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Amanda Reid
areid@unc.edu

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Publication: *Texas Intellectual Property Law Journal*

Recommended Citation

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Texas Intellectual Property Law Journal
Spring 2012

Article

**THE POWER OF MUSIC: APPLYING FIRST AMENDMENT SCRUTINY TO COPYRIGHT REGULATION OF
INTERNET RADIO**

Amanda Reid^{al}

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	Introduction	234
I.	The Intersection of Copyright Law and the First Amendment	240
II.	The Power of Music	244
	A. Music Therapy Can Be Used to Promote Healing and Wellness	244
	B. Music Can Be a Vehicle for Cross-Cultural Education and Reconciliation	248
	C. Music Can Be a Vehicle to Educate and Inspire Political Change	249
	D. Music Transmitted by Internet Radio Fosters Diversity	252
III.	First Amendment Protections for Music	255
	A. The Listener's Right to Hear Music	256
	B. The Speaker's Right to Play Music	258
IV.	Progression of Copyright Protection for Music	259
	A. Protections for Music Were First Extended to Printed Musical Compositions	260
	B. Expanded Protections of Sound Recordings Were Introduced in the Second Half of the Twentieth Century	261
	1. Digital Performance Right in Sound Recordings Act of 1995	262
	2. Digital Millennium Copyright Act of 1998	263
	3. Sound Recording Performance Complement	263
	C. The Decade-Long Struggle to Set Sound Recording Royalty Rate	266
V.	The Expansion of Copyright Protection is Used to Maintain Market Hegemony	272
VI.	Copyright Regulation of Webcasters Fails First Amendment Scrutiny	274

A. The Sound Recording Performance Complement Impairs Webcasters' Own Speech-Making Abilities	274
B. The Sound Recording Performance Complement is Outside the Traditional Contours of Copyright Protection and Affords No Free Speech Safeguards	275
C. The Sound Recording Performance Complement Burdens More Speech Than Necessary and is Not Narrowly Tailored	276
Conclusion	278

**234 Music has power. It can change attitudes, relax or energize the body, animate the spirit, influence cognitive development, enhance the body's self-healing mechanisms, amuse, entertain, and foster a general response which can be a state of comfort, or in some instances even discomfort.¹*

A pamphlet, no matter how good, is never read more than once, but a song is learned by heart and repeated over and over; and I maintain that if a person can put a few cold, common sense facts into a song and dress them up in a cloak of humor . . . he will succeed in reaching a great number of workers who are too unintelligent or too indifferent to read . . .²

Introduction

Music is everywhere. We wake up to it; we exercise with it; it accompanies us on the drive to work; we take it with us on our iPods; it fills the elevator compartment; it keeps us company when we are waiting on the phone; we listen to it at work; we hear it in department stores and doctors' offices; our romantic dinner is not complete without it; and we seek it out at concerts halls.

Music is also powerful. Modern scholarship and research indicates that music has benefits for the individual as well as for the social group. The benefits of music therapy for the individual range from aiding individuals with autism spectrum disorders³ to helping the body manage pain and heal after trauma.⁴ At the societal level, ***235** music has the potential to aid in conflict transformation and peace building,⁵ but it has also been used during wartime to rally the troops and manipulate the masses.⁶ Music can provide a unifying element for political movements, and songs can be powerful devices to educate and inspire listeners.⁷

Deeply expressive and evocative, music is protected both by copyright law and the First Amendment. Copyrights, as authorized by the United States Constitution, are intended "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . ."⁸ On the other hand, the First Amendment in the Bill of Rights ensures that "Congress shall make ***236** no law . . . abridging the freedom of speech . . ."⁹ Generally, these two stalwart protectors of freedom of expression coexist peacefully.¹⁰ But what would happen if the scope of federal copyright law were expanded in such a way as to infringe the First Amendment rights of others?

Copyright is a limited statutory entitlement.¹¹ Modern copyright law gives a copyright holder a "bundle" of legal rights.¹² The legal rights for music are unique ***237** in that each piece of recorded music embodies two copyrights: the musical composition and the sound recording.¹³

Historically, sound recordings had no public performance right. This meant that recording artists had no authority to prohibit others from publicly playing their recorded music, and they had no authority to collect a royalty payment.¹⁴ Today, holders of sound recording copyrights have a limited public performance right; this right is limited to digital audio transmissions (online music).¹⁵ As explained next, recording artists are now entitled to a royalty fee for music transmitted online.

Under existing copyright law, traditional, over-the-air AM/FM radio stations¹⁶ are exempt from paying royalties to recording artists when broadcasting sound recordings.¹⁷ This means that recording artists receive no royalties for traditional radio play.¹⁸ Traditional radio stations compensate only the composer of the underlying ***238** musical work-- the actual notes and lyrics of a song.¹⁹ While traditional radio stations are exempt from paying the sound recording royalties, Internet radio stations that transmit music digitally must pay a royalty fee for both the musical composition and the sound recording copyright.²⁰

Over and above the obligation to pay two types of royalty fees for playing the music, Webcasters who play recorded music are saddled with statutory restrictions on the content and arrangement of their playlists. Among the proscriptions on Webcasters' transmissions, copyright law provides that within a three-hour period, Webcasters may not play more than two songs in a row from the same album, may not play more than three songs in a row by the same artist, and may not play more than four songs by the same artist (or four different songs from the same compilation).²¹ These numerical limitations are called the "sound recording performance complement."²² The Supreme Court has indicated that Congress's amendments to the copyright act are tolerable if the scope of copyright protection is within its "traditional contours" because these contours provide sufficient free speech protections. *239²³ However, the additional statutory restrictions on the content of Webcasters' music transmissions are not within the "traditional contours" of copyright law and offer no free speech safeguards.

These copyright regulations, which limit the number and arrangement of songs a Webcaster may transmit within a three-hour period, infringe the First Amendment interests of (1) the listeners, (2) the speaker, and (3) the uninhibited marketplace of ideas. As outlined in this Article, music can affect us individually, and it can affect our larger social groups. Moreover, the Internet offers a unique platform from which anyone of us can be a Webcaster.²⁴

Without the diversity that Internet radio can foster, today's media-conglomerate-dominated marketplace threatens to commodify music and thereby render it politically impotent.²⁵ The interests implicated by the digital transmission of music extend beyond the private interests of the copyright holders and the lobbying efforts of these copyright holders have helped extend the scope of copyright protection beyond its "traditional contours."²⁶ Accordingly, copyright is no longer an engine of free expression.²⁷ Rather, it now functions as a censor on a medium and a message that deserve greater breathing space.²⁸

Part I of this Article discusses the intersection of copyright law and the First Amendment and provides an overview of the 2003 *Eldred v. Ashcroft* decision, where the Supreme Court declined to apply First Amendment scrutiny to the 1998 Sonny Bono Copyright Term Extension Act (CTEA).²⁹ The Supreme Court's most *240 recent pronouncement on applying First Amendment scrutiny for copyright regulation is the logical starting point for the present discussion. While the *Eldred* decision provides a starting point for applying First Amendment scrutiny to copyright regulation, it does not decide the matter since the issue before the *Eldred* Court was the extension of the term rather than the scope of copyright protection.

Part II explores a growing body of literature documenting the power of music, from promoting the well-being of individuals to fostering reconciliation of cross-cultural disputes. The scholarship from these diverse disciplines underscores that the value of music extends beyond the private interests of the copyright holders. The current dialogue about the First Amendment interests affected by modern copyright law has not fully acknowledged the research that supports the unique communicative potential of music. Part II introduces this research into the legal literature.

Part III discusses Supreme Court jurisprudence that extends First Amendment protection to music, including a listener's right to hear it and a speaker's interest in playing it. Part IV traces the progression of copyright protection for music from its inception to the tangled mess of the royalty debate saga, including an explanation of the sound recording performance complement. This evolution of copyright protection informs the discussion of the "traditional contours" of copyright protection. Part V explores how the ever-expanding copyright protections have been used by incumbents to maintain market dominance without consideration of the First Amendment interests of listeners or Webcasters. And Part VI argues that current copyright regulations, which limit the number and arrangement of Webcasters' playlists, fail First Amendment scrutiny.³⁰

I. The Intersection of Copyright Law and the First Amendment

Our Founding Fathers used the English copyright system as a model³¹ and included within our constitutional framework the congressional authority to create copyrights as well as patents.³² Historically, the First Amendment and copyright law have co-existed with little conflict. The first Copyright Act, promulgated in *241 1790, was adopted by Congress one year before the First Amendment was approved by the states.³³ As the Supreme Court has indicated, "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."³⁴ Constitutional challenges to copyright laws on First Amendment grounds are a relatively new phenomenon. As Marybeth Peters observed, "[u]ntil recently, the body of constitutional law relating to copyright was almost nonexistent."³⁵

The body of constitutional law relating to copyright is growing as a result of litigation challenging Congress's recent amendments to the Copyright Act.³⁶ In 1998, Congress passed the Sonny Bono Copyright Term Extension Act, which extended the term of all existing copyrights by an additional twenty years.³⁷ In *Eldred v. Ashcroft*, petitioners argued the CTEA not only exceeded Congress's power under the Copyright Clause but also violated the First Amendment.³⁸ In 2003, the Supreme Court ruled 7-2 that the CTEA did not violate the Copyright Clause's limitation that the monopoly endures only for "limited times."³⁹

In rebuffing the First Amendment challenge, the Court characterized the CTEA not as a burden on "the communication of particular facts or ideas," but as the protection of "authors' original expression from unrestricted exploitation."⁴⁰ The Court also suggested that simple copying may not deserve full First Amendment *242 protection: "The First Amendment securely protects the freedom to make--or decline to make--one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."⁴¹

In concluding that Congress's extension of the copyright term did not run afoul of the First Amendment, the Court expressed strong confidence in "copyright's built-in free speech safeguards" to protect free speech interests.⁴² These "built-in First Amendment accommodations" are two-fold: the first accommodation is the "idea/expression dichotomy."⁴³ Copyright law distinguishes between ideas and expression and protects only original expression.⁴⁴ For example, the idea of an anthropomorphic, bipedal, animated cartoon mouse is not protectable, but Walt Disney's expression of the character Mickey Mouse is protectable. The idea/expression dichotomy prevents an individual from gaining monopoly privileges over an idea by only protecting an individual's original expression of an idea, rather than extending protection to the idea itself.⁴⁵ Not only are ideas unprotected by copyright law, but facts also fall outside of the protection as well.⁴⁶ Ideas and facts are freely available for anyone to use.

The second First Amendment accommodation is the "fair use doctrine." The fair use doctrine protects individuals who use an author's original expression in certain circumstances.⁴⁷ These circumstances include criticism, comment, news reporting, *243 teaching, scholarship, and research.⁴⁸ The Copyright Act enumerates four factors courts can use to determine whether a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁹

These four statutory factors must be "weighed together, in light of the purposes of copyright."⁵⁰

The Court's confidence in the idea/expression and fair use safeguards was so strong that it noted that when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."⁵¹ By implication, copyright protection that steps outside the "traditional contours" is subject to First Amendment review.⁵² The Court refused to go so far as to say that copyright protection is "categorically immune from challenges under the First Amendment."⁵³ However, the Court acknowledged that Congress is given wide latitude to enact legislation that is within the traditional contours of copyright protection: "[w]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."⁵⁴ While Congress is given broad deference to enact copyright protection that is within its traditional contours, such deference is not warranted when the protection exceeds *244 its traditional contours. Before exploring the traditional contours of copyright protection of music, we must explore the power of music as well as the First Amendment protections for music.

II. The Power of Music

Music is often at the heart of our most profound personal and social experiences.⁵⁵ As professor of musicology and anthropology Thomas Turino observes: "[p]eople in societies around the world use music to create and express their emotional inner lives, to span the chasm between themselves and the divine, to woo lovers, to celebrate weddings, to sustain friendships and communities, to inspire mass political movements, and to help their babies fall asleep."⁵⁶ Music has a long history in the human experience.⁵⁷ Researchers speculate that Neanderthals used a form of holistic song to communicate, to find a mate, soothe their progeny, and cement their social groupings.⁵⁸ Music is used in strikingly similar ways today.

A. Music Therapy Can Be Used to Promote Healing and Wellness

Modern research shows that music has tangible and articulable benefits for us individually as well as for our collective social groups. Music therapy can assist with a range of medical and behavioral issues from reducing the likelihood of drug *245 abuse relapse⁵⁹ to engaging with autistic children.⁶⁰ Music therapy has also been shown to benefit individuals of all ages, by reducing the pain of heel-stick procedures on premature infants,⁶¹ helping troubled adolescents engage with their therapists,⁶² and reducing confusion and agitation in elderly adults after surgery.⁶³ Music has been shown to help with healing⁶⁴ as well as pain management.⁶⁵

*246 The scientific literature shows that music has an observable effect on our brains.⁶⁶ Studying the way the brain processes music provides unique and helpful insights into the way the brain processes information, emotions, and speech.⁶⁷ This research is fruitful because listening to music involves many cognitive and emotional components with distinct brain substrates.⁶⁸

The music we enjoy has been shown to trigger the pleasure and reward centers of the brain.⁶⁹ Specifically, music has been seen to affect the limbic and *247 paralimbic structures of the brain, including the amygdala, ventral striatum, and hippocampus, which are our emotion processing centers.⁷⁰ This research thus suggests that because our emotion processing structures of the brain are activated by music, the emotions triggered by music are “real” emotions, not merely illusions.⁷¹

In addition to activating our emotion centers, making music has even been shown to alter the physical structures of the brain, from enhancing certain neural systems to changing the anatomical structure and tissue density.⁷² Long-term musical training may even affect how we process information, by enhancing auditory and visual memory functions.⁷³ Such research is still ongoing; although there is little *248 disagreement that music affects us and has deeply powerful advantages, only recently are we availing ourselves of the full potential of those benefits.⁷⁴

B. Music Can Be a Vehicle for Cross-Cultural Education and Reconciliation

In addition to the benefits music therapy has for the individual, modern scholarship has tracked the use of music in instigating and resolving larger social conflicts.⁷⁵ The power of music can be harnessed to transform social conflicts by encouraging empathy, creativity, and nonviolence.⁷⁶ Researchers from fields as diverse as ethnomusicology and political science have examined the effect music can have on our larger social networks.⁷⁷ Music can be a vehicle for healing after a social conflict⁷⁸ as well as cross-cultural education and reconciliation.⁷⁹ For example, *249 ethnomusicologist Benjamin Brinner has investigated collaborations between Palestinian and Israeli musicians that combine Hebrew songs with Arabic arrangements to create new, unified musical expressions.⁸⁰ Scholars are exploring how music may provide a unique medium for examining the dynamic character of conflict as well as offering a vehicle for resolving conflict. In addition to aiding reconciliation efforts, music is an effective means of educating, mobilizing, and inspiring political change.⁸¹

C. Music Can Be a Vehicle to Educate and Inspire Political Change

Songs of protest and social awareness have been sung throughout our history.⁸² As Mariana Whitmer, a historical musicology scholar, has noted, “[t]he history of America is reflected in our music, and readily discernible in the songs we have sung.”⁸³ For her, “[t]here is nothing that so aptly reflects what Americans are experiencing and feeling than the songs we sing and listen to” because these *250 “[s]ongs have entertained us, distracted us, and inspired us.”⁸⁴ Indeed, these songs “reflect the fabric of our lives as they provide a chronicle of the past and are a most effective tool for acquainting students with that history and culture.”⁸⁵

Political songs have been written for the Revolutionary War, the Civil War, the Vietnam War, the Civil Rights movement, the nuclear arms race, and for countless causes in between.⁸⁶ The purpose of these songs is often to provide a unifying ethos for a movement as well as a call to action.⁸⁷ As Mark Matten, a professor of political science, has observed, music can function as either “social cement or social solvent.”⁸⁸ These songs serve to rally existing group members as well as to educate potential new recruits.⁸⁹ Education can come in the form of introducing new ideas and information, or providing a new lens through which to view old ideas, or connecting together ideas the listener may not have associated before.⁹⁰ Education may even come in the form of personal enlightenment because, as professor of sociology Rob Rosenthal notes, music “often crystallizes ideas that are floating around but have not yet coalesced into a coherent ideology for the individual, or that need an outside voice of authority to bring them to consciousness and self-acceptance.”⁹¹ While critics argue that music fails to

have a hypodermic needle effect *251 of single-handedly changing listener attitudes, music may have some inculcating and priming effect for listeners, which predisposes them to support certain organizations and movements.⁹²

As our postmodern sensibilities now appreciate, messages sent by the speaker are not always the same as those received by the listener.⁹³ Moreover, culture and politics shape music as much as music shapes culture and politics.⁹⁴ While the politics and the music of the 1960s is no exception, technological innovations in the mid-twentieth century affected the reach of the music and its messages. As professor of music Arnold Perris explained, “[t]he protest songs of past generations were spread slowly and often to a limited audience. The potential of the electronic media in the 1960s was of overwhelming power. A song heard on television was a message delivered to millions.”⁹⁵

The electronic media of today offers to expand the reach of music and its messages worldwide.⁹⁶ Internet radio can be used as a tool for social and political activists. Eric Lee, founding editor of an international trade union organization, uses Internet radio to play music: “authentic music of protest.”⁹⁷ In describing the music, Lee says, “[a]ll this music, all of it, is utterly subversive. Listen to this music *252 and you’ll want to change the world. And that’s the whole point of the station.”⁹⁸

As discussed previously, the power of music can be harnessed in pursuit of peace as well as social change, but as Professor Kent notes, “[t]hat contribution is limited so long as it is held captive by those in power.”⁹⁹ And those in power, namely the “globalized music industry,” serve the market incumbents.¹⁰⁰ The Internet offers a vehicle to redistribute that power and diversify the marketplace of ideas.

