

# CONNECTING THE DOTS: NAVIGATING THE LAWS AND LICENSING REQUIREMENTS OF THE INTERNET MUSIC REVOLUTION

RICHARD D. ROSE\*

## I. INTRODUCTION

In the not so distant past, the gatekeepers of the recording industry came face-to-face with three little characters that turned the paradigm of intellectual property control on its ear. Out of the shadows of the Internet stepped MP3, a music format that had been relegated to the “techie” of college campuses. However, with its ability to squeeze near CD quality sound into a word processing-like file, MP3 exploded out of the dorm room onto the agenda of every record company boardroom around the world. Suddenly, with the simple click of a mouse, anyone could search for, listen to, download, broadcast, and swap any type of music imaginable.

---

\* Copyright © 2002 Richard D. Rose. All Rights Reserved. The author received his B.S. in Recording Industry from Middle Tennessee State University and his J.D. from Franklin Pierce Law Center. Prior to law school, he worked for several years on the technology side of the music industry in Nashville, Tennessee as a recording engineer. He has also served as a consultant on Internet music licensing issues for the Library of Congress' National Digital Library Project, and as a summer associate for the Recording Industry Association of America, both in Washington, DC. He has also served as in-house counsel and Vice President of Legal Affairs and Business Development for Copyright.net, a Nashville based entertainment and technology company. Mr. Rose practices primarily in the areas of copyright, entertainment, and new media law. To contact the author, email him at [richard@copyrightcafe.com](mailto:richard@copyrightcafe.com).

The author would like to thank the Library of Congress for granting permission to adapt this paper; portions of it were originally commissioned as an internal guideline for posting historical music collections on the American Memories Internet site, available online at <http://memory.loc.gov/>. Additional special thanks to Melissa Smith Levine, Denise Incorvia Mroz, Tim Smith, Ralph Oman and especially Melinda Rose. Any errors remain the responsibility of the author.

The popularity of this new file format was confirmed when “MP3” outpaced “sex” in mid-1999 as the No. 1 search term on the Internet.<sup>1</sup> Together with the radio-like technology of webcasting, Internet music established its home on the desktop. Yet, as the popularity of downloading digital songs grew, such activity ran smack into the copyright laws that protect the rights of music owners. What ensued has been a series of industry initiatives and lawsuits aimed at recapturing the threatened control over music copyrights. Results have been mixed, tensions and expectations have grown, and many have been left asking, “Can you legally acquire or play music over the Internet?”

In response to this question, the good news is “Yes, you can.” However, due to the complex nature of both the copyright laws and the licensing process involved with music, it is generally not easy. The purpose of this article is to assist practitioners and Internet businesses in considering the technology and its relationship to copyright law, and walking through the practical steps of licensing music for use on the Internet.

## II. THE TECHNOLOGY

To begin, this section presents the technologies that have created all the fuss. There are two basic ways music files are transmitted through cyberspace: 1) by downloadable files containing sound recordings that can be played back on personal computers and other walkman-like devices; or 2) via “webcasts” or “streaming,” which are electronic transmissions akin to radio broadcasts over the Internet.<sup>2</sup>

### A. MP3

The genesis of downloadable Internet music can be traced back to 1987, when Germany’s Fraunhofer Institut Integrierte Schaltungen devised a method for broadcasting sound in a compressed audio digital format.<sup>3</sup> Previously, the most popular sound file used with computers was called a WAV file.<sup>4</sup> WAV files produced high sound quality but required enormous

---

<sup>1</sup> Christopher Jones & Jennifer Sullivan, *More Popular Than Sex* <<http://wired.com/news/business/0,1367,31834,00.html>> (Oct. 14, 1999).

<sup>2</sup> See Al Kohn & Bob Kohn, *Kohn on Music Licensing* 329 (2d ed., Aspen L. & Bus. 1996 & Supp. 2000).

<sup>3</sup> See Michael Behar, *It’s Playback Time!*, *Wired* 122 (Aug. 1999).

<sup>4</sup> Pronounced “wave,” this technology is the Windows standard for waveform sound files.

file sizes.<sup>5</sup> Using a WAV file, a five-minute CD-quality song would require a 50 megabyte (“MB”) file; an hour-long CD would require file sizes of up to 600MB.<sup>6</sup> Seeking a more efficient way to store and transmit music, the Fraunhofer Institute devised a means of compressing (shrinking the size of the file) and decompressing (expanding the file to its original size) audio in a manner that would maintain the relative sound quality of the file. This compression/decompression algorithm, or “codec,” was then approved by the Moving Picture Experts Group (“MPEG”) in 1992 as the standard for audio compression,<sup>7</sup> and soon became known as MPEG-1 Audio Layer 3, or MP3.<sup>8</sup> Using the MP3 codec a five-minute song could now be contained in a file *smaller* than 5MB.<sup>9</sup>

It was MP3’s near CD-quality sound, small size and free price that first attracted Internet users.<sup>10</sup> Advances in technology, such as 56K modems, cable modems, DSL and 900-MHz computers, came next.<sup>11</sup> Soon after, Internet surfers discovered that they could download MP3 music files in a matter of minutes and create their own virtual-jukebox of music on their desktop, all for free.<sup>12</sup> Specifically, college students are credited with propelling the hacker’s hobby into a mainstream music format.<sup>13</sup> Using their universities’ high-speed Internet access, these students took their entire CD collection, “ripped” the songs from their CDs and saved them on their computer as WAV or MP3 files.<sup>14</sup> These files were then available for posting, emailing and downloading all over the world.<sup>15</sup> This massive grass-roots “pirating” grabbed the attention of major record companies, while simultaneously inducing dot-com entrepreneurs to salivate for opportunities to exploit the phenomenon.<sup>16</sup>

---

<sup>5</sup> See CNET, *10 Questions About MP3, Question 1* <<http://home.cnet.com/category/0-4004-7-294826.html>> (accessed Mar. 18, 2002).

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See* Behar, *supra* n. 3, at 122.

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*; *See also* Jennifer Sullivan, *Napster: Music Is for Sharing* <<http://www.wired.com/news/technology/0,1282,32151,00.html>> (Nov. 1, 1999).

As MP3's popularity became apparent, technology and record companies began to feverishly work on ways to protect their copyrighted material and prevent the unauthorized uploading or downloading of music on the Internet.<sup>17</sup> Organizations such as the Secure Digital Music Initiative ("SDMI"), a coalition of the largest record companies and technology companies from around the world, were formed to develop standards for digital music distribution and to prevent online piracy.<sup>18</sup> In addition, technology companies such as Liquid Audio and RealNetwork developed new "codecs," which promised built-in intellectual property protection and e-commerce features.<sup>19</sup>

### B. Webcasting

The second entry in the Internet music revolution is a technology called "webcasting" or "streaming."<sup>20</sup> Webcasting is a method of transmitting information, such as news or music, across the Internet's World Wide Web to others connected to the Internet.<sup>21</sup> The technology is similar to a radio station; however, instead of "tuning in" on a dial, the user selects their preferred news or music format from a website.<sup>22</sup> This method of transmitting information supposedly does not leave any permanent copies on the listener's hard-drive; in other words, the music or news show is supposedly only heard while the listener's computer is connected to the transmitting website.<sup>23</sup> While webcasting has gained wide acceptance and offers some measure of security, copyright owners should understand that not every streaming file format is 100% copy-proof. For example, listeners can purchase or access freely available software that allows them to capture and download streaming files and convert them into MP3 and other file

<sup>17</sup> See Sullivan, *supra* n. 16.

<sup>18</sup> See e.g. The Berkman Center for Internet & Society, *Intellectual Property In Cyberspace* <<http://eon.law.harvard.edu/h2o/property/MP3/sdmi.html>> (accessed Mar. 18, 2002).

<sup>19</sup> See e.g. J. Daniels, *Compression Algorithms Shrink Hefty Media Files To Net-Friendly Sizes* <<http://www.oregonherald.com/filed/codecs.htm>> (accessed Mar. 18, 2002).

<sup>20</sup> For a definition of "webcasting," see *Webopedia* <<http://webopedia.internet.com/TERM/w/webcasting.html>> (accessed Mar. 18, 2002).

<sup>21</sup> See *id.*

<sup>22</sup> See Kohn & Kohn, *supra* n. 2, at 329 (Supp. 2000).

<sup>23</sup> While no permanent copy is supposedly made on the end user's hard-drive, there are other temporary copies, such as cache copies and buffer copies, which are made and which can require the need for certain mechanical licenses. See Recording Industry Association of America ("RIAA"), *Summary of Agreement Between RIAA, NMPA and HFA* <[http://www.riaa.com/News\\_Story.cfm?id=460](http://www.riaa.com/News_Story.cfm?id=460)> (accessed Mar. 18, 2002).

formats which can then be shared across peer-to-peer networks.<sup>24</sup> Such technological challenges have prompted some copyright owners to require webcasters to implement protection measures when providing streaming content.<sup>25</sup>

Webcasting gained its initial foothold when companies such as Nullsoft, Real Networks and Microsoft developed and released software-based receivers as free downloads to the general Internet community.<sup>26</sup> As these receivers came online, many Web-based radio stations began springing up, providing everything from rebroadcasts of existing, traditional radio station programming to interactive jukeboxes where users could create their own play-lists of their favorite songs. Webcasting has continued to solidify its position as the distribution format of choice for the major record labels, as MusicNet (a co-venture between Real Networks, AOL-Time Warner, BMG and EMI) and PressPlay (a co-venture between Yahoo, Microsoft, Sony and Vevendi-Universal) have come online.<sup>27</sup>

### III. A CLASH OF RIGHTS

With the introduction of the new music mediums, and the ability to distribute directly to consumers via the Internet, why all the fuss? The debate can be traced to the issue of control, or more accurately, lack of control. The Internet has been characterized as “a billion Xerox machines on steroids,” with its ability to copy and distribute files world-wide.<sup>28</sup> For example, in 1998, approximately 846 million new CDs were sold, but at least

---

<sup>24</sup> Software such as Total Recorder, Beam-Back and Streamripper allow listeners to capture streaming audio files and convert them into permanent file formats such as MP3 files. See High Criteria, Inc., *Total Recorder V3.4!* <<http://www.totalrecorder.com>> (accessed Mar. 18, 2002); See also Streamripper <<http://streamripper.sourceforge.net/>> (accessed Mar. 18, 2002); See also MP3.com software product promotion of *Streamripper (BeOS)* <<http://software.mp3.com/software/individual/3483.html>> (accessed Mar. 18, 2002); See also Beam-Back <<http://beam-back.sourceforge.net/>> (accessed Mar. 18, 2002).

<sup>25</sup> See e.g. Harry Fox Agency, MPL Communications, Inc., Peer International Corporation and MP3.com, Inc. Settlement Agreement, *Exhibit A, Form of Governing Agreement* Section 3.1, October 2000, <<http://www.sec.gov/Archives/edgar/data/1078073/000109581101000593/a68938ex10-25.txt>> (accessed Mar. 18, 2002).

<sup>26</sup> See e.g. Patricia Jacobus, *RealNetworks Finds New Outlets for Jukebox Software* <<http://news.com.com/2100-1023-237434.html>> (Feb. 29, 2000).

<sup>27</sup> See John Borland, *Subscription Plans Focus on Real's Success* <<http://news.cnet.com/news/0-1005-200-7933588.html>> (Nov. 20, 2001).

<sup>28</sup> Vito Peraino, *The Law of Increasing Returns*, *Wired* 144 (Aug. 1999).

17 million MP3 files were downloaded from the Internet *each day*.<sup>29</sup> This daily figure adds up to almost 6 billion downloads for all of 1998 (note that these are pre-Napster figures).<sup>30</sup> Fast forward to 2001, after the rise and fall of Napster and the introduction of second generation file trading programs such as KaZaA, we see the music piracy trend spiraling out even further with a reported 10% drop in record sales coupled with an estimated 3.6 billion songs being downloaded via the Internet *every month*.<sup>31</sup>

“Music piracy” refers to the duplication and distribution of sound recordings (the recorded song) and musical compositions (the words and arrangement of the underlying song) without permission from the copyright owner(s) - also known as copyright infringement.<sup>32</sup> With the explosion of digital music, the occurrence of music piracy has seen a similar increase.<sup>33</sup> Tape traders of yesteryear sold unauthorized, often low quality, cassette tapes out of the trunks of their cars and in flea markets. The digital music pirates of today, however, don’t have that problem - digital music is designed for infinite, perfect duplication.<sup>34</sup> That means that the first digital copy from a master recording sounds as good as a digital copy made 1000 generations later. This ability to perfectly duplicate and freely distribute drives the illegal trade of MP3s across corporate intranets, instant messaging groups, secret FTP sites, e-mail exchanges, and in online chat rooms.<sup>35</sup> This wave of unauthorized activity has given the recording industry good justification for their aggressive stance.

