

Note

**THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995:
WILL THE COMPULSORY LICENSING REQUIREMENTS REALLY
SATISFY THE CLEARINGHOUSE FUNCTION FOR COPYRIGHT OWNERS?**

Shannon Hale

I. Introduction

“If nature has made one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who light his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breath, move and have our physical being, incapable of confinement or exclusive appropriation.”¹

Now, as ideas and information enter cyberspace, valuable intellectual property can be downloaded to millions of Internet users with the click of a mouse.² People’s thoughts, ideas and works can now be distributed to millions of people across the world in only seconds. People can buy airline tickets, tickets to sporting events and even go shopping without ever leaving their homes.³

¹ John Perry Barlow, *The Economy of Ideas: A framework for Patents and Copyrights in the Digital Age*, *Wired* 2.03, March 1994. (Statement by Thomas Jefferson).

² Robert G. Gibbons and Lisa M. Ferri, *The Legal War Against Cyberspace*, August 5, 1999, N.Y.L.J.1, at 1. With one click of a mouse, valuable intellectual property such as copyrighted words can be disseminated to millions of Internet users.

³ Interview with Melissa Lande, web-site developer, (October 23, 1999). She sells websites to retail stores, attorneys, country clubs, etc., so consumers can shop for services and tangible items from their own personal computers.

This sounds like a dream come true, however, the speed and ease of transmitted information over the Internet has created more problems for copyright owners than they could have ever imagined.⁴ Consumers can now get almost any copyrighted material without ever paying the copyright holder for their work. This is great for buyers, however, it has had a major impact on copyrightable works and their dissemination.

These copyright problems have been a reality in the music industry for decades. Digital technology over the Internet has become the hottest new arena for bands to deliver their music to the public.⁵ This existing technology has allowed consumers all over the world to have access to any piece of music within seconds. This sounds wonderful, but it has become recording artists' worst nightmare. "Popular groups and individual artists, such as Pearl Jam, Van Halen, Madonna and Eric Clapton found their songs circulating over the Internet months before their official release date."⁶

Every day, thousands of songs are played across the world. No one knows what makes a song a hit.⁷ But, sound recording artists have put forth their time, effort and thoughts into developing these sounds. If this country fails to protect copyright owners, it could hamper artists' ideas and originality.⁸

⁴ Charles Lozow and Neil Rosini, *Music, the Internet and New Media: Special Problems*, 505 PLI PAT 637, 637 (1997). "There are many new audio technologies available on the Internet which have developed rapidly since the early days. First, downloading has allowed users to download sound files which contain digital reproductions of music. Streaming is another method that has allowed users to deliver from any server any music without downloading or storing music. The MPEG 3 has also made digitized songs small enough to be transferred quickly and conveniently. With this new technology a user can download a near CD-quality song in stereo in under thirty minutes."

⁵ Marie D'Amico, *Playing Music on the Internet*, NETCRAWLER MAGAZINE, (visited March 1997) <<http://lawcrawler.findlaw.com/MAD/FAQMUSIC.HTML>>.

⁶ *RIAA Releases Yearend Anti-Piracy Statistics: Internet Piracy Campaign in Full Swing: CD Piracy Remains a Threat*, (visited February 10, 2000) <<http://www.riaa.com/antipir/releases/apyr97.html>>. In 1997, the use of the Internet allowed many unauthorized pre-released copies of CD's to be released.

⁷ Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 Loy. L. Rev. 879 (1992).

⁸ *Mazer v. Stein*, 347 U.S. 201, 74 S.Ct. 460, 460-71 (1954). This case was an action for copyright infringement regarding female and male dancing figures. The holding was that statuettes of these male and female dancers were considered "works of art" and therefore copyrightable. Therefore, the authors of such statuettes could prevent others

There are two separately copyrightable parts in a song, the musical work and the sound recording.⁹ The first part is the “music work” which includes the tune and lyrics. Copyright owners of the “musical work” were granted protection by the Copyright Act of 1976 for both the composition and any public performance of the work.¹⁰ The second entity, the “sound recording,” is the actual final product, reduced to a compact disc or tape.¹¹ Copyright holders in “sound recordings” are entitled to protection of the actual piece, but the Copyright Act specifically denies these owners the right to receive royalties for any public performance.¹²

“It is a current reality that the delivery of stereo quality music on-line could become a common means of retail distribution.”¹³ “The recording industry has very valid concerns that digital audio services will render their product close to valueless.”¹⁴ In response to this threat, Congress passed the Digital Performance Right in Sound Recordings Act of 1995. This Act grants certain digital transmission services a compulsory license to perform digital sound recordings publicly.¹⁵ Soon

from using copies of these dancers for other pieces of art. This relates to the music industry as well because if artists aren’t given copyright protection for their work, it could hamper the arts in the long run.

⁹ Jay L. Bergman, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right For the Digital Transmissions of Sound Recordings*, 24 SW. U.L. Rev. 351, 353 (1995). The “musical work” and the sound recording are two distinct parts of the song and each part deserves its own protection.

¹⁰ *Id.*

¹¹ *Id.*

¹² Marie D’Amico, *Playing Music on the Internet*, NETCRAWLER MAGAZINE, (visited March 1997) <<http://lawcrawler.findlaw.com/MAD?FAQMUSICHTML>>. The Copyright Act provided rights for performance, but failed to give any sound recording artists any protection.

¹³ Megan M. Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 T.M. COOLEY L. REV. 97, 98 (1997). On-line music can be a benefit because it provides a much easier way for consumers to listen to their favorite songs and gives them a broader selection to choose from. However, on-line music has also caused many problems for music artist. This is due to the pirating activities over the Web.

