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Musical Works Performance and the Internet: A Discordance of Old and New Copyright Rules

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I. Introduction: Musical Works Performance Then and Now

{1} I feel strongly that the great fundamentals should be discussed more in all public meetings, and also in meetings of schools and colleges. Not only the students[,] but also the faculty should get down to more thinking and action about the great problems[,] which concern all countries and all peoples in the world today, and not let the politicians do it all and have the whole say.

{2} I have often been told that it is not the function of music (or a concert) to concern itself with matters like these. But I do not[,] by any means agree. I think that it is one of the things that music can do, if it happens to want to, if it comes naturally, and is not the result of superimposition - I have had some fights about this.

(1).

{3} In *The Fourth of July*, American composer Charles Ives depicted the musical clash of two marching bands approaching each other at a Fourth of July celebration, by superimposing two patriotic tunes upon each other simultaneously. As the bands grow nearer to each other during the performance, the clash of the two compositions becomes a great discordant whole. Ives, a successful businessman, in addition to being an innovative and irreverent composer, held New England transcendentalist views. He was not afraid of leaving complex matters in their complex state, believing it a mistake to simplify the necessarily complex.(2) Some of Ives' compositions were intentionally unperformable; his urge to compose often resulted in a musical intellectual exercise unintended for performance reality.(3)

{4} Music copyright law today resembles an Ivesian clash of new and old rules being superimposed upon each other. The challenge to copyright law precipitated by evolving digital forms of works and communication shows clearly in musical works and musical works performance copyright. Musical works performance is an intangible right, and given the inherently ephemeral nature of musical performance, historical rules protecting this right tend to focus not on the performance itself, but on concrete tests and factors, like place of performance, identity of the performer, manner of delivery, and fixation of a performance. This focus on concrete factors allows for some flexibility when technological change occurs in the manner of reproduction and delivery of performances, as long as the geographic model identifies the who, when, and/or where of the performance. However, all of these rules and rights supported by concrete tests, are challenged when the musical work, performance medium, or delivery system exist in digital form.

{5} Today, neither the live performance model and rules, nor the broadcast model for performance and rules, adequately addresses musical works performance on the Internet. While some contexts for musical works performances mimic either the live performance or broadcast models in place prior to the digital age, the Internet is a truly unique phenomenon that allows for flexibility and innovation in the delivery of musical works and their performances. Using the Internet today, a listener can experience music, sounding as if it were being performed in real-time in "webcasts"(4) or other forms of real-time audio like "streaming."(5) Musicians may present live concerts via the Web.(6) Individuals and businesses may use music as a component of their websites as well. Additionally, music may be downloaded simultaneously with a performance or separately delivered. Musicians may collaborate on the Web, composing new music, jamming, or otherwise performing preexisting music. Libraries are now archiving musical works.(7) Musical works sites already exist where users can obtain sheet music.(8) Of course, small and large music retailers, record labels, and other commercial outlets are offering musical works via their websites.(9) Clearly, even amongst these uses, and the many more that do or will soon exist,(10) there is a need to protect the rights of owners of musical works copyrights when they warrant protection. Protection is not as clear when the musical uses are performances under either the new or older copyright provisions.

{6} An "Ivesian clash" in copyright rules is occurring because under the existing rules for musical works performance, it is possible to credibly argue that almost all transmissions involving music through the use of the Internet are public performances, requiring the payment of a royalty.(11) Potentially, the royalties at stake are significant; current projections estimate that Internet music use will continue to escalate.(12) Credible arguments and questions exist, however, regarding apparent contradictions over what is a digital performance within the music copyright provisions themselves, what policy is being served by such an all-encompassing view, and how music performance models actually work in the Internet environment. The arguments do not fit either the live performance, or the traditional broadcast model in many significant ways.

{7} This paper sets out the main arguments and considerations concerning musical works performance. In it, the argument is presented that the musical works performance right should be less broad than the performance rights societies assert, in order to avoid the collapse of musical copyright categories, and to best ensure fair use and public access to musical works performance.

A. Musical Works Performance Copyright Historically

{8} Although musical works were first protected in the United States in 1831, (13) the statutorily-ensured performance right did not officially come under copyright protection until 1897. (14) In the 1909 Copyright Act, the performance right for musical works survived intact, but a "for-profit" requirement was added. This requirement limited the scope of the right to situations where the music user charged an admission fee for the performance, or was a "for-profit" business using music. (15) In these early years, the performance contemplated under the 1909 Act was live performance, either in concert halls, or other public venues. Then, as now, technological change brought questions over who and what could perform a musical work. Ultimately, through a series of complex cases, the performance context expanded to include broadcasters of radio and television programs as performers. (16)

{9} The problem of defining venue, and determining whether the performance was considered public, became further complicated by the broadcasters' ability to transmit, re-transmit, or further transmit a performance by radio waves alone, wires, or any combination of broadcast technology then in use. The multiple performance doctrine emerged so that a subsequent transmission of a musical work, even by a person apparently receiving the work on a receiver, and playing or further transmitting the work in public, was a potentially infringing performance. This doctrine was eroded by several important U.S. Supreme Court cases. (17) By the last of these cases, it was again unclear exactly when, how, and by whom a performance could take place, and in what context technology would be a performer or purveyor of performances subject to licensing fees.

{10} These issues were settled by the passage of the 1976 Copyright Act, which included broad definitions of "perform" and "transmit". (18) Congress specifically intended that the multiple performance doctrine be reinstated, and made clear that further transmission of a radio broadcast of musical works qualifies as "performing", in its passage of Section 110. (19) In its decision to balance the needs of music copyright owners against business users of music, Congress took into account the then current licensing practices of the American Society for Composers and Publishers ("ASCAP"), which was embroiled in a lawsuit against Muzak and other background music services during the time the legislation was written. (20) Ultimately, Congress decided to restore the multiple performance doctrine. (21)

{11} Under the 1976 Act, the multiple performance doctrine has been interpreted broadly, encompassing many different categories of musical works performance transmissions. (22) With each change in technology, lawsuits arise over the liability of the transmitter for delivery of the performance. In particular, the performance rights collections societies charge that, with each new mode of delivery, copyright owners of music are threatened with the loss of royalty income.

B. Performance Licensing Societies

{12} When the performance right became protected under the federal act, the pursuit of public performance royalties was not itself a big business. In those days, music publishers were attempting to hawk music without the benefit of mass media and mass distribution, and they felt that performance of music would stimulate sheet music sales -- the primary source of musical works income at the time. (23) Further, because the 1909 Copyright Act added a "for-profit" requirement to the musical works performance right, (24) there existed a general perception that, unless an admission fee were charged to hear a performance, no performance license was required. (25) In fact, sheet music copies often carried a printed notice allowing the

music user to perform the work in public.(26) Therefore, it was not unusual for a music user to expect that, if he had a copy of the music, then he was entitled to perform it. Many musicians were unaware of the need for separate compensation for the performance royalty.

{13} The conceptual problem of creating respect for musical works performance rights still exists today. It is difficult to conceive of performance as a copy of the music, given that performance is not a physical reproduction or fixation of the work.(27) Owners of copyrights, therefore, have had an historical interest in educating music users about the differences in rights between the use of music in physical and non-physical copies.

{14} In addition to their historical ignorance of this distinction, groups of music users, like restaurants and hotels, resented paying performance royalties for uses of music in their establishments. They claimed the use should be free, implying that the non-physical copy of music produced in their establishment did not have a monetary worth, although the physical manifestation of the same music was worth a fee. This was especially true when the restaurant did not charge an admission fee for the music and was already paying the musicians to perform.(28) It took years of fighting and litigation to clarify that live and broadcast musical works performances require a license, when the venue or entity rendering the performance is a "for-profit" business, even if the listening public does not pay to experience the music performance.(29)

{15} Representatives of the newly-formed ASCAP, a performance rights collection society composed of songwriter members, successfully led much of this fight.(30) In addition to educating music users regarding payment for musical works performance, ASCAP assumed the task of collecting royalties for musical works performance, devising and implementing a system of licenses and collection methods.(31) With this sustained effort, more music users began paying for musical works performances; but, along with ASCAP's successes, came controversy.

{16} In 1940 and 1941, Broadcast Music Incorporated ("BMI") formed and incorporated, in part as a reaction to ASCAP's abuse of unchallenged power to set rates for music performances in the U.S.(32) Although BMI was owned by broadcasters, and operated differently than ASCAP, eventually both ran afoul of antitrust laws. Today, they both operate under consent decrees designed to eliminate the possibility that either can fix prices for musical performance by offering licensing schemes that are not truly market-based.(33) As a result of the consent decrees, both ASCAP and BMI must grant only non-exclusive, non-dramatic performance licenses, make their repertory public, identify owners of music, offer similar licenses at the same rate for similarly-situated users, and, for ASCAP, the decree mandates that an Article III Court serve as arbitrator of disputes. However, despite all of this, the societies remain shielded from real price competition. While seeming to stand as checks on the societies' pricing policies, because the decrees do not force the societies to offer per-use licenses, and do not affect the blanket licensing regime, the decrees further legitimize the societies' pricing power.(34)

{17} Music users' resentment and distrust of the performance rights societies is further exacerbated by the societies' enforcement practices. Both, ASCAP and BMI send undercover representatives into establishments using publicly-performed music who listen and make notations of songs that they believe to be within the societies' repertory.(35) If the performer and/or establishment does not have a license, the societies will often send a letter, or series of letters, claiming copyright infringement and offering to sell a license. If there is no response, or a negative response is forthcoming, the societies may begin litigation to enforce the copyright, sometimes without informing the alleged infringer of any available alternatives, under either the consent decrees, or the Copyright Act.(36) This kind of behavior is, in itself, a violation of the consent decrees.(37)

{18} Some of the corporate music users' concerns are now addressed in the "Fairness in Music Licensing Act of 1998,"(38) which exempts smaller restaurants and establishments hosting musical performances from copyright liability under Section 110(5), and adds a new procedure for determining reasonable license fees

for owners of proprietors of larger eating and drinking establishments who must pay performance fees.(39) Predictably, ASCAP and BMI were not pleased with the passage of the new act.(40) However, the act is clearly limited to certain proprietors of establishments; others, specifically broadcasters, are excluded(41). Against this criticism, the performance rights societies continue to defend themselves by reminding music users that infringing performances of music constitute theft, and without the societies, there would be no practical way for musical works copyright owners to enforce their copyrights and collect their royalties.(42) Collective licensing is actually particularly appropriate to rights enforcement in music and music performance because there are many musical works at issue. It would be unmanageable for music users to find and to negotiate with copyright owners individually. Price discrimination amongst similarly-situated users would actually be greater. Additionally, individual copyright owners cannot effectively enforce their copyrights worldwide or domestically.(43) Finally, blanket license fees are negotiated with representative industry groups, not set in a vacuum by the societies.(44) Therefore, the societies contend that they are champions of the musicians, rather than cloak and dagger operatives preying on unsuspecting music users.(45)

{19} Given that musicians do benefit from the collective administration of their performance rights, one might not expect resentment of the societies from the writers themselves. This is especially true of ASCAP, which is governed by its membership. However, resentment from writers does occur, primarily because of perceptions that the societies are run by a select few who cater to already successful, or politically powerful writers and publishers within the organization. Writers' main complaints are: (1) the ASCAP statistical sampling system unfairly advantages mainstream writers; (2) already successful music is more easily recognizable by ASCAP experts listening for ASCAP repertory; (3) the ASCAP sampling system does not pay the correct percentage to rights' holders because the amount paid is not based upon the exact number of performances played at a venue; (4) the owner or arranger of a public domain song receives less royalty than the writer of an original song; (5) the system favors radio stations that pay higher fees to ASCAP because licensees who pay higher fees are more likely to be surveyed for royalties; (6) even though ASCAP is a member-run organization, it is controlled by its board because a writer who does not get royalties cannot vote; and (7) although ASCAP must follow its distribution formulas, there is no mandate that it must distribute a particular percentage of its income, so that money is spent on lawsuits and other activities that some writers believe should be distributed in royalties.(46)

{20} In spite of the criticisms and problems with the collectives, they remain the easiest method for writers and publishers to use for royalty collection, and the power of the societies remains effectively unchallenged. While the notion of collective administration of musical works performance on the Internet is appealing, the Internet also challenges the performance rights societies' power over the administration of music rights in the Internet environment because it is a new media that defies easy categorization. Predictably, as the digital age became reality, the performance rights societies laid claim to any possible music performance territory on the Internet, even before it was clear whether such rights actually existed.

II. Musical Works Performance on the Internet: Not All Transmissions Constitute Public Performances, Regardless of Whether a Copy of the Musical Work is Delivered Simultaneously with the Transmission

{21} By the early 1990's, the U.S. Government's recognition and interest in promoting a national digital information agenda, and the music industry's progress lobbying for a series of bills protecting music in digital environments set the stage for a continuing debate over protection of musical works on the Internet.(47) The debate over musical works performance rights emerged clearly during the comment stages for both the

National Information Infrastructure ("NII")⁽⁴⁸⁾. Initiative and the Digital Performance Rights in Sound Recording Act ("DPSRA"). As a result of the 1994-96 debate, the performance rights societies, and ASCAP, in particular, successfully advocated the position that all transmissions of musical works over the Internet, if public, are public performances of the musical work, even if the same transmission is a reproduction and/or distribution of the work.⁽⁴⁹⁾ To date, this position has not been successfully challenged, and is regarded as the most compelling interpretation of the matrix of old and new copyright law defining musical works performance rights in the digital arena.⁽⁵⁰⁾

{22} Consequently, the performance rights societies are actively promoting Internet performance licenses, by direct education and persuasion of Internet users of musical works, and by electronic monitoring of music and music users.⁽⁵¹⁾ At its core, the ASCAP argument⁽⁵²⁾ developed to counter the proposal contained in the Green and White Papers, and the proposed NII Act that distinguished between transmissions of reproduced copies of works and transmissions of performances or displays of works.⁽⁵³⁾ Under the proposal, a musical work sent over the NII would not be considered performed or displayed unless it were capable of being sent as a copy and simultaneously rendered as a performance.⁽⁵⁴⁾ This proposal makes sense only if the definitions of "distribution" in Section 106, and "transmit" in Section 101, are redefined to include distribution of copies by transmission. This is impossible under the present Act's definitions, which limit transmissions to performances and displays.⁽⁵⁵⁾

{23} Similarly, the present Act limits distributions to physical copies. According to the authors of the White Paper, if the definitions were changed, a transmission of copyrighted work could be a reproduction, and a distribution by way of transmission, thus, implicating two separately-licensable rights. This would avoid the collapse of the previously-separable categories of reproduction, by copying and distribution under the Act.⁽⁵⁶⁾

{24} The White Paper's proposed definitions rest upon the assumption that there are differing types of transmissions possible on the Internet, and that the intent of the transmitter can be used to further categorize the copyright right involved. Originally, the Green Paper specifically proposed the primary purpose test to be determinative of the copyright rights implicated when a transmission could send a performance, display, and reproduction by transmitted distribution, as redefined. In such a case, the reproduction right would only be triggered if the effect or primary purpose of the transmission was to deliver a copy, or phonorecord of the work.⁽⁵⁷⁾ In other words, the performance right would not be triggered if the sender primarily intended, or purposefully effectuated distribution of a musical work as an identifiable copy, distinguished from situations where the sender intended that the work not be copied, or merely transmitted the work for listening, without being concerned with whether the recipient could copy the work via the transmission.

