UNTANGLING THE WEB OF MUSIC COPYRIGHTS

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"It's as if Franz Kafka designed this system and employed Rube Goldberg as his architect."
– Rob Glaser,[1] Chairman, MusicNet

INTRODUCTION

The music industry is in crisis. Infringement is rampant, with little sign of abating.[2] Despite lawsuits against peer-to-peer file sharing systems,[3] new systems arise faster than old ones are shut down.[4] Consumers are ripping and burning CDs with little regard for music copyright.[5]

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[1] Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, N.Y. TIMES, Sept. 23, 2002, at C1.

[2] Hilary Rosen, Chairman and CEO of the Recording Industry Association of America, claims the most popular network, KaZaA, boasts on its site that its file-sharing software has been downloaded more than 120 million times, and that it is estimated that more than 2.6 billion files are copied every month. *Intellectual Property Theft Online: Hearing on H.R. 5211 Before the House Subcomm. on Courts, the Internet and Intellectual Prop. on the Judiciary Comm.*, 107th Cong., Fed. Document Clearing House Cong. Testimony, (Sept. 26, 2002), *available at* http://www.riaa.org/PR_story.cfm?id=559. Thirty million consumers use file sharing services such as KaZaA and Morpheus, two of the bigger content-swapping networks since Napster's demise. *Music to Their Ears*, THE ECONOMIST, Sept. 21, 2002, at 12.

[3] *See* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

[4] *See, e.g.*, John Borland, *Another File-swapping Site to Fall Silent*, CNET NEWS.COM, Sept. 4, 2002, *at* http://news.com.com/2100-1023-956644.html (noting that the shutdown of Aimster may have little effect on file sharing because "[t]he vast majority of file-traders have migrated to other platforms such as Kazaa, StreamCast Networks' Morpheus, or iMesh").

[5] Indeed this author is often confronted with individuals in social settings who begin recounting their ripping and burning activities, to her great discomfort. Yet there are not adequate alternatives for this author to suggest authorized ways to obtain what these individuals seek – access to digital files of individual recordings.

How has the industry responded? The industry has sought stronger laws,[6] stiffer penalties,[7] and legal protection for technological protections they might employ to stem the tide of copying.[8] Music industry players have also sought to impose royalties at levels that have shutdown many downstream users who seek to stay within the bounds of the law.[9] Even ventures backed by the major record companies are having a difficult time getting off the ground.[10]

The industry is headed in the wrong direction. The copyright system is broken. Merely retooling it will not work. What is needed is a redesign. This Article identifies two fundamental aspects of the 1976 Copyright Act that should be altered if copyright for music is to survive the digital revolution.[11] While this Article focuses on the music industry because the problems are particu-

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[6] One example of additional protection sought is H.R. 5211, introduced July 25, 2002. This legislation is intended to assist copyright owners in battling infringement that occurs through peer-to-peer filing sharing on the Internet. This legislation would exempt copyright owners from criminal and civil liability for "disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file sharer." H.R. 5211, 107th Cong. (2002).

[7] *See, e.g.*, Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 1, 113 Stat. 1774 (1999) (codified as amended at 17 U.S.C. § 504 (2000)); No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

[8] *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, Title I (1998) (codified as amended at 17 U.S.C. §§ 1201-1204 (2000)).

[9] *See* Evan Hansen, *Webcasters Sound off on Net Radio Fees*, CNET.NEWS.COM (Oct. 1, 2002), *at* http://news.com.com/2100-1023-960336.html (discussing the challenges faced by Webcasters attempting to reform the royalty rates for receiving music on the internet).

[10] *See* Harmon, *supra* note 1.

[11] Survival is at stake. Scholars and others are beginning to seriously question the need for copyright protection when the costs of distributing creative works are very low and can be born, in large measure, by the users of those works. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) (arguing that "the economics of digital technology renders copyright both unnecessary and inefficient."); *see also* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741 (2001); John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1994) (concluding that intellectual property law is flawed and that a new set of methods should be developed to deal with the challenges posed by the Digitial Age). These arguments stand on the shoulders of skepticism about the need for copyright protection that antedates the digital age. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

Professor Bell also argues that the increasing global population and the possibilities for extremely low cost global distribution cut in favor of eliminating copyright. Tom W. Bell, *Copyright and Population*, Sept. 17, 2002, *at* http://www.tomwbell.com/writings/(C)&Pop.html. Others argue that the use of technological protections and other forms of trusted systems may negate the need for copyright. *See, e.g.*, Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 38 (1997).

larly pronounced in that industry, the proposals for reform are applicable to other categories of copyrighted works.

The crisis in the music industry has been brought about only in part by the digital revolution. The layering of copyright ownership interests and the complexity of copyright law, particularly as it applies to music, has played a major role in the inability of the industry to respond to the changing nature of the ways in which digital works can be distributed and otherwise exploited. The layering of copyright interests and the complexity of the law began long before digital technology. Digital technology, however, has laid bare the flaws of the current system that have been created by a process of accretion.

The Supreme Court's recent opinion in *New York Times Co. Inc. v. Tasini*,[12] highlights the emphasis the 1976 Copyright Act placed on the author of a copyrighted work. In many different provisions of the 1976 Act the author is given protection against certain rules from the 1909 Act that were seen as unfair.[13] In particular, many of these rules related to the relationship between author and publisher/distributor. However, in the digital era, the role of the publisher/distributor may be significantly reduced.[14] The complicated web of legal rights and vested industry players in the field of music exemplifies the extreme to which the focus on authors' rights can lead. Unfortunately, in the context of digital distribution, many of the provisions that were meant to provide a preference for the author over the publisher/distributor end up being a preference for the author over the public.[15]

The fundamental purpose of copyright law is to promote the progress of knowledge and learning. Thus, examining the reasons to provide a preference for the author over the public becomes critical. Some level of protection is needed in order to provide an incentive for the creation and distribution of works of authorship. How much protection is the fundamental question. When elements

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[12] 533 U.S. 483 (2001).

[13] In establishing the rules allocating rights among various potential recipients, the 1976 Copyright Act evidences a preference for authors' rights in many different provisions. *Tasini* involved the preference for the author in the context of contributions to collective works. *Id.* The termination of grant provisions constitute significant additional evidence of this preference for the author. 17 U.S.C. § 203 (2002). The preference for authors' rights was further solidified in the elimination of formalities as a prerequisite for protection. Berne Convention Implementation Act of 1988, Pub. L. No. 100- 568, 102 Stat. 2853 (1988). Seen as a trap for the unwary, unsophisticated author, this act eliminated the notice requirement for published works. Subsequently, Congress eliminated the registration required in order to have protection extending beyond an initial twenty-eight year term. Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (1992) (codified as amended at 17 U.S.C. § 304 (2000)).

[14] *See* Ku, *supra* note 11, at 300-05.

[15] The international copyright treaties are similarly focused on the author.

of the copyright system hinder dissemination of copyrighted works without providing adequate benefits to the creators or distributors of works, those elements of the system should be eliminated. The Copyright Act is no longer responsive to the reality of the digital world. Many of its provisions create obstacles to both widespread dissemination and compensation to the author in order to continue to provide the incentive necessary to stimulate the creation of new works.[16]

The fast paced world of digital delivery of music needs to have a different structure for facilitating downstream use[17] and for assuring compensation to authors. That structure must significantly reduce transaction costs, which are particularly high in the music industry. In a world in which the speed of delivery is measured not in days or weeks but in seconds and fractions thereof, these high transaction costs created by the current structure of the 1976 Act impose serious obstacles for achieving the goal of copyright. Additionally, the delay, and oftentimes the outright failure, in obtaining legal clearance for certain activities merely results in more demand for unauthorized channels of distribution. The peer-to-peer file sharing phenomenon exemplifies this pattern. While legal regulation can create transaction costs, regulation can also reduce transaction costs. In the world of copyrights in general, and music copyrights in particular, the current regulation adds significantly to the transaction costs.

This Article does not suggest eliminating copyright protection, although there are scholars presently heading down that path.[18] Instead, using the music industry as an example, this Article argues that the 1976 Act should be revised in certain fundamental ways. The proposed revisions do not provide a complete solution to the current problems facing the music industry. Instead the revisions primarily are meant to prepare copyright law to address future innovations in technologies by enhancing the ability of copyright owners, particularly in the music industry, to quickly embrace new methods for exploiting their works.

Part I of this Article is descriptive, exploring the tangle of legal rights in the music industry and identifying the vested industry

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[16] *See* Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1 (2001) (arguing that the major industry players' constant fighting, in and out of court, leaves behind the artists and consumers as casualties).

[17] Throughout this Article "downstream use" refers to the variety of activities that may be engaged in by many different users; from the individual who engages in file sharing through peer-to-peer technology, to the webcasting radio stations that stream music to users, all are downstream users. As used in this Article, "downstream use" does not involve the creation of new derivative works.

[18] *See supra* note 11.

players and their respective roles. Part II explains why the structure of the music industry and the interplay between the vested industry players has led to the current crisis, as digital delivery and digital broadcasting begin to dominate the distribution methods and broadcasting means. This part of the Article describes the problems faced by users of new technology in attempting to comply with the law. These problems may explain, at least in part, the widespread phenomenon of what many in the industry see as infringement on a massive, and global, scale. Without low-transaction-cost solutions and reasonable absolute prices for obtaining authorization for the digital activities of millions of users, we see a classic example of market failure. Users respond to this failure by effectively exiting the failed market, completely ignoring the overly cumbersome requirements of the law.[19]

After identifying the appropriate goals of the copyright law, Part III proposes concrete changes that should be implemented in the new Copyright Act. First, the new Copyright Act should embrace derivative work independence, a doctrine rejected in 1990 by the Supreme Court in *Stewart v. Abend*.[20] This would eliminate the problems resulting from the dual layers of copyright ownership in a final product utilized by downstream listeners. If there is only one copyright owner from which downstream users may obtain complete authorization to use the work, transaction costs will be significantly reduced. For such a consolidation to be effective, however, two additional changes are necessary. First, as explained in Part III.B.2, the compulsory mechanical license for musical works, codified in section 115 of the Copyright Act, must be repealed. Second, as detailed in Part III.B.3, sound recording copyright owners must be granted rights equal to those of musical work copyright owners. This package of three changes constitutes a significant revision in the structure of rights in the music industry, but would result in a more efficient market for downstream use.

Part III also recommends altering the manner in which the rights are granted to copyright owners. Currently section 106 grants different rights that are divisible into different types of uses, e.g., reproduction, derivative work creation, public distribution, public performance, and public display.[21] In the music industry,

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[19] Many, in fact, find it hard to believe that the law actually forbids what they are doing. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 112-14 (2001). This can be particularly true if the user is not making any money in their activities or paying any money to engage in the activity.

[20] 495 U.S. 207 (1990).

[21] 17 U.S.C. § 106 (2000). While owners of all copyrighted works are granted the right to reproduce the work in copies, distribute the work to the public, and prepare derivative works, section 106(1)-(3), not all works are granted the right to public display or publicly perform the

copyright owners have assigned or exclusively licensed these separate rights to different industry players, dividing these legal entitlements and causing a fractionation of rights in a single copyrighted work. The creation of multiple owners[22] would not be a problem if a downstream user's use clearly implicated only one right. However, as detailed in Part II, in the digital realm, each of the owners claims that a variety of uses implicates her rights and thus requires her permission. If, instead, the author were granted a unified right to "commercially exploit the expression," we would not have the same problems associated with industry players building up vested interests around different statutory rights and then causing trouble when distribution technology changes and each industry player asserts a right to obtain royalties for the new methods of exploitation. Such a statutory change would take time to influence contracting behavior, but would hopefully create vested industry players divided by logical markets, rather than clustered around the different statutory rights granted to the copyright owner.

Finally, Part III explores the problems associated with industry consolidation and the existing and potential mechanisms to reduce the negative effects of the present consolidation. While provisions can be included in the Copyright Act to curb the abusive use of market power, copyright law's experience with one such provision is, in part, what has led to the complicated nature of the industry.

While this Article focuses on music copyrights, there are lessons to be learned for other kinds of works as well. To suggest it is time for a revision of the 1976 Act may be shocking, but as demonstrated in Part I and explained in Part II of this Article, significant action is needed. The process of tinkering at the margins each time a new technological development occurs[23] has led to a cumbersome and complicated set of rules that creates significant obstacles to dissemination rather than facilitating such dissemina-

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work, section 106(4)-(5), and one category of copyrightable works, sound recordings, are granted the right to publicly perform the work only by means of a digital audio transmission, section 106(6). The reasons for and the effects of this more limited public performance right for sound recordings are explored below. *See* discussion *infra* Sections I.G, III.B.3.

