ROCKIN' DOWN THE HIGHWAY: FORGING A PATH FOR THE LAWFUL USE OF MP3 DIGITAL MUSIC FILES

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ONLY THE BEGINNING: AN INTRODUCTION

Since the late 1990s there has been an uproar, widely reported in the popular media, over the widespread copying and transmission of pre-recorded music onto high-quality computer files known as MP3 files. With angry representatives of the music industry on one side and defiant copyright infringers on the other, the law that pertains to digital music has been misunderstood and sometimes ignored. The purpose of this Note is to provide some guidance to MP3 users on what is required for lawfully copying and transmitting MP3 music files by applying the current law to digital recordings and analyzing how recent acts of Congress have further sharpened the issues surrounding the use of MP3 files on the Internet. An underlying theme throughout the paper will be the continuing importance of preserving opportunities for the fair use of digital music.

This Note is organized into eight Parts. Part I briefly introduces MP3 files, including how they are made, acquired, and played. The controversy in both the music industry and in the popular media is also described. Part II provides a short primer on the music industry and outlines the relationship between the industry's two principal players, music publishers and record companies.

Part III provides a somewhat longer primer on the complicated law of copyrights for music recordings. Even attorneys who have a basic familiarity with the Copyright Act are frequently confused by the distinctions the Act makes between the rights that accompany musical works and those that accompany sound recordings; this distinction only grows more confusing as the law endeavors to enter the realm of digital audio recordings. This Part begins by attempting to sort out and explain the rights of the two principal players. Next is a simplified description of the complex system of voluntary and compulsory licenses used by the music publishing industry, followed by a brief definition of infringement. Finally, an introduction to the doctrine of fair use is provided.

Part IV demonstrates how common uses of MP3 files, particularly the transmission of MP3 files over the Internet, fit into the framework of copyrights and licensing. More specifically, the licensing provisions of the Digital Performance Rights in Sound Recordings Act of 1995 is used to demonstrate the licensing framework in which non-infringing transmissions of MP3 files can occur. Part V turns to infringing uses of MP3 files and assesses the potential liabilities of various entities in the online world, including the owners of web sites, Internet Service Providers, and home users. The difficulty of using traditional enforcement methods in the online environment is emphasized. Part VI briefly recounts how the music industry is turning to technology to prevent future copyright infringement rather than focusing on finding remedies for past infringements.

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Part VII introduces, somewhat skeptically, the latest salvo in the war to prevent the piracy of digital sound recordings: the Digital Millennium Copyright Act (DMCA), which was enacted in November 1998 and will become effective in October 2000. The basic provisions of the DMCA relevant to MP3 users are described, including sections that shield Internet Service Providers in certain circumstances from liability for infringing web sites, the creation of an additional statutory license for certain transmissions of digital recordings, and how the circumvention of copyright protection devices has been criminalized. The DMCA also purports to accomplish these protections while still protecting traditional notions of fair use.

Part VIII assesses the impact of the DMCA on the fair use of MP3-formatted sound recordings. The dilemma faced by Congress is how to balance a locked-up "pay-per-use" Internet, which was envisioned by some as the likely future of the World Wide Web, with the need to protect fair use. A danger exists that fair use in such a system would require a narrow, regulated, status-based regime that would have to determine who would be "eligible" to make fair use of copyrighted works.

The conclusion contains the hope that during the time before the DMCA goes into effect Congress will formulate a policy able to amply protect the rights of copyright owners while still permitting individuals to make fair use of digital materials without undue regulation or a "locked up" Internet. There may be other ways to compensate copyright owners while preventing a pay-per-view Internet. In fact, the best solution may be for the recording industry to accept the MP3 format and begin to exploit it itself. The appendix contains a table outlining the respective licensing regimes of the two different types of copyright owners in sound recordings.

I. A NEW SENSATION: INTRODUCING MP3 FILES

A powerful new computer file format for digitally storing music has swept through the online community, captured the attention of the popular culture, and in the process, raised the ire of many leaders in the recording industry.[1] This file format is being used to create super-compressed digital copies of pre-recorded works that have the same sound quality as tracks found on compact discs ("CDs"). These files are known as MP3 files.

MP3 stands for MPEG 1 layer 3, which is an abbreviation of "Motion Picture Experts Group Layer 3 Compression Format."[2] It is a file format for digitally storing music in computer files, which as a result are named with the extension

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1. *See, e.g.*, *Blame It on Rio*, NEWSWEEK, Nov. 9, 1998, at 8; David Bowie, *Bowie Wants to Rock Music World with World Wide Web*, INDPLS. STAR, Jan. 24, 1999, at I3; Ron Harris, *Tech Advances May Reform Shopping for Music*, INDPLS. STAR, Dec. 12, 1998, at C1; John Pareles, *With a Click, a New Era of Music Dawns*, N.Y. TIMES, Nov. 15, 1998, at AR1.

2. *See* T. R. Reid, *Record Company Execs Infuriated by the Newest PC Buzzword: 'MP3,'* THE DAILY RECORD (Baltimore), May 19, 1998, at 2B, *available in* 1998 WL 9507824; *MP3 for Beginners* (visited July 28, 1999) <http://www.mp3.com/faq/general.html>.

".mp3." MP3 files have an advantage over the standard WAV[3] music files because the quality of sound they contain is near perfect, and since they are compressed, take up very little space—a ratio of twelve WAV files to one MP3 file.

MP3 files are easy to make. Provided one has a computer with a suitable CD-ROM drive, MP3 files can be made by transforming tracks from an ordinary CD into WAV files (a process called "ripping" that uses CD ripper software, such as WinDac32), and then using MP3 encoder software to compress the WAV files into MP3 files. Alternatively, MP3 files can be encoded directly from a CD with MP3 compressor software.[4] The process can also be reversed. MP3 files can be transferred into WAV files, or even written onto a regular audio CD.[5]

In addition to making MP3 files by ripping tracks from CDs, MP3 files can be acquired directly over the Internet. For instance MP3.com offers a complete catalog of MP3 music, organized both by song titles and artists and by genre and region.[6] Plenty of other MP3 files can be found posted on other web sites, including "renegade" sites with bootlegged music, legitimate sites such as MP3.com and e-music.com and those sponsored by recording artists or record companies. Some music has had its first release in the MP3 file format, including a recent album released online by Public Enemy and an electronic label, Atomic Pop.[7]

To play an MP3 file on a computer requires a simple player that can be downloaded as shareware (such as WinAmp) to uncompress files.[8] MP3s do not require a computer to play them, however. Recently, Diamond Multimedia Systems, Inc. has released a small portable MP3 player, named the Rio.[9] Creative has introduced an even smaller portable player called the Nomad.[10]

In a brief time, MP3 has become a household word and is among the top terms searched on the World Wide Web.[11] The magazine *Entertainment Weekly*

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3. WAV is "[t]he format for storing sound in files developed jointly by Microsoft and IBM. . . . WAV sound files . . . can be played by nearly all Windows applications that support sound." <http://webopedia.internet.com/TERM/W/WAV.html>.

4. *See Making MP3s* (visited July 28, 1999) <http://www.mp3.com/faq/making.html>.

5. *See id.*

6. *See Find Music* (visited July 28, 1999) <http://www.mp3.com/faq/findmusic.html>.

7. *See* Zack Stentz, *Net Effect*, NEWSWEEK, May 14, 1999, at 24. Even a comic strip character—Doonesbury's aging rock star Jimmy Thudpucker—released music on the web in a series of strips during the summer of 1999. *See* Garry Trudeau, *Doonesbury*, INDPLS. STAR, July 5, 1999, at E8.

8. *See MP3 Player Setup* (visited July 28, 1999) <http://www.mp3.com/faq/gettingstarted html>.

9. *See* Harris, *supra* note 1, at C1.

10. *See Join the Happy Wanderers*, NEWSWEEK, July 26, 1999, at 16. An MP3 player is even available for cars from a British company called Empeg at www.empeg.com. <http://www.empeg.com>.

11. "To the surprise of nearly everyone connected to the Web, MP3 has replaced sex as the most frequently searched term on the Internet, according to market researcher Searchterms.com."

now devotes regular coverage of the MP3 world.[12] According to its enthusiasts, the MP3 format has become the dominant form of digital music file found on the Internet:

> MP3 is an open standard, meaning no one organization controls it. On the Internet, open standards win and this is why even without any significant corporate backing, MP3 is already the de facto [music file format]. There are more MP3 listeners, software programs, and hardware devices than any other CD quality audio format in the world. Microsoft has also built MP3 support into Windows 98.[13]

Naturally, multiple legal ramifications accompany this success. The high-quality sound, the compressed format, and the ease and speed with which MP3 files can be reproduced and distributed around the globe via the Internet poses a significant threat to the copyright owners of songs and sound recordings. The Recording Industry Association of America (RIAA) has cracked down on web sites that post MP3 versions of copyrighted songs by getting temporary restraining orders.[14] But RIAA also recognizes that online distribution is the future of the business.[15] Nevertheless, the threat of infringement is growing. Until recently, the danger of computer piracy seemed confined to a relatively small niche of advanced computer users and web surfers. In the near future, however, creating and playing MP3 files will become as easy, and possibly as commonplace as the making of a cassette tape from a CD. An example of this technology reaching the everyday music listener is the recent public release of the Rio, a tiny three-ounce portable digital music player, by Diamond Multimedia Systems, Inc., a California-based electronics company.[16] Resembling a miniature palm-sized Sony Walkman, the Rio is able to store and play up to sixty minutes of digitally-recorded music.[17] Alarmed at the prospect of mass-market copying of music, RIAA asked the U.S. District Court for the Central District of California to enjoin Diamond from releasing the Rio.[18] Although a temporary

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Warren Cohen, *They Want Their MP3*, U.S. NEWS ONLINE, July 26, 1999 (visited Jan. 7, 2000) <http://www.usnews.com/usnews/issue/990726/mp3.htm>.