{25} Although the White Paper did not explicitly include the primary purpose test in its final version, its proposed definitions remained. This caused the performance rights societies concern. They quickly claimed that such definitions would unfairly deprive owners of musical works, primarily publishers, of performance royalties that should be collected for Internet music use.⁽⁵⁸⁾ This supposed deprivation would occur if some transmissions of musical works were not subject to performance licensing because the primary purpose of the transmission was to send a reproduction or copy by phonorecord. Such a transmission would require a mechanical or other reproduction license under Section 106(1) or Section 115, and the performance societies could not collect performance royalties on the musical work itself. Ironically, the societies were in the tricky position of arguing that almost all transmissions of musical works implicate the performance right under Section 106(4), while also arguing, in their general support of the DPSRA, that under the proposed new Section 115 in the DPSRA, reproductions of musical works could be transmitted by digital distribution subject to a mechanical royalty. This impliedly agreed with the White Paper position that physical copies can be distributed by transmissions.⁽⁵⁹⁾ Further, the performance rights societies had to agree with the record industry to support a new performance right for certain digital transmissions of sound recordings, contained in Section 114 of the DPSRA, to preserve their potential market for performance royalties of musical works

involved in those transmissions.(60) In order to preserve these potential performance royalties, the DPSRA specifically provides that none of the rights regulated (or governed) affects performance royalties under Section 106(4).(61)

{26} ASCAP focused on the need to preserve the status quo, by arguing that the proposed White Paper changes, taken together with the passage of the DPSRA, would upset the carefully-created existing balance of industry practice and categorization of rights under existing law. Changing the law, as was proposed in the White Paper would "do violence to the very fabric of the music industry and the needs and expectations of creators and copyright owners of music."(62) It argued that no further changes to the Act were necessary to protect performance rights on the Internet, as long as the presently- recognized categories were kept intact, and the concept that musical works performances could be simultaneously performed and distributed by digital transmission was clearly understood as pre-existing.(63)

{27} Stressing the 1976 Act's careful balance resulting from the 1909 Act history and the ensuing problems over the multiple performance doctrine, ASCAP pointed to Congress' intentionally-broad 1976 Act definitions of "perform" and "transmit", designed to allow for, and actively encourage the technological advances now occurring on the Internet.(64) At the heart of the ASCAP argument that transmissions of musical works must always be performances is the assumption that, because the 1976 Act's definition of "performance" includes performance by different devices that can occur through the use of multi-stage processes, the delivery of musical works performance over the Internet must always follow either a live or broadcast-like transmission model for performing. Therefore, a receiving computer can "capture" a performance for play at the user's preferred time through its retrieval and storage functions.(65) ASCAP argues that, even though the information containing the musical work is transmitted digitally, requiring the capturing computer to convert the work to audible sound, it is essentially no different than the process occurring when a radio broadcaster transmits radio waves through the air, to be picked up by capturing radios, which convert the waves to audible sound. This is the traditional broadcast model.(66) Under this view, it makes no difference when and where the ultimate rendering of the work occurs, under existing performance rights law, as broadcasters and radio players are performers.(67)

{28} Because existing cases hold that various types of technologies are used to effectuate performances, the specific technology used for Internet transmissions is immaterial as to the determination that a performance is occurring.(68) The fact that the performance is not heard when it is transmitted, even for a live feed of a broadcast, or a broadcast of a live performance, does not negate the fact that the performance has taken place. Under existing law, only the fact that the performance is transmitted is necessary to trigger the performance right, even if the performance is not actually heard contemporaneously with the transmission. Nor does it matter whether the performance is or is not heard later after being stored or recorded by the recipient or another broadcaster for later replay.(69) ASCAP argues that the storage and later replay of a performance is merely another step in the original transmission process, which may or may not actually deliver the performance to the recipient.(70)

{29} Similarly, under the 1976 Act definitions and existing case law, the performance audience does not have to be located in one place, nor does it have to hear the performance at the same time. As a result, ASCAP took the position that any transmission of musical works over the Internet, which could potentially reach members of the public, resulting in an immediate or delayed audible rendering of the musical work, constitutes public performing of the works.(71) Because public users of the Internet have the ability to interact with the system and to retrieve musical works at any time, perhaps choosing to play the work, ASCAP further concluded that, both the system and users render and perform the musical works. Further, because the service is communicating works beyond the place of the original sending, and sounds may immediately or eventually be received, ASCAP concluded that all of the steps in a transmission are public performances.(72) Under this interpretation, it is difficult to imagine how a transmission would not be a public performance, because all the steps along the way that make the transmission occur are open to public

access and capture, unless otherwise affirmatively protected. However, ASCAP suggests that private e-mailings of musical works would not be public performances.(73)

{30} While technically credible, the ASCAP argument that musical works transmissions are always performances on the Internet did not alone answer the threat posed by the Green Paper's primary purpose test. Under the test, even if ASCAP succeeded in selling its view that a particular musical works performance occurred, it could not avoid the problem it created by its support of the DPSRA's recognition that identifiable copies of musical works can be digitally delivered under Section 115. Therefore, the DPSRA allows distribution of physical reproductions of musical works by transmission, in apparent contradiction to the 1976 Act and ASCAP's own position that the definition of distribution is limited to physical copies. The DPSRA then increased the possibility of reviving the primary purpose test, to determine which rights require compensation to a copyright owner, in the event that both, a reproduction and a performance of a musical work occurred in the same transmission. Because it is impossible to determine the primary purpose of a transmission, ASCAP argued that both rights should be recognized and compensated, otherwise a loss of performance revenue from the presumed performance of a work would occur.(74)

{31} ASCAP was afraid that if physical reproductions of works could be distributed simultaneously to a claimed performance taking place in the same transmission, only the mechanical license fee under Section 115 would be paid to publishers and writers. The performance rights societies cannot collect such fees.(75) ASCAP's argument that two or more rights in a copyright owner's bundle are implicated in a single transmission, and require compensation for all of the rights involved, was reiterated in its Reply Comments.(76) ASCAP continued to insist that all transmissions of musical works on the NII continue to constitute performances emphasizing that this would be true whether or not such transmissions also constitute reproductions or displays. To add credibility to its position, ASCAP posed a question to music professionals: why point-to-point sale of music by transmission of a sound recording containing a musical work, not audible during transmission, would be a performance of the work when a face-to-face sale of the sound recording would not. According to the Reply, music professionals answered that a face-to-face sale does not require works to be performed, but a transmission does.(77) ASCAP, and the other performance rights societies, on the basis of these unchallenged arguments, proceeded to quickly develop experimental Internet performance licenses. Without any effective challenge, the societies individually decided that the venue of a performance must include websites, which are analogous to broadcasters, to accommodate Internet uses.(78) This means that anyone, from an online service provider, to a child with a webpage, is potentially performing music, and potentially infringing on copyright, unless he has a website blanket license from a society.(79) ASCAP's idea is that webpages serve as pathways to information, and that music is used on parts, or on all of the pathways employed in a website.(80)

{32} At first, ASCAP developed a license with four options, requiring website music users to pay yearly fees based on the site's total gross revenue, music revenue, ASCAP music revenue, or, for non-profit organizations, based upon the total budget.(81) Without identifying a negotiating group similar to the groups identified, that negotiated rates for pre-Internet performance licenses, in 1996, ASCAP charged a minimum of \$500.00 per year for any of these licenses.(82) Today, ASCAP and BMI offer a second generation of website musical works performance licenses. The Society of European State Authors and Composers ("SESAC") also offers a license.(83)

{33} ASCAP's Internet site offers easy methods for setting rates and purchasing a license, along with information about why music performance licenses for the Internet are necessary, and who must purchase a license. In its website section, entitled "Frequently Asked Questions About Internet Licensing," ASCAP continues to hold that, "every Internet transmission of a musical work constitutes a public performance of that work."(84) ASCAP also continues to insist that all unlicensed users of ASCAP repertory on the Internet are infringers, saying, "obviously, it is far less expensive to comply with the copyright law by taking an ASCAP license than to pay damages for violating the law."(85) These second generation licenses, which do not differ

much from the first version, [\(86\)](#) received praise as a model for handling copyrights on the Web. [\(87\)](#) Bennett Lincoff, ASCAP Director of Legal Affairs for New Media said the new licenses truly reflect the value of music online. [\(88\)](#) However, the fact that new licenses now cost a minimum fee of only \$250.00 per year, or half of the original charge, illustrates exactly how arbitrary rate-setting for these licenses may be. Of course, there is still no established way to identify and to negotiate with a representative group of Web music users. [\(89\)](#) ASCAP has already distributed performance royalties for online music to its members, a tribute to its success in marketing on-line performance rights for musical works, using the reasoning outlined above.

III. Why All Transmissions of Musical Works on the Internet Are Not Public Performances, Regardless of Whether a Copy of the Musical Work is Delivered Simultaneously with the Transmission

{34} ASCAP's argument imposes the current 1976 Act definitions and performance rights jurisprudence, based upon either a live performance and/or analog broadcast model of "performance," "performer," "venue," "public," and "transmission," terms often defined geographically, on the non-geographic digital world. ASCAP would like to keep the musical works performance rights category artificially separate from the rights of reproduction and display, instead of relying upon traditionally-fixed categories of musical works and delivery systems to self-define the digital mix. In fact, the new rules passed to protect music on the Internet were intended to leave the musical works performance right as it is, while protecting new performance rights in sound recordings, and further protecting against digital piracy of musical works contained in phonorecords.

{35} Given the complexity of the law, the accelerating pace of technological progress, and the nature of musical performance, it is tempting to accept the apparent logic of the ASCAP argument, rather than to identify the harm in accepting this view. However, if all transmissions of music on the Internet are potentially public performances, several levels of problems are created. First, the ASCAP position fails to account for definitional and conceptual problems creating a collapse of Section 106 categories. Second, traditional, existing live performance and analog broadcast licensing models do not always work in the Internet context. Third, not all forms or deliveries of digital musical works are alike. Fourth, the ASCAP argument fails to account for the balances and limitations on copyright owners' rights mandated under the 1976 Act, including the Section 110 exemptions and fair use. It similarly does not allow for resolution of copyright policy with communications policy, free speech and privacy concerns, or copyright as trade law. Musicians and the general music user public may suffer harm from the overprotection of musical works performance at the expense of public access, recognition and flexibility of the digital medium. The societies' unbounded control over license fee structures creates a false market for blanket licenses, harms musicians and the public by inhibiting the creation of new forms of music and music delivery possible in the digital environment. [\(90\)](#)

{36} Unless the foregoing concerns are addressed quickly, and immediately in accordance with a clear domestic policy position, problems implementing and enforcing performance rights may arise on the Internet and multiply more quickly than any feared propagation of pirated musical performances. Already, problems are appearing as the implementation of the DPSRA begins. To date, no rate has been set for performances of musical works "incidental" to digital phonorecord deliveries under Section 115 because it is impossible to discern what constitutes an "incidental" performance. [\(91\)](#) RealAudio and other "streaming" techniques now routinely bring music to listeners on the Internet in real-time, creating a need for clarification of the rules for the "webcasting" industry. [\(92\)](#)

{37} Recently, a controversy beginning with the sale of the Diamond Rio portable mpegIII player caused a

lawsuit between the RIAA and the manufacturer of the device. The Rio case is the first calling into controversy definitions involving a "digital audio copied recording" and a "digital audio recording device" under the AHRA Section 1001.(93) This case shows how quickly controversy can occur when untested digital definitional categories meet ever-evolving technology.(94) Internationally, it is not clear if the definitions of transmission and distribution of musical works used in the World Intellectual Property Organization ("WIPO") treaties agree with the present U.S. definitions, or if the U.S. vacillation over these definitions during the NII debate, and the subsequent loss by the U.S. of key debates at WIPO, result in a present incongruity for musical works performance rights worldwide.(95) These, and other already-multiplying questions, demonstrate the need for consistent policy concerning global protection of music rights that embraces digital pathways, and sets rules appropriate to traditional copyright balances, rather than relying on traditional rules in the absence of clear and consistent policy.

A. Bundled Rights or Collapsing Categories?

{38} Currently, it is impossible to reconcile the ASCAP argument with the Copyright Act, because it is presently impossible to tell under Sections 101, 106, 114, and 115, the difference between sending and receiving an online copy of a phonorecord containing a musical work, and performing the on-line work contained in the phonorecord. Questions and inconsistencies within the rights and destinations in the present Copyright Act make it difficult to be certain which of the following take place on the Internet:

- transmission of a musical works performance under Sections 101 and 106(4), or a musical works reproduction embodied in a digital phonorecord delivery under Section 115;
- digital distribution of a musical work under Section 115, or transmission of a musical work performance under Sections 101 and 106(4);
- digital delivery of a musical work copy under Sections 101 and 106(1), or digital performance of a musical work under Sections 106(4);
- distribution of a musical work or its dissemination or broadcast by transmission;
- reproduction of a digital copy of a musical work in a digitally-delivered sound recording or digital performance of the work under Sections 106(4) and 114.

Therefore, the categories of musical works performance and reproduction in a phonorecord on the Internet have already collapsed. Consequently, the distribution right encompasses both musical works performances and reproductions by transmission.

{39} Even without the passage of DPSRA, the ASCAP position would have encountered opposition, as demonstrated by the argument in the White Paper. However, given the passage of DPSRA, the categorical problems are even more urgently in need of clarification. Because it begins with the definitions of "transmissions" and "performances" under the 1976 Act, ASCAP's argument fails to adequately define what is being transmitted, or to distinguish the digital version of a musical work from the delivery system. ASCAP's argument is weak because it assumes that copyright owners lose royalties that they are potentially entitled to, rather than beginning with the position that it is not clear in all situations what exactly constitutes a musical works performance on the Internet. By insisting that all transmissions are performances, and that copyright owners are cheated out of royalties, ASCAP contends that Internet transmissions of musical works that are not considered performances infringe upon a right that the performance societies already have, and will lose. This slant ignores the reality that even if some transmissions of musical works are not performances, owners of musical works stand to gain enormously overall as new markets open up through the Internet on an unprecedented scale. ASCAP's position as a victim directs attention away from the

problems inherent in its argument, not the least of which is that copyright owners cannot be cheated out of royalties that do not exist.

{40} Under the 1976 Act definitions, a musical work may be both fixed and reproduced in copies, or in a recording, called a "phonorecord" [\(96\)](#). A phonorecord is a recorded copy of a work in the same way that sheet music is a written copy of a work. In order to record a musical work on a phonorecord, a mechanical license is purchased to record the work, assuming the work has already been distributed to the public on phonorecords. [\(97\)](#) This means that to make and distribute a copy of a musical work in a phonorecord, a royalty is paid to the copyright owner. Under the compulsory license provisions of Section 115, no one can be refused such a license. Thus, Section 115 operates as a cap on how much this license costs because no one is willing to pay more than the compulsory license rate in effect at the time of the recording. [\(98\)](#)

{41} However, in order to create a recorded copy of the work, the work must be performed. The version of the recorded work is a sound recording, susceptible to its own copyright as a recorded performance of the work. [\(99\)](#) Someone who wishes to purchase the recorded musical work at a traditional record store will pick out a physical copy of the work by a particular performer, and in one physical album buy both the phonorecord copy of the musical work and the copyrighted sound recording of the work. At this point, no performance of either the musical work or the sound recording has taken place. The owner of the musical work is owed a mechanical royalty for the sale of the copy of the musical work, and the owner of the sound recording is owed a royalty for the sale of the recorded version. [\(100\)](#) If anyone else wants to record the musical work, he can pay a mechanical royalty; someone who wants to copy the sound recording would purchase a master use license from the owner of the sound recording copyright. Neither the owner of the musical work, nor the owner of the sound recording is owed a performance royalty.

