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THE DIGITAL REVOLUTION IS BEING DOWNLOADED: WHY AND HOW THE COPYRIGHT ACT MUST CHANGE TO ACCOMMODATE AN EVER-EVOLVING MUSIC INDUSTRY

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I. INTRODUCTION

Nothing in recent memory has jolted the music industry into such an extraordinarily swift paradigm shift as the Internet and its ubiquity. Digital subscription services and non-subscription music delivery services,[1] Internet radio stations, illegal downloading, blogging,[2] and podcasting[3] cascaded quickly into the consumer con-

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1. *See, e.g.*, Rhapsody, http://www.real.com/rhapsody/ (last visited Mar. 1, 2006) (showing digital subscription service); Apple - iPod + iTunes®, http://www.apple.com/itunes/ (last visited Mar. 1, 2006) (representing non-subscription music delivery service).

2. *See* Blog, http://www.marketingterms.com/dictionary/blog/ (last visited Mar. 1, 2006) (defining term "blog"). The term "blog" is an abbreviated, colloquial version of the term "weblog" or "web log." *See id.* Blog refers to a serial online publication of a person's periodic journal, commentary, and ideas presented with or without music, along with relevant links to other sites on the Internet. *See* Content and Community: Blog, http://www.marketingterms.com/dictionary/12/ (Mar. 1, 2006). Website serial journals existed before the term "blog" emerged, but the introduction of automated published systems, such as Blogger at blogger.com, facilitated the sudden surge in the popularity of blogs. *See* Blogger: What's a Blog?, http://www.blogger.com/start (follow "Take A Quick Tour" hyperlink) (last visited Mar. 1, 2006) (explaining definition of blog along with recent popularity).

3. *See* Answers.com: Podcasting - Name, http://www.answers.com/topic/podcasting?method=6 (last visited Mar. 1, 2006) (providing history of podcasts and noting that term "podcast" developed around 2004 from combining "ipod" and "broadcasting"). Podcasting uses the RSS 2.0 file format and requires a subscriber to use "podcatching" software, which downloads and detects new content that can be synchronized with the subscriber's personal audio player. *See* Answers.com:

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sciousness. These delivery modes were all virtually nonexistent a mere decade ago. Even music industry executives did not foresee a

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Podcast - Technology, http://www.answers.com/topic/podcast?hl=podcasting (last visited Mar. 1, 2006). Generally, "[a] 'podcast' is a web feed of audio or video files placed on the Internet to which anyone can subscribe." Answers.com: Wikipedia - Podcasting, http://www.answers.com/main/ntquery?method=4&dsid=1512&dekey=podcasting&gwp=8&curtab=1512_1&linktext=podcasting (last visited Mar. 1, 2006). Wikipedia Encyclopedia further describes "podcasting" as the following:

> Podcasting is the distribution of audio or video files, such as radio programs or music videos, over the internet using either RSS or Atom syndication for listening on mobile devices and personal computers. . . . Podcasters' websites also may offer direct download of their files, but the subscription feed of automatically delivered new content is what distinguishes a podcast from a simple download or real-time streaming.

Wikipedia: Podcasting, ¶ 1, http://en.wikipedia.org/wiki/Podcasting (last visited Mar. 1, 2006) (defining term "podcasting"). Wikipedia Encyclopedia further describes:

> While the name was primarily associated with audio subscriptions in 2004, the RSS enclosure syndication technique had been used with video files since 2001, before portable video players were widely available [with or without the syllable "pod" in their names]. . . . In fact, any file with a URL, including still images and text, can be delivered via a web feed.
>
> [The u]se of "podcast" to describe both audio and video feeds seemed natural to some users, while others preferred to reserve the word for audio and coin new terms for video subscriptions. Other "pod-" derived neologisms include "podcasters" for individuals or organizations offering feeds, and "podcatchers" for special RSS aggregators with the ability to transfer the files to media player software or hardware.

Id. (follow "Name" hyperlink) ¶¶ 2-3.

Today, podcasting has become so prevalent that the world-renowned Oxford English Dictionary has included the following definition for "podcast" in its 2005 version: "a digital recording of a radio broadcast or similar program, made available on the Internet for downloading to a personal audio player." *'Podcast' Is the Word of the Year*, PRNEWSWIRE, Dec. 5, 2005, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/12-05-2005/0004228195&EDATE= (defining podcast); *see also Oxford English Dictionary Adds Podcast Definition*, Podcasting News, Aug. 13, 2005, http://www.podcastingnews.com/archives/2005/08/oxford_english.html (describing how Oxford added term "podcast" to its dictionary). Using licensed music in a podcast raises various questions regarding the payment of royalties and statutory licenses for the underlying compositions and sound recordings. *See* Wikipedia: Adoption by Traditional Broadcasters, http://en.wikipedia.org/wiki/Podcasting#Adoption_by_traditional_broadcasters (last visited Mar. 1, 2006) (discussing use of podcasting by traditional broadcasters, specifically news and talk shows which avoid music licensing complications). Even incidental use of copyright-protected music will necessitate the payment of royalties to the copyright owner and the sound recording copyright owner. *See* Wikipedia: Podcasting and Music Royalties, http://en.wikipedia.org/wiki/Podcasting#Podcasting_and_Music_Royalties (last visited Mar. 2, 2006) (discussing problems with "bumper" music at beginning and end of news podcasts). Currently, in addition to their musical uses, podcasts are used for non-music broadcasts, museum tours, and "controversial narrations" of art works by professors and art students. *See* Answers.com: Podcast, ¶ 2, http://www.answers.com/topic/podcast?hl=podcasting (last visited Mar. 1, 2006) (discussing other uses for podcasts).

fair number of these new content delivery modes. Today, legal versions of file sharing are exploding exponentially.[4]

In 1999, the overnight invasion of Napster blindsided everyone, causing industry-wide consternation and chaos.[5] Facing this unknown powerhouse, the Recording Industry Association of America ("RIAA"),[6] made a knee-jerk reaction by suing its own consumers.[7] Recording artists either hailed Napster as a visionary, representing freedom of speech and the ultimate promotional tool,[8] or they complained about the devastation of their royalty

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4. *See Legitimate Music Downloading Enjoys Dream Week,* CNET NEWS.COM, Jan. 8, 2006, http://news.com.com/2102-1027_3-6023769.html?tag=st.util.print (discussing enormous spending on digital downloads during week after Christmas 2005).

5. *See* Michael Fine, CEO of SoundScan, Inc., Report of Michael Fine, CEO of SoundScan, Inc., 1 (June 10, 2000), http://news.findlaw.com/hdocs/docs/napster/riaa/fine.pdf (reporting at plaintiff's request in *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part,* 239 F.3d 1004 (9th Cir. 2001)). Fine described the negative impact of Napster on retail recording sales in and around colleges and universities across the United States. *See id.* at 1-3; *see also* Richard Menta, *RIAA Sues Music Startup Napster for $20 Billion,* MP3 NEWSWIRE.NET, Dec. 9, 1999, http://www.mp3newswire.net/stories/napster.html (discussing copyright infringement lawsuit filed by Recording Industry Association of America ("RIAA") against Napster).

6. *See* RIAA.com, http://www.riaa.com/about/default.asp (follow "About Us" hyperlink) (last visited Mar. 1, 2006) (defining RIAA as "trade group that represents" U.S. recording industry).

7. *See* Erika Morphy, *RIAA Lawsuit Binge Continues,* NEWSFACTOR MAG. ONLINE, May 25, 2004, http://www.newsfactor.com/perl/story/24202.html (discussing lawsuits filed against people for illegally downloading). In an attempt to curtail illegal file sharing and downloading of music on the Internet, the RIAA has sued thousands of Americans. *See id.* Brianna LaHara, a twelve-year-old honors student from New York, was among the first to be sued for sharing music. *See Downloading Girl Escapes Lawsuit,* Sept. 9, 2003, http://www.cbsnews.com/stories/2003/08/28/tech/printable570507.shtml (recapping story of lawsuit against twelve-year-old girl). Eventually, Brianna's mother agreed to pay $2,000 to settle the lawsuit. *See id.* ¶ 1. Critics wondered whether the music industry was in fact being "overzealous" in its quest to rid the world of illegal downloaders. *See id.* ¶ 7. To this end, Verizon Communications Inc.'s lead lawyer, William Barr, complained that "music lawyers had resorted to a 'campaign against 12-year-old girls' rather than trying to help consumers turn to legal sources for songs online." *Id.* ¶ 8. Despite the RIAA's efforts, a poll taken by Harris Interactive between April 14 and April 20, 2004, demonstrated that breaking the law did not deter teenagers and children from downloading music. *See* Morphy, *supra,* ¶ 6. In fact, they are more fearful of the possibility of downloading a virus than breaking the law. *See id.*

8. *See* Aaron Page, *Napster Faces the Music,* NEWSHOUR EXTRA, May 31, 2000, http://www.pbs.org/newshour/extra/features/jan-june00/napster.html (listing Napster fans including rapper Chuck D and rocker Fred Durst, who support Napster as promotional tool).

In fact, Durst has stated, "We could care less about the older generation's need to keep doing business as usual. We care more about what our fans want—and our fans want music on the Internet." Michelle Manafy, *And Justice For All: The Napster Chronicles - Company Business and Marketing,* EMEDIA PROF., ¶ 15, July 2000, http://www.findarticles.com/p/articles/mi_m0FXG/is_7_13/ai_63857408/print (elaborating on Durst's view toward Napster). Durst, with opening band Cypress

payday by taking legal action against Napster and its similar cousins.[9]

The music industry failed to acknowledge that the citizens of the world have an unquenchable, insatiable appetite for music. Despite the current United States Copyright Act of 1976 (the "Act")[10] blocking consumers' access to music, people continue to seek out songs. The Act's mission, from its earliest incarnation, was to construct incentives for authors to create works and to allow the public access to those works. Thus, through this access, the public could learn, enjoy, and develop new works from known works.[11] More

Hill, took part in a free, Napster-sponsored tour to support Napster's role in providing music to large numbers of people. *See id.* ¶ 6. Instead of alienating fans of music and technological innovations, Durst has publicly embraced Napster, calling it a tool "to promote awareness of bans and to market music." *Id.*

9. *See* Manafy, *supra* note 8, ¶ 4 (listing artists who gave Napster ultimatums). During Napster's early days, several artists, including hip-hop mogul Dr. Dre and heavy metal band Metallica, issued ultimatums to Napster, threatening to file suit against Napster unless it removed all of their music from its directories. They were upset because every song downloaded for free on Napster was able to bypass any royalty payments required to be made to the artists. *See id.* ¶¶ 4-5; *see also* John Borland, *Unreleased Madonna Single Slips on to Net*, CNET NEWS.COM, June 1, 2000, http://news.com.com/2100-1023-241341.html?legacy=CNet (discussing record label's anger when unreleased Madonna works leaked onto Napster).

However, Napster refused to remove its music, claiming that it had no responsibility for piracy committed by its users. *See* Manafy, *supra* note 8, ¶ 4. Metallica eventually brought suit against Napster for copyright infringement, as well as against universities such as Yale and the University of Southern California. *See* Wikipedia: Metallica, http://en.wikipedia.org/wiki/Metallica#Napster_controversy (last visited Mar. 1, 2006) (elaborating on Napster controversy). "In 2001, Metallica and Napster agreed to an out-of-court settlement which led to many Napster user accounts being locked out. The band did not take action to sue any individuals for copyright infringement." *Id.*; *see also* James Brewer, *Rock Band Launches Suit Against Internet Music Downloads*, May 5, 2000, http://www.wsws.org/articles/2000/may2000/naps-m05.shtml (discussing Metallica's anti-Napster attitude). Many of Dr. Dre's and Metallica's peers have agreed with their sentiment. *See* Page, *supra* note 8 (setting forth both anti- and pro-Napster sentiments among artists). Scott Stapp, lead singer of Creed has said, "My music is my home. Napster is sneaking in the back door and robbing me blind." *Id.* ¶ 5. Similarly, Art Alexakis of the band Everclear describes Napster and its treatment of musical works as illegal. *See id.* ¶ 7 ("It's inherently wrong. It's stealing."); *see also Artists, Managers and Industry Leaders Speak Out Against Napster*, RIAA.com, http://www.riaa.com/news/newsletter/press2000/041100_2.asp (last visited Mar. 1, 2006) (quoting additional artists' sentiments regarding effects of Napster and other downloading services on their livelihoods).

10. *See* Copyright Act, 17 U.S.C. § 101 (2005) (amending 17 U.S.C. § 101 (2004)) (setting forth rights afforded to copyright owners).

11. *See* U.S. CONST. art. I, § 8, cl. 8 (providing Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). "The First Congress implemented the copyright provision of the U.S. Constitution in 1790. The Copyright Act of 1790, An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies, was modeled on the Statute of Anne (1710)." Time-

recently, however, that mission has morphed into an economic one, where its primary impetus is the copyright owners' control over their property. Copyright owners achieve this goal by controlling the public's access to that property, which is antithetical to copyright law's underpinnings.[12]

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line: A History of Copyright in the United States, ¶ 4, http://www.arl.org/info/frn/copy/timeline.html (last visited Mar. 1, 2006) (giving history of copyright laws). According to the Copyright Act of 1790, American authors were able to "print, re-print, or publish their work for a period of fourteen years and to renew for another fourteen." *Id.*

The law was meant to provide an incentive to authors, artists, and scientists to create original works by providing creators with a "limited" monopoly. The monopoly was so limited in order to stimulate creativity and the advancement of "science and the useful arts" through wide public access to works. *See* Lydia Pallas Loren, *The Purpose of Copyright*, OPEN SPACES Q., Jan. 12, 2006, at 17, *available at* http://www.open-spaces.com/article-v2n1-loren.php (discussing history of copyright law).

> The primary purpose of copyright is not, as many people believe, to protect authors against those who would steal the fruits of their labor. However, this misconception, repeated so often that it has become accepted among the public as true, poses serious dangers to the core purpose that copyright law is designed to serve.
>
> The core purpose of copyright law is not difficult to find; it is stated expressly in the Constitution. Article I, section 8, clause 8 of the United States Constitution provides that Congress shall have the power: "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
>
> This clause is the constitutional basis for the Copyright Act and also the Patent Act. It is the only clause in the grant of powers to Congress that has a stated purpose. . . . The copyright clause . . . is very specific about its purpose. The exclusive rights that are granted to authors are "to promote the Progress of Science and useful Arts." To fully appreciate this clause, one must understand "science" in its eighteenth century meaning. At the time of the writing of the Constitution "science" denoted, broadly, knowledge and learning. So the core purpose of copyright law, as expressly stated in the Constitution is: to promote the progress of knowledge and learning.

Id.

12. *See* Loren, *supra* note 11, at 17 (stating history and purpose of copyright law).