Unauthorized duplication of music covers a wide range of activity, and each activity can expose participants to different levels of liability. For

---

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See Hillary Rosen, President and CEO of the RIAA, Statement, *Recording Industry Association of America Before The Committee on Commerce, Science and Transportation, United States Senate, Protecting Content In A Digital Age*, <[http://www.riaa.com/pdf/2-28-02\\_RIAA\\_Testimony\\_FINAL.pdf](http://www.riaa.com/pdf/2-28-02_RIAA_Testimony_FINAL.pdf)> (U.S. Senate Feb. 28, 2002); see also Michael Greene, President and CEO of the National Academy of Recording Arts and Sciences, Address, *The Insidious Virus of Illegal Music Downloading*, Grammy Magazine <<http://grammy.aol.com/features/speech.html>> (44th Annual GRAMMY Awards Feb. 27, 2002).

<sup>32</sup> See e.g. RIAA, *What is Piracy?* <<http://www.riaa.com/Protect-Campaign-2.cfm>> (accessed Mar. 18, 2002).

<sup>33</sup> See Courtney Macavinta, *Recording Industry Sues Music Start-Up, Cites Black Market* <<http://news.cnet.com/news/0-1005-200-1485841.html?tag=st.ne.1.srchres.ni>> (Dec. 7, 1999).

<sup>34</sup> See Eliot Van Buskirk, *Are My MP3s Illegal?* <<http://cnet.com/electronics/0-3622-7-1420287.html?st.cn.3622-7-1420278.txt.3622-7-1420287>> (accessed Mar. 18, 2002).

<sup>35</sup> See *id.*

example, a user in the United States may make legitimate copies of a CD (that they've purchased) onto their computer for their personal listening pleasure; however, once the user begins distributing (or "sharing") these files across peer-to-peer networks the person crosses into the activity of music piracy. Often the lines are not so clear and it becomes difficult to determine exactly who can be held responsible for the unauthorized activities. In a typical MP3 transaction, where a music fan scours the web in search of songs from his or her favorite band, there are four possible copyright infringers: 1) the web site owner who posts the illegal MP3 files; 2) the Internet Service Provider ("ISP") that hosts the illegal web site; 3) the search engine that provides links to the illegal MP3 site; and 4) the fan accessing the illegal MP3 file.<sup>36</sup> Thus, to avoid liability it is vital to understand the laws involved in online music and the licenses that provide legal use.

#### IV. COPYRIGHT

Estimates indicate that the music industry loses approximately \$4.5 billion each year to piracy worldwide, excluding losses from Internet piracy.<sup>37</sup> Record labels contend that the availability of free, illegal MP3s dissuades consumers from purchasing legally licensed music. On the other hand, musicians and Web site operators see the Internet as a medium to promote themselves and their music to a broad audience without a large marketing investment. The challenge remains, then, for those who want to legally provide music on the Internet, how to comply with copyright laws.

##### A. *Overview of Copyright Law*

In order to understand how music can be used legally on the Internet, it is important to understand the laws that protect the authors and owners of musical compositions and sound recordings - the U.S. Copyright Act.<sup>38</sup> From the founding of our country, copyright has been a vital part of the American landscape.<sup>39</sup> The U.S. Constitution provides that Congress shall have the

---

<sup>36</sup> See Bobby A. Ghajar et al., *Policing the Pirates—A Closer Look at Music Downloading Reveals a Chain of Culprits* <<http://www.thestandard.com/article/display/0,1151,6525,00.html>> (Sept. 24, 1999).

<sup>37</sup> See RIAA, *What is Piracy?, Effects* <<http://www.riaa.com/Protect-Campaign-3.cfm>> (accessed Mar. 18, 2002).

<sup>38</sup> See *Copyright Act*, 17 U.S.C. §§ 101-1101 (1994 & Supp. V 1999) (enacted under the *Copyright Act of 1909*, ch. 320, 35 Stat. 1075, 1075-88 (1909)).

<sup>39</sup> The history of U.S. copyright law was reviewed by the Supreme Court in *Mazer v. Stein*, 347 U.S. 201, 208-12, 100 U.S.P.Q. 325, 329-31 (1954).

power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>40</sup> This provision encourages people to devote themselves to intellectual and artistic creation by granting authors limited control over many aspects of their work.<sup>41</sup> Surprisingly, the purpose of this grant of rights was not specifically intended to reward the author, but rather to promote the best interest of the public by ensuring that innovative works were made available.<sup>42</sup>

In order to encourage the creation of a wide range of creative works, the minimum standard for receiving copyright protection is very low. First, a work, including songs, must embody some minimal degree of *originality* that can be traced to the efforts of the author.<sup>43</sup> Second, the work must be “fixed” in a sufficiently permanent environment where it can be “perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.”<sup>44</sup> Thus, once a song has been created with the slightest bit of originality and is set in some permanent form, it receives the full protection of copyright law. Although a song does not have to be registered to receive protection,<sup>45</sup> copyright registration is highly advisable and provides significant benefits.<sup>46</sup> All rights mature in the original elements of the song at the moment the song is “fixed” in a tangible medium.<sup>47</sup> This includes songs that have been scribbled on the back of a diner napkin, hummed into a tape recorder, or recorded digitally onto a computer.

### B. The Copyrights in a Song

Copyrights exist for all creative works, such as a painting by Andy Warhol, an architectural design by Frank Lloyd Wright, or a poem by Ralph

---

<sup>40</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>41</sup> *Goldstein v. California*, 412 U.S. 546, 555, 178 U.S.P.Q. 129, 133 (1973); see also Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* vol. 1, § 1.03[A], at 1-66.9 to 1-66.10 (rel. no. 54, Matthew Bender & Co. Apr. 2001).

<sup>42</sup> See Nimmer & Nimmer, *supra* n. 41, at 1-66.9 to 1-66.10 (discussing *Mazer v. Stein*, 347 U.S. 201, 219, 100 U.S.P.Q. 325, 333 (1954)).

<sup>43</sup> See 17 U.S.C. § 102(a) (1994); See also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 18 U.S.P.Q.2d 1275, 1278 (1991).

<sup>44</sup> 17 U.S.C. § 101 (1994 & Supp. V 1999).

<sup>45</sup> See 17 U.S.C. § 102(a) (1994).

<sup>46</sup> For example, an author may not sue for copyright infringement unless she has registered the work. See 17 U.S.C. § 504(c) (1994 & Supp. V 1999). Once the work is registered, the author can seek statutory damages for each act of infringement. See *id.*

<sup>47</sup> See 17 U.S.C. § 102(a) (1994).

Waldo Emerson. Unlike other creative works, however, songs are entities with a split personality, embodying two distinct and separate copyrights: 1) a copyright in the original words and arrangement of the music, called the *musical composition*; and 2) a copyright in the actual recording of the song, aptly called the *sound recording*.<sup>48</sup>

These rights are best understood in the context of how they make up a song. Consider the popular rock ballad from the 1960's by Roy Orbison and Billy Dees, *Oh, Pretty Woman*.<sup>49</sup> Originally written in 1964, Roy Orbison recorded this song for the record company Monument Records.<sup>50</sup> Following its release, the song was a huge success and has since been recorded and re-released by numerous recording artists.<sup>51</sup> The musical composition was then licensed, and/or administered, by Orbison's and Dees' respective music publishing companies.<sup>52</sup> Monument Records, however,

---

<sup>48</sup> Library of Congress, U.S. Copyright Office, *Circular 56: Copyright Registration for Sound Recordings*, and *Circular 56(a): Copyright Registration of Musical Compositions* <<http://www.loc.gov/copyright/circs/>> (last updated Mar. 4, 2002).

A **Musical Composition** consists of music, including any accompanying words, and is normally registered in Class PA. The author of a musical composition is generally the composer, and the lyricist, if any. A musical composition may be in the form of a notated copy (for example, sheet music) **or** in the form of a phonorecord (for example, cassette tape, LP, or CD). Sending a musical composition in the form of a phonorecord does **not** necessarily mean that there is a claim to copyright in the sound recording.

A **Sound Recording** results from the fixation of a series of musical, spoken, or other sounds and is always registered in Class SR. The author of a sound recording is the performer(s) whose performance is fixed, or the record producer who processes the sounds and fixes them in the final recording, or both.

Copyright in a sound recording is not the same as, or a substitute for, copyright in the underlying musical composition.

*Id.* (emphasis in original). In other words, a musical composition is the work that is featured on the sound recording that is fixed on a phonorecord.

<sup>49</sup> See Broadcast Music Inc.'s Repertoire database for the song "Oh, Pretty Woman" at <<http://repertoire.bmi.com/title.asp?Action=Top&Page=0&strQuery=oh+pretty+woman&W=on&P=on>> (accessed on Mar. 18, 2002).

<sup>50</sup> See AMG, *All Music Guide*, Roy Orbison <<http://allmusic.com/cg/amg.dll?p=amg&sql=B4ueyxdkbjolf-C>> (accessed Mar. 18, 2002).

<sup>51</sup> Artists that have covered *Oh, Pretty Woman* include: Count Basie, Tom Jones, Van Halen and John Cougar Mellencamp. See AMG, *All Music Guide*, *Albums with a song "Oh Pretty Woman"* <<http://allmusic.com/cg/amg.dll?p=amg&sql=HOH|PRETTY|WOMAN>> (accessed Mar. 18, 2002).

<sup>52</sup> See Broadcast Music Inc., *supra* n. 49.

retained the sound recording copyright as the record company that commissioned and released the recording of the song.<sup>53</sup>

Fast forward to today, and a web-site entrepreneur decides they would like to use the 1964 Monument recording of *Oh, Pretty Woman* as background music on their site – from whom should they get permission for this use? Use of both the sound recording and musical composition requires the site operator to obtain permission from both Monument Records, in order to use the actual recording, and Barbara Orbison Music Company and Acuff Rose Music, to use the underlying musical composition.<sup>54</sup> On the other hand, if the band 2 Live Crew wanted to make a new, non-parody recording of the musical composition *Oh, Pretty Woman*, they would only need permission from Barbara Orbison Music Company and Acuff Rose Music.<sup>55</sup> Since 2 Live Crew would be making their own recording of the song, they would not need Monument Records' permission.<sup>56</sup> In fact, 2 Live Crew's record company would own the copyright in the new sound recording.<sup>57</sup>

### C. *The Rights in a Song's Copyrights*

Once a copyright in a musical composition or sound recording has been created, its owners receive a bundle of six exclusive rights granting them a limited monopoly on how the song is used and paid for. This bundle of rights includes the right to: 1) reproduce the copyrighted work; 2) prepare derivative works; 3) distribute copies of the work; 4) perform the work publicly; 5) display the work; and 6) perform the work by digital audio transmission.<sup>58</sup> These rights allow a copyright owner a significant amount of control over how the song is exploited. Recall that these rights were granted to motivate the owner to use the work to benefit the masses.<sup>59</sup>

While all of these rights may be triggered at one point or another in transmission of a song over the Internet, the right to reproduce and the right to perform publicly are the two key rights that we will focus on here. The right to reproduce applies to both the musical composition and the sound recording. For instance, if a web-site decides they would like to offer the 1964 recording of *Oh, Pretty Woman* as a downloadable MP3 file, they

<sup>53</sup> See Kohn & Kohn, *supra* n. 2, at 334 (Supp. 2000).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See 17 U.S.C. § 106 (1994 & Supp. V 1999).

<sup>59</sup> See *supra* Part IV(A); see *supra* n. 39.

would need to get permission from both the music publishers and the record company.<sup>60</sup> In the case of an MP3 download, several reproductions are made in the course of this transmission, starting from the copy placed on the server of the originating computer to the temporary buffer and cache copies made on the various computers involved as the MP3 file is transmitted across the Internet to the final copy assembled on the end downloader's hard drive. On the other hand, if a song is merely offered as a webcast, the primary right implicated is the right of a public performance of the work. Nevertheless, reproductions are still made with the server, buffer and cache copies. However, because a copy is not made on the end listener's computer, there is no permanent copy left on the end hard drive.<sup>61</sup> Historically under the U.S. Copyright Act, a performance right only applied to musical compositions as opposed to the sound recordings themselves.<sup>62</sup> Recent changes to the Copyright Act, however, have extended the rights of sound recording copyright owners whose work is performed digitally.<sup>63</sup> These changes to the law are discussed below.

**D. Duration of a Song's Copyrights**

Once an original song is fixed and its bundle of rights have been granted, the next issue to consider is the duration of the copyright. As with previous applications of copyright law to musical compositions and sound recordings, each has a different duration.

**1. Musical Compositions**

The duration of copyright protection has repeatedly been modified since the first Copyright Act of 1790.<sup>64</sup> Traditionally, the duration of

---

<sup>60</sup> See Kohn & Kohn, *supra* n. 2, at 335 (Supp. 2000).