{42} Because a phonorecord is a material object, it may not be transmitted [\(101\)](#) under Section 101, but may be distributed under Section 106(3). [\(102\)](#) However, a fixation of a musical work in a phonorecord may simultaneously occur with a transmission of the work. [\(103\)](#) Even under the 1976 Act definitions, without consideration of the DPSRA, not all transmissions of musical works are considered performances. When the first computer transmits data from a phonorecord containing the work to another site, the fixation of the work in the subsequent site is occurring simultaneously with the transmission. The fixation is not a performance of the work because no work is sent aside from the phonorecord copy, resulting from the simultaneous transmission/fixation. [\(104\)](#) Under Section 101, "perform" only refers to a work, not to a phonorecord. Royalties are not due for any performance of the musical work, so the copyright owner could collect a mechanical royalty, but not a performance royalty. This is true because only the copy of the musical work contained in the phonorecord was sent and fixed in another phonorecord; it is not publicly performed unless someone renders the performance of the work, in addition to completing the acts necessary to simultaneously fix the phonorecord. [\(105\)](#) If the person sending the phonorecord data from her own phonorecord data does not know that downloading to the receiving computer requires rendering a performance, it is impossible to tell the difference between sending a copy of the work, a performance of the work, or a performance of the sound recording. [\(106\)](#)

{43} To determine which copyright is implicated in a particular digitally-communicated transaction, the problem is whether a performance can occur without delivery of a copy of the work. If delivery of the work in a copy is essential to effectuate the transaction at its source, then the transaction is like the traditional model of the purchase of a phonorecord in a record store. The copy embodied in the phonorecord is purchased, whatever its recipient chooses to do with it later. Section 115 of the DPSRA, which is supposed to clarify the situation, actually creates further confusion because it defines the delivery of a sound recording in a "digital phonorecord delivery," [\(107\)](#) as possible through digital transmission, without clearly stating whether this transmission is a new distribution right, or reproduction as a result of fixation simultaneous to transmission. The language in the definition of "digital phonorecord delivery" clearly indicates that a reproduction of a phonorecord containing a sound recording results from a transmission. This sounds similar

to the record store album purchase above, so long as each reproduction is specifically identifiable. Reproduction of a sound recording is also a phonorecord containing the musical work. Therefore, the transmission effectuating the reproduction of a musical work by fixation of necessity requires delivery of a copy. The definition seems to mean that copies of the phonorecord are delivered via download, implicating the mechanical reproduction right for the musical work, but the mechanical right for copies of the musical work are not implicated when the source of the data transmission is a real-time non-interactive subscription transmission of a sound recording, provided no reproduction is made at the inception of the transmission. [\(108\)](#)

{44} If digital phonorecord delivery is a reproduction of the phonorecord, then the performance right for a musical work contained in a phonorecord is not triggered, unless there is further rendering of the musical work, beyond what is essential to the delivery of the copy. Section 115(c)(3)(C) provides that there is a distinction between digital phonorecord deliveries incidental to a transmission, which constitutes delivery, and general delivery of digital phonorecords. Both types of phonorecord reproductions are subject to a compulsory mechanical rate, although the rate may differ. [\(109\)](#) Section 115(c)(3)(A) quite clearly distinguishes downloaded reproductions from either performance of a sound recording under Section 106(6), or performance of a musical work under Section 106(4). However, there is no indication by this distinction that any download of a phonorecord containing a musical work must involve a performance of the underlying work. In fact, Section 115(c)(3)(K) specifically provides that nothing in the mechanical reproduction provisions of Section 115 annuls or limits the right to perform a musical work under Section 106(4), including via digital transmission, nor does it annul or limit any other forms of reproduction or distribution of a work. This distinction clearly indicates that a Section 115 digital phonorecord delivery by itself is clearly not a performance under Section 106(4). However, Section 115(a)(1) grants a general right to distribute copies of phonorecords containing a musical work, along with the sound recording, by means of a digital phonorecord delivery. This right is extremely limited, and covers only those situations where delivery of a phonorecord is a downloaded reproduction, as contemplated by Section 115(d). [\(110\)](#) This limitation is extremely important; the only way phonorecords containing musical works can be distributed or delivered under Section 115, occurs if the primary purpose of making the phonorecords is for distribution to the public for private use. Therefore, a person making phonorecords containing musical works for any other purpose would not be bound by Section 115, but would still be affected by Section 106(3). Considered this way, it is easier to understand that the only practical way presently available for someone to digitally deliver phonorecords for commercial sales is under Section 115. Sections 106(3) and the definition of "transmit," taken together, do not allow for digital distribution of the material phonorecords; they may only be transmitted, simultaneously-fixed, and distributed under Section 115, which allows digital phonorecord deliveries of Section 106(1) reproductions of phonorecords. [\(111\)](#)[\(112\)](#)

{45} Whatever was intended by the DPSRA, its inconsistencies contribute to the collapse of the categories of performances, copies of musical works, and sound recordings contained in phonorecords. Digital phonorecord delivery under Section 115 does not mean that a musical work contained on a phonorecord is performed merely because data creating the phonorecord of the work is transmitted. It follows that musical works transmitted using technology, such as streaming, which may occur without simultaneously fixing a phonorecord of a work, could require a performance license, unless the performance is clearly private. [\(113\)](#) Therefore, only performances of works designed to avoid requiring fixation of a phonorecord of a work, in order to perform the work can be performances, if public. Otherwise, the distinctions contained in Section 115, Section 106(1), Section 106(3), and Section 106(4) collapse. [\(114\)](#)

B. No Present Definition or Broadcast Model Adequately Characterizes the Net

{46} ASCAP's position that all transmissions of music over the Internet are performances, and that most are public performances, fails entirely when considered against the variety of transmission methods converging for use in conjunction and integration with the Internet. Even if it is supportable that broadcast-like

transmissions of musical works performances over the Internet are public performances, subject to performance royalties, there is no clear definition of "broadcast" for the Internet. Even the concept of "broadcast" for the Internet is relatively easy to challenge. Perhaps the most obvious distinction is that, unlike the reality of Internet delivery of a musical work, which easily requires sending a copy to the recipient computer, analog broadcast does not require delivery of a copy of a work in order for the listener to receive and to hear the broadcast. [\(115\)](#) For this reason, it has been historically easy to distinguish between a broadcast performance and the delivery of a copy of a work, whether or not a user with the correct equipment chooses to independently create a copy of the work, or re-transmit the work. [\(116\)](#) Unless all transmissions of musical works performances over the Internet can occur without sending a simultaneous fixation of a copy, it is impossible to make the analytical leap that ASCAP makes because transmissions of musical works performances can occur, that in fact such a performance always does occur, even if such transmissions come within the broad definition of broadcast in the 1976 Act. The electronic particles ASCAP contends are identical to the data stream sent over a computer network, and are not analogous, simply because a radio or television station's particles do not, by themselves, stick to a receiving radio or T.V.

{47} It follows that only sending streaming audio or similar performances could possibly be considered performing of musical works within the broadcast transmission model; [\(117\)](#) but even streamed feeds of musical works defy traditional broadcast model analysis. Real-time audio is inherently more likely to be interactive than traditional analog radio broadcasts. [\(118\)](#) This is the reason that the DPSRA explicitly recognizes differing levels of interactivity involved in transmission of musical performances over the Internet. In its initial form, the DPSRA mandated performances to be licensed at the highest rate, if there is a greater risk of copying, as a result of the control exercised by the interactive user, who would be able to plan the receipt of the performance. It completely exempted performances perceived to be less likely copied. [\(119\)](#) Deliveries considered the most similar to broadcast were completely exempted from licensing fees, and did not require permission from the sound recording copyright owner for performance. In other words, in spite of the potential for problems resulting from lack of clarity over what constitutes sending a performance, the DPSRA assumed a broadcast model for delivering performances. However, even given this assumption, the DPSRA incorporation of varying levels to protect works demonstrates differences involving the Internet medium for delivery of performed works, even in the respects closest to traditional broadcast. This inconsistency shows how inadequate the existing, geographically-oriented performance rules are; otherwise, the DPSRA would not attempt to set and incorporate a newly-tiered approach for protection.

{48} The DPSRA has already been amended, primarily because of the rapid rise of "webcasting" on the Internet. As part of the Digital Millennium Copyright Act ("DMCA"), and with little debate, discussion, notice, or fanfare, Congress, persuaded by the RIAA, [\(120\)](#) changed the DPSRA to include new statutory licenses for previously-exempted performances. [\(121\)](#) In this amendment, Congress accepted the RIAA's flawed argument that exempted broadcast-like performances, less amenable to copying, were not free after all. RIAA persuaded the webcasters that a new statutory license would free them from the threat of a copyright owner's refusal to allow a webcaster to play a sound recording. Part of the reason this change occurred is because webcasting, a theory when the DPSRA was passed in 1995, became a threatening industry by the 1998 amendment, less than three years later. [\(122\)](#) Such arbitrary change in a complex and potentially lucrative right illustrates the inadequacy of the existing broadcast performance and traditional broadcast model rules for the Internet.

{49} Even if the broadcast model were appropriate for some webcasting deliveries, it does not determine whether a public performance of a musical work takes place because digital transmission of music over the Internet does not always fit the established rules based upon geographically-located venues, performers, performances, and broadcast or distribution systems. [\(123\)](#) This means that an assessment of whether a given musical works performance is public, either because it occurs before a live audience, a transmission of the live performance is sent to the public, or fixation of a performance is sent to the public, is not easily answered under the existing liability rules for live or transmitted performances.

{50} ASCAP equates the ease with which musical works transmissions are accessible over the Internet to the public with the terminology - "reaches" the public. [\(124\)](#) Thus, all transmissions are public performances under the Copyright Act. ASCAP must address the issue of what is "public" on the Internet prior to addressing public performance of musical works. Because an Internet user may intentionally or unintentionally "capture" and hear, or otherwise hear a performance of a musical work transmitted on the Internet, does not mean that every transmission of a performance is a public act per se. The Internet does not automatically become public, just because a House Report says that the transmission of any performance is public if the transmission reaches the public in any form. It is not at all clear what is considered "public" on the Internet. The rationale behind the holding that a performance is considered "public" if transmitted to the public, even if no one receives the performance, assumes an analog broadcast model of musical works performance that is not viable for the Internet. Even if some of these transmissions are public performances, the ASCAP argument fails to mention, much less correctly analyze, the Section 110 exemptions that would exempt otherwise infringing broadcasts or performances. [\(125\)](#)

{51} For example, even if a website is regarded as "public" because information available through the site can be accessed at any time by Internet users, this does not mean that the performance of a musical work accessible at the site is always deemed "public". If the recipient has a copy of the work delivered to his computer in order to listen to the work, then that particular performance, even if replayed by the individual recipient, would be considered private. If the musical work were delivered to an individual user by streaming, or any technique not requiring the simultaneous delivery of a copy, the performance would be private if the individual user requested the performance to be streamed to his computer privately. Either type of transaction could be an actual or analogue of the private e-mail transaction, attaching a copy of a phonorecord, or a privately-controlled streaming of a song. ASCAP acknowledges that this kind of communication is private, and not to be considered a public performance. [\(126\)](#)

{52} Of course, given that ASCAP claims transmissions are public at any point where a transmission may theoretically be picked up by the public, the notion that e-mail could contain a private performance is inconsistent. This is illustrative of the problem which occurs by applying dated notions of what is "public", for copyright purposes on the Internet. Apart from the Internet, dispute exists over what law governs a transmission of a public performance, because present law is set up around a dissolving model, based upon purely geographical considerations. [\(127\)](#) Even if the view that website postings of music are "public" is accepted, [\(128\)](#) because the delivery of transmissions of protected musical works on the Internet does not fit any established geographical or physical models, it is not immediately obvious which public postings of music are also going to be deemed public performances of works. The problem is that transmissions of musical works performances over the Internet are analogous to several delivery systems for music, so that no single model suffices to identify the performer or broadcaster, who is the recipient, whether it is public or private, and the venue. ASCAP's misplaced insistence that old analog broadcast model rules answer these questions in the Internet of 1999, much less the Internet of 2010, either ignores, or is exceptionally ignorant of technological reality.

{53} Further, some of the Section 110 exemptions may apply to the Internet, making it even less clear how the traditional broadcast-model categories work in a new context. For example, Section 110(5), exempting communication of a performance via a "public reception of the transmission on a single[-]receiving apparatus of a kind commonly used in private homes," may apply to everything from family home computers, receiving streamed music, to small establishments, receiving streamed radio or "celestial jukebox" feeds. [\(129\)](#) In these instances, depending upon the exact technology used to deliver the musical work, it is not clear who would be required to pay a performance royalty. It appears that Section 110(5) exempts at least the recipient/further transmitter of the work who fits the statutory criteria. [\(130\)](#) However, the Section 110(5) criteria are notoriously difficult to apply, even in traditional settings, so it is reasonable to expect that it will take some analysis before it is clear how the criteria apply to the Internet. [\(131\)](#) ASCAP's complete failure to consider the exemption in the Internet context is therefore all the more inexplicable and indefensible. Finally, with the

recent passage of the "Fairness in Music Licensing Act of 1998," [\(132\)](#) it is apparent that the current trend in Congress is to expand the number of music users exempted under Section 110(5), rather than to limit the provision's application.

{54} All of these technical arguments aside, it is apparent under *Reno v. ACLU*, [\(133\)](#) that ASCAP's insistence upon the old analog broadcast model to assess musical works performance issues is an untenable position because the Supreme Court sees the Internet as "a unique and wholly new medium of worldwide communication." [\(134\)](#) Although the issue in *Reno* directly concerns the constitutionality of the Communications Decency Act ["CDA"] portion of the Telecommunications Act of 1996, [\(135\)](#) the Court considered how the Internet and Internet interaction could best be characterized to determine which regulatory mechanism applies to the Internet. After concluding that the Internet is actually a synthesis of a variety of communication and information retrieval methods, which are constantly evolving and impossible to categorize, the Court went on to specifically distinguish the Internet from traditional broadcast industry models:

Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as 'invasive' as radio or television. The District Court specifically found that communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident. [\(136\)](#)

By making such a clear distinction between broadcasting and the Internet as a whole, the Court entertained the possibility that entirely new forms of communication, and composite and hybrid forms of communication and information exchange, will evolve on the Internet. However, the Court suggested that in its present form, the Internet more closely resembles a telephone network, rather than an analog broadcast network. Using the Internet, the Court determined, is like placing a telephone call. Web addresses are more like telephone numbers than broadcast stations, because they require the user to take a more clearly affirmative step to access information, than that required to tune a dial on a radio. [\(137\)](#)[\(138\)](#) The fact that the Court has already made this distinction, eviscerates ASCAP's entire argument.

{55} ASCAP, however, might argue that, if the Internet is more like a telephone system, its argument remains intact; because musical works delivery would be analogous to "music on hold," which involves public performance of the work. Music on hold can be delivered in several ways, including a live radio feed run through the telephone line, or a canned music recording played through the telephone line. However, even if music on hold is a public performance, [\(139\)](#) there are obvious problems applying the concept to Internet connections. Music on hold does not require a copy in the receiver in order for a performance to be received. Perhaps even more importantly, the model of a telephone network cannot entirely describe the Internet, although it may be analogous to some forms of Internet communication, or some features of the Internet, like addresses. The Court's analogy simply means that some features of the Internet resemble telephone communications; yet, even if a telephone network is an appropriate model for some Internet transactions, defining the network, as distinguished from other communication networks, is still not easy.

