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Report for Congress

Copyright Issues in Online Music Delivery

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Summary

Early in the 107th Congress, both the House and Senate Judiciary Committees held hearings on online music. The Committees' goals were to obtain information about the interaction of technology and business surrounding the development of online music services.

The multiplicity of licensing requirements led several online services to call for simplified music licensing on the Internet through "compulsory licensing." When the law creates a compulsory license, parties thereto need not negotiate its availability or terms. When statutory requirements are satisfied, the license is available at statutory rates.

Although there are several types of "compulsory" or "statutory" licenses created by the U.S. copyright laws, 17 U.S.C. § 101 *et seq.*, there are not, at this time, any legislative proposals to create a *general* compulsory license for transmission of music over the Internet.

Two relatively recent laws, however, the Digital Performance Right in Sound Recordings Act (DPRA), which was amended by the Digital Millennium Copyright Act (DMCA), presently control several aspects of compulsory licensing necessary for digital music transmission. 17 U.S.C. § 114 establishes statutory licenses for the public performance of qualified digital audio transmissions. 17 U.S.C. § 112 establishes a statutory license for ephemeral copies of digital transmissions. 17 U.S.C. § 115 creates a compulsory license, referred to as a "mechanical" license, for reproductions of songs and digital phonorecord deliveries over the Internet. Implementation of these provisions is difficult, and often contentious, given their complexity and the challenge of applying them to new and evolving technologies and businesses.

This report gives a brief overview of the basic elements of music licensing and surveys recent developments in the U.S. Copyright Office's implementation of the DMCA. It notes the Copyright Office's DMCA § 104 Report and its interpretation of compulsory licensing provisions under 17 U.S.C. §§ 114, 112, and 115. It reviews preliminary and final rulemaking decisions concerning webcasting, including statutory royalty rates, notice and record keeping requirements, interactive services, and digital phonorecord deliveries. Finally, it surveys legislation focusing on online music introduced in the 107th Congress.

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Copyright Issues in Online Music Delivery

Introduction. At the height of its popularity, Napster captured the public's fancy. For many, especially young people and college students, Napster became synonymous with online music. It popularized music delivery over the Internet; it demonstrated the ease and convenience with which consumers could select songs from vast music repertories; and, it made what had been the unrealized notion of completely customized, personal music CDs a reality. In copyright infringement litigation of widespread interest, the federal courts ruled that Napster violated the copyright interests of the music industry and performing artists whose songs were being freely exchanged.[1]

But the wide-spread popularity of Napster made its mark. As a result, the avowed goal of those within and without the music industry is to see the development of convenient, meaningful, and *lawful* access to services on the Internet.[2]

Early in the 107th Congress, both the House and the Senate held hearings on the legal and technical obstacles to streamlined and expanded online music delivery. On April 3, 2001, the Senate Judiciary Committee held a hearing entitled "Online Entertainment: Coming Soon to a Digital Device Near You."[3] The Committee took testimony from representatives of the music industry and online music services. The Committee's aim was to elicit information about the interaction of technology and business surrounding the development of online music delivery, not to formulate new legislation to regulate it.

Among those who testified were Hank Berry, Interim CEO of Napster, and Robin Richards, President of MP3.com. Both companies were sued successfully by the music industry for copyright infringement. Attempting to comply with the court's orders, Mr. Berry addressed the difficulty of obtaining information on copyright ownership rights and the general complexities of music licensing.

Robin Richards of MP3.com discussed the difficulties obtaining copyright clearance faced by his company's music storage "locker" service, MyMP3.com.

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[1]A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Press accounts indicate that Napster was recently acquired by Bertelsmann AG and is likely to file for reorganization under chapter 11 of the U.S. Bankruptcy Code. *See*, Nick Wingfield, *Napster Gets a Reprieve – Bertelsmann Deal Won't Solve All of Music Site's Woes*, WALL STREET JOURNAL EUROPE, May 21, 2002 *available at* PROQUEST, Newspaper Library.

[2]*Copyright Conference Panelists Say Digital Rights Management, Education, Access Key to Content Protection,* 61 BNA PATENT, TRADEMARK & COPYRIGHT J. 625 (Apr. 27, 2001).

[3]The House Subcommittee on Courts, the Internet and Intellectual Property held an oversight hearing entitled "Music on the Internet" on May 17, 2001.

