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# Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption

Steven M. Marks

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## I. INTRODUCTION

Since its inception, the Internet has proven fertile ground for entrepreneurs to create new businesses in a broad range of industries. The recording industry is no exception. A proliferation of online music sites offering unique services has developed in the past several years,[1] spurred by the fact that music is particularly well-suited for performance[2] on the Internet, compared to other creative works.

When the Digital Performance Right in Sound Recordings Act of 1995[3] ("DPRSRA") was passed, neither Congress nor any of the parties involved appreciated that the Internet would be the testing ground for many of the DPRSRA's provisions. In fact, the legislative history barely mentions the Internet.[4] Yet it was the introduction and rapid growth of

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1. As described *infra* note 20, the primary mechanism for performing sound recordings and other media in real time on the Internet is generally known as "streaming." Due to the limited bandwidth available to most Internet users today, many creative works such as movies or books are too cumbersome to perform on the Internet. Sound recordings, on the other hand, can be encoded in relatively small files so listening to music over the Internet is practical for most users, even at slower connection speeds.

2. This Article is limited to a discussion of the performance of sound recordings. The laws governing, and means of, reproducing and distributing recordings are not addressed.

3. Pub. L. No. 104-39, 109 Stat. 336 (1995).

4. *See* S. REP. NO. 104-128, at 22, 36 (1995); *see also* Reply Comments of Mark Cuban at 5 n.1, *In re* Revisions of the Cable and Satellite Carrier Compulsory Licenses, Copyright Office Docket No. RM 97-1, Comment Letter No. 30 (June 20, 1997) ("Services like [Broadcast.com] were not known to exist at the time of the [DPRSRA], and the impact of such services and their

music services on the Internet that prompted Congress to amend the DPRSRA through the Digital Millennium Copyright Act[5] ("DMCA") in 1998.[6]

This Article discusses two brewing controversies regarding the scope of sound recording performance rights. The first issue is how to apply the revised definition of "interactive service" to personalized music services. The second issue is whether an exemption granted for certain Federal Communications Commission ("FCC")-licensed broadcasts applies to the Internet and beyond. Although both issues have arisen due to the use of recordings on the Internet, resolving these issues will undoubtedly have effects on the performance rights for recordings in other digital media.[7]

## II. AN OVERVIEW OF THE SOUND RECORDING PERFORMANCE RIGHT

Before the DPRSRA took effect in 1996,[8] a sound recording[9] was the only copyrighted work not accorded a federal right of public performance.[10] In other words, a composer had rights when the song was publicly performed, such as on broadcast radio, but the artist performing the song did not enjoy similar rights.[11] Additionally, while copyright

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benefits to the public could not have been considered by Congress when enacting section 114.") (on file with the *Loyola of Los Angeles Entertainment Law Review*).

5. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

6. *Id.*

7. Neither the terms of the DPRSRA nor the amendments in the DMCA are limited to any particular digital medium in which sound recordings might be performed. Rather, the sound recording performance right applies to all performances by means of digital transmission, whether via the Internet, cable, satellite or other digital technology. *See* 17 U.S.C. §114(j)(3) (Supp. IV 1998); *see also* H.R. REP. NO. 104-274, at 25 (1995).

8. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 6, 109 Stat. 336, 349 (1995).

9. Two copyrighted works are embodied in a recording of music. The first is the underlying musical composition, comprised of composed music and written lyrics. Copyright law refers to this as a "musical work." 17 U.S.C. § 102(a)(2) (1994). The second copyrighted work is the sound recording—the fixation of sounds, including the recording artist's interpretation of the musical composition. *See* 17 U.S.C. § 101 (1994). A sound recording is fixed if it can be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

10. *See* 17 U.S.C. § 106(4) (1994) (granting exclusive right of public performance for literary, musical, dramatic, choreographic and audiovisual works and pantomimes). In fact, it was not until 1972 that federal copyright law even protected sound recordings from unauthorized reproduction and distribution. *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (commonly referred to as the "Sound Recording Act").

11. The disparate treatment of sound recordings can be explained largely as a historical anomaly. At the time of the Copyright Act of 1909, sound recordings were still at the stage of the wax cylinder and were not granted copyright protection. Until 1940, this was of little economic import because recording artists' livelihood was derived from live performances. Eventually, live

owners of sound recordings enjoyed a right of public performance in other countries, performances in the United States remained uncompensated.[12]

Before the DPRSRA was enacted, copyright owners of sound recordings repeatedly attempted to remedy this inequity. In 1978, the Copyright Office issued a report endorsing the creation of a performance right in sound recordings.[13] However, strong opposition from broadcasters repeatedly thwarted the enactment of such a performance right.[14]

Support for sound recording performance rights grew with the advent of digital transmission technology. In 1991, the Copyright Office reiterated its previous endorsement,[15] but also concluded "the introduction of digital audio transmission services will increase the potential for economic harm to copyright owners of recorded works."[16] Eventually, broadcaster opposition succumbed to political compromise in the form of the DPRSRA.[17] The DPRSRA granted an exclusive right to perform sound recordings, but limited the right to digital transmissions.[18] The legislation was further limited by a number of exemptions and a statutory license for certain subscription, non-interactive services.[19]

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performances gave way to radio play and the growing commercial popularity of recordings and home players. These two events combined to deprive artists of performance income. *See, e.g., Performance Royalty: Hearing on S. 1111 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm.*, 94th Cong. 11 (1975) (statement of Barbara Ringer, Register of Copyrights that "performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience").

12. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21[D], at 8-292 to 8-293 (1999). "[A]s a general matter most important territories afford [sound recording performance rights protection] under the Rome Convention." *Id.* at § 8.21[D], at 8-292 (citations omitted); *see also* REGISTER OF COPYRIGHTS, COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES 156 (1991) [hereinafter "COPYRIGHT IMPLICATIONS"]. This lack of performance right is a huge loss to American sound recording copyright owners. In 1990, United Kingdom sound recording performance royalties collected actually exceeded £130 million. *See id.* at 19–20.

13. *See* STAFF OF SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMIN. OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS (Comm. Print 1978).

14. *See* COPYRIGHT IMPLICATIONS , *supra* note 12, at 145; *see also* Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3, 4 (1995).

15. COPYRIGHT IMPLICATIONS, *supra* note 13, at xii. "The omission of the performance right in sound recordings is an anomaly in the copyright laws without substantial justification." *Id.*

16. *Id.*

17. *See* H.R. REP. NO. 104-274, at 12 (1995) (noting a digital performance right for sound recordings, as opposed to a comprehensive performance right, addressed the concerns of the recording industry without "upsetting the longstanding business and contractual relationships" with broadcasters).

18. *See* 17 U.S.C. § 106(6) (Supp. IV 1998). "[T]o perform the copyrighted work publicly

Shortly after the DPRSRA took effect on February 1, 1996, the landscape for digitally transmitted sound recordings began to change radically. Most significantly, technology became available to "stream" music in real time on the Internet from websites through a process commonly referred to as webcasting.[20] This technology enabled anyone with Internet access to perform sound recordings worldwide merely by setting up a personal computer. The result was the ability to bypass the significant infrastructure necessary for traditional over-the-air broadcasting or cable or satellite transmission.