D. Music Transmitted by Internet Radio Fosters Diversity

Music is an indispensable vehicle for adding to the marketplace of ideas. Internet radio fosters diversity of music and, correspondingly, of ideas.¹⁰¹ The ubiquity and pervasiveness of radio allows it to permeate our daily lives and draw us together.¹⁰² We multi-task while listening to it; it accompanies us while driving in the car, cooking dinner, or walking in the park.¹⁰³ Internet radio is rapidly gaining popularity, with more than a quarter of all Internet users in the U.S. listening to Webcasts each month.¹⁰⁴

Internet radio is different from other modes of mass communication in that it is easy to access, inexpensive to operate, and almost anyone can be a Webcaster.¹⁰⁵ Unlike FCC-regulated broadcasters, we could all be Webcasters. The line between listener and speaker is thinner online than it has ever been with other modes of *253 mass communication; new software and technologies make the line more blurred than ever before.¹⁰⁶

Unlike the brick-and-mortar, hard-copy world, the digital sphere offers a uniquely equalizing force where extensive distribution networks are unnecessary because content can be distributed instantly on the Internet. Before the popularity of online music, “most consumers learned about new music from major media radio, television and print resources, and labels could predict, with some accuracy, what consumers would buy.”¹⁰⁷ Now, as music business analysts note, “[t]he Internet is shifting the axis of control towards consumers.”¹⁰⁸

The modern music industry is characterized by radical inequality in ability to distribute music. The major music industry companies typically promote only a handful of musicians heavily and aggressively, rather than spreading their resources more evenly over a larger group of musicians.¹⁰⁹ The diversity of music offered online allows for greater variety to satisfy varying individual preferences.¹¹⁰ Internet radio is ideally suited to cater to niche markets,¹¹¹ which are excluded from the *254 mainstream by market incumbents.¹¹² Indeed, as journalist Claire Cain Miller noted, “Internet radio is one of the few bright spots in the music industry, giving airplay to dozens of genres and thousands of artists that never received airplay before”¹¹³ Airplay is critical to creating consumer demand¹¹⁴ and consumer demand is critical to maintaining the saliency and economic value of a song.¹¹⁵

Internet radio offers the potential to unlock the current stranglehold the music industry has on the diversity of music in the marketplace.¹¹⁶ The potential of Webcasting to challenge the hegemonic power of media conglomerates has not fully materialized¹¹⁷ because the fledgling technology has been hamstrung by copyright regulations that were crafted by market incumbents.¹¹⁸ These regulations are outlined in Part IV *infra* and the efforts of market incumbents to use copyright regulations *255 to maintain market dominance are discussed in Part V *infra*. The next section explores the scope of First Amendment protections for music.

III. First Amendment Protections for Music

Art is protected by the First Amendment. The Supreme Court has observed that artistic expression, including a “painting of Jackson Pollock, music of Arnold Schönberg, or [the] Jabberwocky verse of Lewis Carroll,” is “unquestionably shielded” by the First Amendment.¹¹⁹ Courts are not in the business of judging the quality of works as a prerequisite for determining if they receive First Amendment protection; indeed, art need not rise to the level of good, or even popular, to receive First Amendment protection.¹²⁰ Courts are also not in the business of distinguishing between speech that merely entertains and speech that informs because the line between the two is “too elusive.”¹²¹ The Supreme Court has broadly conceived the notion of “speech” and has not limited it to the spoken word: “[T]he Constitution looks beyond written or spoken words as mediums of expression.”¹²² As such, there is little debate that “[m]usic, as a form of expression and communication, is protected under the First Amendment.”¹²³

*256 A. The Listener’s Right to Hear Music

Diversity of music promotes the marketplace of ideas.¹²⁴ Music can often carry powerful social and political messages. Listeners have a First Amendment right to hear these messages. Access to the free flow of ideas is key to informed and reliable decision making in a democracy.¹²⁵ The public has a broad right to receive information, from matters of public concern¹²⁶ to matters of economic interest.¹²⁷ As Justice Brennan observed, “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.”¹²⁸ Listeners thus have a recognized right to receive information.

While the Supreme Court has not had occasion to decide a First Amendment case asserting the specific right to receive music, the Court has confirmed that the right to receive ideas and information is “vital to the preservation of a free society.”¹²⁹ In *Martin v. City of Struthers*, the Court struck down a municipal ordinance that prohibited door-to-door distributors of literature from knocking on the front door or ringing the doorbell.¹³⁰ Justice Black, speaking for the Court, declared that “[t]he right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.”¹³¹ The Court has also protected an addressee’s right to receive Communist propaganda through the mails.¹³² In *Lamont v. Postmaster General*, the Court invalidated a statute directing the Postmaster General not to deliver a publication *257 deemed “communist political propaganda” without a written request from the addressee because such a requirement imposed an unconstitutional burden on the addressee’s First Amendment right to receive protected speech.¹³³

Control of access to information and ideas is tantamount to controlling what people think. In *Stanley v. Georgia*, the Court struck down a state law outlawing the private possession of obscene material because the statute impinged upon a viewer’s right to receive information in the privacy of his home: “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.”¹³⁴

In 1969, a unanimous Court highlighted the listeners’ right to receive information: “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹³⁵ The *Red Lion* decision upheld the FCC’s “fairness doctrine,” which required broadcast stations that discussed issues of public concern to give fair coverage to each side of the issue.¹³⁶ The Court explained,

[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences is crucial here [and] [t]hat [right] may not constitutionally be abridged¹³⁷

Listeners not only have an interest in matters of public concern, but, as the Court has recognized, listeners have an interest in knowing that a vendor will sell X commodity at Y price.¹³⁸ In extending First Amendment protections to commercial speech, the Court emphasized the value of such speech to listeners.¹³⁹ In *Virginia *258 State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court observed that the free flow of commercial information is “indispensable to the proper allocation of resources in a free enterprise system” because it informs the numerous private decisions that animate the system.¹⁴⁰ The Court also noted that a “particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”¹⁴¹ If promoting the free flow of information is “primarily an instrument to enlighten public decision making in a democracy, [the Court] could not say that the free flow of information does not serve that goal.”¹⁴²

Listeners have a right to receive not only political and social messages, but also esthetic ideas and experiences.¹⁴³ This is a protected corollary of a speaker's First Amendment rights.¹⁴⁴ As First Amendment scholar Rodney Smolla has noted, "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping."¹⁴⁵ The Supreme Court has made it clear that a listener's right to receive information is a key component of an "uninhibited marketplace of ideas"¹⁴⁶ and is "fundamental to our free society."¹⁴⁷ This right to listen is not preconditioned on whether the speaker is making "other people's speeches"¹⁴⁸ or making her own original speech; rather, it focuses on the right of the listener to hear the speaker's message, irrespective of the original source.

B. The Speaker's Right to Play Music

The First Amendment protects Webcasters' playlists because the selection process of which music to play - and correspondingly, which music not to play - reflects the expressive and communicative choices of the speaker.¹⁴⁹ The selection *259 process reflects what music the speaker believes is valuable and worth distributing to others. The Supreme Court has explained, the "[l]iberty of circulating is as essential . . . as liberty of publishing; indeed, without the circulation, the publication would be of little value."¹⁵⁰

The First Amendment protects not only the original speaker, but also a non-original speaker's edited compilation of speech.¹⁵¹ The dissemination of compilations of non-original speech is within the core of First Amendment protections when such compilations reflect the expressive voice of the compiler in deciding which speech by others to transmit. The Supreme Court, in reviewing legislation that required cable operators to carry and transmit broadcast stations through their proprietary cable systems, explained that such "must-carry" provisions implicated "the heart of the First Amendment," namely, "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."¹⁵² The Court has a history of providing broad protection for speakers to decide which messages deserve expression because such decisions reach the heart of the First Amendment.¹⁵³

IV. Progression of Copyright Protection for Music

The Constitution expressly authorizes copyright protection,¹⁵⁴ and copyright laws have existed since 1790.¹⁵⁵ The first Act limited its protection to maps, charts, *260 and books, which were the main means by which information was recorded and disseminated in the late eighteenth century.¹⁵⁶ The first incarnation of domestic copyright law offered no protection for musical compositions.

A. Protections for Music Were First Extended to Printed Musical Compositions

Printed musical compositions first became federally protected copyrightable subject matter in 1831.¹⁵⁷ At that time, the sale of sheet music and piano rolls resulted in a copyright royalty payment for composers and was a main revenue source for songwriters and music publishers.¹⁵⁸ The Dramatic Composition Act of 1856 provided that music accompanying stage plays enjoyed a right of public performance.¹⁵⁹ Nearly forty years later, in 1897, the public performance right was extended to all types of musical compositions, not just songs written to accompany dramatic plays.¹⁶⁰ To publicly perform a song, the performer now needed the permission of the song composer; composers granted this permission in the form of a performance license and received a royalty fee in exchange. In 1909, Congress again amended the Copyright Act to introduce the "right of mechanical reproduction" and compulsory license fees.¹⁶¹ Now the holder of the musical composition work received both a royalty for the sale of sheet music as well as for public performances of the work.¹⁶²

*261 Sound recordings did not receive any federal copyright protection until the 1970s.¹⁶³ Prior to 1972, Professor Lionel Sobel explained "sound recordings were not protected by federal copyright law at all--not even against piracy."¹⁶⁴ Congress's amendment gave the sound recording copyright holder (recording artists and record labels) control over the reproduction and distribution of the recordings, but not over their public performances. This limited protection meant musical compositions were eligible for performance royalties, but sound recordings were not. Radio and broadcast stations were required to pay a performance royalty to songwriters each time a song was played, but were not required to pay the recording artists.

B. Expanded Protections of Sound Recordings Were Introduced in the Second Half of the Twentieth Century

In light of the technological advancements of the mid-twentieth century, Congress made a comprehensive overhaul of copyright law in the 1976 Act.¹⁶⁵ Accordingly, sound recordings gained fuller copyright protection under that Act.¹⁶⁶ In the mid-1990s, Congress expanded the scope of protection by creating a new exclusive right to publicly perform sound recordings by means of “digital audio transmission.”¹⁶⁷ Prior to the Digital Performance Right in Sound Recordings Act *262 (“DPRSRA”), sound recordings were the only copyrighted works not accorded a federal public performance right.¹⁶⁸ However, the DPRSRA applied only to “digital” audio transmission, so radio and broadcast stations that transmitted analog signals were still not required to pay a royalty to recording artists for playing their songs.

1. Digital Performance Right in Sound Recordings Act of 1995

The DPRSRA created a complex¹⁶⁹ “three-tiered system,”¹⁷⁰ categorizing license requirements for digital audio transmissions of sound recordings into separate rates for (1) interactive services, (2) non-interactive subscription transmissions, and (3) non-interactive non-subscription transmissions.¹⁷¹ An interactive service is one that enables individuals “to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording . . . which is selected by or on behalf of the recipient.”¹⁷² Such interactive services are not eligible for compulsory licenses and thus must negotiate royalty rates privately with the copyright holders. Interactive services are subject to the copyright holder’s full copyright authority because these services were seen as the main competition to CD sales.¹⁷³ On the other hand, non-interactive transmission services could either be “subscription” or “non-subscription” transmission services. Subscription transmissions are controlled and limited to particular recipients, who have paid for *263 the transmission.¹⁷⁴ A non-subscription transmission is defined as “any transmission that is not a subscription transmission.”¹⁷⁵

2. Digital Millennium Copyright Act of 1998

In 1998, the Digital Millennium Copyright Act (“DMCA”) expanded the scope of the statutory license system and imposed a statutory royalty obligation on non-interactive subscription and non-subscription digital music providers.¹⁷⁶ While the DPRSRA created a three-tier system, the DMCA in effect merged non-interactive subscription and non-interactive non-subscription together leaving interactive transmissions on the one hand and non-interactive transmissions (subscription and non-subscription) on the other. As a direct result of the 1998 amendments, nearly all non-interactive Internet radio stations are obligated to pay the statutory royalty fee for sound recording and musical work copyrights. In other words, Internet radio is obligated to pay a royalty for both the sound recording and musical work copyrights; however, terrestrial radio is still exempt from paying a royalty for the sound recording.

3. Sound Recording Performance Complement

Under current copyright law, to enjoy the benefits of a compulsory license, Webcasters must comply with specific restrictions on how often music from the same artist, or from the same album, may be played. These restrictions, called the “Sound Recording Performance Complement,” have two components:

(1) No more than three selections from any one album may be broadcast within any three-hour period, and no more than two such selections may be played consecutively;¹⁷⁷ and

(2) No more than four different selections by the same featured artist, or from any set or compilation, may be broadcast within any three-hour period, and no more than three such selections may be played consecutively.¹⁷⁸

In addition to complying with the Sound Recording Performance Complement, Webcasters have additional statutory conditions that must be satisfied to enjoy *264 the benefits of the compulsory license. These additional conditions include the following:

- A Webcaster may not make prior announcements of the playlist that disclose the title of the songs, names of the albums, or the names of the recording artists (with exception);¹⁷⁹
- A Webcaster’s archived program must be at least five-hours long and cannot be made available for more than two weeks;¹⁸⁰
- A Webcaster’s continuously looped program must be at least three-hours long;¹⁸¹
- A Webcaster is prohibited from suggesting a false affiliation between the recording artist and the Webcaster or a particular

product or service,¹⁸²

- A Webcaster must cooperate with the sound recording copyright owners on technological protection from user scanning, which is technology employed by listeners to select a particular song to be transmitted (with exception);¹⁸³
- A Webcaster may not affirmatively cause or encourage the duplication of songs, and if technologically feasible the Webcaster must limit the ability of listeners to duplicate songs directly in a digital format;¹⁸⁴
- A Webcaster may not transmit bootleg copies and must use sound recordings that are legally sold to the public or authorized for performance by the copyright owner of the sound recording (with exception);¹⁸⁵
- A Webcaster must accommodate and cannot interfere with the transmission of technical protection measures that are used by the sound recording copyright owners to identify or protect copyrighted works (with exception);¹⁸⁶ and
- A Webcaster must display the title of the song, name of the album, and the recording artist's name to the listener as the song is being played (with exception).¹⁸⁷

***265** The Sound Recording Performance Complement and these additional statutory conditions have been called “one of the DMCA’s most cumbersome provisions, entailing an inordinate compliance burden for webcasters, small and large alike.”¹⁸⁸ Music transmissions that fail to satisfy all of these conditions are ineligible for a statutory license and must be licensed through voluntary negotiations with the owner of the sound recording copyright. In other words, sound recording copyright owners may grant (or withhold) voluntary licenses for digital audio transmissions that do not satisfy all of the conditions for statutory licenses. As law professor Kimberly Craft explained, “[r]eceiving this compulsory license [i]s critical for webcasters; the alternative would require a webcaster to seek out all of the copyright holders of each piece of music played in order to make individualized royalty payments.”¹⁸⁹

Without predictable and affordable statutory royalty rates, Webcasters are at the mercy of copyright holder’s exclusionary powers as well as the power to charge supra-competitive royalty rates.¹⁹⁰ If the copyright holder does not offer an affordable license fee, speakers who wish to communicate through particular songs have no alternate vehicles to express themselves.¹⁹¹

Even complying with the statutory conditions, Webcasters expressive rights are limited. For example, a Webcaster who wants to pay tribute to a recently deceased artist by playing more than two of the artist’s songs consecutively, or more than four songs in a three-hour period, would be prevented from doing so under the terms of the Sound Recording Performance Complement.¹⁹² Terrestrial radio operator’s creative choices in assembling a playlist have never been similarly hampered.