MyMP3.com is designed to allow consumers to use Internet-connected devices to listen to CDs that they have previously purchased. With respect to Internet music transmissions, Mr. Richards referred to several different copyright authorizations required:

> [A]lthough we disagreed with the interpretation of the copyright law put forward by the record labels and publishers, our desire to get our service back up and running led us to enter into very costly agreements covering all of their claims. We have agreed to pay for converting the CDs that we purchase into MP3 format. We have agreed to pay for performing both the sound recordings and the songs contained on those CDs. And we have even agreed to pay the publishers for the temporary, momentary "buffer" copy that automatically is made (and deleted) each time someone listens to their own music out of their MyMP3.com locker. Yet, today, nearly six months after signing the last of these agreements, we haven't been able to obtain all of the licenses that the copyright owners insist we must have before we can fully relaunch the My.MP3.com service.[4]

The multiplicity of licensing requirements for online music led several business consumers and online music services to call for simplified music licensing on the Internet through "compulsory licensing." The recording industry expressed their concerns over the necessity of a secure means to transmit music electronically; and members of the general public (and the Congress) expressed their impatience with the pace of development for online music delivery.

When the law creates a compulsory license, parties thereto need not negotiate its availability or terms. When statutory requirements are satisfied, a compulsory license is available at statutory rates. Many copyright owners, and the U.S. Copyright Office, however, are generally against expanding compulsory licensing, particularly with respect to valuing rights in a cyberspace.[5] They contend that determining the commercial market value of the property is best established through contract negotiation, not regulatory rate-making.

Although there are several types of "compulsory" or "statutory" licenses created by U.S. copyright law, 17 U.S.C. § 101 *et seq*., there are not, at this time, any legislative proposals to create a *general* compulsory license for transmission of music over the Internet.

Two laws, the Digital Performance Right in Sound Recordings Act (DPRA),[6] which was amended by the Digital Millennium Copyright Act (DMCA),[7] control several aspects of compulsory licensing necessary for digital music transmission. 17

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[4]Statement of Robin Richards before the Senate Judiciary Committee at [www.senate.gov/~judiciary/te04030/rr.htm].

[5]*Leave Webcasting to the Marketplace Government, Industry Witnesses Tell Panel*, 60 BNA PATENT, TRADEMARK & COPYRIGHT J. 164 (June 23, 2000).

[6]P.L. 104-39 (Nov. 1, 1995).

[7]P.L. 105-304 (Oct. 28, 1998).

U.S.C. § 114 establishes statutory licenses for the public performance of digital audio transmissions by qualified licensees. 17 U.S.C. § 112 establishes a license for the "ephemeral" or temporary copies necessary to effect a digital audio transmission. 17 U.S.C. § 115 creates a compulsory license, referred to as a "mechanical" license, for reproductions of songs and digital phonorecord deliveries over the Internet. Implementation of these provisions is proving difficult given their complexity and the challenge of applying them to new and evolving technologies and businesses.

Indeed testimony before the Senate Judiciary Committee evidenced a lack of consensus over many of the basic components of copyright rights relative to online music transmission. For example, parties disagree over the "new" statutory language of digital audio transmission and how traditional, protected activities such as "reproduction" and "public performance"should apply in an Internet environment.

This report gives a brief overview of the basic elements of music licensing and surveys recent developments in the U.S. Copyright Office's interpretation of compulsory licensing provisions under 17 U.S.C. §§ 112, 114 and 115.

Background: The Complexities of Music Licensing. While almost all people acknowledge an intellectual property ownership interest in those who contribute their creative talents to the world of music, few outside the music industry appreciate the legal complexity of copyright ownership interests and responsibilities. The Copyright Act confers discrete exclusive rights on different types of expressive media.

The owner of a musical composition (which is the underlying song on a sound recording) has the exclusive right to do or to authorize:

- *reproduction* of the copyrighted work;
- *preparation of derivative* works based on the copyrighted work;
- *distribution of copies* to the public by sale, rental, lease or lending;
- *performance* of the work *publicly*; and,
- *display* of the work *publicly*.[8]

The owners of rights in sound recordings have an exclusive right to control reproduction and distribution of their recordings, but they do *not* have the same public performance right as composers. In the case of sound recordings, the public performance right is qualified and limited. It covers

- *performance of the work publicly by means of a digital audio transmission.*[9]

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[8]17 U.S.C. § 106(1)-(5).

[9]17 U.S.C. § 106(6).