> [F]ar too many people, including lawyers, have major misconceptions concerning copyright. These misconceptions are causing a dangerous shift in copyright protection, a shift that threatens the advancement of knowledge and learning in this country. This shift that we are experiencing in copyright law reflects a move away from viewing copyright as a monopoly that the public is willing to tolerate in order to encourage innovation and creation of new works to viewing copyright as a significant asset to this country's economy.

Id.

a. Purpose of Article

This Article examines the current Copyright Act in the wake of the current, fast-paced technological era. Throughout the text and footnotes, this Article considers the following questions: What responses should Congress issue? Should Congress, through its miscalculations and/or stagnation, continue to allow the RIAA to label grandmothers and twelve-year-old girls as criminals by armor-plating the protections? Alternatively, should Congress seek a radical overhaul of the Copyright Act to address the technological realities of today and the future? In the remainder of this Introduction, this Article continues to discuss the tensions between the Copyright Act's current provisions and contemporary technology. Section II briefly discusses the history of Section 115 of the Copyright Act; this discussion examines Section 115's history, statutory language, and case law. Section III discusses the rights implicated by the new digital business model; to further illustrate, this section also provides tables demonstrating the different implications. Section IV introduces and uses the hypothetical of Peggy the Podcaster to demonstrate the Copyright Act's limitations and frustrations when applied to contemporary life. Sections V and VI propose and explain alternatives and revisions to the Copyright Act. Subsequently, this Article discusses the anticipated beneficiaries of the proposed amendments. Finally, Section VIII applies the proposed amendments to the hypothetical of Peggy the Podcaster to demonstrate the amendments' overall effectiveness to Peggy and the public.

b. Current Era: Copyright Act and iPods

Since its adoption in January 1978, the current Act has been amended numerous times.[13] Despite Congress's attempts to mod-

13. *See* Copyright Act § 101 (listing previous amendments in 2002, 2000, 1999, 1998, 1997, 1995, 1992, 1990, 1988, and 1980). In 2004, alone, there were four amendments to the Act. *See, e.g.*, Intellectual Property Protection and Courts Amendments Act of 2004, Pub. L. No. 108-482, 118 Stat. 3912 (2004) (signing occurred on Dec. 23, 2004); Title IX Satellite Home Viewer Extension and Reauthorization Act of 2004 (contained in Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004)) (signing occurred on Dec. 8, 2004); Individuals with Disabilities Education Improvement Act of 2004, Section 306 (amending section 121 of the Copyright Law), Pub. L. No. 108-446, 118 Stat. 2647 (2004), (signing occurred on Dec. 3, 2004); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 188 Stat. 2341 (2004) (signing occurred on Nov. 30, 2004). The most recent amendment is the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005) (signing occurred on Apr. 27, 2005).

ernize the Act through passage of its most recent amendments,[14] the industry remains trapped in a legal quagmire. This confusion has stymied the forward movement of technologically innovative business models.[15] These models could potentially salvage the music industry and additionally allow the greatest flow of creative content between creator/author and consumer, in a very short time span.

New technological offerings to consumers, like iFill®[16] and iRadio®,[17] blatantly encourage infringement, thus completely dis-

14. *See, e.g.*, Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) (enacting legislation relevant to webcasters); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (enacting legislation relevant to digital technology).

15. In testimony before the 109th Congress on March 8, 2005, Jonathan Potter, Executive Director of the Digital Media Association whose members include AOL, MSN, Napster, and RealNetworks, pleaded for an updated reformation of the current royalty payment system under the Copyright Act. *See Oversight Hearing On Digital Music Licensing and Section 115 of the Copyright Act: Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 19-26 (2005) (testimony of Jonathan Potter, Executive Director, Digital Media Association), *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=300 [hereinafter HEARING]. Potter stated,

> The victims of Section 115's failure are those who invest in the music industry ecosystem – creators who are losing royalties, record stores that are unable to offer comprehensive in-store CD burning services, and online music companies that are not growing as fast as we should be. The beneficiaries are those who ignore royalties and licenses and creators – the black market networks that profit from unauthorized distribution of free music.

Id.

Potter also attempted to alert Congress to the dilemma that legitimate music providers face in becoming profitable in an age of alternative illegal, but free, providers – namely, "to successfully compete against free black markets, a music service must have a comprehensive catalog and be user-friendly, feature-rich and fairly priced." *Id.*

16. *See* iFill - Griffin Technology, http://www.griffintechnology.com/products/ifill/ (last visited Mar. 2, 2006) (describing and advertising benefits of iFill). To use iFill, a consumer simply plugs the device into her computer, selects a radio station, and then waits for iFill to download the contents of the selected radio station programs. *See id.* The consumer may then transfer the downloaded content onto the digital music device of her choice, such as an iPod. *See id.*

17. *See* 3aLab iRadio v.1.5, http://www.3alab.com/iradio.shtml (last visited Mar. 2, 2006) (discussing and promoting iRadio). iRadio captures radio stations and collects the station's music for the listener to save onto her hard drive or music device. *See id.*; *see also* Philip E. Ross, *Loser Motorola Becomes a Disk Jockey*, IEEE SPECTRUM, Jan. 2006, at 36 (discussing iRadio customers using device to subscribe to channels that download music first to their computer and then to their cellphones). Customers listen to the stored programming only once and then purchase individual songs by pushing a button to mark each song for download. *See* Ross, *supra.* Using iRadio's Bluetooth adapter, customers hook the phone directly into their car stereo, which then broadcasts the songs with their same original quality. *See id.* If customers receive a phone call while listening to music on their cellphone, the song can be paused "in mid-syllable." *See id.* For an optional

regarding current copyright laws. This illegal behavior demands rapid reprimanding and Congressional responses. Yet, such responses have not been forthcoming. Congress has attempted to forward bills to address these situations; however, the bills have been assailed as inadequate or overly broad, wiping out all technological innovation in their paths.[18]

Traditionally, representatives of the industries primarily affected by copyright law actively participated in negotiating the parameters of its revisions, helping to avoid the potential stagnation if one industry faction decides to encourage blockage of the introduced revision.[19] The resolutions of such negotiations have been presented to Congress, which has undertaken the responsibility of drafting amendments based upon those suggested resolutions.[20] This pattern remains the norm today, where industry representa-

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fee to the cell service operator, the system can also receive and store weather and traffic reports. *See id.* Listeners may also "rip" (i.e. create) their own CDs from the radio station-collected music. *See id.* at 36-37.

18. *See* Katie Dean, *Techies Blast Induce Act*, WIRED NEWS, July 25, 2004, http://www.wired.com/news/politics/0,1283,64315,00.html (discussing Senate hearings and opposition by technology industry); *see also* Dan Pontes, *P2P Legislation: Toward a More Sensible Solution*, 23 ENT. & SPORTS LAW. 14, 14 (Spring 2005) (discussing legislative efforts to stop internet copyright infringement). The Inducing Infringement of Copyrights Act ("Induce Act") was introduced by Senator Orrin Hatch in July 2004 and was intended to "prevent technology companies and others from engaging in behavior that could 'induce' or encourage end users to illegally trade in copyrighted material." Pontes, *supra.* In relevant part, the Act proposed to amend section 501 of the Copyright Act to make liable as an infringer anyone who "intentionally aids, abets, induces or procures and intent may be shown by acts from which a reasonable person would find intent to induce infringement based on all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability." *Id.*

Immediately upon its introduction, commentators highly criticized the Induce Act for its unintended chilling of future technological advancements and innovations and for its overbreadth. *See id.* Had this bill been passed, inventors and creators of any new technology that had the potential to illegally download music or any other content could have been held liable for copyright infringement merely by the act of creating new technology. *See id.* Thus, under the unintended consequences of the Induce Act, copyright owners could have brought suit against entities and individuals acting within the current laws. *See id.* For example, all parties engaged in the creation of the iPod could potentially have been held liable: Apple Computer for inventing the iPod, Toshiba for creating the hard drive for the iPod, and CNET for posting information on how to transfer and save iPod's music files. *See id.*

19. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 23 (Promethus Books 2001) (elaborating on art of making copyright laws).

20. *See id.* (discussing Congress's encouragement of people affected by copyright law to "hash out" changes to be made amongst themselves).

tives are at the forefront, interjecting their ideas into such revisions, crafted with their own, individual agendas in mind.[21]

Currently, strong areas of disagreement remain on major issues among the publishers, record labels, digital delivery entities, and recording artists. The areas of contention primarily include: 1) the payment of mechanical royalties plus public performance royalties to copyrights holders (what the digital delivery industry representatives refer to as "double-dipping"); 2) the nonpayment or underpayment of royalties to recording artists for such digital deliveries; 3) the lack of payment for the analog public performance of sound recordings; 4) the complexities and inequalities associated with small webcasters' rights and obligations to copyright holders; and 5) the frustration of digital content delivery services ("DCDS") with regards to the complex matrix of licensing procedures.

These DCDSs uniformly contend they are caught in the stranglehold of the oligopoly held by the major labels, those who control the rights to the majority of sound recordings released globally.[22] The DCDSs argue that the fact that they must receive individual mechanical licenses for every song, in addition to licenses for every sound recording for their reproduction and distribution, hurts all the participants. They argue further that this system obscures copyright law's primary tenet of promoting the public welfare by creat-

21. *See id.* (discussing power of multiparty negotiators over Congress); *see also* HEARING, *supra* note 15, at 19-21 (providing oversight testimony of Jonathan Potter, Executive Director, Digital Media Association). Potter testified on behalf of the online music industry and the Digital Media Association "regarding certain amendments to the Copyright Act that will trigger extraordinary growth in legitimate royalty-paying online music and a concomitant reduction in piracy." HEARING, *supra* note 15, at 21.

22. *See* Electronic Frontier Foundation: Intellectual Property: Creative Freedoms, http://www.eff.org/IP/ (last visited Mar. 2, 2006) (stating theory underlying copyright law).

> The idea of copyright law is that, after a time, every work comes back into the hands of the public, where it can be reused, recycled, and made part of new creativity without the artist having to pay a fee or call in the lawyers. Yet some copyright holders act as though copyright is both permanent and boundless, pressing claims that threaten even traditionally protected activities like making a parody. These claims strip-mine the public domain, robbing the next generation of artists of rich source materials for creativity.

Id.; see also Press Release, Digital Media Association, DiMA Seeks Competitive Royalty Rates for Internet Radio (Oct. 31, 2005), *available at* http://www.digmedia.org/docs/Press%20Release%2010-31-05.pdf (discussing royalty payments). The Digital Media Association ("DiMA") has called for a reduction in digital public performance royalty payment rates to recording artists and sound recording owners from the Copyright Royalty Board. *See id.* Theoretically, this would create an atmosphere of fairness, a leveling of the playing field, between small webcasters, i.e., new entrants into the world of Internet broadcasting, and larger Internet radio conglomerates, who can afford larger sums.

ing incentives for authors to create original works and making those works available to the public.[23]

In order to facilitate this exchange, which constitutes the core principle of the Act,[24] the Act must undergo five revisions. The first section in the Act that must be scrutinized is Section 106,[25] which describes the rights afforded to copyright registrants of original works of authorship. Second, Section 114,[26] which describes the

23. *See* HEARING, *supra* note 15, at 11-13 (discussing music industry's current problems with copyright law). In a recent survey about the lack of substantial success in today's music industry, senior executives at RealNetworks, Napster, and Sony, three prominent online music services, cited the "difficulties associated with music publishing rights as their single biggest business problem," not piracy. *Id.* at 22; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("'The copyright law . . . makes reward to the owner a secondary consideration.' However, it is 'intended definitely to grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.''" (alteration in original) (citations omitted)).

24. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (stating core principles of Act). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Id.*

25. *See* Copyright Act, 17 U.S.C. § 106 (2005) (articulating this integral provision of Act). Copyright owners have the exclusive rights to "do and to authorize" the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

26. Copyright Act § 114 (affording several rights to sound recording copyright owners). Those rights include the right to reproduce the work in phonorecords or copies, to prepare derivative works, to distribute copies publicly by sale or other ownership transfer, and to perform the work publicly by a digital audio transmission. *See id.* § 114(a) (referencing §§ 106(1) – (3), (6)). However, a sound recording copyright owner is limited to rights in duplication and distribution of the sound recording only. *See id.* § 114(b). No rights under the Act for sound recording copyright owners existed prior to 1972. The Digital Performance Right in Sound Recordings Act of 1995 amended section 114 as follows: 1) in subsection (a), by replacing "and (3)" with "(3) and (6);" 2) in subsection (b) in the first sentence, by replacing "phonorecords, or of copies of motion pictures and other audiovisual works," with "phonorecords or copies;" and 3) by replacing subsection (d) with new subsections (d), (e), (f), (g), (h), (i), and (j). *See* Pub. L. No. 104-39, 109 Stat. 336 (1995). In 1997, subsection 114(f) was amended. *See* Title 17 Technical Amendments, Pub. L. No. 105-80, 111 Stat. 1529, 1531 (1997).

rights afforded to sound recording copyright owners, is the next section that needs to be revised. The third necessary revision is to Section 115,[27] which describes the compulsory mechanical license. A fourth revision is needed for the Digital Millennium Copyright Act of 1998.[28] The fifth and last revision should be to the Small Webcasters Settlement Act of 2002.[29] At this juncture, it is essential that Congress allow the public to partake in the enormous variety of music being created everyday. It would be anomalous to have the power of technology readily available to creators, easing the process of creation, yet have their creations stored in the digital basement, never to be heard.

In 1998, the Digital Millennium Copyright Act amended section 114(d) by replacing paragraphs (1)(A) and (2) with amendments in the nature of substitutes. *See* Pub. L. No. 105-304, 112 Stat. 2860, 2890 (1998). That Act also amended section 114(f) by revising the title, redesignating paragraph (1) as paragraph (1)(A), adding paragraph (1)(B) in lieu of paragraphs (2), (3), (4), and (5), and amending the language in newly designated paragraph (1)(A), including revising the effective date from December 31, 2000, to December 31, 2001. *See id.* at 2894.

The Digital Millennium Copyright Act also amended subsection 114(g) by striking "subscription transmission," and in the first sentence in paragraph (g)(1), by substituting "subscription transmission licensed" with "transmission licensed under a statutory license." *See id.* at 2897. That Act also amended subsection 114(j) by redesignating paragraphs (2), (3), (5), (6), (7), and (8) as (3), (5), (9), (12), (13), and (14), respectively; by amending paragraphs (4) and (9); and by adding new definitions, including, paragraph (2) defining "archived program," paragraph (4) defining "continuous program," paragraph (6) defining "eligible nonsubscription transmission," paragraph (8) defining "new subscription service," paragraph (10) defining "preexisting satellite digital audio radio service," and paragraph (11) defining "preexisting subscription service." *See id.* at 2897-99.