[22] Even exclusive licensees are considered "transferees" of copyright. 17 U.S.C. § 201(d)(2) (2000). All transferees, including exclusive licensees have the full rights of a copyright owner, including standing to bring a lawsuit. This is achieved through the definitions of "transfer of copyright ownership" and "copyright owner" in section 101, and the provisions of section 501 reinforced by section 201(d)(2). Roger D. Blair & Thomas F. Cotter, *The Elusive Logic of Standing Doctrine in Intellectual Property Law*, 74 TUL. L. REV. 1323, 1367-70 (2000).

[23] By "tinkering" I do not mean to suggest that the new legal rules adopted do not have significant effect, but merely that these laws add layers of complication onto an already overly complex set of rules.

tion. Only by examining the system fresh, identifying the goals and the impediments to those goals, and then starting with a clean slate, can we untangle the complicated web of legal entitlements that currently exist.

I. THE TANGLED WEB OF MUSIC COPYRIGHT

The world of music copyrights is one of the most complicated areas within copyright law. The complexity stems from the historical development of the music industry and the corresponding process of regulation through accretion that responded to the changes in the industry. For the uninitiated, examining the copyright owners, the rights granted to them, and the vested industry players that seized on those rights in chronological fashion is often the most coherent way to understand the current legal landscape.

A. In the Beginning – The Musical Work Copyright

The story really begins in 1831 when Congress added musical compositions to the categories of copyrightable works.[24] Musical work copyright owners were granted the same rights as any copyright owner, which, at the time, consisted of "the sole right and liberty of printing, reprinting, publishing, and vending" the copyrighted work.[25] For musical works this was almost exclusively accomplished through the sales of sheet music. At this time, there existed three major interested parties in the copyrighted musical works. First there were the composers, the authors of the musical compositions to whom the Copyright Act granted copyright protection. Next there were the music publishers who would purchase the copyrights from the composers, either for a lump sum or for running royalty payments, and would exercise the rights of the copyright owner. Finally, there was the consumer who would pay the purchase price to obtain a copy of the musical composition in sheet music form. The consumer could then learn and perform the musical work. In reality, there were other interested parties, namely the rest of the public who would have the opportunity to hear the music played by someone reading the sheet music, but in the 1800s such a public performance of a musical composition did not implicate any rights granted to the copyright owner.

The landscape remained in this relatively uncomplicated state for several decades, resembling the print publishing industry for novels or other books: a three way triangular relationship among

[24] Act of Mar. 3, 1897, ch. 392, 29 Stat. 694.
[25] *Id.*

authors, distributors, and consumers. The 1909 Copyright Act added the right to "arrange or adapt" to the rights granted to a copyright owner of a musical work.[26] Along with the rights of printing and vending the musical composition in sheet music, music publishers, as assignees of the composers' copyrights, controlled the making of adaptations of that musical work with one major exception: the 1909 Act subjected the right to control the creation and distribution of "mechanica[l]" copies to a compulsory license.[27] This statutory innovation became a significant factor in the structure of the music industry and is explored in Section I.B, below.

The rights of reproduction, distribution, and derivation continue to be part of the Copyright Act today. Music publishers continue to be important industry players in the legal landscape of music copyrights, and their trade association, the National Music Publishers Association, remains a powerful lobbying force in Congress and throughout the industry.

B. Complications Begin – Compulsory Licensing for Mechanical Reproductions

As mentioned in the previous section, the legal landscape concerning music copyrights took its first turn towards complexity in the 1909 Act in response to the player piano industry and the Supreme Court's opinion in *White Smith v. Apollo Music*.[28] In that case, the Supreme Court determined that player piano rolls did not constitute reproductions of musical compositions and therefore were not infringing upon the copyright owners' rights in those compositions. Player piano rolls were made without copying the actual notes on staff paper, but rather by having perforations in the rolls that mechanically caused notes to be played on the piano as the rolls rotated. In *White Smith* the Court ruled that these roles were not "copies" of the copyrighted musical composition but rather were component parts of machines.[29] Because no copies were made by the manufacturers of these roles, there was no infringement.

Congress overturned the result in *White Smith* in the 1909 Act, specifically granting to musical work copyright owners the right to control the "mechanical reproduction" of their works, thereby encompassing the player piano rolls as infringements of

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[26] Act of Feb. 3, 1831, 4 Stat. 36.

[27] *Id*. § 1(e).

[28] 209 U.S. 1 (1908).

[29] *Id*. at 18. Justice Holmes, in his concurring opinion in the case, anticipated congressional repudiation of the Court's holding. *Id.* at 19-20.

the musical composition copyright.[30] The story does not end there, however, as Congress was suspicious of the market power of one piano roll company, the Aeolian Company.[31] To avoid the evils that monopolization in the industry might bring, Congress subjected the mechanical reproduction right to a compulsory license system.[32] This licensing system allowed any manufacturer of piano rolls to use any musical composition without negotiating with the copyright owner for permission, so long as the musical work had been previously licensed to someone else for mechanical reproduction, and the manufacturer paid a statutory royalty. Thus, once the Aeolian Company (or any other company) had negotiated the right to reproduce a musical composition in "mechanical copies," any one else could, upon payment of the statutory royalty, produce their own piano rolls of that musical composition. The statutory royalty rate was initially set at two cents per mechanical copy distributed.[33]

The compulsory license for mechanical reproductions of musical works, sometimes called simply "mechanicals," remains a part of the Copyright Act today and is applicable not just to player piano rolls, but also to CDs, cassettes, and any other "phonorecord" that mechanically reproduces the musical work. Currently codified in section 115 of the Copyright Act, the compulsory license allows recording artists to record what are commonly known in the industry as "covers" – musical works written by someone else and previously released on an album by a different recording artist. Section 115 retains the requirement that the musical work must have been previously distributed to the public, embodied in a phonorecord created under the authority of the copyright owner.[34] The compulsory license even allows for a new arrangement of the work to conform it to the style of the recording artist,[35] but does not allow for a change in the "basic melody or fundamental character of the work."[36] The Copyright Office periodically updates the statutory royalty rate, which for phonorecords made and distributed after January 1, 2002, is eight cents per phonorecord or 1.55 cents per minute of playing time or fraction thereof, which-

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[30] Act of Mar. 4, 1909, ch. 320, § 1(b), 35 Stat. 1075.

[31] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 65-67 (1994).

[32] Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075.

[33] *Id.*

[34] 17 U.S.C. § 115(a)(1) (2000).

[35] This permissible new arrangement is expressly excluded from obtaining protection as a derivative work, unless the entity creating the new arrangement obtains the consent of the copyright owner. *Id.* § 115(a)(2).

[36] *Id*.

ever is greater.[37] This royalty is owed for each copy manufactured and distributed, regardless of whether the copy is sold or given away for free.

Most creators of phonorecords, however, do not use the compulsory license mechanism to obtain permission to use musical works. In 1927 the National Music Publishers Company created the Harry Fox Agency, a wholly owned subsidiary, to issue and administer mechanical licenses. Today, most mechanical licenses are obtained through the Harry Fox Agency.[38] The Harry Fox Agency has authority to issue licenses only for those musical works for which Harry Fox has been granted authority by the copyright owner to act on the copyright owner's behalf. However, the number of copyright owners that have entered into such agreements is staggering: Harry Fox represents over 27,000 music publishers, who in turn represent the interests of more than 160,000 songwriters,[39] who own more than 2.5 million copyrighted musical works.[40]

While the creators of most sound recordings do not utilize the statutory provisions for the compulsory mechanical license, the availability of such a license does affect the rate paid under a license granted by Harry Fox and the terms of the license. The parties to the licenses administered by Harry Fox are negotiating in the shadow of the compulsory license that both parties know could be used instead.[41] Thus, for example, it is rare that the agreed license rate exceeds the rate set by the Copyright Office.[42]

The mechanical license remains an important part of the Copyright Act today. Its existence has shaped almost a century of development in the music industry, facilitating the wide availability of remakes of classic tunes. Likewise, the Harry Fox Agency

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[37] 37 C.F.R. § 255.3(k) (1998). On January 1, 2004, the rate will increase to 8.5 cents per phonorecord or 1.65 cents per minute. The responsibility for setting rates lies with an arbitration panel, known as a Copyright Arbitration Royalty Panel or CARP. 17 U.S.C. § 115(c)(3)(D) (2000).

[38] The preference for obtaining licenses from Harry Fox instead of utilizing the statutory license is largely due to the reduction of transaction costs offered by Harry Fox. Harry Fox does not require monthly reports and royalty payments as required by the Copyright Office, using instead quarterly or semi-annual reports and payments.

[39] *Music Publishers Support Landmark Accord with Record Industry For Launch of Internet Subscription Services* (Nov. 27, 2001), at http://www.nmpa.org/pr/internet_subscription.html.

[40] *Subcommittee on Courts, The Internet and Intellectual Property Of the House Committee on the Judiciary*, 107th Cong. (May 17, 2001) (testimony of National Music Publishers' Association), *available at* http://www.house.gov/judiciary/stoller_051701.htm.

[41] Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1310 (1996).

[42] *Id.* at 1310-11. It is also rare that a mechanical license that falls within the requirements of the statutory license is refused by Harry Fox or by the copyright owner of the musical work.

continues to be a vested party in the legal landscape of music copyrights.

C. Another Important Right – The General Public Performance Right

In 1897 Congress granted copyright owners of musical compositions the right to control the public performance of their works and even made such performances, if engaged in willfully and for profit, a crime.[43] The 1909 Act continued the tradition of acknowledging a public performance right, although it limited the scope of the right to only those performances engaged in for profit.[44] It was not until the 1976 Copyright Act that the for-profit limitation was removed.[45]

While musical composition copyright owners were granted a public performance right in 1897, it was not until almost 20 years later that copyright owners began to capitalize on the revenue potential of the public performance right. The problem was really two fold. First, musical work copyright owners needed to establish what it meant for a performance to be "for profit." Second, musical composition copyright owners had to overcome the problem of transaction costs in collecting licensing fees for such performances.

In 1913 a group of nine music business leaders, including attorney Nathan Burkan, established the American Society of Composers, Authors, and Publishers (ASCAP).[46] In the beginning, ASCAP encountered resistance from business owners who did not believe that the use of music in their businesses constituted a "for profit" use because patrons or customers were not charged a separate admission fee to hear the music. The music was only used as background or for creating ambiance. In 1914, ASCAP filed suit against the operator of a restaurant in a hotel at which an orchestra played in the background. The case proceeded to the Supreme Court which unanimously agreed with ASCAP's arguments and established the precedent ASCAP needed in order to began collecting royalties in earnest.[47]

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[43] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481-82, *amended by* Act of Mar. 4, 1909, ch. 320, § 25, 35 Stat. 1081.

[44] Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075.

[45] For an excellent account of this fundamental change, see Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 883-89 (1987).

[46] GOLDSTEIN, *supra* note 31, at 68.

[47] Herbert v. Shanley, 242 U.S. 591 (1917). The Court held:

> If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected . . . . The defendants' performances are not eleemosynary. They are part of a

Once it had been established that performances were "for profit" even if no separate fee was charged to listen to that music, musical work copyright owners needed to overcome the second obstacle: transaction costs. While many businesses were engaging in for profit performances of musical compositions, the cost of collecting licensing fees was prohibitively expensive for any single copyright owner. ASCAP, acting as a collective rights organization (CRO),[48] offered to license thousands of musical compositions for public performances under blanket license agreements. For business owners, these blanket licenses significantly reduced the transaction costs involved in complying with the requirements of the Copyright Act. For copyright owners, signing up with ASCAP meant obtaining a share of the royalties collected under these blanket licenses and therefore effectively capitalizing on the public performance right granted to them by the Act, a right that previously had not been of much value.

The advent and rapid rise to popularity of the radio, coupled with ASCAP's attempt to continually raise the royalty rates charged to the radio stations, led to the formation of another CRO, Broadcast Music, Inc. (BMI).[49] Today, BMI, in affiliation with over sixty foreign performing rights organizations, represents the copyright holders of nearly 4.5 million musical works.[50] One other CRO, the Society of European Stage Authors and Composes (SESAC), was formed in 1930. Each of the CROs can only license public performances of musical works which are under contract with that CRO. Thus, to be able to play a wide array of musical works, businesses must obtain contracts with all three of these CROs, still a vastly better position than having to obtain permission from each individual musical work copyright owner.

The practice of pooling thousands of copyrighted musical works and then offering blanket licenses did not go unnoticed by

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> total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Id. at 594-95.