Problems began to arise because most, if not all, of the new Internet music services were offered on a nonsubscription basis, creating confusion about how DPRSRA provisions applied.[21] The statutory license created by the DPRSRA was limited to subscription services, thereby leaving nonsubscription services to the exclusive rights of copyright owners absent eligibility for an enumerated exception.[22] For example, webcasters argued that nonsubscription webcasts fell within the exemption for "a nonsubscription transmission other than a retransmission."[23] Copyright owners disagreed, and further relied upon the fact that reproductions of sound recordings made in a webcaster's computer server in order to stream music required licenses because they did not qualify for the Copyright Act's ephemeral recording exemption.[24] Whatever the answers to these legal questions might have been, it was clear that without a quick resolution the webcasting business would be fraught with uncertainty.

The pending DMCA[25] provided a vehicle to remedy this uncertainty. According to Congress, a primary goal of the DMCA amendments to the

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by means of a digital audio transmission." *Id.*

19. *See generally id.*; 17 U.S.C. § 114(d) (Supp. III 1997) (amended 1998). The exemptions and statutory license produced a framework described, rightly so, as virtually "incomprehensible" and more complex than the Internal Revenue Code. *See* Sobel, *supra* note 14, at 3. Exemptions range from several for certain FCC-licensed broadcast transmissions and retransmissions to transmissions within or to a business establishment. *See infra* Part IV.

20. Streaming technology enables sound recordings to be transmitted (as opposed to downloaded for permanent retention) to a personal computer in an encoded format that can be played with a software media player. Generally speaking, streaming works by sending packets of audio data that are buffered in the random access memory of a computer, where the packets are organized sequentially and decoded for playback.

21. For examples of non-subscription based internet music services, visit www.spinner.com, www.broadcast.com and www.radiomoi.com.

22. *See, e.g.*, 17 U.S.C. § 114(d)(1)–(3) (Supp. III 1997) (amended 1998).

23. 17 U.S.C. § 114(d)(1)(A) (Supp. IV 1998).

24. *See* 17 U.S.C. § 112(a) (1994 & Supp. III 1997) (amended 1998).

25. The DMCA began as legislation to implement certain obligations from the World Intellectual Property Organization ("WIPO") Copyright Treaty and the Performances and Phonograms Treaty, namely prohibiting the manufacture and distribution of devices designed to

DPRSRA was "to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services."[26] Specifically, the solution was to extend the DPRSRA's license for subscription services to nonsubscription services.[27] This solution recognized that the distinction between subscription and nonsubscription services, while relevant to rates and terms, should not determine whether a service is eligible for statutory licensing.[28] In addition to covering nonsubscription digital transmissions, the DMCA added new terms to the statutory license and established a marketplace test for setting rates.[29]

## III. CUSTOMIZED SERVICES: A CASE STUDY OF THE SCOPE OF INTERACTIVITY

### *A. Interactive Service Under the DPRSRA*

The DPRSRA granted exclusive rights to copyright owners for any digital transmissions made as part of an "interactive service."[30] The DPRSRA defined interactive service as "one that enables a member of the public to receive . . . on request . . . a transmission of a particular sound recording . . . selected by or on behalf of the recipient."[31] The purpose of this definition was to address the potential for certain services to adversely impact the sales of sound recordings.[32] One example of a threat to sound

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circumvent technological measures that protect copyrighted material and protect copyright management information. *See* H.R. REP. NO. 105-551, pt. 2, at 20 (1998). The DMCA also dealt with many other related issues such as the responsibilities of on-line service providers when transmitting copyrighted works. *See* Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, § 202, 112 Stat. 2877, 2877–86 (1998) (codified as enacted at 17 U.S.C. § 512 (Supp. IV 1998)).

26. H.R. CONF. REP. NO. 105-796, at 79–80 (1998).

27. *See id.* at 80 (discussing the extension of the statutory license to "certain eligible nonsubscription transmissions").

28. *See, e.g.*, H.R. CONF. REP. NO. 105-796, at 80 (1998).

29. *See generally* 17 U.S.C. § 114(d)(2)(C) (Supp. IV 1998); *see also* 17 U.S.C. § 114(f)(2)(A)–(B) (Supp. IV 1998) (changing the criteria for establishing rates from four policy-orientated objectives specified in 17 U.S.C. § 801(b)(1) to a marketplace test).

30. *See, e.g.*, 17 U.S.C. § 114(d)(1) (Supp. III 1997) (codified as amended at 17 U.S.C. § 114(j)(7) (Supp. IV 1998) (stating exemptions described apply if transmissions are "other than as a part of an interactive service"); 17 U.S.C. § 114(d)(2)(A) (Supp. III 1997) (stating requirement for statutory license that "the transmission is not part of an interactive service").

31. 17 U.S.C. § 114(d)(1) (Supp. III 1997) (codified as amended at 17 U.S.C. § 114(j)(7)).

32. The legislative history of the DPRSRA contains numerous statements supporting this interpretation. For example, Congress pointed out "[o]f all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record

recording sales was a "celestial jukebox" containing thousands of sound recordings available for listeners to hear recordings on demand, which might deter sales by providing users the ability to hear music of their choice at any time.[33]

Congress left sound recording copyright owners with "the right to negotiate the terms of licenses granted to interactive services."[34] Congress recognized copyright owners are in the best position to determine the economic terms on which to license interactive services.[35] It is important to emphasize that the DPRSRA did not prohibit interactive services; rather, the law granted sound recording copyright owners the same discretion to license their creative works enjoyed by most other copyright owners.[36]

As webcasting began to proliferate, many Internet services offered music in unique ways, challenging the DPRSRA's definition of an interactive service. Although many webcasters offered programming that seemed to fit within Congress' underlying purpose, the narrow definition of interactive service as one offering recordings on demand threw into doubt whether such services could be considered interactive.

For example, some services offered files of pre-recorded programs that users could play repeatedly because they were "archived" on a website.[37] The shorter the archived program, the easier it was to choose a particular recording on demand. Often, the interactive nature of archived programs was significantly enhanced by the use of "rewind" and "fast-forward" functions, which permitted users to navigate quickly to the song of their choice.

Other services permitted users to customize music by interacting with the site. For example, at least one service allowed users to create their own programs by selecting and rating particular artists.[38] Based on these settings, which could be saved and altered as desired, the site allowed the user to create personalized programs according to the user's taste.[39]

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sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." H.R. REP. NO. 104-274, at 14 (1995).

33. *See* 141 CONG. REC. S11953 (daily ed. Aug. 8, 1995).

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

35. *See generally id.*

36. *See id.* at 24–25.

37. *See, e.g.*, www.broadcast.com.