The Small Webcaster Settlement Act of 2002 amended section 114 by adding paragraph (5) to subsection 114(f) and by amending paragraph 114(g)(2). *See* Pub. L. No. 107-321, 116 Stat. 2780, 2781, 2784 (2002) (providing Small Webcaster Settlement Act of 2002).

27. *See* Copyright Act § 115 (detailing distribution and performance rights). The copyright owner's rights to distribute and perform her copyrighted work must comply with Section 115's compulsory license scheme. *See id.* This license scheme requires anyone wishing to obtain such a license to provide a notice of intention to the copyright owner. *See id.*

28. *See* Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (providing text of Digital Millennium Copyright Act). Among the DMCA's most controversial provisions is Section 1201 (17 U.S.C. § 1201). According to Jonathan Band of Morrison & Foerster, Section 1201 "prohibits gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a copyrighted work." Jonathan Band, *The Digital Millennium Copyright Act,* Aug. 16, 2001, http://www.arl.org/info/frn/copy/band.html. The DMCA also permits copyright owners to compel Internet service providers ("ISPs") to remove material from the Internet and the web when the copyright owner believes the material is infringing. *See* 17 U.S.C. § 1201 (2005) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005) (emphasizing extent of Section 1201's enforcement and alluding to potentially affected parties).

29. *See* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) (amending Title 17 specifically statutory license for webcasting).

Section 106 of the Act[30] sets forth the six exclusive rights held by authors or creators of original works; the music industry finds the following five relevant: reproduction, distribution, public performance, creation of a derivative work, and the digital public performance in a sound recording.[31] Each exclusive right has exceptions or limitations attached to it.[32] While Section 114[33] sets forth exclusive rights held by sound recording copyright owners, Section 115[34] provides the parameters of the compulsory mechanical license.

II. BRIEF HISTORY OF SECTION 115 OF THE ACT

In 1831, Congress added musical compositions to the categories of copyrightable works.[35] Musical work copyright owners were

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30. *See* Copyright Act § 106 (setting forth rights implicit in holding copyright).

31. *See id.* (listing rights including right of display which is not at issue here).

32. *See id.* §§ 107-22 (providing exceptions and limitations to rights). There exists in the Copyright Act one provision stating the copyright holder's exclusive rights. *See id.* § 106. The next sixteen sections delineate the scope, exceptions, and limitations on those stated rights. Recently, Section 115 has been the subject of much discussion and scrutiny. For example, Mary Beth Peters, the U.S. Register of Copyrights, recently mentioned this section in her testimony before the United States Senate Committee on the Judiciary on September 28, 2005. Peters stated,

> Section 115 of the Copyright Act governs the compulsory licensing of the reproduction and distribution rights for nondramatic musical works by means of physical phonorecords and digital phonorecord deliveries. However, it has rarely been used as a functioning compulsory license, serving rather as a ceiling on the royalty rate in privately negotiated licenses and thereby placing artificial limits on the free marketplace. Moreover, its "one-at-a-time" structure for licensing individual musical works is incompatible with online music services' need to acquire the right to make vast numbers of already-recorded phonorecords available to consumers. Moreover, many online activities involve both the public performance right and the rights of reproduction and distribution, rights that usually are controlled by separate sets of middlemen in the case of musical compositions, but not in the case of sound recordings. The existing system is characterized by tremendous impediments to efficient and effective licensing of the rights needed by a contemporary online music service. Reform is needed to make it possible to clear quickly and efficiently the necessary exclusive rights for large numbers of works.

Protecting Copyright and Innovation in a Post-Grokster World: Hearings Before United States Senate Comm. on the Judiciary, 109th Cong. (2005), *available at* http://judiciary.senate.gov/testimony.cfm?id1634&wit_id=4682 (providing testimony of Marybeth Peters in reference to recent Supreme Court decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005)).

33. *See* Copyright Act § 114 (setting forth exclusive rights in sound recordings).

34. *See id.* § 115 (setting forth license availability and requirements relevant to copyrights).

35. *See* Julie B. Raines, *The Fairness in Musical Licensing Act: The Tavern Bill Casts a Shadow*, 20 HASTINGS COMM. & ENT. L.J. 169, 174 (1997) (discussing Copy-

granted the same rights as any other copyright owner, "the sole right and liberty of printing, reprinting, publishing, and vending" the copyrighted work.[36] For musical works, this was almost exclusively achieved through the sale of sheet music.

At this time, three major interested parties in the copyrighted musical works existed. First, there were the composers, who were the authors of the musical compositions to whom the Copyright Act granted copyright protection. The second interested parties were the music publishers; they purchased the copyrights from the composers, either for a lump sum or for continuing royalty payments. Once the publishers gained control of the composers' copyrights, they had the authority to exercise the rights of the copyright owner. Third, there was the consumer, who paid to own a copy of the musical composition in the form of sheet music. The consumer could then take the sheet music home, learn the song, and perform it.

The interests of the third group, the general public, were possibly the most important rights copyright law implicated. It was the consuming public that actually listened to the music or learned to perform it. However, in the 1800s, public performances of sheet music did not have any implications on the rights of the copyright-holders (i.e., the publishers).[37]

This symbiotic triumvirate among the authors/composers, publishers/distributors, and consumers remained in effect for several decades, mirroring the print and book industries. Rights began to change when the Copyright Act of 1909 added the right to "arrange or adapt."[38] In addition to the rights of printing and vending the musical composition in sheet music, music publishers, as transferees of the composers' copyrights, now controlled the making of adaptations to that musical work. There was one major exception: the 1909 Act subjected the right to control the creation

right Act's congressional origin); *see also* Copyright Act of 1790, Act of May 31, 1790, 1 Stat. 124 [hereinafter Copyright Act of 1790] (providing Act as implemented by First Congress). For a discussion of the history of the Act, see *supra* note 11 and accompanying text. In 1790, protection was offered only for books, maps, and charts. In 1831, the Act was amended to include protection for musical works.

36. Copyright Act of 1790, § 1; *see* Copyright Act of 1909, Pub. L. No. 60-349, ch. 1, § 1(a), 35 Stat. 1075, 1077-78 (1909) [hereinafter Copyright Act of 1909] (incorporating similar language from 1790 Act).

37. *Compare* Copyright Act of 1790 (lacking right of public performance), *with* Copyright Act of 1909, ch. 1, § 1(c) (containing right of public performance). The right of public performance was not implicated because it did not exist under federal copyright law until the enactment of the 1909 Copyright Act.

38. Copyright Act of 1909, ch. 1, § 1(b) (granting this right to copyright owners).

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and distribution of "mechanical" copies to a compulsory license.[39] The compulsory license became one of the most significant factors affecting the modern structure of the music industry. Unfortunately, this development also became the main source of complications within the industry.

In response to the player piano industry and the Supreme Court's opinion in *White-Smith Publishing Co. v. Apollo Co.,*[40] the legal landscape concerning music copyrights started to become complex with respect to the 1909 Act. In that case, the Supreme Court determined that player piano rolls did not constitute reproductions of musical compositions, and therefore, they were not infringing upon the copyright owners' rights in those compositions.[41] Player piano rolls were made without copying the actual notes on staff paper, but instead, they were made by having perforations in the rolls that mechanically caused notes to be played on the piano as the rolls rotated.[42] In *White-Smith,* the Court ruled that these rolls were not "copies" of the copyrighted musical composition, but were component parts of machines.[43] Therefore, no copyright infringement existed.[44]

The result in *White-Smith* was overturned by the 1909 Act, which granted musical work copyright owners the right to control the "mechanical reproduction" of their works. This explicitly implicated the player piano rolls as infringements of the musical composition copyright.[45] One piano roll company, the Aeolian Company,

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39. *See id.* § 1(e) (detailing exception to compulsory licenses).

40. 209 U.S. 1, 13 (1908) (concluding that under then-existing Copyright Act, producers and performers did not have exclusive right to their respective sound recordings). At issue in this case was whether a mechanical machine that reproduced the sounds of copyrighted musical works constituted infringement. *See id.* at 14.

41. *See id.* at 12 (analogizing to facts and questions of *Kennedy v. McTammany,* 33 F. 584, 584 (C. C. Mass. 1888), *appeal denied,* 145 U.S. 643 (1892)). Specifically, the *White-Smith* Court considered what Judge Colt in *Kennedy* questioned: whether "perforated strips of paper were copies of sheet music within the meaning of the copyright law." *Id.* The *White-Smith* Court further relied on Judge Colt's opinion: "They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument." *Id.* (quoting *Kennedy,* 33 F. at 584).

42. *See id.* at 14-15 (noting that player piano rolls are essentially different from sheet music).

43. *See id.* (acknowledging that player piano rolls were perforated strips of paper that formed part of machine).

44. *See id.* at 18 (holding that perforated rolls operated in connection with mechanical devices for production of music falls outside copyright act).

45. *See* Copyright Act of 1909, ch. 1, § 1(e) (enacting legislation to curb copyright infringement through mechanical means).

had enormous market power.[46] It engaged in the practice of hoarding and monopolizing compositions and refused to allow other competing companies to reproduce their songs in piano rolls or otherwise.[47] Congress responded to this monopolization of copyright compositions by creating the compulsory mechanical license.

This newly-developed licensing construct, that utilized the mechanical license, permitted any manufacturer of piano rolls to use any musical composition without negotiating with the copyright owner for permission, as long as: (1) the musical work had been previously licensed to someone else for mechanical reproduction, and (2) the manufacturer paid a statutory royalty of two cents.[48] Thus, once a piano roll company, like the Aeolian Company, had negotiated the right to reproduce a musical composition in "mechanical reproductions," anyone else, upon payment of the statutory royalty, could also produce piano rolls of such musical compositions.[49] In essence, the law made it impossible for large companies to monopolize mechanical reproduction by stipulating that once copyright owners had granted permission for the first recording of their song, any other person could record that song by simply paying a fee.

The mechanical license construct and the mechanical license fee structure were carried over into the Act's most recent incarnation, Section 115.[50] The compulsory license has provided the basic framework for the relationship between the recording and music publishing industries since its inception. Section 115, however, requires copyright users to license every individual work by following cumbersome notice and accounting procedures.[51]

46. *See The Grand Piano Series: A Technical Outline of the Reproducing Piano*, ¶ 2, http://www.wyastone.co.uk/nrl/gp_tech.html (last visited Mar. 2, 2006) (reporting that "[b]etween 1915 and 1930 the Reproducing Piano was very big business").

> In its peak year, 1925, more than 192,000 domestic instruments were manufactured by the Aeolian Company in the USA, with a total sales value of $59,000,000. The Aeolian Company made every effort to perfect and enhance their invention, and throughout this period they kept the most famous pianists under contract; offering a balanced repertoire of smaller pieces, and, most significantly for us, larger works which the 78 rpm disc could not manage.

Id. (discussing vast market power of Aeolian Company in early 1900s).

47. *See id.* (inferring textual statement through fact that Aeolian Company kept most famous pianists under contract).

48. *See* Copyright Act of 1909, ch. 1, § 1(e) (setting out newly developed licensing construct).

49. *See id.* (preventing monopolization of mechanical reproduction of musical compositions).

50. *See* 17 U.S.C. § 115 (2004) (setting forth licensing structure).

51. *See id.* § (b), (c) (detailing notice and accounting procedures).

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The regulations currently provide more difficult procedures for reporting usage information. Because the official procedures are onerously burdensome, the marketplace reacted by birthing entities like the Harry Fox Agency.[52] Today, however, new technology has caused Section 115 to impede the public's access to copyrighted works.

III. RIGHTS IMPLICATED BY THE NEW DIGITAL BUSINESS MODELS

The number and variety of digital music delivery services have mushroomed over the last several years.[53] To maintain marketplace viability and appeal, the business models of these "content movers" require rapid delivery, easy interoperability with existing content sending/receiving devices (such as standalone MP3 players, iPods®, and cellular phones), and an ever-growing library of millions of works to be made available to consumers.

Some digital content delivery services ("DCDS"), such as Napster.com, are interactive.[54] For a monthly subscription fee, consumers are able to create their own "digital jukebox" and place the songs they desire for future listening on their computers and/or portable devices. While this activity is commonly referred to as

52. *See* HFA ("Harry Fox Agency"), ¶ 1, www.harryfox.com/public/HFA Home.jsp (last visited Mar. 2, 2006) (announcing Harry Fox Agency is primary mechanical licensing, collection, and mechanical royalty distribution agency). The Agency was established in 1927 by the National Music Publisher's Association. *See id.* ¶ 2; *see also* Montez Simmons, *Music Publishing Essentials: The Harry Fox Agency*, http://www.musicianassist.com/archive/article/ART/a-0798-1.htm (last visited Mar. 2, 2006) (explaining services provided by Harry Fox Agency).

53. *See, e.g.*, Recording Industry Association of America, http://www.riaa.com/issues/music/legalsites.asp (last visited Mar. 2, 2006) (listing numerous legal download websites). iTunes®, which entered the market in April 2003, single-handedly jump-started the digital content delivery service industry. *See* Apple –iPod + iTunes, http://www.apple.com/itunes/ (last visited Mar. 2, 2006) (displaying device).

54. *See, e.g.*, Napster, http://www.napster.com/more_about_napster.html (last visited Mar. 2, 2006) (offering consumers catalog of over one million songs from which to choose for monthly subscription fee of only $9.95); Rhapsody, http://www.real.com/rhapsody/info.html?src=rcom_menu_unlimited (follow "Music Sharing" icon; then follow "Offer Terms" hyperlink) (last visited Mar. 2, 2006) (offering over 1.3 million selections for monthly subscription fee of $9.99). It is important to note that, if a subscriber ceases her subscription to these services, she will no longer have access to any of the recordings she has previously downloaded; therefore, the subscriber is "renting" the recordings as long as she pays for the subscription. *See* Rhapsody, *supra* (detailing usage conditions in Terms of Service). Of course, the subscriber also has the opportunity to purchase the recordings for an additional fee. *See id.*

"downloading,"[55] others are non-interactive, such as Internet radio stations. These services merely perform music and have a passive listenership, known as "streaming."[56] In the former case, the music purchased may be permanent (as in the case of purchases from iTunes®); in the latter case, the music may be "tethered" (i.e., limited or impermanent), whereby music consumers may only retain the ability to listen to the songs as long as they maintain their subscription to that service. The lines between downloading and streaming, however, are rapidly disappearing as new software devices, such as iRadio® and iFill®, as well as new hardware devices emerge. Although these devices claim to focus on their streaming capabilities, in reality, their activities result in permanent downloads. Both types of DCDSs implicate certain rights under the Copyright Act. In each recording, two separate copyrightable elements are present: (1) the underlying musical composition (the song),[57] and (2) the sound recording, which encompasses the ac-

55. *See* Wikipedia: Uploading and Downloading, http://en.wikipedia.org/wiki/Downloading (last visited Mar. 2, 2006) (defining downloading). The terms are defined as follows:

> Uploading and downloading are related terms used to describe the transfer of electronic data between two systems or similar devices. Their primary usage is as a verb: to *upload* is to send data from a local system to some remote system, such as a website, File Transfer Protocol (FTP) server, or other similar system. To *download* is to receive data from a remote system.
>
> In general use, the terms do not refer to the basic communication required for the operation of the software including connecting to an FTP server or requesting and receiving data displayed in a web browser. Instead, they are reserved for the specific and intentional act of transferring a file.
>
> By extension, the terms can be used as nouns. In this context, an *upload* is any file that has been uploaded, particularly if it is awaiting the recipient's attention. A *download* is any file that is offered for downloading or that has been downloaded.