¹⁴ *Id.*

¹⁵ Derek M. Kroeger, *Applicability of the Digital Performance Right in Sound Recordings Act of 1995*, 6 UCLA ENT. L. REV. 73, 79 (1998). The bill’s purpose would create a significant addition to the rights of copyright owners. It would create a system to ensure that recording artists and companies are compensated for public performances of their works. The bill requires that most subscription users of sound recordings obtain a statutory license in order to

thereafter in 1998, Congress revised its compulsory license requirements to represent the interests of copyright holders.¹⁶

II. Case History

The origin of copyright protection lies in the Constitution.¹⁷ The first significant case in the music industry was *White-Smith Music Publishing Co. v. Apollo Co.*¹⁸ The court held that even though a specific sound (piano rolls) was “fixed in a tangible medium of expression,” it could not be considered a part of the original musical composition.¹⁹ Sound recordings were regarded as simply the reproduction of sound and were not protected under copyright law.²⁰

For years the court dealt with the issue of whether sound recordings should be afforded protection under the copyright laws. Then in 1955, in *Capital Records v. Mercury Records*, the Court determined that it is not a right of the public domain to copy a performance for sale or reproduction at a public sale.²¹ This case established a right to reproduce and distribute prerecorded music.²²

broadcast these creative works, and guarantees a license to subscription users so long as they pay royalties to copyright owners.

¹⁶ Robert G. Gibbons and Lisa M. Ferri, *The Legal War Against Cyberspace*, N.Y.L.J. 1, 1 (1999). The Digital Millennium Copyright Act expands the rights of sound recording copyright holders and grants them a compulsory license under certain circumstances, for the use of sound recordings on the Internet, thereby expanding the public performance right in sound recordings to cover digital audio transmissions in Webcasts.

¹⁷ U.S. CONST. Art. I, § 8, cl. 8.

¹⁸ Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 120 Seton Hall Legis.J. 624, 631 (1996) citing *White-Smith Music Publishing Company v. Apollo Co.*, 209 U.S. 1, 17, S.Ct. 319 (1908).. This case made the first legal distinction between musical compositions and sound recordings.

¹⁹ *Id.* This case was a copyright action involving the use of perforated rolls when used in piano players. These rolls allowed manufacturers to enjoy the use of musical compositions for which they paid nothing for. The court determined that sound was fixed in the recording and could not be reproduced from a reading of the original musical composition. Therefore, these perforated rolls did not infringe any copyright rights.

²⁰ *Id.* at 18.

²¹ *Id.* citing *Capital Records v. Mercury Records Corporation*, 221 F.2d 657, 663 (2nd Circuit. 1955). In this case, the plaintiff had exclusive rights from a German company to reproduce and distribute phonograph records in the United States. This action was brought against the defendant, who had acquired rights to reproduce and sell in Czechoslovakia. D was not entitled to reproduce and distribute records in the United States because the P had the

In 1971, a copyright interest in sound recordings was established in *Shaab v. Kleindienst*.²³ The court determined that the purpose of this protection was to provide a limited right in sound recordings to protect against duplication and “piracy”.²⁴ The court determined that compulsory licensing was unnecessary because it would hinder the incentive for recording companies to invest in new performers and arrangements.²⁵

“The recent burst in technology has brought an array of new copyright questions before the courts.”²⁶ For example, in *Playboy v. Frena*, the court held that the plaintiff had the exclusive right to exploit its own copyright pictures.²⁷ The case, *Sega Enterprises v. Maphia*, gave further protection to copyright holders.²⁸ The court held that unauthorized copying for the purpose of distribution constitutes

exclusive right to do so. The court ruled that the defendant could not claim any right to sell the records outside of Czechoslovakia, and plaintiff had an exclusive right to reproduce and sell the records in the United States.

²² *Id* at 657.

²³ *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972). The plaintiff alleged that sound recordings did not qualify under the copyright clause and a lack of a compulsory license provision for sound recordings was discrimination. The court said that the compulsory licensing requirement was reasonable against the plaintiff. The holding also stated that compulsory licensing requirements of copyrighted musical compositions promotes the arts because it permits numerous artistic interpretations of a single written composition.

²⁴ *Id* at 589. This case stated that the copyright clause of the Constitution must be interpreted broadly to provide protection for the method of fixing creative works in tangible form.

²⁵ Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 Seton Hall Legis. J. 624, 635. This would occur because any licensee would be able to copy, record and enjoy a profit without investing any time or money, or putting any real effort into the artistic process.

²⁶ *Id*.

²⁷ *Id* citing *Playboy v. Frena*, 839 F. Supp. 1552, 1556 (1993). Playboy magazine brought suit against an operator of subscription computer billboard alleging that their use of copyrighted photographs was prohibited copyright infringement. The court held that “public distribution of copyrighted work is a right reserved to the copyright owner and a usurpation of that right constitutes infringement. Therefore, the unauthorized use of such photographs was prohibited by copyright infringement.

²⁸ *Id* citing *Sega Enterprises v. Maphia*, 1997 WL 337558, at *1 (N.D. Cal. June 9, 1997). Sega is claiming copyright infringement against the defendant. The court granted judgment for the plaintiff and permanently enjoined the defendant from engaging in acts which imitated or reproduced Sega’s video games.

an infringement.²⁹ These decisions were an attempt by the court to protect copyright holders and their individual creations.

