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The Times They Are a Changin': How Technology Has Forced the Law to Deal with a New Era in Music Distribution

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the times they are a changin'

Nearly 30 years ago, Bob Dylan recorded the classic song “The Times They Are A Changin’.”¹ Back then, Dylan probably had no idea that technology would someday exist to distribute his songs throughout the world in near-perfect digital reproductions. Today, through the advent of the Internet and digital networks, consumers have increasing access to digital downloads and digital broadcasts of copyrighted music.² Downloaded music on the Internet alone is estimated to become a \$4 billion business by 2002.³

By Mark Plotkin

Internet? MP3? Digital? How technology has forced the law to

The United States has attempted to keep pace with emerging digital music distribution technology through its copyright law.⁴ However, the perfect quality, limitless geographical scope, and exponential growth of digital music delivery implicate the varied and conflicting interests of songwriters, performers, record companies, broadcasters, and the public.⁵ Reconciling the interests of these groups in digital music delivery has not been, and will not be, easy.⁶

In November 1995, Congress first addressed the copyright problems posed by digital music delivery in the Digital Performance Right in Sound Recordings Act of 1995 (“the 1995 Act”).⁷ The 1995 Act breaks with traditional copyright law by creating a digital public performance right in the copyright owners of sound recordings.⁸ The 1995 Act provides that when a song is broadcast by a digital subscription service, the owner of the sound recording—usually the record company—is entitled to royalties.⁹ However, traditional copyright law still recognizes that if the same song is broadcast in an analog format (such as AM or FM radio), the owner of the sound recording receives *no* royalties.¹⁰

The newly enacted Digital Millennium Copyright Act of 1998 (the “DMCA”) is a further departure from traditional copyright law.¹¹ Among other provisions, the DMCA expands the 1995 Act by allowing the owners of sound recording copyrights a right to royalties in “Internet Radio” or “streaming” broadcasts.¹² The Act also clarifies that sound recording copyright owners are enti-

The DMCA’s allowance of sound recording royalties in streaming Internet broadcasts is particularly problematic.¹⁴ Most streaming Internet broadcasts are non-interactive and non-subscription broadcasts of music, as in traditional radio where, no sound recording royalties exist.¹⁵ Additionally, in streaming broadcasts the end user does not retain a tangible copy of the song that can be recopied. By allowing song copyright royalties in streaming Internet broadcasts, the DMCA treats these broadcasts as radically different from traditional analog broadcasts.¹⁶

Because digital delivery promises to become an increasingly popular means of music distribution, the current law presents multiple problems for the interested parties.¹⁷ First, this new legislation stands to hurt songwriters because their exclusive performance rights have been compromised in this new digital arena.¹⁸ Additionally, it may delay the growth of “streaming” broadcast technology as many future “streaming” broadcasters are not entitled to government-set royalty rate protections.¹⁹ The public also stands to lose by being denied access to the full potential of streaming technology by yielding cost control of downloaded songs to the large record companies.²⁰

A likely outcome of the onerous provisions of the 1995 Act and the DMCA will be the emergence of new smaller “Internet-only” record companies.²¹ These companies will have an alternative business structure, which will not require them to rely on the DMCA and the 1995 Act provisions.²² Such companies will com-

sive contracts with songwriters and recording artists. They will also directly distribute, broadcast and sell their music via the Internet in widespread low-cost distributions.²³

A Crash Course in Music Copyrights

To understand how the 1995 Act and the DMCA change music licensing, one should be aware that, in general, two distinct copyrights exist for each song that is recorded: the song copyright and the sound recording copyright.²⁴ First, the song copyright secures the actual song itself while the sound recording copyright protects the particular recording of the song.²⁵ Therefore, every time someone covers one of Bob Dylan’s songs, Dylan, through his music publisher, receives a royalty payment because the song copyright protects him.²⁶ The artist and producer who cover the Dylan song are only creating a sound recording of a song, and therefore only have a copyright on their particular version of the song, and not on the underlying song itself.²⁷ The practices of the music industry dictate that when a record company commissions the recording of a song by either its author or a secondary artist, the sound recording copyright is conveyed to the record company.²⁸