Id.

56. *See* Webopedia: Streaming, http://www.pcwebopaedia.com/TERM/s/streaming.html (last visited Mar. 2, 2006) (indicating this activity is commonly referred to as "streaming"). Through the process of streaming, data is transferred in a way that enables processing at a continuous and steady flow. *See id.* As the Internet and its capabilities continue to expand, users are often unable to maintain fast enough access to download large media files rapidly. *See id.* Thus, streaming is becoming more important because it allows a user's browser to begin "displaying [some] data before the entire file has been transmitted." *Id.*

57. *See* 17 U.S.C. § 102(a)(2) (1990) (indicating that "songs" are referred to in Copyright Act as "musical works, including any accompanying words"). The term "song" is not precisely defined under the terms of the Copyright Act. *See id.* Compositions consist of words and music, or sometimes, just music. Compositions are also known as "non-dramatic musical works" in order to distinguish them from "dramatic works, including any accompanying music." *See id. Compare* 17 U.S.C. § 102(a)(2) (referring to non-dramatic musical works), *with* 17 U.S.C. § 102(a)(3) (illustrating classification of compositions as "dramatic" musical works).

tual, fixed sounds embodied in the recording (the "tracks" of the recording).[58] To illustrate this further, consider Table I below.

TABLE I. RIGHTS IMPLICATED IN DIGITAL MUSIC DELIVERY SYSTEMS

	REPRODUCTION	DISTRIBUTION	DIGITAL PUBLIC PERFORMANCE	DERIVATIVE WORK
Downloading: Permanent	Song: Yes Sound Recording (SR): Yes	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: No SR: No
Downloading: Tethered	Song: Yes, but ephemeral SR: Yes, but ephemeral	Song: Unk. SR: Unk.	Song: Yes SR: Yes	Song: No SR: No
Streaming (radio stations)	Song: No SR: No	Song: No SR: No	Song: Yes SR: Yes	Song: No SR: No
Streaming clips (over iTunes-type services)	Song: No SR: No	Song: No SR: No	Song: Yes SR: Yes	Song: Yes SR: Yes
iFill-type software	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: No* SR: No*
iRadio-type software	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: No* SR: No*
Cell Phone (beaming songs and listening to songs)	*Beaming:* Song: Yes SR: Yes *Listening:* Song: No SR: No	*Beaming:* Song: Yes SR: Yes *Listening:* Song: No SR: No	*Beaming:* Song: N/A SR: N/A *Listening:* Song: Yes SR: Yes	*Beaming:* Song: No* SR: No* *Listening:* Song: No SR: No
**Instant Messaging	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: N/A SR: N/A	Song: No* SR: No*
Ringtones	Song: Yes SR: Yes***	Song: Yes SR: Yes***	Song: Yes SR: Yes	Song: Yes SR: Yes
Podcasts	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: Yes SR: Yes	Song: No* SR: No*

*This depends on whether the radio station(s) or songs that are downloaded (transferred) engage in playing samples[59] or "mashups."[60] Alternatively, in the case of podcasts, they are intentionally altered to fit the podcast program, which includes theme music, intros, and outros.

58. *See* 17 U.S.C. § 101 (2005) (defining "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied").

59. *See* Wikipedia: Sampling, http://en.wikipedia.org/wiki/Sampling_%28 music%29 (last visited Mar. 2, 2006) (indicating that sample is portion of recording lifted (or edited) from sound recording and inserted, sometimes repeatedly, within body of new and different sound recording to create new work). A sample consists of two copyrightable elements, the song or music and the sound recording; therefore, two separate licenses must be obtained from the respective copyright owners for each sample used in order to insert the sample into the new recording. *See id.* (follow "Legal Issues" hyperlink). Often times, if the sample is derived from a popular recording, the publisher of the sampled song or owner of the sampled sound recording demand copyright ownership rights in the new recording as partial consideration for allowing the sampler's use of their song and sound recording in such new recording. *See id.*

60. *See* Sasha Frere-Jones, *1+1+1=1: The New Math of Mashups*, THE NEW YORKER, Jan. 10, 2005, at 85, *available at* http://www.newyorker.com/critics/mu-

**Instant Messaging ("IM") services,[61] such as AOL Instant Messenger®, facilitate transfer of recorded music to others via their services; it is the consumer, however, not the service that engages in this activity. Therefore, IM services are not considered Interactive DCDSs ("InDCDSs") for purposes of this Article.
*** Only if Ringtone[62] is a True tone,[63] i.e., an excerpt from the original sound recording.

The most common types of Interactive DCDSs ("InDCDS") are:

- Digital Subscription Services, such as the new Napster.com, which offer tethered downloads;
- Podcasts, which are radio-style programs which are archived on a website, such as iTunes®, and available for downloading;
- Digital Non-Subscription Services, such as iTunes®, which offer individual permanent downloads (NOTE:

sic/?050110crmv_music (illustrating implications of rights attributable to samples and mashups). As a result, many separate rights are implicated. For example, "Collision Course," a legally sanctioned record of mashups, contains a combination of the music of Linkin Park and material from Jay-Z's "The Black Album" and other albums. *See id.* ¶ 6. One of Jay-Z's songs used on the record has four publishers and two samples. *See id.* ¶ 7. Therefore, in order to properly record and distribute "Collision Course" under the Copyright Act, the label issuing the mashup needed to obtain permission from the owner of each sample and each publisher (at least six parties), before Linkin Park's music was even added, which could have infinite publishers on its own. *See id.* Unless the issuing label can convince each publisher to accept a reduced royalty rate, it will likely be unprofitable for the label to put out such a creation. *See id.* Thus, as labels are less likely to gamble on a mashup of lesser-known artists, fearing that they will not sell enough records to make a profit, creativity becomes stifled. *See id.*

61. *See* Wikipedia: Instant Messaging, http://en.wikipedia.org/wiki/Instant_messaging (last visited Mar. 2, 2006) (defining "instant messaging"). Instant Messaging is a service offered by AOL® to its subscribers and non-subscribers, which allows two or more people to instantly communicate by sending typewritten messages in "pop-up" style windows that appear on one's computer desktop. *See id.* This type of communication is an online "posting" of messages over a network, such as AOL®, for example, which continues back and forth in real time over the Internet. *See id.*

62. *See* PCMag.com: Definition of Ringtone, http://www.pcmag.com/encyclopedia_term/0,2542,t=ringtone&i=50543,00.asp (last visited Mar. 2, 2006) (defining "ringtone" as sound telephone makes when incoming call). Traditionally, the average ringtone was in the 440-480 Hz range, but today, most cell phones can support a wide differentiation and frequency range, which enables them to play "several bars of music." *Id.* ¶ 1. Ringtones use several formats, including MP3, which supports music and voice, and MIDI and Nokia's RTTTL (Ringing Tones Text Transfer Language), which support music. *See id.* ¶ 2. As ringtones have become increasingly popular, many cellphones now come with "a selection of built-in ringtones" and are able to accept new ones from ringtone services. *Id.* ¶ 1. In some phones and formats, ringtones can also be transferred through text messages (SMS). *See id.* ¶ 2.

63. *See* Wikipedia, http://en.wikipedia.org/wiki/Ringtone (follow "1.3 Music ringtones" hyperlink) (last visited Mar. 2, 2006) (defining "truetone" as new advanced ringtone). A "true tone" or "trutone" is a ringtone that is a short (approximately thirty-second) music clip edited directly from an original sound recording and made available to consumers for downloading onto their cell phones to represent their own, recognizable cell phone ring. *See id.*

iTunes® also streams recorded music clips for consumers to review before purchasing); and

- Ringtone[64] and True tone[65] providers, also referred to as "aggregators".

Every time a consumer streams and downloads a recording over the Internet from an InDCDS, the following occurs: (1) the InDCDS engages in a public performance of both the song and the sound recording; (2) the consumer makes a reproduction of both the song and the sound recording via the InDCDS delivery; and (3) the InDCDS distributes to the consumer both the song and the sound recording. Arguably, however, tethered downloads are merely ephemeral,[66] and therefore, do not constitute a reproduction or a distribution.[67]

This scenario is further complicated by InDCDS' streaming of "music clips," approximately thirty seconds of a song, on their websites for consumer review. According to the recording industry, this results in the creation of a derivative work. The music clip is a derivative work because the underlying nature of the original work was altered.[68] Therefore, in order to comply with current copyright laws, the InDCDS is required to obtain permission for each derivative work, which involves fees to the copyright owner.[69]

When a non-interactive DCDS ("NDCDS"), such as an Internet radio station or webcaster, streams a recording over the Internet, public performance rights for both the song and the sound recording are implicated. The NDCDS must not only gain permission for the broadcast of these recordings, but also comply with the "sound recording complement."[70] Compliance makes the NDCDS eligible

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64. *See id.* (explaining that ringtone is recreated from original sound recording, but does not utilize such sound recording). The copyright owner must issue a license to the user for their reproduction and distribution (mechanical rights). *See id.* Downloading ringtones may also implicate public performance and the right to create a derivative work as well. *See id.*

65. *See id.* (explaining and comparing ringtones to true tones).

66. *See* 17 U.S.C. § 112 (2004) (discussing limitations on exclusive rights and ephemeral recordings).

67. For a further discussion and illustration of InDCDSs involvement, see *supra* Table I.

68. *See generally* Eriq Gardner, *Shake, Rattle and R-R-Ring: Disputes over Faddish New Ringtones – and Billions in Licensing Money – Mean Turmoil in the Music Industry*, 5 CORP. COUNS. 90 (Aug. 2005) (discussing implications of copyright act on ringtones industry).

69. For an illustration of the fees, see *infra* Table II.

70. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2891 (1998) (detailing sound recording performance requirement). Under the sound recording performance complement, a webcaster may not play in any three-

for a statutory license.[71] In effect, this compliance avoids the need to negotiate every sound recording's digital public performance license with every sound recording owner, normally the record label. The rules set forth in the "sound recording complement" are at best unwieldy, and at worst, thwart the intent and nature of copyright law. Today, they may even be moot.[72]

Congress's likely intent in creating the "sound recording complement" was to discourage illegal downloading of music from Internet radio stations. Music streamed over an Internet radio station is in digital form, as opposed to analog form; therefore, if a listener wants to download a song from such a station onto an MP3 player, there will be little or no sonic generational loss. In other words, the reproduced song on an individual's MP3 player will sound nearly as good as the original song embodied on a CD.

The "sound recording performance complement" rules inhibit a listener's ability to reproduce songs by imposing fourteen complicated rules on Internet broadcasters.[73] The broadcaster must comply with these rules to be eligible for the DMCA's compulsory statutory license for the use of sound recordings.[74] These rules have become archaic because they are burdensome to enforce, difficult for small webcasters and podcasters to comply with, and can be expensive for fledgling webcasters.[75] Moreover, they are rapidly

hour period more than three songs from the same album, or four songs from a particular artist or a boxed set. *See* RIAA: Frequently Asked Questions – Webcasting, http://www.riaa.com/issues/licensing/webcasting_faq.asp (follow "What are the conditions a webcaster has to meet in order to qualify for the statutory licenses?" hyperlink) (last visited Mar. 2, 2006) (explaining sound recording performance complement). For a further discussion of the sound recording complement, see *infra* notes 159-62 and accompanying text.

71. *See* Digital Millennium Copyright Act, 112 Stat. at 2890-91 (detailing requirements for statutory license). To qualify for a statutory license, the webcaster must (1) pay royalties, (2) abide by the sound recording performance complement, (3) not make prior announcements of songs to be played, (4) limit archived programming, (5) limit looped programming, (6) limit repeat of programs, (7) identify song, artist, and album, (8) not make false suggestions linking song and advertising, (9) defeat copying by recipient, (10) accommodate technical protection measures, (11) defeat scanning, (12) not transmit bootlegs, (13) not switch channels, and (14) transmit copyright management information. *See* RIAA: Frequently Asked Questions – Webcasting, *supra* note 70.

72. For a further discussion of this provision's mootness, see *infra* notes 76-77 and accompanying text.

73. *See* RIAA: Frequently Asked Questions – Webcasting, *supra* note 70 (detailing requirements on broadcasters).

74. *See id.* (stating rules to be followed in order to obtain license).

75. *See, e.g.*, Live365, www.live365.com (last visited Mar. 2, 2006) (pronouncing it as "the world's largest Internet radio network" hosts thousands of fledgling Internet radio stations); Sound Exchange, www.soundexchange.com (search "Live365"; then follow "Notice of Intent to Audit Live365.com" hyperlink) (last

becoming moot, based on a number of factors, particularly: (1) reports that many independent recording artists willingly waived their rights in order to allow small webcasters and music websites to publicly perform their sound recordings to exploit the inherent promotional value;[76] and (2) the introduction into the marketplace of new technology which completely bypassed any sort of royalty payment structures or licensing procedures.[77]

To summarize, compliance with the Act requires InDCDSs and NDCDSs to adhere to strict accounting procedures, and maintain comprehensive databases and licenses with a convoluted constellation of entities. This process is prohibitively expensive and burdensome. A cursory review of Table II reveals for InDCDSs, DCDSs, and other types of digital delivery, the licensing complexities involved ignore technological realities. To illustrate further, consider

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visited Mar. 2, 2006) (noting actions taken by Live365). In December 2005, many embryonic Internet radio stations, who had barely begun to accrue any revenue, received notice from Live365 that the network, along with its hosted radio stations, was being audited by SoundExchange, the collection agency for digital public performance rights royalties for sound recordings, to ensure that proper payments were being made. *See* Sound Exchange, *supra.*

Moreover, the RIAA has continued to crack-down on Internet radio services, like Live365, to ensure and force compliance with the Digital Millennium Copyright Act. *See* RIAA Looks At Live365 DMCA Compliance, Nov. 28, 2005, http://www.fmqb.com/Article.asp?t=P&id=148481. Users of Live365 "recently received an email stating, 'The RIAA has been in touch with us recently to let us know that they have found a number of stations that are not compliant on the service. If stations continue to operate out of compliance, we will reserve the right to shut them down or otherwise restrict access.'" *Id.*

76. *See, e.g.*, Myspace, www.myspace.com (last visited Apr. 27, 2006) (permitting many independent recording artists to share music with others for free); Pure volume, www.purevolume.com (last visited Apr. 27, 2006) (allowing many independent recording artists to post their music for free downloading).