***266** ¹⁹³ Webcasters were largely marginalized at the legislative drafting table and thus their interests were not fully considered.¹⁹⁴

C. The Decade-Long Struggle to Set Sound Recording Royalty Rate

While Congress set the complex parameters for qualifying for a sound recording statutory license, it did not set the terms or rates of the license itself.¹⁹⁵ The Copyright Act authorized voluntary negotiations between the sound recording copyright holders and Webcasters. In the event the parties could not agree on royalty rates, the Librarian of Congress was empowered to establish an arbitration panel to recommend the rate.¹⁹⁶ A decade-long saga ensued and many would-be Webcasters shut down their operations due to the crushing royalty rates that were established. The highlights of the saga are detailed next.

***267** In 1998, negotiations began between Webcasters¹⁹⁷ and the Recording Industry Association of America, Inc. (“RIAA”), the recording industry’s trade association. When the parties were unable to negotiate an industry-wide agreement, a Copyright Arbitration Royalty Panel (“CARP”) was convened in 1999.¹⁹⁸ In 2002, the Librarian of Congress set the Webcaster royalty rates for commercial transmissions at \$0.0007 per performance and non-commercial transmission at \$0.0002 per performance (“Webcaster I”).¹⁹⁹

The 2002 Webcaster I rates provoked an outcry from Webcasters who argued the per-performance rate was ruinous.²⁰⁰ As law professor William W. Fisher explained, a fraction of a penny per performance may seem like a very small number “until one recognizes that each transmission of a song to each listener is counted as a ‘performance.’”²⁰¹ Facing bankrupting royalty

rates, a large number of small Webcasters shut down their operations.²⁰² Some of the remaining ones turned to Congress for relief, and others turned to the judiciary.

***268** In *Beethoven.com LLC v. Librarian of Congress*,²⁰³ a group of Webcasters and the RIAA squared off again. The Webcasters argued that the Webcaster I rates were arbitrarily high, and the RIAA argued they were arbitrarily low.²⁰⁴ During the pendency of the case, Congress stepped in to aid small Webcasters who could not afford the rates. The Small Webcaster Settlement Act of 2002 (SWSA)²⁰⁵ gave small Webcasters additional time to negotiate “alternative,” or reduced, royalty rates with SoundExchange, the performance rights organization that manages royalties on behalf of recording artists.²⁰⁶

The additional time to negotiate the new royalty rates with SoundExchange was critical to the continued existence of these Webcasters.²⁰⁷ At the end of 2002, small commercial Webcasters and SoundExchange reached an agreement and the rates were calibrated to a percentage of a Webcaster’s gross revenue, rather than a per-performance basis.²⁰⁸ In mid-2003, noncommercial Webcasters also reached an agreement with SoundExchange for a flat, annual fee ranging from \$200 to \$500 per channel.²⁰⁹ These privately negotiated rates were effective through the end of 2004.

In 2004, Congress, in the face of blistering criticism of the CARP,²¹⁰ revised the administrative rate-setting process and replaced the CARP with a three-judge Copyright Royalty Board (“CRB”).²¹¹ In January 2005, the Court of Appeals for ***269** the D.C. Circuit upheld the 2002 Webcaster I rates, in *Beethoven.com LLC v. Librarian of Congress*.²¹² Applying the “exceptionally deferential” standard of review it was bound to apply, the court upheld the Webcaster I royalty rate because the Librarian of Congress offered a facially plausible explanation of the rate.²¹³ In February 2005, the Librarian, with the assistance of the CRB, began the process for setting industry-wide rates again.²¹⁴

The CRB issued the new industry-wide rates in May 2007 (“Webcaster II”).²¹⁵ These rates, effective from 2006 through the end of 2010, were on a per-performance basis, rather than a percentage of Webcaster revenue. For commercial Webcasters (small and otherwise) the CRB set the following rates: a per-performance rate of \$0.0008 for 2006, a per-performance rate of \$0.0011 for 2007, a per-performance rate of \$0.0014 for 2008, a per-performance rate of \$0.0018 for 2009, and a per-performance rate of \$0.0019 for 2010.²¹⁶ The CRB also set a \$500 minimum annual fee per channel.²¹⁷ For Webcasters, like Pandora Radio, which offer hundreds of custom channels, this minimum fee would likely be more expensive than the royalty rates.²¹⁸ Noncommercial webcasters were subject to a minimum annual fee of \$500 per channel or station so long as they transmitted no more than 159,140 aggregate tuning hours (“ATH”) per month.²¹⁹

Dire predictions swiftly followed the CRB’s 2007 Webcaster II rates.²²⁰ Again, the crushing royalty rates forced Webcasters, small and large, to cry out for ***270** help.²²¹ Some Webcasters turned to the D.C. Circuit Court for assistance, and others turned to Congress. While the D.C. Circuit Court ultimately upheld the CRB’s Webcaster II rates,²²² Congress proved more facilitative to Webcasters.

In October 2008, Congress stepped in and passed the Webcaster Settlement Act,²²³ which gave SoundExchange and Webcasters the opportunity to negotiate royalty rates for online music, in lieu of the compulsory license rates set by the CRB.²²⁴ When it appeared that SoundExchange and the Webcasters were not going to meet their February 2009 deadline for negotiating new royalty rates, Congress again mobilized and passed the Webcaster Settlement Act of 2009,²²⁵ which gave the parties an additional thirty days to reach an agreement. An agreement was finally struck with SoundExchange and it will be effective through 2015, when the rate-setting process will start anew.²²⁶ Until that time, commercial Webcasters that elected the negotiated rate, rather than the statutory rate, face a graduated per-performance rate of \$0.0015 in 2009, escalating each year to \$0.0025 in 2015.²²⁷

***271** To elect the SoundExchange’s reduced royalty rates, Webcasters were required to opt out of participating in rate-setting proceedings with the CRB for 2011 through 2015.²²⁸ In March 2011, the CRB issued its latest, graduated statutory royalty rates for commercial Webcasters (“Webcaster III”): a per-performance rate of \$0.0019 for 2011; a per-performance rate of \$0.0021 for 2012, a per-performance rate of \$0.0021 for 2013, a per-performance rate of \$0.0023 for 2014, and a per-performance rate of \$0.0023 for 2015.²²⁹ The CRB maintained the \$500 annual flat fee for noncommercial Webcasters who transmit fewer than 159,140 ATH.²³⁰

The public response to the Librarian of Congress’s rate setting was more muted this time.²³¹ Perhaps the third time was the charm. Or perhaps Webcasters who could not afford the previous per-performance rates were already pushed out of the marketplace. Compliance with the Sound Recording Performance Complement is a precondition to eligibility for the statutory royalty rate. The statutory royalty rate has been extensively criticized in the popular press and the legal scholarship

for being ruinously high,²³² administratively burdensome,²³³ and dizzyingly complex.²³⁴ However, the alternative to the statutory rate is the potential for the copyright holder to deny permission altogether. Webcasters that are not eligible for the statutory royalty rate must engage in private negotiations with copyright holders over the *272 royalty rate. In these private negotiations copyright holders may charge any royalty fee they want, or may withhold permission altogether. Therefore, there is no practical alternative for Webcasters but to comply with the Sound Recording Performance Complement.

V. The Expansion of Copyright Protection Is Used to Maintain Market Hegemony

The current copyright law is the product of a minority's special interests,²³⁵ which now places burdensome regulations on would-be Webcasters and limits our access to Internet radio.²³⁶ Copyright regulation of online music, largely the result of intra-industry negotiations, reflects the efforts of market incumbents to maintain their dominance and squelch competitors.²³⁷ Professor of law Robert Denicola has characterized copyright legislation as a "series of contract negotiations" between interest groups without any "independent congressional evaluation of the substance of the negotiated agreements."²³⁸

The music industry has a history of resisting newcomers via copyright law.²³⁹ Professor Neil Netanel has observed that "the incumbent industries have repeatedly deployed their formidable copyright arsenal as a tool to stifle competition from *273 emerging new media and thus to maintain their dominant market position in the production and distribution of music, television programs, movies, journals, and books."²⁴⁰

An example of this behavior can be seen in the treatment of small Webcasters by the RIAA, the recording industry's trade group. Before the 2002 Webcaster I rates were set, there were allegations that "the RIAA refused to deal with small webcasters," "that it was not treating everyone equally," and that some "webcasters were jockeying to curry unfair favor with the RIAA."²⁴¹ Legislators who were key players in advocating for the DMCA began to question the RIAA and its conduct: "We passed the DMCA. We gave you a lot of what you wanted. You told us without it you wouldn't put your content out. What's going on? Are you leveraging your copyrights to impede distribution rather than enhance distribution?"²⁴²

Ever-expanding copyright protections have been leveraged to maintain market dominance.²⁴³ The mind-numbing complexity of the music royalty system, along with the cost-prohibitive royalty rate, has produced a chilling effect on would-be Webcasters. As Professor Fisher noted, after Webcaster I was promulgated about one third of Webcasters shut down.²⁴⁴ The administrative burden of tracking listenership and playlists, along with the cost-prohibitive royalty rate has also had an effect on the gross number of Webcasters as well as the diversity in the marketplace. These regulations encumber niche music more than popular music, because of the number and variety of songs needed to comply with the Sound Recording Performance Complement.²⁴⁵ Commentators have observed that "[t]he *274 rules set forth in the 'sound recording complement' are at best unwieldy, and at worst, thwart the intent and nature of copyright law."²⁴⁶

VI. Copyright Regulation of Webcasters Fails First Amendment Scrutiny

The First Amendment embraces the expressive power of music.²⁴⁷ The First Amendment "unquestionably" protects music - listeners', speakers', and society's interests in music.²⁴⁸ The natural extension of the Court's reasoning in *Eldred v. Ashcroft* is that First Amendment scrutiny of copyright regulation of online music may be warranted when either (1) one's own speech-making abilities are impaired, or (2) the traditional free-speech safeguards are unavailing.²⁴⁹ Both defects exist in the Sound Recording Performance Complement.

A. The Sound Recording Performance Complement Impairs Webcasters' Own Speech-Making Abilities

The Sound Recording Performance Complement impairs the speech-making abilities of Webcasters. As discussed previously, Webcasters have a cognizable First Amendment interest in the creative arrangement and content of their playlists. And this expressive activity is infringed by the limitation that a Webcaster may play, in any three-hour period, no more than three different songs from an album, so long as no more than two songs are played in a row, or four different songs from the same artist, or from any boxed set, so long as no more than three songs are played in a row.²⁵⁰ Webcasters pay a royalty to both the songwriter and the recording artist when a song is played online, but the content of the Webcaster's message is restricted in exchange for the benefit to enjoy the statutory license.

The proposition that a Webcaster can simply decline to comply with the Sound Recording Performance Complement ignores

the practical reality. The prospect of negotiating privately with the rights holders for each song is unthinkable. The practical reality is that Webcasters must be eligible to receive the statutory rate because otherwise their operation is unworkable. But to receive this statutory rate, Webcasters' expressive rights are infringed. While Eldred could be read as only delaying access to copyrighted works whose term was extended for a limited additional *275 time, the Sound Recording Performance Complement is a perpetual burden on a Webcaster's freedom of expression.

B. The Sound Recording Performance Complement is Outside the Traditional Contours of Copyright Protection and Affords No Free Speech Safeguards

In Eldred, the Court shied away from scrutinizing the CTEA under a standard that would render constitutionally suspect previous copyright term extensions.²⁵¹ Congress on at least three prior occasions - principally in 1831, 1909, and 1976-enlarged the term of protection for existing and future copyrights.²⁵² The Eldred Court determined that the CTEA's most recent extension was a rational enactment within Congress's legislative authority conferred by the Copyright Clause.²⁵³ Unlike the CTEA, where it was the term of protection that was again extended, the DPRSRA and the DMCA expanded the scope of protection for digital sound recording. While there may be precedent for incremental enlargements of the scope of protection for music, the restrictions on the arrangement and content of a broadcaster's playlist is unprecedented. The Sound Recording Performance Complement is an entirely new phenomenon in copyright law and is outside the "traditional contours" of copyright protection. Our copyright laws have never before set numerical limits on the amount and arrangement of works that an authorized user could exploit. Therefore, this recent Congressional expansion of the scope of copyright protection for digital sound recordings is not within the traditional contours and is not due the same deference as the CTEA expansion of the term of protection.

Not only are Webcasters' expressive freedoms infringed, but there are no "built-in First Amendment accommodations"²⁵⁴ to shield the Sound Recording Performance Complement from scrutiny. As outlined previously, music is a powerful vehicle to convey ideas and ideas are not protected by copyright law. However, an artist's expression through music is protected by copyright law. Still, the distinction between an idea conveyed in a piece of music and the particular expression of that idea through the medium of music is far from clear. In instances where the message and the medium are inextricably intertwined, the idea/expression dichotomy provides poor protection for others who want to access the idea contained in the copyrighted music.

Additionally, the fair use doctrine is not designed to combat the threat to free expression posed by the Sound Recording Performance Complement. A "fair use" of a copyrighted work means the user need not seek permission or license from the *276 copyright holder.²⁵⁵ In essence, a fair use allows another to use a copyrighted work for free. But Webcasters do not use copyrighted music for free. Webcasters who digitally transmit music pay a royalty to both the songwriter and the recording artist. Yet, the content and organization of their playlists are unduly constrained and there is no mechanism to protect the expressive interests of Webcasters. While the fair use doctrine, as the Supreme Court explained, provides a "guarantee of breathing space within the confines of copyright,"²⁵⁶ this breathing space is of little assistance to a Webcaster who wants to play three songs in a row from a particular album, or play five songs by the same artist within a three-hour period - and pay the statutory royalty rate.

C. The Sound Recording Performance Complement Burdens More Speech Than Necessary and Is Not Narrowly Tailored

First Amendment review often begins with an assessment of the government's purpose in adopting the regulation.²⁵⁷ The Sound Recording Performance Complement was nominally adopted to prevent or reduce piracy.²⁵⁸ Determining if a regulation is content-neutral or content-based, the Supreme Court has explained, turns largely on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."²⁵⁹ A court would likely categorize the Sound Recording Performance Complement as a content-neutral regulation of speech, which would receive intermediate scrutiny.²⁶⁰

Content-neutral regulation of speech survives First Amendment scrutiny if the regulation "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."²⁶¹ The Sound Recording Performance Complement is a sufficiently *277 novel construct within the copyright schema - meaning it is not within the traditional contours of copyright law - such that the government must show that it

burdens no more speech than necessary. Thus, the Sound Recording Performance Complement is not due the deference the Court gave the CTEA.²⁶² Unlike the must-carry regulations that promoted dissemination of local broadcasting through cable networks, which fed the marketplace of ideas, the copyright regulations - in effect, must-not-carry regulations - for Internet radio diminish the marketplace.²⁶³ The marketplace has lost not only a large number of speakers, but the remaining speakers have lost creative control over their messages.

The government must do more than simply identify an important interest to survive intermediate scrutiny. The government must establish that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”²⁶⁴ Moreover, such regulation must be “narrowly tailored to serve a significant governmental interest” and must “leave open ample alternative channels for communication of the information.”²⁶⁵

The harm the government sought to alleviate by creating the Sound Recording Performance Complement was on-demand access to music that would replace CD sales and the likelihood of home copying. However, the numerical limits on the content and arrangement of Internet radio transmissions are a poor solution to that problem. This mechanism not only burdens more speech than necessary to prevent unrestricted exploitation of digital music, but there is no evidence that the Sound Recording Performance Complement in fact remedies the problem. At this time, there are a number of Internet applications that allow users to capture a potentially unlimited amount of music disseminated on Internet radio and download it to their music storage devices.²⁶⁶ Therefore, restricting Webcasters’ playlist content and arrangement is an ineffective means to limit listeners from downloading music from Internet radio transmissions. As commenters have observed, the Sound Recording Performance Complement “impedes small webcasters from legally entering the marketplace, and as a result, prevents new works from reaching the public.”²⁶⁷ *278 These regulations not only fail to prevent piracy, but they have the effect of reducing the vibrant potential of this burgeoning medium. Thus such regulations burden more speech than necessary to alleviate the harms of on-demand access to music for free.

Current copyright law adds an unacceptably high burden on the First Amendment speech interests at issue in the digital transmission of music. It is no longer simply a catalyst for new expression. It is now a sword to strike down rivals and new media.

Conclusion

Music is a uniquely expressive mode of communication. It can often crystallize thoughts and emotions where language alone fails us. As any star-crossed lover who made a mixed tape for a girlfriend or boyfriend can attest, music can say what our own words fail to express. Playing music can be cathartic and expressive for the speaker. It can also communicate across generations and across cultures.