The difference between a song and a sound recording copyright is particularly important during a public performance of the song.²⁹ A public performance results from a live stage show or a media broadcast of the work.³⁰ Traditionally, songwriters, as owners of song copyrights, have an exclusive right to royalties from public performances of their songs, even if someone else’s sound recording is performed.³¹ As customary owner of the sound recording copyright, the record companies typically do not receive royalties from public

deal with a new era in music distribution

bled to royalties whenever a tangible copy of the song is downloaded.¹³

pletely circumvent the large record companies by directly signing exclu-

performances or broadcasts.³² The 1995 Act and the DMCA dramatically depart from industry practice by creating a new performance right for the record companies when a song is publicly “performed” in a digital broadcast.³³

What is Digital Broadcasting and How It Works

Today, there are two basic methods of digital music broadcasting: 1) via a private digital network, which is covered primarily by the 1995 Act and, 2) via the Internet, which is addressed by the DMCA. In both instances, the basic technology of digital broadcasting is similar to that of a compact disc. Each stores music by translating the sound into a binary series of 0s and 1s. This process allows the sound to be reproduced and copied with no loss of fidelity.³⁴ In the case of digital broadcasting, however, the binary series of 0s and 1s are transmitted to multiple parties rather than to just the single listener of the CD.

Broadcasting CD-quality music over a private digital network today is a reality. In the United States, satellite services such as USSB or Primestar and many cable systems already provide access to channels that broadcast specific styles of music. Generally all of these channels are operated by only three companies: Digital Cable Radio Associates, Digital Music Express, and Muzak. These channels operate like traditional radio stations, playing unannounced songs rather than entire albums. Arguably, they do not directly compete against CD sales because the consumer cannot anticipate what song will be broadcast at any given time; that is, the channels are “non-interactive.” These stations are subscription services, and requires a fee for access, an arrange-

ment fundamentally different from AM/FM broadcast radio.

Within the past two years, Internet digital music delivery has exploded.³⁵ This extraordinary growth can largely be attributed to improved software and faster networking technology. Right now, Internet music delivery can be divided into three distinct methods: 1) file downloading, 2) webpage support, and 3) streaming audio broadcasts.

Users of the Internet have been able to download music and sounds since the development of UNIX-based FTP sites, which were predecessors to the Web. FTP sites, however, were not popular with the general public because they were much more difficult to use than the Web. In these “early days” of music distribution via FTP, a download of a single song could take over an hour due to lack of adequate data compression. Additionally, the end user had to purchase an expensive hard drive with enough storage for the songs. So, although it was possible to download digital music from the Internet, it was highly impracticable and in no way threatened traditional music distribution.

In 1997, a new file compression standard for digital music, MP3 (Mpeg1 Layer 3), was developed and has become wildly popular for downloading music on the Internet.³⁶ The MP3 compression format makes Internet distribution of music viable for two reasons. MP3 allows a song to occupy less space on the end user’s hard drive. More importantly, however, a song in the MP3 format can be downloaded in a few minutes and replayed on demand by the end user, much like a CD. With the development of inexpensive recordable CD’s (CD-R’s), many computer users already have the capacity to download MP3-compressed songs from the

Internet and record perfect quality “mix” CD’s.

