, users, and subscribers of podcasting. *See generally* Jenkins, *supra* note 54.

[276] J.D. Lasica, Co-Founder of ourmedia.org, The Duke Podcasting Symposium (Sept. 28, 2005), http://dukecast.oit.duke.edu/symposium (last visited Jan. 14, 2006).

for Congress, copyright holders, podcasters, and podcasting subscribers will be to reach a fair and equitable solution that protects the digital rights of copyright holders without stifling the advancement or the creative content of those persons seeking to capitalize on podcasting's full potential—a digital audio delivery system capable of providing particularized digital content to interested parties for their enjoyment, unhampered by the restraints of time or place.