Cole Porter, Frank Sinatra, and "I've Got You Under My Skin". Different exclusive rights attach to different uses and expressions of copyrighted work. The convergence of copyright interests in a sound recording is a prime illustration. An oft-cited example is that of Cole Porter's composition, the song *I've Got You Under My Skin.*[10] The copyright to a song is most often owned by the composer or a music publisher, in this case, Warner/Chappell Music, Inc.[11] In order to record a version of *I've Got You Under My Skin*, permission must be obtained from Warner/Chappell. Many performers have recorded different versions of it.

The copyright in a sound recording is most often owned by the recording artist or the recording studio. Frank Sinatra recorded a version, the copyright to which is owned by Reprise Records. Now assume that one wished to use the Frank Sinatra recording. How is it to be used? One way might be a radio station's over-the-air (analogue) broadcast of it. Since a broadcast is essentially a "public performance," the station would obtain permission, i.e., pay a royalty to Warner/Chappell. But, because sound recording copyright holders do *not* have control over "public performances" of the recording, the radio station need not pay royalties to Reprise Records. Assume, however, that the radio station wishes to reproduce and distribute copies of Frank Sinatra's recording of *I've Got You Under My Skin* for promotional purposes. The composer/music publisher has the right to control the reproduction and distribution of the underlying composition (the song). And the sound recording copyright holder has the right to control reproduction and distribution of the sound recording. Hence, permission would be needed from both rights holders. Obtaining permission to use a song is a separate undertaking from permission to use a sound recording.[12]

In addition to what can be a complicated matter of identifying rights holders, one seeking permission to use copyrighted music may negotiate a wide variety of different types of licensing agreements. Again, the license will reflect which of the rights holder's exclusive rights are implicated depending upon the nature of the intended use.[13] In most instances, the negotiation of permission – that is, the licensing agreement – is a private, contractual matter between the parties. By contrast, when the law creates a compulsory or statutory license, no negotiation is

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[10]AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 11 (3rd ed. 2002). *See also*, Kohn, *A Primer on the Law of Webcasting and Digital Musical Delivery*, 20 ENT. L. REPTR. 7 (1998).

[11]Many writers and music publishers are represented by "performance rights societies" such as the American Society of Composers, Authors and Publishers (ASCAP), the Broadcast Music, Inc. (BMI), or the Society of European State Authors and Composers (SESAC).

[12]2 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22[A][3][b]: "Either [music or sound recordings] may be used as applicable, by compulsory license, by direct license, by statutory exemption, by virtue of the fair use doctrine, or because of its public domain status, in any permutation or combination. The point is that each exercise must be undertaken independently."

[13]The variety of music licenses is extensive, including, for example, print licenses, mechanical licenses, electrical transcription licenses, synchronization licenses, videogram licenses, musical product licenses, performance licenses, dramatic performance licenses, and grand performance licenses. KOHN ON MUSIC LICENSING, *supra* at 444-448.

necessary. The user, i.e., the licensee, simply complies with the statutory conditions to use the work and pays the statutory rate or royalty for the benefit of the rights holder.

With respect to online music delivery, however, the relative newness of both the technology and the law itself suggests the absence of an interpretative consensus among affected parties, including the courts, about the precise copyright law principles that will govern online music transmission.

Statutory licenses for public performance of digital audio transmissions under 17 U.S.C. §§ 114, 112. and 115.

Statutory Licensing for Performance Rights for Digital Audio Transmissions, 17 U.S.C. § 114. When Congress adopted the DPRA in 1995, it created a new but limited public performance right for digital audio transmissions. Rather than add a broad, comprehensive new performance right similar to that enjoyed by composers, Congress created many exemptions to the performance right of sound recording owners.

Among the *exemptions* to a sound recording owner's exclusive right under 106(6), pursuant to § 114(d)(1) are:

- a nonsubscription broadcast transmission, i.e., traditional over-the-air radio and television broadcasts and qualified retransmission; and

- internal transmissions by a business on or around its premises, including "on-hold music" transmissions via telephone to a caller waiting for a response.[14]

These services are exempt from the performance right and do not need to obtain a license to pay royalties for digital transmissions.

Congress also provided for statutory licensing for some, but not all, digital transmissions.[15] The nature of the digital public performance right requires the licensing parties to distinguish between "subscription" and "interactive" digital transmissions. Subscription services involve controlled transmissions that are limited to paid recipients, while an interactive service enables a member of the public to request a particular sound recording.[16]

The legislative history of the DPRA expresses congressional concern that interactive services had the greatest potential to impact traditional record sales.