The development of MP3 technology has created new problems in combating bootleg and unauthorized recording distribution. In 1997, Pearl Jam’s newest album was illegally distributed on the Internet in the high quality MP3 format even before its official release.³⁷ Because of MP3’s high quality, strong compression, and wide availability, this audio format promises to long defy those attempting to end such illegal distribution of music.³⁸

By the end of 1998, the record companies took legal action against the MP3 threat because Diamond Multimedia had scheduled a release of a “walkman-like” MP3 player called the RIO PMP 300 (“RIO”).³⁹ The RIO directly threatens the record companies because it allows playback of MP3 recordings without the use of a home computer. With the RIO, consumers can download an hour of selected digital songs from the Internet using a computer, then unhook the RIO from their computer and take the music with them. The Recording Industry of America (“RIAA”), the association that represents the record companies’ collective interests, quickly responded to the threat that RIO poses to record sales. The group won a temporary restraining order against the RIO’s release in the US.⁴⁰ At the time of this writing, the manufactures of RIO filed a successful response to the RIAA complaint, and the RIO is now sold online and at a few of the larger national electronic stores.⁴¹

Despite the RIO controversy, there remains a strong demand for software that will play MP3 files directly on the computer.⁴² This demand is best illustrated by the 10 million downloads of Winamp, a popular Windows MP3 Player⁴³. The very efforts to regulate MP3 down-

loads have likely made it more appealing since it now has an “out-law” allure.⁴⁴ According to *Time*, fast T-1 Internet connections on many college campuses have turned three-fourths of the students into MP3 music pirates.⁴⁵ In February, Lycos became the first search engine to offer searches of both legal and illegal MP3s by artists and song title. Outside the dominant record companies, it appears the rest of the music industry, though somewhat apprehensive, is intrigued by the promise of MP3 album distribution. According to some, MP3 promises to “even out” artists’ access to the public and make it easier for musicians to become their “own” record company.⁴⁶

Digital audio has also been increasingly incorporated in actual websites to make Web “surfing” a truly multimedia experience. The current versions of both Netscape and Internet Explorer allow users to browse sites with music embedded into the actual scripting of the webpage. Internet users also have actively expanded their ability to listen to or script webpages with music by downloading specialized “plugins,” such as Macromedia’s Shockwave.⁴⁷

The most important development for digital broadcasting on the Internet is the realization of streaming audio files. “Streaming” technology permits the user to receive music—and now video—in real time via the Internet without having to download and store entire files. This process is known as “buffering.” Progressive Network’s RealAudio pioneered Internet audio buffering technology in 1995. At this early stage, it could only achieve a poor AM-like quality broadcast due to net congestion and compression challenges. Today, however, with the latest G2 release of the RealAudio play-

er, near-FM quality stereo broadcasts with supporting video are possible.⁴⁸ The future of streaming audio already has converged with the MP3 compression format. This February, beta releases of streaming MP3 players were available on the Internet for product testing.⁴⁹

The number of Internet streaming broadcasts and the number of people who tune into them has grown remarkably. In February, RealAudio announced that downloads of the RealAudio player have topped 50 million, though most of these copies were likely software updates.⁵⁰

As streaming audio technology continues to improve, and as users continue to recognize its potential, the Internet will likely form the backbone of a global digital radio, and possibly television, network.

Additionally, specific sites for finding different streaming music channels on the Internet—such as broadcast.com—have also gained popularity. Streaming audio on the Internet still has much untapped commercial potential. Through websites such as SHOUTcast, any Internet user who has RealAudio capabilities can now set up a streaming audio broadcast and form an Internet radio station with no other special equipment.⁵¹ The latest sign of the maturation of streaming Internet broadcasts came recently from, of all places, Victoria’s Secret. This lingerie boutique used a multi-

million dollar Super Bowl television ad to promote an Internet streaming video broadcast of its fashion show. According to the company, more than 1.5 million Web users watched the broadcast live.⁵² As streaming audio technology continues to improve, and as users continue to recognize its potential, the Internet will likely form the backbone of a global digital radio, and possibly television, network.

The Positions and Plottings of the Interested Parties

Since digital broadcasting has become so promising, record companies, songwriters, digital broadcasters, and the public have a significant stake in establishing how it is regulated.