The first major case involving the uploading and downloading of music on a network was *Frank Music v. CompuServe*.³⁰ The music publishers and CompuServe negotiated a “workable licensing solution that let all the parties claim victory.”³¹ Then in an effort to secure more protection of its creative works, the record industry has lobbied Congress for many years requesting a performance right in sound recordings.³²

One of the latest cases involving the availability of music over the Internet in digital form is *Recording Industry of America v. Diamond Multimedia Systems, Inc.*³³ In this case, an industry association representing record companies and artists brought a suit against Diamond Multimedia seeking an injunction to prevent the release of the Rio MP300 player.³⁴ The RIAA claimed that this device would facilitate the “distribution of pirated music over the Internet.”³⁵ The availability of this piece of technology enables music fans to download any piece of music they desire, without paying the copyright holders a dime.³⁶ This injunction was denied and now the MP3 device is considered one of the biggest technological threats to copyright holders and the music industry.³⁷ Courts in the future need

²⁹ *Id.*

³⁰ *On-line Copyright Dispute Settled, Music & Copyright*, Nov. 22, 1995, available in 1995 WL 132824941.

³¹ *What's the Score? Frank Music Settlement Leaves Law Unsettled But Confirms Online Licensing Possibilities: A voorhees Report*, Nov. 17, 1995. CompuServe settled and in return was a promise for licensing requirements before downloading.

³² *Id.*

³³ *Recording Industry of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (1999).

³⁴ *Id at 1075.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id at 1081.*

to give more deference to the music industry and the rights of sound recording artists or pirating activities will continue to increase over the Internet.

III. Legislative History

A. Copyright Law Leading Up to the Act

The need for legislation to protect intellectual property rights was initially recognized by the drafters of the Constitution.³⁸ The framers recognized that the progress of the arts is so essential to the culture of this country that these artists deserve exclusive protection. The United States Constitution provides Congress with the power to enact laws which “will 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.”³⁹ This clause of the Constitution granted authors, inventors, musicians, etc., complete control over the sale and distribution of their works. The purpose behind this was to facilitate support and encouragement of individual creativity and developments.⁴⁰ As a result of developments in copyright laws, artists are both rewarded for their tangible creations and provided with incentives for continuing their art.

The first efforts to amend the copyright laws to provide protection for sound recordings began in the 1920’s.⁴¹ However, it was not until 1971 that sound recordings were first granted Federal copyright protection by an amendment to the Copyright Act.⁴² The “Sound Recordings Act of 1971” was an effort

³⁸ U.S. CONST. Art. I, §8, cl. 8.

³⁹ *Id.*

⁴⁰ *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 104 S.Ct. 774, 774 (U.S. 1984). Copyright holders of television programs brought this action against manufacturers of home videotape recorders alleging copyright infringement. Manufacturers of these recorders put forth evidence to show that a substantial number of copyright holders who licensed their works for broadcast on free television would not object to having their broadcasts time shifted. Therefore, the manufacturers sale of recorders to the public was not considered copyright infringement.

⁴¹ H.R. REP. NO. 104-274, at 13 (1995).

⁴² *Id.*

to combat phonorecord piracy.⁴³ It gave copyright owners exclusive rights to reproduce and distribute his or her own work.⁴⁴ But, the 1971 Act did not extend to sound recordings the same exclusive rights granted to owners of other copyright matters.⁴⁵ Thus, sound recordings were granted the exclusive rights of reproduction, but were not granted a performance right.⁴⁶

Many problems resulted from the 1971 Act and so Congress instituted an Act in 1976 to deal with these issues.⁴⁷ The drafters of the 1976 Act proposed granting sound recordings performance royalties.⁴⁸ However, the Act expressly denied the exclusive performance right in sound recordings due to strong opposition by the broadcasters.⁴⁹

The advancement of new technology and digital technology pushed the need for performance rights for copyright owners of sound recordings.⁵⁰ Finally, on November 1, 1995 President Clinton signed the Digital Performance Sound Recordings Act and sound recording copyright owners were given performance rights.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id at 14.*

⁴⁷ S. REP. NO. 104-128, at 13 (1995). The 1971 Act had a narrow purpose, which was to prevent against phonorecord piracy. So, to fulfill that purpose Congress couldn't grant sound recording copyright owners the full "bundle" of rights usually afforded a copyright.

⁴⁸ *Id.* "Congress heard extensive testimony favoring a performance right for sound recordings."

⁴⁹ *Id.*

⁵⁰ *Id.*

IV. Purpose of the Act

There was “a historic lack of a performance right for sound recordings under copyright law which had been the source of controversy for decades.”⁵¹ It was the digital era that pushed Congress to enact legislation to address all the issues raised by these new technologies.⁵² With the increase in digital transmissions of sound recordings and musical work, Congress saw the need to protect the livelihoods of the recording artists, songwriters, record companies, and music publishers.⁵³

It was in 1995 that the Senate and House passed the Digital Performance Act of 1995 which provided performance rights for sound recordings. Congress’s intent was to design an Act that would adequately protect the interests of the parties affected by the legislation, while striking a necessary balance between economic incentives for recording artists and public access to recordings.⁵⁴

V. The Music Industry Players

To better understand the controversy at issue, we must discuss the players involved. First, there are record companies. “These companies enter into contracts with recording artists for the financing, promotion, and distribution of sound and video recordings featuring artists’ performances.”⁵⁵ Next,

⁵¹ *Id at 15.*

⁵² *Id at 15-16.* Compact discs have become the dominant medium for the distribution of copyrighted sound recordings. Many new technologies have emerged since the record player and tape-cassette player.

⁵³ *Id at 16.* Congress recognized that current copyright law was inadequate to address all the issues raised by new technologies and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and other who depend upon revenues from traditional record sales they revised the copyright laws.