[48] Often ASCAP is referred to as a "performance rights organization" (PRO). Because this articles explores more than just the performance right, the more general phrase "collective rights organization" (CRO) is used, although ASCAP only licenses performance rights.

[49] GOLDSTEIN, *supra* note 31, at 74.

[50] *BMI Celebrates Urban Music At 2002 Awards Ceremony; Top Urban Songwriters, Producers, Publishers Honored; Godfather of Soul Receives BMI Icon Award*, (Aug. 7, 2002), *available at* http://press.bmi.com/press_releases/200208/urban_release.doc.

the Antitrust Division of the U.S. Justice Department. Lawsuits asserting violations of antitrust laws led to consent decrees that remain in force today, governing aspects of both ASCAP and BMI licensing practices.[51] One of the requirements of those consent decrees is that a potential licensee may apply to a federal court for a binding determination of "reasonable" fees in the event that the licensee and the CRO cannot come to an agreement on the fee to be paid.[52]

The public performance right for musical works remains a significant part of our Copyright Act today. Public performances of musical works can be accomplished in many ways: live musical performances, playing pre-recorded music on a stereo system, broadcasting music on the radio or television, and even turning on a broadcast in an area open to the public or where a significant number of people are gathered. Although various exceptions to the public performance right have been enacted,[53] ASCAP and BMI continue to be significant industry players in the legal landscape of music copyrights, offering licenses to an extremely wide array of downstream users. The National Association of Broadcasters (NAB), the trade association for over-the-air radio and television broadcasters, also continues to play a significant role in the music industry.

D Adding to the Layers of Copyright – Sound Recording Copyrights

The first recorded sounds occurred in the late 1800s,[54] followed by the introduction of the first commercial "victrola" phonograph machine in 1906.[55] While some states specifically recognized a state-law copyright in sound recordings, it was not until 1971 that Congress granted federal copyright protection for these works.[56] Under the terminology employed by the Copyright Act, all other copyrighted works are fixed in "copies," but sound recordings are fixed in "phonorecords," which the Copyright Act

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[51] Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349 (2001); *see also* Simon H. Rifkind, *Music Copyrights and Antitrust: A Turbulent Courtship*, 4 CARDOZO ARTS & ENT. L.J. 1 (1985).

[52] The requirements of certain aspects of the consent decree are now codified in the Copyright Act. 17 U.S.C. § 513 (2000).

[53] *See, e.g.*, *id.* § 110 (outlining "[l]imitations on exclusive rights: Exemption of certain performances and displays").

[54] Thomas Edison invented the basic technology of the phonograph in 1877. Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AIPLA Q.J. 181, 188 (1997).

[55] Mary Seelhorst, *The Progressives*, POPULAR MECHANICS, June 2000, at 101.

[56] Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).

defines as: "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[57] Thus, phonorecords include vinyl albums, cassettes, and CDs, as well as digital files, such as MP3s, in which sounds are fixed.

This new layer of copyright protection is separate from the protection granted to any musical work that may also be reproduced in a sound recording. The sound recording copyright protects the elements of original authorship that inhere in a sound recording, whether it is a recording of a musical performance, the reading of a book, or the sounds of railroad whistles. Within the music industry, the copyrights in sound recordings are typically owned by the record labels. This ownership is accomplished through work for hire and assignment agreements from recording artists. In the realm of record labels, five companies dominate the scene.[58] All of the major record labels and some of the smaller labels are members of the trade association, the Record Industry Association of American (RIAA), a group with significant influence in the music industry and in Congress.[59]

When sound recordings were first added to the Copyright Act as a category of protectable works in 1971, Congress limited the rights granted to these new copyright owners in significant ways. For purposes of this Article, the most important limitation was that sound recording copyright owners were not granted a right to control the public performance of their works. As the 1976 Act was nearing passage, the initial draft of the Senate bill sought to change that by including a full public performance right for sound recording copyright owners with a compulsory licensing system similar to that for mechanical reproductions of musical works.[60] Opposition from broadcasters, performing rights societies, and music publishers helped to defeat these provisions. In the end, the 1976 Act did not include a public performance right for sound recordings.[61]

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[57] 17 U.S.C. § 101 (2000).

[58] The record companies are referred to as the "big five": Universal Music Group, Sony Music Entertainment, EMI Group, Warner Brothers Music, and BMG Entertainment.

[59] RIAA boosts that its "members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States." RIAA, *Mission Statement*, *at* http://www.riaa.com/about-who.cfm (last visited December 28, 2002).

[60] *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyright of the Senate Comm. on the Judiciary*, 94th Cong., 1-4 (1975).

[61] *Id.* at 5 (noting that "Congress . . . has heard some voices in opposition"); *see also* Allen Edward Molnar, Comment, *Performance Royalties and Copyright: A Question of "Sound" Policy*, 8 SETON HALL L. REV. 678, 688-93 (1978) (discussing decisional law prior to 1976

Broadcaster opposition was understandable: they did not desire to pay new royalties for activities that they had been engaged in for decades. However, it is worth pausing to consider why the performing right societies and music publishers opposed granting sound recording copyright owners a public performance right. The claim of the performing rights societies and the music publishers was that if such a right were recognized, they stood to lose substantial revenue. They argued that the total revenues that radio stations and others that engage in public performances would be willing to pay would remain the same, leaving the performing rights societies "to battle the recording industry over the slice of the pie that each obtains."[62] The broadcasters' arguments in opposition to the general public performance right for sound recordings confirmed that this was a likely scenario.

E. Adding Complexity – The Digital Performance Right for Sound Recordings

In 1995 the potential for digital delivery of recorded music caused Congress to add complexity to what was already one of the most complex areas of copyright law. Responding to arguments by record labels that revenues from record sales were going to be significantly damaged by new methods for digital delivery of music, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA).[63] This Act added the right "to perform the copyrighted work publicly by means of a digital audio transmission"[64] to those rights enjoyed by sound recording copyright owners.

While the DPRSRA appeared to be adding a public performance right for sound recording copyright owners, the limitations placed on that right were aimed at granting copyright owners in sound recordings a mechanism for controlling digital exploitations

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regarding sound recording performance rights); William H. O'Dowd, Note, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. LEGIS. 249, 253-54 (1994) (noting that lobbying efforts against such a provision "threatened passage of the entire Copyright Act" and so it was ultimately passed "without the clause creating a public performance right in sound recordings.").

[62] Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives,"* 78 VA. L. REV. 413, 414 (1992).

[63] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). Congress added this new right "to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used." S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357 [hereinafter DPRSRA Senate Report].

[64] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (codified as amended at 17 U.S.C. section 106(6) (2000)).

that were perceived to pose a serious threat to the sales of CDs. At the time, the concern was for new business models offering "audio–on-demand" and "pay-per-listen" services that allowed a level of interactivity between a subscriber and the service, permitting the subscriber to "order-up" certain songs or albums that would then be broadcast for that subscriber's listening pleasure.[65] The record companies feared that if consumers could obtain their music through such services they would be less likely to purchase CDs. Far from a general public performance right,[66] this more limited public performance right for sound recordings is encumbered with a set of complicated definitions and exceptions.

Because, at present, sound recording copyrights are not given a general public performance right, playing a sound recording in an auditorium filled with people is not actionable by the sound recording copyright owner.[67] What constitutes a "digital audio transmission" defines this right that is granted in section 106(6). The Copyright Act defines "to 'transmit' a performance" as: "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[68] A digital transmission is defined as "a transmission in whole or in part in a digital or other non-analog format."[69] Therefore, if a sound recording is sent via digital or other non-analog technology to a place that is beyond where the sender is located and such sending constitutes a public performance, the copyright owner's right under section 106(6) is implicated.

The devil, however, is in the details. Congress was attempting to address the fears of the sound recording industry that digital delivery would eviscerate the market for CDs and other tangible objects through which sound recording copyright owners make their money. At the same time, Congress did not want to "upset[] the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters."[70] In other words, Congress did not want to rock the boat. Achieving this goal, however, required an exceedingly

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[65] *See* DPRSRA Senate Report, *supra* note 63, at 14.

[66] The Copyright Office, the Patent and Trademark Office, and the Clinton Administration all recommended that sound recording copyright owners be granted a full public performance right. *See id*. at 13 (citing such authorities as advocates for greater public performance rights); BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 225 (1995) (commonly referred to as the "White Paper").

[67] Such a performance would, however, be actionable by the copyright owner of the musical work that may be embodied in the sound recording.

[68] 17 U.S.C. § 101 (2000).

[69] *Id*.

[70] DPRSRA Senate Report, *supra* note 63, at 13.

complex set of provisions, which Congress revised and made more complicated a mere three years later. The next two Sections of this Article provide a necessarily brief overview of this morass of statutory language, currently codified in sections 114 and 115.

F A World Full of Overlap – Digital Phonorecord Deliveries

The addition of a public performance right for sound recordings came in response to digital delivery of music. While sound recording copyright owners feared that digital delivery would usurp the market for CD sales and significantly lessen their revenues, the reduction in CD sales would also decrease the revenues for musical work copyright owners. Recall that for each "mechanical" copy of a musical work distributed, the musical work copyright owner receives a royalty payment, currently eight cents per copy distributed.[71] The DPRSRA amended the statute to make clear that digital downloads constitute a mechanical copy encompassed by the compulsory license.

The Act uses the term "digital phonorecord delivery" (DPD), defined as "each individual delivery of a phonorecord by a digital transmission of a sound recording which results in a specifically identifiable reproduction."[72] The definition specifically excludes real-time transmissions "where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the retransmission recipient in order to make the sound recording audible."[73] Because of this exclusion, a streamed transmission[74] presumably is not considered a DPD.[75] If, however, a web site allows individuals

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[71] *See supra* notes 32-37 and accompanying text.

[72] 17 U.S.C. § 115(d) (2000).

[73] *Id.*

[74] Streaming technology uses a different protocol from the packet switching of the TCP Internet. Streaming uses the user database protocol (UDP) that is more forgiving of errors in packets of data as they are received to allow for uninterrupted play. Once a few seconds worth of data have been received, decompressed, and decoded, a computer's media player will begin playing the recording. While playing, the computer is receiving more data, decompressing, and decoding that data, and placing the data in the buffer. The buffer is a small portion of Random Access Memory (RAM) that holds a few seconds of sound at any one time. RON WHITE, HOW COMPUTERS WORK 355-57 (Angela Wethington ed., 1999).

[75] The Senate Report on the DPRSRA contains the following example:

> [A] transmission by a noninteractive subscription transmission service that transmits in real time a continuous program of music selections chosen by the transmitting entity, for which a consumer pays a flat monthly fee, would not be a "digital phonorecord delivery" so long as there was no reproduction at any point in the transmission in order to make the sound recording audible. Moreover, such a transmission would not be a "digital phonorecord delivery" even if subscribers, through actions taken on their own part, may record all or part of the programming from that service.

to download copies of an MP3 file, for example, the downloaded file is a "phonorecord" that qualifies as a "specifically identifiable reproduction," and the entity running the web site has therefore engaged in a DPD.

The Copyright Act, as amended by the DPRSRA, makes clear that the compulsory license for "mechanical" copies is available for these DPDs to authorize the reproduction of the musical work. That compulsory license does not, however, authorize the reproduction of the sound recording that is also embodied in the digital file.[76] Further, the legislative history indicates that it is entirely possible for a sound recording copyright owner to authorize DPDs of the sound recording but not authorize mechanical reproductions of the musical work rendered in the sound recording.[77] Such action would be permissible even if the sound recording were initially recorded and distributed pursuant to a mechanical license. In such a situation, the legislative history provides that the entity engaging in the digital distribution would then need to obtain, in addition to the authorization from the sound recording copyright owner, its own mechanical license from the musical work copyright owner.[78]

Further complicating the matter, the statute expressly provides, (in three places!) that a DPD may also constitute a public performance.[79] The significance of this possibility requires emphasis. Engaging in an authorized DPD requires payment of royalties to the sound recording copyright owner for the reproduction that occurs, and, as explored in the previous paragraph, payment of royalties under a mechanical license to the musical work copyright owner.[80] Payment of those two royalties only authorizes the reproduction and distribution of copies of that recorded music, it

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DPRSRA Senate Report, *supra* note 63, at 45. In exploring this exception, Nimmer points out that the negative pregnant in the exclusion of a "real-time, non-interactive subscription transmission" leaves open the question whether either an interactive or non-subscription transmission in real time results in a DPD. He concludes that construing the Act to encompass such transmissions within the definition of DPDs would contradict with the statutory definition that requires the delivery result in a "specifically identifiable reproduction." 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.23[A][2], at 8-354-55 (2000) (using quotes from 17 U.S.C. § 115(d) and the above mentioned Senate Report to make his argument).