Researchers are now documenting what many anecdotally believed: music can have powerful effects on us. Medical researchers have been tracking the wellness, regenerative, and pain management benefits of music therapy. And political scientists and ethnomusicologist have been exploring the cross-cultural communicative and healing powers of music as well as the power of music to help educate and inspire political change.

Music is a powerful tool. There needs to be adequate “breathing space”²⁶⁸ around the creative choices of Webcasters that transmit music online. The built-in accommodations, which generally shield copyright law from First Amendment scrutiny, afford no protection for a Webcaster’s expressive voice.

The First Amendment provides broad protection for speakers to decide which messages deserve expression; however, Webcasters are effectively denied the ability to make such decisions in their messages. The limitation on the number and arrangement of Webcasters’ playlists restricts their creative choices. Webcasters need the predictability of a statutory royalty rate; thus, they have no choice but to comply with the Sound Recording Performance Complement.

Powerful lobbying efforts of market incumbents have urged the expansion of copyright beyond its “traditional contours.”²⁶⁹ These incumbents have a history of disfavoring small and marginal voices. Congress seems to have ratified this discrimination by promulgating incumbent-friendly copyright regulations. Copyright has expanded beyond the safe-zone within the First Amendment. Copyright regulation of Internet radio - of which the Sound Recording Performance Complement is *279 one example - threatens to strangle this nascent medium as well as the expressive voice of those interested in using it. For these reasons, the Sound Recording Performance Complement cannot withstand First Amendment

scrutiny.

Footnotes

- ^{a1} Assistant Professor of Lawyering Process, Florida Coastal School of Law. J.D., University of Florida, Levin College of Law, 2004; Ph.D., University of Florida, College of Journalism and Communication, 2004; M.A., Florida State University, 1999; B.A., Florida State University, 1998. I am grateful for the thoughtful contributions of Michael Launer, Lucille Ponte, Christopher Roederer, and Jeffrey Schmitt. I also appreciate the able assistance of the TIPLJ editors. As always, any errors or deficiencies are entirely my responsibility.
- ¹ Daniel J. Schneck & Dorita S. Berger, *The Music Effect: Music Physiology and Clinical Applications* 27 (2006).
- ² Gibbs M. Smith, *Joe Hill* 19 (1969). Joe Hill was a labor activist, songwriter, and member of the Industrial Workers of the World (IWW) at the turn of the nineteenth century. *Id.* at 15-20. Professor of political science Courtney Brown has noted “[n]o single person contributed more to the development of the genre of political music in the American labor movement than Joe Hill. (However, some might argue that the legend of Joe Hill is the greatest contributor rather than Joe Hill himself.)” Courtney Brown, *Politics in Music: Music and Political Transformation from Beethoven to Hip-Hop* 111 (2008).
- ³ See, e.g., Hayoung A Lim, *Use of Music in the Applied Behavior Analysis Verbal Behavior Approach for Children with Autism Spectrum Disorders*, 28 *Music Therapy Perspectives* 95, 95-104 (2010) (exploring use of music in treating children with autism spectrum disorders); Rory Allen & Pamela Heaton, *Autism, Music, and the Therapeutic Potential of Music in Alexithymia*, 27 *Music Perception* 251, 259 (2010) (observing that music is a powerful tool for inducing fundamental emotional states in individuals with autism spectrum disorders and suggesting that such inducing of emotions can aid individuals suffering from alexithymia, where they have difficulty identifying and describing feelings and emotional states).
- ⁴ See, e.g., Joke Bradt, *The Effects of Music Entrainment on Postoperative Pain Perception in Pediatric Patients*, 3 *Music & Med.* 150, 150-57 (2010) (finding live music entrainment by a music therapist to be an effective post-operative pain management technique for children and adolescents); Simon Gilbertson & David Aldridge, *Music Therapy and Traumatic Brain Injury: A Light on a Dark Night* 22-35 (2008) (discussing research literature on music therapy for individuals with traumatic brain injuries); Jill M. Sullivan, *Music for the Injured Soldier: A Contribution of American Women’s Military Bands During World War II*, 44 *J. Music Therapy* 282 (2007) (concluding that women’s military bands that performed for convalescing World War II soldiers in hospitals may have been the impetus for the music therapy profession); see also Charles Marwick, *Music Therapists Chime in with Data on Medical Results*, 283 *JAMA* 731 (2000) (discussing range of benefits of rhythmic auditory stimulation).
- ⁵ See, e.g., Johan Galtung, *Peace, Music and the Arts: In Search of Interconnections*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 53, 53-62 (Olivier Urbain ed., 2008) (exploring the uplifting and uniting power of music, and how it can be used to promote peace); Cynthia Cohen, *Music: A Universal Language?*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 26, 38 (Olivier Urbain ed., 2008) (“Music is a powerful medium for expression, communication, healing, and transformation. As peace builders, we can access this potential when we embrace not only musics’ [sic] universal appeal, but their particularities as well.”).
- ⁶ See, e.g., Joseph J. Moreno, *Orpheus in Hell: Music in the Holocaust*, in *Music and Manipulation: On the Social Uses and Social Control of Music* 264 (Steven Brown & Ulrik Volgsten eds., 2006) (discussing the complex ways music was used during the Holocaust: for humiliation, torment, and deception by the Nazis, and for distraction and self-affirmation by the prisoners); George Kent, *Unpeaceful Music*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 108-09 (Olivier Urbain ed., 2008) (explaining that the purpose of war music or hate music is to “build solidarity, whether among racist politicians, neo-Nazis, or combat soldiers,” and that such ties are important because group members often seek and are motivated by the approval of their cohorts); Marie Korpe, et al., *Music Censorship from Plato to the Present*, in *Music and Manipulation: On the Social Uses and Social Control of Music* 252-58 (Steven Brown & Ulrik Volgsten eds., 2006) (exploring link between censorship of music and propaganda in Nazi Germany, the Soviet Union, and Apartheid South Africa).
- ⁷ See, e.g., Pat Gilbert, *Passion is a Fashion: The Real Story of the Clash* 364 (2004) (“The Clash may have woken up Midwest teenagers to the terrible things their government was doing in their name in Nicaragua and El Salvador.”); Ron Eyerman & Andrew Jamison, *Music and Social Movements: Mobilizing Traditions in the Twentieth Century* 24 (1998) (“[I]n the context of

the social movements of the 1960s, American folk-inspired rock music became a major source of knowledge about the world and their own place in it for millions of youth around the globe.”).

8 U.S. Const. art. I, § 8, cl. 8. To this end, Congress created copyright law to protect original expression fixed in a tangible medium of expression. 17 U.S.C. § 102 (2006).

9 U.S. Const. amend. I. Notwithstanding the simplicity and elegance of the text of the First Amendment, “[s]peech’ is an elusive term, and judges and scholars have debated its bounds for two centuries.” *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001).

10 Courts generally deny any conflict between copyright laws and the First Amendment. See, e.g., *Harper & Row Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (approving the argument that copyright’s idea/expression dichotomy “strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression”); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (“[C]opyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts.”); *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“[P]rotection is given only to the expression of the idea-not the idea itself.”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (concluding that 2 Live Crew’s parody of Roy Orbison’s “Oh Pretty Woman” may be a fair use within the meaning of the Copyright Act without exploring First Amendment concerns); *Roy Export Co. Establishment of Vaduz, Liechtenstein v. CBS*, 672 F.2d 1095, 1100 (2d Cir. 1982) (observing that the “fair use doctrine” resolves conflicts between interests protected by copyright laws and the First Amendment).

11 Modern copyright law provides that for certain rights--like the right to make a “cover” version of a song--a copyright holder has no ability to exclude others, but is compensated with a compulsory, statutory license. When a copyright holder is compelled by statute to license a work, and thus may not deny a user permission, such a license is referred to as a “compulsory” or “statutory” license. In exchange for being compelled to license a work, the copyright holder is entitled to receive a royalty. For example, a “compulsory mechanical license” allows a musician to record her own version of a song even when the musical composition copyright--and the corresponding right to exclude others from making such a derivative work--belongs to someone else. If a musician (Alien Ant Farm) wants to record a song (“Smooth Criminal”), the copyright holder of the musical composition (Michael Joe Jackson) cannot deny permission and is compensated with a mechanical license. See 17 U.S.C. § 115 (2006 & Supp. IV 2010) (defining scope of rights for copyright holders of musical compositions); see also Al Kohn & Bob Kohn, *Kohn on Music Licensing* 732 (4th ed. 2010) (explaining that “[e]ven though far removed from the mechanical reproduction of music by piano rolls and music boxes, recordings of music in records, tapes, compact discs, and digital downloads continue to be referred to as mechanical reproductions,” for which a “mechanical license” is needed) (emphasis omitted). It would be administratively costly, if not impossible, for individual songwriters to grant licenses and collect royalty payments for the mechanical reproductions. Accordingly, songwriters often use representatives, like the Harry Fox Agency, to license their songs for use in sound recordings. See About HFA, HarryFox.com, [http:// www.harryfox.com/public/AboutHFA.jsp](http://www.harryfox.com/public/AboutHFA.jsp) (Harry Fox Agency describing itself as “the foremost mechanical licensing, collection, and distribution agency for music publishers in the U.S.”). In addition to mechanical licenses, songwriters also grant public performance licenses to users who publicly play their music, like restaurants, shopping malls, and broadcast stations. As with the administration of mechanical licenses, performing rights organizations (PROs) emerged to help songwriters “police, license, and otherwise administer” their public performance right. Marshall Leaffer, *Understanding Copyright Law* 362 (4th ed. 2005). These organizations, including ASCAP and BMI, each represent a large number of songwriters and function as the middleman between songwriters and radio and television stations by licensing their constituents’ songs and collecting the royalty fees. Kohn & Kohn, *supra*, at 1263. For users that make frequent public performances, PROs grant “blanket licenses.” Such licenses authorize a fee-paying station to play all of the songs within an organization’s repertoire, as often as the station wants for a stated term, usually a year. See Kohn & Kohn, *supra*, at 1263.

12 Generally, these include the exclusive right to (1) reproduce, (2) prepare derivatives, (3) distribute copies, (4) perform the work publicly, (5) display the work publicly, and (6) in the case of sound recordings, to perform the work publicly by means of a digital audio transmission. 17 U.S.C. § 106 (2006). A copyright holder’s bundle of rights is divisible. 17 U.S.C. § 201(d)(2) (2006); Kohn & Kohn, *supra* note 11, at 379-80. The ability to assign and license rights, as well as to exclude others from using a work, is a fundamental feature of copyright law. For example, a copyright holder may assign the publishing rights to one entity, assign the public performance rights to another, and retain the right to prepare derivatives. In practice, music publishers, rather than songwriters, typically hold all of the musical composition copyrights. M. William Krasilovsky & Sidney Shemel, *This Business of Music: The Definitive Guide to the Music Industry* 162, 174 (10th ed., Watson-Guptill 2007); William W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* 51, 54 (2004). Similarly, record companies, rather than recording artists, often hold the copyrights to the sound recordings. In addition to the right to assign, copyright holders have the right to exclude other users.

- 13 These two copyrights may be held by different people and each copyright has different protections. The musical composition may be written by one individual (Irving Berlin), for which a copyright is available (“White Christmas”), and a sound recording of the work may be made by another (Bing Crosby), for which a separate copyright exists. For simplicity, the creator of a musical composition will be referred to as a “songwriter” or “composer” and the sound recording performer as a “musician” or “recording artist.” Admittedly, these labels are overbroad and may not apply to all musical works; however these short-hand descriptions are used in this Article to illustrate the various rights and royalties available for copyrighted music.
- 14 Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid?*, 22 *Loy. L.A. Ent. L. Rev.* 1, 15 n.157 (2001).
- 15 17 U.S.C. § 106(6) (2006) (providing copyright holders the exclusive right, “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission”).
- 16 See 17 U.S.C. § 114(d)(1)(B)(i)(I) (2006) (referring to a traditional, AM/FM radio station, licensed by the Federal Communications Commission, as a “terrestrial broadcast station”).
- 17 Leaffer, *supra* note 11, at 367 (“[W]hen a radio station plays a popular song, only the copyright owner of the musical work may claim royalties for the performance of the musical composition.”).
- 18 See 17 U.S.C. § 114(d)(1) (2006). Or more specifically, the record label does not get compensated. Typically, the rights holder of a sound recording is the record company that commissioned the work. Kohn & Kohn, *supra* note 11, at 588. See also Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, As Soon As We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 *Hastings Comm. & Ent. L.J.* 1, 9-10 (2001) (“The actual artist usually retains very few intellectual property rights in the work; in a standard recording or publishing contract, the artist serves in a work-for-hire capacity and gives away most existing intellectual property rights to the publisher and/or label in exchange for their efforts of manufacturing, promoting and distributing the work. In exchange, the artist receives a percentage of sales, either negotiated or statutory, called royalties.”).
- 19 See Kohn & Kohn, *supra* note 11, at 699-700 (explaining that the standard songwriter publishing contract provides that the songwriter assign his or her copyrights in the composition to the music publisher in exchange for royalty fees).
- 20 See Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 *Ent. L. Rep.*, Nov. 1996, at 2 (“[T]o get broadcasters and music publishers to agree to a public performance right for record companies and recording artists, it was necessary for the record industry to agree to accept a very narrow and specific right. Thus this new right for public performances by means of ‘digital audio transmission’ is the only type of public performance right enjoyed by owners of the copyrights to sound recordings.”).
- 21 The statute defines “sound recording performance complement” as:
[T]he transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than--
(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or
(B) 4 different selections of sound recordings--
(i) by the same featured recording artist; or
(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively:
Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.
17 U.S.C. § 114(j)(13) (2006).
- 22 *Id.*

- 23 Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (concluding that when copyright protection is within its “traditional contours,” copyright law’s “built-in First Amendment accommodations,” namely the idea/expression dichotomy and fair use defense, provide adequate free speech protections).
- 24 Eric S. Slater, Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters, 6 Media L. & Pol’y 25, 26 (1997) (“The Internet enables all of us to potentially become broadcasters.”). See also Steven M. Marks, Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption, 20 Loy. L.A. Ent. L. Rev. 309, 312 (2000) (Webcasting has “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.”).
- 25 George Kent, a professor of political science, argues that “[t]he music system, especially that for popular music, reinforces global inequities, and diverts resources away from where they are most needed.” George Kent, Unpeaceful Music, in Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics 109-10 (Olivier Urbain ed., 2008). Kent further explains that “[i]n this commodification process there is a systematic trivialization of music.” Id. at 110.
- 26 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).
- 27 See Harper & Row, Publ’rs, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (referring to copyright’s economic incentives as “the engine of free expression”).
- 28 Cf. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (describing the fair use doctrine, one of copyright law’s built-in First Amendment accommodations, as a “guarantee of breathing space within the confines of copyright”).
- 29 Eldred, 537 U.S. at 208 (upholding the 20-year extension conferred by the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998)).
- 30 See generally Amanda S. Reid, Play It Again, Sam: Webcasters’ Sound Recording Complement as an Unconstitutional Restraint on Free Speech, 26 Hastings Comm. & Ent. L.J. 317, 344 (2004) (arguing that the sound recording performance complement fails First Amendment scrutiny).
- 31 Tonya M. Evans, Sampling, Looping, and Mashing ... Oh My! How Hip Hop Music is Scratching More than the Surface of Copyright Law, 21 Fordham Intell. Prop. Media & Ent. L.J. 843, 871 (2011). See also Kohn & Kohn, supra note 11, at 399 (“In this country, the copyright laws governing the original 13 states were based largely upon the Statute of Anne.”); L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 Emory L.J. 909, 931-32 (2003) (same).
- 32 U.S. Const. art. I, § 8, cl. 8 (Congress has the authority “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
- 33 Patterson & Joyce, supra note 31, at 943 n.94.
- 34 Eldred, 537 U.S. at 219. The Court seems predisposed to conclude that the Founding Fathers would not promulgate laws incompatible with free speech principles, but perhaps the Court should not be so generous. See Alien and Sedition Acts, four different acts passed over several weeks in 1798, which were used to curtail criticism of the government: Naturalization Act of June 18, 1798, ch. 54, 1 Stat. 566; Alien Friends Act of June 25, 1798, ch. 58, 1 Stat. 570; Alien Enemies Act of July 6, 1798, ch. 66, 1 Stat. 577; Sedition Act of July 14, 1798, ch. 74, 1 Stat. 596. For a deeper discussion on the Alien and Sedition Acts, see generally James M. Smith, Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties (1956).

35 Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 Colum. J.L. & Arts 509, 509 (2007).