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[14]17 U.S.C. § 114(d)(1)(C)(iv). S.Rept. 104-128, 104th Congress, 1st Sess. 23 (1995). *See*, 2 NIMMER ON COPYRIGHT § 8.22[B][3].

[15]17 U.S.C. § 114(d)(2), (f).

[16]17 U.S.C. § 114(j)(7) & (14). Although subscription and interactive services may be related, some guidelines for determining what a service is are established by the statute. The ability of an individual to request that a particular sound recording be performed for the public at large, for example, or for members of a subscription service, does not render it an interactive one if the song is not performed within one hour of the request.

Therefore, copyright owners have the exclusive right to control the performance of their work on interactive media through negotiated contracts.[17] Thus, subscription transmissions may qualify for compulsory licensing, but interactive subscription services must be "voluntarily licensed."[18]

Statutory license for webcasting: eligible nonsubscription and subscription transmissions. Webcasters whose activities are not exempt under § 114(d), and are likewise nonsubscription and noninteractive, may qualify for a statutory, *i.e.*, a compulsory, license. They are referred to as "eligible nonsubscription transmissions."[19]

Unless a subscription service is exempt from the public performance right, it too may qualify for a statutory license if detailed requirements are complied with. Among the requirements for a subscription service's statutory license is adherence to the "sound recording performance complement."[20] The sound recording performance complement is a complex protocol, adapted from traditional radio broadcast practice, which limits the number of selections a subscription service can play from any one phonorecord by the same featured artist. The goal of the protocol is to prevent a pre-announced play schedule that facilitates copying of albums, or the work of individual performers, in their entirety.

Limitation on exclusive licenses for interactive services. Although the DPRA requires negotiated licensing for interactive services, it does limit the duration of an exclusive license for the performance of a sound recording to prevent copyright owners of the recordings from becoming monopolistic "gatekeepers" and limiting opportunities for public performances.[21]

Statutory Licensing for Ephemeral Recordings of Digital Audio Transmissions, 17 U.S.C. § 112. Ephemeral recordings are reproductions of a work produced solely for the purpose of its transmission by an entity legally entitled to publicly perform the work. Section 114 is concerned with the public performance right for digitally transmitted sound recordings. Section 112 authorizes a compulsory license to enable those who webcast a sound recording to make a temporary or

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[17]S.Rept. 104-128 at 16.

[18]2 NIMMER ON COPYRIGHT § 8.22[A][1].

[19]17 U.S.C. § 114(j)(6) defines an "eligible nonsubscription transmission" as:

> a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

[20]17 U.S.C. § 114(d)(2)(B)(i).

[21]17 U.S.C. § 114(d)(3).

"ephemeral" reproduction or copy of the recording, which is generally stored in the hard drive of computers, *i.e.*, servers, in order to facilitate the performance. Thus, a statutory license under § 114 applies to a public performance while the statutory license under § 112(e) applies to a reproduction. The latter covers only those ephemeral recordings of phonorecords used for transmissions in connection with a statutory license under § 114(d) or (f).[22]

Compulsory or "mechanical" licenses for reproduction and distribution rights under 17 U.S.C. § 115. The mechanical license in copyright law was enacted in 1909 in response to a U.S. Supreme Court decision which held that "mechanical" devices such as piano rolls were *not* copies of musical compositions. Hence, to reproduce a song on a piano roll or on a phonograph record would not result in an infringement of the composer's copyright.[23] Acting to overturn the Court's decision, to reverse its impact on owners of copyright interests in musical compositions, and to thwart a potential music monopoly by a large manufacturer of piano rolls, Congress created the compulsory license provision that is currently embodied in 17 U.S.C. § 115. The license protects the composer's right to control reproductions of the work but permits the recording of a song by a third-party on "mechanical" media like a piano roll or record, hence the term "mechanical license."[24] In its present form, it essentially allows reproduction of music that may be heard with the aid of a mechanical device.[25] The mechanical license is validly obtained only after a song has been initially distributed publicly under the authority of the copyright owner. The license is authorized when the licensee's primary purpose is to distribute the work publicly for private use.

The §115 mechanical license compensates the rights holder in the musical composition for reproduction and distribution rights; it does *not* authorize the duplication of a sound recording.[26] Permission to duplicate a sound recording must be obtained from whomever owns the copyright, the recording artist or record studio.

Digital Phonorecord Deliveries. In 1995, the DPRA amended §115 to include "digital phonorecord deliveries" or DPDs.[27] DPDs were included in the mechanical

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[22]"In any particular case, acts implicating the reproduction or performances rights must be considered separately under sections 112[e] or 114, as applicable, and any other relevant provisions under the Copyright Act." H. Comm. on the Judiciary, 105th Cong., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUG. 4, 1998, 52 (Comm. Print 1998).