38. *See* P.J. Huffstutter, *The Cutting Edge: Focus on Technology; Cyberspace; Web Surfing for the Next Wave in Radio*, L.A. TIMES, Aug. 2, 1999, at C3 (discussing Imagine Radio (www.imagineradio.com) and how their services work).

39. *See id.* Imagine Radio was acquired by MTV in February 1999, for $14.5 million after being in business for less than one year. *See* Dan Fost, *2 Net Entrepreneurs Making Noise Over MTV Deal*, S.F. CHRON., Sept. 23, 1999, at B2.

Thus, although the DPRSRA granted broad rights to sound recording copyright owners with regard to interactive services, the statutory language was inadequate to address new functionalities employed by internet music services. Even if the law could not keep pace with changing technology, it needed to keep it in sight.

### *B. The DMCA and the Evolution of Interactive Service*

The DMCA provided a means of amending the DPRSRA that captured the purpose behind granting copyright owners exclusive rights for interactive services. Two concepts guided the evolution of the definition of interactivity. First, interactivity is best understood as a continuum that accommodates a variety of services, rather than merely those that offer recordings on demand, such as a jukebox service. Along this continuum, services range from less to more interactive, depending on the degree of choice offered to the user. Thus, services that permit a choice of recordings within a predetermined program should be considered interactive, even though they may not have the same degree of interactivity as a service that permits a choice of particular recordings from an exhaustive database.[40]

Second, the predictability of a service should be a primary factor in defining it as interactive or noninteractive. Services that fall within the statutory license are predicated on the random play of recordings, much like tuning into a particular broadcast radio station. On the radio, choice is limited to a program of music delivered to all who tune in, without permitting an individual to control or influence the program.[41]

With these concepts in mind, Congress amended the definition of interactive service in several respects. The DMCA amendments illustrate that Congress recognized the concept of interactivity should not be tied to the mechanical selection of particular recordings. The new definition reads as follows:

> An "interactive service" is one that enables a member of the public to receive a transmission of a program *specially created for the recipient*, or on request, a transmission of a particular sound recording, *whether or not as part of a program*, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, *if the programming on each channel*

40. *See* H.R. CONF. REP. NO. 105-796, at 41 (1998).

41. *Id.* at 87.

> *of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request.* If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.[42]

The first amendment to the definition of interactive service specifies that a transmission of a program "specially created for the recipient" is considered interactive.[43] This change was designed to address the practice of offering customized or personalized programs to individual recipients.[44] The legislative history makes clear a program is interactive even if the recipient has not chosen particular songs but has influenced the program in other ways. For example, "the recipient might identify certain artists that become the basis of the personal program."[45]

Second, the definition of interactive service and new provisions of the statutory license make clear archived programming falls within the exclusive rights of copyright owners, except in limited circumstances.[46] A service that permits recipients of a program to navigate with rewind or fast-forward functions is also considered interactive.[47] Again, the legislative history explains that a recipient need not "select the actual songs that comprise the program" in order to create an interactive effect.[48]

The third change to the definition of interactive service also illustrates Congress' intent to distinguish between traditional random programming and more customized offerings. The new definition clarifies individuals may request particular recordings as long as 1) they are performed for reception by the public at large; and 2) the programming on the service does not substantially consist of sound recordings performed within one hour of the request or at a designated time.[49] The intent of these changes

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42. 17 U.S.C. § 114(j)(7) (Supp. IV 1998) (emphasis added).

43. *See* 17 U.S.C. § 114(j)(7) (Supp. IV 1998); H.R. CONF. REP. NO. 105-796, at 87 (1998).

44. H.R. CONF. REP. NO. 105-796, at 87 (1998).

45. *Id.*

46. A new term of the statutory license requires that an "archived program" be at least five hours in duration and available for no more than two weeks. *See* 17 U.S.C. § 114(d)(2)(C)(iii) (Supp. IV 1998). Thus, an archived program that does not meet this requirement or permits users to skip back and forth in the program must be licensed by the copyright owner directly.

47. *See* 17 U.S.C. § 114(j)(7) ("An 'interactive service' is one that enables a member of the public to receive . . . on request, a transmission of a particular sound recording, *whether or not as part of a program* . . . .") (emphasis added).

48. H.R. CONF. REP. NO. 105-796, at 88 (1998).

49. *Id.*

was to clarify that "a service that engaged in the typical broadcast programming practice of including selections requested by listeners would not be considered interactive."[50]

The result of these amendments is to establish two distinct ways in which a programming service may be considered interactive. The first is that programming "specially created for the recipient" is interactive.[51] The second is that requests or selections of recordings by individuals—whether on demand or as part of an existing program—are interactive except under certain circumstances.

### *C. Why Customized Services Are Interactive*

Since the enactment of the DMCA, an increasing number of webcasters have begun to offer users some degree of control over the programs offered in order to allow users to customize or personalize programming. These services give consumers the power to "decide what music you hear and how often."[52] This section briefly addresses whether these services fall within the new definition of interactive service, or may qualify for the statutory license.[53]

Consider the following: an internet radio service allows users to create their own "station." The station initially plays music based on the user's preferences. Users may then refine the station by rating songs,

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50. *See id.* at 87–88; *see also* 17 U.S.C. § 114(j)(7).

51. *See* 17 U.S.C. § 114(j)(7).

52. *See* <www.radio.sonicnet.com> (describing My radio.sonicnet Station service); see also Christopher Jones, Dueling Over Digital Music Rights (visited April 3, 2000) <http://www.wired.com/news/mp3/0,1285,34114,00.html> (these services aim to give consumers "access to their music when they want it") (quoting John Parres of Beverly Hills-based Artist Management Group).

53. This issue is hardly academic. On April 17, 2000, certain webcasters, through the Digital Media Association ("DiMA"), asked the Copyright Office to initiate a rulemaking proceeding to resolve whether certain types of customer-influenced programming are interactive or eligible for the statutory license. *See* Preliminary Statement and Need for Rulemaking for the Digital Media Association, *In re* Section 114 Definition of Interactive Service, Copyright Office Docket No. RM 2000-4 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). Specifically, DiMA asked the Copyright Office to rule that a webcasting service offering consumer influence should not be considered interactive if it: 1) makes transmissions that are made available to the public generally; 2) does not enable listeners to know in advance which sound recordings will be transmitted at any particular time; and 3) makes transmissions that do not substantially consist of sound recordings performed within one hour of a request or at a time designated by the transmitting entity or the individual making the request. *See id.* at 2. The Copyright Office has asked interested parties to comment on whether a rulemaking proceeding should be initiated. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 33,266–68 (2000) (to be codified at 37 C.F.R. pt. 201) (request for comments May 23, 2000). The following discussion addresses arguments raised both in DiMA's Petition for Rulemaking as well as those raised by other webcasters.

albums or artists on a scale from zero to one hundred. While higher rated songs, albums or artists are played more often on a station, those with lower ratings would be played less often or removed from the rotation. Is such a service interactive?