12. *See, e.g.*, Chris Willman, *A New Format Lets Any Dorm-room Netnik Download and Duplicate Music*, ENTERTAINMENT WKLY., Nov. 27, 1998, at 92 (the magazine's first article on MP3). The magazine now routinely covers MP3 news in its Internet section. *See, e.g.*, several mentions in the Nov. 5, 1999 issue at 89.

13. Michael Robertson, *Top 10 Things Everyone Should Know About MP3* (visited July 28, 1999) <http://www.mp3.com/news/070.html>.

14. *See* John F. Delaney & Adam Lichstein, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 505 PLI/PAT 79, 104 (1998).

15. *See* Jason Chervokas, *New CD-Copying Trend Threatens Record Industry*, CHI. TRIB., Apr. 17, 1998, at 70, *available in* 1998 WL 2846958.

16. *See* Michael S. Mensik & Jeffrey C. Groulx, *From the Lightweight 'Rio' Flows Heavyweight Battle*, NAT'L L.J., Dec. 14, 1998, at B5.

17. *See id.*

18. *See id.*; Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys. Inc., 29 F.

restraining order was granted, at the full hearing for a preliminary injunction, the court denied the relief the recording industry sought on the grounds that the Rio is a neutral recording and playback device, not a device for making downstream copies.[19] This interpretation was upheld by the Ninth Circuit in June 1999.[20] Although RIAA did not yet prevail against the Rio, this case will likely be one skirmish in a long battle between the recording industry and the consumer electronics industry over the future use of MP3 files.

It is important to recognize that the MP3 format is itself legally neutral. For instance, the use of MIDI technology to record music played on electronic instruments directly into a computer file is a method of creating original music as an MP3-formatted recording. Similarly, copyrighted music can be reproduced as an MP3 file by the copyright owner or with the owner's permission, and recordings in the public domain can also be MP3-formatted. This Note is concerned with the reproduction, performance, and distribution of MP3 files created from *copyrighted* works by *non-owners*. Before launching into the place of the MP3 storm in the context of our current copyright law system, broad summaries of both the music industry and of copyright law as it relates to music are needed to provide a framework for understanding the problem.

II. ROCKIN' IN THE FREE WORLD: A PRIMER ON OWNERSHIP IN THE MUSIC INDUSTRY

The ownership of a piece of music and any accompanying lyrics (a "song" for our purposes) can be divided among a variety of personages. The songwriter (the "composer") is generally the original owner of the song.[21] As is frequently the case in today's popular music, the composer is also the artist who will eventually perform or record the song. Thus the owner of a song may simultaneously be its composer, lyricist, and artist. Composers ordinarily enter into a contract with a music publisher ("publisher") in which the composer licenses to the publisher his ownership of the song in exchange for a share of the song's revenues. The publisher's job is to market the song commercially, which includes contracting with record companies to record the song in exchange for royalties, a share of which is then passed on to the composer.[22] Because traditionally song composers were not themselves performing artists, publishers also contracted with selected artists who would perform and record the song. These days, however, the role of the traditional independent publisher has

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Supp.2d 624 (C.D. Calif. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999).

19. *See Recording Indus. Ass'n of Am., Inc.*, 29 F. Supp.2d at 632.

20. *See* Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1080 (9th Cir. 1999).

21. If the song is comprised of music written by one person and lyrics written by someone else (as in the famed collaborations of George and Ira Gershwin or, more recently, Elton John and Bernie Taupin), then ownership in the song may be divided between both authors jointly.

22. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 213-35 (1997) for a good summary of the role of music publishers.

diminished. Many composers are themselves the performers, and now often serve as their own publishers as well. Moreover, record companies now also have publishing divisions. For the sake of simplicity, I shall always refer to a song's owner as the "publisher." Still, it is important to keep in mind that in many contractual arrangements the "publisher" may actually be the composer, who may also be the artist.[23]

Publishers enter into contracts with record companies (the ever-elusive "record deal") for their songs. Although the terms of these contracts can vary widely, the standard agreement requires the record company to produce and manufacture a sound recording ("record") of the publisher's song(s).[24] The recording company gets to keep the bulk of the revenues from sales of the record while passing on a percentage to the publisher in the form of royalties. The artist who performs on the record will also be given either a royalty share or a flat stipend. Thus, when the publisher and artist are the same person, the publisher/artist contracts upon two bases for payment from the record company. The record company must also arrange for the distribution and marketing of the record (including advertising and soliciting radio play), and in some cases support the artist's promotional activities on behalf of the record (such as concerts and tours).[25] While in most agreements the publisher maintains ownership of the songs, the record company has complete ownership of the record itself.[26] Therefore, when discussing a particular recording, at least two sets of rights are generally involved: those of the owner of the song, and those of the owner of the recording of the song.

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23. A song in which the recording artist has an ownership interest is termed a "controlled composition," which entitles the artist to receive publisher's royalties as well as royalties for performing on the record. See *id.* at 221-30 for a detailed account of the complex negotiations that occur to set royalty rates in recording contracts for controlled compositions.

24. These are also known as phonographs. A "record" here is intended to be the same as what the Copyright Act refers to as "sound recordings" in section 101, including MP3 files and all the formats currently being manufactured by record companies, such as CDs/Enhanced CDs/mini discs, audio cassettes, Digital Audio Tapes (DATs), and LPs. *See* 17 U.S.C. § 101 (1994).

25. As this is a very simple example, complicating factors such as music videos (often paid for by the artists themselves) and the selection and compensation of producers (sometimes the artists pay producers out of their own pockets) are not considered.

26. Although a variety of entities may own copyrights to a sound recording, the term "record company" will be used synonymously with the owner of a sound recording. A single song may be recorded several times by the same record company or by different record companies, as in a studio version, a live version, various "re-mixed" versions, "cover" versions by different artists, or a re-mastering of original recordings. It is important to note that a record company has ownership rights only to its *own* recordings of the song, not to *any* recording of the song. This is amplified in the discussion of compulsory licenses in Part III.B of this Note. *See, e.g.*, 17 U.S.C. § 114(b) (Supp. IV 1998).

III. WHERE IT'S AT: THE CURRENT STATE OF COPYRIGHT PROTECTION FOR MUSIC RECORDINGS

A. The Nature of Copyrights

Copyright law today is governed almost entirely by federal statute.[27] According to the Copyright Act of 1976, copyright protection extends for a limited period of time to original works, including songs, as soon as they are expressed in a "tangible medium of expression."[28] For a composer, this means that automatic copyrights are granted to a song once it is reduced to written music notation or when a simple recording of the song is made. The copyrights are the ownership interests that are then licensed to the publisher. For a record company, the record is copyrighted once it has been reduced to a tangible form such as a master tape, and the copyright extends to all reproductions of the master tape that are made by the record company (such as CDs, audio cassettes, and of course MP3 files).[29]

Publishers of songs have, subject to certain exceptions, exclusive rights in the form of a temporary monopoly to do or authorize all reproductions and distributions of songs in the form of phonorecords (or sound recordings), the preparation of all derivative works based on the songs, and every public performance of the songs.[30]

Record companies traditionally only own the rights to reproduce and distribute their sound recordings and to prepare derivative works based on them; no display or performance rights to sound recordings were granted.[31] However, in 1995, a performance right was provided for sound recordings in limited circumstances.[32] A brief examination of each of the relevant rights belonging to publishers and to record companies is useful.

1. The Reproduction Right.—The exclusive right to reproduce one's works includes both partial and complete copying and exists regardless of whether the

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27. For the sake of simplicity, this Note considers only the 1976 Copyright Act and its subsequent amendments; however, songs published before 1978 are still governed by the 1909 Copyright Act until their copyrights expire, at which point the works enter the public domain. State common law may also still protect certain rights not preempted by the 1976 Copyright Act. *See id.* § 301 (1994).

28. *Id.* § 102(a). The duration of copyright protection is defined in *id.* §§ 303-305.

29. See PASSMAN, *supra* note 22, at 206 for further examples of tangible expressions of music.

30. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998). Although as the discussion above details, the reproduction and distribution rights are the main rights that are sold or licensed to the record company in the record deal.

31. *See id.* § 114(a) (Supp. IV 1998).

32. *See* The Digital Performance Right in Sound Recordings Act (1995), codified at 17 U.S.C. §§ 106(6), 114(b), 115(c)(3)(A) (1994 & Supp. IV 1998). See *infra* Part IV for a closer look at the Digital Performance Right in Sound Recordings Act.

copies are made for private or public use.[33] For publishers, the right to reproduce their songs means they have the right to make copies of the tangible forms of their songs, including sheet music to the song or even recordings of the song made by the publisher. If a contract has been made between the publisher and a record company, the publisher has licensed, in exchange for royalties, the reproduction right for that particular recording of its song since whenever the record is reproduced, the song is reproduced too. However, the Copyright Act provides a limit to the otherwise "exclusive" reproduction right of music publishers: once a publisher has allowed a song to be recorded, that song can then be recorded by anyone else.[34] Thus, a record company does not necessarily have to negotiate a contract with a publisher in order for it to be able to make recordings of the publisher's previously recorded songs. While publishers are free to arrange for multiple recordings of their songs, they cannot prevent anyone else from making a recording of their songs. A record company does not need the publisher's permission to record that publisher's music; the company only pays a statutory license fee to the publisher.[35] For other forms of reproduction, like sheet music, the publisher retains full exclusive rights.