The recording industry is currently dominated by a handful of major record companies, which have an interest in maintaining a virtual monopoly on music distribution. These companies are especially apprehensive about the growth of digital music delivery because it threatens to challenge their strong market position.

All record companies, however, are concerned about protecting their traditional sales of music recordings. Record companies invest heavily in publicity to generate profitable record sales. If the same recording is available on the Internet or on an interactive digital network, in perfect reproduction, the record company loses a potential sale with every illegal download or copy. Even copies of the downloaded song can be perfectly reproduced again and again, so digital distribution of music threatens exponential losses to record companies. The new laws, however, serve to mitigate some of these losses by creating new performance rights.

Record companies and their trade association, RIAA, have been active in prosecuting all forms of music

piracy. Recently, RIAA has applied pressure to illegal digital broadcasters who do not pay royalties to record companies as provided by current law. RIAA has already sent strongly worded letters to such broadcasters asserting the record companies' rights. Its members have even forced some illegal music sites to completely shut down.⁵³

Since songwriters have long enjoyed a traditional public performance right, they and their collection societies are concerned with perpetuating this asset in digital broadcast format. Every time a song is performed in public—whether in an arena, airplane, or media broad-

cast—songwriters are entitled to royalties. Songwriters currently collect their performance royalties independently of record companies. Major songwriter collection societies such as ASCAP, BMI and SESAC license all of the songs in their respective catalogues. These groups collect the performance royalties and distribute them to the individual songwriters based on the amount their song was performed. The protection of their performance right is therefore critical to ensure fair compensation when one of their songs becomes a hit.

Until this year, songwriters have also enjoyed performance royalties in restaurants and bars. Under the recent enactment of the Fairness in Music Licensing Act, however, songwriters lose much of this royalty base.⁵⁴ As songwriters see their royalties shrink from performances in bars and restaurants, they have a fundamental interest in expanding, or in at least preserving, traditional music copyright law in digital broadcasting to ensure continued royalties.

Digital music broadcasters hope to replace traditional analog broadcasts.⁵⁵ Despite the 50 million total downloads of RealAudio, only a small percentage of the public currently has access to digital music broadcasts. Most people do not subscribe to a satellite or cable service with digital music stations, nor own a computer with an adequate Internet connection for practical digital music delivery. Even regular Internet users still rely on local analog broadcast radio stations for most of their music. To establish digital broadcasting as the future industry standard, digital broadcasters must invest in online technology to enhance its quality and to generate public demand. Establishing digital music distribution as a replacement

to traditional music delivery requires a significant amount of money. It is no surprise, then, digital broadcasters are reluctant to pay out royalties. When the end user downloads music to produce a “tangible copy” of the song, digital broadcasters all concede that record companies have a legitimate copyright interest. They strongly disagree, however, what royalty percentage should be imposed.⁵⁶ When the consumer does *not* end up with a “tangible copy” of the song, digital broadcasters are even more opposed to royalty expenses. With the enactment of the DMCA and the creation of new record company royalties in “streaming” broadcasts, it is unclear what the future negotiated royalty rates will be. If the rates are too high, the DMCA could severely restrict future growth of Internet broadcasting; consumers may not be willing to pay the high prices needed to cover broadcasters' royalty and operating expenses.

Recently, a consortium of the three largest Internet broadcasters formed The Digital Media Association (“DiMA”).⁵⁷ According to Hillary Rosen, president and CEO of RIAA, the sole purpose of DiMA was to undermine the record companies. The DiMA, however, only represents the three largest Internet broadcasters and not the digital broadcast industry in general.⁵⁸ Accordingly, both the DiMA and RIAA share a common interest in suppressing competition in Internet music distribution.⁵⁹ In fact, the DiMA and RIAA pooled their special interest pressure, as evidenced by the successful lobby for “grandfather” royalty rate provisions in the DMCA, narrowly tailored and uniquely favorable to DiMA members.