The dispositive question is whether such a program is "specially created for the recipient."[54] This statutory language appears to present a straightforward test: if the service designs and sends a program to an individual based on input by that individual, then the service is interactive. The input is not limited to selecting recordings, but can be comprised of any choices made by the recipient. The legislative history explains "the recipient . . . need not select the particular recordings in the program for it to be considered personalized."[55] For example, "the recipient might identify certain artists that become the basis of the personal program."[56]

Some webcasters have argued a customized program that otherwise complies with the terms of the statutory license is not interactive. For example, an algorithm might modify user input so the program complies with the specific terms of the statutory license, such as the sound recording performance complement.[57] But this modification would not change the fact that the program is "specially created for the recipient." Indeed, taken to its logical conclusion, this argument would render even on-demand services noninteractive as long as the service abided by the statutory license programming terms. Whether such a service is interactive is a separate question from whether it complies with these conditions, and compliance with these conditions does not make the service noninteractive.

Some webcasters have also argued a program is not interactive even if it is specially created for the recipient, as long as it is also made available to the general public. They rely in part on legislative history that states, "[A] service would not be interactive it if merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners."[58] The better interpretation is that this provision allows traditional features like a radio "request line" to be used by webcasters, but does not permit creation

54. 17 U.S.C. § 114(j)(7).

55. 144 CONG. REC. H10071 (daily ed. Oct. 8, 1998).

56. *Id.*

57. *See* 17 U.S.C. §§ 114(d)(2)(C)(I), 114(j)(13) (Supp. IV 1998). The sound recording performance complement forbids statutory licensees from intentionally or unintentionally transmitting, during any three hour period, more than 1) three selections from any one record, only two of which can be played consecutively, or 2) four songs from the same artist or compilation album, only three of which can be played consecutively. *See* 17 U.S.C. § 114(j) (Supp. IV 1998) (defining sound recording performance complement).

58. *See* 144 CONG. REC. H10071 (daily ed. Oct. 8, 1998).

of personalized programs. A contrary result would subvert the purpose of the statute by providing a loophole if the service merely made each customized program available for others.

Other webcasters have argued the classification of a service as interactive should turn on whether the service actually adversely impacts recording sales. In support, one could point to the DPRSRA legislative history discussion about how interactive services should fall within the exclusive rights of copyright owners because they have potential to interfere with traditional sales.[59] However, neither the statute nor the legislative history require a showing that sales are adversely affected before that service may be considered interactive.[60] Rather, Congress has determined that certain types of services—such as those offering on demand or personalized programming—are so different in character from the random programming eligible for statutory license and so likely to adversely impact recording sales that they are subject to the copyright owner's exclusive rights regardless of actual harm.

Again, the opposite conclusion would create perverse results. First, it would require a case-by-case judicial analysis of whether a particular service actually affected sales—leading to expensive litigation for every new service offering a unique type of personalization. Indeed, one could imagine that two sites offering precisely the same personalized programming could differ in this regard due to facts or circumstances entirely irrelevant to the programming. Second, the determination of whether a particular service is interactive could turn on factors such as technology used to deliver the music. If an on-demand service offers music in a low quality stream, it could be argued the sound quality makes it unlikely that recording sales would be impacted. In fact, the same service could offer both high quality streams to some listeners and lower quality to others, as most webcasters do, thus rendering some programming interactive in some instances but not others.

Finally, there is the question of whether limiting user input to the selection of a number of genres to combine together as one station should be interactive. It seems clear a service that offers a number of pre-programmed, highly-themed genre stations to the public at large is not interactive. Therefore, some webcasters have argued that permitting a user

59. *See* 141 CONG. REC. S11953 (daily ed. Aug. 8, 1995).

60. Congress' concern of an impact on sales is often misconstrued as relating only to home taping. *See generally* H.R. REP. NO. 104-274, at 12 (1995). Rather, the concern also encompasses the substitutional affect that, for example, customized programming may have because listeners might substitute the ability to hear precisely the artists or type of music they choose at any given time for purchasing albums. *See generally id.*

to combine several different genres should not be considered interactive, especially if the user's genres are broader than those on the pre-programmed service. The webcasters rely in part on the fact that the example of personalized programming outlined in the legislative history addresses the choosing of specific artists,[61] which is more akin to selecting particular recordings than to customizing broad genres.

While not as obvious on its face as personalized stations based on selection of recordings or artists, genre personalized services should be considered interactive.[62] The statutory language does not distinguish between artist and genre personalization any more than it distinguishes between customization based on year of release, number of records sold or country of origin. And while the legislative history uses the example of choosing particular artists, that language is not meant to be limiting given it is introduced by the words "for example."[63] Moreover, it is conceivable that rating narrow genres with few artists may be similar to rating particular artists and even rating broad genres could displace sales of genre-specific compilation albums.

Thus, any programming customized for an individual listener falls within the new definition of interactive service. While customized programs may differ as to the degree of choice provided, those distinctions do not take them out of the definition of interactive service so long as they create programs for individual listeners, and are relevant only to where a particular service is plotted on the continuum of interactivity.

## IV. ARE WEBCASTS OF OVER-THE-AIR RADIO PROGRAMMING BY FCC-LICENSED STATIONS EXEMPT?

When the DPRSRA was enacted, broadcasters distinguished themselves from new digital audio services by emphasizing their "statutory obligation to serve the needs and interests of the communities to which they are licensed."[64] Eventually, Congress accommodated both the need for a new right of public performance for sound recordings in the digital world and the concerns of the broadcasters by providing an exemption for "nonsubscription broadcast transmission[s]" ("broadcast exemption").[65]

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61. *See* 144 CONG. REC. H10071.

62. 17 U.S.C. § 114(j)(7).

63. *See* 144 CONG. REC. H10071.

64. *Digital Performance Right in Sound Recordings Act: Hearings on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 86 (1995) (statement of Edward O. Fritts, National Ass'n of Broadcasters).

65. *See* 17 U.S.C. § 114(d)(1)(A) (Supp. IV 1998); 141 CONG. REC. H10098 (daily ed. Oct. 17, 1995) ("The performance of a sound recording publicly by means of a digital audio

In 1995, when Congress enacted the DPRSRA, the scope of the broadcast exemption appeared to be limited to local over-the-air broadcasts where the signal was converted from analog to digital. But since the time of the DPRSRA, thousands of radio stations have begun to webcast their over-the-air signal on the Internet.[66] Furthermore, many broadcasters, including the National Association of Broadcasters ("NAB"), now take the position that such internet webcasts fall within the broadcast exemption.[67] The following discussion explains why the broadcast exemption should be construed narrowly to cover only digital transmissions of over-the-air broadcasts.[68]

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transmission, other than as part of an interactive service, is not an infringement of section 106(6) if the performance is part of . . . a nonsubscription transmission other than a retransmission.").

66. *See* BRS Media, *Web-Radio Stats* (visited Apr. 3, 2000) <http://www.brsradio.com/iradio/analysis.html> (providing statistics as of December 1998).