[76] In fact, authorization by the sound recording copyright owner is a condition of the mechanical license for the DPD. 17 U.S.C. § 115(c)(3)(H)(i)(I).

[77] DPRSRA Senate Report, *supra* note 63, at 43-44.

[78] *Id.*

[79] 17 U.S.C. §§ 115(d), 115(c)(3)(A), and 115(c)(3)(K)(i).

[80] After an agreement reached between the RIAA and the National Music Publishers Association, it is possible that mechanical licenses for DPDs could be issued in bulk format. *Songwriters, Music Publishers Reach Landmark Deal for Internet Music Licensing*, 62 PAT. TRADEMARK & COPYRIGHT J. (BNA) 539, 539 (2001). The agreement itself is available at http://nmpa.org/pr/FinalRIAAAgreement.pdf (last visited Jan 31, 2003) (on file with the Case Western Reserve Law Review).

does not permit the licensee to engage in a public performance of the musical work if a DPD constitutes a public performance. Permission to publicly perform the musical work must also then be obtained (most likely from one of the CROs). And, because the performance is occurring by means of a digital transmission, permission to publicly perform the sound recording will also be necessary.

The provisions concerning the royalty rates make the picture even hazier. The statute directs that the rates for the DPD compulsory license shall distinguish between a DPD in general and a DPD "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery."[81] Such incidental DPDs are not exempt from royalty payments, the rates merely need to "distinguish" those DPDs. Thus, an activity that looks predominately like a public performance and not a DPD, nonetheless may require authorization from, and payment to, the musical work copyright owner for the reproductions that may incidentally be made, and presumably to the sound recording copyright owner who will need to be consulted and paid as well![82]

G. The Granddaddy of Complexity – Digital Performances

As explained above, in 1995 Congress granted sound recording copyright owners a limited public performance right. The contours of that right, however, were spelled out through a three tier system: (1) some performances of sound recordings by means of digital audio transmissions were statutorily exempt; (2) some were granted a compulsory license in the statute; and (3) some

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[81] 17 U.S.C. § 115(c)(3)(C).

[82] Again, the Senate Report provides an illustration:

> [I]f a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose), delivering the phonorecord to the transmission recipient would be incidental to the transmission. If such a system allowed transmission recipients to retain phonorecords for playback on subsequent occasions, but transmission recipients did not do so, delivering the phonorecords to the transmission recipients could be incidental to the transmissions.

DPRSRA Senate Report, *supra* note 63, at 39.

The problem is similar to an issue raised by the Register of Copyrights in an amicus brief filed with the Supreme Court in *New York Times, Co. v. Tasini.* The Register noted that in addition to reproducing the articles and publicly distributing them, the databases at issue in that case publicly "displayed" the articles. 533 U.S. 483, 498 n.8 (2001).

were left within the complete control of the copyright owner to be voluntarily licensed within the confines of statutory limits on such licenses.[83]

Broadly speaking the 1995 amendments divided digital transmissions based on whether they were subscription or nonsubscription and whether the nonsubscription broadcasts were interactive. Interactive services[84] were within voluntary licensing (category (3), above), meaning that authorization from the sound recording copyright owners were necessary. Non-interactive subscription services were within the copyright owners control, but subject to a compulsory license, referred to as a "statutory license" (category (2), above). Non-subscription, non-interactive broadcasts were, for the most part, exempt from any control by the sound recording copyright owner (category (1), above).

Amendments contained in the Digital Millennium Copyright Act altered the structure of these provisions.[85] While interactive services remained within the voluntary licensing category,[86] the DMCA amendments expanded the activities that fit in the category of statutory licensing by significantly reducing the category of activities that were exempt from the sound recording copyright owner's control. Congress termed this new category of previously exempt but now subject to statutory licensing "eligible nonsubscription transmission[s]," defining the term to mean:

> a noninteractive nonsubscription digital audio transmission . . . that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of

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[83] This creates the "oxymoronic category" of a "mandatory scheme of 'voluntary licensing' . . ." NIMMER & NIMMER, *supra* note 75, § 8.22[A][1], at 8-299 (2000).

[84] The statute defines an "interactive service" as:

> one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

17 U.S.C. § 114(j)(7) (2000).

[85] For a good account of some of the politics that resulted in both the DPRSRA and the amendments made by the DMCA, see Craft, *supra* note 16, at 9-19.

[86] For an exploration of what it means for a service to be "interactive," see Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309 (2000).

> sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.[87]

Generally speaking, this definition encompasses your average webcasting radio station.[88] Therefore, if a radio station is transmitting its broadcasts via the Internet, the radio station will need authorization to publicly perform any sound recordings it includes in its broadcasts. That authorization can be obtained directly from the copyright owner (for each sound recording), or the radio station may avail itself of the statutory license if it stays within the statutory requirements for such a license.

Multiple separate conditions must be met for an eligible entity to stay within the bounds of the statutory license. These provisions are quite detailed and quite complex. One requirement prohibits the service from exceeding the "sound recording performance complement."[89] Supposedly designed to permit typical programming practices used on traditional broadcast radio,[90] the sound recording performance complement prohibits digital transmitters from performing, in any three hour period, more than four selections from a single album or single featured recording artist.[91] The maximum number is reduced to three selections if two or more of the selections are played consecutively.[92] Another of the requirements prohibits the transmitter from publishing program schedules or lists of featured artists or selections that will be included in an upcoming transmission.[93] While the statute permits services to identify the names of the featured artists and specific sound recordings immediately before they are played, a service must be careful in identifying even illustrative examples of the art-

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87 17 U.S.C. § 114(j)(6) (2000).

88 "Webcasting implies real-time transmission of encoded video under the control of the server to multiple recipients who all receive the same content at the same time. This is in contrast to normal web browsing which is controlled from the browser by individual users and may take arbitrarily long to deliver a complete document." *available at* http://www.dictionary.com/search?q=webcasting (Sept. 6, 1997) (on file with Case Western reserve Law Review).

89 17 U.S.C. § 114(d)(2)(B)(i).

90 DPRSRA Senate Report, *supra* note 63, at 26.

91 17 U.S.C. § 114(j)(13)(B).

92 *Id.* § 114(j)(13)(A).

93 *Id.* § 114(d)(2)(C)(ii).

ists played. Continuous programs[94] that are longer than three hours are permitted, while ones of shorter duration are outside the scope of the statutory license, and thus require permission directly from the sound recording copyright owner.[95] Similarly, archived programs[96] that are longer than five hours are within the statutory license, so long as they do not remain available on the webcaster's site for more than two weeks.[97] There are many more details but, hopefully, the reader now has some idea of the complexity contained in the statute.

The statute's exceptional detail, subsequent rulemakings before the Copyright Office,[98] litigation appealing the rules,[99] rate making arbitrations,[100] and subsequent legislation to provide relief from the rates,[101] have kept music copyright lawyers quite busy fleshing out the meaning of these complicated provisions.[102]

The two different types of licenses contemplated for those transmissions that are not exempt[103] involve a level of complication onto themselves. The first category is those licenses that are "voluntary." These are licenses issued to those services that do not qualify for the statutory license and are not exempt. The statute prohibits granting an exclusive license to an interactive service if the period of exclusivity is greater than twelve months.[104] Copyright owners can avoid this prohibition by issuing at least five li-

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[94] "A 'continuous program' is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient." *Id.* § 114(j)(4).

[95] *Id.* § 114(d)(2)(C)(iii)(III).

[96] "An 'archived program' is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording." *Id.* § 114(j)(2).

[97] *Id.* § 114(d)(2)(C)(iii)(II).

[98] *See, e.g.*, Public Performance of Sound Recordings, 65 Fed. Reg. 77,292, 77,292-77,293 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

[99] Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001) (holding that the copyright office's interpretation of a statutory exemption from copyright coverage was within its authority).

[100] Copyright Office Final Rule Details on New Webcasting Royalties, 67 Fed. Reg. 45,240 (July 8, 2002).

[101] Small Webcaster Settlement Act of 2002, Pub. L 107-321 (signed Dec. 4, 2002).

[102] *See, e.g.*, Copyright Office Final Rule Details on New Webcasting Royalties, 67 Fed. Reg. 45,240 (July 2002). An excellent account of the initial battles within the music industry following enactment of the amendments contained in the DMCA can be found in Craft, *supra* note 16, at 19-38.

[103] After court affirmance of the Copyright Office interpretation of the exempt categories, very few transmissions are exempt. *See supra* notes 98-99. Broadcasters are currently appealing the district court's ruling in the *Bonneville* case, *supra* note 99.

[104] 17 U.S.C. § 114(d)(3)(A) (2000). Copyright owners that hold fewer than 1,000 sound recording copyrights may grant exclusive license for up to 24 months. *Id.* There are also details in the statute prohibiting the practice of granting sequential exclusive licenses. *Id.*

censes to different interactive services.[105] These restrictions are clearly aimed at reducing the effect of market concentration in the industry. The statute also contains an important restriction on the licenses issued to non-interactive services that fall within the category of voluntary licenses. Once a sound recording is licensed to an affiliated entity,[106] the copyright owner must offer a license "on no less favorable terms and conditions to all bona fide entities that offer similar services."[107] This "most-favored nation" requirement is intended to address "the issue of vertical integration among companies involved in both the music and the subscription service business."[108] The statute allows for the appointment of a common agent to collect fees, presumably on a model of a CRO, but requires that each copyright owner independently establish the rates to be charged and other material license terms,[109] to avoid the antitrust concerns inherent in any CRO.[110]

The second type of license contemplated is the compulsory "statutory licenses." The statute provides first for negotiated agreement among the affected parties.[111] Absent timely agreement, the Librarian of Congress is to convene a copyright arbitration royalty panel (CARP) to determine a schedule of rates and terms binding on all copyright owners and entities seeking to perform sound recordings pursuant to the statutory license.[112] After an initial six month voluntary negotiation period with no agreement achieved, the Copyright Office convened a CARP proceeding on September 27, 1999.[113] The CARP issued its recommendations on February 20, 2002. The Librarian of Congress rejected the panel's report and issued its modified ruling on June 20, 2002.[114] That

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105 *See* 17 U.S.C. § 114(d)(3)(B)(i).

106 An affiliated entity is one "in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock." *Id.* § 114(j)(1).

107 *Id.* § 114(h)(1).

108 DPRSRA Senate Report, *supra* note 63, at 24. Because this most favored nation clause only applies to non-interactive services, Congress did not address the issues that could arise through vertical integration of entities offering interactive services, except through the restriction on exclusive licensing.

109 17 U.S.C. § 114(e)(2)(A).

110 *See* DPRSRA Senate Report, *supra* note 63, at 28. Although the antitrust concerns are real, the requirement that the rates be set independently hinders the ability of the common agent to reduce transaction costs, a fundamental benefit of a CRO.

111 *See* 17 U.S.C. § 114(e)(1).

112 *See id.* § 114(f)(3).

113 *See* 64 Fed. Reg. 52,107 (Sept. 27, 1999).

114 Copyright Office Final Rule Details on New Webcasting Royalties, 67 Fed. Reg. 45,240 (July 8, 2002).

report set the statutory license using a per-song/per-listener rate of .07 cents.[115]

Parties on both sides of the debate are currently appealing the rates set by that ruling to the Court of Appeals for the D.C. Circuit.[116] Companies engaging in digital transmissions argue that the per-song/per-listener method for establishing the royalties will drive them out of business.[117] Once the rate is finalized by the exhaustion of appeals, the rate will cover all transmissions from October 28, 1998 through December 31, 2002. Of the royalties received pursuant to this license, half is distributed to the copyright owners of sound recordings and the other half is divided among the featured artists and non-featured musicians and vocalists.[118] This rate making proceedings has received a tremendous amount of attention. Its initial effect was to shut down a wide array of webcasters.[119] Subsequently, Congress enacted the Small Webcaster Settlement Act of 2002,[120] which is intended to provide some relief for small commercial and noncommercial webcasters but requires further negotiation with SoundExchange, the entity designated to collect royalties on behalf of the sound recording copyright owners.[121]

Finally, it is important to emphasize, once the downstream user has worked its way through the maze required to clear the public performance right for the sound recording, the downstream user will still need public performance authorization from the musical work copyright owner. And, as explored above, the downstream user might need to obtain clearance for a DPD (from both the sound recording copyright owner and the musical work copyright owner), even if it is incidental to the public performance through transmission!

