NOTE

WEBCASTING AND INTERACTIVITY: PROBLEMS AND SOLUTIONS

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I. INTRODUCTION

The Internet has changed the lives of nearly everyone in the world. Businesses run more efficiently, communication is easier and faster, and the public can access with the touch of a button almost any information it desires. Industries have changed dramatically as well over the past twenty years, some for the better and others for the worse.[2] The music industry is no different from any other. Consumers can now purchase digital copies of songs and albums without ever stepping foot in a conventional retail store. New technologies have also enabled music fans to listen to music from any computer terminal with Internet access before they reach for their credit cards. The Internet has streamlined the market by eliminating some of its costs. Even so, the Internet has also brought serious challenges to the music industry in the form of illegal downloading and file sharing.[3] The digitization of data, including recorded songs, has been both beneficial and detrimental to those involved in music, including composers, performing artists and especially the recording companies that represent them.[4]

Driven by consumer demand and market competition, industries sometimes progress too swiftly for the laws governing them to keep up. Changing technologies often pose new questions that statutes and common law in many cases cannot answer with certainty.[5] Copyright law in particular has seen several rounds of changes in response to the rise of the Internet and digital media.[6] The last major addition to copyright law was the Digital Millennium

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[2] *See*, *e.g.*, Courtenay W. Daum, *Feminism and Pornography in the Twenty-First Century: The Internet's Impact on the Feminist Pornography Debate*, 30 WOMEN'S RTS. L. REP. 543, 558 (2009); Benjamin R. Sachs, *Consumerism and Information Privacy: How Upton Sinclair Can Save Us From Ourselves*, 95 VA. L. REV. 205, 205 (2009); Chris Sagers, *"Rarely Tried, and . . . Rarely Successful": Theoretically Impossible Price Predation Among the Airlines*, 74 J. AIR L. & COM. 919, 944 (2009); Richard S. Witt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 443 (2009).

[3] *See*, *e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

[4] *See* Paul Veravanich, *Rio Grande: The mp3 Showdown at Highnoon in Cyberspace*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 433, 435-36 (2000).

[5] Consider, for example, the effect of VCRs on the laws governing the film and television industry. *See* Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[6] *See*, *e.g.*, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971); Digital

Copyright Act of 1998 ("DMCA").[7] Although Congress enacted the DMCA fairly recently, significant advances in the industries of computer hardware, software, and Internet technology since its enactment have exposed problems inherent in the Copyright Act. Not surprisingly, courts are having trouble applying the laws, written over a decade ago, to the novel factual issues that come before them today.[8]

More specifically, the application of the DMCA to the Internet radio industry has proven particularly problematic.[9] As with many other industries, the Internet has drastically changed the landscape of broadcast radio. Whereas radio stations have traditionally been capable of extending their listening area only as far as the surrounding geography would allow, today anyone can listen to any number of stations broadcasting from anywhere in the world, at any time. Seattle residents can, at the click of a button, tune into the local news in London. Sleeping in on weekends is no longer a problem – you can still catch your favorite early morning programming later in the afternoon, thanks to the Internet. Perhaps the best classical music station in your home town recently shut down; if you have access to the Internet, you have as many classical stations at your fingertips as you could ever desire. Better still, the Internet has stations that are much more specialized than terrestrial broadcasts ever were. Where once listeners had "rock" stations, now they have "Rockabilly Revival," "Grunge" and "Hair Metal."[10] Some websites even allow their users to build their own stations.[11]

Musical performing artists enjoy the benefits of Internet radio as much as anyone else. However, Internet radio raises serious copyright questions regarding the songs that these stations deliver to the public. If listeners can hear exactly what they want to hear for free over the Internet, what need have they to visit traditional or online music stores at all? What incentive would

Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336, 343-44 (1995); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2898 (1998).

[7] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[8] *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148 (2d Cir. 2009).

[9] Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 344 (2004).