77. *See, e.g.*, iFill - Griffin Technology, *supra* note 16 (displaying new device touted as "a great fit for your active lifestyle"). The iFill website boasts the following:

> **iFill Music from thousands of radio streams.**
> iFill streams mp3 files from thousands of free radio stations directly to your iPod. You can choose several stations at once and select from many different genres. And since iFill goes directly to your iPod, it won't clutter up your hard drive with extra files.
> **iFill 'er Up!**
> iFill is a great fit for your active lifestyle. With iFill, you can go to bed while charging your iPod, and wake up to an iPod full of new music, *ready to go jogging with you, and without having to search through your record collection, browse the iTunes Store, or rip any CDs.*
> **Using iFill is easy:**
> 1. Open iFill
> 2. Select your radio stations (you can select more than one!)
> 3. Click Record
> Done! Fresh music starts streaming to your iPod.

Id. (emphasis added) (noting additionally that iFill device costs only $19.99).

the following story of Peggy, discussed in Section IV. Unfortunately, our prototypical example, Peggy, was faced with such complexities, as are many other prospective consumers, and easily could have fallen victim to the perplexing pitfalls under the current Copyright Act.

TABLE II. TABLE OF CURRENT RIGHTS AND LICENSES*[78]

* Note Ringtone licensees are required to obtain separate Ringtone licenses[79] from the copyright owners of the songs (for both Ringtones and True tones) and the sound recordings (for True tones only).

Types of Rights	REPRODUCTION	DISTRIBUTION	PUBLIC PERFORMANCE	DERIVATIVE WORK	DIGITAL PUBLIC PERFORMANCE IN SOUND RECORDING
License Needed for Composition	-First Use: NML -After First Use: CML	-First Use: NML -After First Use: CML	PP License via PRO	Negotiated License	N/A (digital PP rights for Compositions licensed via PRO)
License Needed for Sound recording	NML	NML	No license required for terrestrial, i.e., analog, PP	Negotiated License	PP License via Digital PRO, i.e., SoundExchange
Who gets paid for the Composition	Publisher(s), i.e., Copyright Owner(s)	Publisher(s), i.e., Copyright Owner(s)	Publisher (and Composer, if they are different parties)	Publisher(s)	Publisher(s)
Who gets paid for the Sound Recording	Copyright Owner, i.e., generally, Record Label; recording artist gets paid from sales as negotiated through label	Copyright Owner, i.e., generally, Record Label	N/A	Record Label	Record Label, Featured Recording Artist, Background Musicians and/or Vocalists

IV. THE STORY OF PEGGY THE PODCASTER

Peggy owns a chain of fashion boutiques for women, called *Peggy's Threads*, and she is an expert on emerging trends in teenage

78. *GLOSSARY OF TERMS FOR TABLES*
PP: Public Performance
PRO: Performing Rights Organization, i.e., ASCAP, BMI, SESAC and their international affiliates
NML: Negotiated Mechanical License
CML: Compulsory Mechanical License
MRO: Music Rights Organization
MRL: Music Rights License
Mashups: Digital re-mixes of the fixed musical digitized sounds of a recorded song, possibly in connection with other, different fixed musical digitized sounds, to create a new, transformative song that may or may not resemble the original fixed musical sounds. See *supra* note 60 for a further discussion of mashups.

79. *See* HFA: Ringtones, http://www.harryfox.com/public/infoFAQRingtones.jsp (last visited Mar. 2, 2006) (discussing licenses of Ringtones).

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fashion. She also owns and maintains a popular interactive website at www.peggysthreads.com.

While in high school, Peggy recalled learning that the United States Constitution embodies, in Article I, § 8, Clause 8, the impetus for the institution of the United States Copyright Act. She also learned that the primary purpose of the United States copyright laws are to maximize the public availability of creative works in order to facilitate the creation of more original works. Essentially, the copyright law is in existence for the public welfare.

Therefore, Peggy decided to take advantage of exciting new technology and create a podcast. She discovered that a podcast is an Internet-based radio program which sits on a "server"[80] and is offered on a website for consumers to download onto their portable digital device, such as an MP3 player or an iPod®. Each podcast is archived on its website. Moreover, podcasts generally offer free subscriptions. Each radio program created will appear on the consumer's computer on a designated website, such as iTunes®, or the podcaster's own website, i.e., www.peggysthreads.com, ready for the consumer to download and enjoy.

Peggy thought it would be a wonderful idea to create a weekly podcast featuring interviews with fashion industry professionals. She used some pre-existing sound recordings by artists like Britney Spears, Madonna, and Alicia Keyes as introductions to her interviews and as underscores for some of her opinion pieces. Also, she featured some underground, trendy artists' songs as representative of the fashion counter-culture. Peggy thought the podcast was a terrific way to publicize and promote *Peggy's Threads.* Indeed, the traffic to her online store increased dramatically after only a few weeks of podcasting. Moreover, Peggy received numerous emails praising her for bringing such insight into the world of fashion, as well as positive feedback on the musical interludes and background scores.

One afternoon, Peggy was having lunch with her attorney, who informed her that she needed permission from the owners of the recordings she used in her podcasts. Peggy asked her attorney what she needed to do in order to receive such permission. The attorney

80. *See* Wikipedia: Server (Computing), http://en.wikipedia.org/wiki/Server_%28computing%29#Server_applications (last visited Mar. 2, 2006) (defining "server" as "a computer system that provides services to other computing systems - called *clients* - over a network").

enumerated the licenses Peggy would need to obtain in order to comply with the United States Copyright Act.[81]

First, Peggy was reproducing and distributing recordings, which embody two copyrightable elements: the composition[82] and the sound recording.[83] Accordingly, Peggy would need to obtain certain licenses for each of those elements. For the compositions embodied in the sound recordings, Peggy would need to obtain mechanical licenses, either negotiated or compulsory, from the publisher(s) for **each and every** song. In order to do so, Peggy must contact the Harry Fox Agency ("HFA"). This agency issues mechanical licenses on behalf of music owners (publishers) to music users.[84] HFA can tell Peggy if the publisher(s) of the compositions she has used registered the particular compositions. If she chose to utilize the Act's procedures for obtaining compulsory mechanical licenses, she may do so, but these procedures are cumbersome.[85]

For example, in the event the compositions were indeed registered with HFA, Peggy would need to obtain the official HFA mechanical license forms[86] and fill them out. After that, she would need to pay HFA, who would then disseminate the revenue to the rightful publisher(s).[87] Further, in the event the publisher(s) had NOT registered the compositions with HFA, Peggy would be required to locate each publisher of each composition and obtain their signatures on a mechanical license,[88] giving her the rights to reproduce and distribute the compositions in the podcast. Moreover, if the compositions Peggy would like to use in her podcasts have not been previously distributed, Peggy must obtain a First Use

81. *See* 17 U.S.C. § 101 (2005) (setting forth current U.S. copyright law).

82. For a discussion of the term "composition," see *supra* note 57 and accompanying text.

83. For a discussion of the term "sound recording," see *supra* note 58 and accompanying text.

84. *See* HFA, *supra* note 52 (follow "Licensee information" hyperlink) (noting that "the Harry Fox Agency, Inc. offers publishers and licensees a single source for licensing and for the collection and distribution of royalties").

85. *See* 17 U.S.C. § 115(b) - (c) (2005) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005)) (explaining legislative requisite for compulsory mechanical license).

86. *See, e.g.*, HFA Mechanical License Request, http://www.harryfox.com/docs/m-license_laccountapp.pdf (last visited Mar. 2, 2006) (providing HFA Mechanical License Request form that first-time licensees need to complete).

87. *See* HFA: What Does HFA do exactly?, http://www.harryfox.com/public/FAQ.jsp#2 (last visited Mar. 2, 2006) (detailing HFA's dissemination of revenue to appropriate publishers).

88. *See* 17 U.S.C. § 115 (2004) (setting forth parameters under which party may negotiate mechanical license). A mechanical license derives its name from the act of "mechanically" reproducing a phonorecord onto a fixed medium. *See id.*

Mechanical License for each undistributed composition.[89] These licenses must be negotiated with the composition's publisher(s). This will cost Peggy approximately 9.1 cents per composition per podcast downloaded.[90]

Even if Peggy managed to perfectly comply with the Act and obtain all the requisite licenses for use of the compositions, Peggy must then maintain comprehensive records of how many podcast subscribers she has in order to keep track of the number of times the compositions are downloaded from her podcast. Then, Peggy would pay the publisher(s) accordingly. Peggy, however, questions the feasibility of knowing how many people are actually downloading her podcast at any given point in time.

Furthermore, Peggy would like to use a large number of compositions, some in their entirety, and only portions of others. It is extremely burdensome for her to obtain individual mechanical licenses for each composition. Finally, because Peggy is only using a portion of some compositions, she will also need to obtain permission to create a derivative work[91] for each composition she excerpts because the rights-holder(s) may argue she is altering the fundamental nature of the work.

This mechanical license scheme and payment structure is cost-prohibitive for Peggy. It also creates an administrative stranglehold and a creative conundrum. This results in an intolerable limitation on Peggy's ability to create and offer her work (the podcast) to the public.

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89. *See id.* (providing that no compulsory mechanical license is available for musical work if that work has not yet been distributed). The "first use" of the work is reserved to the work's copyright owner, and as such, the owner may or may not decide to grant another person or entity the right to mechanically reproduce and distribute the musical work onto a phonorecord. *See id.*

90. *See* Copyright Royalty Rates Section 115, the Mechanical License, http://www.copyright.gov/carp/m200a.html (last visited Mar. 2, 2006) (explaining Mechanical License Royalty Rates).

91. *See* 17 U.S.C. § 106(2) (nothing that "the owner of copyright . . . has the exclusive rights to authorize . . . [the creation] of derivative works based on the copyrighted work"); *see also id.* § 101 (describing derivative work). The statute reads:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Id. § 101.

Unfortunately, Peggy's legal morass is far from over. Peggy has discovered that she must pay additional public performance royalties to the compositions' copyright-holders via the established performing rights organizations ("PROs"), which are ASCAP, BMI, and SESAC.[92] Generally, when any type of broadcast entity wishes to legally and publicly perform another's song, whether over the airwaves or Internet, that entity must obtain a license from the aforementioned PROs.[93]

In Peggy's case, because her podcast is an Internet site, her public performance royalty cost may be alleviated to some degree. She is entitled to obtain an Experimental Internet Site License from ASCAP,[94] a Web Site Music Performance Agreement from BMI,[95] and SESAC's Internet License.[96] The licensing fees set forth in these agreements are "sliding scale" style fees, based on gross revenues or music revenues. Although Peggy is receiving a financial benefit because of the increased traffic on her website, which results in sales, she is not generating much direct revenue. Therefore, it is arguable whether such income should be included when calculating the "sliding scale" fee.

Even though Peggy can realistically assess and therefore predict her yearly public performance licensing fees under these fee plans, for a small podcaster like Peggy, this cost is a significant factor to weigh as Peggy contemplates her podcast's continued existence. Moreover, Peggy feels that she is already paying publishers for the use of the songs via mechanical licenses, and suspects that

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92. *See* ASCAP, http://www.ascap.com/about/ (last visited Mar. 2, 2006) (describing ASCAP as American Society of Composers, Authors, and Publishers); BMI, http://www.bmi.com/about/backgrounder.asp (last visited Mar. 2, 2006) (describing BMI as Broadcast Music Incorporated); SESAC, http://www.sesac.com/about.aspx (last visited Mar. 2, 2006) (describing SESAC as Society of European Stage Authors and Composers). These three performing rights organizations represent the interests of copyright owners of compositions, i.e., publishers, by issuing public performance licenses to, and collecting public performance royalties from, entities that engage in public performances of copyrighted compositions, e.g., television, radio, live performance venues. *See, e.g.*, SESAC: Why do I need a license for my website?, http://www.sesac.com/licensing/internet_licensing_faq.aspx#sesacA (explaining need for license due to U.S. copyright law).

93. For an explanation of the aformentioned PROs, see *supra* note 92.

94. *See, e.g.*, ASCAP Experimental License Agreement for Internet Sites & Services – 5.0, http://www.ascap.com/weblicense/ascap.pdf (last visited Mar. 2, 2006) (displaying ASCAP Experimental License Agreement for Internet Sites & Services form).

95. *See, e.g.*, BMI Licensing, Web Site Music Performance Agreement, http://www.bmi.com/licensing/forms/Internet0105A.pdf (last visited Mar. 2, 2006) (displaying BMI Web Site Music Performance Agreement form).

96. *See* SESAC Internet License, http://www.sesac.com/pdf/internet_2006.pdf (last visited Mar. 2, 2006) (displaying SESAC Internet License form).

this cost constitutes "double-dipping." She argues she is not really broadcasting the compositions used in her podcast, but rather, her podcasts are being downloaded directly to individuals in the privacy of their homes or offices. Therefore, Peggy's podcast pursuit is subject to yet another administrative layer and cost.

Finally, with respect to Peggy's use of the compositions, she must gain permission to allow her son, an audio engineer and "disc jockey," to create transformative "mashups" of some select recordings, resulting in derivative works. These "mashups" are new, original creations, and Peggy's audience responds favorably to them. Arguably, the transformative nature of the derivative work may mitigate in favor of such use as a fair use.[97] No legal bright line, however, exists with respect to what does or what does not constitute fair use.[98]

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97. *See* 17 U.S.C. § 107 (2005) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)) (allowing certain uses of copyrighted works without permission of copyright owners under certain circumstances). Under the Fair Use Doctrine, the most important factor the courts consider is whether the use infringes on the copyright owner's market for the original work, i.e., whether the copyright owner engages in distributing her work in this market. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) (discussing fair use provision of Copyright Act).

The Court concluded with respect to the provision of the Copyright Act of 1976 (17 U.S.C. § 107) that fair use of a copyrighted work does not constitute infringement. *See id.* at 579-85. The main purpose of investigating the purpose and character of a use under 17 U.S.C. § 107(1) is to determine whether a new work (1) "merely supersedes the objects of the original creation," or (2) instead is transformative, that is, "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; . . . [a]lthough such transformative use is not absolutely necessary for a finding of fair use"—the straight reproduction of multiple copies for classroom distribution being an exception to such necessity—"the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* at 579.

98. *See* 17 U.S.C. § 107 (describing what constitutes fair use).