<sup>61</sup> See *id.*

<sup>62</sup> See 17 U.S.C. § 106(4) (1994). The broadcast of a musical composition by a radio station is one example where the only performance right implicated is that of the musical composition.

<sup>63</sup> See 17 U.S.C. § 106(6) (Supp. V 1999) (enacted under the *Digital Performance Right in Sound Recording Act of 1995*, Pub. L. No. 104-39, § 2, 109 Stat. 336, 336 (1995)).

<sup>64</sup> Under the Copyright Act of 1790, a work was granted an initial term of 14 years from first publication with a 14-year renewal term for a total of 28 years. See *Copyright Act of 1790*, ch. 15, § 1, 1 Stat. 124, 124. The Copyright Act of 1831 extended the initial term to 28 years from first publication with a renewal term of 14 years for a total of 42 years. See *Copyright Act of 1831*, ch. 16, §§ 1-2, 4 Stat. 436, 436-37. The Copyright Act of 1909 left the initial term at 28 years from first publication but extended the renewal term

protection began on the date the work was first published, an event that occurs when copies of the work are distributed to the public without any restriction on use or disclosure, such is the case with musical compositions.<sup>65</sup>

With the codification of the 1976 Copyright Act, both the basis and term under which a work receives protection were changed to expand protection of a work to the moment of its creation and fixation.<sup>66</sup> Furthermore, works created on or after January 1, 1978 receive protection for the life of the author, plus an additional 70 years of protection after the author dies.<sup>67</sup> Anonymous works, pseudonymous works, and works made for hire are protected for 95 years from first publication, or for 120 years from creation, whichever occurs first.<sup>68</sup> Under this new copyright regime, nothing in a current copyright term will enter the public domain under the life-plus-70 rule until the end of 2048.<sup>69</sup>

The following chart helps determine the duration of a musical composition copyright and whether it has passed into the public domain.<sup>70</sup>

---

to 28 years for a total of 56 years of protection. *See Copyright Act of 1909*, ch. 320, § 23, 35 Stat. 1075, 1080.

<sup>65</sup> The 1976 Copyright Act defines “publication” as: “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not itself constitute publication.” 17 U.S.C. § 101 (1994 & Supp. V 1999) (enacted under the *Copyright Act of 1976*, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543 (effective Jan. 1, 1978)).

<sup>66</sup> *See id.* at § 302(a).

<sup>67</sup> *See* 17 U.S.C. § 302(a) (1994 & Supp. V 1999) (enacted under the *Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, § 102(b)(1-2), 112 Stat. 2827, 2827 (1998)) (amending the 1976 Copyright Act and extending the term following the author’s death from 50 to 70 years).

<sup>68</sup> *See id.* at § 102(c) (amending the 1976 Copyright Act and extending the terms from 75 to 95 years from first publication, or from 100 to 120 years from creation, whichever is earlier).

<sup>69</sup> For example, if an author died in 1978 after creating a copyrightable work, the work would be protected for 70 years beginning on Jan. 1, 1978.

<sup>70</sup> Lolly Gasaway & Thomas Field, Jr., *When Works Pass Into the Public Domain* <<http://www.unc.edu/~unc1ng/public-d.htm>> (last updated Sept. 18, 2001). The chart and accompanying footnotes are reprinted, slightly modified, with permission from professors Gasaway and Field.

**Copyright Duration of Musical Compositions**

<b>Date of Work</b>	<b>Protected From</b>	<b>Term</b>
Published before 1923	In Public Domain	None
Published from 1923 – 1963	When published with notice <sup>71</sup>	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain.
Published from 1964 – 1977	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, which ever is greater
Created before 1-1-78; published between 1-1-78 and 12-31-2002	1-1-78, the effective date of the 1976 Act which preempts state common law copyright <sup>72</sup>	Life + 70 years or 12-31-2047 whichever is greater
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years <sup>73</sup> (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation) <sup>74</sup>

<sup>71</sup> Under the 1909 Act, works published without notice went into the public domain upon publication. See ch. 320, §§ 9, 35 Stat. 1075, 1077. Works published without notice between Jan. 1, 1978 and Mar. 1, 1989, the effective date of the Berne Convention Implementation Act, retained copyright only if registration was made within five years after the publication without notice. See 17 U.S.C. § 405(a)(2) (1994).

<sup>72</sup> See 17 U.S.C. § 301(a).

<sup>73</sup> Term of joint works is measured by the life of the author who lives longest. See 17 U.S.C. § 302(b) (1994 & Supp. V 1999).

<sup>74</sup> Works for hire, anonymous and pseudonymous works also have this term. See 17 U.S.C. § 302(c) (1994 & Supp. V 1999).

## 2. Sound Recordings

The duration of a sound recordings copyright is a relatively new feature of the federal copyright law. It was not until February 15, 1972, that sound recordings received official recognition as a right under the U.S. copyright law.<sup>75</sup> This lack of federal recognition, however, does not make pre-1972 sound recordings unprotected; in fact, many states provide statutory and common-law protections that generally parallel federal copyright law.<sup>76</sup> In addition, the copyright in the underlying literary or musical composition may restrict the use of the sound recording.<sup>77</sup>

With the enactment of the 1976 Copyright Act, sound recordings were granted the same term of protection as musical compositions.<sup>78</sup> Pre-1976 sound recordings, however, are subject to prior versions of the federal copyright law, or if pre-1972, state statute or common law. The following chart helps determine the duration of the sound recording copyright and whether it has passed into the public domain.<sup>79</sup>

---

<sup>75</sup> See Mary Brandt Jensen, *Does Your Project Have a Copyright Problem? : A Decision-Making Guide for Librarians* 72 (McFarland & Co. 1996).

<sup>76</sup> See *id.*; see also 17 U.S.C. § 301(c).

<sup>77</sup> See *id.* For example, if a state does not provide copyright protection for the sound recording of the Beatles' *Sgt. Peppers Lonely Hearts Club Band*, the underlying lyrics and score (i.e., the musical composition) of the work embodied in the sound recording is still eligible for federal copyright protection - provided the song was properly registered. See *id.*

<sup>78</sup> See 17 U.S.C. § 301 (1994 & Supp. V 1999) (enacted under the *Copyright Act of 1976*, Pub. L. No. 94-553, § 301, 90 Stat. 2541, 2572).

<sup>79</sup> Adapted with permission from Lolly Gasaway & Thomas Field, Jr., *supra* n. 70.

**Copyright Duration of Sound Recordings**

<b>Date of Work</b>	<b>Protected From</b>	<b>Term</b>
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years (or if works of corporate authorship, the shorter of 95 years from publication, or 120 years from creation)
Published from 2-15-72 through 1977	When published with notice <sup>80</sup>	28 years for first term; now automatic extension of 67 years for second term
Published from 2-15-72 through 1977 without notice	In the Public Domain	None
Created before 2-15-72 but not published	Protected by state law <sup>81</sup>	Must look to state statute or common law
Created before 2-15-72 but published	Protected by state law <sup>82</sup>	Must look to state statute or common law
Non-U.S. works created before 2-15-72 that have fallen into the public domain	No formalities required; protection resumes for the remainder of the term.	If the work meets 3 requirements <sup>83</sup> it will be restored for the remainder of the term of copyright.

<sup>80</sup> Works published *without notice* between Feb. 15, 1972 and Mar. 1, 1989, the effective date of the Berne Convention Implementation Act, retained copyright only if registration was made within five years after the publication without notice. See 17 U.S.C. § 405(a)(2) (1994).

<sup>81</sup> See Nimmer & Nimmer, *supra* n. 41 at § 4.06[B], 4-38.7 to 4-40 (rel. no. 54, Apr. 2001).

<sup>82</sup> See *id.*

<sup>83</sup> See generally 17 U.S.C. § 104A (1994 & Supp. V 1999). First, the work must enjoy copyright protection in its source country, i.e., not be in the public domain. See 17 U.S.C. § 104A(a)(1) (1994); 17 U.S.C. § 104A(h)(6)(B) (1994); 17 U.S.C. § 104A(h)(8) (1994 & Supp. V 1999) (defining “source country”). Second, at the time the work was created, at least one author or right holder must have been a national or domiciliary of an eligible country and, if the work was published, it must have been first published in an eligible country and not published in the U.S. during the 30-day period following

## V. LEGISLATIVE INFLUENCES ON INTERNET MUSIC

Over the last decade of the 20th century, numerous domestic and foreign initiatives have been launched, with the intention of strengthening traditional forms of intellectual property protection. As related to music transmitted over the Internet, the most notable include:<sup>84</sup>

- The Copyright Amendments Act of 1992 (provided for automatic renewals without the necessity of registration);<sup>85</sup>
- The Audio Home Recording Act of 1992 (provided for a tax on the sale of home recording equipment and digital recordable media to compensate record companies for lost sales due to home duplication);<sup>86</sup>
- The 1994 Uruguay Round GATT agreement, with TRIPS (restored copyright protection to certain foreign works);<sup>87</sup>
- The Digital Performance Right in Sound Recordings Act of 1995 (established the first performance rights for digitally transmitted sound recordings);<sup>88</sup>
- The WIPO Treaties of December 1996, concerning copyright, phonograms, and performers rights (mandated changes to U.S. copyright law);<sup>89</sup>
- The No Electronic Theft Act, enacted in 1997 (created criminal liability for the illegal reproduction or distribution of copyrighted works even if done without financial gain);<sup>90</sup>

---

publication in such eligible country. *See* 17 U.S.C. § 104A(h)(6)(D) (1994). Third, restorable works must have fallen into the public domain under U.S. law for failure to comply with formalities or because the work did not originate in a country with which the U.S. had copyright relations. *See* 17 U.S.C. § 104A(h)(6)(C) (1994).

<sup>84</sup> *See* Don Biederman, *Copyright Trends: With Friends Like These . . .*, 17 Ent. & Sports Law. 3, 3-4 (1999).

<sup>85</sup> Pub. L. No. 102-307, 106 Stat. 264, 264-72 (1992).

<sup>86</sup> 17 U.S.C. § 1001-10 (1994 & Supp. V 1999) (enacted under Pub. L. No. 102-563, 106 Stat. 4237, 4237-48 (1992)).

<sup>87</sup> General Agreement on Tariffs and Trade, *Multilateral Trade Negotiations (The Uruguay Round): Ministerial Decisions and Declarations, Dec. 15, 1993*, 33 I.L.M. 136, 136-52 (1994).

<sup>88</sup> Pub. L. No. 104-39, 109 Stat. 336, 336-49 (1995) [hereinafter DPRA].

<sup>89</sup> WIPO, *Copyright Treaty and Performances and Phonograms Treaty* <<http://clea.wipo.int/>> (accessed Mar. 18, 2002).

<sup>90</sup> Pub. L. No. 105-147, 111 Stat. 2678, 2678-80 (1998).

- The Sonny Bono Copyright Term Extension Act (added an additional 20 years of copyright protection to most active copyrights);<sup>91</sup> and
- The Digital Millennium Copyright Act of 1998 (implemented the WIPO treaties, established the limits on liability for service providers, created anticircumvention provisions for copy protected works and expanded performance rights for sound recordings to include webcasting).<sup>92</sup>

Although each the above legislative actions have played a part in addressing the challenges of protecting and securing the future of intellectual property, the following sections focus on only two of these initiatives: The Digital Performance Right in Sound Recordings Act,<sup>93</sup> and The Digital Millennium Copyright Act.<sup>94</sup> Both of these initiatives are playing key roles in shaping the future of digital music distribution over the Internet.

#### **A. *Digital Performance Right in Sound Recordings Act***

Even before webcasting and the transmission of MP3s became widespread Internet activities, the recording industry and lawmakers sought to update the copyright laws to specifically address digital music. The first fruit of these efforts was The Digital Performance Right in Sound Recordings Act of 1995 (the “DPRA”).<sup>95</sup>

Prior to the DPRA, digital music was not specifically identified in the Copyright Act.<sup>96</sup> However, as satellites began beaming digital subscription radio stations, lobbying groups rallied the support of lawmakers and carved out a new set of rights for musical content.<sup>97</sup> Under the DPRA, a copyright holder whose sound recording is transmitted in a digital broadcast

<sup>91</sup> Pub. L. No. 105-298, 112 Stat. 2827, 2827-29 (1998) (amending the 1976 Copyright Act and extending the term following the author’s death from 50 to 70 years).

<sup>92</sup> Pub. L. No. 105-304, 112 Stat. 2860, 2860-2918 (1998) (adding new ch. 12).

<sup>93</sup> See DPRA, *supra* n. 88.

<sup>94</sup> See DMCA, *infra* n. 106.

<sup>95</sup> See DPRA, *supra* n. 88.

<sup>96</sup> Compare 17 U.S.C. § 106 (1994) (enacted under the 1976 Copyright Act, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2542 (1976)) with 17 U.S.C. § 106(6) (Supp. V 1999) (enacted under the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 348 (1995)).