36 See, e.g., *Eldred*, 537 U.S. 186 (upholding copyright amendment that extended copyright term for existing copyrighted works by 20-years); *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005) (upholding copyright amendment that restored copyright protection to certain foreign works that had fallen into the public domain); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (upholding copyright amendment that changed the copyright system from an opt-in system to an opt-out system), cert. denied 552 U.S. 1096 (2008); *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010) (upholding copyright amendment that restored copyright protection to works that had entered the public domain), cert. granted 131 S. Ct. 1600 (Mar. 7, 2011).

37 Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998).

38 *Eldred*, 537 U.S. at 186.

39 *Id.* at 198-99. Justices Stevens, *id.* at 222 (Stevens, J., dissenting), and Breyer, *id.* at 242 (Breyer, J., dissenting), wrote separately, opining that the CTEA’s retrospective term extension did indeed violate the Copyright Clause’s limitation that the protection endure only for “limited [t]imes.”

40 *Id.* at 221.

41 *Id.* This phrasing has not escaped criticism. See, e.g., Arlen W. Langvardt & Tara E. Langvardt, *Caught in the Copyright Rye: Freeing First Amendment Interests from the Constraints of the Traditional View*, 2 Harv. J. Sports & Ent. L. 99, 137 (2011) (“The Court probably was incorrect in arguing that the First Amendment ‘bears less heavily when speakers assert the right to make other people’s speeches.’”); Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 Hastings L.J. 1083, 1086 (2010) (“Unfortunately, the Court’s simplistic distinction between speaking and ‘making other people’s speeches’ cannot support the analytical weight it is being forced to bear. The use of copyrighted material has substantial speech value to both the user and the public, whether or not it is copied.”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 563 (2004) (“Explaining why intermediate scrutiny was not required, Justice Ginsburg distinguished *Turner* from *Eldred* by drawing a line between copiers and real speakers: ‘The First Amendment securely protects the freedom to make--or decline to make--one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.’ As a matter of doctrine, this is false.”).

42 See *Eldred*, 537 U.S. at 221.

43 *Id.* at 219.

44 See *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (noting that the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”) (internal quotation omitted).

45 *Eldred*, 537 U.S. at 190 (“[C]opyright gives the holder no monopoly on any knowledge, fact, or idea”).

46 17 U.S.C. § 102(b) (2006); see, e.g., *Eldred*, 537 U.S. at 219; *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349-50 (1991).

47 *Eldred*, 537 U.S. at 219 (explaining that the fair use doctrine “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances”).

48 17 U.S.C. § 107 (2006); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994); *Harper & Row*, 471 U.S. at 560

(discussing “the latitude for scholarship and comment traditionally afforded by fair use”).

49 17 U.S.C. § 107 (2006).

50 Campbell, 510 U.S. at 578.

51 Eldred, 537 U.S. at 221. The Court also suggested that “copying” is speech that may not deserve full First Amendment protection: “The First Amendment securely protects the freedom to make-or decline to make-one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” *Id.*

52 See, e.g., Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the “Digital Millennium,”* 89 *Minn. L. Rev.* 1318, 1349 (2005) (“The implication [of *Eldred*] clearly seems to be that further First Amendment scrutiny is in order when Congress has altered those [traditional] contours [of copyright protection].”); Neil Weinstock Netanel, *Copyright’s Paradox* 185-94 (2008) (observing that *Eldred* leaves room for First Amendment scrutiny); see also *Order Granting Motion to Dismiss, Kahle v. Ashcroft*, No. C-04-1127 MMC, 2004 WL 2663157, at *17 (N.D. Cal. Nov. 19, 2004) (stating that unless statutes alter the scope of copyright protection, they do not alter the traditional contours); *Golan v. Gonzales*, 501 F.3d 1179, 1188-89 (10th Cir. 2007) (noting that “the term [‘traditional contours of copyright protection’] seems to refer to something broader than copyright’s built-in free speech accommodations”).

53 *Eldred*, 537 U.S. at 221 (rejecting the assertion made in *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)) (internal quotation marks omitted).

54 *Id.* at 208.

55 Exploring the exact metes and bounds of the notion of “music” is beyond the scope of this Article. That task will be left in the capable hands of others. See generally Peter Kivy, *Introduction to a Philosophy of Music* (2002); Leonard B. Meyer, *Emotion and Meaning in Music* (1961); What is Music?: *An Introduction to the Philosophy of Music* (Philip Alperson ed., 1994); Philip Dorrell, *What is Music?: Solving a Scientific Mystery* (2005); John Powell, *How Music Works: The Science and Psychology of Beautiful Sounds, from Beethoven to the Beatles and Beyond* (2010).

56 Thomas Turino, *Music As Social Life: The Politics Of Participation* 1 (2008). See also David Huron, *Is Music an Evolutionary Adaptation?*, in *The Cognitive Neuroscience of Music* 57, 63 (Isabelle Peretz & Robert J. Zatorre eds., 2003) (“There is no human culture known in modern times that did not, or does not, engage in recognizably musical activities.”); Arnold Perris, *Music as Propaganda: Art to Persuade, Art to Control* 1 (1985) (“No society yet studied is without music, neither in the tiny, lost tribe of the Philippine Tasaday nor in the rigorously censored lives of the eight hundred million Chinese during the Cultural Revolution.”).

57 The Supreme Court has observed that “[m]usic is one of the oldest forms of human expression.” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). See also Schneck & Berger, *supra* note 1, at 22 (2006) (“The history of music in the human experience is at least as old as our civilized past, and probably even older.”); Kohn & Kohn, *supra* note 11, at 670 (“Archeologists have unearthed evidence dating back to the dawn of antiquity of man’s creating music throughout Asia, Europe, Africa, the Americas, and other parts of the globe.”).

58 See generally Steven Mithen, *The Singing Neanderthals: The Origins of Music, Language, Mind, and Body* (2007); see also Schneck & Berger, *supra* note 1, at 29 (2006) (“The voice was perhaps the first instrument through which *Homo sapiens* (or perhaps even earlier species with vocal abilities) could call out to one another, attract animals, convey needs, communicate within groups, establish presence of self and others, and, most of all, to express human conditions such as needs, desires, fears, pain, joy, excitement, etc....”); Steven Brown, *The “Musilanguage” Model of Music Evolution*, in *The Origins of Music* 271-300 (Nils L. Wallin, et al. eds., 2000) (suggesting music and language evolved from a common ancestor, namely the “musilanguage” stage of evolution).

59 Teresa L Lesiuk, *A Rationale for Music-Based Cognitive Rehabilitation Toward Prevention of Relapse in Drug Addiction*, 28

Music Therapy Persp. 124, 124-29 (2010) (discussing how music-based cognitive rehabilitation may successfully reduce the likelihood of drug addiction relapse); Ted Ficken, Music Therapy with Chemically Dependent Clients: A Relapse Prevention Model, in *Music Therapy and Addictions* 103 (David Aldridge & Jörg Fachner, eds., Jessica Kingsley Publishers 2010); Marko Punkanen, Music Therapy as a Part of Drug Rehabilitation: From Adhering to Treatment to Integrating the Levels of Experience, in *Music Therapy and Addictions* 123 (David Aldridge ed., Jessica Kingsley Publishers 2010). See also Jaakko Erkkilä, Gambling Addiction: Evaluation of a Multimethod Treatment Programme Including Music Therapy, in *Music Therapy and Addictions* 132 (David Aldridge ed., Jessica Kingsley Publishers 2010).

⁶⁰ See, e.g., Alaine E. Reschke-Hernández, History of Music Therapy Treatment Interventions for Children with Autism, 48 *J. Music Therapy* 169, 169 (2011) (reviewing history of music therapy research and treatment of children with autism); Hayoung A. Lim, Use of Music to Improve Speech Production in Children with Autism Spectrum Disorders: Theoretical Orientation, 27 *Music Therapy Persp.* 103, 103-14 (2009) (explaining that because music and speech are closely related, both neurologically and developmentally, music can be an effective tool for language and speech development for children with ASD because their perception of musical elements appears intact); Hayoung A. Lim, Effect of “Developmental Speech and Language Training Through Music” on Speech Production in Children with Autism Spectrum Disorders, 47 *J. Music Therapy* 2, 2 (2010) (studying 50 children with ASD and observing that, while both high and low functioning participants improved their speech production after receiving either music or speech training, the low functioning participants showed a greater improvement after the music training than the speech training); Dawn C. Wimpory & Susan Nash, Musical Interaction Therapy: Therapeutic Play for Children with Autism, 15 *Child Language Teaching & Therapy* 17, 17 (1999) (suggesting music therapy is an appropriate means of both motivating a child with autism and addressing deficits in social timing).

⁶¹ Mark Jude Tramo, et al., Effects of Music on Physiological and Behavioral Indices of Acute Pain and Stress in Premature Infants: Clinical Trial and Literature Review, 3 *Music & Med.* 72, 72-83 (2011) (finding controlled music stimulation appears to be a safe and effective way to ameliorate pain and stress in premature infants following heel-stick procedures).

⁶² See Alexander W. Keen, Using Music as a Therapy Tool to Motivate Troubled Adolescents, 39 *Soc. Work in Health Care* 361 (2004) (discussing how music can successfully help adolescents with emotional disorders who have problems in peer and adult relationships engage in therapeutic processes with minimized resistance when they relate via music, including song discussion, listening, writing lyrics, composing music, and performing music). See also Roy Kennedy & Amanda Scott, A Pilot Study: The Effects of Music Therapy Interventions on Middle School Students’ ESL Skills, 42 *J. of Music Therapy* 244, 245 (2005) (“Music therapy can be used as a holistic approach to develop language comprehension, dissolve cross-cultural barriers, and enhance specific knowledge using structure provided by repeated rhythmic assignment of information utilizing verbal and nonverbal communication.”).

⁶³ Ruth G. McCaffrey, The Effect of Music on the Cognition of Older Adults Undergoing Hip and Knee Surgery, 1 *Music & Med.* 22, 22-28 (2009) (observing that while acute confusion is common in older adults after hip or knee surgery, a music-listening group of post-surgery adults had higher levels of cognitive function and less confusion than those who did not listen to music after surgery); see also Yu Lin, et al., Effectiveness of Group Music Intervention Against Agitated Behavior in Elderly Persons With Dementia, 26 *Int’l J. Geriatric Psychiatry* 670, 670 (2011) (exploring the effectiveness of group music intervention against agitated behavior in elderly persons with dementia); Adarsh M. Kumar, et al., Music Therapy Increases Serum Melatonin Levels in Patients with Alzheimer’s Disease, *Alternative Therapies in Health & Med.*, Nov. 1999, at 49, 49-57 (concluding increased levels of melatonin following music therapy may have contributed to the relaxed and calm mood of patients with Alzheimer’s disease); Ameer Baird & Séverine Samson, Memory for Music in Alzheimer’s Disease: Unforgettable?, 19 *Neuropsychol. Rev.*, 2009, at 85 (finding that procedural musical memory, including the ability to play a musical instrument, may be unforgettable for some musicians with Alzheimer’s disease).

⁶⁴ See, e.g., Teppo Särkämö, et al., Music Listening Enhances Cognitive Recovery and Mood After Middle Cerebral Artery Stroke, 131 *Brain*, 866, 866 (2008) (finding that stroke patients who listened to music had significantly enhanced cognitive functioning in the domains of verbal memory and focused attention, as well as less depression and confused mood); Cathie E. Guzzetta, Soothing the Ischemic Heart, 94 *Am. J. of Nursing* 24, (1994) (discussing benefits of music therapy for cardiac patients); Soo Ji Kim, Music Therapy Protocol Development to Enhance Swallowing Training for Stroke Patients with Dysphagia, 47 *J. Music Therapy* 102, 102-19 (2010) (finding pilot study of music-enhanced swallowing protocol with stroke patients suffering from abnormality in swallowing fluids and/or foods, where patients risk aspirating food or liquid, causing pneumonia, or malnutrition, showed statistically significant changes in swallowing functions); Teri Randall, Music Not Only Has Charms to Soothe, But Also to Aid Elderly in Coping with Various Disabilities, 266 *J. Am. Med. Ass’n* 1323 (1991) (discussing advantages of using music therapy during rehabilitation exercises of geriatric patients).

- 65 See, e.g., Joanne V. Loewy & Ralph Spintge, Music Soothes the Savage Beast, 3 *Music & Medicine* 69, 69-70 (2011) (exploring music's effect on pain management); Lauren Dimaio, Music Therapy Entrainment: A Humanistic Music Therapist's Perspective of Using Music Therapy Entrainment with Hospice Clients Experiencing Pain, 28 *Music Therapy Perspectives* 106, 106-15 (2010) (discussing use of music therapy entrainment with hospice patients experiencing pain).
- 66 See generally Daniel J. Levitin, *This Is Your Brain On Music: The Science of a Human Obsession* (2006) (examining from a neuropsychological perspective how music affects our brains); Oliver Sacks, *Musophilia: Tales of Music and the Brain* (2007) (examining the effects of music on the brain and how music affects the human condition).
- 67 Robert Zatorre, Music, the Food of Neuroscience?, *Nature*, Mar. 17, 2005 at 313 (observing that while the research suggests that "music and speech processing do not use completely overlapping neural substrates," neuroimaging research indicates that "the ability to organize a set of words into a meaningful sentence and the ability to organize a set of notes into a well-structured melody might engage brain mechanisms in a similar way"). See also Stefan Koelsch, et al., Music in the Treatment of Affective Disorders: An Exploratory Investigation of a New Method for Music-Therapeutic Research, 27 *Music Perception* 307, 308 (2010) (suggesting that one of the great powers of music is to evoke activity in the hippocampus and amygdala structures of the brain, which are key to generating emotions like joy and happiness, such that music therapy may be able to assist patients with depression or post-traumatic stress disorder, who have reduced activity in these brain structures).
- 68 See, e.g., Isabelle Peretz & Robert J. Zatorre, Brain Organization for Music Processing, 56 *Ann. Rev. of Psychol.* 89, 89 (2005) (examining the effect of musical training on brain plasticity); Lauren Stewart, et al., Music and the Brain: Disorders of Musical Listening, 129 *Brain* 2533, 2533-53 (2006).
- 69 Anne J. Blood & Robert J. Zatorre, Intensely Pleasurable Responses to Music Correlate With Activity in Brain Regions Implicated in Reward and Emotion, 98 *Proceedings of the Nat'l Acad. of Sci.* 11818, 11818-23 (2001) (measuring intensely pleasant emotional responses to music and linking music with biologically relevant, survival-related stimuli by increasing blood flow to pleasure and reward centers of the brain); Anne J. Blood, et al., Emotional Responses to Pleasant and Unpleasant Music Correlate with Activity in Paralimbic Brain Regions, 2 *Nature Neurosci.* 382, 382 (1999) (measuring cerebral blood flow in response to music, researchers posit that music may elicit brain responses similar to those previously associated with pleasant/unpleasant emotional states); Stefan Koelsch, et al., Music in the Treatment of Affective Disorders: An Exploratory Investigation of a New Method for Music-Therapeutic Research, 27 *Music Perception* 307, 313 (2010) (finding that "[m]usic making positively changed mood, as indicated by a decrease of depression/anxiety, a decrease in fatigue, and an increase in vigor").
- 70 See, e.g., Katie Overy & Istvan Molnar-Szakacs, Being Together In Time: Musical Experience and The Mirror Neuron System, 26 *Music Perception* 489, 490 (2009) ("different aspects of musical processing recruit almost all regions of the brain--including prefrontal cortex, premotor cortex, motor cortex, somatosensory cortex, temporal lobes, parietal cortex, occipital cortex, cerebellum, and limbic regions including the amygdala and thalamus--unlike any other stimulus or cognitive process."); Stefan Koelsch, et al., Music in the Treatment of Affective Disorders: An Exploratory Investigation of a New Method for Music-Therapeutic Research, 27 *Music Perception* 307, 307-08 (2010) (discussing the limbic and paralimbic correlates of music-evoked emotions); Anne J. Blood & Robert J. Zatorre, Intensely Pleasurable Responses to Music Correlate With Activity in Brain Regions Implicated in Reward and Emotion, 98 *Proceedings Of The Nat'l Acad. Of Sci.* 11818, 11818-23 (2001).
- 71 See, e.g., Stefan Koelsch, et al., Music in the Treatment of Affective Disorders: An Exploratory Investigation of a New Method for Music-Therapeutic Research, 27 *Music Perception* 307, 308 (2010) (explaining that because music can activate core structures of emotion processing, namely the amygdala, music can evoke "real" emotions).
- 72 See, e.g., Robert Zatorre, Music, the Food of Neuroscience?, *Nature*, Mar. 17, 2005, at 314.
- 73 See, e.g., Lorna S. Jakobson, et al., Memory for Verbal and Visual Material in Highly Trained Musicians, 26 *Music Perception* 41, 41-55 (2008) (finding that musicians showed superior immediate and delayed recall of word lists, as well as superior learning, delayed recall, and delayed recognition for visual designs, which suggests that extensive music training is associated with a generalized enhancement of auditory and visual memory functions); Susanne Brandler & Thomas H. Rammsayer, Differences in Mental Abilities Between Musicians and Non-Musicians, 31 *Psychol. of Music* 123, 123-28 (2003) (finding reliably higher performance on verbal memory assessment test for musicians than for non-musicians, which supports the notion that long-term musical training exerts beneficial effects on verbal memory--most likely due to changes in cortical organization); Michael S.