[10] *See, e.g.*, Profile for Genre Stations - Pandora, http://www.pandora.com/people/genrestations#tbl_stations_table,all (last visited Apr. 5, 2011).

[11] *See, e.g.*, Wendy Boswell, *Technophilia: 15 ways to get more out of Pandora*, LIFEHACKER.COM, http://lifehacker.com/#!201072/technophilia-15-ways-to-get-more-out-of-pandora (Sep. 18, 2006).

listeners have to join online music services that charge a monthly subscription fee? Internet radio existed when Congress enacted the DMCA, but just how the Act applies to its newer incarnations is far from certain. This note addresses these issues and several possible resolutions.

II. HISTORY OF THE SOUND RECORDING COPYRIGHT

The Copyright Act lists musical works and sound recordings, among other things, as copyrightable works.[12] A sound recording is defined in the Copyright Act as a work that "result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[13] Notably, sound recordings are distinct from "musical works" in the Copyright Act.[14] The Act uses the term "musical work" to refer to the underlying composition, or notes, of a piece of music.[15]

The Copyright Act gives copyright holders a bundle of rights. These include, but are not limited to, the right to make copies of the copyrighted work, the right to distribute the work, the right to display the work, the right to prepare derivative works, and the right to perform the work publicly.[16] While musical works were accorded public performance rights in 1897,[17] it was not until 1995, with the enactment of the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"),[18] that sound recordings received the same rights.[19] Even so, public performance rights in sound recordings were limited and still are today.[20] The limitations on sound recording public performance rights are a major source of the problems presented in this note.

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[12] 17 U.S.C. § 102 (2006).

[13] *Id*.

[14] Perhaps more notably, the Act does not expressly define the term "musical work." *See id*.

[15] 18 C.J.S. *Copyrights* § 19 (2010). Congress has referred to the underlying musical composition as the "raw material" of a sound recording. H.R. REP. NO. 92-487, at 4 (1971).

[16] 17 U.S.C. § 106 (2006).

[17] Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L. J. 83, 89 (2009) (citing JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 426, 463 (2d ed. 2006)).

[18] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[19] Delchin, *supra* note 9, at 352.

[20] *Id*.

A. The Public Performance Right

Among the rights accorded both sound recordings and musical works by the Act (though in differing degree) is the public performance right.[21] The Act gives a piecemeal definition of public performance. First, to "perform" a work is to "recite, render, play, dance, or act it, either directly or by means of any device or process . . . ."[22] The Act then provides two definitions of public performance. To perform a work "publicly" can be "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered," or it can be "to transmit or otherwise communicate a performance or display of the work . . . by means of any device or process, whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times."[23] The second definition provided by the Act is of greater import to the discussion of sound recordings because copyright holders of sound recordings enjoy the exclusive right to public performance only of "digital audio transmissions."[24]

Since the beginning of copyright legislation in 1790, Congress has greatly expanded both the scope of the rights of copyright holders and the types of works eligible for copyright protection.[25] Musical works were first protected in 1831, but musical works copyright holders did not enjoy an exclusive right to public performance until 1897.[26] Throughout most of this period, however, the ability to record and duplicate sounds was, at best, rudimentary.[27] The various revisions of the Copyright Act during this time period did not address sound recordings because, although sound recordings did exist, at the time there was no viable commercial method of copying them.[28]

Methods of copying sound recordings became cheaper and more effective in

[21] 17 U.S.C. § 106(4), (6) (2006).

[22] *Id.* § 101.

[23] *Id.*

[24] *Id.* § 106(6).

[25] *See* Kristen E. Riccard, Comment, *Product Placement or Pure Entertainment? Critiquing a Copyright-Preemption Proposal*, 59 AM. U. L. REV. 427, 434 n.42 (quoting H.R. REP. NO. 94-1476, at 51 (1976)).

[26] Stephanie C. Haun, *Musical Works Performance and the Internet: A Discordance of Old and New Copyright Rules*, 6 RICH. J. L. & TECH. 3, 8 (1999).