H. Summary of Rights and Parties

To summarize the rights and parties that play a role in the music industry, there is, first, the creator of the musical work who

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115 *Id.*

116 Evan Hansen, *Webcasters Sound off on Net Radio Fees*, CNET NEWS.COM, Oct. 1, 2002, *at* http://news.com.com/2100-1023-960336.html (last visited Jan. 31, 2003). The Copyright Office is also considering a motion to stay the final rule. *See* Copyright Office Request for Comments on Stay for Webcasting Final Rule, 67 Fed. Reg. 58,550 (Sept. 13, 2002).

117 *See* Amy Harmon, *Royalties Proposal Casts Shadow Over Webcasters*, N.Y. TIMES, April 1, 2002, at C1 (quoting one webcaster describing the rate as "a bankruptcy royalty").

118 *See* 17 U.S.C. § 114(g).

119 *See* Hansen, *supra* note 117 (noting that hundreds of small webcasters shut down in response to the fees).

120 Pub. L. No. 107-321, 116 Stat. 2780 (2002).

121 *Congress Approves Legislation Granting Relief to Small Webcasters*, 65 PTCJ 70 (2002).

typically assigns the copyright initially granted by the Copyright Act to a music publisher that is usually a member of the National Music Publishers Association. The musical work copyright is subject to a compulsory license for reproduction and distribution of mechanical copies, including digital copies that come within the definition of a digital phonorecord delivery. The compulsory license is seldom used, however, because the Harry Fox Agency is authorized by many music publishers to negotiate and issue licenses, including licenses for mechanical reproductions and distributions. The general public performance right is typically licensed through a collective rights organization (CRO), such as ASCAP or BMI.

Next, there is the sound recording copyright, typically created by recording artists, musicians, and sound engineers, all of whom are often under contract with a record label, making the record label the owner of the copyright in the sound recording. Many of the record labels are members of the RIAA. The sound recording copyright owner is not granted a general pubic performance right, and its more limited digital public performance right is also subject to a separate and complex compulsory license. No CROs exist to license any aspect of the sound recording copyright, although the RIAA has petitioned to be a common agent to collect fees.[122]

Anytime a downstream user reproduces copies or distributes copies of a sound recording, or publicly performs that sound recording, or makes a derivative work of that sound recording, authorization from not only the sound recording copyright owner is needed, but authorization must be obtained from the musical work copyright owner as well. Unless one of the limitations on the rights granted to copyright owners applies, multiple clearances will be needed, particularly if the use involves more than one right. For example, in webcasting a sound recording, not only will the webcaster need to have authorization[123] for the public performance (for both the sound recording copyright and the musical work copyright), but the webcaster will also need to have authorization for the reproductions of both copyrighted works that are made in the process of webcasting.[124]

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[122] *See supra* notes 109-10 and accompanying text.

[123] Authorization may be obtained from the copyright owner or its agent, or the required authorization may be found in a statutory license or exemption.

[124] As with the public performance right, authorization may be obtained from the copyright owner or its agent, or the required authorization may be found in a statutory license or exemption. In the context of the reproductions made in the process of broadcasting, the ephemeral copy exemption may apply. *See* 17 U.S.C. § 112 (2000).

The music industry is characterized by dual layers of copyright owners, and each of those copyright owners is granted multiple rights. Some of those rights are subject to compulsory licensing provisions and a few of those rights have spawned entire organizations that specialize in authorizing downstream uses. It is a complicated maze of rights that must be navigated by a downstream user, and this Article has not even ventured into the complex world of the Audio Home Recording Act[125] or the anti-circumvention provisions of the DMCA.[126] Additionally, the issues associated with the exemption for ephemeral copies[127] have been omitted from this discussion.

II. REFLECTIONS

Three significant problems are evident in the picture just painted of copyright law and the music industry. First, as a result of the dual layer of copyrights and the divided rights granted to each owner, there are too many vested industry players for downstream users to be able to efficiently obtain the authorizations needed for downstream use of recorded music. Second, the divisible yet overlapping rights granted to copyright owners leads to industry gridlock and problems with holdout behavior. Finally, the demands for payment from the downstream user by too many vested industry players, combined with industry consolidation, result in the price being too high to achieve the goal of copyright. In the words of economists, the music industry is full of market failures.

High transaction costs are a primary cause of market failure. The transaction costs are high in the music industry, first, because a downstream user typically is not interested in using only one piece of prerecorded music. Radio or webcasting stations broadcast music, nonstop, 24 hours a day. A station cannot survive by playing only one song over and over again. Alternatively, a business offering digital downloads would not be viable if its selection of downloads available included only one or a handful of songs. This type of high transaction costs is similar to the transaction costs faced by database publishers after the Supreme Court's decision in *Tasini*. In order for a database to be useful, it needs to include content. The more comprehensive the database, the more useful it will be. After *Tasini*, however, database creators cannot simply obtain authorization from the creators of collective works

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[125] *Id.* §§ 1001-10.
[126] *Id.* § 1201.
[127] *Id.* § 112.

such as newspapers and magazines but must gain authorization from the freelance authors who wrote the individual articles. While collective rights organizations (CROs) significantly reduce some of the transaction costs created by this aspect of the music industry, other problems remain.

In addition to needing to license multiple works, the nature of the current CROs in the music industry highlights two other factors leading to high transaction costs. CROs only license one layer of copyright, the musical work. No CRO exists from which to obtain permission to utilize the sound recording copyright. While Congress attempted to reduce the transaction costs associated with licensing the sound recording copyright by creating the statutory license, the complexity of the provisions largely defeats its attempt. And, in the end, payment to *at least* two entities for each piece of recorded music used remains necessary.

Additionally, existing CROs only license one of the rights granted to musical work copyright owners, the public performance right. This is also true for the statutory license available for some digital transmissions of sound recordings; it only authorizes the limited public performance right granted to sound recording copyright owners. The Copyright Act, however, grants separate divisible rights to a copyright owner. As explored above, in the music industry those separate rights are often controlled by different entities, requiring multiple authorizations for a single activity. For example, to clear the reproduction right for the musical work one would typically contact the Harry Fox Agency, but to clear the public performance rights for that same recording one would likely contact ASCAP, BMI, or SESAC. Requiring clearances for each of the separate rights granted to copyright owners causes transaction costs to multiply.

The legislative history of the DPRSRA indicates Congress was fully cognizant of the overlapping rights problem.[128] Instead

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[128] The Senate Report states:

> where a digital audio transmission is a digital phonorecord delivery as well as a public performance of a sound recording, the fact that the public performance may be exempt from liability under section 114(d)(1) or subject to statutory licensing under section 114(f) does not in any way limit of impair the sound recording copyright owner's rights and remedies under section 106(3) against the transmitter for the distribution of a phonorecord of the sound recording. As another example, where an interactive digital audio transmission constitutes a distribution of a phonorecord as well as a public performance of a sound recording, the fact that the transmitting entity has obtained a license to perform the sound recording does not in any way limit or affect the entity's obligation to obtain a license to distribute phonorecords of the sound recording.

DPRSRA Senate Report, *supra* note 63, at 27.

of finding a way to reduce the resulting high transaction costs, Congress added more complexity, thereby further increasing the transaction costs.

If the separate rights clearly covered certain activities and did not overlap, then the divisible nature of the rights granted to copyright owners would not increase the already high transaction costs. For example, if permission were needed for a particular use, the downstream user could obtain permission from the one clear owner of the particular right implicated. Today, however, we have several different entities claiming an interest in any given activity.[129] Each of those entities backs its claim with reference to the Copyright Act and the full panoply of legal remedies available. If clearance from more than one entity is necessary, in addition to high transaction costs, the environment is ripe for strategic behavior and the potential for holdouts.[130] This is particularly true when you have muddy rules masquerading as clear entitlements. Even in light of the mechanisms used to reduce those transaction costs (e.g., compulsory licensing and CROs), the lack of certainty concerning which right must be authorized creates the very real potential of consumption below the socially optimal level.[131]

Because multiple parties argue that their rights are implicated in a particular activity, those parties each assert that they should be paid. They each want a slice of the pie. Part of the problem is the dual layer of copyright protection. While the transaction costs involved in having to track down more than one owner for each work in a market that involves using multiple works is cumbersome at best and debilitating at worst,[132] the sense of having to pay twice to be able to use a single work strikes many downstream users as counterintuitive, unfair, and excessive. The sense that the music industry is asking to be paid multiple times for a single use may contribute to widespread public rejection of the copyright system.

In addition to the market failures created by high transaction costs and overlapping and unclear rights, the obstacle of price also stands in the way for authorized downstream use of recorded music. The price being charged by each of the separate entities when combined for a final total price paid by the user is not conducive to widespread dissemination of these works. These rates are being

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[129] *See supra* notes 71-82 and accompanying text; *see also* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997).

[130] *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621, 676-78 (1998).

[131] *See id.*

[132] *See* Harmon, *supra* note 1, at C1 (describing the "nightmare" faced by companies trying to obtain clearances).

set either by the copyright owners or their various agents, or by the Copyright Office under compulsory or statutory licensing. Not all of the arbitration procedures used to set the compulsory licensing royalty rates are designed to take into account the reality of the industry and the nature of a particular downstream use in light of the ultimate goal of copyright.[133] When not set through compulsory or statutory licensing, the consolidation of the music industry into a handful of large record labels, and the other vested industry players acting as agents for large numbers of copyright owners, creates opportunities for monopolistic pricing.

In the list of items that can create market failures, the music industry boasts many: high transaction costs caused by multiple parties, some of which are hostile to each other; numerous contingencies created by complex legal regulation; high costs of monitoring; and costly punishments. Additionally, the uncertain and complex rights increase the transaction costs. When the transaction costs are sufficiently high, reaching market bargains is less likely. Alternatives to individual bargaining can be employed and have been tried with some success for the music industry in the pre-digital era.[134] Legal reform should also seek to remove the impediments to private agreements.[135] Part III of this Article proposes several such reforms.

The reforms proposed in this Article are attempts to provide workable solutions that are technology neutral. A recent trend in copyright legislation has been to amend the statute to address problems associated with a specific technology.[136] Copyright scholars have also suggested revisions that would address the current crises created by peer-to-peer file sharing over the Internet.[137]

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[133] The general rules governing CARPs provide that the determinations are to be calculated to (1) maximize the availability of creative works to the public; (2) provide a fair return to copyright owners for his creative work; (3) reflect the relative roles of the copyright owner and the copyright user; and (4) minimize any disruptive impact on the structure of the industries involved. 17 U.S.C. § 801(b)(1). In contrast, the statutory licensing for digital public performances of sound recordings directs the arbitration panels to set royalty rates using a "willing buyer and willing seller" standard. 17 U.S.C. § 114(f)(2)(B). The Internet Radio Fairness Act, H.R. 5285 would replace that standard and direct that the standard set forth in section 801 be used. H.R. 5285, 107th Cong. (2002)

[134] Compulsory licenses reduce transaction costs by setting the terms of the agreement and by providing administrative support in the form of record keeping, royalty collection and distribution. CROs also reduce transaction costs, but do so in a different way. Merges, *supra* note 41, at 1295-96.

[135] This normative version of the Coase theorem is explored in ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 93-94 (3d ed. 2000).

[136] *See, e.g.*, Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001-1010 (2000)) (addressing Digital Audio Tape technology).

[137] *See, e.g.*, Neil Weinsock Netanel, *Impose a Noncommercial Use Levy to Allow P2P File-Swapping and Remixing*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=352560.

While these solutions may provide temporary fixes for current problems, and indeed they may be necessary once a problem has developed, these technology specific solutions fail to provide the kind of structural reform that will assist in preventing future problems in the face of inevitable technological change. The proposals outlined in Part III of this Article offer suggestions for such structural reforms.

III. UNTANGLING THE WEB

The current legal landscape for music copyrights clearly has resulted from a process of accretion. As technology changed, new rights were added, new copyright interests created, and even more rights added. However, if one were to devise a system for the efficient allocation of rights, one would not pick the current allocation. As has been noted by law and economics scholars, "[p]olitics leads to bargains and compromises that violate the requirements of economic efficiency."[138] The current state of copyright in the music industry has led to a situation in which the industry cannot embrace new business models in large part because of the inability to satisfy the different constituencies of the vested industry players.[139] At the same time, millions of users have rejected the notion that there is anything wrong with copying creative works without paying for them. These users have turned to file sharing systems and are, in some ways, understandably enraged when the music industry seeks to use copyright law to shut off the supply of "free" music.

Designing a new system for copyright in the digital age will upset the current balance of power in the music industry. That, however, should not stop us from fixing a system that is truly broken. This Part of this Article proposes different areas of copyright law that are ripe for reform. First, to facilitate downstream use of creative works, copyright law should embrace the doctrine of derivative work independence. Next, the six separate rights granted to copyright owners should be consolidated into one "right to commercially exploit" the copyrighted expression. Each of these proposals involves controversial changes to the current system and will raise many objections, particularly among vested industry players. This Part discusses some of the legitimate complaints that may be raised about these proposals because of the negative effects of the proposed changes. However, with each proposed

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[138] *Id.* at 124.