Record companies acquire the exclusive right to reproduce copies of their products. This applies to the words and graphics found on the label and other packaging material accompanying the recording, and to the sequence of sounds contained in the recording—usually originating in a master tape—as reproduced in the form of mass-produced CDs, audio cassettes, or even MP3 files posted on the company's web page. "Reproduction" is understood to mean producing a "material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be 'perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'"[36] In the case of sound recordings, only the actual recorded sounds from the sound recording are protected; the right does not protect against reproductions that merely simulate or imitate the sounds in the sound recording.[37]

In the digital age, records are increasingly being transmitted digitally over telephone lines and cable lines, both directly and on the Internet. The expansion of the ways to acquire music adds complexity to the understanding of record reproduction and distribution. The recent Digital Performance Right in Sound Recordings Act (1995) amended section 115 of the Copyright Act to recognize the nascent digital reproduction and distribution of music.[38] This means that when a record of a musical work is created and digitally transmitted to a receiver, for the intended purpose that the receiver making a copy of the record as it is received, then both a reproduction and a distribution have occurred, and a

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33. *See* 17 U.S.C. § 106(1) (1994). This is true by inference from the language of section 106, because the performance and display rights are qualified with the adjective "public."

34. *See id.* § 115(a)(1).

35. See *infra* Part III.B for a discussion of these "compulsory" or "mechanical" licenses.

36. H.R. REP. NO. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

37. *See* 17 U.S.C. § 114(b) (1994 & Supp. IV 1998).

38. *See id.* § 115(c)(3)(A) (Supp. IV 1998).

compulsory fee must be paid. These types of transmissions are called "digital phonorecord deliveries."[39]

2. The Distribution Right.—As in the reproduction right, publishers have the right to distribute copies of their songs to the public, although those rights are also typically sold or licensed to record companies with respect to particular recordings of songs.[40] As noted above, publishers may maintain the right to distribute other forms of their songs such as the sheet music. Similarly, record companies acquire the exclusive right to distribute to the public the records they produce. However, the right to distribute is limited to the first sale of each copy, according to a concept known as the First Sale Doctrine. In other words, a record company has the exclusive right to make the initial sale of each record it manufactures, but once someone has lawfully acquired a copy of a copyrighted work, that person is entitled to re-sell that particular copy to someone else, even at a profit, without the record company's permission.[41]

3. The Right to Prepare Derivative Works.—A derivative work is defined as a work that is based upon a preexisting work (as in a song or a recording of a song) which consists of "editorial revisions, annotations, elaborations, or other modifications [that] as a whole represent [the] original work."[42] That is, an actual part of the original work must be incorporated into the new work for it to be considered a derivative work.[43] The derivative work itself is also copyright protected, just like any other work, as soon as it is reduced to a "tangible medium of expression."[44] Owners of rights to songs or recordings of songs also have copyrights to works derived from those songs or recordings. For instance, a recording that is based on "samples" taken from an earlier recording may be a derivative work of both the original recording and the original song.[45]

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39. *Id.* Note that the distribution may also be a protected public performance of the record, with implications for those with performance rights, namely publishers.

40. *See id.* § 106(3) (1994).

41. *See id.* § 109(a). For a further twist to distribution rights, see *id.* § 109(b)(1)(A). The music and software industries, wielding their considerable political muscle, lobbied for and received an amendment to section 109 that prohibits the lending, rental, or leasing for profit of records or computer software without the permission of those who, in the case of records, own the copyrights in both the sound recording and the underlying music. Hence there are no music or software "Blockbuster" stores.

42. *Id.* § 101.

43. A song based on a story in a novel would not be a derivative work of that novel unless the song's lyrics come from the actual text of the novel, thereby incorporating portions of it into the song. *See id.* § 114(b) (limiting the scope of the right to derivative works in sound recordings to those derivative works that reproduce actual sounds from the original sound recording).

44. *Id.*

45. A recent example of this phenomenon is the royalty settlement arranged between the British rock group The Verve and the Rolling Stones' publisher—The Verve's 1998 hit "Bittersweet Symphony" was based on a sampled guitar riff from the Rolling Stones' song "The Last Time." *See* Paul Sexton, *Bittersweet Synergy*, ADWEEK E. EDITION, Oct. 26, 1998, *available in* 1998 WL 10549389.

4. Performance Rights.—The publisher maintains the exclusive right to perform its songs in public.[46] This encompasses live performances of the song in public, including "covers" of songs by other artists and the broadcasting of songs over the radio.[47] Understandably, it is virtually impossible for an individual publisher to enforce the performance right for every song, given the enormous number of ways that songs can be performed. Everyday examples include the local bands who play throughout the country in bars, restaurants and other venues for live music, and the large variety of radio broadcasts, such as low-frequency college and high school radio broadcasts. Publishers handle this problem by contracting with performance rights societies. These nonprofit organizations serve as agents for securing performance fees for the publishers' material.[48] The two dominant societies are American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Incorporated (BMI). These societies negotiate "blanket licenses" with users such as radio stations and nightclubs.[49] Blanket licenses give the users a license to perform all of the songs owned by all of the publishers who have contracted with the performance right society, in exchange for one fee.[50] The society then pays a share of the fees to the publishers.[51] Thus, for example, radio stations pay fees to performance rights societies for the songs they broadcast; the performance rights societies pay the publishers, who in turn pay the composers.

Performance rights in recordings, until recently, fared differently. For most of the history of copyright law no copyright was available for the public performance of sound recordings.[52] Thus, following the radio example, record companies receive nothing when a song is broadcast on the radio (although they do arguably still benefit from the record sales that accrue from radio play). However, in response to the technological changes brought by digital audio files and Internet radio broadcasting, foreshadowing the eventual digital distribution of music over telephone and cable lines, the 1995 Digital Performance Right in

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46. *See* 17 U.S.C. § 106(4) (1994 & Supp. III 1997).

47. *See id.*

48. *See* PASSMAN, *supra* note 22, at 230-35. Over $800 million has been generated by performance rights societies for their members, constituting the main source of income for music publishers. *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. at 179, 197 (1997).

49. Even though the nightclub owners themselves are not the performers of the songs, they could still be liable for infringing performances under a theory of vicarious infringement. Thus it behooves them to protect themselves through blanket licensing with performance rights societies.

50. The use of these blanket licenses may give the impression that these licenses are somehow compulsory—that is, that the publisher has no choice or control over who may or may not "cover" their songs. While practically speaking this may be true, in fact these licenses are voluntary. Publishers maintain the exclusive right under the Copyright Act to control the public performances of their songs and therefore, theoretically could choose to deny permission to perform its songs in public. For comparison, see *infra* Part III.B. for a discussion of compulsory licenses.

51. *See* PASSMAN, *supra* note 22, at 231-32.

52. *See* 17 U.S.C. § 114(a) (1994).

Sound Recordings Act recognized that certain digital audio transmissions of sound recordings constitute a public performance.[53] The Act further provides a compulsory license for publishers and record companies for these transmissions under certain conditions.[54] Thus in limited circumstances record companies join music publishers in receiving royalties for licensing performance rights.

B. Compulsory Licenses

It would seem that an implication of a copyright being "exclusive" is that the copyright owner can choose to withhold permission for the copying of the work by another, or that the owner is the one who has the privilege of deciding who gets to exercise the copyrights to the work, for example by licensing the use of the copyrighted work for a negotiated fee (known as a "voluntary license"). Nevertheless, for the reproduction and distribution rights to songs, Congress has limited music publishers' "exclusive" reproduction rights to only a right to collect compulsory license fees. A compulsory license is a license that is mandated by statute to permit otherwise infringing uses of a copyrighted work in exchange for the payment by the user of statutorily determined royalties to the copyright owner.[55] They are "compulsory" because the permission by the copyright owner for these uses cannot be denied and the formula for determining the license is set by statute.

Congress, fearing monopolies by music publishers over the recording of songs, enacted compulsory (also known as "mechanical") licenses to permit others to make new recordings of previously-recorded songs.[56] Section 115 of the Copyright Act provides that once a song has been recorded and publicly distributed, the publisher is required to license the song, in exchange for a fee, to anyone else who wants to record and distribute the song.[57] Thus anyone is entitled to make and sell a recording of a previously recorded song, provided the requisite license fee is paid to the song's owner, the publisher.

Just as nonprofit organizations like ASCAP assist publishers in collecting

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53. *See* 17 U.S.C. § 101 (1994 & Supp. III 1997).

54. *See id.* §106(6). The Act requires that the performances be digital (as opposed to analog), that it be audio-only, and that the transmission be a part of a subscription transmission in which the listener has paid the provider to receive the transmission. For the specific requirements for entitlement to compulsory licenses for these transmissions, see *id.* § 114(d).

55. See PASSMAN, *supra* note 22, at 208-12 for a helpful summary of compulsory licenses.

56. For the rationales behind compulsory licensing, see H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 107 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5722; H.R. REP. NO. 83, 90th Cong. Sess., *reprinted in* 11 COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976).

57. *See* 17 U.S.C. § 115. Additional compulsory licenses are paid by the Public Broadcasting System (§ 118), owners of jukeboxes (§ 116), and cable and satellite television companies for the copying and rebroadcasting of programs in areas with weak television reception (§ 119). Certain digital performances and the digital distribution of records are also subject to compulsory licenses under the Digital Performance Right in Sound Recordings Act, as discussed *infra* Part IV. *See also* 17 U.S.C. § 106(6).

license fees for the public *performances* of their songs, organizations are also available to help publishers collect the compulsory license fees for the *recording* and *distribution* of their songs. The Harry Fox Agency is the most prominent organization that is dedicated to collecting license fees from record companies on behalf of publishers.[58]

C. Infringement of Copyrights

The use of a copyrighted work by a non-owner, that conflicts with any of its copyrights and that fails to qualify as an exception (such as fair use), is an infringement of the copyright.[59] Only one right need be infringed to constitute an infringement; conversely, a single act can infringe on multiple rights.[60] The Copyright Act confers a private right of action for copyright owners against infringers.[61]

Infringement can also be a federal crime.[62] At one time the law required that in order to bring criminal charges against an infringer, the infringer had to have made a profit from the infringing activities.[63] Because of piracy on the Internet by individuals who are not interested in benefitting financially from their exploits, this is no longer the case. Now, infringers who reproduce and distribute more than $1000 worth of copies of copyrighted works, even if with no financial gain, will face criminal charges.[64]

Infringement can also be vicarious. A third party can incur liability by enabling infringement by someone else providing the third party had control over the infringement and derived profit from it.[65] As will be discussed below, this

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58. *See* PASSMAN, *supra* note 22, at 211. These compulsory licenses are now widely used as merely a benchmark in negotiations for royalties owed to publishers from sales of records. See also Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 No. 4 ENTERTAINMENT LAW REP., Sept. 1998, at 6-7, for an introduction to the Harry Fox Agency.