The public at large has a stake in regulation that encourages digital broadcasting growth. Digitally

additional resources on digital music

www.real.com

the homepage of the RealAudio player

www.mps.com

an online record company that posts the latest MP3 news

mp3.lycos.com

an MP3 search engine

www.liquidaudio.com

an online record company

www.broadcast.com

the streaming audio channel guide

www.goodnoise.com

an online record company

www.riaa.com

The Recording Industry of America online

www.diamondmm.com

the RIO (a “walkman-like” MP3 player) maker's homepage

broadcast music enhances the Web, making cyberspace a more friendly and entertaining environment. Today, computers offer not just pictures and text but are fast becoming multimedia machines. In fact, many new home computer systems produce sound that rivals even the top hi-fi stereo. Consumers have an interest in promoting digital broadcasting because it furthers the versatility and usefulness of home computers. Digital broadcasting also promises consumers more choice in music selection. Consumers can escape the technological and geographic boundaries of analog stations and instead listen to radio stations from all over the world. Finally, "on demand" music downloading is more convenient than buying CD's. Consumers, in most cases, must buy an entire CD to get the one song that they like. By downloading a particular song, consumers can mix their favorites and avoid paying for other songs they never wanted. Also, consumers would not have to change and store CDs, since their entire recording collection could be stored on their computer "jukebox."⁶⁰

Evolution of the Copyright Law of Digital Broadcasting

Prior to the Sound Recording Act of 1971 ("the 1971 Act"), federal copyright law did not prohibit musical recording piracy.⁶¹ As recording duplication technology emerged in the late 1960s in the form of affordable analog tape recorders, Congress decided to protect legitimate record sales by making recording piracy illegal.⁶² Although the 1971 Act did authorize copyrights for sound recordings, it did not create any performance rights for the owners of sound recordings.

The 1971 Act automatically expired at the beginning of 1975. In 1976, Congress enacted the

Copyright Act of 1976 ("the 1976 Act"), which contained no automatic expiration provision. The 1976 Act provided that all sound recordings, if original and fixed in a tangible means of expression, are protected by a sound copyright.⁶³ Like its predecessor, the 1976 Act did not create a performance right for sound recording owners.

Passage of the 1995 Act, like the 1971 Act, was also driven by the growth of new technology. Congress' primary concern in the new law was regulating digital satellite broadcasts of music by subscription. The 1995 Act departs from the prior acts because 1) it creates a public performance right for the owners of sound recordings, and 2) it requires a compulsory musical license in certain types of digital music delivery.

The 1995 Act applies only to performances of sound recordings that are transmitted, digital, and "sound-only." A transmission, by definition, must result in "digital phonorecord delivery," which occurs when the end user receives an actual digital copy of the song. A public performance in a club or concert hall or even playing a CD or DAT does not constitute a "transmission" of the music and is therefore beyond the scope of the 1995 Act. Because the phonorecord delivery must be digital, analog broadcasts such as AM/FM radio are not covered by the Act. Finally, the 1995 Act is limited exclusively to sound recordings; it does not extend to music that is part of an audiovisual work such as the soundtrack of a movie or TV show.

The most interesting provision of the 1995 Act was the exemption for non-subscription transmissions of digital music. This important exception has since been amended by the passage of the DMCA.

The 1995 Act is revolutionary

because it creates a new public performance for record companies. Under the 1995 Act, the law fixes, rather than deferring to negotiation the actual rate of royalties paid to the record companies.⁶⁴ Since this is a compulsory license, this amount determines the prevailing royalty rates in the industry.

Since the passage of the 1995 Act, there has been wide debate about the proper amount of the statutory royalty rate. In July 1998, RIAA and the three largest cable/satellite digital music networks attempted but ultimately failed to agree on the rates of license fees. RIAA maintains that it should receive a royalty rate of 41.5 percent of a digital music broadcaster's gross revenues. This figure was adopted from the revenue percentage rate that cable movie networks (such as HBO or Showtime) pay to movie companies when they broadcast their movies on TV. The digital audio subscription services countered with a royalty rate ranging between 0.5 to 2.0 percent.