67. *See* Comments of AMFM, Inc. et al. at 3, 12–32, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*); *Copyright Office to Settle Dispute Over Streaming Audio Fees*, AUDIO WEEK, Mar. 20, 2000 (quoting National Association of Broadcasters ("NAB") spokesman as saying, "[o]ur position is . . . we don't believe we are required to pay performance rights for streaming of signals over the Internet"); Reply Comments of the National Association of Broadcasters at 9–12, *In re* Revisions of the Cable and Satellite Carrier Compulsory Licenses, Copyright Office Docket No. RM 97-1, Comment Letter No. 30 (June 20, 1997) (on file with the *Loyola of Los Angeles Entertainment Law Review*).

68. On March 1, 2000, the Recording Industry Association of America ("RIAA") asked the United States Copyright Office to initiate a rulemaking proceeding to determine the scope of the broadcast exemption. *See* Petition for Rulemaking for the Recording Industry Association of America at 1, *In the Matter of* Section 112 and 114 Licenses; Webcasting of AM and FM Radio Stations By Broadcasters, Copyright Office Docket No. RM 2000-3 (Mar. 1, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). On March 16, the Copyright Office initiated a rulemaking proceeding and published a notice in the Federal Register requesting comments on the RIAA's petition by April 17. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 14,227–28 (2000) (to be codified at 37 C.F.R. pt. 201) (notice of proposed rulemaking Mar. 16, 2000). The Copyright Office asked for comments on two questions: whether it should resolve the issue and, if so, how the issue should be resolved. *See id.* On March 27, 2000, the NAB filed a declaratory judgment action against the RIAA in the Southern District of New York. *See* Plaintiff's Complaint, National Ass'n of Broad. v. Recording Indus. Ass'n of Am., No. 00 Civ. 2330 (S.D.N.Y. Mar. 27, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). The NAB action requests the court to declare the broadcaster exemption covers webcasts by an FCC-licensed broadcast radio station of its over-the-air programming. *See* Plaintiff's Complaint at 9, *National Ass'n of Broad.* (No. 00 Civ. 2330). The NAB then asked the Copyright Office to suspend its rulemaking proceeding pending the outcome of the federal court case. *See* Motion for Suspension of Proceedings for the National Association of Broadcasters at 1, *In re* Notice of Proposed Rulemaking Published March 16, 2000 Regarding Digital Performance Right in Sound Recordings, Copyright Office Docket No. RM 2000-3A (filed Mar. 29, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). The Copyright Office refused and both actions are pending. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 17,840–41 (2000) (to be codified at 37 C.F.R. pt. 201) (notice of proposed suspension Apr. 5, 2000).

### A. Statutory Language

The language of the broadcast exemption appears to limit the scope of the exemption to local over-the-air broadcasts. Those provisions exempt a "nonsubscription broadcast transmission"[69] and define broadcast transmission as one "made by a terrestrial broadcast station licensed as such by the Federal Communications Commission."[70]

First, the use of the word "terrestrial" limits the scope of the statute to over-the-air transmissions by radio stations.[71] Second, the words "licensed as such by the FCC" indicate the activities required for an FCC license, e.g., providing certain services to local communities, are an important part of the exemption.[72] Such license requirements are irrelevant to worldwide Internet transmissions. Third, the current nature of internet transmissions—one-to-one communications—is different from a broadcast where one signal is available to many parties with no requirement that either party know the other's identity.[73]

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Eight parties or groups filed comments with the Copyright Office. Two groups filed comments arguing that the Copyright Office should resolve the issue and that the broadcast exemption does not apply to the Internet: 1) groups representing major and independent recording companies, artists and background musicians; and 2) the Digital Media Association (DiMA) on behalf of webcasters. *See* Joint Comments of the Recording Industry Association of America, Inc., Association for Independent Music, American Federation of Musicians and American Federation of Television and Radio Artists at 1, Public Performance of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*); Comments of the Digital Media Association at 1, Public Performance of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). The NAB, major broadcasting companies, a group of state broadcaster associations and three other parties filed comments taking the opposite view on both issues. *See* Comments of AMFM, Inc. et al. at 1, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). Reply comments from all parties were due and submitted by May 1, 2000. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 14,227–28 (2000) (to be codified at 37 C.F.R. pt. 201) (notice of proposed rulemaking Mar. 16, 2000).

69. 17 U.S.C. § 114(d)(2)(1)(A) (Supp. IV 1998).

70. 17 U.S.C. § 114(j)(3) (Supp. IV 1998).

71. *See id.*

72. *Id.*

73. *See* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT CASES AND MATERIALS 589 (5th ed. 1999) (noting a broadcast exemption "would not appear to mean point-to-point herzian transmissions [because] 'broadcasting' "means a transmission to multiple simultaneous recipients"). As originally developed, streaming technology operates in a so-called unicast environment where a webcaster sends a separate transmission to each listener. Although new technologies such as "multicasting," where one transmission may reach multiple listeners, are on the horizon, they could not transform a non-exempt transmission into an exempt transmission.

Broadcasters have argued that the exemption turns on the entity making the transmission rather than the nature of the transmission.[74] Pointing to the definition of broadcast transmission, the broadcasters argue that the exemption covers *any* transmission made by "a terrestrial broadcast station licensed as such by the Federal Communications Commission."[75] In other words, the exemption covers *broadcasters*, not broadcasts.

However, the term "broadcaster" is not found in the statute anywhere. Rather, as explained above, Congress chose terms such as "terrestrial," "broadcast station" and "licensed as such by the [FCC]"—all of which have meaning and appear to limit the exemption to local, over-the-air transmissions. The broadcasters' argument also proves too much. Under their interpretation, any programming transmitted by an FCC-licensed broadcaster including Internet-only programming—would be exempt. So, for example, to escape copyright liability, Viacom could locate MTV's webcasting operation at the premises of a CBS radio affiliate, make webcast transmissions from those premises and claim an exemption. Or, a webcaster could obtain an FCC license and use it as a basis to exempt its primary webcast business.

As discussed below, a narrow interpretation of the broadcast exemption to cover only local, over-the-air transmissions is consistent with a review of the context in which the DPRSRA was enacted, the stated reasons for distinguishing broadcasters, and the reasons why, and manner in which, the DMCA amended the DPRSRA—to clarify webcasters are subject to the sound recording performance right.

### *B. Context of the DPRSRA*

Congress granted sound recording copyright owners a right of public performance in the DPRSRA in order to ensure creators of sound recordings "will be protected as new technologies affect the ways in which their creative works are used."[76] Congress recognized copyright law was "inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings . . . ."[77]

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74. *See* Comments of AMFM, Inc. et al. at 20, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) ("it is the nature of the transmitter . . . rather than the nature of the transmission, which determines whether a transmission (or retransmission) qualifies as a 'broadcast' transmission.") (on file with the *Loyola of Los Angeles Entertainment Law Review*).

75. *See id.* at 21.