59. *See* 17 U.S.C. § 501 (1994) (providing remedies for copyright infringement). Infringement need not be intentional. *See also* Pinkam v. Sara Lee Corp., 983 F.2d 824, 829 (8th Cir. 1992) ("The defendant's intent is simply not relevant: The defendant is liable even for 'innocent' or 'accidental' infringements.").

60. *See* 17 U.S.C. § 501 (1994).

61. *See id.* § 501(b).

62. *See id.* § 506 (1994 & Supp. III 1997).

63. The old version of § 506(a) read as follows: "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." *Id.* § 506(a) (1994).

64. *See id.* §§ 101, 506(a), as amended by the No Electronic Theft Act ("NET") (1997). The NET Act amended § 101 ("financial gain" definition) and § 506(a). The legislation was enacted in response to a Massachusetts case that had been dismissed because the defendant had not benefitted financially from his practice of encouraging users to download unauthorized copies of computer games from his bulletin board service. *See* United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994).

65. *See* Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F. 2d 354 (7th Cir.

potential liability is particularly salient for web site owners and Internet service providers who may find themselves liable for the infringing actions of their users.

Civil remedies for infringement include injunctive relief, the impounding and destruction of unlawful copies, actual damages, or potentially large statutory damages, costs, and attorneys fees.[66] The criminal penalties range from fines to up to five years in prison.[67]

D. A Limit to Copyright Protection: The Fair Use Exception

Despite the broad and overlapping rights accorded to songs and records, as well as the extensive system of compulsory licenses to compensate music publishers, copyrights are not absolute. In fact, exceptions are built in to the granting of the rights. In section 106 of the Copyright Act, included with the enumeration of the rights of copyright owners, fifteen exceptions are referenced—corresponding to sections 107-121.[68] These exceptions include certain reproductions by libraries and archives, the First Sale Doctrine, and certain performances and displays in front of students.[69] Perhaps the most important of these exceptions is the fair use exception.

Section 107 permits some uses of copyrighted works that would otherwise be infringing by recognizing them as "fair uses," thereby providing an affirmative defense to copyright infringement.[70] As the preamble to section 107 states, fair uses generally serve the public interest through such endeavors as scholarship, teaching, criticism, commentary, research, and news reporting.[71]

To help courts determine whether a particular use is fair (and assuming of course that it would be otherwise an infringement), section 107 provides four factors:

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

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1929).

66. *See* 17 U.S.C. §§ 502-505 (1994). An owner's entitlement to some of these remedies depends on whether the work was formally registered with the Copyright Office prior to the infringement. The details concerning registration are important for copyright owners, but are beyond the scope of this Note.

67. *See id.* § 506 (Supp. IV 1998); 18 U.S.C. § 2319 (1994 & Supp. IV 1998).

68. *See* 17 U.S.C. § 106-121 (1994 & Supp. IV 1998). The grounds for reading the exceptions of sections 107-121 as being incorporated into section 106 by reference came recently from the United States Supreme Court in *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998).

69. *See* 17 U.S.C. § 106-121 (1994 & Supp. IV 1998).

70. *See id.* § 107 (1994).

71. *See id.*

copyrighted work.[72]

These factors have not been interpreted as exclusive.[73] What they have in common is a focus on the conduct of the alleged infringer and the nature of the thing used and not the status of the user. Thus, in addition to the scholars, teachers, journalists, and others who serve the public interest, home users have also been allowed the fair use of copyrighted works in certain circumstances. In *Sony Corp. of America v. Universal City Studios, Inc.*,[74] the Supreme Court held that the time-delayed video taping of television programs by home consumers constituted fair use.[75] Similarly, and relevant to the world of music, the Audio Home Recording Act of 1992 finds certain non-commercial copying of digital audio recordings non-infringing.[76]

There is no question of the fundamental importance in the United States of protecting copyrights, particularly since protecting these rights is a specifically enumerated power of Congress in the U.S. Constitution.[77] Some theorists claim that the primary goal of securing copyrights is to reward a private benefit to authors and inventors in the form of a temporary monopoly in their works since authors have a "natural right" to the fruits of their labor; any benefit to society ensuing from these works is secondary and incidental.[78] However, in recognition of the constitutional function of fair use, the U.S. Supreme Court has determined that the founding fathers' intention was to place the benefit to the public that accrues from authorship at the forefront, and the private reward received by the author is secondary.[79] In *Sony*, Justice Stevens, quoting Chief Justice Hughes, noted that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[80] The relation between rewarding authorship and benefitting

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72. *Id.*

73. *See, e.g.*, Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986) (stating that "the doctrine is an equitable rule of reason . . . each case raising the question must be decided on its own facts"), *cert. denied*, 481 U.S. 1059 (1987). The Second Circuit has also analyzed the denial of permission by the copyright owner and the commission of errors by the alleged infringer. *See id.* at 1260-61, 1264.

74. 464 U.S. 417 (1984).

75. *See id.* at 449-50.

76. *See* 17 U.S.C. § 1008 (1994).

77. *See* U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

78. For a discussion of the author-centered approach to the justification of copyrights, see MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 12-17 (1995).

79. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("[T]he primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and the Useful Arts.'").

80. *Sony Corp. of Am.*, 464 U.S. at 429 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

society exists in a type of balance—"the rights of owners to control and exploit their works, and society's demand to use, to learn from, and to build upon the same materials."[81]

Acting consistently with its desire to nurture the development of the "useful arts" for the benefit of the public, Congress codified in section 107 the traditional common law privilege of fair use.[82] The fair use exception is a long-standing recognition of the worthiness of tipping the balance in favor of society's "demand to use" in certain circumstances, permitting certain otherwise infringing uses of copyrighted works. Since fair use is justified by tying it to the very purpose of copyright protection—to benefit the public—it should be viewed as indispensable. Although our emergent digital, online society is making it more and more difficult for copyright owners to maintain control over their works, it should be an imperative of those attempting to adapt the law to new technology that the devices of the information age not preclude opportunities for fair use. As the conflict rages over digital music recordings, particularly those surrounding MP3 files, fair use risks getting lost in the maelstrom.

IV. BALL OF CONFUSION: FITTING MP3 INTO THE COPYRIGHT FRAMEWORK

Now that the nature of copyrights and the fair use exception has been outlined, a framework exists to analyze where the use of MP3 music files fits under the Copyright Act. Users of MP3 files will need to know which uses are infringing, whether permission for their uses (i.e., a voluntary license) is required or whether the mere payment of a compulsory license will suffice, and, perhaps most important, who gets paid the fee—the publisher, the record company, or both? Further, when might an otherwise infringing use constitute fair use?

The key to answering these questions emerges from an analysis of the thorny and controversial problems of whether the manner in which these files are made and used constitutes a performance, a reproduction, a distribution, or perhaps even simultaneous uses. This analysis is particularly necessary for understanding the implications of the transmission of MP3 files over the Internet.

A. MP3 Transmissions as Performance

"Performance" is defined in the Copyright Act. Section 101 states that "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by any means of any device or process . . . in its images in any sequence or to make the sounds accompanying it audible."[83]

"Performance" becomes relevant to the use of MP3 files when they are transmitted over the Internet via web sites that operate like conventional radio stations in a medium known as "webcasting." However, it is important to make a distinction between two types of transmissions. Some digital audio

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81. KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES 3 (1993).

82. *See* 17 U.S.C. § 107 (1994).

83. *Id.* § 101.

transmissions are only transmissions and nothing else. That is, the MP3 files are "broadcast" out to Internet users much like songs are broadcast out into the air by radio. These can be thought of as "pure transmissions." Other transmissions, however, result in an identifiable copy of the song being received by the recipient of the transmission, as in the actual downloading of the song as an MP3 file. These transmissions are called "digital phonorecord deliveries."[84] The former type of transmission is relevant here, for the purposes of figuring out *performance* rights; digital phonorecord deliveries will be discussed in the context of reproduction rights.[85]

When a webcaster broadcasts music in the form of MP3 files (or any other digital format) in a manner analogous to a radio broadcast, the songs are being publicly "performed" by the means or process of the data's streaming from one site to another, in that the transmissions are potentially available to Internet users generally. As discussed above, publishers have under section 106(4) an exclusive right to the public performance of their songs. Thus, like radio broadcasters, webcasters of MP3 files should negotiate a blanket license arrangement with the performance rights societies such as ASCAP and BMI for songs that are transmitted.[86] This is generally true for all types of digital audio transmissions.[87]

A more difficult question is whether the record companies should also get a performance royalty from pure transmissions of digital audio files. Remember, no general right exists in the public performance of sound recordings.[88] However, a performance right to sound recordings has been provided for certain types of digital audio transmissions under the Digital Performance Rights in Sound Recordings Act ("DPRSRA").[89] To qualify as a "digital audio transmission" there must be a transmission that is digital (not analog) and audio only (since audiovisual works are already covered in section 106(4)).[90] A transmission is the communication of a work "by any device or process whereby images or sounds are received beyond the place from which they are sent."[91] Under this definition, webcasting MP3 files would seem to constitute a digital

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84. Kohn, *supra* note 58, at 7. Digital audio transmissions are addressed in 17 U.S.C. § 114 (1994 & Supp. III 1997); digital phonorecord deliveries are addressed in *id.* § 115.