⁵⁴ *Id.*

⁵⁵ Bob Kohn. *A Primer on the Law of Webcasting and Digital Music Delivery*, (visited October 13, 1999) <<http://www.kohnmusic.com/articles/newsprimer.html>>. In return, the artist is paid a royalty which is some percentage of the revenues earned by the record company.

there are the music publishers who enter into agreements with the songwriters for the exploitation of their songs.⁵⁶

There are also “performance rights societies” involved in the music industry which are organizations developed to represent the publishers and songwriters with respect to the performances of songs.⁵⁷ These organizations act as the middlemen and help to collect revenue owed to publishers and songwriters for public performances.⁵⁸ The performance rights societies only deal with the songs, not the recordings of songs.⁵⁹

The Harry Fox Agency is another protective organization that issues licenses to record companies for the production of songs.⁶⁰ However, this agency does not license performance of songs.⁶¹ Lastly, there is the RIAA, the Recording Industry Association of America. This trade association was set up to balance the interests of both the music industry as a whole and record companies.⁶²

⁵⁶ *Id.* “These music publishers license the song for use in recordings made and distributed for use in sheet music, songbooks, for live and recorded performances of songs in nightclubs, restaurants, hotels and similar establishments and on radio, television and other kinds of broadcasts.”

⁵⁷ *Id.* The three major “performance rights societies” are ASCAP, BMI, and SESAC. “Music publishers and songwriters use these organizations to collect royalties from nightclubs, restaurants, hotels, and other venues, and radio and television stations for the public performance of all the songs they represent in their respective catalogs. They may charge the venues an annual flat fee and charge the radio and television stations a percentage of advertising revenues in exchange for a “blanket license” to use all of the songs the particular performance rights society controls or represents. After collecting the money on a blanket basis, each organization takes surveys of what songs are played during the year; they then allocate the total collected revenue among the particular songs performed and pay each respective music songwriter and corresponding music publisher an amount representing what the song earned in performance royalties during the year.”

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The Harry Fox Agency retains a small percentage for its services, and then pays these fees to music publishers.

⁶¹ *Id.*

⁶² *Id.* The RIAA is headquartered in Washington D.C. and the association operates as an aggressive anti-piracy unit which conducts extensive consumer and industry research, and combats any piracy attacks.

VI. The Digital Performance Act of 1995

The Digital Performance Act of 1995 ensures that digital audio transmissions will be heavily watched in light of the spark of new technologies and the new electronic era. The Act “provides copyright holders of sound recordings with the ability to distribute products through digital transmissions without hampering any new technologies.⁶³ It gives recording artists the right to reap the royalties for their public performance license from the copyright owner of the song to be broadcasted over the Internet.⁶⁴ The Act demands that certain services obtain a public performance license from the copyright owner of the song to be broadcasted over the Internet.⁶⁵ Lastly, it allows copyright owners in sound recordings to negotiate their licensing contracts and provides for arbitration if needed.⁶⁶

A. Exempt Transmissions

Some music may be broadcasted over the Internet without a license and without incurring any liability for copyright infringement.⁶⁷ These are called exempt transmissions and include: (I) non-interactive services (one which does not allow an Internet user to choose or request a song) and (ii) non-subscription services (no consideration is received to hear the song).⁶⁸ If a transmission falls under the exempt category, no license is needed and any song may be played over the Internet without liability.⁶⁹

⁶³ Ronald H. Gertz, *Rules and Regulations: Library of Congress, Copyright Office 37 CFR Part 260 [Docket No. 96-5 Carp DSTR] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 545 PLI/PAT 921, 921 (1999).

⁶⁴ *U.S. digital performance rights bill: a summary of the main points*, Music and Copyright, March 30, 1995, at 2.

⁶⁵ Ronald H. Gertz, *Rules and Regulations: Library of Congress, Copyright Office 37 CFR Part 260 [Docket No. 96-5 Carp DSTR] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 545 PLI/PAT 921 (1999).

⁶⁶ *U.S. digital performance rights bill: a summary of the main points*, Music and Copyright, March 30, 1995, at 2.

⁶⁷ H. REP. NO. 104-274, at 21 (1995).

⁶⁸ Marie D’Amico, *Playing Music on the Internet*, NETCRAWLER MAGAZINE, (visited March 1997) <<http://lawcrawler.findlaw.com/MAD/FAQMUSIC.HTML>>.

⁶⁹ *Id* at 2.

B. Subscription Transmissions which qualify for statutory licensing

The Act devises statutory licensing for certain subscription transmission. “Subscription transmissions are defined as transmissions for which subscribers are charged a fee.”⁷⁰ Compulsory licenses are needed if the Internet-based music transmission: (i) is non-interactive, (ii) does not exceed the sound recording complement (in a three-hour period of three selections from a single record album, with no more than two selections transmitted consecutively, or of four selections by a single featured artist or from a single boxed set, with no more than three transmitted consecutively); (iii) does not publish a program schedule or prior announcement which specifies the songs to be transmitted; (iv) does not automatically switch from one program channel to another; and (v) is accompanied by information encoded in the song, such as song title and recording artist.⁷¹ Subscription transmissions which do not qualify for the compulsory license must negotiate licensing royalty fees directly with the sound recording copyright owners.⁷²

C. Interactive Transmissions which are subject to voluntary licensing

Interactive transmissions are subject to limitations. In order to avoid copyright liability, a subscription transmission which is not exempt from the Act and doesn’t satisfy all the conditions for a statutory license, must be licensed through a voluntary grant.⁷³ These types of licenses must be negotiated separately with each sound recording copyright owner.⁷⁴ Section 114(f) the Act sets out the procedure for negotiations between the copyright owners and the transmission services.⁷⁵ The Librarian