[27] The phonograph was not widely used until the 1870s. For a more detailed history of the phonograph and other methods of recording sound, s*ee generally* TIMOTHY DAY, A CENTURY OF RECORDED MUSIC: LISTENING TO MUSICAL HISTORY (2002).

[28] Delchin, *supra* note 9, at 346.

the middle of the twentieth century.[29] In response to the recording industry's urgings, Congress recognized sound recordings as copyrightable subject matter for the first time when it enacted the Sound Recordings Act of 1971 ("SRA").[30] When it enacted the SRA, Congress stated that sound recordings are "clearly within the scope of 'writings of an author' capable of protection under the Constitution."[31] However, the SRA did not place sound recordings on equal footing with other types of copyrightable works. The SRA protected sound recordings only against distribution and physical reproduction,[32] rights generally afforded to most other types of copyrightable works.[33] The SRA did not give the copyright holder a right of public performance.[34] Some viewed the fact that sound recordings were not granted performance rights as a historical anomaly.[35] Congress recognized that new technologies like records and tapes had made the copying of music much easier, and as a result that music piracy was becoming more widespread.[36] The SRA therefore focused on the reproduction and distribution of sound recordings simply because copyright holders were not particularly worried about public performance at the time. On the other hand, broadcasters protested a public performance right because it would require them to pay royalties to copyright holders for playing songs over the radio.[37] In light of the more recent "advancement of digital audio transmission services" resulting in a "substantial rise in the number and type of public performances of sound recordings," it might make sense to extend the exclusive rights of sound recording copyright owners to cover public performances as well.[38]

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[29] *See generally* MICHAEL CHANAN, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC (1995).

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

[31] Abbott Marie Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127, 129-30 (2008) (quoting H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570).

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

[33] *See* 17 U.S.C. § 106 (2002).

[34] *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[35] William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 249 (1994).

[36] H.R. REP. NO. 92-487, at 2 (1971) *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567.

[37] Delchin, *supra* note 9, at 348.

[38] O'Dowd, *supra* note 35, at 250.

B. Digital Audio Transmissions

In 1995, Congress enacted the DPRA as a compromise between these two competing points of view, limiting the performance right of sound recordings to digital audio transmissions.[39] The Act currently defines a "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format."[40] In turn, to "transmit" a work is "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[41] Congress intended to include "pay-per-listen," "celestial jukebox," and "audio-on-demand" services in the list of transmissions subject to copyright liability.[42] The section of the DPRA governing sound recordings further defines a "digital audio transmission" as a digital transmission "that embodies the transmission of a sound recording."[43] Internet radio is a good example of a digital audio transmission. Internet radio stations provide their services to users by the transmission of songs in digital format from websites to home computers. The geographic location of the website providing the music service is presumably separate from that of the listener's computer. Therefore, the statute classifies such transmissions as the public performance of a digital audio transmission because the sounds are received beyond the place from which they are sent.[44]

The Copyright Act goes to great lengths to further classify various types of digital audio transmissions for licensing purposes.[45] The distinction of most importance to this note is that between interactive and noninteractive services. The DPRA defined an interactive service as "one 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."[46] However, "[t]he ability of

[39] *See* 17 U.S.C. § 106(6) (2006); *see generally* 17 U.S.C. § 114 (2006).

[40] 17 U.S.C. § 101 (2006).

[41] *Id.*

[42] S. REP. NO. 104-28, at 14 (1995).

[43] 17 U.S.C. § 114(j)(5) (2002).

[44] *See* Arista Records, LLC v. Launch Media, Inc, 578 F.3d 148, 150 (2d Cir. 2009) (finding an Internet radio webcast to be subject to public performance rights under 17 U.S.C. § 106(6)). While the Act does make an exception for radio broadcasters that use digital copies of songs for over-the-air transmission, courts have held that identical transmissions by the same broadcasters over the Internet are not exempt. *See* Bonneville Intern. Corp. v. Peters, 347 F.3d 485, 487 (3d Cir. 2003).