76. S. REP. NO. 104-128, at 10 (1995).

77. H.R. REP. NO. 104-274, at 13 (1995).

Numerous Congressional statements contrasted local over-the-air broadcasts with new technologies to be covered by the new performance right. For example:

> [the new law] does not affect the interests of broadcasters, as that industry has *traditionally* been understood.[78]

> *If the technological status quo could be maintained, it might well be that the current laws could be tolerated.* But, we know that technological developments such as satellite and digital transmission of recordings make sound recordings vulnerable to exposure to a vast audience through the initial sale of only a potential handful of records.[79]

> [C]opyright owners of sound recordings should enjoy protection with respect to digital subscription, interactive and certain [other such performances]. By contrast, *free over-the-air broadcasts* are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment and non-entertainment programming and other public interest activities *to local communities to fulfill a condition of the broadcasters' license.* The Committee has considered these factors in concluding not to include free over-the-air broadcast services in the legislation.[80]

> [T]he classic example of such an exempt transmission is a transmission to the general public by a free, over-the-air broadcast station, such as a traditional radio or television station, and the Committee intends that such transmissions be exempt, regardless of whether they are in a digital or nondigital format, in whole or in part.[81]

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78. 141 CONG. REC S948 (daily ed. Jan. 13, 1995) (statement of Sen. Hatch) (emphasis added).

79. *Id.* (emphasis added).

80. H.R. REP. NO. 104-274, at 13 (emphasis added).

81. *Id.* As explained *infra* Part IV.C.1., the DMCA deleted the other exemptions for nonsubscription transmissions, leaving only the broadcast exemption.

These statements support the conclusion that Congress intended to exempt radio programming only when that programming was digitally transmitted locally, over-the-air.

Other statutory provisions of § 114, as altered by the DPRSRA, suggest that the broadcast exemption should be limited to local over-the-air broadcasts. For example, § 114(d)(1)(B) sets forth circumstances in which a "retransmission of a radio station's broadcast transmission" is exempt.[82] By limiting the exemption to the circumstances enumerated, § 114(d)(1)(B) contemplates certain retransmissions of radio will not be exempt.[83] For example, § 114(d)(1)(B)(iv) permits nonsubscription broadcast retransmissions of public radio stations, provided that the broadcast is originally made by a federally funded, noncommercial educational radio station and "consists solely of noncommercial educational and cultural radio programs."[84] More importantly, the exemption is limited to retransmissions of such educational programming by "nonsubscription terrestrial broadcasts."[85] If all nonsubscription terrestrial broadcasts were exempt pursuant to the broadcast exemption, then this further exemption would be unnecessary.[86]

Likewise, the exemptions in § 114(d)(1)(B) are restricted to locality in some way, demonstrating that Congress specifically intended to permit retransmissions of radio broadcasts beyond the locality of the radio station only in limited circumstances.[87] For example, § 114(d)(1)(B)(i) limits the exemption to cases where "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."[88]

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82. 17 U.S.C. § 114(d)(1)(B) (Supp. IV 1998).

83. The definition of "transmission" includes both an initial transmission and a retransmission. *See* 17 U.S.C. § 114 (j)(15) (Supp. IV 1998). Thus, the exemption for nonsubscription broadcast transmissions would apply to both initial transmissions and retransmissions.

84. 17 U.S.C. § 114(d)(1)(B)(iv) (Supp. IV 1998).

85. *Id.*

86. Broadcasters have argued that provisions of § 114(d)(1)(B) are irrelevant because they address retransmissions by third parties, not transmissions made by the broadcast station itself. *See* Comments of AMFM, Inc. et al. at 26, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). However, the broadcasters offer no reason why this distinction is significant other than to support their interpretation of the statute.

87. *See* 17 U.S.C. § 114(d)(1)(B).

88. *See* 17 U.S.C. § 114(d)(1)(B)(iii) (Supp. IV 1998) (requiring certain retransmissions are not broadcast outside of the 150-mile limit by satellite and cable systems). Even the exception to this 150-mile limit supports the theme of geographical limitation running through the various exemptions for broadcast transmissions. Section 114(d)(1)(B)(i)(I) states that the 150-mile

Thus, the policy underlying the broadcast exemption is one of grandfathering the traditional business of the radio industry by insulating local, over-the-air programming from liability for sound recording performance royalties. There is no indication that new businesses by FCC-licensed broadcast radio stations beyond their local area, such as webcasting, are covered. Moreover, as previously described, other provisions of § 114(d) and accompanying legislative history support a limitation of the broadcast exemption to local broadcasts.

### *C. Context of the DMCA Amendments*

#### 1. Amendments to § 114

The DMCA amendments to the DPRSRA support a narrow interpretation of the broadcast exemption. The goal of the DMCA amendments was "to further a stated objective of Congress when it passed the [DPRSRA] to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used."[89] The focus of the DMCA amendments was webcasting.[90]

The main purposes in enacting the DMCA amendments was to clarify webcasting was subject to a sound recording performance right.[91] The DMCA deleted an exemption for "a nonsubscription transmission other than a retransmission,"[92] which some webcasters relied upon to argue their transmissions were exempt.[93] As Congress explained when making the deletion, this exemption was "the cause of confusion as to the application of the [DPRSRA] to certain nonsubscription services (especially webcasters) . . . ."[94]

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limitation does not apply to retransmissions of nonsubscription broadcast transmissions by an FCC-licensed "terrestrial broadcast station, terrestrial translator or terrestrial repeator." 17 U.S.C. §114(d)(1)(B)(i)(I). As the legislative history explains, "a radio station's broadcast transmission may be retransmitted by another FCC-licensed broadcast station (or translator or repeator) on a nonsubscription basis without regard to the 150-mile restriction." S. REP. NO. 104-128, at 20 (1995). The limitation to terrestrial retransmissions demonstrates that worldwide transmissions (such as those on the Internet) were not contemplated by the DPRSRA exemptions.

89. H.R. CONF. REP. NO. 105-796, at 79 (1998).

90. *See id.* at 80.

91. *See id.* at 79–80.

92. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2868, 2890 (1998) (amending 17 U.S.C. § 114(d)(1)(A) (Supp. III 1997)).

93. *See* Reply Comments of Mark Cuban at 5 n.1, *In re* Revisions of the Cable and Satellite Carrier Compulsory Licenses, Copyright Office Docket No. RM 97-1, Comment Letter No. 30 (June 20, 1997) (on file with the *Loyola of Los Angeles Entertainment Law Review*).

94. H.R. CONF. REP. NO. 105-796, at 80.

It is noteworthy that in addressing the treatment of webcasting, Congress did not create any specific exemptions. Furthermore, there are no exemptions for webcasting mentioned in the legislative history. When explaining deletions made to clarify that webcasters are subject to the sound recording performance right, Congress stated that the "deletion of these two exemptions is not intended to affect the exemption for nonsubscription broadcast transmissions."[95] This statement suggests the broadcast exemption is unrelated to webcasting.