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id at 3.*

⁷⁵ *Id at 43.*

of Congress sets the guidelines for the procedures by which subscription services keep records of their recordings and by which notification of this use is given to copyright owners.⁷⁶ If no voluntary agreement is reached, the Librarian of Congress must convene a copyright arbitration royalty panel to determine a schedule of rates and terms.⁷⁷

D. Licensing

The Act requires that “once a song has been recorded, the copyright holder must grant a statutory license to any digital music or on-line subscription service that wants to transmit a sound recording for a fee or a compulsory mechanical license.”⁷⁸ There are no limits placed on non-exclusive licensing for interactive transmissions, however, the Act does limit the duration of exclusive licenses a right owner may grant. The Act places limits on the licenses granted to services in response to concerns that sound recording copyright owners might become “gatekeepers” to the performance rights of music works.⁷⁹

Owners to right to 1,000 or fewer sound recordings cannot grant more than a twelve month exclusive license to an interactive service.⁸⁰ When this twelve month period ends, the copyright owner may not issue an exclusive renewal to that same licensee until at least thirteen months have expired.⁸¹ Owners can get around the Act’s limits by granting exclusive licenses to more than five interactive services for at least ten percent of the total number of the owners’ licensed sound recordings, but no less than fifty sound recordings.⁸² Congress’s purpose behind this limitation was to encourage the wide dissemination

⁷⁶ *Id.*

⁷⁷ *Id at 2.*

⁷⁸ Megan M. Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 T.M. COOLEY L. REV. 97, 109 (1997).

⁷⁹ S. REP. 104-128, at 27 (1995).

⁸⁰ *Id.*

⁸¹ *Id at 27.*

⁸² *Id.*

of works.⁸³ An interactive service can obtain these licenses from the copyright owners themselves or from a “performance rights society” (such as American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., or SESAC, Inc.⁸⁴

E. Royalties

All transmission royalty rates are to be set by individual or collective negotiation (except from antitrust laws by Act), or arbitration, if necessary.⁸⁵ Any copyright owners may negotiate and agree upon a royalty rate and the statutory licensing terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners.⁸⁶ This exemption only applies to the negotiation of compulsory licenses for digital transmissions.⁸⁷ The royalty for these types of licenses may be set by a copyright arbitration panel convened by the Librarian of Congress if the parties do not reach an agreement.⁸⁸ The arbitration royalty panel can step in if the copyright owners attempt to impose supracompetitive rates.⁸⁹

Without the Digital Performance Rights Sound Recording Act of 1995, a compact disc could be transmitted from a subscription service to a consumer, who could store it, reproduce it again and then redistribute it. The compact disc would become widely distributed, and the record company that created the CD would never be paid for it. By displacing the traditional market for “hard copies” sold in record stores, this could seriously threaten the incentive of artists to create sound recordings. As the Internet

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Charles Lozow, *Music, The Internet and the New Media: Special Problems*, 505 PLI/PAT 637, 649 (1998).

⁸⁶ *Id.* at 657.

⁸⁷ *Id.*

⁸⁸ *Id.* at 658.

⁸⁹ *Id.*

has become more prevalent, it has pushed Congress to provide more safeguards for copyright owners in the music industry.

VII. How Piracy Occurs Over Internet

“The advent of the digital age presents unprecedented challenges to aims of copyright protection.”⁹⁰ In the past decade the Internet is one of the main providers for sound recordings.⁹¹ The problem is that sound recordings are being transmitted for free through cyberspace. Because of the Internet’s widespread global access it has made it virtually impossible to detect each dissemination of music and therefore recordings artists are not getting the royalties they deserve.⁹²

Musical works are transmitted over the Internet in several ways. First, downloading allows users to sample compact-disc quality music and “download” the music they like on their hard drives.⁹³ Essentially, even before a sound recording is released in the music stores, anyone who has Internet access can receive their own copy of the musical piece before authorized copies are released to the public.⁹⁴ If users have this type of easy access, why would they want to get in their cars and drive to the music store to purchase the music?

⁹⁰ Carolyn Andrepont, *Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, DEPAUL-LCA J. ART&ENT. L 397, 405 (1999).

⁹¹ *Id at 401.*

⁹² *Id.*

⁹³ Derek M. Kroeger, *Applicability of the Digital Performance Right in Sound Recordings Act of 1995*, UCLA ENT. L. REV. 73, 98 (1998). Capitol Records sells singles over the Internet in this way. Users download a free copy of the company’s software on their computers. “Then, a device is created to ensure that users cannot purchase the songs and distribute copies themselves.” However, even with these devices, pirates are able to download these works without permission. The process takes a bit of time and uses a lot of space on the computer. However, with new emerging technologies it will only be a matter of time before a pirate will be able to do this in seconds with virtually no space being used.

⁹⁴ Martin Schwimmer and Craig S. Mende, *Madonna and Audio Streaming and Copyright Infringement of the Internet*, N.Y.L.J. 1, 1 (1998). Unauthorized, advance copies of one of Madonna’s new albums were downloaded over the Internet days before authorized copies were placed in the record stores.

Audio streaming is another way users can listen to their favorite composers over the Internet without paying the recording artist. This technology “allows the user to receive music without downloading or having to store the music”.⁹⁵ The technology bringing recording artists the most trouble is the MPEG3. ⁹⁶This format became popular in 1997 and this technology has allowed users to download, and even upload hundreds of near CD-quality sound recordings, without permission from the copyright holder. Any person with a standard modem can download a song in stereo using an MP3 in under thirty minutes.⁹⁷ The RIAA has been actively hunting down sites with illegal MP3 files, however, it is hard to detect because of the Internet’s global marketplace.