[139] Satisfying the different constituencies involves more than just a slice of the royalty pie, the different industry players also evidence different levels of risk aversion concerning new technologies, for example controlling copies in the digital realm.

change, the potential negative effects are outweighed by the enhanced likelihood of promoting copyright's ultimate goal as technologies for experiencing copyright works continue to evolve.

A. Identify the Goals

Before undertaking any major revision of the Copyright Act, it is important to identify the goal that such a law should be designed to serve. The ultimate goal of a new, revised, copyright law should be the same as the ultimate goal of the 1976 Act – to promote progress in knowledge and learning.[140] It is widely accepted that in the United States, the Copyright Act seeks to achieve such progress through the grant of a marketable right that will provide appropriate incentives for the creation and dissemination of creative works. But, in the face of digital reality, copyright needs to shift some of its focus from providing incentives for creation and distribution, to facilitating widespread dissemination. So long as copyright law maintains sufficient means for compensating the authors of the creative works, copyright law would better serve the goal of promoting progress by reducing obstacles to the dissemination of creative works.

At a time when digitized works can be replicated quickly and easily by users without requiring the manufacturing plants and distribution mechanisms of the past, obstacles which prevent rapid dissemination from occurring should be eliminated. Fundamentally, the existence of copyright protection itself creates a significant obstacle in the form of a legal prohibition on many dissemination activities. Eliminating copyright protection, however, would reduce incentives for the creation to such a degree that it would, in the end, be detrimental to achieving copyright's goals.[141] It is important to design the copyright system to retain the necessary incentive for creation while at the same time facilitating the widest possible distribution and downstream use.

B. Embrace Derivative Work Independence

Assuming that one agrees that copyright protection is necessary at all,[142] one way to facilitate dissemination is to design the

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[140] It is always worth remembering the underlying goals of copyright. Believing that the purpose is "fairness" to creators, or compensation for investment in creation or dissemination of creative works may result in choosing legal rules that may promote a different goal and actually deter the promotion of the true goal of copyright.

[141] *But see* Ku, *supra* note 11, at 305-11 (arguing that if copyright were eliminated other mechanisms for compensating authors would provide sufficient incentives for creation).

[142] This is a proposition scholars have questioned. *See supra* note 11. This Article assumes that some level of copyright protection is necessary to provide incentives for creation.

copyright system to reduce rather than increase any transaction costs that a downstream user of an existing work may encounter when seeking to obtain permission for such dissemination.

If a downstream user must obtain multiple authorizations in order to disseminate a single work, this increases the transaction costs. Thus, the first obvious place for increasing the likelihood of greater dissemination is by reducing the number of copyright owners from whom a downstream user must negotiate permission. In the music industry, for example, at a minimum most downstream users need to obtain permission for both the musical work and sound recording. The existence of these dual layers of copyright protection should not be eliminated, however, as each provides compensation to creative talents brought to bear on the end product. Additionally, two layers are necessary because there will remain instances where a downstream user seeks to make use of only musical works and not sound recordings. Thus, what is needed is a system in which the downstream user can obtain one permission without worrying that additional permissions from additional rights' holders are needed. The best way to achieve this single-source authorization is to embrace the doctrine of derivative work independence.

In the field of music copyrights, embracing derivative work independence would mean that full authorization to use a particular sound recording (including its underlying musical work) could be obtained from the sound recording copyright owner. To accomplish derivative work independence and reap all of the benefits the doctrine has to offer, it will be necessary to repeal the compulsory license for mechanical reproductions of musical works. Finally, for derivative work independence to function efficiently in the music industry, sound recordings need to be treated similarly to musical works with regard to the rights granted to copyright owners. It is important that these three changes be implemented together. Implementing only one or two of these changes could further complicate matters without providing any additional benefit towards the ultimate goal of copyright.

1. Derivative Work Independence

Currently, a sound recording embodies both the work that is protected by the sound recording copyright and the work that is protected by the musical work copyright.[143] In copyright terms,

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[143] As noted previously, not all copyrighted sound recordings embody protected musical works, or even musical works at all. For example, books on tape and recordings of nature sounds are sound recordings eligible for copyright protection that do not include musical works.

the sound recording is a derivative work based on the musical work.[144] A derivative work is a work that is "based upon one or more preexisting works."[145] The statute lists sound recordings as an example of derivative works.[146]

Currently, without derivative work independence, courts have recognized that reproducing or publicly performing a derivative work also constitutes a reproduction or performance of the work, or works, on which the derivative work is based. In music, if a webcasting radio station wishes to utilize sound recordings of musical works, the station must obtain permission from both the sound recording copyright owners and the musical work copyright owners. If the current law embraced the doctrine of derivative work independence, obtaining permission to use the derivative work is all that would be required. Under this doctrine, the copyright owner in an underlying work on which the authorized derivative work is based cannot claim infringement involving activities that utilize the underlying work only as part of the derivative work.

Derivative work independence provides that the creation of the derivative work results in a new and independent property right – the copyright in the derivative work. That new property right is independent from any pre-existing works that were incorporated into the derivative work. In order to be able to reproduce and distribute copies of the derivative work or perform the derivative work, the creator of the derivative work would only require permission to use the underlying work to create the derivative work; the derivative work creator would not also need to obtain the right to reproduce, distribute, and display that underlying work as incorporated in the derivative work. More importantly, in the context of facilitating the digital dissemination of works, the downstream user of a derivative work would not be required to obtain permission from the various copyright owners in the underlying works that may be incorporated in the derivative work. Obtaining permission from the derivative work copyright owner is all that would be required.[147]

This Article focuses on sound recordings that embody musical works because of the dual layers of copyrights existing in the resulting sound recording.

144 If the sound recording is mechanically reproducing the musical work pursuant to the compulsory license of section 115, the statute allows for a new arrangement to be made of that musical work, but that new arrangement is prohibited from obtaining copyright protection. 17 U.S.C. § 115(a)(2) (2000). This prohibition on derivative work copyright is for a new musical work copyright. It is not a prohibition on obtaining copyright in the sound recording itself.

145 17 U.S.C. § 101 (2000).

146 *Id.*

147 *See* F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures under U.S. Copyright Law*, 49 UCLA L. REV. 225, 249-51 (2001) (recognizing that "de-

Derivative work independence does not result in the loss of copyright protection for the underlying works merely because of the creation of an authorized derivative work. If a downstream user makes use of an underlying work *not* as part of an authorized derivative work, the copyright owner of the underlying work may still bring suit. This remains true even if the copyright owner has authorized other derivative works to be created. For example, once a musical work is embodied in an authorized sound recording, a new recording artist could not create her own recording of that musical work without first securing authorization from the musical work copyright owner.

If derivative work independence were the rule, copyright owners in the underlying musical work would understand that in authorizing the creation of a derivative sound recording, they are allowing a new property right to come into existence. That new property right may be exploited in ways unknown at the time of contracting for the creation of the derivative work. Thus the copyright owner in the underlying work should contract for benefits as he sees fit, including the possibility of royalty payments generated from the exploitation of the derivative work sound recording. If this new property right were allowed to come into existence, the transaction costs that result from payments to copyright owners of the underlying works would be shifted to the parties engaged in the creation of a derivative work. The creators of the sound recording and the copyright owners in the underlying work are better able to negotiate meaningful methods of reducing any remaining transaction costs.[148]

The Second Circuit briefly embraced the doctrine of derivative work independence[149] only to have the doctrine subsequently rejected by the Supreme Court in *Stewart v. Abend*.[150] In that case, the Supreme Court was confronted with a derivative work, the movie *Rear Window*, that was made pursuant to a contract with the author of a short story on which the movie was based. The author, however, died before the beginning of the renewal term of copyright. The subsequent assignee of the renewal term copyright in the short story sought to stop the creators of the movie from engaging in further distribution of the movie during the renewal term

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rivative work independence is consistent with copyright's purpose because it facilitates public access to a derivative work").

[148] To the extent that these parties are not of equal bargaining power, there are other mechanisms that can be used to facilitate bargaining. *See* Maureen O'Rourke, *Bargaining in the Shadow of Copyright Law after* Tasini, 53 CASE W. RES L. REV. 603 (2003).

[149] *See* Rohauer v. Killiam Shows, Inc., 551 F. 2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1977).

[150] 495 U.S. 207 (1990).

of copyright protection for the short story. In that context, the Court rejected the idea of an independent derivative work. The Court held that the distributors of the movie were violating the copyright in the short story because the authorization that they had obtained lasted only during the first term of copyright.

The importance of the renewal term and the statutory vesting rules for that renewal term drove the Court to reject derivative work independence. The Court believed that if an independent new property right were permitted in this derivative work and if that new property right meant that the derivative work owner could reproduce and distribute the derivative work past the first term of copyright, even if, pursuant to the statute, the renewal term had vested in someone that had not authorized the creation of the derivative work, it would circumvent the statutory vesting rules. While that reasoning may have made some sense under the 1909 Act's dual term of copyright protection, today's copyright statute grants a unified term.[151]

In place of the renewal vesting rules, the 1976 Act grants to the author of a copyrighted work the right to terminate any transfer of copyright ownership thirty-five years after the date of the grant. This termination right is not transferable, nor is it waivable,[152] and, if the author dies before the exercise of the termination right, the termination right vests according to statutory vesting rules.[153] Initially, it would seem that the termination rights present the same policy arguments in favor of rejecting the doctrine of derivative work independence. There is, however, an important distinction: the termination provisions expressly provide that derivative works created pursuant to the grant before the effective date of any termination may continue to be utilized under the terms of the grant.[154] Congress recognized the problem that would be created if underlying work owners could stop the exploitation of an authorized derivative work already created. This is a form of derivative work independence – once the derivative work is created, the author in the underlying work is not given any right pursuant to the copyright statute to stop the exploitation of that derivative work by the derivative work copyright owner.[155]

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[151] Although renewal terms will continue to haunt us until the year 2072 (1977 + 95 = 2072), the renewal term will begin for the last works covered by the dual term system in 2005 (1977 + 28 = 2005).

[152] 17 U.S.C. § 203(a)(5) (2000).

[153] The termination right vests in the widow or widower of the author, children or lineal descendants (on a per stirpes basis), etc.. 17 U.S.C. § 203(a)(2).

[154] 17 U.S.C. § 203(b)(1).

[155] The existence of the provision protecting the exploitation of the derivative work could provide evidence that the '76 Act does not embody the doctrine derivative work independence.

In *Stewart* the Supreme Court also looked to the language of the 1976 Act to determine the scope of the rights granted to the creator of a derivative work. Specifically, section 103 of the Act provides:

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.[156]

The Court wrongly viewed this language as requiring rejection of the doctrine of derivative work independence.

This language, however, delineates the rights of the derivative work copyright owners consistent with a theory of derivative work independence.[157] In the music context, for example, the first sentence provides that a sound recording copyright owner is given protection for those elements of the work that are new to the sound recording. The sound recording copyright owner could not stop someone from recording their own version of the musical work or reproducing copies of the musical work in sheet music. The second sentence further clarifies that the copyright in derivative work is independent of the copyright in the musical work. If, for example, the copyright owner of the sound recording were to expressly abandon his copyright, that would not constitute an abandonment of the copyright in the musical work, except to the extent embodied in the derivative work. Reproducing the sound recording in reliance on that abandonment would not be actionable by the musical work copyright owner,[158] but reproducing sheet music of the musical work in reliance on that abandonment would be actionable.

Stewart, 495 U.S. at 234. Alternatively, the provision's existence could signal a change from the prior rules of the 1909 Act and assurance that Congress intended derivative work independence under the new statute.

156 17 U.S.C. § 103(b).

157 *Stewart*, 495 U.S. at 239 (Stevens, J., dissenting).

158 This example illustrates why the contractual arrangements between the copyright owner in the musical work and the creator of the sound recording would be critical. If the copyright owner desired to avoid the economic ramifications that abandonment of the copyright in the sound recording might have, the contract would need to prohibit such abandonment. An abandonment in the face of contractual prohibition would give rise to an action for breach by the musical work copyright owner against the sound recording creator, but not for infringement against users of the, now abandoned, sound recording.

Before the Supreme Court's decision in *Stewart v. Abend*, scholars had persuasively argued in favor of derivative work independence.[159] After the decision, unfortunately, few have tried to revive the doctrine.[160] To allow copyright law to harness the full potential of digital dissemination, and thereby further its primary goal, requires that we reconsider the positive effects of embracing derivative work independence – namely, sharp reductions in transaction costs for downstream users and the concomitant increase in the extent of dissemination.