[45] *See* 17 U.S.C. § 114 (2002).

[46] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 343-44 (1995).

individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive."[47] The definition then allows for services to be separable into their components, and for the interactivity of those components to be determined separately.[48]

The interactivity classification is important to Internet radio services because the statute creates different licensing schemes based on the distinction.[49] If a service is classified as interactive, the administrator of that service is required to negotiate directly with copyright holders for licensing; on the other hand, a noninteractive service is entitled to statutory licensing through the Copyright Arbitration Royalty Panel.[50] Direct negotiations are in general more lucrative for the copyright holder, which is usually a recording label.[51] This is especially true since the Copyright Act requires up to half the revenue generated by compulsory licensing to be given directly to the performing artists without first being channeled through the copyright holder.[52]

At this point it is important to note some aspects of the similarities and differences between musical works and sound recordings. Anyone (including a website operator) who wishes to publicly perform recorded songs must obtain permission to do so from the musical works copyright holder, regardless of whether the public performance is interactive or even a digital audio transmission.[53] This would ordinarily lead to almost insurmountable transaction costs because radio stations, concert venues and websites would have to seek out musical composers individually in order to obtain permission from them to publicly perform their musical works.[54] Collective rights organizations ("CRO"s) such as the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") have grown out of this market failure.[55] These CROs collect musical works copyrights from

[47] *Id*.

[48] *Id*. at 344.

[49] *Arista Records*, 578 F.3d at 154 (citing Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 692 (2003)).

[50] Corey Field, *Copyright, Technology, and Time: Perspectives on "Interactive" as a Term of Art in Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 49, 54 (2003).

[51] *Id*.

[52] 17 U.S.C. § 114(g)(2) (2006).

[53] 17 U.S.C. § 106(4) (2002).

[54] COHEN ET AL., *supra* note 17, at 446.

[55] For a thorough discussion of the formation of CROs, *see generally* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

composers and license them together through blanket licenses.[56]

On the other hand, there is currently no CRO that collects sound recording copyrights.[57] In fact, the Copyright Act itself seems to require anyone who wishes to publicly perform a sound recording to negotiate individually with the sound recording copyright holder.[58] However, the Act requires this type of unilateral negotiation only when the public performance is interactive.[59] Thus, even though interactive Internet radio websites must obtain permission to perform both musical works and sound recordings, it is more difficult to obtain permission for sound recordings because there are no collective rights organizations to streamline the negotiation process.

C. The Interactivity Distinction

Even given the lengthy definition of interactivity, there has nevertheless been ample room for ambiguity. There has also been no shortage of scholarly input concerning which types of webcasting services should be classified as interactive, and why.[60] The stated purpose of the DPRA was to "ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used."[61] In its report, Congress concluded that interactive services were more likely than noninteractive services to cause harm to conventional record sales.[62] Congress accordingly made copyright licensing for these services more expensive than for any other type of service.[63]

The Senate Report on the DPRA offers examples of interactive services such as a "celestial jukebox" or an "audio-on-demand" service.[64] It was unclear under the DPRA just how narrowly websites could allow users to tailor

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[56] *Id.* at 1300-01.

[57] COHEN ET AL., *supra* note 17, at 469.

[58] *Id.*

[59] *Id.*

[60] *See, e.g.*, Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 320 (2000); Hillel I. Parness, *Internet Radio: As RIAA and DiMA Prepare to Do Battle over "Interactivity," Questions Resurface About ISP Liability*, 6 NO. 5 CYBERSPACE LAW. 2 (2001).

[61] S. REP. NO. 104-128, at 10 (1995).

[62] *Id.* at 17.

[63] *Id.* at 14.