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
> (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.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

A further complication for Peggy could arise if any of the compositions she uses in her podcast have not been previously distributed, making Peggy the "first user" of the composition. In that case, the composition is not subject to a compulsory mechanical license. Instead, Peggy must negotiate a license with the composition's individual rights-holder(s).[99] There is no guarantee that Peggy will be successful in such a negotiation. The rights-holder has the ability to restrict her from reproducing and distributing the relevant composition. The licenses and permissions outlined above only apply to the composition. To legally use the sound recordings for her podcasts, Peggy must also obtain concomitant licenses for the sound recordings.[100]

First, because no compulsory mechanical licenses are available for sound recordings under the Act,[101] she must negotiate each license for each sound recording's reproduction and distribution. Second, she must register each sound recording used with SoundExchange,[102] the organization that collects and disseminates public performance royalties for digital public performances of sound recordings.[103] If Peggy is eligible as a non-interactive broadcaster, and she complies with the matrix of rules, including the "sound recording performance complement"[104] set forth in the Act, she may be able to apply for a digital public performance statu-

Id.

99. *See id.* § 115 (detailing "First Use Rule").

100. *See id.* § 114 (describing subject matter and scope of copyrights).

101. *See id.* §§ 114, 115 (describing copyright scope of non-dramatic musical works).

102. *See* SoundExchange, http://www.soundexchange.com/about/about.html (last visited Mar. 2, 2006) (describing SoundExchange®, Inc.).

> [It] is a dynamic, 501(c)(6) nonprofit performance rights organization embodying hundreds of recording companies and thousands of artists united in receiving fair compensation for the licensing of their music in the new and ever-expanding digital world. Modern technology makes all of our lives a little bit simpler and SoundExchange takes full advantage of its accuracy and efficiency to license, collect and distribute public performance revenues for sound recording copyright owners (SRCOs) and artists for noninteractive digital transmissions on cable, satellite and webcast services.

Id.

103. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (amending Copyright Act to add exclusive right in copyright to Section 106: public performance right for digital performances in sound recordings); *see also* Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3, 3 (Nov. 1995) (stating that President Clinton signed Digital Performance Right in Sound Recordings Act of 1995 into law on November 1, 1995).

104. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2891 (1998) (detailing "sound recording performance complement").

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tory license.[105] Therefore, Peggy will pay the statutory rate set forth in the Act. This is less expensive and more predictable than engaging in individual, negotiated licenses for public performance of the sound recordings. Nevertheless, this remains a huge administrative burden for Peggy to bear. Finally, she must negotiate derivative work[106] licenses for each and every sound recording her son uses for his creative "mashups."

With respect to the sound recordings, however, Peggy may have a problem because sound recordings are subject to negotiation, not compulsory or mandatory licenses. There is no guarantee that Peggy will be able to obtain them from the copyright owners, let alone afford the proffered licensing fees. Because sound recordings are not subject to compulsory mechanical licenses, the sound recording owners (record labels and/or recording artists) may refuse to license them to Peggy for her use, despite the fact that they may have been previously distributed. Moreover, in addition to the above-stated payments, Peggy must make royalty payments, in ac-

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105. *See id.*; *see also* SoundExchange: What digital music services are covered by a statutory license?, http://www.soundexchange.com/licensing101.html#a2 (last visited Mar. 2, 2006) (describing basics of copyright licensing).

> The section 114 statutory license covers public performances by four classes of digital music services: eligible nonsubscription services (i.e., noninteractive webcasters and simulcasters that charge no fees), preexisting subscription services (i.e., residential subscription services providing music over digital cable or satellite television), new subscription services (i.e., noninteractive webcasters and simulcasters that charge a fee), and preexisting satellite digital audio radio services (i.e., XM and SIRIUS satellite radio services). The section 112 statutory license covers ephemeral reproductions (i.e., temporary server copies) made by all digital music services covered by the section 114 license as well as certain background music services that are exempt from paying public performance royalties under section 114.
>
> . . . .
>
> To obtain a statutory license, you must first notify sound recording copyright owners by filing a "Notice of Use" with the Copyright Office. All services must file a Notice of Use prior to making the first ephemeral copy or first digital transmission of a sound recording to avoid being subject to liability for copyright infringement. In addition, all services that were in operation prior to April 12, 2004 and intend to remain in operation after July 1, 2004 must file a Notice Of Use with the Copyright Office not later than July 1, 2004, even if such service previously filed a Notice of Intent with the Office. In the future, services may be required to update their Notices of Use at regular intervals. The Copyright Office expects to announce any such requirements when it issues final Notice and Recordkeeping regulations sometime in the future.

SoundExchange: What digital music services are covered by a statutory license?, *supra.*

106. *See* 17 U.S.C. § 106(2) (2005) (stating that copyright owner has exclusive rights to authorize creation of derivative works that are based on copyrighted work).

cordance with the Small Webcaster Settlement Act of 2002, once her podcast generates a certain level of revenue.[107]

Peggy was understandably concerned and upset about the time and money spent on this uncertain licensing nightmare, and had some legitimate policy questions: (1) Isn't it double or quadruple-dipping for rights-holders to demand mechanical royalties and public performance royalties, both for the sound recording and the song?; (2) Why should she be forced to spend inordinate amounts of time and effort obtaining individual mechanical licenses for each song and sound recording, or alternatively, have to follow the incomprehensible procedures for securing compulsory mechanical licenses for each composition set forth in the Act?; (3) Does her use of music "clips" constitute derivative works,[108] even though she feels she isn't changing the song or the sound recording's fundamental nature?; (4) Isn't her use of the music considered "fair use"?;[109] and (5) Aren't her son's "mashups" transformative enough to constitute "fair use"[110]?

As a result of all of these convoluted machinations, Peggy reluctantly decided to discontinue her podcasts. Consequently, the current licensing hoops impeded Peggy's ability to interact with the public, and detracted from the fundamental premise of copyright law and the United States Constitution. Table III, listed below, demonstrates the licenses and rights implicated by current copyright law.

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107. *See* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 2780-85 (2002) (amending Section 112 and Section 114 statutory licenses in Copyright Act as they relate to small webcasters and noncommercial webcasters). Among other things, the Small Webcaster Settlement Act of 2002 allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002 order, to collect royalty payments made by eligible nonsubscription transmission services under Sections 112 and 114 statutory licenses, to enter into agreements on behalf of all copyright owners and performers, and to set rates, terms, and conditions for small commercial webcasters operating under the section 112 and section 114 statutory licenses. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45239, 45239-45276 (July 8, 2002) (to be codified at 37 CFR pt. 261).

108. *See* U.S. Copyright Office – Fair Use, http://www.copyright.gov/fls/fl102.html (last visited Mar. 2, 2006) (discussing derivative works).

109. *See* 17 U.S.C. § 107 (1992) (providing fair use doctrine).

110. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) (deciding that "commercial character of song parody" should be evaluated in fair use inquiry).

TABLE III. PROPOSED RIGHTS AND LICENSES – THE COMPULSORY MRL* UNDER THE NEW MRO**

Types of Rights	REPRODUCTION Included in NML***	DISTRIBUTION Included in NML	PUBLIC PERFORMANCE Compulsory under MRO	DERIVATIVE WORK Included in NML	DIGITAL PUBLIC PERFORMANCE IN SOUND RECORDING
License Needed for Composition (including synch usage)	First Use Period: NML for nine month period of use After First Use Period: **Compulsory MRL under MRO**	First Use Period: NML for nine month period After First Use Period: **Compulsory MRL under MRO**	MRO for digital and analog: Compulsory Blanket or Per Song License under new MRO from first date of public performance	First Use Period: Negotiated Derivative Work License for nine month period After First Use Period: **Compulsory MRL under MRO**	N/A (digital PP rights for Compositions licensed via MRO)
License Needed for Sound recording (including synch usage)	First Use Period: NML for nine month period of use After First Use Period: **Compulsory MRL under MRO**	First Use Period: NML for nine month period of use After First Use Period: **Compulsory MRL under MRO**	Create new right: Analog PP in SR: MRO for analog: Compulsory Blanket or Per Song License under new MRO from first date of public performance	First Use Period: Negotiated Derivative Work License for nine month period After First Use Period: **Compulsory MRL under MRO**	**MRO License**
Who gets paid for the Composition	Publisher, i.e., Copyright Owner	Publisher, i.e., Copyright Owner	Publisher	Publisher	Publisher
Who gets paid for the Sound Recording	Copyright Owner, i.e., generally, Record Label	Copyright Owner, i.e., generally, Record Label	Both digital and analog SR performance, record label and recording artist	Record Label	Record label and Recording Artist

* Music Rights License
** Music Rights Organization
*** Negotiated Mechanical License

In today's digital world, nearly every public performance of a composition and digitized sound recording results in either an actual reproduction and distribution of that composition, or the potential for there to be one. Moreover, the ability to define what constitutes an ephemeral recording is blurry at best.[111] It is nearly impossible, at this point in time, for copyright-holders who zealously maintain almost absolute control of their original works to continue to do so. There has always been an inherent tension be-

111. *See* 17 U.S.C. § 112 (2004) (attempting to clarify definition). Digital music subscription services offer recordings for download, which can be listened to on their specific digital music devices, but the recordings are never actually owned. If a subscriber stops the service, the recording disappears – at least in theory. New devices, in all probability, will alter that. Currently, however, if one never owns a recording, and it can disappear at any time, is that recording considered ephemeral or fixed? This question has not been adequately addressed or answered.

tween the rights-holders of original works and the consumers of those works. The new technologies available today have amplified that historic tension to the breaking point.

V. Proposal for Radical Change

When the United States joined The Berne Convention[112] in 1989, it agreed to align its copyright policies with the other treaty members by increasing the term of copyright to life of the last living author plus an additional fifty years. At that time, no one could have anticipated the impact of the Internet on the music industry. Giving a considerably longer "monopoly" period of control to authors and creators seemed reasonable and warranted. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act[113] increasing the "limited monopoly" copyright term seventy years after author's death.

It is not suggested the United States reassess its compliance with the Berne Convention. The "limited monopoly" must stand, even though it is arguable that this length of time actually imposes more than a "limited" monopoly. In fact, this argument was forwarded and rejected by the Supreme Court in the recent case of *Eldred v. Ashcroft.*[114]

Instead, the proposed changes will radically alter the Act. The primary reasons for the following proposals are to: (1) impose rea-

112. *See* Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971): Article 7, http://www.law.cornell.edu/treaties/berne/7.html (last visited Mar. 2, 2006) ("The term of protection granted by this Convention shall be life of the author and fifty years after his death."). The Berne Convention for the Protection of Literary and Artistic Works, of 1886 (completed at Paris in 1896, revised at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967, and at Paris in 1971, and amended in 1979) aimed to assist nationals of its member countries in obtaining international protection of their right to control, and receive payment for, the use of their creative works. *See* Wikipedia: Berne Convention for the Protection of the Literary and Artistic Works, http://en.wikipedia.org/wiki/Berne_Convention_for_the_Protection_of_Literary_and_Artistic_Works (last visited Mar. 3, 2006).

113. *See* Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 302 (1998) (pending legislation H.R. 2408, 109th Cong. (1st Sess. 2005)) (increasing duration of copyright protection of original works to life of author plus seventy years).

114. 537 U.S. 186 (2003). Petitioners in the *Eldred* case made two main arguments. The first was that retroactive extension of the Sonny Bono Term Extension Act (17 U.S.C. § 302) (the "Bono Act") surpassed Congressional authority under the "limited time" language of Article I, Section 8, Clause 8 of the United States Constitution. *See id.* at 193-94. The second argument was that the Bono Act violated the First Amendment by keeping works out of the public domain. *See id.* The Supreme Court rejected both arguments. *See id.* at 194. This arguably caused over 375,000 works, slated to enter the public domain had the Court struck down the Bono Act, to remain in private hands.

sonable charges on those who financially benefit from digital distribution; (2) reward those who create content for such digital distribution; (3) allow content to flow freely from creator to consumer; and (4) de-criminalize the downloading and sharing of music by otherwise law-abiding American citizens. All parties, except the consumer, financially benefit from the use of intellectual property, especially musical works. Therefore, all parties must pay according to the specific type of use and the scale of financial benefit gained.

Many additional revisions should be explored beyond the scope of this article; however, the following proposed revisions represent salient and timely ones. First, eliminate the need for, or revise, Sections 108 through 122[115] of the Act, with the exception of Section 109.[116] Section 109 encompasses the limitations, exceptions, and definitions of the scope of the misnamed "exclusive" rights granted under Section 106[117] and Section 114.[118] The rights granted under the aforesaid sections purport to offer copyright holders an exclusivity for their rights, but at the same time take it away. The constraints and restrictions attached to the purportedly exclusive rights not only unnecessarily complicate the exercise of these rights, they effectively erode them.

Second, revise the Audio Home Recording Act[119] to raise the royalty surcharge to two-and-one-half percent (2.5%), and broaden the definition of "digital audio recording devices"[120] to include computers and all digital devices that contain hard drives. Third,

115. *See generally* 17 U.S.C. §§ 108-122 (2005) (describing limitations and scope of copyright law).

116. 17 U.S.C. § 109 (1997) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)) (detailing Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord).

117. 17 U.S.C. § 106 (2002) (setting forth authors' exclusive rights in original works).

118. 17 U.S.C. § 114 (2004) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005)) (setting forth exclusive rights of copyright owners of sound recordings).

119. 17 U.S.C. §§ 1001-10 (2005) (providing text of Audio Home Recording Act).

120. *See* 17 U.S.C. § 1001(3) (1992). Under the Audio Home Recording Act of 1992, a "digital audio recording device" is currently defined as:

> [A]ny machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for –
>
> (A) professional model products, and
>
> (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the crea-

revise Section 107, the "Fair Use Doctrine,"[121] to impose a "fair use" royalty on "fair user" entities or persons. Fourth, revise the Digital Millennium Copyright Act of 1998 ("DMCA"),[122] to comport with the United States Constitution. The DMCA must also be revised with respect to the "sound recording complement."[123] Finally, create and implement a surcharge on Internet Service Providers ("ISPs").

VI. EXPLANATIONS OF PROPOSED REVISIONS

A. Eliminating the need for, or revising The Copyright Act's Sections 108 Through 122 Except Section 109

The Act must eliminate the need for, or revise the extensive exceptions and limitations to the copyright owners' exclusive rights as set forth in Section 106 of the Act and replace Sections 108-22 with a nine-month "Author's Reserved Rights Complement" ("ARRC").[124] The ARRC would be a monopoly with no exceptions or limitations, commencing on the date of first publication as set forth in the copyright owner's registration application. This nine-month ARRC would allow and encourage the copyright owner to maximize her market for her copyrighted work, without any additional administrative or legislative burdens, limitations, or exceptions.[125] Furthermore, and in furtherance of the public welfare, this provision encourages creators, authors, and originators to pub-

tion of sound recordings resulting from the fixation of nonmusical sounds.

Id.

121. 17 U.S.C. § 107 (1992) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)) (describing subject matter and scope of fair use).

122. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (legislating Congressional response to advent of internet enabling individuals to easily download movies, music, and software for free, while companies spent money to develop antipiracy technologies); *see also* Brandon K. Lemley, *Fighting Piracy in the Digital Age: The Digital Millennium Copyright Act,* 10 THE YOUNG LAW. 1 (Nov. 2005) (describing DMCA which "makes it unlawful [for end-users (i.e. everyday consumers)] to circumvent antipiracy technologies" at risk of being subjected to lawsuit).

123. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2891 (1998) (codified as amended in 17 U.S.C. § 114 (2005)) (describing Congressional response to digital downloading and copyright piracy on internet).

124. The nine-month length of the ARRC was set in order to coincide with the average radio service and marketing life for three singles (songs). Generally, a record is shipped to radio programmers one month prior to its street-date (the date of release to consumers through retail). Subsequently, independent promoters and the artist's record label continue to solicit airtime from radio stations for approximately eight weeks. A successful single at pop radio could maintain a twelve-month shelf-life.

125. This proposal's authors remain amenable to a proposed lesser time period for the ARRC, but insist that this complement is nonetheless integral in the

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lish their creative works and disseminate them to a wider population.[126]

After the ARRC time period, the copyrighted work automatically becomes subject to a compulsory statutory "music rights license" ("MRL"), encompassing the bundle of exclusive rights. Nevertheless, the rights-holder continues to own the right of public performance.[127] This would be accompanied by a fixed schedule of fees. The amount of such fees depends on certain factors, including: (1) the rights of third parties using the copyrighted work; (2) the capacity of use; and (3) the period of time they desire its use.

The post-nine-month period MRL encompasses the rights of reproduction, distribution, and derivative work for the composition, and the rights of reproduction, distribution, and derivative work for the sound recording. The one exception to this scheme resides in the right of public performance. All works are immediately subject to a compulsory MRL, commencing on the date of the composition's and sound recording's first public performance.[128]

The Act shall establish a single organization, referred to as a Music Rights Organization ("MRO"). The MRO should administer all royalty payments from all sources to the copyright owners of musical works. The MRO will be an independent, non-profit organiza-

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balance of copyright protection afforded in today's technologically advanced world.

126. One may argue that consumers will simply wait until the work is offered for free, or at a lesser price to obtain it. That may be so, but it is consistently shown that consumers have a desire to be "the first on their block" to acquire (or hear or see) a new work as soon as or before, it hits the market. This is evidenced time and time again, when people line up in the early morning hours to see the new "Star Wars" movie. People also eagerly go to the record stores on the release date to purchase, for example, the new Kelly Clarkson CD at its top-line price. The top-line price is the price at which major retailers, such as Sam Goody, Coconuts, or Tower sell the record. Moreover, there is at least informal and anecdotal evidence that it is considered "cool" to be the discoverer of a new, underground, and independent recording artist. Bloggers, podcasters, and the general population thrive on the excitement of telling their compatriots, readers, and listeners about new music and recording artists. One may somewhat analogize the model to the film industry, as films are shown exclusively in theaters for a fixed period of time before they are available on a DVD for rental.

127. *See* 17 U.S.C. §§ 106, 106A (2006) (delineating exclusive rights of creator/author).

128. This allows the Music Rights Organization ("MRO") to begin tracking airplay and other types of public performance as soon as the work is being publicly performed. Currently, it is not administratively feasible for the work's owner, during the market-maximizing nine-month ARRC time period, to track airplay on the thousands of terrestrial, satellite, and Internet and HD (i.e., high definition digital band) radio stations. Therefore, the format for collecting royalties for public performances would essentially remain intact, but under one umbrella organization: the MRO.

tion. Logistically, the Copyright Office and the MRO must remain in constant digital communication. To illustrate, the Copyright Office instantly sends all registration data on each application it receives directly into the MRO's database. Such registration data includes new registration applications, as well as all received transfers, assigns, addenda, revisions, and any other documents that will affect the copyright owners' and music users' payments. The MRO maintains this database with daily updates available to music users by sustaining a 24-hour turnaround on copyright information. The revised statute shall provide that all MRO databases are copied and maintained in the Copyright Office's servers for cross-referencing and archiving purposes.

The MRO would issue either "blanket" licenses[129] or "per work" licenses.[130] This new scheme amends Section 106[131] and the Digital Performance Right in Sound Recordings Act of 1995.[132] It does so by extending the public performance right, both digital and analog,[133] currently enjoyed by copyright owners of compositions to the copyright owners of sound recordings.

Sound recording copyright owners would then receive public performance royalties for terrestrial, live venue, or analog broadcast public performances, as well as digital public performances. Record labels and recording artists are the benefactors of the additional royalty payments, in accordance with the current royalty pay-

129. A blanket license encompasses the entire catalogue registered with the MRO and commands a higher monthly fee.

130. A per work license is for those entities for whom reproducing, distributing, publicly performing, and/or creating derivative works are incidental.

131. *See* 17 U.S.C. § 106 (2006) (setting forth exclusive rights granted to authors in original works of authorship under Copyright Act of 1976 as amended).

132. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) ("DPRA") (amending 17 U.S.C. § 106 to include right of digital public performance to copyright owners of sound recordings); *see also* RIAA, Glossary of Terms, http://www.riaa.com/issues/glossary/default.asp (follow "D-F" hyperlink) (last visited Mar. 2, 2006) (noting that prior to DRPA, sound recordings were "only U.S. copyrighted work denied the right of public performance"). The DPRA, however, placed a limit on this performance right by creating a new statutory license that allows nonexempt, non-interactive subscription digital audio transmission services to publicly perform those recordings through digital audio transmission. *See* 17 U.S.C. § 114(d)(2) (2006). In order to operate under the license, however, eligible digital audio services must comply with certain conditions such as providing payment for the use of the license and adherence to notice and record keeping requirements. *See* 17 U.S.C. § 114 (f)(4)(1)(A)-(C) (2006) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005).

133. *See* 17 U.S.C. § 106 (6) (2006) (providing for right to perform sound recordings publicly by digital audio transmission).

ment allocations as set forth in the SoundExchange[134] format. This scheme also envisions the inclusion of all synchronization rights.[135]

Finally, failure to register one's copyrighted work results in automatic waiver of the nine-month ARRC period. On the date of its first publication, an unregistered work shall automatically fall under the MRO licensing rules. If the copyright of a published work is infringed upon, and such work is unregistered on the date of infringement, the copyright owner shall lose the right to sue for such infringement under the Act. The right to sue for copyright infringement shall remain intact for all unpublished, registered works.[136] Importantly, this provision further encourages copyright owners to exercise their rights granted under the Act.

B. Revising the Audio Home Recording Act of 1992 ("AHRA")[137]

Currently, under the AHRA, all those who import and distribute or manufacture and distribute digital audio recording devices or digital audio recording media,[138] must pay a royalty. The royalty is a surcharge of two percent (2%) of the transfer price of such devices or media.[139] The AHRA outlines a variety of configurations or types of digital audio recording devices. It distinguishes between digital audio recording devices that are self-contained and

134. *See* SoundExchange Background, 2003, http://www.soundexchange.com/about/about.html (last visited Mar. 2, 2006) (discussing SoundExchange's collection of digital public performance royalties for sound recordings and its distribution of such royalties to record labels, recording artists, background musicians, and vocalists).

135. *See* 17 U.S.C. § 115 (2006) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005)) (failing to subject synchronization rights for compositions to third parties by copyright owners of compositions to current compulsory mechanical license). Synchronization rights entail copyright owners of both or either songs and/or sound recordings granting a synchronization license to filmmakers to use their copyrighted works in timed-relation with the subject audiovisual, i.e., the film or the TV show. "Synch licenses," as they are called, must be individually negotiated. The PROs collect revenue from television public performances of compositions synchronized with TV shows on major networks (ABC, CBS, NBC, and FOX) and cable television networks. Currently, synchronization licensing fees and other fees for sound recordings must be individually negotiated between the film producers and the sound recording owners, as well.

136. *See* 17 U.S.C. §§ 501-13 (2006) (providing law governing copyright infringement).

137. *See id.* §§ 1001-10 (outlining provisions of Audio Home Recording Act of 1992).

138. *See id.* § 1001(3) - (4)(A) (defining terms "digital audio recording device" and "digital audio recording medium").

139. *See id.* § 1004 (a)(1) (requiring only "first person to manufacture and distribute, or import and distribute" device to pay royalties for it).

those that are merely parts of a larger or different device, thus prorating the royalty surcharge accordingly.[140]

In 1999, the decision in *Recording Industry Association of America v. Diamond Multimedia System*[141] stated that "to be a digital audio recording device, [the item] must be able to reproduce, either 'directly' or 'from a transmission,' a 'digital music recording.'"[142] The case proclaimed that "computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings."[143] Also, in the same case, it was stated, "a [computer] hard drive is a material object in which one or more programs are fixed; thus, a hard drive is excluded from the definition of digital music recordings."[144]

It is an insurmountable challenge in today's digital world to adequately discern what is or is not a computer. Certainly, a judge would be hard-pressed to do so. One could ask, is an iPod® a computer? iPods transfer information as well as contain games, contact lists, and a calendar. iPods are also capable of receiving digital audio copied recordings. Is it a "hand-held" or "pocket" PC, like HP IPAQ®[145] or a Trēo®,[146] a digital audio interface device,[147] a digi-

140. *See id.* § 1004(2) (establishing calculations for devices which are part of physically integrated units or devices distributed in combination with other devices as separate components).

141. 180 F.3d 1072 (9th Cir. 1999) (answering whether hand-held device capable of receiving, storing, and re-playing digital audio file stored on hard drive of computer violated AHRA).

142. *Id.* at 1076.

143. *Id.* at 1078 (citation omitted). In fact, the Court noted, "the exclusion of computers from the Act's scope was part of a carefully negotiated compromise between the various industries with interests at stake, and without which, the computer industry would have vigorously opposed passage of the Act." *Id.* at n.6. Furthermore, computers are designed to be exempt from certain requirements under the Act. *See id.* at 1078-79 ("because computers are not digital audio recording devices, they are not required to comply with the SCMS requirement and thus need not send, receive, or act upon information regarding copyright and generation status").

144. *Id.* at 1076 (confirming status of hard drive under AHRA).

145. *See* HP Handheld Devices – IPAQ & Calculators, http://welcome.hp.com/country/us/en/prodserv/handheld.html (last visited Mar. 2, 2006) (providing brief description of IPAQ pocket PC).

146. *See* palmOne – Products - Trēo600 Smartphone, http://www.palm.com/us/products/smartphones/treo600/?source1=thetreostore&KWOPT-no_popup-PALMONE.1.1000.client=true (last visited Mar. 2, 2006) (giving description of Trēo "smartphone").

147. *See* 17 U.S.C. § 1001(2) (2006) (defining digital audio interface device as "any machine or device that is designed specifically to communicate digital audio information and related interface data to a digital audio recording device through a nonprofessional interface").

tal audio recording device,[148] and/or a computer? Each of these contains a hard drive.

Therefore, the question is, should these devices remain exempt from the royalty surcharge imposed on "digital audio recording devices" under the AHRA? One must take into account the fact that websites and device owners share music and video content. One must also acknowledge that people commonly do and are expected to download music and video onto these devices. Furthermore, it must be noted that people purchase these devices because the hard drive allows them to receive and store digital audio recordings. In light of all these considerations, the answer must be "No."

In 2004, Congress passed the Copyright Royalty and Distribution Reform Act,[149] which established Copyright Royalty Judges. These judges oversee royalty payments and disputes.[150] However, language that addresses broadening the definition of "digital audio recording devices" to include new technologies is notably absent.

Therefore, three major remedies to this issue are proposed:

> (i) Broadening the definition of "digital audio recording devices" to include all computer and computer-like devices, including any devices which are able to receive or record audio and devices possessing a hard drive;
>
> (ii) Increasing the royalty payment imposed on the importation, manufacture and distribution of such devices to two-and-one-half percent (2.5%); and
>
> (iii) Eliminating the distinctions between devices that are only partly digital audio recording devices and those which are only digital audio recording devices. (The lines between the technological devices can no longer be meaningfully articulated.)

The proposed royalty increase emanates from the reality that an entire generation has grown up with the idea that music is, if not free, then very inexpensive. This proposal's thrust is to impose charges on those who directly financially benefit from receiving and sharing digital music files. It cannot be disputed that computer

148. *See id.* § 1001(3) (defining digital audio recording device as "any machine or device of a type commonly distributed to individuals . . . the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use" (exceptions omitted)).

149. *See* Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004) (codified as amended in 17 U.S.C. § 803).

150. *See id.* at 2341-45 (detailing functions of Copyright Royalty Judges).

manufacturers and importers benefit greatly from the ability of these devices to record, transmit, and receive digital music files.

C. Revise the "Fair Use Doctrine"

The Fair Use Doctrine is looked upon as the Copyright Act's proverbial "third rail." The existence of new technologies, such as the iPod®, has called into question the scope of both the Fair Use Doctrine and the First Sale Doctrine, which operate concomitantly.[151] The proposed revision retains, intact, the four factors of "fair use."[152] Fair use is the only exception to the nine-month ARRC, which allows copyright owners to exclusively and freely exercise their rights to their works under the Act. The scheme envisions this exception to entail a Compulsory Fair Use License ("CFUL"),

151. *See* Susan Butler, *iPods Loaded with Issues*, BILLBOARD, Nov. 12, 2005, at 12 (discussing scope of Fair Use and First Sale Doctrines as they relate to resale of iPods and CD collections). The scope of the Fair Use Doctrine has most recently come into question, for example, as consumers are using eBay to auction off iPods and CD collections, after first copying the music into their iTunes. *See id.* Currently, the Fair Use Doctrine permits the copying of "music for personal (noncommercial) use [to] share . . . with a select group of others." *Id.* According to Bill Patry, a partner with Thelen Reid & Priest, once a CD is sold, the consumer may still maintain a digital copy on iTunes® and on an iPod. *See id.* Similarly, the First Sale Doctrine permits a consumer to purchase a digital copy from iTunes and store it in their iTunes library. *See id.* However, it is much less clear, and highly improbable, that the Doctrine would permit a consumer to "maintain an iTunes library on their computer, copy it over to an iPod, sell the iPod and then keep filling and selling iPods with that computer-based song library." *Id.* The Fair Use and First Sale Doctrines likely did not even envision this type of behavior that can be frequently accomplished with modern technology. *See id.* For a further discussion of the Fair Use Doctrine, see *supra* notes 97-98.

152. *See* 17 U.S.C. § 107(1)-(4)(2006) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)). The statute reads:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

which gives a "fair user" the right to exercise any or all of a copyright owner's enumerated exclusive rights, in and to a copyrighted work. Without the copyright owner's permission, the "fair user" would pay a reduced royalty rate during the copyright-holder's nine-month ARRC period. After the ARRC period has terminated, the "fair user" may then continue to use the work without payment to the copyright owner. It is arguable that the payment of such a "fair user" royalty has a chilling effect on the purpose of the Fair Use Doctrine, i.e., freedom of speech. Nevertheless, this greatly reduced royalty payment is implemented to avoid uncertainty about whether or not one is a "fair user" or a use is "fair." It will also eliminate resultant costly litigation that ensues when an entity or person claims that they are engaging in "fair use" by using a copyrighted work over the copyright holder's objections. The process outlined below would eliminate such uncertainties as to the identity of a "fair user."