[23]White-Smith Music Pub. Co. v. Apollo Co. 209 U.S. 1 (1908).

[24]2 NIMMER ON COPYRIGHT § 8.04[A].

[25]KOHN ON MUSIC LICENSING, *supra* at 677.

[26]17 U.S.C. § 115(a)(1), "A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording... ."

[27]A DPD is defined as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any

(continued...)

license to compensate composers for an anticipated offset in revenues from record sales as songs become more frequently transmitted digitally:

> Among other things, [§ 115] is intended to confirm and clarify the right of musical work and sound recording copyright owners to be protected against infringement when phonorecords embodying their works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales. The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.[28]

Hence, a mechanical license is available: to compensate the rights holder in the musical work when the licensee makes or distributes a phonorecord of a new version of the work; to compensate the musical composition rights holder when the licensee has obtained permission from a sound recording holder to duplicate the sound recording; and, to compensate the rights holder in the musical work for a DPD transmission of the work.

To summarize, there are many copyright requirements for both permission and licensing which must be observed before music can legally be transmitted over the Internet. These include:

- permission from the rights holder in the musical composition to duplicate, distribute, and/or perform the song publicly;

- permission from the rights holder in the sound recording to duplicate and distribute it and/or to perform it publicly via a digital audio transmission.

In most cases and contexts, parties will negotiate licensing agreements. However, statutory and compulsory licenses are available in limited circumstances:

- a third party may obtain a compulsory license to compensate composers/ music publishers when the licensee mechanically reproduces a song or transmits it digitally as a DPD;

- with respect to the public performance of a digitally transmitted sound recording, some transmissions are subject to a digital performance right, some are exempt, and yet others are entitled to the statutory license to compensate the sound recording rights holder.

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[27](...continued)
transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording... ." 17 U.S.C. § 115(d).

[28]S.Rept. 104-128 at 37.

Recent and ongoing interpretations by the U.S. Copyright Office. Recent actions and determinations by the U.S. Copyright Office illustrate the complexity of many of the legal issues affecting online music delivery, particularly with respect to the implementation of requirements under the DMCA.

The DMCA § 104 Report: Recommendations regarding "incidental" copies and performances. Pursuant to § 104 of the DMCA, Congress directed the Copyright Office and the Department of Commerce to evaluate the effects of the DMCA on the development of electronic commerce and the relationship between existing and emergent technologies in connection with two provisions of the Copyright Act, §§ 109 and 117. Section 109 of the Act addresses the "first sale" doctrine, which, in essence, allows the purchaser of a traditional, *i.e.*, nondigital book, copy, or phonorecord, to dispose of it without being in violation of the copyright owner's distribution right. Section 117 of the Act sets forth exceptions to the owner's right of reproduction with respect to specific uses of a computer program.

In August of 2001, the Copyright Office issued the "DMCA Section 104 Report."[29] Although the Report's general conclusions are beyond the scope of this report, one of its recommendations relates directly to webcasting. The Report considers the unsettled copyright status of "incidental" or buffer copies necessitated by digital streaming. Also discussed are digital performances that are incidental to digital music downloads. Technically, discrete reproduction(s) or public performance(s) takes place in connection with streaming or a music download. The question is whether these activities should be authorized within a single grant of permission to the licensee to stream or download, or should each incidental transaction be separately licensed and compensable?

The Report analyzes the issue and recommends "that Congress enact legislation amending the Copyright Act to preclude any liability with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work."[30] Likewise, it concludes that "no liability should result under U.S. law from a technical 'performance' that takes place in the course of a [music] download."[31]

The Copyright Office acknowledges the close, analogous relationship between temporary buffer copies and ephemeral copies addressed in 17 U.S.C. § 112:

> As with temporary buffer copies, ephemeral recordings are made for the sole purpose of carrying out a transmission. If they are used strictly in accordance

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[29]U.S. Copyright Office, DMCA SECTION 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT. (August 2001). The Report in its entirety is available on the Copyright Office's website at [http://www.copyright.gov/reports/studies/dmca/dmca_study.html].

[30]*Id.* at 142-143.

[31]*Id.* at 148.