85. However, the performance rights societies (BMI, ASCAP, SESAC) may be taking the controversial position that a digital phonograph delivery is both a reproduction which entitles publishers to a receive a mechanical license AND a performance which entitles them to their negotiable blanket licenses. *See* Kohn, *supra* note 58, at 9. The language of section 115(c)(3)(A) is sufficiently vague to provide support for this position.

86. *See* Kohn, *supra* note 58, at 9. Several web sites have already entered into blanket license agreements with ASCAP and/or BMI. *See* Bloom, *supra* note 48, at 197-98.

87. In fact, Bloom suggests that the mere posting of an MP3 file may still be considered a public performance, even if no one accesses it. *See* Bloom, *supra* note 48, at 195.

88. *See* discussion *supra* Part III.B.4; *see also* Kohn, *supra* note 58, at 5.

89. 17 U.S.C. § 106(6) (1994 & Supp. IV 1998).

90. *See* Kohn, *supra* note 58, at 3.

91. 17 U.S.C. § 101 (1994).

audio transmission. On this basis, RIAA has independently contacted MP3 webcasters requesting that they pay performance license fees to record companies for all of the pure transmissions of MP3 versions of their recordings.[92]

RIAA may be overreaching, however. Identifying the webcasting of MP3 files as a pure transmission does not end the question. The scope of the DPRSRA is limited by certain conditions and exemptions enumerated in section 114.[93] Further, pure transmissions consist of two types: one type of transmission occurs at the request of the recipient as part of an interactive service, and the other does not. An interactive service is defined as a service that "enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[94] The ability merely to request a recording is not enough to make the service interactive; to be interactive the user must also be able to receive the transmission on request.[95] Since users will thus be able to receive music upon request and at will (with a fee paid to the interactive service), these services will likely be used to bypass the purchase of the recording. These are the sort of transmissions that are contemplated by section 106(6), and therefore record companies are entitled to licensing fees from the "performance" via these types of transmissions.[96] The fees for the license are not defined by the statute, but are negotiable between the record company and the webcaster who provides the interactive service. Implicitly as well, the license is itself voluntary—it can be denied by the record company.

Pure transmissions that are not part of an interactive service also come in two types, subscription and non-subscription transmissions.[97] A subscription transmission is defined as one that is "controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission."[98] A common example of a subscription transmission is an online bulletin board service for which users pay a fee to gain access to data posted on the electronic bulletin board. For the same reasons that were articulated for interactive services, subscription transmissions require licenses for both the performance of the song (from the publisher) and for the performance of the sound recording (from the record company) under section 114(d).[99]

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92. *See* Kohn, *supra* note 58, at 3.
93. *See* 17 U.S.C. § 114(d) (Supp. IV 1998).
94. *Id.* § 114(j)(4).
95. *See id.*
96. *See id.* § 114(d)(1) (1994 & 1996 Supp. II).
97. *See* Kohn, *supra* note 58, at 12.
98. 17 U.S.C. § 114(j)(8) (1994 & Supp. III 1997).
99. Section 114 is actually more complicated: for some transmissions in which there is a greater risk of loss of record sales, the statute provides for voluntary licensing, meaning the record company can negotiate the fees or even withhold permission for the license; other types of subscription transmissions only require the familiar compulsory licenses, which the record companies are required to give in exchange for statutory fees. *See id.* § 114(d).

Non-subscription transmissions, which most closely resemble traditional radio broadcasts, should not require a license to the record company. However, it is precisely these sorts of transmissions that the recording industry claims are subject to voluntary licensing.[100] Yet section 114(d) clearly intends to exempt transmissions that are non-interactive and non-subscription, in other words, transmissions that resemble today's radio broadcasts:

> The greater part of Section 114(d) is intended to make it clear that public performances of sound recordings over the radio continue to be free of any requirement of a license from the owners of the sound recordings, even though such performances are by means of digital audio transmissions, provided they are not part of an interactive service, and are made on a non-subscription basis.[101]

In summary, MP3 webcasters must first receive permission from music publishers for all pure digital transmissions of copyrighted songs. Webcasters can contract with performance rights societies to receive blanket licenses. Second, while there remains no general performance right for sound recordings, there is a specific delineated performance right in certain digital audio transmissions for which record companies may choose to grant licenses for negotiated fees. These "performances" are the types of transmissions that are most likely to affect the actual market for the record companies' records, such as interactive transmissions and certain non-interactive subscription transmissions. Other types of non-interactive subscription transmissions may only require compulsory licenses. Non-interactive, non-subscription pure transmissions, however, are currently exempted from any licensing from record companies.

B. Reproduction and Distribution of MP3 Files

Grounds may exist for recognizing a reproduction/distribution mechanical license for publishers from a pure transmission received from an interactive service, even though no actual "copy" was made by the recipient. The ease of access to songs by request from interactive services could conceivably replace the need to purchase an actual physical copy of the record or even to purchase a digital phonorecord delivery of the song. Therefore, some organizations, including the Harry Fox Agency, argue that these transmissions should be subject to the same compulsory mechanical licenses that record companies pay to publishers.[102] Conceptually, it has already been asserted that such a transmission

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100. *See* Kohn, *supra* note 58, at 18.

101. *Id.*

102. *See id.* at 12. This raises a troubling issue of "double-dipping" by music publishers. From a single transmission by an interactive service, a publisher would claim entitlement to fees from the public performance of the transmission, paid to ASCAP or BMI on their behalf (as if it were a radio broadcast) *and* claim entitlement to a mechanical license fee as if it were equivalent to a phonorecord delivery, paid to Harry Fox on their behalf (as if it were a royalty from the sale of a record). There is language in the statute to support such a proposition. Section 115, addressing

can be both a public performance and a reproduction/distribution of a record.[103]

In contrast to the "pure" transmission of digital recordings, some transmissions result in the recipient actually receiving a fixable copy of the record. These transmissions are called digital phonorecord deliveries.[104] A commercial purchase of an MP3 file from a web site is an example of a digital audio transmission that results in a digital phonorecord delivery. For each copy, publishers are entitled to the compulsory mechanical license fees provided in section 115 and usually collected by the Harry Fox Agency on the publishers' behalf, just as in other reproduction/distribution licenses.[105]

Record companies are in the same position they would be in for any other reproduction of their sound recordings—the position to grant voluntary licenses. Web sites that seek to make digital phonorecord deliveries of records therefore must receive the permission of the record company and pay the negotiated fee.

V. HERE, THERE, AND EVERYWHERE: WHO IS LIABLE FOR INFRINGING USES OF MP3 FILES?

Despite, or perhaps due to, the complex framework for voluntary and compulsory licensing for digital recordings, ample opportunities remain for copyright infringement with the use of MP3 files. The infringement can range from an innocent misunderstanding of the law to willful piracy designed to separate publishers and record companies from their profits. A common example of infringement would be fly-by-night web sites posting MP3 files and encouraging visitors to listen to and/or download (and keep or redistribute) copies of the files, either for free or after payment to the web site owner, who neither compensates nor has permission from the record company or the publisher.

There is currently no authority that regulates the Internet to police copyright infringements.[106] Thus, copyright owners are essentially responsible for their own enforcement. Publishers and record companies have conceptually three potential targets when enforcing their copyrights in this scenario: those who

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licenses for phonorecord deliveries, says its provisions do not apply to *exempt* transmissions under section 114(d)(1). 17 U.S.C. § 115(c)(3)(L) (1994 & Supp. III 1997). Because interactive transmissions are *not* exempt, arguably section 115 would apply to them as well. However, the whole purpose in recognizing a performance right in these particular sound recordings is to address the problem of their equivalency to reproduction/distribution.

103. The White Paper from the Working Group on Intellectual Property Rights (September 1995) has stated that transmissions of phonorecords are both a distribution and a public performance. *See* Delaney & Lichstein, *supra* note 14, at 113-14.

104. *See* Kohn, *supra* note 58, at 8.

105. *See* 17 U.S.C. § 115 (1994 & Supp. III 1997). In addition, publishers are asking for performance fees (via ASCAP and BMI) for each digital phonorecord delivery, on the basis that section 115 implies that a digital phonorecord delivery can also be a public performance. *See* Kohn, *supra* note 58, at 9, 10.

106. *See* Bloom, *supra* note 48, at 180.

create the web sites, the consumer who appropriates the copyrighted material, or the Internet Service Providers (ISPs) who provide the server for the web site.

A. Web Site Owners

Renegade web site owners are a logical choice for copyright owners' enforcement activities since they are the direct infringers in the scenario described above. Unfortunately, the ubiquity of web sites maintained by ordinary people, the ease with which MP3 files can be made, posted, copied, and played, and the online community's growing appreciation for the quality and efficiency of the MP3 file format all make catching, not to mention preventing, infringement very unlikely. Moreover, even when an infringing site is found, it is very difficult to pin down the people responsible for the site. Recent lawsuits directly addressing MP3 postings have been stymied when the web sites simply disappear after restraining orders have been issued.[107] These web sites may reappear in a different location. If damages are sought in addition to an injunction, another consideration is the fact that most of the smaller web sites (who are likely to be the most flagrant infringers) are likely to be judgement-proof.