[64] *Id.* at 25.

the music being transmitted to them before the website became an "audio-on-demand" or "celestial jukebox" service, and thus could be classified as "interactive."[65] Congress enacted the DMCA in an effort to resolve the issue raised by the new generation of Internet radio webcasters.[66] The DMCA amended the definition of an "interactive" service in an attempt to clarify any ambiguity. Under the definition provided in the DMCA, an "interactive" service is "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[67] The definition further qualifies which services are interactive:

> The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request.[68]

The definition then notes that if an entity offers both interactive and noninteractive services, the noninteractive component is not treated as part of an interactive service.[69]

The DMCA definition differs from the DPRA definition in three ways.[70] First, the DMCA classifies as interactive those services that are "personalized," or "specially created for the recipient," whereas the DPRA definition does not.[71] The legislative history suggests that the "recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program."[72] Second, the new DMCA

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[65] *See* Delchin, *supra* note 9, at 354-55 ("[T]he DPRA failed to specifically address the issue of webcasting and other nonsubscription services on the Internet.").

[66] *Id*.

[67] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2898 (1998).

[68] *Id*.

[69] *Id*.

[70] H.R. REP. NO. 105-796, pt. 2, at 87-88 (1998) (Conf. Rep.).

[71] *Id*. at 87; *see* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 343-44 (1995).

[72] H.R. REP. NO. 105-796, pt. 2, at 87 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 663. It is important to note that while the definition given in the Act

definition provides that transmissions sent in response to a particular user request do not have to be part of a "program" in order to be considered interactive.[73] The transmission of individual songs may be considered interactive. Further, the transmission might be interactive if it allows the user to "move forward and backward between songs . . . ."[74] Third, the new definition sets forth an exception to interactivity where webcasting services honor user requests in a fashion similar to the call-in requests of traditional over-the-air radio broadcasts: "[A] service that engaged in the typical broadcast programming practice of including selections requested by listeners would not be considered interactive, so long as the programming did not substantially consist of requests regularly performed within an hour of the request, or at a time that the transmitting entity informs the recipient it will be performed."[75] The differences between the definitions of "interactive" in the DPRA and the DMCA are summarized in the table below.

Differences Between Definitions of "Interactive" in the DPRA and DMCA		
	DPRA	DMCA
"Specially created for the recipient"	Not Required	Required
"Part of a program"	Required	Not Required
Traditional over-the-air request exception	Not Present	Present

The most important of these changes for the purposes of this note is the first one. Although the updated definition of interactivity in the DMCA was intended to be clearer and more on point, questions still remained regarding which features, if any, of webcasting services are interactive.

itself does not use the word "personalized," the legislative history states that "personalized transmissions – those that are specially created for a particular individual - are to be considered interactive." *Id.*

[73] *Id.* at 88.

[74] *Id.*

[75] *Id.*

III. THE DECISION IN *ARISTA RECORDS*

A. Background

The first case to reach a federal Court of Appeals that addressed these types of questionably interactive websites was *Arista Records*.[76] In that case, Launch Media administered a website (LAUNCHcast) that offered to its users streaming digital transmissions of songs.[77] Users could not receive, on demand, any particular songs; instead, the website allowed them to set up their own "stations" based on their individual musical preferences.[78] Arista Records was among a group of copyright holders asserting that LAUNCHcast was sending digital audio transmissions to its users without a proper license under the DMCA. They claimed that the website's service was "interactive" under the statute, and therefore Launch Media was required to negotiate licenses for public performance of the sound recordings.[79] The court ultimately used a "predictability" standard to determine whether LAUNCHcast was interactive: if its users could predict with certainty what songs were going to be played, then the website effectively served as a substitute for the traditional sale of music and the proprietors of the service should be required to negotiate licensing agreements directly with the copyright holders.[80] Under this standard, and after examining the nature of LAUNCHcast's service in great detail, the court found that LAUNCHcast was not interactive.[81] The court also provided its interpretation of the newly enacted phrase "specially created for the recipient," holding that "a playlist of completely random songs selected without regard for the user's preferences" is not "specially created" under the terms of the statute.[82] A cursory examination of the LAUNCHcast service will shed light on the scope of the predictability standard and the court's interpretation of the statute.