The Recording Industry Association of America has expanded its staff to include a team of specialists to monitor the Internet. However, with the advent of a rapidly increasing digital age and rapid developments in technology (such as the Mp3), many more efforts need to be made to stop pirating activity over the Internet.

VIII. How Pirates are Caught

Throughout the Internet revolution, many technologies have been invented which help to pinpoint piracy over the Internet. Organizations such as Cyrveillance, Ewatch and Cybercheck are just few of the organizations which have been set up to track all trademark and copyright infringement over

⁹⁵ Charles Lozow and Neil Rosini, *Music, The Internet and New Media: Special Problems*, 505 PLI/PAT 637 (1998). This idea was first marketed in 1995 by Progressive Network’s Real Audio. It was originally only AM quality music, but by 1996, Real Audio was delivering stereo quality music at 28.8 bytes or higher.

⁹⁶ Larry Lange, *Copyright Fight Rocks Net*, *Electric Engineering Times* 16 (February 25, 1998). The MP3 has created an open door for students and hackers to illegally reproduce and distribute various types of music for free with the click of a mouse. There will be huge losses for both copyright holders and the music industry itself if this type of activity is not stopped.

⁹⁷ *Id.*

the Internet.⁹⁸ Because the Internet covers such a vast and international market, it makes it hard to detect all piracy.⁹⁹

Digital watermarking and fingerprinting are used to detect unauthorized copying over the Internet.¹⁰⁰ Watermarking technology has allowed copyright holders to get source information such as the title of the music being transmitted, the artist and the record company. Broadcast Music Inc. and Music Bot are two specialized monitoring systems, which are used to search for music piracy.¹⁰¹ After finding an on-line infringer, copyright holders may issue a license to the pirate or they may pursue the infringers by issuing cease-and-desist letters and infringement actions.¹⁰² The Recording Industry Association of America has also punished infringers by shutting down Web sites which post unlicensed copyrighted music. However, the problem is that these sites cannot be stopped indefinitely. It is very easy to conceal these sites and have them up one day and down the next day. Because of the complex system of the Internet, Congress has continued to deliberate over what changes should be made to better balance the industry and the copyright holder's rights.

IX. The Clearinghouse Function

⁹⁸ Robert G. Gibbons and Lisa M. Ferri, *The Legal War Against Cyberspace Privacy*, N.Y.L.J., Volume 222, Number 26 (August 5, 1999).

⁹⁹ *Id.* These surveillance companies use search tools, called spiders or robots, to crawl through chat groups, bulletin boards, Web sites and bit streams looking for any sense of infringement.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

⁹⁹ *Broadcast Music v. Columbia System*, 441 U.S. 1, 99 S.Ct. 1551, 1551 (1979). A television network in this case brought an antitrust lawsuit against licensing agencies for composers, writers and publishers and their members, alleging that the system of blanket licenses was illegal price fixing. Justice White held that the blanket license fee was set by licensing agencies rather than by competition among copyright holders. However, he concluded that this licensing scheme was an acceptable mechanism and the issuing of blanket licensing did not constitute price fixing.

Copyright laws have vested in an owner of a copyrighted musical composition the exclusive right to perform the work publicly for a profit.¹⁰³ However, “because a musical composition is heard by many consumers at the same time without the creator’s knowledge, there is no way for copyright holder to demand reimbursement, except through copyright laws.”¹⁰⁴ Many composers have organized “clearinghouses” for copyright owners and users to solve the problems associated with the licensing and fees involved in the music industry.¹⁰⁵ These organizations include BMI, ASCAP and SESAC. They were organized because those who performed copyrighted music for profit were so numerous that it became impossible for many copyright holders to negotiate with and license users and to detect unauthorized uses.¹⁰⁶ Now, with the use of the Internet, this function has been more increasingly difficult.

This middleman is an obvious necessity, because it avoids the impossibility of millions of negotiations.¹⁰⁷ It has also eliminated an intricate schedule of fees and an expensive reporting system for copyright holders. These organizations also make sure to monitor the Internet to make sure users do not use more than they pay for. Licensing by these agencies also allows the licensee immediate use of covered compositions without the delay of prior individual negotiations, and great flexibility in its music choices.

Their main function is to represent songwriter and recording artists to make sure their copyrighted works are protected in the marketplace.¹⁰⁸ These agencies issue licenses and distribute

¹⁰⁴ *Id.*

¹⁰⁵ *Id at 1555.*

¹⁰⁶ *Id at 1557.*

¹⁰⁷ *Id at 1563.*

¹⁰⁸ *Id at 1560. .*

royalties to copyright holders.¹⁰⁹ These organizations give licensees the right to perform an and all of the compositions owned by the recording artists for a stated term.¹¹⁰ In return, they issue fees to the licensees which is usually a percentage of the total revenue or a flat dollar amount.

IX. The Digital Millennium Copyright Act

Since the Digital Performance Act of 1995, the U.S. Senate has also approved the Digital Millennium Copyright Act of 1998.¹¹¹ This Act was an attempt by Congress to update the copyright laws concerning the Internet.¹¹² The Act provides protection for Internet Service Providers who fear their works, now available on the Internet, will be misappropriated.¹¹³ The Digital Millennium Copyright Act also outlawed the manufacture of devices or software to circumvent protective security measures on the Internet.¹¹⁴

This Act sets forth guidelines by which sound-recording holders will be able to collect a new licensing fee.¹¹⁵ Any copyright owner of a sound recording and any organization entitled to a license may negotiate and agree upon royalty rates and license terms. The fees paid to the copyright owners or their agents will be negotiated. Those who do not qualify for the new license will be required to negotiate with the labels individually, a prospect most Webcasters would rather avoid for the time

¹⁰⁹ *Id at 1560.*

¹¹⁰ *Id at 1551.*

¹¹¹ H.R. REP. 106-84, at2 (1999).