{56} In fact, part of the problem applying musical works performance rules to the Internet stems from the collapse of traditional categories distinguishing types of broadcasts from telephone, cable, satellite, wireless, and computing networks. Today, many combinations of broadcast and communications technology are available, which may be subject to different copyright rules, depending on how they are defined. [\(140\)](#) Historical distinctions based upon analog broadcast models are no longer feasible because conceptual and definitional confusion resulting from the "technological convergence" [\(141\)](#) of works creation and delivery systems disrupts previously-separable copyright categories and policy balances. Categories of transmissions previously separated under the Copyright Act, for example, cable under Section 111, and satellite under Section 119, are each subject to different licensing rules. [\(142\)](#) When these systems are fed through, or

otherwise combined with the Internet, they appear to collapse under the broad definition of "transmit." (143). Most importantly, because some transmissions combine technologies presently regulated by different laws, which, in turn, are governed by massively divergent policy balances, it is unclear which definitions and regulations will apply between the Copyright Act, communications regulation, and information law.

{57} In an August 1998 Working Paper, the Federal Communications Commission ("FCC") acknowledged the impending collision of definitional categories for the Internet's expanding integrated transmission technologies, by warning that: "Internet service offerings, such as those provided over the Internet, present fundamental problems to a regulatory framework dependent upon technological distinctions. As one writer recently observed, '[w]hen basic and enhanced services become intertwined and indistinguishable, the current regulatory system implodes.'" (144). The implosion results, in part, from the impossibility of applying any single existing regulatory framework or model to the entire Internet. (145). If the FCC, as the entity in charge of regulating the broadcast industry, admits that it cannot use existing categories to define the Internet, ASCAP cannot claim to be certain that transmissions of musical works are broadcast-like performances. Under the Copyright Act, exemptions from and compromises over liability for the performance right are based upon concerns arising from technological threats of easy copying, problems of enforcement, and problems of categorization. The DPSRA encompasses all of the concerns with its striation of liability levels, discriminating between situations with little perceived danger of copying (exempt from liability), to situations involving a high risk of copying (higher cost, copyright owner retains right to refuse to license). Similarly, the cable compulsory license takes into account the danger of copying by subscribers, balanced against the impossibility of requiring cable broadcasters to negotiate individually with copyright owners over individual programs. (146).

{58} Problems occur where the policy interests collide. (147). For example, if the Internet is analogous to a cable system, does this mean that the FCC must regulate it? Will many copyright questions become moot because everyone will apply for compulsory licenses under Section 111? (148). Obviously, ASCAP's position is untenable, either technically, under the Copyright Act jurisprudence, or as a matter of policy and common sense. ASCAP simply cannot claim universal performance rights royalties by relying upon its outmoded and outdated arguments based upon yesterday's broadcast realities. Even the recently-passed webcasting amendment to the DMCA shows the reality of "webcast" is already beyond the ASCAP argument because, among other reasons, the new amendment discriminates between terrestrial broadcast stations licensed by the FCC, and satellite digital audio, and distinguishes fees and types of licenses between these phenomena. (149). The Conference Report explaining the policy behind the amendment specifically acknowledges and distinguishes "streaming" technology that can be sent without copying by the user. (150). Clearly, these distinctions, and the recognition that not all transmissions are broadcast-like, makes a challenge necessary to the performing rights societies' position.

C. Not All Musical Works on the Internet Are Alike

{59} ASCAP's argument ignores the reality that digital musical works are not all alike. Even assuming a digital delivery system for musical works performances, not all formats for the works could fit into the old serial model rules. Music may be stored in order, such as on a fixed CD, so that digital information is relayed, translated, and performed by the device "playing" the music file from beginning to end. For example, if a music user uploads a CD sound recording into her computer and plays it back, she is playing a fixed file of music data, in the same way a traditional CD player would. In either example, the musical work is stored on the CD, and the file is delivered in order, so that a digital fixation of the sounds of the musical work is performed. It is conceivable that this kind of data file is a phonorecord of a musical work within the existing Copyright Act definitions because it is very similar to any other analog fixation of the sounds of a work being performed. However, once a user changes this file, by uploading it, altering it, or interacting with it, whether the file is still a fixation of the musical work that can be recognizably performed, and thus, infringe upon a performance right, as opposed to infringing only upon a reproduction right, depends upon the alterations.

{60} Musical Instrument Digital Interface ("MIDI") files challenge the existing definitions of musical works, phonorecords, and sound recordings because by their nature, they are designed to facilitate, cause, create, or encourage manipulation of musical material. [\(151\)](#) It is a multifaceted set of products enabling users to create music, either on electronic or electronically-connected instruments, by writing music via a method comparable to using a word processor, or even by listening. [\(152\)](#) MIDI storage of musical works differs radically from traditional music storage in traditional phonorecords in most respects. In fact, the only common feature between the two forms of storage is that a musical work can be stored as audio alone, for use as a recording of the work for playback. However, MIDI was never intended to be a new form of phonorecord. MIDI music files differ from traditional audio files because they do not include all of the data constituting a musical work, and do not have to contain actual stored sounds of a work's recording. Instead, the MIDI file contains a set of instructions to tell the other components of the MIDI system, or another MIDI system, to execute steps that will create sounds. Because less data is necessary, MIDI files are much smaller than traditional audio files. Given its communicator role, [\(153\)](#) the MIDI file, in combination with a sequencer, [\(154\)](#) functions almost like an orchestra conductor; it communicates with the rest of the computer system's components to create a particular version of a work by directing the computer to perform steps creating individual musical steps, which constitute the performance. Even though a MIDI file can be fixed and the user may choose to play it without alteration, the MIDI system never plays back captured sounds; it repeatedly creates the work.

{61} Therefore, just as an orchestra performs a work, so does a MIDI system, and if a fixed audio MIDI file is publicly performed, there is no barrier to the collection of performance royalties for the resulting performance of the musical works. But when MIDI files are downloaded or uploaded, a performance does not necessarily occur. First, because the file containing the list of events to be executed is reproduced in a simultaneous fixation, as argued in Parts II and III, the transmission is not a public performance, although it can be considered as such, if streaming or a comparable type of delivery is used.

{62} Second, because MIDI files are designed for flexibility, and invite manipulation by the user, it is not clear what category best describes the files for copyright purposes. The Copyright Office considers an audio MIDI file to be a sound recording, finding it analogous to a piano roll or a CD, and the storage media to be a phonorecord. [\(155\)](#) This means that audio MIDI files containing music qualify for a compulsory license under Section 115, and the royalty rate is fundamentally capped by the current statutory maximum. The problem is, however, that most MIDI applications are designed for interactivity, so that even if audio alone is an option, the nature of MIDI invites a user to combine audio with graphics, other sounds, and other audio. [\(156\)](#) One very easy way to avoid any potential application of the Section 115 compulsory license is to combine MIDI audio with MIDI visual, rendering Section 115 inapplicable, and requiring a negotiated license. [\(157\)](#) Because any MIDI file may be easily manipulated, many files will contain visual elements; these files, even if publicly-performed, cannot be licensed by ASCAP because they are audiovisual works. [\(158\)](#) Third, because MIDI files contain instructions, rather than data representing captured sound or ordered, notated music, MIDI files may be best categorized as computer software, rather than traditional music media. [\(159\)](#)

{63} However, the instructions are dictated at least, in part, by the nature of the musical work, making the MIDI file a reproduction of the musical work which may be replicated exactly or altered. The computer instruction set containing the potential musical work is similar to the instructions for video game strategy levels protected as reproductions in *Micro Star v. Formgen, Inc.* [\(160\)](#) Unlike a traditional sound recording of a musical work, the work embodied in the MIDI instruction set is inseparable from the computer program, while it remains in MIDI format. [\(161\)](#)

{64} Because MIDI can make anyone who can operate a device similar to a word processor a composer, it is popular; [\(162\)](#) in fact, it has become a musical culture. MIDI helped create access to music and musical performance practice that was unavailable to people who could play traditional instruments, but who liked

electronic sounds, as well as to those who could not play traditional instruments well enough to execute the sounds they would like to hear. MIDI created the means by which new techniques developed. One writer calls MIDI the "democratization" of music, allowing active musical access for all. [\(163\)](#) MIDI can function with many MIDI instruments plugged in, so interactivity exists not only at the level of preexisting music instruction files, but also amongst the musicians performing together, and/or along with the computer. Given the interactive nature of MIDI composing and performing, the lines between composer and performer are now blurred, and this blurred relationship demonstrates that music notation is not a necessary prerequisite feature of a recorded, fixed musical work. [\(164\)](#)

{65} ASCAP's argument leaves no room for the reality that some MIDI files that are uploaded, downloaded, or otherwise transmitted on the Internet are unique and require unique treatment. This is why, in the music industry reality, MIDI files are licensed in individual ways, based upon rights encompassed by the use of files, and not by artificial assumptions about categories of containers. The Harry Fox Agency licenses MIDI audio files by limiting the scope of the license to audio only, and by acknowledging in the license that the category is experimental. [\(165\)](#) Other versions identify the license as a MIDI rights license, refusing to limit the scope of the license and price to the Section 115 statutory rate. [\(166\)](#) Surely, if the music industry recognizes that MIDI is a format well beyond the traditional modes of recording, ASCAP cannot assume that all transmissions of musical works in MIDI files over the Internet are public performances of the work, nor that the performance rights societies should be the entities collecting such royalties.

D. Musical Works Performance Rights on the Internet Must be Balanced by Public Access

{66} Congress made it undeniably clear that the broadly-granted Section 106(4) performance right under the 1976 Act is limited by Sections 107-120, and any other traditional copyright limitations, like fair use and de minimus use of the musical work. [\(167\)](#) Congress' concern for maintaining the constitutionally-mandated balance providing public access to musical works performances is quite clear, because it balanced the performance right with specific exemptions in Section 110. [\(168\)](#) ASCAP makes no mention of the traditional limitations on the performance right, or on any copyright monopoly, nor does it address any other theory that balances its hold on performance rights in musical works, that may be exercised on the Internet. In making this glaring omission, ASCAP essentially asserts an unconstitutional position, fails to counter any of these limitations, and further weakens its credibility.

{67} Briefly summarized in this section are a few of the many arguments and theories that mandate or suggest limits on the copyright owner's exercise of performance rights in musical works on the Internet. These and other arguments must be considered before the ASCAP position is to be accepted, in addition to the arguments already addressed. To do otherwise grants a performance rights society enormous power without accounting for the public benefit of public access to musical works in the U.S. and abroad.

1. How does Section 110 exempt some performances of musical works?

{68} In addition to the Section 110(5) exemption discussed earlier, Section 110(1) may apply by analogy because some classrooms are virtual, and face-to-face teaching situations need interpretation in the of context of distance learning. [\(169\)](#) Even though Section 110(2) seems to apply most easily in the Internet context, it covers performance of a work in the course of "systematic instructional activities." It would be a mistake to apply only Section 110(2). Both exemptions are needed to encompass all of the educational uses of interactive materials over the Internet, most notably, including collaborative educational-based efforts, and necessary pupil-to-pupil, or teacher-to-pupil, transmissions not directly in a classroom, but work necessary for a class. Musicians may need to work on music together, or send it to performers who will participate in its performance. [\(170\)](#) Sections 110(3), (4), (6)-(10) need interpretation because there are already virtual locations, like churches, and other virtual educational settings on the Internet. [\(171\)](#)

{69} There appears to be no reason why these exemptions cannot apply. Section 110(7), in particular needs interpretation because there is no clear definition of what constitutes a vending establishment with the sole purpose of performing musical works to promote retail sale of works or sound recordings containing the works on the Internet. There are already many locations selling online music and recordings, but the freedom the exemption may allow to an online vendor in rendering the work part of its place of business online is unclear. [\(172\)](#) The scope of the types of establishments that can claim this exemption are equally unclear, which seems broadly enough as written, to encompass a wide variety of sites.

2. What is the scope of permissible non-infringing public access to musical works performed on the Internet?

{70} In *Reno v. ACLU*, [\(173\)](#) the Court hints that the Internet is a public forum, by expressing its concern that the government stay out of regulation censoring its content. Ironically, it is both concern for public access to speech in the form of music, and concern for music users' privacy rights that implies that First Amendment rights are not served by any collective, like ASCAP, gaining too much control over defining the proper balance between music owners' rights to compensation under the copyright monopoly, and music users' rights to access and use music without being monitored.

{71} If all transmissions of music are public performances requiring payment for use, then music users cannot make an informed choice whether they want to use music by listening to it. Similarly, a music user cannot browse, nor listen to a performance for the purpose of creating a parody under the fair use provisions in Section 107. [\(174\)](#) Additionally, the proposed "pay-per-listen" models are flawed because no provision exists for fair use. [\(175\)](#) Restrictions like this, in combination with the coercive tactics used by the performance rights societies, effectively determine who has access to performances of musical works by price scale, rather than by fair administration of performance rights in accordance with copyright law in its constitutional balance.

{72} Of course, the societies' interest in expanding their control to encompass as much of the Internet as possible is understandable; but the power to influence access to music must be curtailed at the boundaries of fair and de minimus use. If the current performance licensing scheme is retained for the Internet, prices should be based upon a discernable rationale, and consent decree provisions must be enforced. Otherwise, the societies will be able to extract blanket Internet music licenses from everyone, because when a collective license is available, fair use is non-existent, or at least, much less likely to be recognized. [\(176\)](#)

3. Under what circumstances is private copying of musical works performance permissible?

{73} In addition to traditional copyright exemptions for fair uses in general, downloading music, including copying any performance feed, is permissible when the use is clearly private and only the user's personal copy is retained. Under the AHRA, [\(177\)](#) home copying of digital music is permitted for noncommercial uses. [\(178\)](#) While the use contemplated under the AHRA is an exemption for non-commercial copying of reproductions of musical recordings, there is no barrier to applying the AHRA to consumer-copied performances, such as streamed performances that are subject to performance licensing on the Internet. Performances may be exempted because the language of the exemption allows a consumer to make "digital musical recordings" that are broadly-defined as material objects in which sounds are fixed. [\(179\)](#) This provision means that a consumer may use a recording device to capture a streamed performance for private use. The performance does not have to be copied directly from a reproduction in order to qualify for this exemption. [\(180\)](#) Finally, music performances that are available through a website may be subject to an implied license, permitting the user to listen to the performance. [\(181\)](#) The rationale is that a website operator's purpose is to make the work available to the public, at least in the absence of restrictions to entry into the site. Intensive browsing, and even browsing requiring temporary copying into the user's computer, is allowable under this theory. [\(182\)](#)

IV. Digital Rights in Musical Works: A Realistic Approach to Resolving the Legal, Technological, and Musical Reality of the Internet

{74} No matter whether a musical work is performed, reproduced, displayed, or distributed on the Internet, the owner of the work may be owed a royalty. When a compensable use of the work occurs, it should not matter what category it fits, or who collects the royalty, but only that the owner's economic interest in the Internet use is protected, balanced with the public benefit in works being made available on the Internet. ASCAP's best argument is that, as long as the artificial categories of rights, tortured as these classifications may become, are kept intact and the status quo remains in force, it is easier to ensure that the music owner gets paid for some Internet music use, ensuring predictability in the forecast for royalties; but the reality is that, by failing to fully embrace the Internet's unique and purposely unclassifiable essence, and insisting upon its argument based upon categories and models that no longer make sense, ASCAP costs music owners royalty revenue, and delays the development of music usage models that are practical. Because the Internet is truly unique, new licensing models are appropriate, and concomitant licensing fees, unbound by old rules and consent decrees would develop.