B. Home Users

Ordinarily, the exposure of home users to liability for copying MP3 files stems from the principle that a fixed copy of a file is made when it is downloaded from an online source to a disk drive. In fact, a fixed copy is made even when a file is uploaded from a disk drive into random access memory (RAM), even though its existence is only temporary.[108]

However, the Audio Home Recording Act of 1992, codified as Chapter 10 of the Copyright Act,[109] may protect some consumers. Section 1008 permits noncommercial consumer copying of both digital and analog material.[110] Therefore "ripping" songs from one's own CDs for the purpose of creating MP3 files for playing on a computer (or on the new portable Rio) should be considered the equivalent of making an audio cassette of a CD for one's own home use. Although the impetus for enacting the Audio Home Recording Act was the development of digital audio tape (DAT) technology that allowed people to create CD-quality cassette tapes of their CDs in their homes, there are reasons to believe that section 1008 may also be applicable to MP3 files received from Internet transmissions.[111] The act defines a "digital audio copied recording" as

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107. *See, e.g.*, A&M Records, Inc. v. Internet Site Known as Fresh Kutz, No. 97-CV-1099 H (S.D. Cal. filed June 10, 1997). It and a similar case are discussed in Delaney & Lichstein, *supra* note 14, at 104.

108. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

109. 17 U.S.C. §§ 1001-10 (1994); other provisions of the Audio Home Recording Act protect copyright owners. These other provisions are discussed in the Conclusion of this Note.

110. *See id.* § 1008.

111. See the discussion in Bloom, *supra* note 48, at 192.

"a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording *or indirectly from a transmission*."[112] Thus, the reasonable "recording" of a song from a webcast in the privacy of the home for one's own use may be recognized as the equivalent of making a digital cassette recording of a CD.

C. Internet Service Providers

ISPs presented at one time an enticing target for copyright owners who were seeking to redress infringements on the Internet, on theories of either direct, contributory, or vicarious infringement. Compared to the number of individual web sites, there are relatively few ISPs. The ISAs are easier to target and are more likely to have sufficient resources to make lawsuits worthwhile. However, the recent Digital Millennium Copyright Act has clarified and limited the liability of ISPs.[113]

ISPs may be liable for direct infringement to the extent that they are directly responsible for infringing sites, for instance by providing subscription services in which MP3 files are transmitted upon request or by hosting bulletin boards in which MP3 files are posted and directly downloaded by visitors. As the discussion of sections 114 and 115 above suggested, the operators of subscription services are publicly performing the music and thus are subject to paying compulsory licenses to the copyright holders of sound recordings and voluntary licenses to music publishers. Conversely, operators of bulletin boards that allow visitors to download fixed copies of records are subject to paying voluntary licenses for the sound recordings and compulsory licenses for the songs.[114]

ISPs are therefore required to obtain licenses only to the extent that they provide subscription services or are directly responsible for infringing sites and not because they provide space on the Internet to others' infringing subscription services or web sites.[115]

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112. 17 U.S.C. § 1001(1) (1994) (emphasis added).

113. *See* H.R. 2281, 105th Cong., 144 CONG. REC. H7074-03 (1998). The Digital Millennium Copyright Act is discussed *infra* Part VII.

114. The stage was also set for ISPs to be responsible for the payment of mechanical licenses—that is, the compulsory license that is paid to music publishers for the reproduction of their songs—before the passage of the 1995 Performance Right in Sound Recordings Act. In 1993, Frank Music Corporation, acting on behalf of the Harry Fox Agency, filed suit against CompuServe in the U.S. District Court in Manhattan. Frank Music claimed that CompuServe's bulletin board service infringed their copyrights by providing a database of copyrighted musical works for its subscribers to download. The case reached a settlement before trial, in which in addition to paying damages, CompuServe agreed to a license agreement to provide future mechanical fees to Harry Fox. *See* Frank Music Corp. v. CompuServe Inc., No. 93 Civ. 8153 (S.D.N.Y. filed Nov. 29, 1993); Bloom, *supra* note 48, at 192-94; *see also* Delaney & Lichstein, *supra* note 14, at 97-98 (providing more details of the *Frank Music* case).

115. To be liable for direct infringement, it would have to be shown that the ISP actually engaged in infringing activity; "[m]erely encouraging or facilitating [infringing] activities is not

An ISP, however, may be liable for contributory infringement, if, having knowledge of an infringing site, it "'induces, causes or materially contributes to the infringing conduct' of the primary infringer."[116] Even if contributory infringement is not found, the ISP may still be liable for vicarious infringement, where the ISP "(1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement."[117] ISPs should not be allowed to ignore and allow infringement by those who make use of their space, particularly when they also profit from the infringement. However, for practical and policy reasons, ISPs should also not be pressured to censor or otherwise exert prior restraint on the activities of their members.

VI. PARANOID ANDROIDS: THE INDUSTRY'S USE OF TECHNOLOGY TO PROTECT COPYRIGHTS

Because enforcement of copyrights on the Internet is so difficult, the music industry has turned to technological innovations with the aim of preventing infringement from occurring. Although these innovations may be successful, there are also troubling implications for the use of works in the public domain or for the fair use of copyrighted works, particularly if these innovations become mandatory.

Technology exists that can be included in the MP3 file compression process that would make the format more secure from the moment an MP3 file is made. Encryption technology that prevents the saving of MP3 files received from digital broadcasts, watermarks that embed the computer source of an MP3 file in the file itself, and the restriction of the playback of an MP3 file to one computer are all possible and in use in MP3 applications today.[118]

Congress has taken an interest in mandating the use of security technology. The Audio Home Recording Act of 1992 implements a Serial Copyright Management System for DAT devices.[119] DATs are audio cassette tapes that make CD-quality digital recordings. As a response to the danger of the mass production of CD-quality DATs copied from CDs, a Serial Copyright Management System is incorporated into DAT devices so that the device can make a copy of a CD onto a DAT, but it will not be able to make a copy from the

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proscribed by the statute." Playboy Enter., Inc. v. Russ Hardenburgh, 982 F. Supp. 503, 512 (N.D. Ohio 1997). Indeed, ISPs have been resistant to entering into blanket license agreements because they are not the ones directly purveying the audio files found on web sites or on bulletin board services operated by private individuals on the Internet. *See* Bloom, *supra* note 48, at 198. For another example of a subscription bulletin board service, and not the ISP, being found liable for infringement, see *Sega Enterprises, Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996).

116. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (citations omitted).

117. *Id.* Much of the holding of this case was codified in the safe harbor provisions of the Digital Millennium Copyright Act, discussed *infra* Part VII.

118. *See* Robertson, *supra* note 13.

119. *See* 17 U.S.C. § 1002 (1994).

copy. Thus while unlimited copies may be made from the original recording, copying a copy is always prevented.[120] Furthermore, Microsoft has also recently released MS Audio 4.0 which prevents the copying of music files that have been downloaded from the Internet.[121]

These are potentially very effective methods to prevent rampant piracy of digital sound recordings. They may, however, prove to be too effective if they also prevent justifiable copying, such as when the copyright owner seeks to make copies, the copying is fair use, or when the recording eventually enters the public domain. The problem with using mandatory technological measures to address infringement is that it impacts all devices indiscriminately. Copy protection devices on MP3 players and recorders are legally neutral entities that function whether the material is copyrighted or in the public domain, or whether permission to use a copyrighted work has been granted or not.

Nevertheless, Congress, apparently undaunted by such concerns, recently enacted new legislation that expands the Serial Copyright Management System requirements to cover other kinds of digital recordings, including MP3 files.

VII. THE SHAPE OF THINGS TO COME: THE DIGITAL MILLENNIUM COPYRIGHT ACT

In October 2000, the recently passed Digital Millennium Copyright Act[122] (DMCA) will go into effect, and the copyright framework depicted above will change. Passed in November of 1998, the DMCA (H.R. 2281) creates Chapter 12 of the Copyright Act (titled "Copyright Protection Systems and Copyright Management Information") and implements both the World Intellectual Property Organization (WIPO) Copyright Treaty and the Performances and Phonograms Treaty.[123] The DMCA came as a response to the "ease with which flawless copies of copyrighted materials can both be made and transmitted in the digital network environment,"[124] of which MP3 formatting is the obvious example. It has been interpreted as creating a "paradigm shift" in copyright law that reflects Congress's change in focus "from 'giving minimal protection to works to providing maximum revenue flow to American companies.'"[125]

The DMCA contains three major components pertinent to MP3 files: a clarification of the responsibilities of ISPs in the transmission of digital recordings, new statutory licensing for digital audio transmissions, and most significantly, a sharp focus on the protection of encryption and other security technologies that protect the copyrights of digital materials.

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120. *See* PASSMAN, *supra* note 22, at 245-46.

121. *See* Maureen S. Dorney, *New High-tech Solutions for High-tech Infringement*, NAT'L L.J., May 17, 1999, at B5.

122. Pub. L. 105-304, 112 Stat. 2860 (1998).

123. *See* 144 CONG. REC. H7074-03 (Aug. 4, 1998).

124. *Id.* at H7096 (statement of Rep. Boucher).

125. Wendy Leibowitz, *The Sound of One Computer Copy*, THE NAT'L L.J., Nov. 2, 1998, at A16.

A. Safe Harbor for ISPs

The DMCA protects ISPs with the Online Copyright Infringement Liability Limitation Act.[126] One of its purposes is to reduce the incentives on ISPs to censor their users.[127] The Act provides that an ISP will not be liable for infringement when it transmits, routes, or provides connections for material on its systems, when the following conditions are met: the transmission was initiated by someone other than the ISP; the transmission is an automatic process (meaning the ISP did not select the material to be transmitted); the ISP does not select the recipient of the transmission; no copy of the material is made that can be accessed by anyone other than an intended recipient; and no modification of the material occurs during transmission.[128] Thus, ISPs need not aggressively monitor webcasts for infringing transmissions of MP3 files.