> with the restrictions set forth in section 112, they have no economic value independent of the public performance that they enable.[32]

Hence, the Office favors repeal of § 112(e) and "the adoption of an appropriately-crafted ephemeral recording exemption."[33]

Webcasting: Are radio broadcasters exempt from the digital performance right when they simultaneously stream over the Internet? As discussed earlier, the DPRA's public performance right for digital transmissions of sound recordings *exempts* "nonsubscription broadcast transmissions."[34] Radio broadcasters assert that this exemption covers FCC-licensed broadcasters who stream their radio programming over the Internet.

The question, which arose in the course of rate adjustment proceedings for the § 114 statutory license, is whether FCC-licensed broadcasters' simultaneous retransmission of radio broadcasts via the Internet are exempt from the limited sound recording performance right.

On December 11, 2000 the Copyright Office issued a final rule holding that, with the exception of over-the-air digital radio broadcasts, all other digital transmissions, including streaming over the Internet or "webcasting," *are* subject to statutory licensing under § 114(d)(2).[35] Broadcasters have challenged the rule, unsuccessfully to date.[36]

DMCA-based rulemaking relating to webcasting.

Rulemaking to establish statutory royalty rates for public performance and ephemeral copies of digital sound recordings. The compulsory license provisions of 17 U.S.C. §§ 114 and 112 necessitate establishing statutory rates. Rates are generally set for two year periods. They are established by the Librarian of Congress in consultation with the Copyright Office. The Copyright Office consolidated the proceedings for the first two terms for post-DMCA webcasting rates, 1998-2001.

The ratemaking scheme is intended to create consensus and/or support an informed market-based rate: First, affected parties (potential licensors and licensees) are subject to a six-month period to engage in voluntary negotiations.[37] In the absence of consensus and if requested by a party, owners and users may submit to

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[32] *Id.* at 144. (Footnotes omitted.)

[33] *Id.*, fn. 434.

[34] 17 U.S.C. § 114(d)(1)(A).

[35] Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77292 (December 11, 2000)(to be codified at 37 C.F.R. § 201.35). The notice is also available on the Copyright Office's web site, www.copyright.gov.

[36] Bonneville International Corp. v. Peters, 153 F. Supp.2d 763 (E.D.Pa. 2001).

[37] 17 U.S.C. §§ 112(e), 114(f).

and be bound by compulsory arbitration conducted pursuant to the Copyright Act.[38] Arbitration is an adversarial proceeding held before a three-person panel, the Copyright Arbitration Royalty Panel (CARP). If, prior to the commencement of the CARP proceedings, the parties are able to agree to an industry-wide settlement, the Librarian may adopt the proposed rate in the absence of an objection by an affected party.[39]

Although the Copyright Office has announced the initiation of a voluntary negotiation period for statutory royalty rates for webcasters for a future two-year cycle, 2003-2004,[40] rates have not yet been finalized for the previous terms, 1998-2002. Those rates were subject to a contentious arbitration before the CARP. The Report of the Copyright Arbitration Royalty Panel entitled "*In re rate setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings"* was issued on February 20, 2002.[41] On May 21, 2002, the Librarian, upon the recommendation of the Copyright Office, issued an order rejecting the CARP's proposed rates.[42] The Librarian will implement rates by June 20, 2002. Aggrieved parties bound by the rates may then bring suit in the U.S. Court of Appeals for the D.C. Circuit.[43]

Rulemaking to establish notice and record keeping requirements for public performance of digital sound recordings. The compulsory licenses created by 17 U.S.C. § § 114 and 112 also require that licensees give copyright owners notice and maintain records of use.[44] These requirements facilitate delivery of royalty payments to copyright owners. In February, 2002, the Copyright Office initiated a rulemaking to establish new requirements for notice and record keeping that will impact webcasters.[45] Statutory licensee webcasters would be required to keep and report detailed information on the sound recordings performed through "Intended Playlists." The RIAA has proposed the collection of additional information in a "Listener's Log" and "Ephemeral Phonorecord Log." Comments and feedback from webcasters indicate the absence of consensus over the appropriate

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[38]17 U.S.C. §§ 801-803.

[39]37 C.F.R. § 251.63 (2001).

[40]Digital Performance Right in Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 4472 (January 30, 2002),available on the Copyright Office's web site, [www.copyright.gov].

[41]The report, in its entirety, is posted online at the U.S. Copyright Office's website at [http://www.loc.gov/copyright/carp/webcasting_rates.pdf].

[42]In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, available online at the U.S. Copyright Office website, [http://www.copyright.gov/carp/webcasting-rates-order.html].