To generate a customized station, users submit the names of recording artists that they enjoy, and rank several genres of music by preference.[83] The website generates a playlist of fifty songs based on these parameters; users then have the option of evaluating the songs that they hear through a rating

[76] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 150 (2d Cir. 2009).

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 162.

[81] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 162 n.22 (2d Cir. 2009).

[82] *Id*. at 162 n.22.

[83] *Id*. at 157.

system, which affects future playlists generated from the same initial criteria.[84] Additionally, users can rate stations created by other users, which also impacts the site's creation of future playlists.[85] The website keeps track of all songs that a user explicitly rates, and assigns implied ratings to songs from the same album as the explicitly rated songs, as well as to songs rated by other users whose stations the primary user enjoys.[86] The algorithm used for generating the playlist is intricate.[87] Many of the songs that LAUNCHcast includes in the playlist are loosely based on the user's genre preferences, but some are not. Using the list of explicitly and implicitly rated songs, as well as the user's initial genre preferences, the website selects songs randomly from a pool of thousands of songs (the "hashtable") to generate a final playlist.[88] A minimum percentage of songs in the playlist must be unrated (either explicitly or implicitly), although the user can choose to increase this percentage.[89] Importantly, users are not capable of navigating back to previously heard songs within the playlist or moving forward or backward within a song; they also cannot view any of the remaining songs in the playlist.[90] Finally, there is an easily accessible "buy" button attached to every song that gives users access to online music stores from which they can purchase the music if they wish.[91]

Applying the predictability standard, the court focused on the fact that the algorithm populates playlists with a large number of songs that the website has never played for the user, as well as on the limited amount of control users can exert. The court used a number of technical factors to determine whether users have sufficient control over the songs in the final playlist such that they might use the webcasting service as a substitute for actually purchasing music. First, the court noted that "[a]t least 60% of the songs in the hashtable are generated by factors almost entirely beyond the user's control."[92] It went on to say that "no more than 20% of the songs the user rates – marked by LAUNCHcast as explicitly rated – can be pooled in the hashtable," and that "[a]t minimum, 20% of the songs played on the station are unrated – meaning the user has never

[84] *Id.* at 157-58.

[85] *Id.*

[86] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 158-59 (2d Cir. 2009).

[87] *Id.* at 160.

[88] *Id.* at 158.

[89] *Id.* at 157.

[90] *Id.* at 158.

[91] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 157 (2d Cir. 2009).

[92] *Id.* at 162.

expressed a preference for those songs."[93] The court added several other factors to the list of those influencing its analysis, including the fact that LAUNCHcast implicitly rates some songs without the user's knowledge or consent, and the fact that there are restrictions on the number of songs on any one album or by any one artist that can eventually make it into the final playlist.[94] Also relevant in the court's analysis was the fact that users cannot regenerate playlists at will, but must finish one playlist before another is generated for them.[95]

B. Analysis

Some factors influencing whether LAUNCHcast is interactive according to the statutory definition include: (1) which songs are included in the hashtable; (2) which songs are included in the playlist; (3) the amount and type of restrictions on multiple songs from the same album or by the same artist; (4) the number of explicitly and implicitly rated songs in the hashtable and playlist; and (5) whether users can generate playlists at will. Using these factors, the court held that "LAUNCHcast does not provide a specially created program within the meaning of § 114(j)(7) because the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby . . . diminishing record sales."[96]

When Congress enacted the DPRA, it created a limited public performance right in sound recordings in part "to prevent the 'threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.'"[97] However, with enactment of the DMCA, Congress also specifically singled out websites that offer streaming music based on user preferences, as ones that should carry a presumption of interactivity.[98] When interpreting statutes, courts generally look first to the plain language of the statute and its

[93] *Id*. at 163.

[94] *Id*. at 163.

[95] *Id*.

[96] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 162 (2d Cir. 2009).