As provided by the 1995 Act, a Copyright Arbitration Panel heard both sides. The panel determined that digital audio subscription services should pay five percent of their gross U.S. sales revenue to the record companies.⁶⁵ The record companies were displeased with this outcome and appealed unsuccessfully.⁶⁶ According to the Register of Copyrights, the record companies should not be entitled to greater royalties on the sound recording than the songwriters receive on the songs themselves, which would equal 6.5 percent.⁶⁷

As made clear by the need for the DMCA revisions, there were severe problems with the 1995 Act. First, the 1995 Act failed to fully anticipate the development of streaming digital broadcast technolo-

gy. The narrow contours of the 1995 Act reveal that Congress did not foresee the advent of this technology. Related to streaming Internet broadcasts is the additional problem of “ephemeral recordings.” Ephemeral recordings are copies of a song, allowed by law, that a broadcaster uses to facilitate the broadcast. When the 1995 Act was enacted, Congress did not include digital broadcasts in the ephemeral recording exception.

Second, the 1995 Act failed to account for the “royalty shift” away from songwriters and towards record companies. Digital broadcasting is a technology that will likely replace analog broadcasts in the future. If so, the value of a sound recording copyright will likely increase relative to a song copyright since, in digital broadcasting, the exclusiveness of a song copyright performance right is compromised. Thus, as digital broadcasting becomes more pervasive, songwriters may see their exclusive performance rights diminished as a result of the 1995 Act.

Third, the 1995 Act failed to address pressing international issues and problems. The World Intellectual Property Organization (“WIPO”), the major international copyright association, generally supports the abolition of compulsory licenses for primary broadcasts and satellite communications. The 1995 Act deviates from this prevailing view.

Finally, the 1995 Act failed to adequately address enforcement issues. With the growth of Internet music distribution, any computer user can become a digital music broadcaster. The 1995 Act only targeted sophisticated, for-profit private broadcasters. Had Congress then recognized that any computer user could become a digital broadcaster, it might have enumerated clearer and broader penalties for 1995 Act violations.

The DMCA and its Effects on Digital Broadcasting

In the summer of 1998, Congress began to address some of the shortcomings of the 1995 Act. The result of this effort is the newly enacted Digital Millennium Copyright Act. Though the bulk of the DMCA adopts the 1996 WIPO Performance and Phonograms Treaty, tucked away in the DMCA’s “Miscellaneous Provisions” are revisions that greatly modify the 1995 Act.

At best, the DMCA represents compromise legislation between

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interested parties in technology regulation.⁶⁸ At worst, it is the definitive product of special interest legislation.⁶⁹ When examining the DMCA outside the scope of its music provisions, it is clear that technology interest groups have directed this legislation. Title II of the Act limits the copyright liability of Internet service providers, while Title III allows computer repairpersons to use a customer’s copyrighted software. Remarkably, the end of the Act even tacks on a provision addressing the decorative features on the hulls of ships. According to Ralph Oman, former Register of Copyrights, the DMCA has clearly been subject to the “congressional sausage factory” of special interests.⁷⁰

The music provisions of the DMCA not only appear to be shaped by special interests but also appear to be in large part actually drafted by them.⁷¹ In the late summer of 1998, while Congress was contemplating the DMCA, the DiMA and RIAA engaged in direct talks to arrive at a compromise of their interests. In the course of negotiation, these two interest groups drafted much of the music provisions of what would become the law. On August 4, 1998, Congress incorporated their agreements into the DMCA.⁷²

Since the DiMA only represents the three largest Internet broadcasters, it, like RIAA, sought to discourage competition from new digital broadcast companies. The compromise with RIAA produced a narrowly tailored “grandfather” clause that extends a government-set royalty rate only to broadcasters who meet the exact business profile of the DiMA members. All future streaming Internet broadcasters must negotiate their rates with the record companies directly, which will likely result in a higher royalty than the three members of the DiMA must pay.⁷³

The DMCA changes the 1995 Act most significantly by eliminating the sound recording royalty exemption for most non-interactive, non-subscription digital audio transmissions. Under the DMCA, non-interactive audio broadcasts—such as streaming Internet broadcasts—must, without question, pay the record companies a performance royalty rate.