Likewise, neither the statutory provisions of the DMCA nor its legislative history suggest webcasting by a "terrestrial broadcast station licensed as such by the FCC" would be treated differently than any other webcaster. Indeed, the definition of nonsubscription transmissions eligible for the statutory license includes "retransmissions of broadcast transmissions."[96] Moreover, several terms of the statutory license provide for special treatment of retransmissions of broadcast radio that are "made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission."[97] The implication of these exceptions is that retransmissions of radio broadcasts by a station that has the right or ability to control the programming must satisfy that statute's various terms to receive a statutory license.[98]

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95. *Id.*

96. *See* 17 U.S.C. § 114(j)(6) (Supp. IV 1998).

97. *See, e.g.*, 17 U.S.C. § 114(d)(2)(C)(i) (Supp. IV 1998) (limiting compliance with the "sound recording performance complement" to instances where the retransmitter is notified as to when a broadcast station violates the complement); 17 U.S.C. § 114(d)(2)(C)(ii) (Supp. IV 1998) (limiting compliance with the prohibition on publishing advanced schedules or making prior announcements of sound recordings performed); 17 U.S.C. § 114(d)(2)(C)(iii)(IV) (Supp. IV 1998) (limiting compliance with restrictions on repeated programs); 17 U.S.C. § 114(d)(2)(C)(vii) (Supp. IV 1998) (limiting requirement that rebroadcasters obtain authority of a copyright owner before transmission); 17 U.S.C. §114(d)(2)(C)(ix) (Supp. IV 1998) (limiting requirement to display title, artist and album).

98. *See* David J. Wittenstein and M. Lorraine Ford, *The Webcasting Wars*, 2 J. INTERNET L. 1, 8 (1999).

> [T]he DMCA's inclusion of programming modifications, available to third-party webcasters that license radio station content, raises questions about whether there is a flat exemption for radio stations that feed their signals to the Web. Why should a webcaster, such as NetRadio, that licenses a radio station signal be subject to webcasting license fees, when the radio station itself could webcast the same content free of performance license obligations.... [T]he flip side of the exemptions from programming and playlist restrictions available to secondary webcasters is that retransmitters that *do* have the right and ability to control the original broadcast programming—namely, radio station webcasters—are required to comply with the range of licensing requirements ....

*Id.* at 8–9.

Broadcasters have argued that, unlike the DPRSRA, the DMCA was enacted with little debate and did not change the broadcast exemption.[99] This, they argue, is in contrast to the detailed discussions that took place before the DPRSRA was enacted.[100] It is unlikely, broadcasters argue, that Congress would make the same broadcast programming that it historically exempted subject to licensing in a new medium without any explanation in the legislative history.[101]

While it is correct that the DMCA amendments were enacted more quickly than the DPRSRA and the legislative history for the DMCA is more brief than that of the DPRSRA, there is ample evidence of Congress' intent when it enacted the DMCA amendments. As discussed above, the overriding reason behind the DMCA amendments was to clarify that webcasting is subject to the sound recording performance right.[102]

Strong policy reasons also militate in favor of concluding that the broadcast exemption does not extend beyond local, over-the-air transmissions. Webcasts of broadcast programming compete with other webcasts for audience and advertising revenue. Thus, extending the broadcast exemption to the Internet would give broadcasters an unfair competitive advantage in a new entertainment medium with new business opportunities.[103] There appears to be no justification for granting preferential treatment to broadcasters for transmitting their local AM/FM signal to listeners worldwide based on an exemption rooted in traditional, FCC-regulated activity of serving local audiences.[104]

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99. *See* Comments of AMFM, Inc. et al. at 30, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) (quoting DMCA legislative history that new law "is not intended to affect the exemption for nonsubscription broadcast transmissions.") (emphasis omitted) (on file with the *Loyola of Los Angeles Entertainment Law Review*).

100. *See id.* at 29.

101. *See id.* at 30.

102. *See* discussion *supra* Part IV.C.1.

103. *See* Comments of the Digital Media Association at 5–6, Public Performance of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*) (explaining why "an exemption for a broadcaster's Internet retransmissions of its broadcast signals would introduce significant and unanticipated competitive distortions into the Internet marketplace").

104. Broadcasters also argue that many broadcasters might be forced to make fundamental changes to their programming in order to qualify for the statutory license. *See* Comments of AMFM, Inc. et al. at 31, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Comment Letter No. 5 (Apr. 17, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). For example, the broadcaster comments claim that traditional broadcast programming often violates the sound recording performance complement or fails to preannounce songs. *See id.* They claim that without making changes necessary to qualify for the statutory license,

### 2. Amendments to § 112

The DMCA amendments to § 112, governing the making of ephemeral recordings, also support the conclusion that the broadcast exemption does not extend to the Internet. Before the DPRSRA and DMCA, § 112 provided a limited exemption for reproductions of sound recordings[105] made to facilitate a licensed or exempt transmission. The purpose of the exemption was to permit certain "transmitting organizations," including FCC-licensed radio stations, to tape programs prior to their broadcast without incurring copyright liability.[106] These transmitting organizations did not have to pay fees for publicly performing sound recordings. Thus, the ephemeral recording exemption ensured copies expressly made for certain exempt performances did not provide a basis for copyright liability.[107]

The DMCA amended § 112 in two ways. First, Congress amended § 112(a) to include an ephemeral recording exemption for "a transmission organization that is a broadcast radio or television station licensed as such by the [FCC] and that makes a broadcast transmission of a performance of a sound recording in a digital format . . . ."[108] The purpose of this change was to allow broadcasters to enjoy the ephemeral recording exemption when they converted their over-the-air analog signal to digital.[109] As the legislative history explains, the amendment "changed the existing language of the ephemeral recording exemption (redesignated as § 112(a)(1)) to extend explicitly to broadcasters the same privilege they already enjoy with respect to analog broadcasts."[110] However, the legislative history did not

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broadcasters would be required to obtain separate licenses from individual copyright owners. Broadcasters argue that it is "inconceivable" that Congress intended to force such changes in light of Congress' historical exemption of traditional broadcast radio. *See id.* However, the broadcasters' assertion is inconsistent with the fact that more than a thousand broadcasters have filed a notice indicating that they are operating under (and therefore comply with) the terms of the statutory license. *See* U.S. Copyright Office, *Directory of Services that have filed Initial Notices of Digital Transmissions of Sound Recordings made under Statutory License* (last modified Mar. 31, 2000) <http://www.loc.gov/copyright/licensing/notice/index.html>.

105. The exemption also covers musical works. *See* 17 U.S.C. § 112(c) (1994).

106. *See* H.R. REP. NO. 94-1476, at 110–12 (1976).

107. 17 U.S.C. § 112(a)(1) (Supp. IV 1998).