Franklin, et al., *The Effects of Musical Training on Verbal Memory*, 36 *Psychol. of Music* 353, 353-65 (2008) (suggesting that musical training may influence verbal working memory and long-term memory, and that these improved abilities are due to enhanced verbal rehearsal mechanisms in musicians); Thomas G. Bever & Robert J. Chiarello, *Cerebral Dominance in Musicians and Non-musicians*, 185 *Science* 537, 539 (1974) (seminal article on hemispheric specialization by musicians for music, revealing an apparent preference for left ear listening for music analysis, and by inference, right hemisphere for processing). See also Paulo Estêvão Andrade & Joydeep Bhattacharya, *Brain Tuned to Music*, 96 *J. of Royal Soc'y of Med.* 284, 284-87 (2003) (reviewing mechanisms by which music is processed in the brain).

74 Schneck & Berger, *supra* note 1, at 13 (2006) (“Introduced in the United States just after World War II, primarily as an intervention to help trauma victims of combat, music therapy has grown to be recognized internationally as a medical treatment.”).

75 See generally, e.g., *Music and Conflict* (John Morgan O’Connell & Salwa El-Shawan Castelo-Branco eds., 2010) (collection of essays discussing how music can be used to both promote conflict and to advance conflict resolution, and illustrating how music can promote a shared musical heritage across borders, with specific focus on the music of Albania, Azerbaijan, Brazil, Egypt, Germany, Indonesia, Iran, Ireland, North and South Korea, Uganda, the United States, and the former Yugoslavia); *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* (Olivier Urbain ed., 2008) (collection of interdisciplinary articles exploring the role of music in conflict resolution).

76 Olivier Urbain, *Preface*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 4-5 (Olivier Urbain ed., 2008); see also Katie Overy & Istvan Molnar-Szakacs, *Being Together In Time: Musical Experience and The Mirror Neuron System*, 26 *Music Perception* 489 (2009) (proposing that it is music’s ability “to communicate social and affective information and to create the feeling of ‘being together’ that makes it so appealing to humans across all ages and cultures”).

77 See Schneck & Berger, *supra* note 1, 27 (2006) (“Why music exists and how it is able to affect such profound physiological responses are questions that have piqued the interest and imagination of investigators in fields as diverse as anthropology, biomedical engineering, education, physiology, psychology, psychiatry, philosophy, neuroscience, medicine, speech and language research, and of course artists and musicians.”).

78 Maria Elena López Vinader, *Music Therapy: Healing, Growth, Creating a Culture of Peace*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 147, 147-71 (Olivier Urbain ed., 2008) (exploring contributions that the profession of music therapy is making to the world through healing and promoting peace); Kjell Skyllstad, *Managing Conflicts through Music: Educational Perspectives*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 172, 172-86 (Olivier Urbain ed., 2008) (exploring use of inter-cultural music education in primary schools to foster empathy and tolerance and prevent ethnic conflicts).

79 Olivier Urbain, *Art for Harmony in the Middle East: The Music of Yair Dalal*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 201, 201-11 (Olivier Urbain ed., 2008) (exploring the music and philosophy of peace of Yair Dalal, a self-described “Arab Israeli Jew”); Anne-Marie Gray, *Music as a Tool of Reconciliation in South Africa*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 63, 63-77 (Olivier Urbain ed., 2008) (discussing how vocal music of polarized South African societies can foster reconciliation and unforced nation building); June Boyce-Tillman, *Music and Peacemaking in Educational Contexts*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 212, 212-28 (Olivier Urbain ed., 2008) (proposing revisions to Western music curricula in primary schools to foster multiculturalism and diversity). But cf. *Music and Manipulation: On the Social Uses and Social Control of Music* (Steven Brown & Ulrik Volgsten eds., 2006) (collection of essays exploring sociology of music and music’s behaviorally manipulative effects, its morally questionable uses and control mechanisms, and its economic and artistic regulation through commercialization).

80 Benjamin Brinner, *Playing across a Divide: Israeli-Palestinian Musical Encounters* 3-4 (2009). See also Karen Abi-Ezzi, *Music as a Discourse of Resistance: The Case of Gilad Atzmon*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 93, 93-103 (Olivier Urbain ed., 2008) (exploring the work of Israeli-born jazz musician Gilad Atzmon, “a vociferous anti-Zionist,” who uses his music to challenge Zionism and make a political statement).

81 Reebee Garofalo, *Understanding Mega-Events: If We Are the World, Then How Do We Change It?*, in *Rockin’ the Boat: Mass Music & Mass Movements* 35, 35 (Reebee Garofalo ed., 1999) (“[I]t would, perhaps, be fair to say that mega-events appear to be quite useful for priming the political pump.”).

- 82 Social and political issues have often animated mass-mediated popular music events. As professor of popular music studies Reebee Garofalo noted, “[h]unger and starvation in Africa, apartheid, the farm crisis, peace, political prisoner, the environment, child abuse, racism, black-on-black violence, AIDS, Central America, industrial plant closings, and homelessness have all been themes for fundraising concerts, popular songs, or both.” *Id.* at 16. It is in the dialectic of speaking and listening through music that culture and politics emerge. Professor Garofalo has argued that, since the civil rights and anti-war movements of the 1960s, the power of such mass movements has declined; in the absence of these grassroots political movements, popular music now functions as the animating force to raise awareness of social issues and organize masses of people. Reebee Garofalo, *Understanding Mega-Events: If We Are the World, Then How Do We Change It?*, in *Rockin’ the Boat: Mass Music & Mass Movements* 16, 16-17 (Reebee Garofalo ed., 1999) (“The civil rights and anti-war movements engaged millions of people in the politics of direct action primarily on the strength of the issues themselves. In the process, these movements exerted a profound influence on the themes and styles of popular music. Since the 1980s, music--which is to say, culture--has taken the lead in the relative absence of such movements. With the decline of mass participation in grassroots political movements, popular music itself has come to serve as a catalyst for raising issues and organizing masses of people.”).
- 83 Mariana Whitmer, *Songs with Social Significance: An Introduction*, *Magazine of History*, July 2005, at 9.
- 84 *Id.* at 22.
- 85 *Id.*
- 86 See, e.g., Mariana Whitmer, *Songs with Social Significance: An Introduction*, *Magazine of History*, July 2005, at 9-22; Baruch Whitehead, *We Shall Overcome: The Roles of Music in the US Civil Rights Movement*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 78, 78-92 (Olivier Urbain ed., 2008) (exploring power and importance of music in the Civil Rights movement).
- 87 Ron Eyerman & Andrew Jamison, *Music and Social Movements: Mobilizing Traditions in the Twentieth Century* 45 (1998) (observing that music can “help mobilize protest and create group solidarity ...”). And as sociologist Serge Denisoff observed: Songs of persuasion can be perceived as functioning to achieve six primary goals:
1. The song attempts to solicit and arouse outside support and sympathy for a social or political movement.
 2. The song reinforces the value structure of individuals who are active supporters of the social movement or ideology.
 3. The song creates and promotes cohesion, solidarity, and high morale in an organization or movement supporting its world view.
 4. The song is an attempt to recruit individuals for a specific social movement.
 5. The song invokes solutions to real or imagined social phenomena in terms of action to achieve a desired goal.
 6. The song points to some problem or discontent in the society, usually in emotional terms.
- Serge R. Denisoff, *Sing a Song of Social Significance* 2-3 (1983).
- 88 Mark Mattern, *Acting in Concert: Music, Community, and Political Action* 144 (1998).
- 89 Rob Rosenthal, *Serving the Movement: The Role(s) of Music*, *Popular Music & Soc’y*, Fall 2001, at 11.
- 90 *Id.* at 13.
- 91 *Id.* at 18.
- 92 Compare Serge R. Denisoff, *Sing a Song of Social Significance* 133 (1983) (“[T]here is little, if any, concrete or empirical evidence that songs do in fact have an independent impact upon attitudes in the political arena.”), with Robert Cantwell, *When We Were Good* (1996) 15, 375-81 (suggesting that activists in the ‘60s had grown up listening to folk songs of the ‘40s and ‘50s, which predisposed them to support the Civil Rights movement). See also Marie Korpe, Ole Reitov & Martin Cloonan, *Music Censorship from Plato to the Present*, in *Music and Manipulation: On the Social Uses and Social Control of Music* 239, 239-42

(Steven Brown & Ulrik Volgsten eds., 2006) (describing how Plato urged the rejection of bad music because it had the potential to undermine good order and society).

⁹³ Professor Rosenthal explained: “But if we have learned anything at all from postmodernism, it is that the product as created by the producer is unlikely to be the product as received or used by the audience. Between the minstrel declaring ‘The emperor has no clothes’ and the audience hearing that message lies a myriad of factors leading to a gap between message as intended (assuming even that is clear-cut) and message as received and then used.” Rob Rosenthal, *Serving the Movement: The Role(s) of Music*, *Popular Music & Society*, Fall 2001, at 15.

⁹⁴ See Mostafa Rejai & Kay Phillips, *Classical Music and Political Sociology: A Research Note*, 29 *J. of Pol. & Mil. Soc.* 177, 185 (2001) (“Music evolves in a cultural, social, and political context. Politics shapes much music; music is inseparable from the political universe. The music of an age is shaped by--and in turn it reflects--the politics of an age.”).

⁹⁵ Arnold Perris, *Music as Propaganda: Art to Persuade, Art to Control* 182 (1985).

⁹⁶ See Brown, *supra* note 2, at 3 (“What is new about the contemporary relevance of music as a conveyor of political ideas is not that music is being used at all in this regard. Rather, what is new is the magnitude of this phenomenon combined with technological advances in the distribution and accessibility [sic] of music, minimally affecting hundreds of millions of mostly young adults across nearly all cultures in the world today.”).

⁹⁷ Eric Lee, *How Internet Radio Can Change the World* 45 (2005).

⁹⁸ *Id.* at 47.

⁹⁹ George Kent, *Unpeaceful Music*, in *Music and Conflict Transformation: Harmonies and Dissonances in Geopolitics* 110, 110 (Olivier Urbain ed., 2008).

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Adriana Helbig, *The Cyberpolitics of Music in Ukraine’s 2004 Orange Revolution*, 82 *Current Musicology* 81, 81-101 (2006) (analyzing the pivotal role music and the Internet played in the Orange Revolution, when between November 21 and December 26, 2004, nearly one million people protested in Kyiv, Ukraine against election fraud, media censorship, mass government corruption, and oligarchic market reforms).

¹⁰² See generally Steve Craig, *Out of the Dark: A History of Radio and Rural America* (2009) (exploring how terrestrial radio spurred changes in U.S. culture between World War I and World War II by speeding the flow of information, news, music, entertainment, and advertising to once isolated areas, which had the effect of diminishing differences between urban and rural life and bringing rural citizens a greater sense of national belonging).

¹⁰³ Eric Lee, *How Internet Radio Can Change the World* 8, 50 (2005).

¹⁰⁴ Andrew Stockment, *Note, Internet Radio: The Case For A Technology Neutral Royalty Standard*, 95 *Va. L. Rev.* 2129, 2133 (2009) (“More than 69 million Americans listen to internet radio every month, including at least 42 million weekly listeners, which is more than a quarter of all U.S. internet users.”).

¹⁰⁵ See, e.g., *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 489 (3d Cir. 2003) (“Anyone with a computer, a reasonably speedy connection to the Internet, streaming software and the equipment to copy songs from CDs to a computer in the popular and compressed MP3 format (‘rip’ the songs) could webcast sound recordings through streaming.”).

- ¹⁰⁶ Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 *Cardozo Arts & Ent. L.J.* 343, 354 (2004) (noting that “webcasting spread rapidly, since anyone with a personal computer could set up their own Internet ‘radio station,’ and anyone with free RealAudio software could tune in”); Eric Lee, *How Internet Radio Can Change the World* 42 (2005) (observing that “no special technical skills are required, software is all free, and from the moment you think you might want to do an Internet radio station until it’s actually on the air can be a matter of minutes”); Craft, *supra* note 18, at 12 (explaining that “anyone with an updated PC and a few pieces of relatively inexpensive equipment could now operate a cyber-radio station from home-or freely download and share music”).
- ¹⁰⁷ Diane Rapaport, *A Music Business Primer* 5 (2003).
- ¹⁰⁸ *Id.* See also Krasilovsky & Shemel, *supra* note 12, at 399 (observing the Internet offers to “level the playing field between independent and major record labels, since on-line distribution affords even the smallest record labels the opportunity to reach as wide an audience as a major record label”); Kohn & Kohn, *supra* note 11, at 69 (stating that “the Internet has provided individual songwriters and artists an alternative means of reaching the public with their artistic creations, bypassing traditional distributors and publishers, and opening up opportunities for new entrants into the publishing and recording industries”).
- ¹⁰⁹ Fisher, *supra* note 12, at 78 (describing the distributive inequality and observing that “only a few musicians received the exposure and support necessary to become stars and to earn correspondingly generous royalties”).
- ¹¹⁰ Rapaport, *supra* note 107, at 57 (“Consumers object strongly to having their tastes and listening habits dictated to by the marketing needs of major conglomerates.”); Eric Lee, *How Internet Radio Can Change the World* 45 (2005) (“People grow tired of the same sterile commercial garbage played on most radio stations. Internet radio can bring back to life the sounds of a different culture.”).
- ¹¹¹ See Claire Cain Miller, *Music Labels Reach Deal With Internet Radio Sites*, *N.Y. Times*, July 8, 2009, at B2 (“Online listening has become an increasingly valuable outlet for music companies and artists. Internet radio services can appeal to niche audiences by tailoring individual streams, and they feature independent artists who might never get played on broadcast stations.”); Rapaport, *supra* note 107, at 206 (“The Internet provides new sources of distribution and promotion and is an ideal medium for serving niche interests.”).
- ¹¹² Rapaport, *supra* note 107, at 190 (“With only rare exceptions, independent labels receive no exposure in print media that is [sic] owned by the conglomerates. They receive virtually no exposure on major AM and FM radio stations.”).
- ¹¹³ Claire Cain Miller, *Music Labels Reach Deal With Internet Radio Sites*, *N.Y. Times*, July 8, 2009, at B2. See also Kohn & Kohn, *supra* note 11, at 69 (“[T]he Internet has provided individual songwriters and artists an alternative means of reaching the public with their artistic creations, bypassing traditional distributors and publishers, and opening up opportunities for new entrants into the publishing and recording industries.”).
- ¹¹⁴ Kohn & Kohn, *supra* note 11, at 36 (“Studies show that at one time nearly 90% of all CD purchases were influenced by radio airplay.”).
- ¹¹⁵ Kohn & Kohn, *supra* note 11, at 36 (urging that to develop a song’s economic value, the copyright holder must “maintain an active relationship between the song and the listening public”).
- ¹¹⁶ While the Internet offers to level the playing field between market incumbents and newcomers, observers note “marketing expertise will remain as important, if not more important, than distribution” because “getting above the noise level will become more difficult over time, not less.” Kohn & Kohn, *supra* note 11, at 69; see also Rapaport, *supra* note 107, at 207 (“A [web] site can easily get lost in cyberspace. The incredible competition for audience share on the Internet and the increasing presence and dominance of large sites by major entertainment conglomerates does not make getting visitors an easy task for independent artists.”). As music industry experts explain, getting above the noise is critical because “[a]n excellent song or record is worthless without public exposure.” Krasilovsky & Shemel, *supra* note 12, at 366.