[43]For more information on the CARP's recommendations, *see*, CRS Report RS21200, *Copyright Law: Statutory Royalty Rates for Webcasters*, by Robin Jeweler (May 21, 2002).

[44]*See*, 37 C.F.R. §§ 201.35-.36 (2001).

[45]Notice and Recordkeeping for Use of Sound Recordings under Statutory License, 67 Fed. Reg. (February 7, 2002), available on the Copyright Office's web site, [www.copyright.gov].

level of detail and manner of record keeping. Many webcasters claim that the proposed record keeping requirements are too burdensome and impracticable.[46]

Rulemaking to determine whether a service is interactive. On the same day as the Copyright Office issued its rule finding broadcasters *non*exempt from the public performance right when webcasting, it denied a petition filed by the Digital Media Association (DiMA) to initiate a rulemaking to determine when an online music delivery service is "interactive."[47] Interactive services must conduct arms-length negotiations with a sound recording copyright owner for a license before making a digital transmission that constitutes a public performance. Non-interactive services may qualify for a statutory license under § 114(d). Although the term "interactive service" is statutorily defined,[48] the Copyright Office noted that neither the statutory definition nor the legislative history "draws a bright line delineating just how much input a member of the public may have upon the basic programming of a service."[49] DiMA sought a rulemaking to attempt to clarify that some expression of consumer preference in audio digital transmissions will not necessarily render a service "interactive" and thus ineligible for a statutory license. The Copyright Office found that a rulemaking is not necessary or appropriate because "[i]n light of the rapidly changing business models emerging in today's digital marketplace, no rule can accurately draw the line demarcating the limits between an interactive service and a noninteractive service."[50]

Application of 17 U.S.C. § 115 to certain digital music services: Rulemaking to consider what constitutes an "incidental" DPD . On March 9, 2001, the Copyright Office issued a "Notice of Inquiry" requesting public comment on whether it should conduct a rulemaking on the question of what constitutes an "incidental" DPD in order to determine royalties for a mechanical license.[51] When Congress amended § 115 to include DPDs, it made a statutory reference to – but did not define – "incidental" DPDs. Specifically, when a Copyright Arbitration Royalty Panel (CARP) is convened to establish a statutory royalty rate for the mechanical license, it is directed to "distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general."[52]

To date, establishing rates for incidental DPDs has been deferred. However, a wide variety of issues for online music delivery are implicated as the Copyright

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[46]*Roundtable Reveals Wide Disagreement on Webcasting Compulsory Licensing*, 64 BNA PATENT, TRADEMARK & COPYRIGHT J. 67 (May 17, 2002).

[47]65 Fed. Reg. 77330 (Dec. 11, 2000). The notice is also available on the Copyright Office's web site at [www.copyright.gov].

[48]17 U.S.C. § 114(j)(4).

[49]65 Fed. Reg. at 77331.

[50]*Id*. at 77332.

[51]66 Fed. Reg. 14099 (2001).

[52]17 U.S.C. § 115(c)(3)(D).

Office considers how best to address the issue. Indeed, the question "what is an incidental DPD?" arguably transcends mere copyright law and enters the realm of the metaphysical. As the Copyright Office's Notice of Inquiry observes:

> [T]here is considerable interest in the streaming of recorded music. Streaming necessarily involves a making of a number of copies of the musical work – or portions of the work – along the transmission path to accomplish the delivery of the work. RIAA [Recording Industry of America] and MP3.com relate that copies are made by the computer servers that deliver the musical work (variously referred to as "server," "root," "encoded," or "cache" copies), and additional copies are made by the receiving computer to better facilitate the actual performance of the work (often referred to as "buffer" copies). Some of these copies are temporary; some may not necessarily be so. Are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs? If temporary copies can be categorized as incidental DPDs, what is the definition of "temporary"? Some "temporary" copies may exist for a very short period of time; others may exist for weeks. Is the concept of a "transient" copy more relevant than the concept of a "temporary" copy? If fragmented copies of a musical work are made, can each fragment, or the aggregation of the fragments of a single work, be considered an incidental DPD? If a fragmented copy can be an incidental DPD, does it make a difference in the analysis whether the copy is temporary or is permanent? ... [53]

Many parties will be affected by any resolution of the issue. RIAA, for example, seeks an interpretation of the DPD status of "On-Demand Streams"[54] and "Limited Downloads,"[55] asserting that they are incidental DPDs. Napster filed comments opposing RIAA's position, arguing that Congress must clarify the status of incidental DPDs, not the Copyright Office. DiMA argues that all temporary copies of a musical work that are made to stream constitute a "fair use" which should not be subject to any royalty. And, MP3.com, reiterating concerns expressed in testimony before Congress, argues that a distinction must be made between different types of streaming. In the context of its "locker"service, which permits subscribers to access music that they have previously purchased, MP3.com argues that its users have already compensated copyright rights holders when they purchased the original CD.