<sup>97</sup> See Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 Cardozo Arts & Ent. L.J. 733, 740-41 (1996).

now has the right to be paid for that performance, via a new statutory license scheme.<sup>98</sup> These provisions were limited, though, despite their revolutionary stance.<sup>99</sup>

Further, the DPRA compulsory license provision governed only subscription, or “on-demand,” providers of sound recording transmissions, because those were the transmissions most likely to be copied.<sup>100</sup> The DPRA also stopped short of addressing the issue of webcasting or other non-subscription based song services offered on the Internet.<sup>101</sup> As a result, webcasters claimed that their services were similar to traditional radio broadcasts, and as such were not required to pay for a license to play the digital sound recordings.<sup>102</sup> The recording industry, on the other hand, interpreted the law differently, and claimed that webcasters were required to obtain a license for their use of sound recordings.<sup>103</sup> This dispute was resolved, at least partially, by the Digital Millennium Copyright Act’s webcasting provisions, which are themselves a negotiated compromise between the Recording Industry Association of America (“RIAA”) and the webcasting industry.<sup>104</sup> This compromise is discussed further in Part V(B)(1) below.

### **B. The Digital Millennium Copyright Act**

On October 28, 1998, President Clinton signed the Digital Millennium Copyright Act (“DMCA”),<sup>105</sup> thereby bringing the U.S. into compliance with the intellectual property treaties of the World Intellectual Property Organization (“WIPO”).<sup>106</sup> The DMCA is a landmark piece of

<sup>98</sup> See 17 U.S.C. § 114(f) (1994 & Supp. V 1999) (enacted under § 3, 109 Stat. at 340-42).

<sup>99</sup> See 17 U.S.C. § 114(d) (1994 & Supp. V 1999) (enacted under § 3, 109 Stat. at 336-40).

<sup>100</sup> See Martin, *supra* n. 97, at 746.

<sup>101</sup> See Kohn & Kohn, *supra* n. 2, at 330 (Supp. 2000).

<sup>102</sup> See *id.* at 332-33; see also David J. Wittenstein & M. Lorraine Ford, *The Webcasting Wars*, J. Internet L. <[http://www.gwcf.com/articles/journal/jil\\_feb99\\_2.html](http://www.gwcf.com/articles/journal/jil_feb99_2.html)> (accessed Mar. 18, 2002).

<sup>103</sup> See Kohn & Kohn, *supra* n. 2, at 332-33 (Supp. 2000); see also Wittenstein & Ford, *supra* n. 102.

<sup>104</sup> See Kohn & Kohn, *supra* n. 2, at 333 (Supp. 2000); see also Wittenstein & Ford, *supra* n. 102.

<sup>105</sup> Pub. L. No. 105-304, 112 Stat. 2860-2918 (1998) (adding new ch. 12).

<sup>106</sup> The DMCA is alternately entitled “WIPO Copyright and Performance and Phonograms Treaties Implementation Act of 1998.” See Pub. L. No. 105-304, § 101, 112 Stat. at 2861.

legislation addressing many of the issues vital to a market and society in the Internet age. Among its key provisions, the DMCA:

- (1) makes it a crime to circumvent “built-in” anti-copying measures to prevent copyright infringement of the software;<sup>107</sup>
- (2) outlaws the manufacture, sale, or distribution of devices that can crack software protection codes;<sup>108</sup>
- (3) limits liability of Internet Service Providers (“ISP”) and Online Service Providers (“OSP”) from copyright infringement when acting solely as a conduit for transmitting information;<sup>109</sup>
- (4) creates a new license for sound recordings that are digitally transmitted;<sup>110</sup> and
- (5) provides a new statutory license for webcasters that do not provide on-demand services and grants recording copyright holders the exclusive right to authorize those webcasts provided on-demand.<sup>111</sup>

With the DMCA, Congress expanded the rights of sound recording copyright holders to control the performance of their works on the Internet.<sup>112</sup> The DMCA’s provisions, however, specifically exclude non-interactive music transmissions from coverage.<sup>113</sup>

---

<sup>107</sup> See 17 U.S.C. § 1201(a) (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 103, 112 Stat. at 2863-65).

<sup>108</sup> See 17 U.S.C. § 1201(b) (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 103, 112 Stat. at 2865).

<sup>109</sup> See 17 U.S.C. § 512 (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 202, 112 Stat. at 2877-86).

<sup>110</sup> See 17 U.S.C. § 114(d) (1994 & Supp. V 1999) (enacted under Pub. L. No. 105-304, § 405, 112 Stat. at 2890-94).

<sup>111</sup> See *id.*

<sup>112</sup> See 17 U.S.C. § 114 (1994 & Supp. V 1999) (enacted under Pub. L. No. 105-304, § 405, 112 Stat. at 2890-2902) (establishing the scope of rights in ephemeral sound recordings).

<sup>113</sup> See 17 U.S.C. § 114(d)(2)(A)(i) (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. at 2890-94).

### 1. Webcaster Eligibility Requirements for a Statutory License

Under the DMCA's webcasting licensing provision, a statutory license is available for entities providing digital audio transmissions of sound recordings that fall into any one of the following three categories: 1) subscription digital audio transmissions; 2) eligible non-subscription transmissions; and 3) pre-existing satellite digital audio radio service.<sup>114</sup> The DMCA covers subscription digital audio transmissions and pre-existing satellite digital audio radio services under terms identical to the DPRA.<sup>115</sup>

The remaining category of "eligible non-subscription transmissions" encompasses those entities that make eligible "free play" transmissions.<sup>116</sup> Webcasting services fall into this category. In addition, the definition of eligible non-subscription transmission also includes retransmission of broadcast transmissions.<sup>117</sup> Therefore, traditional broadcast radio stations that simultaneously retransmit their over-the-air broadcasts via a webcast may also be eligible for the statutory license as it relates to their webcasting operations.<sup>118</sup>

The statutory license provided by the DMCA is a license provided by the copyright law, as opposed to one that is voluntarily granted by individual copyright owners.<sup>119</sup> It is an efficient way to license because it permits a webcaster to perform all of the sound recordings it wishes, without

<sup>114</sup> See 17 U.S.C. § 114(d)(2) (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. at 2890-94).

<sup>115</sup> Compare 17 U.S.C. § 114(d) (Supp. V 1999) (enacted under the DPRA, Pub. L. No. 104-39, § 3(3), 109 Stat. 336, 336-44 (1995)), with 17 U.S.C. § 114(d)(2) (Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. at 2890 (1998)).

<sup>116</sup> See 17 U.S.C. § 114(d)(2) (Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. at 2890-94) (The term "free play" refers to those transmissions in which no fee is charged for listening).

<sup>117</sup> See 17 U.S.C. § 114(d)(2)(C)(i) (Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. at 2890-94).

<sup>118</sup> "On February 20, 2002, the Copyright Arbitration Royalty Panel ("CARP") delivered its report recommending rates and terms for the statutory license for eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions ("webcasting") under 17 U.S.C. § 114 and to make ephemeral recordings of sound recordings for use of sound recordings under the statutory license set forth in 17 U.S.C. § 112." *Rates and Terms for Statutory License for Eligible Nonsubscription Services* <[http://www.loc.gov/copyright/carp/webcasting\\_rates.html](http://www.loc.gov/copyright/carp/webcasting_rates.html)> (accessed March 18, 2001).

<sup>119</sup> See 17 U.S.C. § 114(f) (Supp. V 1999) (enacted under Pub. L. No. 105-304, § 405(a)(2), 112 Stat. at 2894).

obtaining separate licenses from each copyright owner.<sup>120</sup> A webcaster's service and programming must meet several criteria before being eligible for a statutory license.<sup>121</sup> Otherwise, a webcaster needs to obtain licenses directly from recording companies.<sup>122</sup> The programming requirements include:<sup>123</sup>

- (1) **Sound recording performance complement.** Basically, a webcaster may not play in any three-hour period (a) more than three songs from a particular album, including no more than two consecutively, or (b) four songs by a featured artist or from a boxed set, including no more than three consecutively.
- (2) **Archived programs.** Programs that are posted on a web site for listeners to hear repeatedly on-demand should be at least five hours long, and should not be available for more than two weeks at a time. (Note: merely changing one or two songs does not meet this condition.)
- (3) **Continuous looped programs.** Programs that automatically start over when finished should be at least three hours long.
- (4) **Rebroadcasts of programs.** These programs can be performed at scheduled times three times in a two-week period for programs of less than one hour, and four times in a two-week period for programs of an hour or more.
- (5) **Prior announcements not permitted.** Advance song or artist playlists generally may not be published. However, a webcaster may name one or two artists to illustrate the type of music on a particular channel. DJ teaser announcements using artist names are permitted, but only those that do not specify the time a song will be played.
- (6) **Obligation to identify song, artist and album.** When performing a sound recording, a webcaster must identify the sound recording, the album and the featured artist, if receivers of the service are capable of displaying this information. This requirement took effect October 28, 1999.

---

<sup>120</sup> See The Digital Media Ass'n, *The Digital Millennium Copyright Act of 1998 – A Primer for DiMA Members* <<http://www.digmedia.org/dmca/dmcaexp.html>> (last updated Dec. 1, 1998).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See Digital Millennium Copyright Act § 405(a)(1)(B), 112 Stat. at 2890-94 (codified as amended at 17 U.S.C. § 114(d)(2)(C)(i-ix) (Supp. V 1999)). See also *The Digital Millennium Copyright Act of 1998 – A Primer for DiMA Members*, *supra* n. 120. These are general guidelines for the restrictions listed in 17 U.S.C. § 114 (1994 & Supp. V 1999). The license provides different options depending on the type of service that is offered.

- (7) **Prohibition on falsely suggesting a link between recording artists and advertisements.** A webcaster may not perform a sound recording in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.
- (8) **Obligation to take steps to defeat copying by recipient.** A webcaster must disable copying by a transmission recipient if in possession of the technology to do so, and must also take care not to induce or encourage copying by transmission recipients.
- (9) **Requirement to accommodate technical protection measures.** A webcaster must accommodate the transmission of measures widely used by sound recording copyright owners to identify or protect copyrighted works. To the extent it is technically feasible, transmissions must be set so that receiving software will inhibit the end user from direct digital copying of the transmitted data.
- (10) **Obligation to cooperate to defeat scanning.** A webcaster must cooperate with copyright owners to prevent recipients from using devices that scan transmissions for particular recordings or artists.
- (11) **Transmission of bootlegs not covered.** The statutory license is limited to transmissions made from lawful copies of sound recordings. It does not cover transmissions made from bootlegs or pre-released recordings (unless the performance of a pre-released recording is otherwise authorized by the copyright owner).
- (12) **Automatic switching of channels.** The webcaster must not automatically and intentionally cause a device receiving the transmission to switch from one program channel to another.
- (13) **Transmission of copyright management information.** If technically feasible, transmissions by the webcaster must be accompanied by the information encoded in the sound recording by the copyright owner that identifies that title of the song, the featured artist and other related information (if any).

If a webcaster is providing a free play or non-subscription transmission that meets all of the above conditions, it will qualify for a statutory license. In other words, the webcaster can legally *compel* the record companies to provide a performance license for a statutorily mandated fee.

However, if a webcaster does not qualify for the statutory license, then licenses must be obtained from *each* of the copyright owners of the sound recordings that a webcaster intends to transmit. In this scenario, where the webcaster does not qualify for a statutory license they must contact each copyright owner *individually*. Webcasters not qualifying for the statutory license who do not obtain licenses directly from individual sound

recording copyright owners run the risk of being held liable for copyright infringement.<sup>124</sup>

## 2. Eligibility Requirements for Ephemeral Recording Exemption

Beyond merely providing streaming audio to a listening audience across the Internet, webcasters must also make copies of sound recordings onto computer hard drives to facilitate such transmissions. The DMCA foresaw this necessity.<sup>125</sup> This type of temporary copy is referred to as an ephemeral recording,<sup>126</sup> and was originally included in section 112 of the 1976 Copyright Act, but was expanded by the DMCA.<sup>127</sup> Originally, section 112 provided radio and television broadcasters an exemption from infringement in copying copyrighted works to facilitate transmissions of the works.<sup>128</sup> The DMCA expanded this exemption for ephemeral recordings to cover those digital audio services that qualify and pay royalties for public performances under a statutory license.<sup>129</sup>

The DMCA grants an exemption for ephemeral recordings if: 1) the webcasting service making such recordings is licensed, statutorily or otherwise, to transmit the recordings; and 2) the webcaster meets the following conditions of the ephemeral recording exemption:<sup>130</sup>

- (1) The copy of the recording must be used only by the webcaster;
- (2) The copy must be destroyed within six months from the date the transmission program was first transmitted to the public, unless preserved exclusively for archival purposes;

---

<sup>124</sup> See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* vol. 2, § 8.23[B][1] at 8-356 (rel. no. 54, Matthew Bender & Co. Apr. 2001).