- 117 Rachel McLean, et al., *The Myths of Empowerment Through Information Communication Technologies: An Exploration of The Music Industries and Fan Bases*, 48 *Mgmt Decision* 1365, 1365-77 (2010) (arguing that current media manipulation and corporate interests restrict and alienate independent musicians, and the hegemonic state remains unchallenged where music continues to be commodified and fans are increasingly constructed as “consumers” such that the ultimate power remains in mass media and broadcasting rather than independent “narrowcast” and DIY [do it yourself] artistry); Roger Wallis, *The Changing Structure of the Music Industry: Threats to and Opportunities for Creativity*, in *Music and Manipulation: On the Social Uses and Social Control of Music* 287 (Steven Brown & Ulrik Volgsten eds., 2006) (“Digital production and distribution technology, in theory, provide powerful opportunities for creators and performers of musical works to reach a potential global audience without dependence on the series of intermediaries that is so typical of the established music industry. However, this does not appear to have occurred in practice via players in the traditional industry.”).
- 118 William F. Patry, *Copyright and The Legislative Process: A Personal Perspective*, 14 *Cardozo Arts & Ent. L.J.* 139 (1996) (describing industry involvement in drafting copyright legislation); Kohn & Kohn, *supra* note 11, at 1468-1504 (describing industry influence in the evolution of the digital audio transmission right).
- 119 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995). See also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (“It goes without saying that artistic expression lies within this First Amendment protection.”). While “works of art are ‘unquestionably shielded’ by the First Amendment,” law professor Jed Rubenfeld has observed that traditional First Amendment theories based on democratic governance or individual autonomy do not adequately explain art’s protected status. Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *Yale L.J.* 1, 31, 37-48 (2002) (proposing a theory of the First Amendment based on protection of the freedom of imagination). See also Edward J. Eberle, *Art as Speech*, 11 *U. Pa. J. L. & Soc. Change* 1 (2008) (concluding that art understood as speech should constitute the presumptively protected core expression); Marci A. Hamilton, *Art Speech*, 49 *Vand. L. Rev.* 73 (1996) (suggesting that a representative democracy demands a means of challenging government and that art performs this function in a singular way and thus deserves the most stringent First Amendment protection).
- 120 *Cohen v. California*, 403 U.S. 15, 25 (1971) (“Wholly neutral futilities ... come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons’”) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)). See also *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“[S]o long as the means are peaceful, the communication need not meet standards of acceptability.”).
- 121 “Speech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (quoting *Winters*, 333 U.S. at 510).
- 122 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).
- 123 *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“From Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state The Constitution prohibits any like attempts in our own legal order.”); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”).
- 124 The Supreme Court has often employed the marketplace of ideas metaphor in First Amendment cases. The metaphor first appeared in American jurisprudence in Justice Oliver Wendell Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616 (1919). Justice Holmes stated: “[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” *Id.* at 630 (Holmes, J., dissenting).
- 125 See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (“And if [the free flow of information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow

of information does not serve that goal.”); *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (“The listener’s interest is substantial Such speech serves individual and societal interests in assuring informed and reliable decisionmaking.”). See also Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1, 2 (arguing that the right to receive information is essential for seeking the truth and decision making in a democratic society).

¹²⁶ See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

¹²⁷ See, e.g., *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

¹²⁸ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

¹²⁹ *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing a listener’s right to receive information and ideas).

¹³⁰ 319 U.S. 141 (1943).

¹³¹ *Id.* at 143 (citation omitted).

¹³² *Lamont*, 381 U.S. at 301.

¹³³ *Id.* at 305.

¹³⁴ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); see also *id.* (“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”). But see *Osborne v. Ohio*, 495 U.S. 103 (1990) (refusing to extend *Stanley v. Georgia* to the possession of child pornography).

¹³⁵ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹³⁶ *Id.* at 369.

¹³⁷ *Id.* at 390.

¹³⁸ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“The ‘idea’ [the pharmacist] wishes to communicate is simply this: ‘I will sell you the X prescription drug at the Y price.’”).

¹³⁹ See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (acknowledging that the extension of the First Amendment protections to commercial speech is “justified principally by the value to consumers”); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561-62 (1980) (“Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (“The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”).

¹⁴⁰ *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

141 Id. at 764.

142 Id. at 765.

143 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

144 See, e.g., Virginia State Bd. of Pharmacy, 425 U.S. at 756-57; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Red Lion Broad., 395 U.S. at 390; Martin v. Struthers, 319 U.S. 141, 143 (1943).

145 Rodney A. Smolla, Freedom of Speech for Libraries and Librarians, 85 Law Libr. J. 71, 77 (1993).

146 Red Lion Broad., 395 U.S. at 390.

147 Stanley, 394 U.S. at 564. See also Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 977 (2009) (explaining “the right to hear and receive information is essential to the health of the marketplace of ideas and democratic deliberation, and it is also essential to individual flourishing and decision-making”).

148 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

149 Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”); City of Los Angeles v. Preferred Commc’ns, Inc., 476 U.S. 488, 494 (1986) (“Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats.”).

150 Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). See also Martin v. Struthers, 319 U.S. 141, 146-47 (1943) (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”); Int’l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 702-03 (1992) (Kennedy, J., concurring) (“We have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment.”).

151 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 570 (1995) (noting in dicta that “the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security”).

152 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

153 Hurley, 515 U.S. at 572-73 (holding state law that required St. Patrick’s Day parade organizers to include a group of gay, lesbian, and bisexual descendants of Irish immigrants (“GLIB”) in the parade, which promoted a message that the organizers did not wish to endorse, would violate “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”); Turner Broad. Sys., Inc., 512 U.S. at 636 (“Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” (quoting Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986))). See generally Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1977) (holding government-imposed right-of-reply, requiring newspapers to give political candidates space in which to reply to critical speech appearing in the newspaper, violated the First Amendment).

- 154 U.S. Const. art. I, § 8, cl. 8.
- 155 An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, ch. 15, 1 Stat. 124, § 1 (May 31, 1790). The term of protection was 14 years, renewable in the 14th year for a second 14-year period. *Id.*
- 156 Patterson & Joyce, *supra* note 31, at 940 (“The key to understanding the 1790 Act is Section 1, which created copyright protection for printing, reprinting, publishing, and vending books, maps, and charts, the principal means of recording and disseminating information in the late eighteenth century.”).
- 157 Copyright Act of Feb. 3, 1831, An Act to Amend the Several Acts Respecting Copyrights, ch. 16, §1, 4 Stat. 436, 436 (Feb. 3, 1831).
- 158 Kohn & Kohn, *supra* note 11, at 4-5 (noting that when the modern music business started “the sale of sheet music constituted by far the most important source of a music publisher’s revenue”).
- 159 Dramatic Compositions Copyright Act of August 18, 1856.
- 160 An Act to Amend Title Sixty, Chapter Three of the Revised Statutes, Relating to Copyrights, ch. 4, §1, 29 Stat. 481-82 (Jan. 6, 1897).
- 161 An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (Mar. 4, 1909) (effective July 1, 1909).
- 162 The Harry Fox Agency grew up to manage the mechanical license distribution and royalty collection. Performing rights organizations (PROs), like ASCAP, emerged to manage and collect public performance royalties. Music publishers initially received the bulk of their income from the sale of sheet music, rather than royalties from the public performance of music. Publishers generally viewed the public performances as advertising that spurred sales of the sheet music. Today, the opposite is true and the royalties from public performance licenses are the largest source of income for music publishers, accounting for roughly 40% of all music publishing income. Kohn & Kohn, *supra* note 11, at 84, 669 (noting “during the twentieth century the music industry saw its revenues shift from the sale of printed music to the licensing of public performances and mechanical reproductions”). PROs administer these licenses and collect and distribute the royalties. Royalties from mechanical reproduction licenses are the second largest source of income, accounting for about 25% of the income. Kohn & Kohn, *supra* note 11, at 84. Other sources of income include synchronization licenses, printed music, commercial advertising, music boxes, karaoke, and digital samples. Kohn & Kohn, *supra* note 11, at 83-86.
- 163 Sounds Recording Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972). The Sound Recording Amendment defined “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture.” 85 Stat. at 391. Prior to 1972, there was “patchwork of state laws conferring common law protection for sound recordings” Leaffer, *supra* note 11, at 140.
- 164 Sobel, *supra* note 20, at 6. This sound recording protection was challenged in a lawsuit to enjoin the Attorney General and the Librarian of Congress from implementing and enforcing the 1971 Act. *Shaab v. Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972). The court found that a limited copyright in sound recordings was justified because it was designed to protect against piracy. *Id.* See also *Goldstein v. California*, 412 U.S. 546, 559 (1973) (“At any time Congress determines that a particular category of ‘writing’ is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized.”).
- 165 As Judge Posner observed, “[t]he comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress’s satisfaction.” *WGN Contl. Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 627 (7th Cir.

1982). See also Kohn & Kohn, *supra* note 11, at 399 (referring to the 1976 Act as a “complete overhaul”).

166 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2554 (codifying sound recordings with the other permissible subject matters for copyrights at 17 U.S.C. § 102). Copyright protection for sound recordings was still thin because sound recordings were not protected under 17 U.S.C. § 106, thus--until the Digital Performance Right in Sound Recordings Act of 1995--there was no exclusive right of a musician to publicly perform a sound recording.

167 Digital Performance Right in Sound Recordings Act of 1995, 17 U.S.C. §§ 106(6), 114 (effective Feb. 1, 1996).

168 Marks, *supra* note 24, at 310.

169 The DPRSRA is generally acknowledged to be complex and convoluted. As law professor Lionel Sobel observed: “Indeed, on the day the Senate passed its version of the bill that became the new Act, the bill’s co-sponsor, Senator Orrin Hatch, told his colleagues that ‘the legislation is complex,’ and even that was an understatement. The Internal Revenue Code is ‘complex’; the Digital Performance Right in Sound Recordings Act of 1995 is something else. ‘Incomprehensible’ perhaps, though ‘You had to be there to appreciate it’ may be fairer, because the convoluted language of the new Act appears to have been required by a number of very specific problems which the Act attempts to address with precision.” Sobel, *supra* note 20, at 4.

170 *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 767 (E.D. Pa. 2001).

171 17 U.S.C. § 114 (2006 & Supp. IV 2010).

172 17 U.S.C. §114(j)(7) (2006). See also *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009), cert. denied, 130 S. Ct. 1290, No. 09-619 (Jan. 25, 2010) (clarifying, after eight years of litigation, that an online music service that allows listeners’ feedback to the music to influence future playlists for the listener is not “interactive,” and thus is eligible for a compulsory license for the sound recording).

173 H.R. Rep. 104-274, at 14 (1995) (“Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales. The Committee believes that sound recording copyright owners should have the exclusive right to control the performance of their works as part of an interactive service, and so has excluded interactive services from these limitations on the performance right.”); see also Craft, *supra* note 18, at 23 (“Publishers argued against what they called a ‘music giveaway,’ where if consumers were allowed to customize their online broadcasts, then they would have little or no incentive to purchase the music.”).

174 17 U.S.C. § 114(j)(14) (2006).

175 17 U.S.C. §114(j)(9) (2006).

176 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The DMCA was signed into law on October 28, 1998. As law professor Kimberly Craft explained, “Congress’ primary goal in drafting this revision of the Copyright Act was to allow the United States to participate in two new WIPO treaties: the Copyright Treaty and the Performances and Phonograms Treaty, which updated international copyright standards on Internet technology security and anti-piracy measures. Congress’ secondary goal of pleasing the recording industry by permitting last-minute language on webcasting would soon become a thorn in its side.” Craft, *supra* note 18, at 15.

177 17 U.S.C. § 114(j)(13)(A) (2006).

- 178 17 U.S.C. § 114(j)(13)(B) (2006).
- 179 17 U.S.C. § 114(d)(2)(C)(ii). See also Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure For Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 *Loy. L. & Tech. Ann.* 1, 9 (2009); Joseph E. Magri, *New Media-New Rules: The Digital Performance Right and Streaming Media Over the Internet*, 6 *Vand. J. Ent. L. & Prac.* 55, 59 (2003); Craft, *supra* note 18, at 17.
- 180 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(II).
- 181 17 U.S.C. § 114(d)(2)(C)(iii)(III).
- 182 17 U.S.C. § 114(d)(2)(C)(iv).
- 183 17 U.S.C. § 114(d)(2)(C)(v).
- 184 17 U.S.C. § 114(d)(2)(C)(vi).
- 185 17 U.S.C. § 114(d)(2)(C)(vii).
- 186 17 U.S.C. § 114(d)(2)(C)(viii).
- 187 17 U.S.C. § 114(d)(2)(C)(ix).
- 188 Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 *Vill. Sports & Ent. L.J.* 271, 314 (2006).
- 189 Craft, *supra* note 18, at 14.
- 190 Netanel, *supra* note 52, at 128-30; see also Kohn & Kohn, *supra* note 11, at 1490 (noting “record companies may charge what they want, demand advances against royalties, or refuse to license altogether”).
- 191 See Netanel, *supra* note 52, at 135, 131 (works of original expression “that audiences and speakers most value lack colorable substitutes”). See also Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 *Colum. J.L. & Arts* 397, 404 (2007) (“While it is true that the First Amendment does not guarantee a person the right to make another’s speech, there are times when the purpose of the speech requires, or perhaps simply benefits from, the inclusion of another’s expression in order to more appropriately make a point or where the purpose is referential to the expression of another.”).
- 192 Not only is a Webcaster’s voice circumscribed by the numerical limitations, but in some instances the artistic integrity of an album may be affected by these limitations, especially when an album has a message when heard holistically. A Webcaster may play no more than three songs in a three-hour period, even if the album that has a unifying theme or message, which can only be fully conveyed by playing all, or most of it.
- 193 See *Bonneville Intern. Corp. v. Peters*, 347 F.3d 485, 493 (3d Cir. 2003) (noting “the ‘sound recording performance complement,’ which limits statutory licensees’ ability to transmit performances of multiple recorded songs from the same artist or from the same ‘phonorecord’ within a short time of each other, would not apply to any transmission by an FCC-licensed broadcaster.”).

194 The statements of the original cosponsors of the House bill (H.R. 1506) that would become the DPRSRA are illuminating. Congressman Carlos J. Moorhead (R-CA), chairman of the House Judiciary's Subcommittee on Intellectual Property and Judicial Administration, acknowledged that the legislation was a product of intra-industry negotiation, save Webcasters, and that all parties to the negotiation supported its passage: "I would like to congratulate the parties of interest for working together and coming up with what I believe is a good, solid piece of legislation, that's both good for the industry and good for the American consumer.... I am not aware of any opposition to this legislation. It has the support of the American Federation of Musicians, the American Federation of Television and Radio Artists, the record industries, the songwriters, the radio and TV broadcast industry, and the administration." Digital Performance Right in Sound Recordings Act of 1995, 141 Cong. Rec. H10098, H10102 (daily ed. Oct. 17, 1995) (statement of Rep. Carlos J. Moorhead).

Congressman John Conyers, Jr. (D-MI), lead cosponsor of the bill, also acknowledged the intra-industry negotiations, which did not include Webcasters: "The sounds of harmony that I hear today on H.R. 1506 are, well, music to my ears. I am truly delighted that our friends in the recording industry, the performing rights societies, the broadcasters and the background music services have, under the auspices of this subcommittee, done the tough job of hammering out a compromise agreement that is acceptable to all." Digital Performance Right in Sound Recordings Act of 1995, 141 Cong. Rec. H10098, H10103 (daily ed. Oct. 17, 1995) (statement of Rep. John Conyers, Jr.). See also Vanessa Van Cleaf, Note, A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work For Internet Radio, 40 Stetson L. Rev. 341, 380 (2010) (observing the DPRSRA "was enacted without any notable input from the webcasting industry," and "the legislation that currently governs that industry only favors those who meaningfully participated in its enactment - namely, musicians, recording companies, and terrestrial broadcasters"); Craft, *supra* note 18, at 16 (noting "the coming explosion of webcasting had not been anticipated").

195 Sobel, *supra* note 20, at 8. See also Van Cleaf, *supra* note 194, at 362-78 (outlining the decade-long struggle to set statutory licensing rates); Erich Carey, Comment, We Interrupt This Broadcast: Will The Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull The Plug On Internet Radio?, 19 Fordham Intell. Prop. Media & Ent. L.J. 257 (2008) (same).

196 Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, available at http://www.copyright.gov/carp/webcasting_rates_final.html.

197 The Digital Media Association (DiMA) was formed by RealNetworks and Broadcast.com to act on behalf of Internet audio companies. Kohn & Kohn, *supra* note 11, at 1472.

198 Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240, 45241 (July 8, 2002); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 64 Fed. Reg. 52107 (Sept. 27, 1999) (scheduling the CARP proceeding by Copyright Office).