{75} If ASCAP and BMI were not bound by consent decrees, and could, for example, license music for use beyond their present constraints, one wonders whether they would be so quick to define a market for Internet music performance, without taking into account the potential for greater revenues from interactive music use licenses, and other potential digital music use licenses. It appears that one solution to the problems addressed in the NII and performance societies' arguments is to allow digital works to be used as flexibly as the Internet and similar interactive mediums will allow. By stressing the behavior and interactive nature of the work in the digital environment, rather than rigid adherence to illusory historical models, there is a basis for assessing appropriate licensing fees based upon the market, balanced by a body of Internet and digital fair use principles. This idea is already suggested in part by the American Bar Association in its proposal to amend Section 101 to add a definition of "Digital Work." [\(183\)](#) Although the ABA definition is limited to literary works, its key idea of grading a work's flexibility by its "behavioral capability" is worthy of consideration beyond its originally suggested scope. [\(184\)](#) Using this concept, whether a musical work is considered to be "performed" is measured by the acts and behavior of the work in its digitally-induced communicative process, rather than by simply lumping transmissions into one characterization, as is necessary to find present Internet musical works performances. [\(185\)](#)

{76} Of course, there remains a need to track the uses of a musical work, even under a model that allows for interactive digital uses. Further, traditional licensing concerns like how and where the work is used can best be accommodated if a licensing regime is easily administrable. However, there is no reason that the administering entity has to be any of the existing performance rights societies, because the technology that allows the performance rights societies to monitor music uses on the Internet could be used by anyone who chooses to compete with the licensing entities. Even copyright owners can more easily license and administer their works, at least in the sense that the process is easy for protecting uses of the works, via several technological methods. [\(186\)](#) More collectives would be healthier for competition, and would force reality into the Internet music licensing pricing strategy. Further, because new collectives would not operate under the consent decrees, it would be easier to ascertain and to implement global music licensing market prices. Similarly, new licenses, even for music performance, could more easily develop in a freely-competitive market.

{77} A "digiworks" or "digital works" approach appears to offer copyright owners greater options and opportunities for the Internet, as the concept continues to evolve. Needless to say, these approaches greatly

threaten ASCAP and BMI, who exist entirely because they are the lesser evils for copyright owners who cannot otherwise enforce their performance rights; but both ASCAP and BMI deliver a disservice to copyright owners by advocating a position that actually limits potential music royalty revenue, and serves only to keep revenue in the control of the societies, by promotion of a perceived loss of revenue to music owners. It does not make sense that the copyright owner will receive royalties from uses of the work, whatever the source, and whatever the use is called. Because interactive "digiworks" music licenses can be freely negotiated, no loss of revenue from Internet use of the work has to occur at all. [\(187\)](#) Such a flexible licensing approach would also resolve the problem of geographic origination of a musical works use. Instead, the focus would be on the work's availability for digital interactive uses, and the responsibility for the transaction would be on the person or entity having the most control over the transaction. [\(188\)](#) Liability rules could be based upon the cost of liability for unauthorized uses, rather than solely on the basis of [\(189\)](#). This approach avoids the subjectivity of the NII's primary purpose test, while preserving its recognition that more than one kind of digitally-transmitted transaction exists.

{78} Because the Internet is a Web of connected communication technologies that is evolving more quickly than any single historical communications model, [\(190\)](#) it makes sense to structure rules for the Internet that embrace its flexibility and uniqueness, rather than impede its progress. No matter what ASCAP or any other group argues, there is no way to entirely prevent copying on the Internet, if a work is posted or streamed without security. [\(191\)](#) However, given that the music industry recognizes that its technology must keep pace with the opportunities to exploit musical works on the Internet, it makes sense that legal protection regimes must allow for the flexibility of exploitation. Achieving new recording and protection standards, while allowing flexible use of music is more realistic and lucrative than adhering to outmoded rules and interpretations. [\(192\)](#) The music industry is poised to move forward, while ASCAP promotes its position, akin to a kitten advocating the forever chasing of its technological tail, with no hope of ever catching it.

V. Conclusion

{79} Musical works performance rights for the Internet must be considered a part of digital musical works usage in flexible settings and applications. ASCAP's argument, instead of protecting music owners, actually harms them by standing in the way of enlightened development of musical works rights that serve copyright owners and facilitate public access to musical works through the Internet's public fora. Rights without reality engenders further fighting, and loss of energy and money to enliven the already-dying concepts. There is simply no reason to accept the ASCAP position that all transmissions of musical works on the Internet are public performances. Such a position only serves to enliven potentially-dying performance rights societies and does nothing to fully exploit the potential music markets for the Internet.

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[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

- [1]. Letter from Charles Ives to Lehman Engel, *quoted in* PETER S. HANSEN, AN INTRODUCTION TO TWENTIETH CENTURY MUSIC 79 (3rd ed. 1971).
- [2]. *Id.* at 85.
- [3]. *Id.* at 84-85.
- [4]. In this paper the term "webcast" is used to describe a selection of music delivered through the Internet. A webcast may be a live feed from an analog radio station, a digital feed originating from a terrestrial radio station, a website, or any combination thereof.
- [5]. Several technologies for the delivery of real-time audio and video already exist; others are being developed or launched at this writing. Streaming is a term describing music delivered in a manner intended for listening only, as opposed to music delivered for copying an album or concert. *See* Liquid Audio, (last visited July 10, 1999) <<http://www.liquidaudio.com>>; Real Audio, (last visited July 10, 1999) <<http://www.realaudio.com>>, both providing this service. For example, the Real Audio player is available for free download. A user having Internet access and the RealAudio Player may use the channels provided to listen to a variety of radio stations' live feeds. While it is possible for listeners to copy from these feeds, copying is not encouraged by the service. Furthermore, the listener is not aware of the selections that are available at a specific time. It is not necessary to copy the feeds to simply listen to the broadcast. From a listener's perspective, this kind of live audio feed clearly resembles the traditional radio broadcast model.
- [6]. *See, e.g.*, a BeeGees concert was transmitted live from South Africa in November 1998 and tied in with recording sales at Wal-Mart stores displaying the performance. (Information obtained in a November 1998 "Music Industry Contract Negotiations" class discussion given by Matt Bonelli, bass guitarist with the group.)
- [7]. *See California Sheet Music Project*, (visited July 13, 1999) <<http://lyra.rlg.org/r-focus/i29.shmus.html>>. A consortium of libraries in California is creating an online sheet music library.
- [8]. *See* Warner Chapell <<http://www.warnerchapell.com/>>; (visited July 13, 1999) <<http://www.sheetmusic.com>>.
- [9]. *See* Music Boulevard (visited July 10, 1999) <<http://www.musicblvd.com/>>; Tower Records (visited July 10, 1999) <<http://www.towerrecords.com>>.
- [10]. *See infra* Part III.B.
- [11]. This is the view espoused by the performances rights licensing societies. *See* discussion *infra* Part II.
- [12]. *See Ask the Surf Guru* (visited Mar. 15, 1999) <<http://www.zdnet.com/yil/content/surfschool/guru/guru990308.html>> (some music sites have 200,000 visitors per day, especially with popularity of MP3 sites); NATIONAL MUSICPUBLISHERS' ASSOCIATION, INTERNATIONAL SURVEY OF MUSIC PUBLISHING PRACTICES 6 (1996)(In the 51 countries surveyed, forty-two percent (42%) total music revenues come from performance income.); Press Release from International Intellectual Property Alliance (IIPA)(May 7, 1998), *New Economic Study Shows U.S. Copyright Industries Pass \$278 Billion Mark and Account For Over 3.5 Million U.S. Jobs*, (visited July 10, 1999) <http://www.iipa.com/html/pr_05071998.html>; *Data Highlights: First Comprehensive Study of Online Retailing Practices*, (visited July 10, 1999) <<http://www.shop.org/research/reshighlights.html>> (stating online

retail market as a whole is experiencing growth in excess of 200% per year).

[13]. Act of February 3, 1831, ch. XVI, Section 1, 4 Stat. 436.

[14]. Act of January 6, 1897, ch. IV, Rev. Stat. Section 4966.

[15]. See 17 U.S.C. Sec. 1(e)(1909 Act); *Herbert v. Shanley*, 242 U.S. 591 (1917).

[16]. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 64-74 (1994)(telling the story behind these changes and generally discussing copyright's transformations at each technological challenge).

[17]. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931)(finding hotel proprietor who made broadcast feed available to his guests using radio receivers and loudspeakers in both public and private rooms performed the music without a license; a person who tunes to station on receiver is a performer who can be liable for performance in public, for profit); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (finding a community antenna television ["CATV"] system that retransmitted television programs was not a performer because it functioned like a viewer (audience) since it only allowed viewers to receive signals already broadcast); *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974)(holding importation of distant signals by a cable television provider, and its subsequent selection and conversion of those signals for reception and viewing by its viewers, was essentially a viewer function; the court rejected argument that local cable broadcaster does more than perform passive retransmission, and held it is not subject to licensing). Apparently, the Court perceived little threat of economic loss from retransmissions to original licensees of television programs who take the augmented cable market into account when paying licensing fees. *Id.*; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)(holding a fast-food restaurant owner who received radio broadcasts and played them through four speakers installed in ceiling of restaurant was not performing the music). See *Aiken* limiting *Buck* (finding original broadcast of music was unauthorized, holding instead that if broadcast is authorized and original broadcast is licensed, reception alone is not a performance). See also David M. Lilenfield, Note, *Why Congress Should Eliminate the Multiple Performance Doctrine*, 58 OHIO ST. L.J. 695 (1997)(for a good discussion and history of the multiple performance doctrine).

[18]. See 17 U.S.C. Section 101(1976) that provides:

To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

[19]. See Bernard Korman, *Performance Rights In Music Under Sections 110 and 118 of the 1976 Copyright Act*, in N.Y.L. SCH. L. REV., *THE COMPLETE GUIDE TO THE NEW COPYRIGHT LAW*, 229 (1977) (a concise discussion of this process).

[20]. *Id.* at 237-39. The case was *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), where the owner of fast food restaurants was held not to be performing under the 1909 Act when he used radio broadcasts publicly in his restaurants. The background music services had filed as amici, arguing for reasonable fees under the ASCAP consent decrees. See *infra*, Part I.B. discussing ASCAP consent decrees.

[21]. *Id.*, *supra* note 19.

[22]. See generally, Lilenfield, *supra* note 17. See also GOLDSTEIN, *supra* note 16.

[23]. See AL KOHN & BOBKOH, KOHN ON MUSIC LICENSING 864 (2d ed. 1996)[hereinafter KOHN].

[24]. See 17 U.S.C. Section 1 (e)(1909).

[25]. See KOHN, *supra* note 23, at 864.

[26]. *Id.*

[27]. See 17 U.S.C. Section 1(a), (e), (f)(1909)(distinguishing music performance right from reproduction and other rights); 17 U.S.C. Section 106 (1976)(distinguishing music performance right from other copyrights, including reproduction in copies or phonorecords).

[28]. This was the issue in *Herbert v. Shanley*, 242 U.S. 591 (1917)(Holmes, J.)(finding the music was part of the service provided and performed at the restaurant, which was in the business of making a profit, meant the music was performed for profit under the 1909 Act, even in absence of an admission charge for the music itself).

[29]. See KOHN, *supra* note 23, at 864-66.

[30]. See *id.* ASCAP was formed in 1914, the first U.S. performing rights society. The earliest performing rights society in Europe, Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM) formed in 1851. There are at least 90 musical rights collectives in 80 countries today. See DAVID SINACORE-GUINN, COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS 747 (1993).

[31]. See KOHN, *supra* note 29. See also JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY, AND SUCCESS 237-82 (1994)(describing workings of performance rights societies and their payment formulas). See also ASCAP, available at (visited July 10, 1999) <<http://www.ascap.com>>, BMI, available at (visited July 10, 1999) <<http://www.bmi.com>>, SESAC, available at (visited July 10, 1999) <<http://www.sesac.com>>, National Music Publishers Association music rights societies links, available at (last visited July 10, 1999) <<http://www.nmpa.org/links.html>>.

[32]. See KOHN, *supra* note 23, at 866; KERRY SEAGRAVE, PAYOLA IN THE MUSIC INDUSTRY: A HISTORY 1880-1991, 22-23 (1994). Another reason BMI began was a perception that ASCAP was a closed group of songwriters. One estimate in 1920 had 80% of hits written by only about fifteen writers. *Id.*

[33]. See KOHN, *supra* note 23, at 866-67; Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 741-49 (1998)(discussing ASCAP and BMI history, consent decrees, and societies' historical and continuing virtually unchecked market power). Much of the criticism of the societies' prices centers around the use of blanket licensing, that allows a user to pay a fee for the use of all the society's repertoire. While this may be a reasonable solution for a music user who performs great numbers of ASCAP or BMI compositions, for many users a fairly priced per program or per use license would be more appropriate. Both ASCAP and BMI do offer per program licenses, but the rates are very expensive and the license requirements are cumbersome, thus making the blanket license the easier choice. Of course this means that as a practical choice, many customers would be influenced into choosing the blanket license over negotiating their own license with the individual copyright owner. The lawsuits leading to the consent decrees alleged music users had no reasonable alternative to the blanket license and were in fact forced into paying for music they would not use. However, the courts ultimately did not find the blanket license unreasonable under a rule of reason analysis. *Id.*

[34]. See Hillman, *supra* note 33, at 746-49, 757-58.

[35]. *See id.* at 757.

[36]. *See id.*

[37]. *See id.* For this and other similar reasons, many states have passed, or are attempting to pass, legislation curbing the tactics of the performance rights societies imposing notice and other requirements as a prerequisite for sending representatives to establishments. In New Jersey, a recent attempt to pass a bill requiring ASCAP to comply with the consent decree requirements was met with ASCAP's threat to withdraw completely from the New Jersey market. This would mean any establishment performing an ASCAP song would be potentially infringing its copyright. This kind of conduct shows the true power the performance rights societies have. *See id.* at 757. *See also* ASCAP v. Pataki, 930 F.Supp. 873 (S.D.N.Y. 1996) (performance rights societies successfully challenged a New York statute requiring societies to give 72 hours notice to proprietors of establishments they intend to visit).

[38]. Pub. L. No. 105-298, --- Stat. --- (to be codified as amended at 17 U.S.C. Sections 101, 110, 504, 512) (Oct. 27, 1998) [hereinafter Fairness].

[39]. *See id.* at amended Section 512.

[40]. *See* ASCAP and BMI websites, *supra* note 31.

[41]. *See* Fairness, *supra* note 38, Section 101 as amended, defining "establishments," "proprietor," and specifically excluding owner and operator of radio and television station.

[42]. *See* ASCAP and BMI websites, *supra* note 31.

[43]. *See* KOHN, *supra* note 23 at 864-68; SINACORE-GUINN, *supra* note 30, at 18-19 (discussing rights that are particularly appropriate for collective rights administration, distinguished from rights inappropriate for collective administration).

[44]. *See* BRABEC, *supra* note 31.

[45]. *See* ASCAP and BMI websites, *supra* note 31.

[46]. *See* SEAGRAVE, *supra* note 32, at 97 (unhappy ASCAP writers claim lesser-known publishers and writers could not advance within the organization, consent decrees are not always followed, songs are not always credited under sampling systems, and sampling systems are not objective). *See also* Harvey Reid, *ASCAP & BMI-Protectors of Artists or Shadowy Thieves?* (visited July 10, 1999) <<http://www.woodpecker.com/articles/royalty-politics.html>>. Reid is apparently such a disenchanting ASCAP writer, however, his criticisms are reiterations of common complaints against the societies.