<sup>125</sup> See 17 U.S.C. § 112(a)(1) (1994 & Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 402, 112 Stat. 2860, 2888-89 (1998)).

<sup>126</sup> *Id.*

<sup>127</sup> 17 U.S.C. § 112(a) (1994) (enacted under Pub. L. No. 94-553, § 112(a), 90 Stat. 2541, 2558-60).

<sup>128</sup> See *id.*; See also Kohn & Kohn, *supra* n. 2, at 374-75 (Supp. 2000).

<sup>129</sup> See 17 U.S.C. § 112(a)(1) (1994 & Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 402, 112 Stat. at 2888-89); See also Kohn & Kohn, *supra* n. 2, at 377-78 (Supp. 2000).

<sup>130</sup> See 17 U.S.C. § 112(a)(1) (1994 & Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 402, 112 Stat. at 2888-89).

- (3) Only one ephemeral copy of the recording may be made, and no further copies of the recording can be made from the ephemeral copy; and
- (4) The copy must be used only for transmissions in the webcaster's local service area.

## VI. OVERVIEW OF THE MUSIC INDUSTRY PLAYERS

Having had a brief review of the laws and legislation related to music transmission over the Internet, we will now turn to a discussion of the key players that make up the American music industry. These players include record companies, music publishers, performing rights societies, administration and licensing companies, trade associations, music unions, as well as other international organizations. As noted in Part IV(D) above, there are two distinct rights in each song: the musical composition rights and the sound recording rights. Different industry players align with each of the two distinct rights.

The most familiar players of the recording industry are often the *record companies*, which have deep pockets to finance, promote and distribute the majority of sound recordings on the market.<sup>131</sup> The role of the record company is to contract with artists for the creation and promotion of recordings.<sup>132</sup> This is most often accomplished through the record company's financing of the recording project, for which the artist receives a monetary advance, and the record company receives royalties on the sale and licensing of the completed recording.<sup>133</sup> Under this scenario the record company usually retains all rights in the sound recording, since it commissioned and paid for the project.<sup>134</sup>

Without songs, however, there would be no record and the parties that most often handle the underlying words and arrangements of a song – the musical composition – are the *music publishers*.<sup>135</sup> Generally, a songwriter will sign an exclusive contract with a music publisher, who then works on the songwriter's behalf to get the song recorded or licensed in some commercially rewarding manner.<sup>136</sup> The music publisher is also responsible for licensing songs to be recorded on an album, printed in songbooks,

---

<sup>131</sup> See Kohn & Kohn, *supra* n. 2, at 377 (Supp. 2000).

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 334.

<sup>135</sup> See *id.* at 377-78.

<sup>136</sup> See *id.*

performed in a club, or broadcast on radio, television or the Internet.<sup>137</sup> For these services a music publisher retains a percentage of the copyright in the musical composition.<sup>138</sup>

Working on behalf of songwriters and music publishers to license and collect on the performance of musical compositions are *performing rights organizations*.<sup>139</sup> In the U.S., the three entities that handle these licenses are the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Incorporated (“BMI”), and SESAC.<sup>140</sup> Music publishers and songwriters become members of one of these three organizations, authorizing the organization to license and collect royalties for the performance of their songs.<sup>141</sup> Generally, the organization sells a blanket license covering all the songs in an organization’s catalog to nightclubs, radio stations, television broadcasters and Internet webcasters.<sup>142</sup>

*Administration and licensing companies* make up another sector of the industry representing the rights of songwriters and music publishers. Organizations such as the *Harry Fox Agency*, which is the licensing arm of the National Music Publisher’s Association, represent works on behalf of music publishers to license musical compositions that have been recorded so that these compositions can be reproduced in CDs and other kinds of recordings.<sup>143</sup> Different from the performance rights societies, these licenses are not issued on a blanket basis, but rather are based on a statutory rate set by the Copyright Act.<sup>144</sup> Representing record companies, *SoundExchange* (a division of the Recording Industry Association of America) acts as a

---

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See* Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Question 5* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002); *see also* Kohn & Kohn, *supra* n. 2, at 338 (Supp. 2000).

<sup>140</sup> SESAC was originally the Society of European Stage Authors and Composers, but is now known simply as SESAC. *See* Kohn & Kohn, *supra* n. 2, at 867 (2d ed., Aspen L. & Bus. 1996).

<sup>141</sup> *See* Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Question 5* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002); *see also* Kohn & Kohn, *supra* n. 2, at 338 (Supp. 2000).

<sup>142</sup> *See* Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Questions 5 & 7* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002); *see also* Kohn & Kohn, *supra* n. 2, at 338 (Supp. 2000).

<sup>143</sup> *See* Kohn & Kohn, *supra* n. 2, at 338-39 (Supp. 2000).

<sup>144</sup> *See id.* The statutory rate and compulsory license is discussed in greater detail below in Part VIII.

licensing agent for the digital performance of sound recordings and collects and distributes royalties to their clients.<sup>145</sup>

The *trade association* representing most American record companies is the *Recording Industry Association of America* (“RIAA”). Based in Washington D.C., this association acts collectively to represent the licensing, legislative and legal interests of its members.<sup>146</sup> Among other things, the RIAA operates a government affairs division and an anti-piracy unit, and is also responsible for issuing the gold, platinum, and diamond status for album sales.<sup>147</sup> Recently, the RIAA represented record companies and negotiated with webcasters for new performance licenses for digitally transmitted sound recordings.<sup>148</sup>

Within the music industry there are a wide variety of *unions* representing the various interests of their members.<sup>149</sup> Some are trade unions affiliated with the American Federation of Labor - Congress of Industrial Organizations (“AFL-CIO”), while others operate more as a guild.<sup>150</sup> The most relevant unions in the context of music licensing are the *American Federation of Musicians* (“AFM”),<sup>151</sup> the *American Federation of Television and Radio Artists* (“AFTRA”),<sup>152</sup> and the *Screen Actors Guild* (“SAG”).<sup>153</sup> Members of these unions include musicians, singers, actors and radio announcers.<sup>154</sup> Unions represent the interests of their members by setting minimum payment rates, issuing licenses, collecting royalties, and promoting favorable business practices within the industry.<sup>155</sup>

The licensing entities identified above operate within the U.S., and usually only deal with those musical compositions and sound recordings that are owned and maintained by companies and individuals located within the U.S. If one wishes to obtain rights to a musical piece having a foreign

<sup>145</sup> For a description of the services provided by SoundExchange see their website at <<http://www.soundexchange.com>> (accessed Mar. 18, 2002).

<sup>146</sup> See Kohn & Kohn, *supra* n. 2, at 339 (Supp. 2000).

<sup>147</sup> See *id.*

<sup>148</sup> See e.g. *musicmusicmusic inc. and RIAA Ink Historic Agreement* <<http://www.musicmusicmusic.com/main.php3>> (accessed Mar. 18, 2002).

<sup>149</sup> See David Baskerville, *Music Business Handbook & Career Guide* 130 (5th ed., Sherwood Pub. Co. 1990).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 130-32.

<sup>152</sup> See *id.* at 132-34.

<sup>153</sup> See *id.* at 136.

<sup>154</sup> See *id.* at 132-36.

<sup>155</sup> See *id.*

copyright, it is necessary to first contact the international licensing department of the music publisher or if such a department does not exist, contact the appropriate publisher in the work's country of origin.<sup>156</sup>

## VII. LICENSES INVOLVED

Recognizing the parties that make up the recording industry is half the challenge in clearing a song for use on the Net; the other half is knowing what rights need to be asked for. Permission to use a song is obtained through the granting of a license by the appropriate copyright owner or licensing agent.<sup>157</sup> In the case of musical compositions, the most common Internet related licenses include: 1) mechanical licenses; 2) synchronization licenses; and 3) performance licenses. The two most common licenses for sound recordings include: 1) master recording licenses; and 2) performance licenses for digital audio transmissions.

### A. *Musical Composition Licenses*

#### 1. Mechanical License

The *mechanical license* originates from the basic grant of rights of a copyright owner to record, reproduce and distribute a musical composition in a fixed perceivable medium - such as a compact disc or a computer hard drive in the case of MP3 files.<sup>158</sup> It is worth noting that a copyright owner is not required to issue a mechanical license unless the work has been distributed to the public. Once a public distribution occurs the Copyright Act is triggered and the musical composition can be licensed under a compulsory license.<sup>159</sup>

As the chart above shows, these licenses are often obtained through a licensing agent such as the Harry Fox Agency ("HFA") or Copyright Management Services ("CMS") on behalf of a music publisher, or can be obtained directly from the publisher. Mechanical licenses are based on the statutory rate, which is currently 8 cents per song, for recordings under five minutes, or 1.55 cents per minute for recordings over five minutes, but rates

<sup>156</sup> See Kohn & Kohn, *supra* n. 2, at 94, 299 (2d ed., Aspen L. & Bus. 1996).

<sup>157</sup> See *supra* Part IV.

<sup>158</sup> See Kohn & Kohn, *supra* n. 2, at 9-11 (Supp. 2000); see also 17 U.S.C. § 115(c)(3)(A) (1994 & Supp. V 1999).

<sup>159</sup> See 17 U.S.C. § 115(a)(1) (1994 & Supp. V 1999).

are negotiable depending on the circumstances surrounding the project and use.<sup>160</sup>

Currently, both HFA and CMS require parties who wish to stream audio to obtain a mechanical license for any copying that occurs through the process of transmitting a musical composition from a server computer, as well as for any subsequent permanent and/or temporary copies made in the process of transmitting the audio from the host website to the end user.<sup>161</sup>

## 2. Synchronization License

A *synchronization license* (“sync license”) is required if a musical composition is used in connection with visual images, and usually permits distribution in connection with a public performance.<sup>162</sup> For example, a sync license is required when a musical composition is used in a movie or television show. In contrast, a mechanical license does not permit reproduction with still images or motion pictures.<sup>163</sup> Sync licenses are not compulsory licenses and can be obtained either directly from the music publisher or through the publisher’s licensing agent.<sup>164</sup> The terms of a sync license depend upon such factors as the importance of the song, the geographic scope, and the duration and type of intended use.<sup>165</sup>

## 3. Performance License

True to its name, a *performance license* is required any time a musical composition is performed, transmitted, or otherwise communicated to the public by some means.<sup>166</sup> Such licenses are often necessary for both

<sup>160</sup> See Kohn & Kohn, *supra* n. 2, at 354 (Supp. 1999).

<sup>161</sup> See Kohn & Kohn, *supra* n. 2, at 671 (2d ed., Aspen L. & Bus. 1996).

<sup>162</sup> See Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Question 13* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002).

<sup>163</sup> See 17 U.S.C. § 106 (1994 & Supp. V 1999). See also Kohn & Kohn, *supra* n. 2, at 9 (Supp. 2000).

<sup>164</sup> See Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Question 20* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002); see also Kohn & Kohn, *supra* n. 2, at 729-30 (2d ed., Aspen L. & Bus. 1996).

<sup>165</sup> See Harry Fox Agency, *HFA’s FAQ List* <<http://www.nmpa.org/hfa/hfafaq.html>> (accessed Mar. 18, 2002).

<sup>166</sup> See 17 U.S.C. § 101 (1994 & Supp. V 1999) (defining “publicly”); see Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Questions 2 & 4* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002);

streaming and downloadable music.<sup>167</sup> Similar to the sync license, a performance license is not compulsory and can be obtained either from the music publisher, its licensing agent or most likely through the PRO representing the publisher.<sup>168</sup>

Most performances are covered by a “blanket” license issued by each PRO for narrow categories of performances, such as radio broadcasts or webcasts.<sup>169</sup> Remember, each PRO only licenses the musical compositions of their members, so it may be necessary to obtain licenses from all three societies.<sup>170</sup>

## **B.     *Sound Recording Licenses***

The reproduction, distribution or digital transmission of sound recordings requires separate licenses, each of which must be obtained from the artist and/or record company. If the performer is a member of a musicians union, then the consent of that organization may also be required.<sup>171</sup> A discussion of two sound recording licenses most relevant to Internet music follows.

### **1.     *Master Recording Licenses***

A *master recording license* is involved whenever a sound recording is reproduced or “fixed” in a sufficiently permanent form, whereby it may be perceived, reproduced, or otherwise communicated.<sup>172</sup> Such a reproduction could include making copies of a sound recording on a CD, posting sound

ASCAP Internet Licensing, *Frequently Asked Questions about Internet Licensing, Question 1* <<http://www.ascap.com/weblicense/webfaq.html>> (accessed Mar. 18, 2002).

<sup>167</sup> See ASCAP Internet Licensing, *Frequently Asked Questions about Internet Licensing, Questions 4, 26 & 30* <<http://www.ascap.com/weblicense/webfaq.html>> (accessed Mar. 18, 2002).