2. Eliminate the Compulsory License of Section 115

As described above, embracing the doctrine of derivative work independence requires allowing the copyright owners of works that might be included in derivative works the freedom to structure licenses in a variety of ways. Almost all copyright owners have relatively complete freedom of contract.[161] The major exceptions to this contracting freedom come in the form of compulsory licensing.[162] In the context of the creation of derivative sound recordings, the availability of the compulsory mechanical license codified in section 115 constrains the bargains that musical work copyright owners might otherwise be able to obtain. As described above,[163] a musical work copyright owner's right to reproduce the work in copies is subject to a compulsory license for mechanical copies once the work has been distributed in mechanical copy form. To allow for the consolidation of rights in a single party through the doctrine of derivative work independence, this compulsory license should be repealed.

The compulsory license exists because of an historical artifact – player piano rolls. Once that compulsory license was in place, however, the present-day music industry grew up around it. The derivative work independence doctrine would alter the workings of that industry, and it would be best if freedom of contract prevailed

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[159] *See, e.g.*, Richard Colby, Rohauer *Revisited: "Rear Window," Copyright Reversions, Renewals, Terminations, Derivative Works and Fair Use*, 13 PEPPERDINE L. REV. 569, 580-81 (1986); Carol A. Ellingson, *The Copyright Exception for Derivative Works and the Scope of Utilization*, 56 IND. L.J. 1 (1980); Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715 (1981).

[160] *See, e.g.*, Dougherty, *supra* note 147, at 249-51.

[161] The doctrine of copyright misuse provides some limits on abusive contracting practices. *See, e.g.*, Practice Mgmt. Info. Corp. v. American Med. Assoc., 121 F.3d 516 (9th Cir. 1997); In re Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

[162] The statute also contains some contracting limitations for the category of "voluntary licensing" for public performances of sound recordings by means of digital audio transmissions. *See supra* notes 104-10 and accompanying text.

[163] *See supra* notes 33-34 and accompanying text.

in structuring the arrangements between musical work copyright owners and sound recording copyright owners.

It may not be an exaggeration to say that the compulsory license is the root of the problem in the music industry. Because of the mechanical license and its statutorily provided royalty rate, there exists a sense of entitlement across the music publishing industry: musical work copyright owners are entitled to eight cents per "mechanical" copy of their work, regardless of the form that copy takes, the manner of the distribution, or the price charged for the distribution. After all, musical work copyright owners are not permitted to refuse to license these derivative works, so they darn well should be paid for any and all copies that are distributed.[164]

The compulsory license has also led to a situation of lower cooperation than might otherwise be expected under a free alienation regime. The mechanical license is something the musical work copyright owner grants because she knows that she must, not because she believes this particular recording of her musical work will bring revenue sufficient to make the bargain worthwhile. The lower levels of cooperation that result in the industry as a whole have been a contributing factor in the industries' inability to embrace new business models.[165]

If Congress were to eliminate the compulsory mechanical license, the musical work copyright owners could continue to license their works for incorporation into sound recordings. All evidence indicates that this is the most likely scenario for three reasons. First, very few actually use the statutory compulsory license system anyway.[166] Sound recording producers routinely seek licenses from the Harry Fox Agency, or, less frequently, directly from the copyright owners. Second, Harry Fox has established itself as providing a valuable service, connecting music publishers with potential licensees. There is no reason why, without the mechanical license, Harry Fox would not continue to perform that role. The only difference is that the shadow of the compulsory license would no longer influence the terms of the agreements reached. Third, for musical work copyright owners, the overwhelming majority of their revenue is generated as a result of sound recordings, either through sales of copies of the sound re-

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[164] *See* Harmon, *supra* note 1, at C4 (discussing the feeling of entitlement by musical work copyright owners).

[165] *See* Craft, *supra* note 16, at 4-9 (describing the conflicts between the musical work copyright owners and the sound recording copyright owners). The lack of cooperation in the industry also is evidenced by the heralding of the "historical" and "landmark" agreement reached between music publishers and the RIAA in 2001. *See Songwriters, Music Publishers Reach Landmark Deal for Internet Music Licensing*, *supra* note 80, at 539.

[166] *See supra* note 38 and accompanying text.

cording or through royalties generated from public performances of the sound recordings.[167] Thus, the incentive is quite high for musical work copyright owners to continue to license the creation of derivative sound recordings. Finally, if without the compulsory mechanical licenses, existing musical work copyright owners refuse to license their works for the creation of sound recordings, the law will have generated an additional incentive for the creation of new musical works rather than the continued recycling of pre-existing musical works.

Eliminating the compulsory mechanical license would only assist in fulfilling copyright's goal if undertaken in combination with embracing derivative work independence. Without such combination, elimination of the compulsory license would only serve to strengthen the bargaining position of one of the existing vested industry players, without furthering downstream dissemination.

3. Grant Sound Recording Copyright Owners Full Public Performance Rights

As previously highlighted, sound recording copyright owners are currently treated as second class copyright owners. The Copyright Act does not grant sound recording copyright owners a general public performance right. Instead, the Act grants only the right to control public performances by means of digital audio transmissions, and even that limited performance right has exceptions and compulsory "statutory licensing."[168] The unequal rights between musical work copyright owners and sound recording copyright owners has contributed to the strange bargaining dynamics between the vested industry players.

There are strong arguments in favor of adopting a general public performance right for sound recordings. First, many countries grant full public performance rights to sound recording copyright owners.[169] Without similar treatment in the United States, U.S. copyright owners may not benefit from a share of those foreign royalties.[170] More fundamentally, there is no objective reason

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[167] Although the proposals advanced in this Article would result in the elimination of direct payments to musical work copyright owners for public performances engaged in by performance of sound recordings, as outlined in the next sections, the musical work copyright owners could structure contractual obligations providing for flow-through royalty payments from sound recording company owners for such public performances.

[168] *See supra* notes 63-70 and accompanying text.

[169] *See* O'Dowd, *supra* note 61, at 261.

[170] John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization – and the Need for Congress to Get In Step With a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1075 (2002).

why sound recordings should be treated differently from other copyrighted works.[171]

For purposes of this Article, however, the most important reason for extending the general public performance right to sound recording copyright owners is to create parity with musical work owners and to allow for flow-through royalties for public performances if the musical work copyright owner and sound recording copyright owners have contracted for such royalties. Only with this parity will the doctrine of derivative work independence allow the parties, including the musical work copyright owner, to profit from public performances. Only with parity will it become unnecessary to allow a musical work copyright owner the right to sue when a sound recording that embodies that musical work is publicly performed without authorization. If sound recording copyright owners were granted a general public performance right then the sound recording copyright owner would be the appropriate party to bring such a lawsuit.[172] Additionally, a single royalty for public performances could be collected from downstream users and then divided among the two sets of copyright owners as is common practice in European countries.[173]

Without embracing derivative work independence, however, this author recommends strongly against the adoption of a general public performance right for sound recording copyright owners. Such a public performance right would merely add yet another party or right that needs to be "cleared" before downstream users may use each piece of recorded music.[174] Additionally, the fact that sound recordings are produced in abundant quantities should weigh heavily against any argument that such protection is "necessary" for promoting the goal of copyright. In fact, given their abundant creation, granting a general public performance right for sound recordings may cause the public to suffer the ill-effects of monopoly rights when no such rights are necessary to induce creation and dissemination.

The proposal urging the grant of a general public performance right for sound recordings is made only in the context of embracing derivative work independence and eliminating the mechanical

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[171] *See* O'Dowd, *supra* note 61, at 250 (asserting that the "failure to recognize the substantial contributions of the performers and producers of sound recordings has always been a significant weakness in the copyright law's protective framework").

[172] The parties could provide contractually that if the sound recording copyright owner failed to bring such a suit the musical work copyright owner could be assigned the cause of action.

[173] Craft, *supra* note 16, at 10.

[174] *See* discussion *infra* Section III.C. If the proposed reform in Section III.C is adopted, granting a full public performance right would be a natural consequence.

license. Additionally, this suggestion for a full public performance right for sound recording copyright owners would be superceded by the proposal to adopted a unified right of exploitation explored below in Section III.C.

4. Potential Negative Effects

In the music industry today, embracing derivative work independence means allowing sound recording copyright owners to be the only source of authorization necessary for downstream users of recorded music. Under the current system both sound recording copyright owners and musical work owners are necessary points of authorization. We would be transitioning from a system requiring permission from two very powerful industries to a system requiring permission from only one. In doing so, however, it is important that incentives for the creation of musical works remain. It is important that the composers of musical works are sufficiently rewarded so that they will continue to invest in the creation of new musical works.

If derivative work independence were adopted, any payments to the composers of musical works would be the result of the contractual bargains struck at the time of authorizing the creation of sound recordings. The sound recording industry is an extremely powerful and extremely consolidated industry. The problem of concentration in the music industry is addressed later in this Paper.[175] Here, however, it is important to consider the relative bargaining power of the record labels and the music publishers, because the former would be the only entity entitled to collect royalties from downstream users if derivative work independence were adopted.

In general, the composers who write musical works are not the ones negotiating directly with the record labels. Composers typically assign their rights to music publishers who then either negotiate licenses with performing artists and record labels or enter into an agreement with the Harry Fox Agency. Because of the number of music publishers it represents, the Harry Fox Agency already has significant bargaining power. Eliminating the compulsory license would provide musical work copyright owners, either music publishers or the Harry Fox Agency, with far greater bargaining power than they currently possess.[176]

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[175] *See* discussion *infra* Section III.D.

[176] Because of the existence of the established intermediaries of music publishers and the Harry Fox Agency, authors of musical works would likely fare better than the freelance authors currently fare in the publishing world. *See* O'Rourke, *supra* note 148, at 605-06 (discussing how

To date, the market power of the Harry Fox Agency has been kept somewhat in check by the compulsory license. Removing the compulsory license may cause the Harry Fox Agency to abuse its market power. However, there are mechanisms other than copyright law to regulate such abuse of power, such as the antitrust laws and the copyright misuse doctrine.[177] Additionally, because the creation of derivative works does not typically require blanket licensing of multiple works, but rather can be done on an individual work basis, the potential for certain types of antitrust concerns to arise is reduced.

Embracing derivative work independence does not, nor should it, negate the parties' freedom of contract. The ability to freely contract, however, would allow the parties to recreate the high-transaction-cost structure that we currently have today. For example, if a copyright owner in a musical work desired to authorize the creation of a derivative work but did not want to have the sound recording copyright owner authorize or otherwise control the public performance of the musical work as embodied in the sound recording, the parties could contract to reach this arrangement. The agreement could provide that while the musical work copyright owner grants permission for the creation of the derivative sound recording, the sound recording copyright owner grants back the right to control the public performance of the sound recording. If a sound recording copyright owner agrees to such a contract, then the sound recording copyright owner would not be capable of authorizing certain kinds of downstream uses. This recreates the situation that we have today where sound recording copyright owners cannot authorize the public performance of the musical work embodied in the sound recordings.[178] While this has the potential to recreate the high transaction cost problems present in the industry today, freedom of contract is critical to copyright ownership. Freedom of contract is also likely to result in a more competitive industry with different musical work copyright owners offering different terms for the use of their works. Moreover, if the sound recording copyright owner is given a general public performance right, reaching the kind of deal described in this paragraph will mean the sound recording copyright owner has to give up a significant revenue potential, and the parties will bargain accordingly.

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the problem of unequal bargaining power in the publishing industry has resulted in freelancers having to assign away rights in their works for no additional compensation).

[177] *See* discussion *infra* Section III.C.

[178] Nothing in the present statute prevents the parties from contracting so that sound recording copyright owners are given the authority to authorize the public performance of the musical work, although this is rarely, if ever, part of the bargain struck.

If the default rule was one of derivative work independence, and if the sound recording copyright owner is granted full public performance rights, a downstream user should be permitted to act in reliance upon a sound recording copyright owner's authorization. In a situation where a downstream user has acted in good faith, relying on a grant from a copyright owner in the derivative work, there should be no liability to the copyright owners of underlying works that are embodied in the derivative work.[179] Instead, the underlying work copyright owner would have an action for breach against the derivative work owner for authorizing uses beyond the bounds of the contract.

If the dual layers of copyright protection were consolidated by embracing derivative work independence, downstream users would need authorization from only one copyright owner – the sound recording copyright owner. Recall, however, that downstream users will want to make use of more than one sound recording and thus will need to contact multiple sound recording copyright owners.[180] The resulting transactions costs could be prohibitive. However, new CROs could be used to effectively reduce those transactions costs.