[47]. Much of the music industry's concerns about copying and piracy threats from digital music production and use crystallized during the hearings and passage of both the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992)(codified at 17 U.S.C. Sections 1001-1010) [hereinafter AHRA] (a new system of royalty payments on digital audio recording equipment instituted to balance the costs of unauthorized copying and piracy threats; payment of royalties to owners, performers, engineers of sound recordings), and the Digital Performance Rights in sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. Sections 106(6), 114 & 115 (Nov. 1, 1995) [hereinafter DPSRA] (adding new performance right in digital audio transmission of certain sound recordings, in specific, limited categories, subject to exemptions; granting "digital phonorecord delivery" right).

[48]. *See* AL KOHN & BOB KOHN, *KOHNON MUSIC LICENSING* 64-34 (2d ed. Supp. 1999) [hereinafter

1999 Supp.]. *See also* BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, (Sept. 1995) [hereinafter WHITE PAPER]; BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (July 1994) [hereinafter GREEN PAPER].

[49]. *See Comments of the American Society of Composer's, Authors and Publishers on the Preliminary Draft of the Report of the Working Group on Intellectual Property Rights*, submitted and filed with the U.S. Patent and Trademark Office on September 7, 1994 (Comments filed on behalf of Marilyn Bergman, President, ASCAP, on the Green Paper by the Working Group on Intellectual Property Rights and the National Information Infrastructure) [hereinafter ASCAP Comments]; *Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary* (1996) (statement of Frances Preston, President and CEO Broadcast Music, Inc) located at <<http://www.house.gov/judiciary/4.htm>>.

[50]. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING, (2d ed. 1996) (1997, 1998, 1999 Supplements). The Kohns have performed a great and unparalleled service in creating these volumes fully explaining music licensing and industry publishing practices. In the first and second Supplements, the Kohns included chapters explaining music licensing in cyberspace and the new DPSRA, including examples using hypotheticals. These works are absolutely required reading for anyone working in the area of music rights. The Kohns originally presented the ASCAP argument, the White Paper positions, and the definitional problems under the copyright laws, always acknowledging that there were problems with any of the arguments. *See id.* 1998 Supp. at 82, 101 (urging clear policy as to whether a transmission of music must be either a performance/display, reproduction, or both and suggesting their own, better definition of transmit to resolve reproduction and distribution problems). However, the Kohns explicitly found the ASCAP argument discussed here to be "compelling," saying this is the most reasonable position on this issue. *See id.* 1997, 1998, 1999 Supps. However, the 1999 Supp., received recently while this article was in progress, while still maintaining that position, appears to back off some from that position. *See id.* 1999 Supp. at 305-310 (Bob Kohn saying he has never taken a position on this issue, and now proceeds to point out some of the arguments against this ASCAP argument, in some definitional detail!) *See also id.* 1999 Supp. at 130 ("It is not altogether clear that the current licensing and royalty distribution practices by the performing rights societies will result in the most equitable outcome for all music copyright owners and songwriters, particularly with respect to public performances of musical works by interactive electronic transmission."); *Id.* 1999 Supp. at 294 (table outlining licenses due under various DPSRA scenarios, shows it is unclear whether performance licenses are also due when digital phonorecord deliveries occur). Partly because of the Kohns earlier work, the ASCAP argument is widely accepted. *See* Nancy A. Bloom, *Protecting Copyright Owners of Digital Music-No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y U.S.A. 179, 194-99 (1997). *See also infra* Part III.

[51]. *See* the Internet licensing websites for the societies in order to read the latest versions of their licenses. *See* ASCAP, (visited July 11, 1999) <<http://www.ascap.com/licensing/licensing.html>>; BMI, (visited July 11, 1999) <http://bmi.com/home_li.html>; SESAC, (visited July 11, 1999) <<http://www.sesac.com/license1.htm>>. *See* *Copyright Owners Learning to Police Online Sales, Performance of Musical Works*, 66 U.S.L.W. at 2483-84 (U.S. Feb. 17, 1998) (BMI using virtual robot to police music use on the Internet; ASCAP monitoring using search engines and other techniques).

[52]. For the purpose of this discussion, the framework of the ASCAP argument is used. The BMI position is similar.

[53]. *See*, 1999 Supp., *supra* note 48, at 64-83.

[54]. See WHITE PAPER, *supra* note 48, at 71.

[55]. See William A. Tanenbaum, *Lost in Cyberia: Electronic Transmissions Under the Law of Copyright*, (visited July 11, 1999) <<http://www.pli.edu/arts/Cyberia.htm>> (excerpt from PLI Two Volume Course Handbook entitled: PLI'S THIRD ANNUAL INSTITUTE FOR INTELLECTUAL PROPERTY LAW); see 17 U.S.C Sections 101, 106, defining "transmit" including only a performance or display, but not including distributions of copies or reproductions, defining "copies" as material objects other than phonorecords, and allowing distribution of copies or phonorecords. See also David Goldberg and Robert J. Bernstein, *The Information Infrastructure*, 212 N.Y.L.J., Sept. 16, 1994 at 3.

[56]. See *id.*

[57]. See *id.*; GREEN PAPER, *supra* note 48, at 122.

[58]. See WHITE PAPER, *supra* note 48 at 218, n. 544 (continuing to urge the primary purpose test cloaked as explanation in a footnote). See also Information Law Alert: A Vorhees Report, *Let the Jockeying Begin: Copyright Gang Begins to Gang Up On One Another in Battle for the Future*, (No. 17, Vol.2, October 28, 1994) (Thompson); Josh Warner, *Negotiating Licenses and Royalties in Multimedia is Still an Evolving Process*, HOLLYWOOD REP., Oct. 18, 1994, at S12.

[59]. See Les Watkins, *The Digital Performance Right in Sound Recordings Act of 1995: Delicate Negotiations, Inadequate Protection*, 20 COLUM.-VLA J.L. & ARTS 323, 333 (1996)(interpreting the new Section 115 as granting a new digital distribution right in musical works contained in "digital phonorecord deliveries" subject to a mechanical royalty). See also *Frank Music v. Compuserve*, No. 93 Civ. 8153 (S.D.N.Y. filed Nov. 19, 1993) (settled almost contemporaneously with the passage of DPSRA, and without litigating the issue of whether musical works uploaded and downloaded on the Internet, as MIDI files, are subject to mechanical licensing).

[60]. For example, the DPSRA contemplates broadcast-like performances of sound recordings, that if subject to existing broadcast-model rules would often be subject to performance royalties.

[61]. See 17 U.S.C. Sections 114(B)(i),(C), 115(c)(3)(A)(K), 115(d). See also ASCAP Comments, *supra* at note 49, at 5:

Simply put, the potential of the NII for replacement of record sales by digital electronic transmissions is too great a threat to performers and record producers -- to say nothing of writers and publishers of music -- to be ignored. But such rights can not be granted to the detriment of existing rights. That is, new rights cannot in any way derogate the rights of creators and copyright owners of the musical compositions which are recorded.

See also David Goldberg and Robert J. Bernstein, *The Information Infrastructure*, N.Y.L.J., Sept. 16, 1994, at 3 (discussing generally Green Paper and performance societies' arguments, including the primary purpose test, and illustrating how timing of the sound recording performance right debate colored the debate as to the best way to categorize transmissions of rights on the Internet).

[62]. ASCAP Comments, *supra* note 49 at 4.

[63]. See *id.*

[64]. See *id.* at 7-11. See H.R. REP. NO. 94-1476 at 63,64 (1976)(Reprinted in 1976 U.S.C.C.A.N. 5659, 5677) [hereinafter House Report]. In response to the technological advancement problems then posed by

radio and television analog broadcast, the 1976 Act attempts to define perform to include any conceivable method of rendering a musical work audible as a performance, with and without the aid of any device or process, and under any concept of transmission from one location to another, including indirect processes.

[65]. See ASCAP Comments, *supra* note 49, at 12.

[66]. See *id.* at 12.

[67]. There is a long line of interesting cases establishing the parameters of performers, performances, and venues, but a discussion of these would be outside the scope of this article. See ASCAP Comments, *supra* note 49, at 10, 13-17; See 1999 Supp., *supra* note 48, at 68-73 (discussing broadcast transmission of musical works performances and related cases, and arguing that the Internet and similar computer network environments fit into the parameters established in these cases). See also sources cited *supra* note 17. ASCAP also uses *Playboy Enterprises v. Frena*, 839 F.Supp. 1552 (M.D. Fla. 1993) to support its argument because Frena held that pictures could be displayed by transmission over a computer network, and the 1976 Act definitions would mandate the same result for musical works performance by computer network transmission.

[68]. ASCAP Comments, *supra* note 49, at 13 (citing "the specific technology used -- whether by telephone wires, coaxial cables, or satellite carriers -- is immaterial").

[69]. See *id.* at 14.

[70]. See *id.* at 8, 12 (outlining the various steps involved in transmitting a musical work performance over the Internet, including the storage of the work by a transmitting service, and acknowledging, without distinguishing, that transmissions can take place in 'real' or 'compressed' time).

[71]. See *id.* at 12-17 (citing House Report *supra* note 64, at 63) (concept of public performance covers not only the initial showing, but any act by which that performance is further transmitted or communicated to the public; for example a cable system is performing when it retransmits a broadcast to its subscribers, and an individual is performing when she plays a recording or turns on a receiving set); See also *id.*, *supra* note 64, at 64 ("Each and every method by which the images or sounds comprising a performance or display are picked up is a 'transmission,' and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106."); and, *id.* (citing *David v. Showtime Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988))(Showtime's transmissions of copyrighted music to local cable systems for retransmission, instead of broadcasting directly itself to viewing public, were still public performances; rejecting the argument that Showtime was a "passive carrier" thus exempt from copyright liability, because of its selection and control of the transmissions). See also 1999 Supp., *supra* note 48, at 70-71 (there would be no need for the Section 111 cable retransmission copyright liability exemption, if such retransmissions were not public performances).

[72]. See, ASCAP Comments, *supra* note 49, at 17.

[73]. See *id.* at 4.

[74]. See *id.* at 21-23.

[75]. See *id.* at 22-23. See also Warner, *supra* note 58, at S12 (quoting Don Passman, noted music business attorney and author, as raising still unclear questions as to whether the download of new album would be public performance broadcast, like analog radio, or sale of pre-recorded music, like CD, noting differences in the licensing involved).

[76]. See *Reply Comments of the American Society of Composers, Authors, and Publishers on the*

Preliminary Draft of the Report of the Working Group on Intellectual Property, (filed October 20, 1994), cited in 1999 Supp., *supra* note 48, at 72-73.

[77]. See 1999 Supp., *supra* note 48, at 70. This point is defended and supported by the Kohns' argument that any other interpretation is wrong because all a sender would have to do to avoid performance right liability would be to send files that are not audible simultaneously with the transmission.

[78]. While liability of online service providers themselves is not yet clear, blanket licensing of music performance rights solves any potential infringement problems the services may encounter. See *Protection of Copyrights in Music for the 90's and Beyond*, Course No. 7725R, Florida Bar Continuing Legal Education Committee & the Entertainment, Arts & Sports Law Section, (Feb. 29, 1996) *remarks and presentation* by Bennett M. Lincoff [hereinafter "Lincoff remarks"].

[79]. There remain some issues over who is the infringer in various contexts involving the uploading, downloading, and otherwise sending protected material over the Internet. The recently passed "Digital Millennium Copyright Act" answers some of the questions regarding internet service provider liability for such material if it infringes. See Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) [hereinafter "DCMA"].

[80]. See Lincoff remarks, *supra* note 78.

[81]. See *ASCAP Experimental Performance License Agreement for Computer Online Services, Electronic Bulletin Boards, Internet Sites, and Similar Operations* [hereinafter "ASCAP Internet License"] (license option "A" fee structure derived from gross revenue of the site itself, not including revenue from any goods sold online).

[82]. See Lincoff remarks, *supra* note 78 (stating while some trade and other users groups for the Internet were identifiable, it was difficult to ascertain what would be the appropriate industry group for the purpose of negotiating fair rates the way ASCAP does with traditional licenses).

[83]. See Internet license sites, *supra* note 51.

[84]. *ASCAP Internet Licensing* (visited July 11, 1999) <<http://www.ascap.com/weblicense/webfaq.html>>.

[85]. *Id.* See also Hillman, *supra* note 33 (arguing that these types of statements are coercive and in fact violate the ASCAP consent decrees).

[86]. Fees still based on website revenue; new tracking requirements and absence of separate license for nonprofit sites.

[87]. See *New ASCAP Licenses Drafted With Web in Mind*, MEDIA DAILY (No. 5, Vol. 4, Dec. 12, 1997).

[88]. See *id.*

[89]. For another example, the current SESAC license for Internet web sites, that does not also apply to Online Computer Services, requires a minimum \$50.00/six mos. fee. See Internet licenses, *supra* note 51.

[90]. See Hillman, *supra* note 33, at 734 (specifically identifying internet music market as a place where legislation is needed immediately to curb unchecked market power of performance rights societies). See also Jane C. Ginsberg, *Putting Cars On the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1489-90 (1995) (advocating a collective licensing model generally for Internet copyright licensing, and particularly musical works performance rights model for digital enforcement problems). Collective licensing may spread to protected works other than music, and so may the increased

use of primarily blanket licensing models as a perceived easy and already worked out way to administer rights on the Internet. This is a problem if the problems inherent in the musical works performance model are not addressed and corrected before the idea spreads.

[91]. See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 64 Fed. Reg. 6221-23 (1999)(to be codified at 37 C.F.R. Part 255)(establishing rates for some digital phonorecord deliveries under Section 115 and delaying setting rates for "incidental" deliveries).

[92]. See *infra* Part III.A. and B. Again, what occurs under the music copyright rules is likely to affect other protected works. For example, distance learning can use real-time streaming to bring the live professor to the user.

[93]. See 17 U.S.C. Section 1001.

[94]. See *infra*, note 122. See also (visited July 11,1999) <<http://www.MP3.com>> and related links for the story of the Rio litigation. MpegIII is a data compression technique that allows fast downloads of audio and/or video data. MP3 sites presently proliferate on the Internet, causing concern and hysteria about piracy. See Recording Industry Association of America website (visited July 11,1999) <<http://www.riaa.com>>; <<http://www.kohnmusic.com>> (Bob Kohn involved in this litigation in support of Rio). See also John C. Dvorak, *MP3 Spells Disaster*, PC MAGAZINE , March 9, 1999; *MP3 and the Record Industry-Musician's Exchange*, (visited July 11, 1999) <<http://musicians.miningco.com/library/weekly/aa122198.htm>>.

[95]. See generally Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997); Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759 (1997).

[96]. Section 101 provides:

A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.; 'Phonorecords' are 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 sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.

(emphasis added). Section 106(1) grants the owner of the musical work the right to "reproduce the copyrighted work in copies or phonorecords."

[97]. Section 115(a)(1).

[98]. Section 115(a)(1). The rate presently in effect is 7.1 cents per unit, or 1.35 cents per minute playing time. See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 63 Fed. Reg. 7288-89 (1998)(codified at 37 C.F.R. Part 255). This is the rate for traditional physical mechanical licenses. Regardless of the statutory rate cap for a Section 115 mechanical license, the parties can always negotiate a different rate. For example, record companies often offer only 75% of the statutory rate for traditional phonorecords.

[99]. See Section 101:

'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. (emphasis added).