<sup>168</sup> See Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Questions 5* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002).

<sup>169</sup> See Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Questions 5 & 7* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002).

<sup>170</sup> See Music Reports, Inc., *supra* n. 168.

<sup>171</sup> See Music Reports, Inc., *A Television & Film Producers Guide to Music Clearance, Questions 9* <<http://www.musicreports.com/pguide.asp?m=4,9,0>> (accessed Mar. 18, 2002).

<sup>172</sup> See 17 U.S.C. § 101 (1994 & Supp. V 1999) (defining “fixed”).

recordings on a web site for downloading, and downloading sound recordings from a web site. When these types of reproductions are made by someone other than the copyright owner, a master recording license is generally required.<sup>173</sup> These licenses are not compulsory.

## 2. Performance Licenses for Digital Audio Transmissions

In the past, copyright owners of sound recordings received the right to protect the reproduction of the recording, but not the right to prevent public performance of the work.<sup>174</sup> The DPRA created a *public performance right for digitally transmitted sound recordings*.<sup>175</sup> In contrast, the DMCA established a compulsory license for webcasters who meet specified eligibility requirements.<sup>176</sup>

### VIII. LICENSING PROCESS

As discussed in the previous sections, the laws, players and industry practices create a puzzle of intricate issues when it comes to transmitting music across the Internet. Combining these various puzzle pieces, this section considers practical steps for identifying the rights needed and how to obtain proper permission for downloading and streaming music. Remember, however, even within these narrow applications the scenarios for transmitting digital music are numerous and every possibility presents new complex copyright and licensing issues. Thus, it is important to methodically walk through each step of the process, so as not to miss any issues.

---

<sup>173</sup> See 17 U.S.C. § 106(6) (Supp. V 1999); see also Kohn & Kohn, *supra* note 2, at 293-314 (Supp. 2000).

<sup>174</sup> Compare 17 U.S.C. § 106 (1994) (enacted under the 1976 Copyright Act, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (1976)) with 17 U.S.C. § 106(6) (Supp. V 1999) (enacted under the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 336 (1995)).

<sup>175</sup> See 17 U.S.C. § 106(6) (Supp. V 1999) (enacted under the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 336 (1995)).

<sup>176</sup> See 17 U.S.C. §§ 108, 112 & 114 (1994 & Supp. V 1999) (enacted under the Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 402-05, 112 Stat. 2860, 2888-2902 (1998)).

**Step 1** Identifying the musical compositions and sound recordings to be used.

A good first step is to determine exactly what songs will be used in a particular project. While this information is not mandatory, it provides the licensor with a good framework for walking through the licensing process. This may include the name of specific songs as recorded by specific recording artist, or in the case of an online music subscription service, it may include entire catalogs of music from a particular artists or record company. Either way it's a good first question to answer since both record companies and music publishers have thousands of songs in their music libraries. In addition, it is helpful to identify as much information as possible about the song, including: the record company, the artist(s) that recorded the song, the album on which the song appears, the songwriters and the music publishing company. It is probably a good idea to have alternative music selections in mind since copyright owners are not obligated to grant a license for *all* uses.

**Step 2** Outline how the musical compositions and sound recordings will be used.

The application and context of how the musical compositions and sound recordings will be used is a vital question for copyright owner(s) in the licensing process. Identifying the type of use is important since it distinguishes which rights are being used and thus which copyright owner one will need to contact in order to obtain the necessary licenses. To prevent having to make repeated requests, outline all the different ways the song will be used *before* contacting any copyright owners. This outline will be helpful because music used in more than one application requires separate licenses for each use. Also, keep in mind that use of music on the Internet is a relatively new activity, and because it can be easily pirated, copyright owners may be reluctant to license their songs. Therefore, be prepared to educate the licensing agent and be sure they know exactly how you intend to use the work.

As discussed in previous sections, the means by which a song is transmitted over the Internet determines which copyright owners need to be contacted and what licenses are required. In order to narrow the types of use related to Internet music transmissions, consider use in the context of four main categories:

- (1) **Webcasting.** This includes transmitting music to an end-listener without making a permanent copy of the song on the end-listener's computer hard-drive.<sup>177</sup>
- (2) **Retransmission of radio stations.** This type of use, primarily applicable only to existing terrestrial radio stations, refers to the retransmission of a radio station's over-the-air broadcast via the Internet.<sup>178</sup>
- (3) **Interactive music.** An interactive use of music refers to the manner whereby a listener is able to choose particular songs to listen to on-demand or the ability to create a customized music playlist.<sup>179</sup>
- (4) **Downloadable music.** This type of use covers the transmitting of music in a manner that makes a permanent copy on the end-user's computer hard-drive. Such a use can include music files, such as MP3 files, posted on Websites, FTP sites, or other locations available via the Internet whereby a user may download the files to their own computer for repeated replay. Licenses for this type of use must be negotiated and obtained from both the sound recording and musical composition copyright owners directly.

**Step 3** Determine whether the musical compositions and sound recordings are protected by copyright.

At this stage, one should have a list of the songs they wish to use and an outline of their potential uses. The next step is to determine if the musical compositions and sound recordings are still protected by copyright law. This determination can get complicated very quickly, so it is best to start with the premise that all songs are protected by copyright, and that permission will be required for every use. Only when a song meets an exception to the copyright owner's exclusive rights, or its copyright protection has lapsed, can it be used without obtaining permission. This section helps determine this issue.

#### EXCEPTION 1: A Note on Fair Use

This article does not address the complex issue of copyright fair use. Fair use, which can be found in section 107 of the Copyright Act, applies to

---

<sup>177</sup> See RIAA, *Licensing, Statutory Licenses/Webcasting, Webcasting FAQ* <<http://www.riaa.com/licensing-licen-3a.cfm>> (accessed Mar. 18, 2002).

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

all the copyright holder's rights.<sup>180</sup> The statute provides a non-exhaustive list of factors to be considered in determining whether a particular use of a copyrighted work falls within the exception.<sup>181</sup> Many uses are covered by either voluntary licenses, statutory licenses, or by guidelines such as those drafted for educators. Although this article looks at various exceptions to copyright protection, it does not discuss the fair use exception.<sup>182</sup>

**EXCEPTION 2:** Has the copyright in the song expired?

As discussed above in Part IV(D), the term of a song's copyright is of limited duration. Once the term of protection expires, the work enters the public domain and can be used by anyone without a license. In order to determine whether a song is still covered by copyright, refer to the tables in Part IV(D). Keep in mind that some elements of a song may fall into the public domain before other elements. A modern day song set to an ancient tune would be a prime example. In this situation, the underlying arrangement of the song would be part of the public domain, but the new lyrics and recording would be protected by copyright. When in doubt, obtain a license.

**EXCEPTION 3:** Is the song in the public domain?

As a general rule, all works should be treated as though covered under some term of copyright protection, unless, either the author has done something specifically to dedicate the work to the public domain or it was published prior to 1923.<sup>183</sup> As presented in the discussion of copyright terms in Part IV above, the Copyright Act of 1909 required authors to fulfill specific notification guidelines in order to claim and maintain federal copyright protection.<sup>184</sup> Without proper notice on published works they would immediately fall into the public domain.<sup>185</sup> Such strict formalities, however, were done away with in the passage of the Copyright Act of 1976, and the implementation of the General Agreement on Tariffs and Trade

---

<sup>180</sup> See 17 U.S.C. § 107 (1994).

<sup>181</sup> See *id.*

<sup>182</sup> See generally Nels Jacobson, Note, *Faith, Hope & Parody: Campbell v. Acuff-Rose, "Oh, Pretty Woman," and Parodists' Rights*, 31 Hous. L. Rev. 955, 994-1014 (1994) (providing an in-depth discussion of fair use issues).

<sup>183</sup> See *supra* Part IV(D)(1).

<sup>184</sup> *Copyright Act of 1909*, Pub. L. No. 60-349, ch. 320, §§ 9, 18-19, 35 Stat. 1075, 1077, 1079 (1909). See also Jensen, *supra* n. 75, at 55.

<sup>185</sup> See Copyright Act of 1909, *supra* n. 184; See also Jensen, *supra* n. 75, at 55.

(“GATT”) in 1989.<sup>186</sup> Now, with copyright protection attaching upon the creation of a work in a tangible medium, there must be some affirmative act taken by the author to thrust it into the public domain.<sup>187</sup>

While it is not a common occurrence for authors to just give up their rights, some authors may seek to make educational, religious, or other such contributions to the public by making a statement expressly dedicating the work, including all of the bundle of rights discussed in Part IV(C), to the public domain.<sup>188</sup> A far more common occurrence is the natural tolling of the copyright term, whereby the work enters the public domain at the end of its term of protection, thus allowing the public to freely use and transform it.<sup>189</sup>

**Step 4** Identify the owners of each musical composition and sound recording.

Once you have narrowed down the songs you want to use and the way in which you plan to use them, the next step is to identify who you need to contact to get permission. Depending on whether you plan to record your own version of a song or use an existing recording, there are two paths to pursue – the owners and licensing agents of the *musical composition* and the *sound recording*.

**Who Owns the Musical Composition?** The copyright in a musical composition is a complex mix. Originating as the words and arrangement of a song, musical compositions are usually transferred from the creators to a music publisher in exchange for a percentage of royalties. It is the music publisher that then acts as the licensing agent from whom permission must be sought for song use.<sup>190</sup> Music publishers, however, often utilize the services of licensing agents who license and collect the license fees on behalf of the publisher. Depending on how the song is used, different agents represent specific rights in the song. Each of these licensing agents are discussed above in Part VI.

**Who Owns the Sound Recording?** Sound recordings offer a less complex bundle of owners, but an equally complex array of rights. Most

<sup>186</sup> See Music Reports, Inc., *A Television Broadcaster’s Guide to Music Licensing, Questions 21* <<http://www.musicreports.com/broadcast.asp?m=4,10,0>> (accessed Mar. 18, 2002); see also 17 U.S.C. §§ 401-406 (1994 & Supp. V 1999) (enacted under the 1976 Copyright Act, Pub. L. No. 94-553, ch. 4, §§ 401-406, 90 Stat. 2576, 2576-79).

<sup>187</sup> See Jensen, *supra* n. 75, at 55.

<sup>188</sup> See *id.* at 56.

<sup>189</sup> See *supra* Part IV(D)(1).

<sup>190</sup> See M. William Krasilovsky & Sidney Shemel, *This Business of Music* 182 (7th ed., Billboard Books 1995).

sound recordings are owned by the record company that released the recording.<sup>191</sup> Most rights can be cleared directly through the record company, except for those recording contracts that include terms requiring an artist's approval of how the sound recording is used before the record company can grant a license. Typically, the record company will inform prospective licensees if the artist's contract contains such artist approval terms. When such terms are unclear or unknown, it is advisable to also contact the artist or their estate for approval.

**a.     Where do you find the copyright owner?**

Locating the identity of the appropriate music publisher and record company is the first step in tracing a work's "chain of title." This information is used to identify the current owner(s) of the song that have the authority to issue a valid license.<sup>192</sup> Some good sources for finding the music publisher and record company include the album's liner notes or online databases.

**Liner Notes.** Most current releases of an album, cassette or CD list the various music publishers associated with each musical compositions in the liner notes or album label copy. Typically, the liner notes provide the names of the contributing songwriters, their publishing company and quite often which PRO they are affiliated with. If this information is not provided, such as with older releases, there are several online databases which can assist in satisfying the gaps of ownership information.

**Online Databases.** A wealth of song information is now available via the Internet through the searchable databases of many of the larger music publishers, PROs and other music portals. Many of these online databases allow you to search for information by artist, album, song, style or record label. It is also usually possible to conduct a search even if you only know the song's name. ASCAP, BMI and SESAC maintain vast databases of song titles, songwriters, performers and music publishers of their members.<sup>193</sup> The database you select to search will depend on the style of music and the year in which the song was written or performed.<sup>194</sup> Search reports generally

---

<sup>191</sup> See *supra* Part IV(B).

<sup>192</sup> See J. Dianne Brinson et al., *Multimedia : Law and Business Handbook : A Practical Guide for Developers and Publishers* 122 (Ladera Press 1996).

<sup>193</sup> See e.g. ASCAP's ACE database, *ACE on the Web* <<http://www.ascap.com/ace/ACE.html>> (accessed Mar. 18, 2002); BMI's database, *BMI Song Search* <<http://www.bmi.com>> (accessed Mar. 18, 2002); SESAC's database, *Repertory Online* <<http://www.sesac.com/sesac.html>> (accessed Mar. 18, 2002).

<sup>194</sup> For instance, ASCAP was founded in 1914 and is the largest and oldest society. BMI was founded in 1940 and originally catered to blues, rhythm and blues, country, Latin

identify who wrote the song and, in most cases, the current music publisher and their licensing agent. The PRO databases do not provide any information on the record companies; however, record company information can be obtained through one of the other databases listed below.