¹¹² *Id.*

¹¹³ 15 No. 19 Andrews Computer & Online Industry Litigation Reporter (July 7, 1998). The limitations and exemptions will be applicable only to service providers who adopt a policy of terminating infringing subscribers, designate an agent to receive notifications of infringement claims, and make contact information available to the Copyright Office.

¹¹⁴ Carolyn Andrepont, *Digital Millenium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT.L .397, 399 (1999). This legislation presents practical extensions of copyright materials in the growing global infrastructure.

¹¹⁵ H.R. REP. No. 106-84, at 2 (1999).

being.¹¹⁶ In the absence of negotiated license agreements, the Librarian of Congress shall, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which will be binding on all copyright owners of sound recordings.¹¹⁷ The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings, and licensed organizations will keep track of these records.¹¹⁸ These new licensed organizations were set up to help eliminate many of the problems involving Internet copyright infringers.

X. Continuing Problems

A. Guidance Needed for License Negotiations and Fees

The first problem is that current legislation dealing with copyright issues in the music industry has “failed to set out specific licensing requirements and definite fees for the downloading of music over the Internet.”¹¹⁹ The Digital Performance Act of 1995 and the Digital Millennium Copyright Act are a good start at defining the requirements that are needed, but more guidance is suggested. With the increasing use of the Internet, more regulations with regard to licensing requirements need to be set out. Without any specific requirements, the door will be left open for abuses.

First, the music industry needs to make users more aware of the licensing requirements. This notice could be done by posting on each web site a notice of licensing requirements and the penalties that will

¹¹⁶ *Id.*

¹¹⁷ *Id.* The panel shall establish rates that represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. This decision for fees will be based on economic, competitive, and programming information presented by the parties.

¹¹⁸ *Id.*

¹¹⁹ Megan Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 T.M. COOLEY L. REV. 97, 107.

be imposed if these requirements are not met. This would give users notice of their illegal pirating activities before they enter the site and harsher penalties could be imposed on these Internet pirates.

Secondly, music artists need to come together and agree on uniform rates and royalties. At the present time, fees and royalties are set through either negotiation or by the Library of Congress. These rates are not set in stone and instead differ with each individual user. This causes confusion and negotiation between a user and a copyright holder can prove to be very difficult.

B. There needs to be better system in place to enforce these licensing requirements

The Internet enables millions of people to instantaneously access, reproduce and distribute copyrighted works in digitized form without authorization. In 1997, acts of piracy cost the software industry more than \$2 billion in the United States alone, and more than \$11 billion worldwide.¹²⁰ Because of the vast number of Internet users and the few sources of enforcement, it becomes nearly impossible to catch every act of piracy.

Each time a computer is turned on, an Internet user has the capability of downloading almost any musical composition. This easy access to such information has created a fear in the music industry. For a recording artist to be paid for their work, each user who downloads their music must get a license and negotiate a royalty with the recording artist and the music artist. This becomes nearly impossible for each and every copyright holder to detect who is and is not downloading their music files. To catch every pirate, someone would have to be standing over a user's shoulder every time they turned on their computer to keep track of each musical piece that is downloaded. This cannot be done.

The Recording Industry Association of America has created many organizations to serve as "Clearinghouses" for copyright holders. BMI and ASCAP are just two of these organizations that were created to detect pirating activities. They act as the middlemen by determining the royalty rates and

¹²⁰ *RIAA Releases Yearend Anti-Piracy Statistics: Internet Piracy Campaign in Full Swing: CD Piracy Remains a Threat*, (visited February 10, 2000) <<http://www.riaa.com/antipir/releases/apyr97.html>>.

licensing requirements for each copyright holder. This proves very helpful, however, there is no way that these organizations can collect royalties from each and every person who downloads musical files. Technology has advanced to the point where a user can now download any file in less than a minute. These organizations can scan sites for their activities and watermark, but pirates will still get through the cracks. We need to develop a better technological system that will be able to spot pirating activities. With developing technology and more consumers using the Internet, the copyright industry must stay ahead of these advancements or copyright holders will suffer.

C. The Legislature Needs to Take More Steps to Deter Pirating Activities

The Digital Sound Recording Act of 1995 and the Digital Millennium Act of 1998 were two great efforts by Congress to help protect the copyright industry. Since then, no real developments have been made. The legislature needs to focus in on the computer market and the pirating activities that occurring. If these activities are not put to a stop, the musical industry and the ideas and thoughts of musical artists could be put in jeopardy.

Congress needs to develop harsher penalties for copyright infringers and the legislature needs to address the issue of developing technologies, which are making it easier to download musical files over the Internet. There may be a point where Congress can no longer tolerate these new technological devices such as the MP3 from being used. They are creating a better world for pirates and frankly, the copyright industry cannot keep up with such rapid developments. If they do not address these issues quickly, it will become all too easy to download any musical piece for free. Copyright holders would not be reaping the benefits they deserve and consumers would be getting anything they wanted at absolutely no cost. This is not a fair market.

XI. Conclusion

Within the past century, there has been a string of technological developments. The newest, most popular form of technology is the Internet. This has benefited consumers because they can buy pretty much anything they desire by way of computer, they can use E-bay and barter on-line, or even use E-trade as their broker. This form of technology has made life easy.