[100]. Most often publishers receive the mechanical royalty, and record companies (publishers of the sound recording) receive the royalty for the sale of the sound recording album. Usually, performance royalties are collected by the societies, based upon formulas discussed *supra* note 31, and paid from the society to the publisher or to the publishers and composers under royalty splits contained in song or co-publishing contracts. The music publisher, or whoever is in charge of administering the exploitation of the composition attempts to get the song reproduced and performed in as many ways as are economically advisable for the type of composition. *See* KOHN, *supra* note 23, at 5-34 (publishing, licensing strategy).

[101]. *See supra* note 96.

[102]. Section 106(3) grants the copyright owner the exclusive right to "distribute copies or phonorecords of the copyrighted work to the public...."

[103]. *See supra* note 96. *See also* WHITE PAPER, *supra* note 48, at 27-28.

[104]. The download of a copy of the musical work in the phonorecord is the same as the download of a computer game in *Sega Enterprises v. Maphia*, 857 F.Supp.679 (N.D.Cal. 1994), involving the Section 106(1) reproduction right. *See also* Frank Music, *supra* note 59 (musical works contained in MIDI files were uploaded and downloaded to a CompuServe bulletin board; the Harry Fox Agency and Music Publishers sued on basis of infringement of reproduction right, the settlement included an agreement that such services must now purchase mechanical licenses).

[105]. WHITE PAPER, *supra* note 48, at 64-65 ("...the placement of copyrighted material into a computer's memory is a reproduction of that material."). When a digitized file is either uploaded or downloaded from or to a user's computer via a bulletin board or similar server, or when a file is transferred, a copy is made.

[106]. *See* 1999 Supp., *supra* note 48, at 308, second and third paragraphs. Kohn is saying the same thing here, although he does not make it clear that this would be true even absent DPSRA.

[107]. Section 115(d) provides:

As used in this section, the following term has the following meaning: A 'digital phonorecord delivery' is each individual delivery of a phonorecord which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording 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 transmission recipient in order to make the sound recording audible. (emphasis added).

[108]. *Id.*

[109]. *See supra* note 91.

[110]. Distribution is not defined in the Copyright Act, except for its definition in Section 115(c)(2) which provides, "...a phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession." If digital phonorecord deliveries are considered copies, there is fear that under the first-sale doctrine, a recipient of a copy would somehow then have license to further distribute that copy, and in the digital world this could mean infinite further deliveries of copies. This does not necessarily follow, however, because the recipient having the equipment to copy a music album to his own CD, or other personal media storage/playing device, could then share only his copy that way, and is not any more bound to deliver it infinitely over the Internet than is someone today who chooses not to infinitely copy cassette copies of albums. The argument that this is easier to accomplish digitally does not mean music users have no choice. Also, the argument that first-sale could even be a problem should not influence the decision whether a particular transmission is a performance.

The phonorecord distribution right under Section 115, the compulsory license for making phonorecords of nondramatic musical works, is actually more limited than the distribution right accorded all copyrighted works under Section 106(3), which includes distribution of phonorecords that may not contain musical works.

[111]. The legislative history for the 1976 version of Section 115 is quite clear that the compulsory license is available to reproduce the musical composition, thus invoking the Section 106(1) reproduction right. The House Report regarding Section 115 also makes it clear that the reason Congress included the requirement that the primary purpose for obtaining the license is for distribution to the public for private use was to allow for negotiation of a different license and fee, called an electrical transcription license, for commercial uses of music, such as background music, jukeboxes, and broadcasters, who would still require the copyright owner's consent to record the musical work. This decision reflects the balance arrived at between public access to musical works being recorded by different artists, and the business-to-business uses of purely commercial music. *See* House Report, *supra* note 64, Section 115. *See also* KOHN, *supra* note 23, at 693 (electrical transcription licenses).

[112]. Bob Kohn may be reaching the same conclusion, although he hedges. *See* 1999 Supp., *supra* note 48, at 309-10. Kohn recently changed his position again, and now he clearly acknowledges the digital phonorecord delivery contemplated in Section 115 will likely only only render a private first performance to the recipient, if at all. Therefore, it is unlikely that a public performance of the musical works would occur at the same time, and thus only a mechanical royalty would be paid on this transaction.

[113]. It is important to distinguish the performance right in the musical work under Section 106(4) from the new performance right in the sound recording under Section 106(6), even though both the musical work and the sound recording version of the work are contained in the same phonorecord, even for the purpose of a digital phonorecord delivery under Section 115. Section 106(6) provides a new performance right for the sound recording version contained on the phonorecord, the right to "perform the copyrighted work [the copyrighted sound recording] publicly, by means of a digital transmission." Section 114 clearly states that the performance right under Section 106(6) does not include the Section 106(4) performance right. But, Section 115(d) provides a digital phonorecord delivery may be effected by digital transmission of a sound recording, regardless whether the same digital transmission is also a public performance of the sound recording. Depending upon whether this means both the reproduction right and the performance right are implicated, the problems discussed here regarding the digital performance of the musical work itself are further complicated. Although a complete analysis of Section 114 and the sound recording performance right is impossible here, it appears that the reproduction right must be implicated as it is in the musical works. Any other interpretation would again fail to distinguish between the delivery of a reproduction of the sound recording contained on the phonorecord, and its performance. This anomaly may have been overlooked by the drafters who were primarily concerned with constructing rules making it less likely that easily copied performances or downloads would go uncompensated. *See* 1999 Supp., *supra* note 48, at 248. However, for such a reproduction, the license purchased would be the sound recording master use license, not a mechanical

license under Section 115. Only in instances when it is entirely clear that the transmission is a performance of both the sound recording and any musical work also performed by the sound recording should performance licenses be required for both. *See* Section 114(d)(3)(B) (requiring interactive service licensee of performance right in sound recording to obtain performance licenses for underlying musical works). *See also* 1999 Supp., *supra* note 48, at 310 (identifying problem in reverse: Harry Fox Agency claiming that every digital audio transmission of a musical work by an interactive service is also a digital phonorecord delivery). *See also* DMCA Section 112 (1998). In this recent amendment to the ephemeral recording requirement under Section 112, it is quite clear that it is necessary to make a phonorecord of a sound recording in order to deliver even an ephemeral performance of the sound recording and necessarily any musical works therein.

Musical works performance royalties are collected by the societies or the copyright owner, usually a publisher, and licenses from the societies may be granted only on a nonexclusive basis, with rates adjusted to similarly situated users under the consent decrees. Mechanical licenses are granted by the copyright owner, usually a publisher, or an agency like the Harry Fox Agency, but are affected by the statutory rate cap. Royalties for performances of sound recordings will be collected from the owners of the sound recordings, usually a record label, or its licensing representative, and may or may not be capped or voluntarily negotiated under Section 114.

[114]. *See* 1999 Supp., *supra* note 48, at 308-10.

[115]. This position was clearly considered during the various debates over how best to amend the Copyright Act to distinguish between delivery of copies of works and deliveries of other transmissions. *See* Letter from Marybeth Peters, Register of Copyrights, to The Honorable Carlos J. Moorhead, Chairman, Subcommittee on Courts and Intellectual Property, (April 1, 1996). In response to Rep. Moorhead's inquiry regarding broadcasters' requests for an exemption to the NII bill, Peters says:

"The bills would amend the distribution right to clarify that the distribution of copies of a work to the public may be accomplished by means of transmission. Based on current technology, this would not cover broadcasts any more than present law does, since a broadcast does not result in copies being distributed to the public." *Id.* (emphasis added).

[116]. *See* *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (making it clear that in the broadcasting context material vs. non-material transmission distinction is relevant in determining that broadcaster could be performing work rather than distributing work). Broadcast context refers to non-material transmission of a sound recording, whether or not it is also possible that dissemination of the work can occur by transmission. *Id.*

[117]. *See* TROTTER HARDY, PROJECT LOOKING FORWARD: SKETCHING THE FUTURE OF COPYRIGHT IN A NETWORKEDWORLD 115 (Final Report Prepared for the Copyright Office, May 1998)(stream of bits played as it arrives is most like radio) [hereinafter FORWARD].

[118]. *Id.*

[119]. DPSRA, Section 114. *See also* 1999 Supp., *supra* note 48, at 243-47.

[120]. *See* 1999 Supp., *supra* note 48, at 324-45 (Bob Kohn's "Webcasting Primer"). *See also* Digital Media Association, *What's In H.R. 2281 for Webcasters?*, (visited July 11, 1999) <<http://www.digmedia.org/2281exp.html>>.

[121]. *See* 1999 Supp., *supra* note 48, at 324-45. Kohn was correct that these performances were free, and

were completely exempt under the original DPSRA. The debate between Kohn and the RIAA, and the resulting change by Congress taking place under the cloud of impending impeachment proceedings demonstrates the corruption of the process determining music rights on the Internet. Although this paper discusses and stresses performance rights generally administered by the performance rights societies, and points to abuses of their powers, this latest DPSRA amendment illustrates how little the decisions made have actually to do with any solid basis in copyright law and policy, much less any concern for public good. The grasping for power over music played and otherwise delivered on the Internet appears to affect the collectives and major organizations in the music industry as a whole, and is certainly not restricted to any one powerful organization. Bob Kohn himself has also recently entered the webcasting business.

[122]. See Eric S. Slater, Note, *Broadcasting On the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL'Y 25, 26 (1997) (First permanent cybercast of a traditional radio station began in 1995; number of stations increased 900% by end of 1996). Slater lists Internet radio listing sites: MIT Internet Guide to Radio Stations (visited July 11, 1999) <<http://wmbr.mit.edu/stations/list.html>>; see also (visited July 11, 1999) <<http://www-kzsu.stanford.edu/radio.html>>; (visited July 11, 1999) <<http://www.rronline.com>>.

[123]. See Marc E. Mayer, *Do International Internet Sound Recording Infringements Implicate U.S. Copyright Law?*, 15 COMPUTER L. 11, 12-14 (1998) (identifying and discussing how broadcast model "dichotomy" between broadcaster as performer and recipient as receiver, and multiple performance doctrine leads to varying conclusions about what can be a public performance on the Internet; traditional doctrines based on geographic locations are increasingly inadequate to protect copyright in new technological environments). As a result of similar concerns, the European Community Council created new right of communication to the public by satellite, identifying the act of communication as where satellite signals are introduced into chain of communication. *Id.*

[124]. House Report, *supra* note 64, at 64 ("...if the transmission reaches the public in my[sic] form, the case comes within the scope of clauses (4) or (5) of section 106").

[125]. See *id.* at 63:

...Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in Section 101. Certain other performances and displays, in addition to those that are 'private,' are exempted or given qualified copyright control under Sections 107 through 108.

[126]. ASCAP Comments, *supra* note 49. See also Yvonne A. Tamayo, *Who? What? When? Where?: Personal Jurisdiction and the World Wide Web*, 4 RICH. J.L. & TECH. 7, (1998), <<http://www.richmond.edu/~jolt/v4i3/tamayo.html>>, (discussing cases bringing out distinction between "passive" and "interactive" websites for purposes of establishing personal jurisdiction).

[127]. See FORWARD, *supra* at 117, at 18 (because technology is rapidly changing, allowing for different environments on the Internet, when a posting is "public" is slippery slope issue that is most difficult in copyright where the definition of public is tied to physical places). See also Marc E. Mayer, *Do Internet Sound Recording Infringements Implicate U.S. Copyright Law?*, 15 COMPUTER L. 11, at 12-14 (1998) (discussing problem of identifying venue of performance on the Internet and comparing two main existing theories based upon geographical location of either performer or recipient(s)). Problems occur because if performance is assessed by physical place of origination, then for example, performance occurring in foreign

country but heard in U.S. can not be assessed performance royalties in U.S. ASCAP does not even enforce copyrights in U.S. for those presently occurring traditional transmissions. But if the performance occurs at the place of reception, then that means infringement can occur at any actual or potential place of receipt. This is like the Bogsch Theory applied to satellite transmissions, where infringement occurs wherever the "footprint" of a satellite falls, where unauthorized performances. *Id.*

[128]. See WHITE PAPER, *supra* note 48, at 72; FORWARD *supra* note 117, at 121 (unauthorized posting of work on website is an infringement, even if not clear which right); 1999 Supp., *supra* note 48, at 106-112 (examples of scenarios where website transmissions implicate performance rights); Nancy A. Bloom, *Protecting Copyright Owners of Digital Music-No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y U.S.A. 179, 193-99 (posting a song on website may be considered public performance).

[129]. "Celestial jukebox" is term used by GOLDSTEIN, *supra* note 16. Of course if "pay-per-listen" celestial jukeboxes are to be part of the new model, a consideration of the application of Section 116 negotiated licenses may also be necessary, but not in addition to a broadcast-like performance license. See also 1999 Supp., *supra* note 48, at 97 (advocating "pay-per-listen" musical works performance delivery).

[130]. The criteria of a "receiving apparatus of a kind commonly used in private homes" could easily apply now to any personal computer system. See Section 110(5).

[131]. See John Wilk, *Seeing the Words and Hearing the Music: Contradictions in the Construction of 17 U.S.C. Section 110(5)*, 45 RUTGERS L. REV. 783 (1993) (identifying the impossibility of discerning a consistent standard in courts' application of Section 110(5) tests for square footage, type of receiving apparatus, and further transmission to the public and concluding that tests are virtually meaningless); see also Lilenfield, *supra* note 17, at 704 n.35 (citing numerous authorities describing the extensive problems interpreting and applying Section 110(5)).

[132]. Fairness, *supra* note 38.

[133]. 117 S.Ct. 2329 (1997).

[134]. 117 S.Ct. 2329 at 2334 (emphasis added) (citations omitted).

[135]. The Court found portions of the CDA unconstitutional, *Id.*

[136]. 117 S.Ct. 2329 at 2343 (emphasis added)(citations omitted).

[137]. *Id.* at 2335, 2343.

[138]. *But see* 117 S.Ct. 2329 at 2353. In her concurrence and dissent, Justice O'Connor disagrees with the majority by thinking that the Internet must have geography because it can be zoned so that users can screen out locations, by means of fixed Internet addresses. However, the very fact that technological screening can take place means that there is no universal geography to the Internet. It also means that technological means designed to obscure locations and content on the Internet make it even less likely that venue for performance right purposes can be easily identified under existing geographic copyright rules. See also FORWARD, *supra* note 117, at 172 (ways to mask origination of Internet transmissions).

[139]. See Prophet Music v. Shamla Oil Co., 1993 U.S. Dist. LEXIS 7839, 26 U.S.P.Q.2d (BNA) 1554; Copy. L. Rep. (CCH) para. 27, 113 (D. Minn. 1993)(granting statutory damages for infringement and permanent injunction in holding that music delivered to gas station's telephone customers via music-on-hold system connected to station's radio receiver was public performance under Section 101 definitions of perform, transmit, and publicly, and House Report-suit brought by ASCAP members). See also Lisa Zhito, *Music*

licensing fees, liability issues among concerns of PAC mgrs. at IAAM, ASAP (Vol. 106, No. 34, August 22, 1994) at 10 (discussing ways performing arts center managers can avoid liability for infringing performance right for music on hold).

[140]. A few possibilities include: analog broadcast-tower-(waves)-receiver, cable headend-cable wires-converter box/tv, satellite dish-headend-cable wires-converter box/tv, satellite dish-wire-(direct video)-satellite receiver/tv, and analog or digital broadcast tower-wireless-receiver.

[141]. FORWARD, *supra* note 117, at 218 (indicating copyright and communication law may not be independent of each other).