In this scenario, the four factors of "fair use" are invoked to assess if an entity or a person is eligible for such a reduced "fair use" royalty payment to copyright owners for the use of their works during the nine-month ARRC period. These factors are also examined to assess the amount of the "fair use" royalty charged to "fair users." The MRO additionally follows case law in making its decisions regarding a potential "fair user's" eligibility. News organizations, educational institutions, certain authors, researchers, public noncommercial broadcasters, and other traditional, and non-traditional "fair users" must register with and concurrently apply to the MRO as a "fair user" of copyrighted works.

If one is deemed to be a "fair user" by the MRO, one receives a certificate of registration which is recorded in the MRO's database. The entity then pays an assessed "fair use" royalty surcharge, which the MRO shall accordingly distribute to the relevant copyright owners. Moreover, this certificate of registration serves as *prima facie* evidence, and both actual and constructive notice to the world, that they are "fair users" of the copyrighted material. There will be an appeals process through the MRO and the Copyright Office if an applicant is initially denied "fair use" status.

D. Revise the Digital Millennium Copyright Act of 1998 ("DMCA")[153]

There are several ways in which it is proposed that the DMCA should be revised:

(i) *Anti-Circumvention*

The DMCA sets forth provisions creating both civil and criminal legal sanctions for circumventions of protective technological measures employed by copyright owners to control access to their works.[154] These overly-broad provisions disregard the rationale behind such circumvention. In only a few narrowly-drawn and specifically prescribed circumstances would circumvention avoid violating federal law.[155] These anti-circumvention provisions interfere with the public's access to copyrighted works, as well as access to other possible public domain elements of certain works.

This proposal suggests that Congress narrow the anti-circumvention provisions of the DMCA because these provisions are overly-broad, and they also unduly chill free speech.[156] These provisions also violate the intent of Article I, Section 8, Clause 8 of the U.S. Constitution and the Fair Use Doctrine.[157] Finally, they interfere with the public's right to access the public domain.[158]

Under the proposed revisions, anti-circumvention technological measures will be mandatory for all copyrighted works within a short period of time after their first publication. Each work will fall into a compulsory music rights licensing scheme as outlined above

153. *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in 17 U.S.C § 1201 (2006)).

154. *See* 17 U.S.C. § 1201 (2006) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

155. *See id.* (providing narrow exceptions to application).

156. *See* U.S. CONST. amend. I (providing "Congress shall make no law . . . abridging the freedom of speech . . .").

157. *See* 17 U.S.C. § 107 (2006) (pending legislation H.R. 4536, 109th Cong. (1st Sess. 2005)) (inferring assertion from statute's fair use limitations to exclusive rights).

158. *See* Wikipedia: Public Domain, ¶ 1, http://en.wikipedia.org/wiki/Public_domain (last visited Mar. 2, 2006) (describing public domain and inferring limits on it created by copyright and patent law).

> The **public domain** comprises the body of knowledge and innovation (especially creative works such as writing, art, music, and inventions) in relation to which no person or other legal entity can establish or maintain proprietary interests. This body of information and creativity is considered to be part of the common cultural and intellectual heritage of humanity, which in general anyone may use or exploit.

Id.

after the initial nine-month ARRC period expires. The MRO will be liable for imprinting each song with a "tracking" mechanism, which will notify the MRO of infringement. No mechanism is fool-proof, and there are those who will strive to circumvent such technological protective mechanisms for illegal means. The DMCA's overreaching, however, is not the answer as it interferes with the core principles of the Act as stated herein. Therefore, Congress must realize the constraints consumers endure under the DMCA's anti-circumvention provisions as unconstitutional, illegal, and only marginally effective.

(ii) *The Sound Recording Performance Complement ("SRPC")*[159]

The "sound recording performance complement" (the "SRPC") is one of the DMCA's most cumbersome provisions, entailing an inordinate compliance burden for webcasters, small and large alike.[160] In order to be considered for the compulsory statutory license available to eligible non-interactive DCDSs,[161] a webcaster must comply with the SRPC on an ongoing basis, or lose its

159. *See* 17 U.S.C. § 114 (2006) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005)) (providing scope of exclusive rights in sound recordings).

160. *See id.* (giving guidelines for licensing of sound recordings). For additional discussion of the "sound recording performance complement," see *supra* notes 70-71 and accompanying text.

161. *See* 17 U.S.C. § 114(d)(2) (2006) (pending legislation H.R. 1036, 109th Cong. (1st Sess. 2005)) (discussing statutory licensing). The Digital Millennium Copyright Act of 1998 amended 17 U.S.C. § 114 by inserting the term "preexisting subscription services." *See* Pub. L. No. 105-304, 112 Stat. 2860, 2890-91 (1998). The DMCA also expanded the statutory license in Section 114 to include new categories of digital audio services that may operate under the license. The three categories created by the DMCA are: (1) preexisting satellite digital audio radio services, (2) new subscription services, and (3) eligible non-subscription transmission services. *See id.* The DMCA also amended 17 U.S.C. § 112 by adding a new license that permits digital audio services to make ephemeral recordings of a sound recording to facilitate the transmission permitted under Section 114. *See id.* at 2899-902.

In order to qualify for the compulsory license, an Internet transmission must fit into five criteria. *See* Marie D'Amico, *Playing Music on the Net*, NETGUIDE MAG., Mar. 1997, http://lawcrawler.findlaw.com/MAD/playing.htm (providing five criteria for Internet transmission to qualify for compulsory license). The five criteria are as follows:

- it is non-interactive
- it does [not] exceed the sound recording performance complement
- it does [not] publish a program schedule or specify the songs to be transmitted
- it does [not] automatically switch from one program channel to another, and
- it is accompanied by certain information, such as song title and recording artist.

Id.

right to the statutory license.[162] If a webcaster is deemed ineligible, or at any time, fails to comply with the elaborate set of rules and loses the right to obtain the compulsory statutory license, each sound recording performance license must be negotiated with each sound recording copyright owner in order for the digital broadcast to occur. More likely than not, this would result in an administrative nightmare for the webcaster. The SRPC impedes small webcasters from legally entering the marketplace, and as a result, prevents new works from reaching the public. The fact that anyone can download, share, or download and share digital music files from nearly all digital locations without any significant generational loss, renders this provision utterly archaic and moot. It must be repealed so the webcasting marketplace can unreservedly broadcast new, exciting, and cutting edge music without fear of recrimination for failure to follow the current arbitrary and capricious rules.

(iii) *Revising the DMCA's Internet Service Providers ("ISPs") Provisions*[163]

Over the last few years, a variety of interested parties have forwarded a proposition to add a Congress-mandated surcharge on Internet Service Providers ("ISPs").[164] Consumers may not notice a

162. *See* 17 U.S.C. § 114(f)(4)(A) (2006) (requiring compliance with notice requirements prescribed by Copyright Royalty Judges for certain nonexempt transmissions).

163. *See* 17 U.S.C. § 512 (2006) (codified as amended by Pub. L. No. 105-304, 112 Stat. 2860 (1998)) (providing limits to liability for on-line materials).

164. *See* John Borland, *Should ISP Providers Pay for P2P?*, CNET NEWS.COM, Dec. 4, 2003, http://news.com.com/Should+ISP+subscribers+pay+for+P2P/2100-1027_3-5113638.html (discussing proposals aimed at collecting money from ISPs). The first proposal, supported by the Canadian Society of Composers, Authors, and Music Publishers, suggested that "ISPs should pay into a nationwide pool — similar to a tax now imposed on blank tapes and CDs — to compensate copyright holders for widespread music downloading." *Id.* ¶ 2. The proposal would impose a fee on ISPs to provide songwriters with "ISP-collected royalties as a way to ameliorate potential losses from piracy." *Id.* ¶ 8. The idea of an ISP surcharge "has already been partially approved by a lower Canadian court, but only for those cases in which ISPs make temporary local copies or 'caches' of content to speed downloads." *Id.* As one can imagine, telecommunications companies and ISPs strongly oppose this type of proposal, claiming they are "conduits of information, not distributors, and so should play no role in collecting royalties." *Id.* ¶ 9. They also claim "the fee would increase Internet costs across the country." *Id.*

A second proposal, advanced by the Distributed Computing Industry Association ("DCIA"), "a peer-to-peer industry trade group," would allow file-sharing networks to operate under a model "similar to cable television." *Id.* ¶ 3. This proposal would require ISPs to "collect a fee from anybody using file-trading software and distribute that pool of money to record labels, artists and music publishers." *Id.* The goal behind DCIA's proposal, according to Marty Lafferty, executive director of the DCIA, is to "get three strong proposals together and start wrestling with them by January [2004]. We want to get a critical mass of ISPs,

moderate surcharge. In exchange for this small payment embedded in the ISP fee, consumers could legally and inexpensively partake of any and all copyrighted materials offered on the Internet. These fees would then be distributed according to the frequency of use of the copyrighted material. Of course, this requires extensive and costly administration. Organizations like ASCAP, BMI, SESAC, and HFA, however, have been employing successful methods of such data collection for a number of years. Indeed, dramatic improvements in new technologies have facilitated contemporaneous improvements in data collection and royalty payments.

This surcharge would serve to supplement the revenue for songwriters, recording artists, record labels, and publishers. This may compensate for the potential reduction caused by this proposal's "all rights included" MRO licensing scheme. Moreover, imposing such a surcharge on large and financially healthy ISPs fits the three-pronged core mission of this proposal: (1) to charge those who directly benefit financially from copyrighted works for the right to use such works; (2) reward the authors of those works; and (3) allow the public to enjoy those works, unfettered, without threat of copyright infringement litigation.

VII. BENEFICIARIES OF THE NEW COPYRIGHT REGIME

Recording label owners and executives will benefit from the new regime because they are granted a new statutory right under this proposal – the right of public performance for the analog or terrestrial performances of the sound recordings they own or will acquire. Granting this new right will augment the possible, not probable, loss of revenue under the MRO "all rights included," paradigm. Recording artists will gain by being rewarded for their contribution to the sound recording under this new statutory grant of right.

Moreover, record labels' sound recordings will gain more exposure. People can enjoy freer, more liberal uses of the record la-

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music companies and software companies who can say, 'Yes, let's move ahead with one of these.'" *Id.* ¶ 5. The DCIA proposal would assess a $5 surcharge on file swappers' monthly ISP bills to be ultimately distributed from a pool to copyright holders. *Id.* ¶ 11. According to Lafferty, "[e]ven if some peer-to-peer users decided to stop using the software, the plan could raise nearly $2.5 billion a year." *Id.* "Under the plan, ISPs would have to install software such as that from Packeteer or other network-management companies that can identify which applications subscribers are using. Some portion of the fee would go to fund those activities." *Id.* ¶ 12. DCIA's proposal has been opposed by P2P United, another "file-swapping trade association, . . . which represents companies including Lime Wire, Streamcast Networks, Grokster and Blubster." *Id.* ¶ 17.

bel's owned works. This would increase not only the record label's revenue, but would also create intangible benefits, such as good will.

The Act would reduce uncertainty regarding loss of revenue due to rampant infringement of works owned by record labels. The ARRC period afforded to record labels under the new Act would also make them less reluctant to sign new and unproven artists to their labels. This is because labels would be assured more commercial outlets for such artists, at a lower administrative cost. These factors serve to fulfill the constitutionally-mandated purpose of the Act.

Other beneficiaries include songwriters, publishers, independent and studio filmmakers, and creators of digital media, such as digital video games. The proposed suggestions will create an environment in which beneficiaries will be able to use creative musical works to their advantage, and for the public's benefit. The aggregate effect of the proposed changes would make the system easier to navigate and reduce litigation. Publishers and record labels are no longer combatants under this new regime. Instead, they become partners in developing and exploring new ways and outlets to offer musical works to the general population.

Consumers would also benefit by seeing reduced prices. Additionally, consumers will be less afraid of litigation. Finally, the public will have more access to a greater array of creative works.

VIII. Conclusion: The Story of Peggy the Podcaster (Revisited)

It is the dawn of the Digital Rights Revolution. Congress passed this proposal's revisions. The new MRO is in place, and its website is online. Peggy hears about the new rules and decides to "test drive" the new regulations to see if it would be feasible for her to resume her podcast.

While programming the podcast's format, Peggy creates a list of the recorded songs she would like to use on her first monthly podcast. She visits the newly-constructed MRO website and types in the song titles in the appropriate webpage to search for the songs' availability. Peggy immediately discovers through the MRL's current comprehensive database that most of the songs and sound recordings she wishes to use are subject to the compulsory MRL.

Because she has typed in numerous song titles that are subject to the MRL, the MRO webpage informs her she is entitled to elect

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to pay a "blanket" monthly license fee, instead of a "per song" license fee. Peggy fills out the online application for a "blanket" MRL monthly license which provides for a monthly payment for the rights of reproduction, distribution, public performance, and creation of derivative works (her son is still an avid "mashup" artist) for all the songs and sound recordings that are now subject to the MRL.

However, Peggy realizes that some of the recorded songs she would like to use still fall under the ARRC provision. For her to use those particular works, she must wait until the nine-month period expires or contact the publishers to negotiate a fee for their immediate use. She contacts her attorney, who successfully negotiates digital rights podcast licenses with the songs' publishers for the ARRC period, or some portion thereof. The attorney also obtains negotiated digital rights podcast licenses from the sound recording copyright owners for the same periods of time. Peggy is happy to pay the royalties; she knows that if she wishes to continue to use these recordings after the expiration of the ARRC period, she may do so under her "blanket" MRL. Also, she can feel secure in the knowledge that her podcast will not infringe on anyone's rights. The MRO, which has an Internet Tracking Division ("ITD"), shall track Peggy's podcasts, review them for infringement, and find that she is in compliance with the new regulations. Peggy receives confirmation emails to reflect her compliance. If the MRO's ITD had a question regarding Peggy's compliance, she would immediately receive an email informing her of the infraction, and offer her either the chance to comply within a reasonable period of time or to take advantage of the delineated MRO appeal procedures.

Each month, in accordance with the Copyright Act's new, simplified procedures, Peggy's assistant, Ryan, enters the names of all the songs Peggy wishes to include in her podcast into the MRO website. The website informs Ryan which songs are, or currently, are not, subject to the MRL. The site also tells Ryan the date the songs that are not currently subject to the MRL shall become subject to it. Every month, at their podcast staff meeting, Ryan and Peggy decide whether they would like to use those songs, or wait until the ARRC period is over. When the ARRC period is over, those songs will fall under Peggy's "blanket" MRL monthly license. Peggy's podcast is a rousing success . . . and the public is richer for it.