An ISP is also not liable for the temporary storage of infringing material that occurs during the material's transmission, when the material was made available by someone other than the ISP, the material is transmitted without modification by the person who made it available to another person who requested it, and when the storage is only what is necessary for the transmission.[129] Similarly, an ISP would also not be liable for storing infringing materials at the direction of users, if the ISP does not know of the existence of the infringing materials (no actual knowledge, no awareness of the apparent signs of the materials, or if the ISP did have knowledge it took quick action to remove the materials), and the ISP does not receive any economic benefits attributable to the infringing materials (under the rationale that if no money is earned the ISP has no control over the material).[130] Thus an ISP will not be found liable for renegade web sites in its file servers that post MP3 files containing pirated material if the ISP is unaware of their presence.

B. Additional Requirements for Licensing Digital Audio Transmissions

The status of record companies' public performance rights in non-interactive, non-subscription digital audio transmissions will change with the implementation of the DMCA. The language in section 114(d)(1) that exempted non-subscription transmissions from any licensing requirement has been changed to exempt only non-subscription "broadcast" transmissions.[131] Accordingly, "eligible non-subscription transmissions" that are not "broadcast" transmissions are now subject to compulsory licensing from record companies, just as subscription transmissions are in section 114(d)(2).[132] New eligibility

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126. 17 U.S.C. § 512 (found in 144 CONG. REC. H7079).
127. *See* 144 CONG. REC. H7092 (statement of Rep. Frank).
128. *See* 17 U.S.C. § 512(a) (found in 144 CONG. REC. H7079).
129. *See* 17 U.S.C.A. § 512(b) (West Supp. 1999).
130. *See id.* § 512(c).
131. *See id.*§ 114(d)(1)(A).
132. *Id.* § 114(d)(2).

requirements have been added, including a requirement that transmitting entities take "reasonable steps to ensure, to the extent within its control, that the transmission recipient cannot make a phonorecord in a digital format of the transmission . . . ."[133] What would constitute such "reasonable steps" is not clear. Other eligibility provisions limit the duration of the transmissions.[134] Transmissions that are neither exempt nor meet the eligibility requirements for statutory licenses must be permitted by the record company, however, the transmitter will have to pay the record company the agreed-upon license fee.

C. The Advent of an Encrypted Web?

The DMCA takes copyright law in a new direction by focusing not only on the protected works themselves, but also on general types of security devices that protect digital works from infringement. The DMCA adds criminal penalties for the use of devices that circumvent copyright protection measures to the already existing criminal penalties for the infringement itself; specifically, section 1201 will prohibit the circumvention of any technological measures that control access to copyrighted sound recordings.[135] For instance, if Diamond Multimedia Systems negotiates with the RIAA to install a type of serial management system on its tiny MP3 player, the Rio, that would prevent or limit the ability to make copies of MP3 files; any interference with such a system would be a federal crime under the DMCA.

The prohibition will not apply to libraries, educational institutions, and other types of nonprofit institutions whose use of copyrighted works has traditionally been considered non-infringing fair use, if they are likely to be "adversely affected" by the prohibition in their abilities to make non-infringing use of copyrighted works.[136] Moreover, the implementation of the DMCA will not affect any other existing copyrights or defenses to copyright infringement, including the fair use privilege.[137] The DMCA encourages the private sector to develop technological measures that will enable nonprofit educational institutions and libraries to continue to create and lend copies of sound recordings while at the same time protecting copyright owners from infringements of their rights.[138] As a further showing of good faith, in the interim two-year period between the date the DMCA was passed and the date the Act goes into effect, the Secretary of Commerce must assess the impact of the new criminal provision on fair use and on the market for the copyrighted works.[139]

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133. 144 CONG. REC. H7084 (daily ed. Aug. 4, 1998) (statement of Rep. Cable).
134. *See* 17 U.S.C.A. § 114(d)(2)(iii) (West Supp. 1999).
135. *See id.* § 1201(a)(1)(A).
136. *See id.* § 1201(a)(1)(B).
137. *See id.* § 1201(c).
138. *See* 144 CONG. REC. at H7078-7079.
139. *See* 17 U.S.C.A. § 1201(a)(1)(C) (West Supp. 1999).

VIII. TRAMPLED UNDER FOOT: THE FAIR USE OF SOUND RECORDINGS AND THE DMCA

The comprehensive and complex statutory licensing system that exists to compensate record companies and music publishers can be avoided if the reproduction or public performance of the songs and sound recordings is considered fair use. Uses of MP3 files made from copyrighted recordings that, in a general sense, are a benefit to society in a manner consistent with section 107 of the Copyright Act do not require the payment of mechanical or voluntary licenses and there may be permissible uses of MP3 recordings that will be recognized after analyzing the language of the preamble and the four factors in the fair use statute.[140] After all, the Supreme Court, interpreting the Constitution, said that, "the primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and the useful Arts.'"[141] Unfortunately, the DMCA may have the unintended consequence of stifling this Constitutional mandate by encouraging the technological locking up of access to digital materials and providing mandatory payments for most types of digital transmissions. These measures are contributing to the commercialization and over-regulation of the Internet, which could narrow its early promise as a haven for the relatively unregulated flow of information worldwide.

The time before the October 2000 effective date for the DMCA, will determine the impact of Congress's desire to justly balance the "technical measures" that will be designed to protect copyrighted material against the fair use needs of non-profit libraries, educational institutions, and other organizations whose function is the dissemination of information. A risk exists that Congress will overreach and unnecessarily constrain lawful uses of copyrighted material or even access to uncopyrighted material.

Particularly problematic is the fact that technological security devices, like Serial Management Systems or password protections, do not distinguish between infringing and non-infringing uses. For instance, if MP3 recorders were

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140. *See* 17 U.S.C. § 107 (1994). For instance, a nonprofit fan-supported web site that reviews the music of a particular genre or recording artist may contain samples from recent records. Commentary and criticism are recognized public purposes in the preamble to section 107. Although the artistic nature of the work may weigh against fair use (the law may be more likely to favor the fair use of factual works), the noncommercial use of a limited amount of a sound recording favors fair use. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works if fiction or fantasy."); Dr. Seuss Enters. L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997) ("Creative works are 'closer to the core of intended copyright protection' than informational and functional works . . ."). *But see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (which found 2 Live Crew's parody of "Oh, Pretty Woman" to be fair use). The impact on the market for the copyrighted work may even be favorable if visitors to the site are motivated to purchase the entire album.

141. Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

equipped with devices that limited the number of copies that could be made, or that permitted copies to be made only from a CD, musicians who are now eschewing the traditional recording industry and distributing their music themselves on the Internet may find it difficult to exercise their own reproduction, distribution, and public performance rights. Furthermore, not every digital recording is necessarily copyrighted. Federal government-produced materials, for instance, automatically belong in the public domain.[142] Thus under the scenario described above, it would be difficult to disseminate a digital recording of the President's State of the Union Address, even though the recording of that work would almost certainly be in the public domain. Even copyrighted digital recordings will eventually enter the public domain as their term of protection expires.

Lastly, there is a growing movement on behalf of the "copyleft" ideal—the complete antithesis of copyright—which advocates placing and keeping new works—such as software—permanently in the public domain.[143] Copyleft refers to a quasi-license agreement that certain works on the Internet are intended by their authors to be freely copied, distributed, performed, derived from, or displayed by anyone free of charge, no permission necessary, with only the requirement that the work and any subsequent copies or derivative works continue to be "copylefted," so that no-one ever "owns" any rights to it.[144] This could be the ethos behind many small-scale recording artists who are currently using MP3 files to freely distribute their music on the Internet, desiring only that they reach an audience.

Thus a key issue for Congress is whether the security devices contemplated by the DMCA will be amenable to accessing works in the public domain, regardless of how they enter the public domain, or, whether due to the recording industry's desire to prevent infringement, non-infringing uses will be prevented too. The Supreme Court has looked disfavorably on efforts to combat infringement that interfere with the public's ability to make non-infringing uses of materials. In denying Universal the ban it sought on Betamax video recorders, Justice Stevens commented that "an injunction which seeks to deprive the public of the very tool or article of commerce capable of some non-infringing use would be an extremely harsh remedy, as well as unprecedented in copyright law."[145]

There are also significant dangers of overreaching with respect to the fair use of copyrighted recordings. The DMCA encourages a vision of the future digital environment in which copyrighted materials are promulgated with technological

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142. *See* 17 U.S.C. § 105 (1994).

143. Not surprisingly, much discussion of "copyleft" is found on the Internet. Derived from the "open source" movement in software development and distribution, "copyleft" is introduced in *Open Source Software: A (New?) Development Methodology* (visited Nov. 17, 1998) <http://www.opensource.org/halloween1.html>.

144. This "copyleft" licensing scheme is summarized in Wired Magazine's web site: <http://www.wired.com/wired/5.08/linux.html>.

145. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444 (1984) (citation omitted).

"locks" that limit their ability to be accessed, reproduced, and circulated without first being assessed a charge, creating in effect a "pay-per-view" Web.[146] Congress, expressing its best intentions, made it clear that the circumvention provision does not apply to nonprofit libraries, archives, educational institutions, and charitable and other tax-exempt institutions.[147] The DMCA also stipulated that it would have no effect on the law of fair use.[148] Thus certain copyrighted works may also be required to contain some sort of "key" that will facilitate the circumvention of their protection devices.

Unfortunately, this may result in a very narrow, regulated future for fair use. While it may be conceivable to authorize such "keys" to libraries, educational institutions, and other organizations who routinely make fair use of copyrighted works, the fair use privilege does not belong solely to these institutions.[149] As the language of the statute and the development of the case law demonstrates, the finding of fair use is based on *conduct*—that is, the "use" of the copyrighted work and the effects of that use, and *not* on the *status* of the user, that is, on whether the user is a librarian, a professor, scholar, or journalist.[150] Anyone may be in the position to make a fair use of a copyrighted work for a variety of legitimate purposes, including scholarship, commentary, parody, and even the more mundane temporary copying for later use or the copying for home use of lawfully acquired materials.[151] If the general public is going to be able to continue to make fair use of copyrighted works in Congress's locked-down vision of the Internet, then either everyone is going to be provided a "key" (thereby defeating the purpose of the locks in the first place), or "keys" will have to be distributed in advance for each purported fair use in an oppressive regulatory framework. Unfortunately, savvy members of the online community may respond to excessive regulation by attempting to hack around protection devices, exposing themselves not only to the risk of a suit for infringement but for criminal prosecution as well.[152]

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146. *See A Pay-Per-View World*, WASH. POST, Aug. 4, 1998, at A14 (discussed in 144 CONG. REC. H7094) (statement of Rep. Bliley).