The DPD controversy leads to the broader question of *how* music royalties should be distributed over the Internet. Some argue that digital transmission on the Internet blurs the distinction between public performance and computer-driven

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[53]66 Fed. Reg. at 14101-02.

[54]An "On-Demand Stream" is defined in the filings of the RIAA as an "on-demand, real-time transmission using streaming technology such as Real Audio, which permits users to listen to the music they want when they want and as it is transmitted to them." 66 Fed. Reg. at 14100.

[55]A "Limited Download" is defined in the filings of the RIAA as "an on-demand transmission of a time-limited or other use-limited (i.e. non-permanent) download to a local storage device (e.g., the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (e.g. a time certain or a time tied to ongoing subscription payments) or for a limited number of times." *Id.*

reproduction. Online firms argue that royalties to compensate composers and publishers for streamed music should track traditional over-the-air broadcast and retail sales: Mechanical royalties are triggered when CDs or tapes are sold and performance royalties apply when music is broadcast or played publicly. Hence, they assert that when a consumer listens to music on the Internet (without saving it), it should constitute a performance as opposed to a reproduction; downloading a song for future use, they contend, is a reproduction.[56]

Legislation introduced in the 107th Congress. To date, only one bill has been introduced in the 107th Congress that is concerned solely with online music licensing issues.

H.R. 2724, 107th Cong., 1st Sess. (2001): The "Music Online Competition Act"(MOCA). Introduced by Representatives Cannon and Boucher, MOCA, if enacted, would streamline music licensing procedures by consolidating different aspects of copyright owners' performance and reproduction rights through the licensing processing for digital transmission of sound recordings. It addresses other aspect of online music. Among other things, it:

- amends the public performance exemption for vendors, 17 U.S.C. § 110(7), to allow music "sampling" in a retail context to promote sales to include digital audio transmission by vendors and online services;

- amends the ephemeral licensing requirements in § 112(a) to liberalize the terms for ephemeral copying;

- exempts statutory public performance licensees from the ephemeral recording license requirement for digital audio transmissions used pursuant to the performance license. This provision appears to implement the Copyright Office's recommendation under the DMCA § 104 Report;

- amends 17 U.S.C. § 114(g) regarding royalty payment distributions to performers for digital audio sound recordings;

- amends 17 U.S.C. § 114(h) governing the terms under which a copyright owner who licenses a digital sound recording to an affiliate must also offer comparable licenses to the public. It would permit a licensor to require some level of digital rights management (DRM) technology by licensees, but not any particular DRM technology or electronic equipment;

- amends notice and royalty setting standards for mechanical licenses under 17 U.S.C. § 115, and creates a new category of digital phonorecord deliveries, namely, "limited digital phonorecord deliveries;" and

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[56]Jon Healy, *Net Music Services in Royal Bind; Web: Online firms say publishers' demand for reproduction and performance royalties is holding up business*, LOS ANGELES TIMES, May 21, 2001 at C1.

- amends 17 U.S.C. § 117 to exempt "incidental"copies of a sound recording in digital format provided that the use of the work is otherwise lawful. This provision also appears to implement the Copyright Office's recommendation under the DMCA § 104 Report. And, the bill creates a new exemption from a copyright owner's exclusive rights to permit the recipient of either a phonorecord or literary work received by digital transmission to make copies for archival purposes, provided that all archival copies are destroyed in the event that continued possession of the phonorecord or copy ceases to be rightful.[57]

Conclusion. While many have called for legislation to streamline the licensing of sound recordings on the Internet, others believe it is unnecessary because widespread demand and the market itself will shape a viable new business environment for online music.

The foregoing discussion illustrates several areas where Congress and the Copyright Office continue to attempt to adapt traditional licensing practices to new laws, technologies, and business models. In some instances, issues may be resolved administratively or judicially as the new language of online music takes on discernable and concrete meaning. Or conversely, these licensing questions may be a starting point for legislative proposals to streamline music licensing on the Internet.

[57]For a discussion of the Copyright Office's recommendations with respect to amendments to 11U.S.C. § 117, *see* the DMCA § 104 Report, *supra* at 159-161.