**All Media Guide.** This online database provides a variety of databases and search engines and allows users to search by artist, album, song, style and record label.<sup>195</sup> This database only contains basic information on songwriters, but is a great tool for locating different albums and artists who have recorded particular songs.

**Record Company Websites.** Many record company sites provide useful information on artists and their albums. These sites will often provide the record company's address and other useful contact information. One drawback to these sites, however, is their focus on current popular artists. If you are looking for an older or more obscure artist, you might have better luck elsewhere.

**Recorded Sound Reference Center at the Library of Congress.** The Reference Center is part of the Motion Picture, Broadcasting, and Recorded Sound Division of the Library of Congress in Washington, D.C. The Reference Center provides a wealth of catalogs, indexes and other reference resources for locating information about commercial music, spoken word recordings, literary recordings, special collections, and various published and unpublished works. The collection dates from 1926 to present and represents over 2 million items in formats from wax cylinders to CDs.<sup>196</sup> The Reference Center's resources range from on-line catalogs to index files, each covering either a different genre of music or time period. Online searches can be conducted via the Reference Center's website, and manual searches of the index files can be conducted onsite at the Library's James Madison building.<sup>197</sup>

#### b. Is the work registered?

**Copyright Office Records.** Whether or not you identify the copyright owners using an online database, one should consider searching

---

and other indigenous American musicians. SESAC, the smallest of the three, was founded in 1930 and originally focused its representation to European and gospel music.

<sup>195</sup> See *All Music Guide Search* <<http://www.allmusic.com>> (accessed Mar. 18, 2002).

<sup>196</sup> For a description of the services provided by the Library of Congress' *Recorded Sound Reference Center*, see <<http://lcweb.loc.gov/rr/record/>> (accessed Mar. 18, 2002).

<sup>197</sup> Online searches of the Recorded Sound Catalog (SONIC) can be conducted via the Library of Congress' *Recorded Sound Reference Center* at <<http://lcweb.loc.gov/rr/record/>> (accessed Mar. 18, 2002); For more information about onsite searching, contact: Sam Brylawski, Head of Recorded Sound Section, Library of Congress, Washington, DC 20540-4698 (202-707-8465).

the Copyright Office records.<sup>198</sup> The Copyright Office records likely provide the most reliable source of the actual name and address of the copyright owner that appears on the U.S. copyright registration. The copyright registration, however, will not reveal any assignments of the copyright. Assignments of the copyright must be identified using a title search, which is discussed below in Part 4(c).

A search of the Copyright Office records may provide the following information, if the work is registered:

1. Title of the work;
2. Author of the work;
3. Year in which the work was completed;
4. Date the work was first published;
5. Probable owner of the copyright; and
6. Whether the work incorporates other copyrighted works.<sup>199</sup>

The Copyright Office records can be searched in three ways:

- (1) In mid-2001 the Copyright Office released an “experimental” web-based online search tool that allows users to search and access registrations, renewals, assignments and other ownership documents for works registered in the Copyright Office *after* January 1, 1978. The Copyright Office database is searchable via their website.<sup>200</sup> In addition to conducting web-based searches, the Copyright Office continues to provide advanced searches via the Library of Congress Information System (LOCIS). While this system can provide more advanced search capabilities, it is an older system and can be difficult to use because it requires users to connect via a Telnet program.<sup>201</sup> Additionally, LOCIS only provides access to works registered since 1978.
- (2) For works registered before 1978 the Catalog of Copyright Entries (“CCE”) is available in print and microfiche.<sup>202</sup> This catalog lists

---

<sup>198</sup> See generally Library of Congress, U.S. Copyright Office, *Circular 22, How to Investigate the Copyright Status of a Work* <<http://www.loc.gov/copyright/circs/circ22.html>> (accessed Mar. 18, 2002).

<sup>199</sup> See *id.*

<sup>200</sup> Online searches of works registered in the U.S. Copyright Office after 1978 can be conducted via <<http://www.loc.gov/copyright/search/>> (accessed Mar. 18, 2002).

<sup>201</sup> For more information on the Copyright Office’s LOCIS search tool, a user guide is available at <<http://www.loc.gov/copyright/guide.html>> (accessed Mar. 18, 2002).

<sup>202</sup> The Copyright Office published the *Catalog of Copyright Entries* in printed format from 1891-1978, and in microfiche format from 1979-1982. In 1982, the *Catalog of Copyright Entries* was discontinued. The only possible way to search outside the Library

registered works by title and divides entries into nine categories: 1) literary works, 2) serials and periodicals, 3) performing arts, 4) music, 5) maps and atlases, 6) visual arts, 7) commercial prints and labels, 8) motion pictures, and 9) sound recordings.<sup>203</sup> The CCE is limited to a summary of the actual record and does not list any transfer of ownership of rights.<sup>204</sup>

- (3) Onsite searches can also be conducted at the Copyright Office in person. Research can be done using microfilm and automated registration records for all registered works, or by accessing the above mentioned online databases for records from January 1978 to present.<sup>205</sup>
- (4) Another available service is to request a Copyright Office staff member to conduct a search on your behalf. Such searches can be requested by filling out a Search Request Form and sending it to the Copyright Office.<sup>206</sup> Check the “Registration” box near the top of the form and provide as much information on the work as possible.<sup>207</sup> The Copyright Office will search its records at the statutory rate of \$65 an hour.<sup>208</sup> Therefore, if this search method is selected you should provide as much detail on the work as possible in order to reduce the search time.<sup>209</sup>

**Rights Clearance Agencies.** If conducting your own search seems confusing and you do not mind spending a little money, commercial rights clearance agencies can be hired to identify the appropriate copyright owners,

---

of Congress for registrations made since 1982 is to use the Internet to access the automated catalog. *See id.*

<sup>203</sup> *See Catalog of Copyright Entries, supra* n. 202.

<sup>204</sup> *See Circular 22, supra* n. 198.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*; *see also* Library of Congress, U.S. Copyright Office, *U.S. Copyright Office Search Request Form* <<http://www.loc.gov/copyright/circs/circ22-2.html>> (accessed Mar. 18, 2002).

<sup>207</sup> *See id.*

<sup>208</sup> *See Circular 22, supra* n. 198.

<sup>209</sup> If you choose to have the Copyright Office conduct a search of its records you should provide as much as possible of the following information: 1) Title of the work, with any possible variants; 2) Authors names, including possible pseudonyms; 3) Name of the probable copyright owner; 4) Approximate year the work was published or registered; 5) Type of work involved, such as sound recording or musical composition; 6) For a work originally published as part of a collection, the title and any other information to help identify it; and 7) Registration number or any other copyright data. *See id.*

negotiate license fees and obtain the necessary licenses on your behalf.<sup>210</sup> These agencies specialize in identifying copyrights ownership and whether licenses are available for your intended use.<sup>211</sup> The turnaround time for these commercial services is quick, with some organizations able to complete a full copyright search within 24 hours.<sup>212</sup>

**c. Has the copyright been assigned?**

It is important to keep in mind that identifying the copyright owner may not be the end of the ownership search. It is also necessary to ensure that the person you've identified still owns the specific rights required. For example, when seeking to license a musical composition you may identify a music publisher as an owner of the copyright. However, it may be that the music publisher owns only the right to license of the musical composition for print in North America. Another music publisher may own the licensing rights to the rest of the world, and the right to publish the work on the Internet may be retained by the songwriter, or perhaps even owned by yet another party. Thus, it is always important to look behind the rights allegedly owned by the person who claims to be the copyright holder.

Besides the separation of rights, you may also discover that the music publisher or record company identified on the copyright registration no longer exists. Many of these entities have either merged with larger companies, or assigned their catalog of music rights to someone else.

*Assignment Search: Registered Copyrights.* If the copyright in the work has been registered with the Copyright Office, you can trace the work's chain of title by obtaining a Copyright Office assignment search, if the assignment was registered.<sup>213</sup> As long as the assignment was recorded with the Copyright Office, this search will reveal if a song has been assigned to a creditor, another record or publishing company, or some other entity.<sup>214</sup> The copyright law does not mandate the registration of an assignment; therefore, it is possible that even a thorough search of the Copyright Office records may not reveal many valid assignments.

An assignment search, like a registration search, can be obtained by sending a completed Search Request Form, with the "Assignment" box

---

<sup>210</sup> See Brinson, *supra* n. 192, at 123, 136.

<sup>211</sup> See *id.* at 136.

<sup>212</sup> Thomson & Thomson is one such search service. They can be reached at 1-800-692-8833 or can be found online at <<http://www.thomson-thomson.com/>> (accessed Mar. 18, 2002).

<sup>213</sup> See Brinson, *supra* n. 192, at 123.

<sup>214</sup> See *id.* at 123-26.

checked, to the Copyright Office's Reference and Bibliography Section.<sup>215</sup> An assignment search may also be conducted by searching the Copyright Office's files online, in person, or by hiring a copyright search agency.<sup>216</sup>

Remember, “[f]or sound recordings made by U.S. ‘authors,’ only those recordings fixed and published on or after February 15, 1972, are protected by [U.S.] copyright [law]. Pre-1972 sound recordings by U.S. authors are not protected by [U.S.] federal copyright law, but they may be protected under state law.”<sup>217</sup> In the case of musical compositions that were published before January 1, 1978, you may want to request a renewal search, as well as an assignment search, to see if the copyright was renewed. If the copyright was not renewed, the work may now be in the public domain.<sup>218</sup>

*Assignment Search: Unregistered Copyrights.* It is important to note that only those copyrights that have been formally registered with the Copyright Office will be on file and thus revealed during a search. Additionally, any assignments or transfers of copyrights that have not been registered will not show up in a search. Therefore, in order to check the chain of title of an unregistered work, it is advisable to directly contact the copyright owner listed in the copyright notice of the work and ask whether the copyright has been assigned.<sup>219</sup>

For *Steps 5 and 6* the following chart provides a quick overview of how specific Internet uses of music trigger specific licenses and the appropriate parties to contact regarding such uses.

---

<sup>215</sup> See *Circular 22*, *supra* n. 198; see also Library of Congress, U.S. Copyright Office, *U.S. Copyright Office Search Request Form* <<http://www.loc.gov/copyright/circs/circ22-2.html>> (accessed Mar. 18, 2002).

<sup>216</sup> See Brinson, *supra* n. 192, at 123.

<sup>217</sup> *Id.* at 160. “Foreign-made sound recordings, until recently, were treated the same as U.S.-made recordings – i.e., no protection for pre-1972 foreign sound recordings. However, effective January 1, 1996, pre-1972 foreign sound recordings whose ‘source country’ is a member of the Berne convention or the World Trade Organization are protected by copyright. (This change in the law is part of the GATT legislation.)” *Id.* at 160-61.

<sup>218</sup> See *id.* at 115.

<sup>219</sup> *Id.* at 124.

Intended Use Of The Music	Licenses Needed		Party To Contact				
	COMPOSITION  (M = Mechanical, P = Performance, S = Sync)	RECORDING  (MA = Master, CDP = Compulsory Digital Performance, NDP = Non Compulsory DP)	Music Publisher / Agent	PRO	Record Co. / Agent	Unions	Copyright Office
Provide Download	M, P? <sup>*</sup>	MA	✓	✓?	✓	✓	
Provide Stream: Non-Interactive/ Non-Subscription	M, P	MA?, CDP	✓	✓	✓	✓?	✓
Provide Stream: Non-Interactive/ Subscription	M, P	MA, NDP	✓	✓	✓	✓	✓
Provide Stream: Interactive/ Subscription	M, P	MA, NDP	✓	✓	✓	✓	
Retransmit an over-the-air radio broadcast	M, P	MA?, CDP	✓	✓	✓?	✓?	✓
Provide Stream w/ Video or Multimedia	M, P, S	MA?, CDP?	✓	✓	✓?	✓	
Provide music from a pre-recorded concert	M, P	MA?, NDP	✓	✓	✓	✓	
Make ephemeral recordings	M?	Qualify for CDP	✓?		✓?		✓

\* “?” Designates that the License or Party may or may not be necessary depending on the facts surrounding the use.

**Step 5** Identify what licenses are needed to use the musical composition.

At this stage in the process it should be clear what songs you plan to use, the intended use of each song (or at least a range of potential uses), and the identity of the various owners that hold each song's copyright. The next step is to obtain the appropriate license(s). In order to get a better understanding of what licenses are needed and who to contact, this section provides an overview of how specific Internet uses trigger specific musical composition licenses and which parties you should contact to get permission for such uses.