147. *See* 17 U.S.C.A. § 1201(d)(1) (West Supp. 1999).

148. *See id.* § 1201(c)(i).

149. Not to mention that the very idea of "authorizing" fair use by such institutions before the fact brings to mind troubling images of fair use being narrowly defined.

150. The diversity of those found to have made permissible fair use of copyrighted materials includes the rap group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman." *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

151. Certain home copying was recognized as legitimate fair use in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); home taping for noncommercial use is permitted in the Audio Home Recording Act. *See* 17 U.S.C. § 1002 (1994).

152. Congress, made sensitive to the importance of fair use from lobbying by libraries, universities, and other interested parties, convened a Conference on Fair Use (CONFU) to address these concerns and to begin to develop guidelines for librarians. Ultimately the CONFU could not reach a consensus on the guidelines, reporting that it was "premature to draft guidelines for digital transmissions of digital documents." 144 CONG. REC. at H7096-7097 (statement of Rep. Boucher).

To summarize, the Digital Millennium Copyright Act encourages music publishers and record companies to control the access and circulation of their works, which could cut off not only infringing uses but also lawful fair use.[153] This, along with the imposition of a more expansive regime of statutory licenses, will make the Internet increasingly a pay-per-use marketplace rather than an open forum for the free flow and exchange of information. However, by providing for fair use, as supported by language in the Constitution, the Copyright Act has recognized that there are circumstances in which the goals enumerated in the Constitution, that are served by copyrights (that is, promoting progress), are better served by allowing the use of copyrighted works, rather than prohibiting such use.[154] Congress should spend the time before the DMCA goes into effect carefully reconsidering the impact of the Act on fair use as understood in its broadest (and truest) sense and taking action to ameliorate the potential damage to the best aspects of the Internet. Until then, the music industry will be developing technological measures to contain MP3 music piracy.

STRANGE BREW: A CONCLUSION

MP3 files are at the forefront of a revolution in the reproduction and distribution of popular music:

> [r]ecord companies and music publishers are confronted with a consuming public that can literally manufacture its own albums based on material that is beamed into households from remote sources, and can enjoy these albums with a sound quality that is equal to, or higher than,

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Besides the fact that the CONFU was given a narrow charge that did not consider fair use outside an educational and institutional context, any guidelines on fair use would be of limited use to libraries and other academics anyway. Whether an otherwise infringing use of copyrighted materials constitutes lawful fair use is an extremely fact-sensitive determination that ultimately is best settled by looking at each situation on a case-by-case basis, rather than applying a static set of guidelines. Analysis on a case by case basis ensures both a more accurate assessment of fair use that is tailored to each use and the ability to adapt each assessment to the current state of the law. This approach was recently adopted by Indiana University in its policy on the use of copyrighted works for education research, on the advice of Professor Kenneth Crews, Director of the IUPUI Copyright Management Center. This approach is supported by the United States Supreme Court. Emphasizing the hard-to-pin-down nature of fair use, Justice Stevens in *Sony* remarked that fair use is not conducive to rigid rules or guidelines, but instead must be decided on a case by case basis. *See Sony*, 464 U.S. at 449.

153. The usefulness of the protection devices once the copyright term has expired is yet another question.

154. *See* Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992); *see also* Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 (Ga. 1984), *cert. denied*, 471 U.S. 1004, *on remand*, 618 F. Supp. 469 (1985) ("The 'fair use' doctrine allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon creators of original works.").

that which is currently the standard.[155]

Nevertheless, users of MP3 files on the Internet must conscientiously attempt to comply with the Copyright Act. Some form of a license payment is necessary for most transmissions of digital recordings not made by the copyright owner or on the owner's behalf. Voluntary licenses for public performances can be negotiated with ASCAP and the other performance rights societies; mechanical licenses for reproductions and distributions can be paid to the Harry Fox Agency; and RIAA can negotiate on behalf of record companies. On the other hand, MP3 users should always remain open to exploring the scope of fair use of sound recordings for bona fide purposes that benefit the public.

For its part, the recording industry can develop sensitive methods to obtain all the royalties to which copyright owners are entitled, while at the same time not foreclosing non-infringing uses of MP3 technology. For example, ASCAP has recently begun using a software program called "EZ-Seeker" that searches out web sites that distribute music and automatically sends out a license form.[156] The RIAA is in the process of developing an industry-wide technical standard that would give the music industry control over the online distribution of music.[157] Entitled the Secure Digital Music Initiative (SDMI), the initiative is a coalition of representatives from the record industry and several technology companies organized to develop a system to limit music distribution, provide license and royalty payments, and secure online music from unauthorized copying.[158] While such a system may satisfy the RIAA, it is unclear, and probably doubtful, whether these companies have been concerned with fair use or access to works either in the public domain or not eligible for copyright protection.

Yet a workable model already exists: the Audio Home Recording Act compensates copyright owners for unlawful copying using DATs by providing them with royalty payments derived from sales of DAT recording devices and paid to them by manufacturers and importers of DAT equipment.[159] Similarly, a small surcharge could be added to the price of MP3 playback devices like the Rio, or even to blank CDs and floppy disks, with a share going to publishers and record companies. Although this would compensate copyright owners by raising the prices paid by consumers, the impact of the increase would be minimized since it would spread the cost across the public. Meanwhile, the MP3 files themselves would remain accessible for fair use, public domain use, and authorized copying.

Finally, the music industry may have to accept the revolution in music

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155. Howard Siegel, *Digital Distribution of Music: How Current Trends Affect Industry*, 5 MULTIMEDIA & WEB STRATEGIST, Oct. 1998 at 1, 3.

156. *See Multimedia Developments of Note*, 4 MULTIMEDIA & WEB STRATEGIST, Sept. 1998, at 1, 2.

157. *See* Dorney, *supra* note 121, at B7.

158. *See id.*

159. *See* PASSMAN, *supra* note 22, at 245-46.

distribution that MP3 files represent. Rather than trying to contain the proliferation of digital music on the information highway, record companies and music publishers should embrace and develop the new markets made possible by MP3 technology. For instance, the industry could learn from the way obscure, far-flung musicians have made names for themselves in localized online communities by distributing their recordings on MP3 sites. As one web site enthuses, "[a]rtists and labels can employ MP3 technology in the best way to suit their individual needs. Give away one song to sell a CD, distribute low quality versions of songs, sell individual songs for digital delivery, prepend an audio commercial to songs, there are limitless possibilities for artists to explore."[160] Record companies could reproduce and distribute music in a similar fashion, reaching widely diverse audiences:

> [D]igital distribution presents utopian possibilities. Freed of the costs of manufacturing and distributing CDs, digitally distributed music could be cheaper for consumers and more profitable for musicians. Music could be geared to more specialized audiences that may be small but widely scattered; a fan in Helsinki could download tunes from a band in Jakarta.[161]

As an example, Hollywood Records, a well-known handler of high-profile movie soundtracks, has adopted MP3 as its standard.[162]

In the meantime, Congress will struggle to develop a policy that both facilitates the technological protection of copyrights and preserves the law's traditional deference for fair use. Whatever policy emerges may be short lived. Congress, the music industry, and the online community are likely to discover well before the October 1, 2000 implementation of the DMCA that the MP3 format has become obsolete and a new format is looming on the horizon. To prevent perennial crises as new technologies emerge, Congress and the courts must learn to reconcile both the law to technology and the rights of copyright owners to the progressive goals found in the Constitution.

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160. Robertson, *supra* note 13.

161. Jon Pareles, *Internet Incites Revolution in Music Industry*, J. REC., July 17, 1998, *available in* 1998 WL 11955428.

162. *See Internet: Hollywood Records Embraces "Pirate" Standard MP3*, NETWORK WK., July 27, 1998, *available in* 1998 WL 16054305.

APPENDIX: TABLE OF LICENCES

Rights	Record Companies (sound recordings)	Music Publishers (songs)
Reproduction	Voluntary License (including digital phonorecord deliveries)	Compulsory License for reproductions in the form of recordings (mechanical licenses) (Harry Fox Agency) (including digital phonorecord deliveries)
Distribution	Voluntary License (including digital phonorecord deliveries)	Compulsory License for distributions of recordings (Harry Fox Agency)
Public Performance	No license required/No performance right (Except for certain digital transmissions*)	Voluntary License (ASCAP/BMI/SESAC)
Derivative Works	Voluntary License	Voluntary License

Voluntary License: the copyright owner may voluntarily grant the license. The effect is that the use cannot be made without the owner's permission and without paying a negotiated license fee.

Compulsory License: the copyright owner must grant a license. The effect is that the use may be made without the owner's permission as long as the license fee set by statute is paid.

Digital Phonorecord Delivery: a recording that is transmitted digitally with the intent that the receiver will be acquiring a fixed copy of the recording.

*criteria for **Digital Audio Performances**:
There must be a transmission, that is digital, and audio only (not audio-visual).
If the transmission is interactive: Voluntary License.
If the transmission is non-interactive:
and through a subscription: Voluntary (Compulsory if "compliant").
and not through a subscription:
and is a "broadcast": no performance right, so no license is required.
and is an "eligible" non-broadcast: Compulsory License (DMCA).