199 Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,241 (July 8, 2002) ("0.07[cent] per performance per listener" and "0.02 [cent] per performance per listener" [hereinafter Webcaster I]; Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings available at http://www.copyright.gov/carp/webcasting_rates_final.html. The Librarian of Congress largely accepted CARP's recommendations but with some modifications. See Matt Jackson, From Broadcast to Webcast: Copyright Law and Streaming Media, 11 Tex. Intell. Prop. L.J. 447, 467 (2003) ("The Librarian did indeed modify the rates, most importantly by reducing the standard Internet-only (IO) rate from 0.14¢ to 0.07¢; the same rate used for radio retransmissions (simulcasts of over-the-air radio stations).").

200 See, e.g., Andrew Noyes, Not Music to Their Ears, national Journal, July 7, 2007, at 50 ("Protests ensued, legislation was introduced, and appeals were filed. The webcasters and the music industry eventually cut a deal."); Benny Evangelista, Royalties Silence KPIG Webcasts, San Francisco Chronicle, July 20, 2002, at B1 (similar); Clea Simon, Ruling Dooms Boston Webcaster, Boston Globe, July 18, 2002, at C20 (similar).

201 Fisher, *supra* note 12, at 107.

202 In describing the effect of the 2002 Rates, attorney Robert Delchin explained as follows: "The result was that smaller webcasters began shutting down in droves. Immediately after the Librarian's order, hundreds of Internet radio stations shut down in anticipation of the royalty fee which was expected to go into effect in September of 2002. Indeed, most of the estimated 10,000 webcasters were expected to follow suit. For example, one station which existed on listener donations and received approximately

\$3000 per month in revenues was expected to pay royalties in excess of \$10,000 per month. Moreover, because the rate was retroactive to 1998, the station was looking at an upfront payment of \$60,000 to \$80,000--all for running a small Internet radio site out of one's garage. Said an unsympathetic RIAA spokesperson: 'If you don't have a business model that sustains your costs, it sounds harsh, but that's real life.'" Delchin, *supra* note 106, at 377 (internal citations omitted). See also Carey, *supra* note 195, at 278 (noting "small commercial webcasters began shutting down in droves after the Librarian of Congress' [2002 Rate] determination").

203 394 F.3d 939 (D.C. Cir. 2005).

204 *Id.* at 942.

205 Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

206 Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008 (June 11, 2003) ("Specifically, the SWSA authorizes SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc. and the Receiving Agent designated by the Librarian of Congress in the initial rate setting proceeding, to enter into agreements on behalf of all copyright owners and performers for the purpose of establishing an alternative payment structure for small commercial webcasters and noncommercial webcasters operating under the section 112 and section 114 statutory licenses." (emphasis added) (footnotes omitted)).

207 Delchin, *supra* note 106, at 377-82; Carey, *supra* note 195, at 282.

208 Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002). Until the end of 2004, the agreed royalty rate was the greater of 10 percent of the Webcaster's first \$250,000 in gross revenues and 12 percent of any gross revenues in excess of \$250,000, or 7 percent of the Webcaster's expenses. *Id.* at 78,511.

209 Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,010-11 (June 11, 2003). A "noncommercial webcaster" is defined as a webcaster that: (1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986, 26 U.S.C. 501; (2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes. 17 U.S.C. 114(f)(5)(E)(i) (2006).

210 Carey, *supra* note 195, at 283 (discussing criticism of the CARP arbitration system, including unpredictable and inconsistent decisions, arbiters lack of appropriate expertise, and an unnecessarily expensive process).

211 Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified as amended at 17 U.S.C. §§ 801-805).

212 *Beethoven.com v. Librarian of Cong.*, 394 F.3d 939, 945-46 (D.C. Cir. 2005). The court also determined that Webcasters who had not participated in the CARP lacked standing to challenge the rates because they were not parties in the original rate-setting. *Id.*

213 *Id.* at 946.

214 Digital Performance Right in Sound Recordings and Ephemeral Recordings, 70 Fed. Reg. 7970 (Feb. 16, 2005).

215 Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084 (May 1, 2007) [hereinafter *Webcaster II*].

216 Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,096 (May 1, 2007).

217 Id.

218 Pandora, one of the most established and vibrant webcasters, was on the verge of shutting down, with royalty fees constituting seventy percent of its projected revenue of twenty-five million dollars for 2008. Peter Whoriskey, *Giant of Internet Radio Nears Its 'Last Stand:'* Pandora, Other Webcasters Struggle Under High Song Fees, *Wash. Post*, Aug. 16, 2008, at D1. See also Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, *Wired* (Mar. 6, 2007), <http://www.wired.com/entertainment/music/news/2007/03/72879>; Tim Bajarin, *Saving Internet Radio*, *PC Mag.* (Oct. 3, 2008), <http://www.pcmag.com/article2/0,2817,2331594,00.asp>.

219 Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,099-100 (May 1, 2007). Transmission beyond 159,140 ATH per month are subject to the royalty rates of commercial Webcasters. *Id.* at 24,100. Critics of the 2007 CRB rate argue that applying commercial rates to non-commercial Webcasters that exceed the allotted ATH is unsound and threatens the viability of public radio online. Carey, *supra* note 195, at 296-300.

220 See, e.g., Brian Day, Note, *The Super Brawl: The History And Future Of The Sound Recording Performance Right*, 16 *Mich. Telecomm. & Tech. L. Rev.* 179, 190 (2009) (“Small and large webcasters alike predicted the CRB rates would result in the ‘end of Internet radio.’”); Van Cleaf, *supra* note 194, at 369 (“proverbial death knell for Internet radio”).

221 Amy Duvall, Note, *Royalty Rate-Setting for Webcasters: A Royal(ty) Mess*, 15 *Mich. Telecomm. Tech. L. Rev.* 267, 281 (2008) (“There was a widespread belief that most webcasters would be unable to continue at a sustainable rate, since these royalties represented at ten-fold increase in payments. Smaller webcasters, like Bill Goldsmith from Radio Paradise, were facing bills of up to 125 percent of their yearly income, an unsustainable cost. Hypothetically, larger webcasters like Pandora, a webcaster which offers thousands of channels without subscription fees, could have a royalty bill of \$2 billion just for one year.”); Van Cleaf, *supra* note 194, at 369 (“Webcasters’ monthly royalty payments skyrocketed from approximately \$120 to \$6,500.”). See also Shaun Assael, *Online and on the Edge*, *N.Y. Times*, Sept. 23, 2007, at Arts 32.

222 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009).

223 Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008). The original Webcaster Settlement Act amended the Small Webcaster Settlement Act of 2002, which allowed a settlement to bypass a CARP proceeding to set royalty rates between private parties.

224 Kohn & Kohn, *supra* note 11, at 1517 (“The rate structures for the various forms of webcasting have become increasingly complex. Agreeing that the CRB may have set webcasting rates too high, SoundExchange and various forms of webcasters have entered into a series of settlement agreements modifying the fees and fee structures for the respective forms of webcasts.”).

225 Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009).

226 Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 19, 2009).

227 *Id.* at 34,799. SoundExchange negotiated the following rates for commercial Webcasters: a per-performance rate of \$0.0008 in 2006; a per-performance rate of \$0.0011 in 2007; a per-performance rate of \$0.0014 in 2008; a per-performance rate of \$0.0015 in 2009; a per-performance rate of \$0.0016 in 2010; a per-performance rate of \$0.0017 in 2011; a per-performance rate of \$0.0020 in 2012; a per-performance rate of \$0.0022 in 2013; a per-performance rate of \$0.0023 in 2014; and a per-performance rate of \$0.0025 in 2015. Small pureplay Webcasters negotiated a percentage of revenue basis, which is the greater of 7% of annual expenses, or 12% of the first \$250,000 gross revenues and 14% of any gross revenues in excess of \$250,000. *Id.* Pureplay Webcasters, like Pandora, generate most of their revenue from streaming music. See Van Cleaf, *supra* note 194, at 372 n.204.

- 228 Kaitlin M. Pals, Note, Facing The Music: Webcasting, Interactivity, and a Sensible Statutory Royalty Scheme For Sound Recording Transmissions, 36 J. Corp. L. 677, 689 n.105 (2011) (“It is especially noteworthy that as a condition of accepting SoundExchange’s lower rates, webcasters must opt out of participating in rate-setting proceedings with the CRB for 2011 through 2015. Only one commercial broadcaster, Live365, participated in the 2010 hearings.”).
- 229 Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,036, 13,047-48 (Mar. 9, 2011) [hereinafter Webcaster III].
- 230 Id. at 13,042 (“The annual minimum fee of \$500 per station or channel functions as the royalty payable for usage of sound recordings up to 159,140 ATH per month. This flat fee is the same that we adopted in Webcaster II and ... is demonstrably affordable to noncommercial webcasters.”).
- 231 See, e.g., David Oxenford, Final Webcasting Royalty Rates Published - A Comparison of How Much Various Services Pay, Broadcast Law Blog, Mar. 14, 2011, <http://www.broadcastlawblog.com/2011/03/articles/internet-radio/final-webcasting-royalty-rates-published-a-comparison-of-how-much-various-services-pay/> (discussing Webcaster III and not reflecting any criticism of the rate).
- 232 See, e.g., Carey, supra note 195, at 291; Hiawatha Bray, Royalty Hike Could Mute Internet Radio: Smaller Stations Say Rise Will Be Too Much, Boston Globe, Mar. 14, 2007, at F1; Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 942 (D.C. Cir. 2005); Allison Kidd, Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid, 4 N.C. J. L. & Tech. 339, 341 (2003); Kevin Featherly, Critics Carp About CARP Webcast Royalty Plan, Newsbytes, April 9, 2002; Amy Harmon, Royalties Proposal Casts Shadow Over Thousands of Webcasters, N.Y. Times, April 1, 2002, at C1.
- 233 See, e.g., Wagman & Kopp, supra note 188, at 291 (observing that the Sound Recording Performance Complement rules “have become archaic because they are burdensome to enforce, difficult for small webcasters and podcasters to comply with, and can be expensive for fledgling webcasters”).
- 234 See, e.g., Leaffer, supra note 11, at 368 (observing the digital performance right in sound recordings is a “complex regulatory scheme” which is “subject to a dazzling series of limitations” resulting from “a number of political tradeoffs”).
- 235 See Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 862-79 (1987) (tracing the negotiations and compromises of interest groups during the legislative process leading to the 1976 Copyright Act and the broad copyrights that resulted from these negotiations); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1, 68 (2001) (discussing intra-industry negotiations that resulted in an “ever-expanding set of copyright holder rights, riddled with narrow exceptions for various sectors present at the bargaining table”); Jessica D. Litman, Copyright Legislation and Technological Change, 68 Or. L. Rev. 275, 278-82 (1989) (exploring how the process of drafting copyright statutes through negotiations among industry representatives became entrenched).
- 236 Christina Bohannon, Reclaiming Copyright, 23 Cardozo Arts & Ent. L.J. 567, 581-92 (2005) (“[T]he [1976] Copyright Act reflects all of the hallmark characteristics of a special-interest statute [namely]: (1) concentrated benefits and diffuse costs; (2) uncertainty in the optimal regulatory framework or level of regulation; (3) a statutory structure that is very specific or detailed (which indicates interest-group compromise) rather than general (which would allow more judicial discretion); (4) legislative history materials revealing extensive interest-group influence; and (5) statutory results that are indefensible on economic or other grounds.”); Netanel, supra note 52, at 132 (observing music industry incumbents have pressed their power to maintain dominance in the digital world).
- 237 Jessica Litman, Copyright Legislation and Technological Change, 68 Or. L. Rev. 275, 359 (1989) (“Each time we rely on current stakeholders to agree on a statutory scheme, they produce a scheme designed to protect themselves against the rest of us.”); Netanel, supra note 235, at 62 (“When the legislature distributes speech entitlements that enable certain speakers to maintain their market position and restrain competition, we thus have particular reason to suspect that the broad public interest in free speech has been inadequately protected.”).

- 238 Robert C. Denicola, *Freedom to Copy*, 108 *Yale L.J.* 1661, 1684-86 (1999); see also Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 *Mich. L. Rev.* 1197, 1244-46 (1996) (“In the period leading to the 1976 Copyright Act, Congress made it clear that industry representatives would have to hammer out a bill acceptable to all interest groups.”).
- 239 Netanel, *supra* note 52, at 149-50 (noting incumbent industry has pattern and practice of using copyright to maintain control and market position in the face of new technology).
- 240 Netanel, *supra* note 52, at 111.
- 241 Craft, *supra* note 18, at 24-25.
- 242 Craft, *supra* note 18, at 25 (quoting Senator Orrin Hatch (R-Utah)).
- 243 See Denicola, *supra* note 238, at 1683 (“The Copyright Act, enacted in 1976 and enlarged in almost every subsequent year, has swelled to well over six times the length of its succinct 1909 predecessor.”).
- 244 Fisher, *supra* note 12, at 108 (“By September of 2002, the total number of Webcasters was more than 31 percent smaller than it had been in 2001.”). See also Karen Fessler, *Webcasting Royalty Rates*, 18 *Berkeley Tech. L.J.* 399, 412 (2003) (“The threat of large royalty payments and the uncertainty over copyright liability has already left its mark on the webcasting industry: the number of radio stations transmitting signals online has declined 31 percent to 3,940 as of September 2002, as compared to a high of 5,710 in 2001.”).
- 245 See Richard Elen, *Queuing Theory & Radio Playlists*, June 12, 2010, <http://brideswell.com/content/sci-tech/queuing-theory-and-radio-playlists/> (discussing mathematical algorithm for programming Internet radio playlists to comply with restrictions of Sound Recording Performance Complement); Ira Hoffman, Note, *Pseudo-Interactivity: An Appropriate Rate Scheme For Customizable Internet Radio Services*, 32 *Cardozo L. Rev.* 1515, 1524 (2011) (“With many songs averaging between three and four minutes in length, an Internet radio station can perform approximately sixteen songs per hour.”); *DMCA: Restricting College Radio Without Benefit*, *The Tufts Daily*, Oct. 27, 2010, available at <http://www.tuftsdaily.com/op-ed/editorial-dmca-restricting-college-radio-without-benefit-1.2383916> (“While these legal measures [Sound Recording Performance Complement] were designed to ensure that artists get royalties and to prevent piracy, they are a net detriment. Placing these restrictions on college radio stations will hardly prevent music fans from illegally downloading music, yet they make it more difficult for smallbudget, understaffed university stations to operate.”).
- 246 Wagman & Kopp, *supra* note 188, at 291.
- 247 See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”).
- 248 See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (explaining that Supreme Court precedent has focused “not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas”).
- 249 See Christina Bohannon, *Reclaiming Copyright*, 23 *Cardozo Arts & Ent. L.J.* 567, 624 (2005).
- 250 17 U.S.C. § 114(j)(13) (2006).
- 251 See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

252 Id. at 193.

253 Id. at 207-08.

254 Id. at 219.

255 Kohn & Kohn, *supra* note 11, at 1628 (explaining “a fair use does not require permission of the copyright owner, which is to say that one making a fair use of a copyrighted work does not require a license to do so”).

256 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

257 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages”).

258 House Committee on the Judiciary, Section-by-Section Analysis of H.R. 2281, 105th Cong., 2d sess., 1998, Committee Print No. 6, 55 (acknowledging and addressing concerns of recording artists and record companies that certain types of programming were “permitting listeners to hear the same songs on demand any time the visitor wishes”); Wagman & Kopp, *supra* note 188, at 291 (“Congress’s likely intent in creating the ‘sound recording complement’ was to discourage illegal downloading of music from Internet radio stations.”); Fisher, *supra* note 12, at 104-05, n.49 (explaining Congress’s intent was to “reduce the ability of listeners to make copies of their broadcasts”).

259 *Ward*, 491 U.S. at 791.

260 See *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010) (determining that a copyright amendment, which extended protection to various foreign works that were previously in the public domain, was a content-neutral regulation of speech subject to intermediate scrutiny); see also *Netanel*, *supra* note 52, at 47-54 (arguing copyright law should be classified as content-neutral regulation of speech).

261 *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) [hereinafter *Turner II*].

262 *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003); see also Peters, *supra* note 35, at 18 (“Although the [C]ourt didn’t quite put it this way, in essence its [Eldred] ruling was that the Copyright Clause gives Congress the power to enact bad copyright legislation. The [C]ourt didn’t actually express the view that term extension was a bad idea, but reading between the lines, it is difficult to avoid the conclusion that the [C]ourt had some distaste for the decision to add another twenty years to an already-long copyright term.”).

263 See *Turner II*, 520 U.S. at 180.

264 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) [hereinafter *Turner I*].

265 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

266 *Wagman & Kopp*, *supra* note 188, at 277-78 (describing two such applications, iFill and iRadio, which “blatantly encourage infringement, thus completely disregarding current copyright laws”).

²⁶⁷ See *id.* at 315.

²⁶⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁶⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).