C. Unifying the Rights

Once the dual layers of copyright in recorded music are reoriented with respect to one another through derivative work independence, the next step should be to unify the rights granted to a copyright owner. Under the current statutory structure, the rights granted by section 106 are considered separate and distinct, and are severable from one another. Section 106 grants copyright owners the right to control the reproduction of works in copies or phonorecords, the public distribution of copies or phonorecords, the creation of derivative works, public performances, and public displays.[181] The assignment of one right does not waive any of the other exclusive rights, and assignees of any right are considered copyright owners under the statute.[182] This structure is consistent with conceiving of copyright as a property right; copyright owner-

[179] The current Copyright Act contains such a defense. *See* 17 U.S.C. § 205(d), (e) (2000).

[180] *See* discussion *supra* Section II.

[181] 17 U.S.C. § 106 (2000). *See* discussion *supra* Section I.E. The rights of public distribution and public display are granted only to certain categories of copyrighted works, with sound recordings receiving a separate right to control the public performance by means of a digital audio transmission.

[182] *See* 17 U.S.C. § 201(d)(2) (2000) (describing rights under transfer of ownership).

ship consists of bundle of rights.[183] But the rights we have today are overlapping in the face of changing channels of distribution and exploitation. The sticks in the copyright owner's bundle have become nets that shift and change shape, tangling to create a web of rights impeding downstream dissemination.

Some have argued that the way to deal with the changing methods of exploitation is to grant the copyright owner additional rights encompassing these new methods of exploitation.[184] Such additions, without displacing other rights would merely complicate matters further by potentially creating yet another copyright owner in a single copyrighted work. Because of the separate and divisible nature of copyright, a system has evolved in which more than one party has legal entitlement to stop the downstream utilization of a work. This significantly raises transaction costs for downstream users and can result in hold-out negotiating problems.[185] Both of those problems contribute to the rampant market failure that is present in the system today.

Instead of the six separate listed rights, the statute should simply provide copyright owners with "a right to commercially exploit the copyrighted expression." In fact, as a result of interpretations given to the terms in the current statute, this is largely what the statute grants to copyright owners today.[186] Very few uses of copyrighted expression do not fall within at least one of the enumerated rights.

To some, an all encompassing "right to commercially exploit" the copyrighted expression might seem as if copyright owners would be granted more control than they presently have. In reality, the combination of rights granted by the current Copyright Act is limited not by the statutory section providing the grant of rights, section 106, but by a series of limitations codified in other provisions of the Act. For example, the first sale doctrine permits individuals in possession of a lawfully created copy of a copyrighted work to sell, rent, or otherwise transfer that copy without violating the copyright owners right to control the public distribution of copies. The first sale doctrine is effected through an express limitation on the distribution right codified in section 109. In all, fifteen

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[183] *See generally* Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics*, 111 Yale L.J. 357 (2001). Merrill and Smith explore the evolution of conceiving of the in rem nature of property ownership to conceiving of property as a collection of exclusive rights.

[184] *See, e.g.*, Lemley, *supra* note 129, at 582 (proposing a "right of transmission" but emphasizing the importance of such a right replacing other rights).

[185] *See id.* at 572 (noting that if too many exclusive licenses are issued "the perverse result may well be that *no one* has the right to distribute the work on the Net.").

[186] The obvious exception is sound recordings, which are not granted a general public performance right. *See* discussion *supra* Section II.D.

separate sections of the Copyright Act expressly limit the rights granted to copyright owners.[187]

The proposed "right to commercially exploit the copyrighted expression" would need to be similarly limited. Some of the current formulations of limitations would remain useful. For example, fair use, codified in section 107, is not a limitation specific to any one right granted by section 106. Other limitations could remain specific to certain types of activities, although in the world of digital convergence limitations based in right-specific language can create problems and inequities and should be carefully considered.

Unifying the rights in section 106 would avoid the lock-in of vested industry players that has evolved out of the accreted nature of copyright rights in the music industry. Because the statute identifies these separate and distinct rights, assignees of a particular right correctly believe that any activity invades their statutorily granted right. Under the present law, arrangements are made, deals are struck, and licenses are written using the terminology of the different sticks in the copyright owner's bundle: reproduction, distribution, public performance, etc. If the copyright owner's bundle were conceived of not as a bundle of limited sticks, but more as a field of grass with each blade representing a different way to commercially exploit the copyrighted expression, then arrangements might begin to take shape around distinct markets, not distinct rights.

Equally important, as new ways to exploit works arise, there will be new blades of grass to be licensed. These new licenses will be structured around the new markets, not around pre-existing rights specified in an outdated statute.

The proposed unified "right to commercially exploit the copyrighted expression" is not a suggestion that we return to the system of indivisible copyright ownership that prevailed under the 1909 Act. The problems associated with the doctrine of indivisibility are well documented,[188] and the doctrine was rejected with good cause. Under the proposed unified commercial exploitation right, exclusive licensees should continue to have standing to sue, the right to claim copyright, and the ability to record their assign-

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[187] *See* 17 U.S.C. § 106 (2000). Section 106 begins by stating that the rights granted in that section are "[s]ubject to sections 107 through 122." *Id*.

[188] *See, e.g.*, NIMMER & NIMMER, *supra* note 80, at § 10.01[C] (discussing standing to sue, right to claim copyright and recordation of assignments).

ments.[189] These rights are currently afforded to exclusive licensees and should continue to be.

Allowing a unified right to be sublicensed could permit similar problems of overlapping ownership claims to arise. There is a simple solution that would permit sublicensing and yet avoid the pitfalls associated with the current overlap of rights. If copyright owners were granted a unified "right to commercially exploit" the copyrighted work, they could still assign to others the right to engage in certain activities, and certainly those grants could be on an exclusive basis. If the assignee were also granted the right to authorize others to engage in that activity, then downstream users could obtain permission from that assignee. Problems might arise, however, if two or more assignees felt their respective exclusive licenses encompassed a downstream use, and the downstream user only obtained authorization from one of them.

One solution is to permit an absolute defense by the downstream user of authorization by an entity that possessed the power to grant the authorization.[190] In that case, the non-authorizing exclusive licensee is really complaining that the license it obtained from the copyright owner was not exclusive after all. That would be a dispute with the copyright owner, not with the downstream user.[191] These would be disputes about contract language, not disputes concerning statutory interpretation.

This solution is not particularly satisfying if the licenses continue to be designed around and drafted using traditional rights-styled language. For example if Company B is granted the exclusive right to commercially exploit the copyrighted work by means of reproduction and distribution, and Company C is granted the exclusive right to commercially exploit the copyrighted work through public performances, the overlapping claims will be similar to those impeding dissemination of copyrighted music today.

Unifying the rights granted to a copyright owner would hopefully encourage the parties to contract in terms of markets, not in terms of specified means of exploitation. To return to the blades of grass metaphor, exclusive licensees would be given control over particular patches of grass in the copyright owner's field. As new means of exploitation develop, we may see fights about whether those new blades of grass are growing in Company B's patch of exclusively licensed grass or in Company C's patch of exclusively

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189 17 U.S.C. § 201(d)(2).

190 The current statute has similar provisions. *See* 17 U.S.C. § 205(d), (e) (2000).

191 Alternatively, exploring the possibility of treating exclusive licensees who have rights that both appear to encompass a new method of exploitation as joint tenants may prove fruitful, although it is beyond the scope of this Article.

licensed grass. But, hopefully, because the patches of grass will be defined in terms of markets, the blades of grass will not be growing in both patches at once. Alternatively, if the new method of exploitation is within the bounds of both exclusive licensees, either licensees should have the right to authorize the new use. It might be worthwhile to explore imposing obligations similar to joint tenants on both licensees. Alternatively, a priority system, similar to the one presently in the Copyright Act[192] could be used to resolve these kinds of disputes.

D. Market Power

In addition to the problems that result from high transaction costs and unclear entitlements, in the music industry there is the very real problem of industry concentration. This market power possessed by certain players in the music industry does not result from the exclusive rights granted by the Copyright Act, although those rights are sometimes referred to as monopoly rights. Instead, the market power is the result of the large quantity of copyrights owned by each of these industry players. The power wielded by the major record labels has been the subject of antitrust investigations and consent decrees in the past,[193] as have the practices of both ASCAP and BMI.[194] The proposals outlined in this Article do not specifically address the problems associated with the concentration of market power that would remain despite reformation of the provisions discussed.

Any reformation of the Copyright Act should be mindful of the potential for such market concentrations to create market failures. There have been examples of attempts within the Copyright Act to guard against the abusive use of market power in the music industry. The first is the mechanical license itself. Adopted to assure that the Aeolian Company was not the only company to be producing player piano rolls, the mechanical license remained in the statute, and an entire industry grew up around it. One cannot help but wonder what the music industry would be like today if the

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[192] 17 U.S.C. § 205(d), (e) (2000).

[193] *See, e.g.*, Alec Klein & Jonathan Krim, *Online Music Ventures Probed: U.S. Opens Antitrust Inquiry into Major Firms' Partnerships*, THE WASHINGTON POST, Aug. 7, 2001, at E04 (investigating the MusicNet the venture backed by AOL Time Warner Inc., Bertelsmann AG, EMI Group PLC, and RealNetworks Inc.; and Pressplay, backed by Sony Corp. and Vivendi Universal SA).; Press Release, Federal Trade Commission, *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market All Five Major Distributors Agree to Abandon Advertising Pricing Policies*, (May 10, 2000) *at* http://www.ftc.gov/opa/2000/05/cdpres.htm.

[194] *See* Einhorn, *supra* note 51, at 349 (discussing a FTC settlement with the five largest distributors of recorded music, over minimum advertised price programs).

competitive forces of the free market had been allowed to shape the relationship between copyright owners in the musical works and the creators of sound recordings.

A more recent example of copyright attempting to prevent the abusive use of market power is in the voluntary mandatory licensing scheme of music webcasting. These restrictions are aimed primarily at preventing extensive exclusive licensing arrangements that would otherwise permit dominant players in one market from extending that dominance into new distribution markets.[195] As opposed to a general prohibition on abusive licensing, the details currently in the statute provide certainty, allowing copyright owners the freedom to employ other restrictive licensing practices that are not prohibited by the statute. Perhaps some of these kinds of restrictions would be appropriate. However, because these restrictions impede free markets, Congress should tread carefully in this area. As we have seen in the past, entire industries can evolve around these types of provisions despite outdated origins.

While antitrust laws remain an important check on abuse of market power, proving market power, in the antitrust sense of the phrase, can be difficult. In the music industry, however, there have been several instances in which the antitrust laws have been used to reform behavior.[196]

In addition to regulation by the antitrust laws, there are equitable doctrines that can keep the abuse of dominant market position in check. Specifically, the doctrine of copyright misuse could play a major role in checking abusive licensing practices. The district court in the *Napster* case recently recognized industry practice by the record labels in licensing their works for digital distribution raised serious questions of misuse.[197] Under the misuse doctrine, if a copyright owner is engaged in misuse, they may not enforce their copyrights until the misuse is purged. The existence of the doctrine, and the real threat of its application, provides some measure of deterrence against abusive licensing practices, although the misuse doctrine alone is probably not sufficient.

While antitrust laws can provide protection from abuse of monopoly power, the proposals offered in this Article may encourage more competition within the music industry itself. By simplifying many of the statutory provisions relating to different aspects of music copyright, the proposals offered here would lower the barriers to entry, fostering greater competition. The reduction of transaction costs for downstream users may also facilitate the ap-

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[195] *See supra* notes 108-10 and accompanying text.

[196] *See* Einhorn, *supra* note 51.

[197] In re Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

pearance of new competitors. Under the simplified system proposed in this Article, new record labels may be able to profit by quickly adapting to changing methods of dissemination, unencumbered by the current complex set of regulations.

CONCLUSION

Copyright risks irrelevancy in the digital world. This is particularly true for the music industry. The market created by the existence of copyright in the first place has, over time, filled with multiple owners and overlapping rights in a single copyrighted work. The transaction costs associated with the downstream use of music are naturally high because multiple works are needed for marketable downstream use. If each one of those works continues to require multiple clearances, the market will continue to fail as new methods of exploitation are discovered. The additional fact of market concentration in a limited number of entities compounds the problem by creating unreasonable demand on price.

Reducing the number of parties from whom a downstream user must obtain authorization by embracing the doctrine of derivative work independence and unifying the rights granted to copyright owners would further the goals of copyright by facilitating market transactions thus allowing more rapid exploitation of new methods of dissemination. While problems of market concentration would remain, the proposals offered in this Article would begin to head copyright law in the right direction.