The DMCA, however, creates an interesting exception of its own. If a traditional FCC-licensed analog station transmits the streaming Internet broadcast, such a “dual” broadcaster does not have to pay record company royalties. The DMCA then permits existing radio stations to expand their broadcasts

to the Internet without infringing a sound recording performance right. Conversely, an Internet broadcaster can avoid paying record company royalties by buying and broadcasting from an analog radio station.

The DMCA replaces the pervasive compulsory license requirement in the 1995 Act with a more limited compulsory license. As strong proof of a successful lobby, the DMCA allows RIAA to propose its own rates when negotiating with most future streaming broadcasters. According to the DMCA, only "eligible nonsubscription transmissions" are subject to the government-set compulsory license and can avoid rate negotiation with RIAA. The DMCA defines an eligible transmission as:

a noninteractive, nonsubscription transmission made as part of a service that provides audio programming consisting...of performances of sound recordings...if the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.⁷⁴

Even once a transmission is found eligible for the government set royalty rate, a host of additional restrictions apply.⁷⁵ The most demanding of the restrictions requires that a broadcaster seeking the statutory royalty rate must have been transmitting on the Web before July 31, 1998.

It is no surprise that the requirements for an eligible nonsubscription mirror the business profiles of the three members of DiMA. In this way, the DMCA leaves the record companies free to negotiate a performance royalty rate closer to its goal of a 41.5 percent rate.⁷⁶ The DiMA supported the limited compulsory license because the grandfather

provision effectively protects them from these higher royalties. Their future competitors will not be as fortunate.

The DMCA also clarifies the status of ephemeral recordings used to facilitate broadcast. The new law allows their use only by digital broadcasters that also broadcast in a traditional format or have a license from the FCC. For Internet-only broadcasters, for whom the FCC requires no license, the DMCA extends a statutory license for ephemeral recordings, available at a government-determined rate.⁷⁷

Developments Since the Passage of the DMCA

Since the passage of the DMCA, new technology has become available to attach a digital watermark to music files that have been downloaded from the Internet.⁷⁸ This digital watermark signals when and whether a royalty has been paid for the download. Watermarks, however, do not prevent additional copies of the music once it is downloaded. Thus, even a watermarked copy of a song can be reproduced thousands of times by the end user. When a song is copied, however, the watermark remains, allowing authorities to trace at least the origin of the first illegal copy.⁷⁹ In February, RIAA began the Secure Digital Music Initiative to encourage legal distribu-

tion of music on the Internet.⁸⁰ At this time it is unclear what effect this effort will have on Internet downloads of music. As of the time of this writing, the initiative was scheduled to hold a conference where the participants are expected to advocate improved watermarking technology.

Secrecy and uncertainty shroud another Internet music proposal named "The Madison Project."⁸¹ In conjunction with all the major record labels, IBM is coordinating the development of this test-project. IBM plans on launching a six-month test of a new music download system in a thousand San Diego homes this summer. The Madison System is reported to not use the MP3 encoding standard. Instead, the system involves a separate interface that allows a cable modem user to download songs on a per use basis. Industry insiders speculate the Madison Project is perfecting a revolutionary piece of hardware that works as an extension of a cable television box. The new device will also likely incorporate a video-on-demand service, another step in the inevitable integration of entertainment media. Lawmakers cannot check this relentless transformation; they can only attempt to respond.