108. *id.*

109. *See* S. REP. NO. 105-190, at 59 (1998). This clarification was necessary because § 112(a) exempted only ephemeral recordings made to facilitate transmissions exempt under § 114(a), which addressed the exemption for performances of sound recordings in analog form only. *See id.*

110. S. REP. NO. 105-190, at 22 (1998).

indicate this change included webcasts by an FCC-licensed broadcast radio station.[111]

Second, Congress created a statutory license to cover multiple ephemeral recordings made by 1) transmitting organizations, such as webcasters, operating under the statutory license for performances and 2) transmitting organizations making transmissions to business establishments exempt under § 114(d)(1)(C)(iv).[112] For the most part, this statutory license was a response to the many webcasters who wished to reproduce multiple copies of sound recordings in different formats for play, on different servers, or to encode recordings for transmission at different transmission rates.[113] These are four conditions that must be satisfied in order to become eligible for a statutory license.[114]

What do these changes tell us about the scope of the broadcast exemption? As discussed above, the DMCA amendments to the sound recording performance right were designed primarily to address webcasting.[115] Section 112(e) addresses a particular concern of webcasters that the § 112(a) exemption, which is limited to one ephemeral copy, is insufficient to address a webcaster's need to make multiple ephemeral copies as described above.[116] These reasons apply equally to webcasting of over-the-air broadcast transmissions.

While the statutory license for multiple ephemeral recordings in § 112(e) is available for webcasters operating under the statutory license in § 114(f), it does not apply to transmissions made under the broadcast

111. This is underscored by the fact that the amendment occurred before the webcasting issues ever arose as part of the DMCA legislative debate. The Senate Report, which included this change, was made May 11, 1998. *See* S. REP. NO. 105-190, at 1 (1998). The webcasting issues arose later and are discussed in the Conference Reports on October 8, 1998. *See* H.R. CONF. REP. NO. 105-796, at 78–89 (1998). Moreover, the Senate Report characterizes the change for broadcasters in § 112(a)(1) as "digital broadcasts" without mentioning the Internet. *See* S. REP. NO. 105-190, at 22 (1998).

112. 17 U.S.C. § 114(d)(1)(c)(iv) (Supp. IV 1998).

113. *See* H.R. CONF. REP. NO. 105-796, at 89–90 (1998).

114. *See* 17 U.S.C. § 112(e) (Supp. IV 1998). Generally, to be eligible for the ephemeral recordings statutory license, the transmitter must meet the following conditions: 1) The phonorecord must be retained and solely used by the transmitter and the transmitter can not make any further copies; 2) the phonorecord can only be used by a transmitter entitled to a statutory license under § 114(f) or under the § 114(d)(1)(C)(iv) exemption for business establishments in the course of business; 3) the ephemeral recording is destroyed within six months of the first public transmission; and 4) the copyright owner has authorized the transmitter to transmit the recording and the ephemeral recording is made from a lawfully made and obtained phonorecord. *See* 17 U.S.C. § 112(e)(3)(A)–(D) (Supp. IV 1998).

115. *See* discussion *supra* Part IV.C.1.

116. *See* 17 U.S.C. § 112(e).

exemption.[117] Thus, multiple recordings made for programming falling under the broadcast exemption are subject to the exclusive rights of sound recording copyright owners. However, there is no reason to believe Congress would grant exclusive rights for multiple ephemeral recordings for webcasts of over-the-air broadcast programming to sound recording copyright owners, but grant all other webcasters a statutory license to make ephemeral recordings. This indicates the broadcast exemption does not cover webcasting and that webcasts by broadcast stations are eligible for statutory licensing.

This statutory interpretation is also supported by § 112(a)(1). If webcasts of over-the-air broadcast programming are covered by the broadcast exemption and not the statutory license in § 114(f), then the exemption for the first ephemeral recording by an FCC-licensed broadcaster making webcasts would only be exempt if some other part of § 112(a)(1) applied. The only conceivable language in § 112(a)(1) that could exempt a webcast by an FCC-licensed broadcaster is the new language exempting an ephemeral recording made for a digital broadcast transmission of a sound recording by an FCC-licensed radio station.[118]

However, a condition of the exemption in § 112(a)(1) is that the ephemeral recording is used "solely for the transmitting organization's own transmissions within its local service area . . . ."[119] As previously discussed, the legislative history of the DMCA makes clear the change to § 112(a) was intended "to extend explicitly to broadcasters the same privilege they already enjoy with respect to analog broadcasts."[120] Thus, the term "local service area" as it relates to FCC-licensed broadcast radio should be construed consistently with its meaning prior to the DMCA amendments.

The House Report to the 1976 Copyright Act states "[t]he term 'local service area' is defined in section 111(f)."[121] Section 111(f) provides that the local service area of a radio broadcast station is the service area of the station "pursuant to the rules and regulations of the [FCC]."[122] Thus, local service area in § 112(a)(1), as it relates to digital broadcasts by an FCC-licensed radio broadcast station, means the geographical area in which the radio station is located. Accordingly, webcasts by FCC-licensed broadcast radio stations, which are available worldwide, would not come within the

117. *See* 17 U.S.C. §§ 112(e), 114(d) (Supp. IV 1998).
118. *See* S. REP. NO. 105-190, at 59.
119. 17 U.S.C. § 112(a)(1)(B) (Supp. IV 1998).
120. *See* S. REP. NO. 105-190, at 59.
121. H.R. REP. NO. 94-1476, at 103 (1976).
122. 17 U.S.C. § 111(f) (Supp. IV 1998).

language of § 112(a)(1) exempting an ephemeral recording made for a digital broadcast by a station.[123]

It is inconceivable that Congress would deny an FCC-licensed broadcast radio station an exemption for an initial ephemeral recording or a statutory license for multiple ephemeral recordings for webcasts. Therefore, the more plausible interpretation of § 112 is the first ephemeral recording for a webcast by an FCC-licensed radio station is exempt because such a webcast is made pursuant to the statutory license in § 114(f), and multiple ephemeral recordings are eligible for a statutory license for the same reason.

Thus, the newly enacted provisions of § 112 and § 114 do not reflect any intent to grant special treatment for webcasting by an FCC-licensed radio broadcast station. The DMCA's stated purpose of protecting sound recordings as new technologies emerge, specifically those on the Internet, should apply equally to all webcasters.

## V. CONCLUSION

Resolution of the issues addressed in this Article will significantly impact the enjoyment, consumption and use of sound recordings through new technologies and media. Although the issues discussed within this Article are currently the most topical regarding sound recording performance rights, additional issues will undoubtedly arise as new business models test the labyrinth of legal provisions governing these rights.

123. Broadcasters have argued that because the exemption in section 112(a)(1) also applies to webcasters, the meaning of the term "local service area" was necessarily expanded and therefore is not limited to a radio station's local audience. *See* Reply Comments of AMFM, Inc. et al. at 36, *In re* Notice of Proposed Rulemaking Regarding Public Performance Of Sound Recordings: Definition of a Service, Copyright Office Docket No. RM 2000-3, Reply Comment Letter No. 6 (May 1, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*). However, giving the term "local service area" a different meaning for webcasters (e.g., worldwide) than for FCC-licensed broadcast radio stations making webcasts (e.g., the local geographical area around the station) is consistent with the statute before the DMCA. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[E][4][b][ii], at 8-245 n.195 (1999) (stating a network station is defined as one having nationwide transmissions). Moreover, the broadcasters' interpretation would render the term "local service area" meaningless.