**a. Does the use of the composition involve non-interactive non-subscription or subscription webcasting?**

As discussed above, non-interactive webcasting generally refers to streaming audio on the Internet where a listener "tunes in" to hear music, but does not select particular songs or performers.<sup>220</sup> The subscription element, whether monthly or on a pay-per-listen basis, does not effect the licenses required for the composition; however, this status does effect the availability of licenses when dealing with the sound recording (this is discussed in detail in Step 6). The transmission of streaming audio in this manner involves the copyrights of the underlying musical composition, and as such, a performance license and mechanical license is required from the owner of each composition.<sup>221</sup> If only a small number of compositions will be used, then it may be more cost effective to obtain performance licenses directly from the music publisher. If several compositions will be used, however, it may be more efficient to obtain a blanket license from the PRO representing each underlying work. This type of use would not qualify for the compulsory mechanical license, thus each license must be obtained through voluntary negotiations with the music publisher or their licensing agent. Additionally, a mechanical license may also be required for the various permanent and temporary copies made in the process of transmitting the composition.<sup>222</sup> Finally, licensees may also be eligible for the ephemeral

---

<sup>220</sup> See RIAA, *supra* n. 177.

<sup>221</sup> See *supra* Part IV.

<sup>222</sup> See *supra* Part VII(A)(1).

recording license exemption if they meet the criteria described in Part V(B)(2) above.<sup>223</sup>

**b. Does the use of the composition involve providing interactive music?**

Interactive music services include both those that permit a listener to select particular songs and those that create personalized “play lists” of songs.<sup>224</sup> Similar to non-interactive webcasting, interactive services only permit listeners to enjoy music streamed to their computer while they are connected to the Internet and supposedly do not create a permanent copy of the music file on the listener’s computer hard drive.<sup>225</sup> Interactive music services require both performance and mechanical licenses as described in Step 5a above.

**c. Does the use of the composition involve retransmitting a radio station’s broadcast?**

Distinct from the previous examples, this is a transmission of an actual terrestrial radio station’s over-the-air broadcast retransmitted over the Internet. Similar to a non-interactive webcast, a user would not interact with the programming. For such a use, licensees may negotiate with the composition owner or agent for the permanent and temporary mechanical copies of the musical composition, and the radio station would need to obtain a blanket license from the applicable PROs for the Internet performance of the musical composition.<sup>226</sup> Depending on the length of time that the licensee intends to keep the copy of the composition, licensees may also be eligible for the ephemeral exception outlined under 17 U.S.C § 112 of the Copyright Act.<sup>227</sup>

**d. Does the use of the composition involve posting downloadable music?**

Downloadable music, such as MP3 files, has become a widely popular means of distributing music. In offering such services, there are potentially 3 types of copies being created: the copy created when the song is copied onto the host computer’s hard drive, the temporary copies created on

---

<sup>223</sup> See *supra* Part V(B)(2).

<sup>224</sup> See *supra* Part V(B)(1).

<sup>225</sup> See *id.*

<sup>226</sup> See *supra* Part IV.

<sup>227</sup> See 17 U.S.C § 112.

intermediate computers that facilitate the transmission between the host and end user's computer, and the copy created on the end-user's hard drive.<sup>228</sup> This type of use requires a license for the mechanical reproduction of composition and the transmitter may be eligible for a compulsory mechanical license under 17 U.S.C. § 115 of the Copyright Act or may negotiate the license and terms directly with the music publisher or their licensing agent.<sup>229</sup> There is an unresolved debate, however, as to whether downloading a file over the Internet is considered a public performance, thus requiring users to also obtain a performance license from the PROs and/or the copyright owners.<sup>230</sup>

**Step 6** Identify what licenses are needed to use the sound recording.

The sound recording is the second component involved in transmitting a song over the Internet, and clearing this right is the final step in our clearance process. Unlike its counterpart, the musical composition, the permission maze required of sound recordings is usually limited to the record company that produced, manufactured and distributed the sound recording.<sup>231</sup> It's all in how the sound recording is used which triggers what license a users must request. In what follows, each license is considered in the context of the various ways in which sound recordings are transmitted across the Internet.

**a. Does the use of the sound recording involve non-interactive non-subscription webcasting?**

Originally introduced in 1995 in the DPRA, and reiterated in 1998 by the DMCA, webcasting became an official part of the copyright landscape enabling eligible webcasters to obtain a statutory license to digitally perform sound recordings on the Internet.<sup>232</sup> As discussed previously, a statutory license is a license provided by the copyright law itself, as opposed to one that is voluntarily granted by individual copyright owners.<sup>233</sup> For webcasters who are willing to create services that fit within the narrow confines of the

<sup>228</sup> See *supra* Part VII(A)(1).

<sup>229</sup> See *id.*

<sup>230</sup> See e.g. Christopher Jones, *RIAA Sues MP3.com* <<http://www.wired.com/news/mp3/0,1285,33634,00.html>> (Jan. 22, 2000).

<sup>231</sup> See RIAA, *supra* n. 177.

<sup>232</sup> 17 U.S.C. § 114(d)(2) (Supp. V 1999) (enacted under the DMCA, Pub. L. No. 105-304, § 405(a)(1)(B), 112 Stat. 2860, 2890-94 (1998)).

<sup>233</sup> See *supra* Part V(B)(1).

law, as outlined in Part V(B)(1) above, this is an efficient way to license because it permits a webcaster to perform all of the sound recordings it wishes without having to obtain separate licenses from each copyright owner.<sup>234</sup> Webcasters who qualify for the statutory license must pay royalties for all transmissions made since October 28, 1998. The statutory royalty rate remained in effect through December 31, 2000, and shall be revised every two years thereafter.<sup>235</sup>

Webcasters that meet the eligibility requirements must notify the Copyright Office to exercise a statutory license.<sup>236</sup> A webcaster can do this by filing an “Initial Notice” with a prominent caption or heading that contains the webcaster’s full legal name, mailing address, phone and fax numbers, and the web address of the website where the service will be made available.<sup>237</sup> This “Initial Notice” should be filed prior to the first transmission of the sound recording.<sup>238</sup> Each notice must include a \$20 filing fee mailed to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, S.E., Washington, DC 20557-6400.<sup>239</sup>

Licenses can also be obtained by going through licensing agents, such as Sound Exchange, who represent sound recording owners.<sup>240</sup> Sound-Exchange collects and distributes proceeds from the issuance of statutory licenses in the proportion of 50% to the copyright owner, 2.5% to AFM for non-featured musicians, 2.5% to AFTRA for non-featured vocalist, and 45% to the featured artist.<sup>241</sup> If a statutory license is not obtained then the webcaster must contact the unions directly and inform them of the intended use and to begin the rate negotiation process.<sup>242</sup>

**b.     Does the use of the sound recording involve non-interactive subscription webcasting?**

---

<sup>234</sup> *See id.*; *see also* 17 U.S.C. § 114(d)(2) (Supp. V 1999).

<sup>235</sup> *See* 17 U.S.C. § 114(f)(1)(A) (Supp. V 1999).

<sup>236</sup> *See* 37 C.F.R. § 201.35 (1999) (Initial Notice of Digital Transmission of Sound Recordings under Statutory License).

<sup>237</sup> *See id.*

<sup>238</sup> *See id.*

<sup>239</sup> *See id.*

<sup>240</sup> *See* Sound Exchange, *Background, About Us* <<http://www.soundexchange.com/>> (accessed Mar. 18, 2002).

<sup>241</sup> *See* Sound Exchange, *Webcasting FAQ, Distribution, Royalty Administration* <<http://www.soundexchange.com/royalty.cfm>> (accessed Mar. 18, 2002).

<sup>242</sup> *See supra* Part VI.

This method of transmitting sound recordings involves webcasts that are non-interactive and available on a subscription basis. Webcasters who provide subscription services, such as monthly subscriptions or pay-per-listen, can qualify for the DPRA or DMCA statutory license for the digital performance of the sound recording if they meet the strict requirements outlined in Part V(b)(1) above.<sup>243</sup> Eligible webcasters must also notify the Copyright Office as described in Step 6(a). Webcasters who do not qualify under these requisite guidelines must obtain a voluntary license directly from the record company along with a license for the reproduction and distribution of the sound recording. In addition, if they do not qualify for the statutory license, the webcaster must also contact the musician's and performer's unions, the AFM and AFTRA, in order to negotiate the rates due for the non-interactive subscription use.<sup>244</sup>

**c. Does the use of the sound recording involve providing interactive music?**

Interactive music services mirror those of non-interactive services except that they provide listeners with the ability to select specific songs and artists on demand. These types of services are not eligible for the statutory license provision under the DPRA or DMCA.<sup>245</sup> Instead, proprietors of an interactive service must negotiate a license directly with the copyright owner before digitally performing the sound recording.<sup>246</sup> Therefore, when contacting the record company, or other copyright owner, a webcaster must obtain both: (i) a master recording license in order to make a copy of the sound recording on the webcaster's server for use in the interactive service; and (ii) a performance license for a digital audio transmission of a digitally transmitted sound recording.<sup>247</sup> Similar to the previous use, when a webcaster does not qualify for the statutory license they must contact and negotiate with the musician and performer unions directly.<sup>248</sup>

The terms of these licenses will be dependent on song choice, amount used, and type of use. Remember, record companies consider what impact a potential license grant will have on revenue from record sales then charge licensing fees accordingly; they may even refuse to grant a license at all. Since an interactive service allows users to choose their own songs, a

---

<sup>243</sup> See *supra* Part V(B)(1).

<sup>244</sup> See *supra* Part VI.

<sup>245</sup> See 17 U.S.C. § 114(d)(2)(A)(i) (Supp. V 1999).

<sup>246</sup> See *supra* n. 244.

<sup>247</sup> See *supra* Part VII.

<sup>248</sup> See *supra* Part VI.

license for this type of service is the most difficult and expensive to obtain. Webcasters interested in this type of service may consider engaging the services of a rights clearance agency to help manage the licensing process.

**d. Does the use of the sound recording involve retransmitting a radio station’s broadcast?**

This form of use involves a retransmission of a radio station’s terrestrial broadcast via the Internet.<sup>249</sup> Subject to numerous conditions, a statutory license for the digital performance of the sound recording is available for such uses.<sup>250</sup> If the transmission meets the eligibility requirements, the same notification procedure applies to webcasters as in Step 6a above.<sup>251</sup> If eligible for the statutory license the webcaster can obtain the license from Sound Exchange who will in-turn pay the necessary percentages to each union out of the webcaster’s license.<sup>252</sup> If a webcaster does not qualify for the statutory license, it must obtain a digital audio performance license directly from the record company and negotiate directly with each union.<sup>253</sup>

**e. Does the use of the sound recording involve posting downloadable music?**

Providing a service that offers downloadable music is a distinctly different enterprise from the previous examples in two ways. First, multiple copies are being made of the sound recording. In addition to the initial copy made on the webcaster’s server, each time a user downloads a file to his or her own computer, the user makes an additional copy. These are reproductions made under the copyright owner’s exclusive right of reproduction and thus require specific permission under a master recording license.<sup>254</sup>

Second, depending on the type of downloadable file, a performance may or may not take place while the file is downloaded. Some software applications permit a user to listen to a file *while* it is being downloaded; others allow listening *after* the file is downloaded. If a file can be listened to during the downloading process, it may be considered a “performance of a

---

<sup>249</sup> See 17 U.S.C. § 114(d) (Supp. V 1999).

<sup>250</sup> See *supra* Part V(B)(1).

<sup>251</sup> See 37 C.F.R. § 201.35 (1999).

<sup>252</sup> See *supra* Part VI; see *supra* n. 241.

<sup>253</sup> See The Digital Media Ass’n, *The Digital Millenium Copyright Act of 1998 – A Primer for DiMA Members* <<http://www.digmedia.org/dmca/dmcaexp.html>> (last updated Dec. 1, 1998); see also *supra* pt. VI.

<sup>254</sup> See *supra* Part VII(B)(1).

digitally transmitted sound recording,” and may therefore require a performance license for a digital audio transmission.<sup>255</sup> Finally, prior to offering downloads a transmitter must contact both the AFM and AFTRA to enter into the appropriate rate negotiations.<sup>256</sup>

## IX. CONCLUDING REMARKS

The Internet revolution has introduced an entirely new context for the use and enjoyment of music. Linking artists in Baton Rouge with fans in Beijing, music is no longer limited by its geographic availability, but only by the speed in which an Internet user connects. With all of this promise and innovation, however, the Internet poses a complex bundle of copyright issues that are just beginning to surface and are far from being resolved. Issues such as territorial licensing, split rights, multiple owners, digital rights management and piracy challenge copyright owners and users alike. But who ever said a revolution is easy—change never is.

Until the day when an all encompassing system is available to clear all rights from all parties in one place through a convenient “click license,” a good understanding of the music licensing process is the best resource for navigating through the complex maze of laws, players and rights that comprise Internet music.

---

<sup>255</sup> See *supra* Part VII(B)(2).

<sup>256</sup> See *supra* Part VI.