The Sound of the Future

Despite the strength of the 1995 Act and the DMCA, no law can forever preserve the current state of the record industry. The major record companies have long enjoyed a near

internet videos

The Internet promises to become a popular means to distribute video in conjunction with music. If an actual transmission of a video causes a copy of the song to be made, a Videogram license for the song is required. When a song is accompanied by a video "performance," a synchronization license is required. Currently there are specialized types of multimedia synchronization licenses, such as a television or theoretical synchronization licenses. Ultimately, a new Internet synchronization license will have to be developed to protect music as Internet video distribution becomes more popular.

monopoly in music distribution. In a large part, they also determine what is broadcast on the radio. The 1995 Act and the DMCA reveal how the major record companies, have lobbied hard to tame digital music delivery instead of embracing it. Despite the prospects of this new digital age, the major record companies seem intent on preserving as much of their fading traditional business model as possible and creating new sound recording royalty rights to offset whatever losses they sustain.

The digital delivery of music promises to transform the music industry from a conglomerate of a few major companies into a more accessible and "democratic" business. The ease and reduced capital costs of Internet music distribution and broadcasting present a unique opportunity for upstart record companies who embrace its promise. New Internet record companies, such as goodnoise.com, liquidaudio.com and atomicpop.com, have already bypassed the major record companies and signed artists directly to recording contracts. Unlike traditional record companies, these companies generate popularity for their bands by giving away their music for free

via the Internet. Ultimately, they hope to generate a profit by eventually selling their artists' music exclusively online at reduced rates. The provisions of the 1995 Act and the DMCA do not apply to the alternative structure of these new record companies; these companies will directly broadcast and sell their own music to the public.

Despite the opportunity for upstart record companies, the 1995 Act and the DMCA still has pervasive effects on most digital music distribution. The major record companies have built up an extensive catalog of songs that they control. Consumers will not only download new music but will also want to download their favorite old songs, which are inevitably controlled by a major record company. The major record companies have no incentive to allow their songs to be distributed at less than their already proven market rate. For these songs, the record companies will take full advantage of the 1995 Act and the DMCA provisions. The major record companies are also likely to create their own Internet only record labels. These labels will probably operate similarly to the upstart record com-

panies as a test market for new talent. It will be interesting to see how established artists deal with their record companies in the future. Some successful artists, such as Todd Rundgrin, who licenses his music directly to the public on the Internet might eliminate the need for record companies altogether.⁸²

The development of music copyright law is intertwined with the development of new technology. The 1995 Act and the DMCA are clear legislative responses to the emergence of digital network technology. These acts illustrate that Congress, under pressure of powerful recording lobbies, is willing to radically change song performance royalty rights to protect the interests of large record companies and established broadcasters. In the process of protecting those interests, other parties may be harmed. The 1995 Act and the DMCA seem to embody a goal to tie music distribution to the past instead of promoting its future. However, despite the provisions of the acts, the music industry is, and promises to continue to be "a changin'" faster than ever. ♦

¹ Bob Dylan, *The Times They are a Changin'* (Columbia Records 1964).

² See Karl T. Greenfeld, *You've Got Music: Record Companies, Hearing Disaster, Are Desperate to Keep Their Wares from Being Pirated off the Internet*, TIME, Feb. 22, 1999, at 53.

³ *Id.*

⁴ Alan N. Sutin and Ellen Goldberg, *High-Tech Agenda in Congress*, 220, N.Y.L.J., S3 (1998).

⁵ See Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4 (1998).

⁶ See *id.*

⁷ The Digital Performance Right In Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

⁸ Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right In Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 643-48 (1996).

⁹ Pub. L. No. 104-39, 109 Stat. 336 (1995).

¹⁰ *Id.*

¹¹ Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860 (1998).

¹² *Id.*

¹³ *Id.*

¹⁴ See Kohn, *supra* note 5.

¹⁵ *Id.*

¹⁶ *Id.*

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¹⁸ *Id.*

¹⁹ Kohn, *supra* note 5.

²⁰ *Id.*

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