However, the Internet has also created unanticipated methods for individuals to infringe copyrighted works and distribute them instantaneously. Some examples of copyright infringement that occur on a daily basis over the Internet include: “a college student who makes sound recordings available for downloading for free from her personal web site; a radio station that “broadcasts” songs from its Web site by audio streaming; an Internet Service Provider that has knowledge that subscribers are posting copyrighted software to its client’s electronic bulletin board; a Web site designer who designed a site that frames but does not alter the copyrighted content from another site without permission.”¹²¹ These are just some examples of copyright infringement.

The issue addressed within this note is copyright infringement in the music industry. It is a current reality that the ‘delivery of stereo quality music online could become a common means of retail distribution.’¹²² “The recording industry’s primary fear is that a digital audio service could purchase a single compact disc and deliver it ‘electronically to millions of homes via satellite, radio, or cable without any payment to the creators of the sound recording.’¹²³ Madonna and Pearl Jam are just two

¹²¹ Richard Raysman and Peter Brown, *The Digital Millenium Copyright Act*, N.Y.L.J. 3 (1998). These examples show just some of the many ways infringement takes place. The transactions involved include text and images and involve many players such as Internet service providers and subscribers. Because of the vast array of users and players, pirating activities are on the rise.

¹²² Megan M. Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 T.M. COOLEY L. REV. 97, 98 (1997). Delivery of stereo quality music has given bands the opportunity to be heard by consumers, however, it has also given consumers easy access to download music for free.

¹²³ *Id.* If millions of people could get compact discs over the Internet, millions of musical artists’ profits would decrease. With the advances in downloading technology and such, entire songs can be transmitted from computer to computer. This is a true threat to copyright holders.

musical groups that have suffered lost profits due to pirating activities over the Internet.¹²⁴ If these activities continue, many artists will lose incentive to produce their works and in the long run everyone will lose. Copyright infringement is a serious issue that is going to need serious consideration as Internet activity expands.

The legislature has made many attempts throughout the last decade to stop pirating activities. The biggest development was the Digital Performance Act of 1995, which gave performance rights to sound recording artists. Throughout this act the legislature was to trying to balance public access with the rights of copyright holders.¹²⁵ The Act demands that certain services obtain a public performance license from the copyright owner of the song to be broadcasted over the Internet.¹²⁶ The Act requires that “once a song has been recorded, the copyright holder must grant a statutory license to any digital music or on-line subscription service that wants to transmit a sound recording for a fee or a compulsory mechanical license.”¹²⁷ It also allows copyright owners in sound recordings the right to negotiate their licensing contracts and provides for arbitration if needed.¹²⁸

The Digital Millenium Copyright Act of 1998 was another attempt by the legislature to work out the kinks of the Internet and the music industry. The Act provides protection for Internet Service

¹²⁴ Martin Schwimmer and Craig S. Mende, *Madonna and Audio Streaming, Copyright Infringement on the Internet*, 219 N.Y.L.J. 44 (1998). In 1998 one of Madonna’s albums was released to several Web sites allowing anyone with Internet access to download a copy weeks before authorized copies would be available for sale.

¹²⁵ S. REP. NO. 89-910, at 13 (1995).

¹²⁶ Ronald H. Gertz, *Rules and Regulations: Library of Congress, Copyright Office 37 CFR Part 260 [Docket No. 96-5 Carp DSTR] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 545 PLI/PAT 921 (1999).

¹²⁷ Megan M. Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 T.M. COOLEY L. REV. 97, 109 (1997).

¹²⁸ *U.S. digital performance rights bill: a summary of the main points*, Music and Copyright, March 30, 1995, at 2.

Providers who fear their works, now available on the Internet, will be misappropriated.¹²⁹ The Digital Millennium Copyright Act also outlaws the manufacture of devices or software to circumvent protective security measures on the Internet.¹³⁰ It also outlines the licensing guidelines and royalty rates for copyright holders.¹³¹

The problem with these requirements and many attempts by the legislature are that new emerging technology has made it possible for consumers to download any piece of music they wish, without ever compensating the copyright holder. Because of the widespread access of the Internet and the creation of the MP3, the music industry is suffering huge losses of profit. Even with these licensing requirements and mandatory royalty rates, pirates are escaping through the cracks within the system.

There is at least one computer in every household in America. Every time a computer is turned on, there is an opportunity for a consumer to download any music they wish, without ever paying the person who created that music. The Recording Industry of America has set up institutions known as “Clearinghouses” such as BMI and ASCAP to catch pirates and put a stop to their activities. Even with these attempts, it has become impossible to catch every act of piracy. Something has to be done to put a stop to such activities or it will undermine the musical world as we know it. Musical artists need to reap the benefits from their work or they will stop producing.

Congress needs to take stronger steps in the future to protect musical artists and their copyrighted works. We need stronger licensing requirements, stronger penalties and we need to prevent any further

¹²⁹ 15 No. 19 Andrews Computer & Online Industry Litigation Reporter (July 7, 1998). The limitations and exemptions will be applicable only to service providers who adopt a policy of terminating infringing subscribers, designate an agent to receive notifications of infringement claims, and make contact information available to the Copyright Office.

¹³⁰ Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT.L .397 (1999). This legislation presents practical extensions of copyright materials in the growing global infrastructure.

¹³¹ H.R. REP. No. 106-84, at 2 (1999).

emerging technologies that will encourage these activities. The musical industry needs to get together and address these issues to devise a better system so that the persons deserving the benefits will receive them.