[142]. The history of cable broadcasting and copyright is illustrative of the problem defining scope of rights by technological parameters. While the regulation and law of cable, and other satellite or hybrid systems is worthy of a textbook-sized effort, a few examples of how definitions resulting in colliding categories arose shows how massive the current Internet definitional problems could become. For example, the FCC regulates the cable industry, but copyright covers some retransmissions of content by cable systems. The copyright rules are sometimes tied to FCC definitions and decisions. In the 1976 Copyright Act, the Section 111 compulsory license provisions, requiring cable systems to pay royalties for retransmissions of imported distant signals came directly out of a compromise between the FCC, Congress, cable system owners, broadcasters, and other copyright owners. The compromise gave cable systems greater latitude in what they could carry in exchange for their agreement to pay royalties. *See Cable Television Report and Order*, 36 F.C.C.2d 143, 167 (1972) (cable industry agrees to support revision of copyright and agreements granting syndicated exclusivity in a market in exchange for relaxed restrictions for cable importing distant signals). Similarly, cable operators were not required to pay copyright royalties for must-carry signals (mandatory local network), as defined by the FCC. A difference in the definition of a "cable system" between the Copyright Act and the Communications Act led to many controversies over exactly which kinds of systems would be included in the definitions and thus subject to only compulsory licensing. The definitional problems stemmed from the fact that SMATV, MMDS and satellite systems differ in precise structure form a prototypical cable system. MMDS does not use wires or cables to deliver content, and neither does satellite so these systems, although in reality functioning almost exactly similarly, were not cable systems under the copyright definitions. *See Cable Compulsory License: Definition of Cable Systems*, 56 F.R. 31580, 31592-93 (July 11, 1991); *Satellite Broadcasting & Communications Assoc. v. Oman*, 17 F.3d 344 (11th Cir. 1994) (affirming Copyright Office definition of "cable system"). This controversy led to the passage of the Satellite Home Viewer Act of 1988, Section 119 of the Copyright Act, which made compulsory licensing available to satellite systems. The controversy continues today. *See* [new proposed satellite act cite]. *See also* Patrick Murphy, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 COLUM.-VLA J.L. & ARTS 237 (1993).

[143]. *See also* FORWARD, *supra* note 117, at 220 (individual who digitizes television signal taken from analog television broadcast, and sends the signal over the Internet may have unknowingly just become a "cable system"). Just a few of the presently competing new forms: TV-based Internet access, *see* Paul M. Zislis, *How TV-Based Internet Service Can Be Delivered Over a Cable Network*, COMPUTER TECH. 104 (December 1998), Internet protocol (IP) telephony over cable, *see* Wade Carter, *Launch A Telephony Winner*, COMPUTER TECH., at 44, 45 (March 1999) ("Customers care less about the underlying technology than the service itself."); Tom Girard & Charles Paikert, *Cable and Internet: Friends or Foes?*, CABLEVISION, Oct. 12, 1998.

[144]. BARBARA ESBIN, INTERNET OVERCABLE: DEFINING THE FUTURE IN TERMS OF THE PAST 2 (OPP Working Paper No. 30, written for the FCC (August 1998)) [hereinafter FUTURE].

[145]. *Id.* at 2-3 (The Internet fundamentally differs from existing communications systems); *see also* Slater,

[146]. See House Report, *supra* note 64, at 89 (explaining that because the 1976 Act changed the law and now requires cable broadcasters to pay copyright royalties for retransmissions of works to paying subscribers, compulsory license is appropriate method for balancing policy between copying concerns and business reality).

[147]. See Section 111(a)(3) (Copyright Act exempts passive carriers who simply retransmit and exercise no control over content or selection of protected material; FCC decides who is classified a passive carrier). See also FUTURE, *supra* note 144, at 25-36 (history of common carrier provisions of Communications Act); see also FORWARD, *supra* note 117, at 221-24.

[148]. *Id.* See also In the Matter of GTE Telephone Operating Cos., F.C.C. Order No. 98-292 (CC Docket No. 98-79 Oct. 30, 1998) (Commnr's Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement) (GTE new Internet access service that permits Internet Service Providers to give their end-user customers high-speed access to the Internet ("ASDL" dedicated connection) is an interstate service subject to tariff at federal level). See also Melissa de Zwart, *The Worst Intellectual Property Opinion Ever Written: THE MUSIC ON HOLD CASE*, 5 J. INTELL. PROP. L. 397 (1998)(Analysing and discussing Telestra Corp. Ltd. v. Australasian Performing Rights Ass'n, 146 A.L.R. 649 (1997)(under Australian Copyright Act, communications carrier that serves only as conduit for transmission of infringing material can be liable for copyright infringement).

[149]. DMCA Section 114.

[150]. H.Rep. No. 105-796, at 83 (1998)(DMCA Section 114).

[151]. See MIDI Manufactures Association Site, *What is MIDI?* (visited July 12, 1999) <<http://www.midi.org/abtmidi.htm>>.

[152]. *Id.*; see also Eric Lipscomb, *The Method of MIDI* (visited July 12,1999) <<http://server.music.vt.edu/technology/Intromidi/midimethod.html>>; *Did U Know?* (visited July 12,1999) <<http://www.windytown.com/featured.html>>, (for simplified explanations).

[153]. See Lipscomb, *supra* note 152 ("[t]wo synthesizers communicate via MIDI").

[154]. *Id.*; See also 1999 Supp., *supra* note 48, at 6 (describing components of MIDI system).

[155]. *Id.* at 11; "Copyright Office Affirms that MIDI Musical Data is Subject fo Mechanical Compuslory Licenses," *West's Legal News*, Sept 20, 1996, 1996 WLN 9949, 1996 WL 530541.

[156]. Open any issue of a media magazine like ELECTRONIC MUSICIAN and be exposed to the seemingly endless musical and musical plus other media combinations possible and easily accessible to users today.

[157]. See ABKO Music, Inc. v. Stellar Records, 96 F.3d 60 (2d Cir. 1996)(defendant's karaoke CD+G's, containing music and timed lyrics in graphic display not subject to Section 115 compulsory license). See also 1999 Supp., *supra* note 48 at 12 (print reproduction license may be required when MIDI file displays lyrics in addition to playing music).

[158]. There are many MIDI Internet sites. See *Laura's MIDI Heaven*, (visited March 9, 1999) <<http://www.web-street.com/MIDIS/>>. Laura's allows the user to experience MIDI in every conceivable way, and allows the user to download a MIDI player that allows the user to open three windows to view Karaoke

lyrics, view the actual notation, or manipulate the mix of channels, among other things. Laura's was closed temporarily recently as a result of Harry Fox Agency complaining to her Internet provider.

[159]. See 1999 Supp., *supra* note 48, at 114. See also Christos P. Baldavos, *MIDI Files: Copyright Protection for Computer-Generated Works*, 35 WM. & MARY L. REV. 1135, 1169 (1994) ("MIDI files are nothing more than 'computer programs' as defined by the [Copyright] Act.").

[160]. See *Micro Star v. Formgen, Inc.*, 154 F.3d 1107 (9th Cir. 1998). Formgen used analogies to sheet music and choreography in holding exact, replicable description in computer language of video game levels is fixed, and therefore protected as a reproduction, even independent of the game player device. Instructions themselves are sufficient expression to represent protected work which can be copied.

[161]. See Baldavos, *supra* note 159, at 1171.

[162]. See "Did U Know?", *supra* note 152 (comparing user's experience of typing in notes in MIDI program to word processing). A very basic and simple-looking interface like that in "MusicWrite[TM] Plus", available for under \$30.00 from Voyetra allows this user to operate the written function of music notation very much like a word processor. Notes can be dragged and dropped, music can be cut and pasted, etc. The interfaces can also translate recorded music into audible sound and written notation. A new version of Finale, used by music publishing houses today to do everything from transposing to arranging music now employs a new feature that allows music to be scanned into MIDI-equipped systems and then further manipulated. See *Voyetra Turtle Beach Inc., Welcome* (visited July 12, 1999) <<http://www.voyetra-turtle-beach.com/site/default.asp>>; Barbara Remley, *Coda Music Technology, Inc. Announces Music Scanning Partnership*, BUS. WIRE, Sept. 30, 1998.

[163]. PAUL THEBERGE, ANY SOUND YOU CAN IMAGINE: MAKING MUSIC/CONSUMING CULTURE 89 (1997). Of course, as Theberge points out, the easy access led to mediocrity in product because more musicians rely on easily available prerecorded sound libraries. Musicians who do not understand the technology are most likely to be drawn to the easily available musical solutions. Musicians and others are thereby controlled by the manufacturers of the musical product they consume. Of course this already existed in the pop song commercial recording industry, but with MIDI the use is interactive.

[164]. *Id.* (musicians use techniques like sound layering instead of traditional notation).

[165]. See KOHN, *supra* note 23, at 1137 (Harry Fox MIDI License).

[166]. See TIM WHITSETT, MUSIC PUBLISHING: THE REAL ROAD TO MUSIC BUSINESS SUCCESS 136-38 (1997) (describing and illustrating MIDI software license); The MIDI Manufacturer's Association publishes special instructions for users registering musical works embodied in MIDI sequences that are sound and specifically excludes MIDI sequences containing music and visual material together. See *MIDI Manufacture's Association, Filling Out Application Form SR for MIDI Sequences* (visited July 13, 1999) <<http://home.earthlink.net/~mma/formsr2.htm>>.

[167]. See House Report, *supra* note 68, at 62-65.

[168]. *Id.* at 62 (detailing that "the approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and nonprofit uses").

[169]. Under the DMCA, the Copyright Office is presently holding hearings about the promotion of distance learning and regulation. See *Promotion of Distance Education Through Digital Technologies*, 63 Fed. Reg. 71,167 (1998).

[170]. Specific guidelines for exempt and non-exempt educational uses of music are given in the House Report at 70-72. These guidelines were recommended by publishers as fair uses of music. See House Report, *supra* note 68, at 70-72.

[171]. Online education is increasing. Even an online law school now exists. See *Kaplan Launches Online Law School, Making 24 Hour Legal Education Possible for Working Students and Professionals* (visited July 12, 1999)

<<http://www1.kaplan.com/view/article/0,1898,2983.00.html>>.

[172]. Susan Israel & Jeffrey D. Neuberger, *Examining Licensing Issues On the Internet*, 14 No. 2 Ent. L. & Fin. 1 (1998)(discussing "Joint Petition" submitted to Copyright Office by music publishers and record companies that would allow 30 second downloads from Internet music sites without liability; performance rights societies object on basis of infringement of performance rights).

[173]. 117 S.Ct. 2329, 2344, 2349.

[174]. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164 (1994)(commercial song parody was fair use). See also *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984). Sony, the betamax case, permits home-taping of free broadcast television programs for time-shifting purposes. It is possible that to the extent a musical works performance is broadcast in an analogous free broadcast context, Sony might apply to exempt the user's copying the performance. Even if the user has to buy access to the Internet from an Internet service provider, under Sony the question would be whether the broadcast material itself were free, not the conduit itself. *Id.*; see *contra* Bloom, *supra* note 50, at 189.

[175]. See KOHN, *supra* note 23 (advocating "pay-per-listen" model).

[176]. Ginsburg, *supra* note 90, at 1489-90. Collective licensing model for musical performance may solve digital enforcement problems. But fair use may be foreclosed where collective license is available. *Id.*

[177]. AHRA, *supra* note 47.

[178]. AHRA ' 1008. See also Bloom, *supra* note 128, at 190-92.

[179]. '1008; ' 1001(5)(A)(i) provides: "A 'digital musical recording' is a material object (i) in which are fixed, in a digital recording format, only sounds...."

[180]. See also M. Robertson, *Diamond Reveals Secret Weapon in Rio Battle*, (visited July 11, 1999) <<http://www.MP3.com/news/114.html>>. The current Diamond Rio mpeg III player lawsuit will for the first time interpret the AHRA and how it fits within the Copyright Act as a whole.

[181]. See Allen R. Grogan, *Implied Licensing Issues in the Online World*, 14 COMPUTER L. 1, no. 8 (August 1997).

[182]. *Id.* at 2.

[183]. Many thanks to Patrice Lyons who graciously sent me a copy of this report. See American Bar Association, Section of Intellectual Property Law, ANNUAL REPORT, at 528-30 (1995-96)(Proposes new copyright definition: "'Digital Works' are literary works consisting of an ordered set of symbols selected from a discrete alphabet, such as a computer program or knowledge structure, that are capable of behavior when processed."

[184]. *Id.*

[185]. *Id.* at 530; see also Patrice A. Lyons, *Managing Access to Digital Information: Some Basic Terminology Issues*, BULL. OF THE AM. SOC'Y FOR INFO. SCI. at 21-24 (December/January 1998)(specifically discussing how interactive works, such as MIDI, differ from works that are fixed copies in other digital contexts and stressing the need for distinguishing these works; pointing out and explaining why terms like digital transmission and digital communication can not describe all disseminations of works, and particularly why some works are and are not performed depending upon exact method of access and delivery of the work).

[186]. 1999 Supp. *supra* note 48, at 99-100 (evolving encryption and other owner control technology).

[187]. See *id.* at 130-31(suggesting it is not clear what the correct licensing practices are for the Internet, and specifically suggesting publishers grant licenses covering both the performance and reproduction rights).

[188]. See FORWARD, *supra* note 117, at 286.

[189]. *Id.* at 248, 258, 288.

[190]. Already there are communications systems in existence that will soon perform in ways unimaginable a few years ago, and in ways that would challenge inflexible, categorical, legalistic approaches to protecting works. See George Johnson, *Computer program turns music world on its ear*, MIAMI HERALD, December 17, 1997, at 6E (composing computer); see also Daniel Lyons, *Immortality at last*, FORBES, November 30, 1998 at 182-83 (discussing success of present artificial intelligence computing and Raymond Kurzweil's current project developing computers that outperform humans and literally contain human brains).

[191]. See Michael Robertson, *Can Music Be Secure?* (last visited July 12, 1999) <<http://www.mp3.com/news/115.html>>. (Describing easy ways music users can switch off music protection codes, record streamed music, and advocating fair methods and prices for consumers to pay for music usage, rather than technologically oriented abstract and unenforceable focus.); see also Brian Livingston, *How to turn Windows into a Jukebox*, (visited July 12, 1999) <<http://cnn.com/TECH/computing/9812/15/jukebox.idg/>>; Martin Schwimmer and Craig S. Mende, *Madonna and Audio Streaming*, New York L.J. March 9, 1998, (visited July 13, 1999) <<http://www.ljx.com/internet/0309madonna.html>>. Describing how a recent Madonna album, released first to foreign radio stations began being available almost simultaneously at unauthorized websites using streaming technology, and discussing implications of worldwide web music usage and rights.

[192]. See *Yamaha Announces the Development of MIDI Watermark Technology to Protect the Copyright of Digital Music Files*, BUS. WIRE, Sept. 3, 1998, Westlaw 9/3/98 BWIRE 10:16:00; See also *MIDEM Report: Nothing But Net*, Webnoize, Feb. 1, 1999, (visited July 13, 1999) <<http://webnoize.com/cgi-bin/n/item.rq?ID-3709>> (topics discussed were Internet music use, piracy, and new technologies for tracking and protecting music use globally); See also Steve Traiman, *NARM Chief Addresses Online Distrib. at Meet.*, BILLBOARD, Dec. 26, 1998, Westlaw 1998 WL 22606767, 12/26/98 Billboard (recording industry committing to standards for technological protection of music on the Internet); *Legislation and Encryption Remain Important Issues for US Societies*, Music Business International, October 1998 (available on LEXIS)(reporting that performance rights societies are pursuing encryption codes to track music performance, but also being criticised for unnecessarily duplicating already existing efforts, and acting separately-BMI left this effort).