[97] *Id*. at 154 (quoting H.R. REP. NO. 104-274, at 14 (1995)). This report comes from the 104th session of Congress, which enacted the DPRA.

[98] H.R. REP. NO. 105-796, pt. 2, at 78 (1998) (Conf. Rep.) ("The recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program.").

ordinary meaning.[99] When a court finds the plain language of a statute to be ambiguous or unhelpful, it will often look to the intent of Congress in enacting the statute for further guidance.[100] The *Arista Records* court examined the Congressional intent underlying both the DPRA and the DMCA. After it enacted the DPRA, Congress had the chance to observe the effects and potential problems associated with the newly created public performance right. With the DMCA, Congress considered and addressed the issues that arose by amending several definitions, including the definition of an "interactive" service.[101] While it did discuss the amended definition as well as the intent of Congress in making the change, the court in *Arista Records* chose to focus instead on the policy goals Congress expressed when enacting the DPRA.[102] Evidently the court had trouble reconciling the goals of the legislature that enacted the DPRA with the examples set forth by the later Congress enacting the DMCA.[103] The apparent conflict between the goal of protecting traditional methods of selling music and complying with Congress's intent of keeping the sound recording performance right "narrow" is representative of the problems created by the interactivity distinction.[104]

On its face, the court's predictability standard appears to classify as interactive very little beyond the obvious. The *Arista Records* court noted that users do have control over the genre of many of the songs that LAUNCHcast places in the hashtable, but went on to say that such genre control is no different from the ability of traditional over-the-air radio listeners to choose among stations.[105] Because it is not currently necessary to acquire a performance license (statutory or directly negotiated) for over-the-air digital transmissions, it is plausible to say that LAUNCHcast should be considered noninteractive because its service is comparable to a different type of service that is noninteractive under the statute.[106]

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[99] *See* Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343, 2350 (2009) (quoting Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).

[100] *See* Zuni Public Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007).

[101] H.R. REP. NO. 105-796, pt. 2, at 78 (1998) (Conf. Rep.).

[102] *See Arista Records*, 578 F.3d at 164; *see generally* H.R. REP. NO. 104-274 (1995).

[103] *See* H.R. REP. NO. 105-796, pt. 2, at 87-88 (1998) (Conf. Rep.).

[104] *See Arista Records*, 578 F.3d at 164*; see also* H.R. REP. NO. 104-274, 12 (1995) ("[The DPRA] creates a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.").

[105] *See Arista Records*, 578 F.3d at 162-63.

[106] 17 U.S.C. § 114(d)(1)(A) (2006).

IV. THE STATE OF THE INDUSTRY TODAY

The first terrestrial radio stations to stream content over the Internet began doing so in 1994.[107] The limitations of technology at the time resulted in poor quality transmissions.[108] However, Internet radio grew rapidly in popularity as the Internet became faster and more accessible.[109] Radio providers also saw an increase in flexibility with improving technology, and along with the growth in popularity came new business models. Some Internet radio websites began to allow users to build their own stations based heavily on a set of parameters chosen by the users themselves.[110] As webcasting services continued to gain popularity, diversify, and tailor their services more narrowly to the tastes of their users, however, it became clear that the definition in the DPRA was inadequate.[111] Today, Internet radio websites are numerous and diverse in nature. On one end of the spectrum are traditional over-the-air radio stations that stream their programs on the Internet. These are almost definitely noninteractive and, until fairly recently, were exempt from paying any kind of royalty at all to the creators of sound recordings (as opposed to the composers of the written music, whom radio stations have long compensated through organizations like BMI and ASCAP).[112] The user has no more control over what these types of websites transmit than does a person listening to a traditional radio.

On the other end of the spectrum are services like Grooveshark.[113] Grooveshark allows users to search for and listen to specific songs, artists or albums. The users themselves populate the website's song database by

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[107] Jennifer Waits, *The decade's most important radio trends: #2 The growth of Internet radio*, RADIO SURVIVOR (Dec. 31, 2009), http://www.radiosurvivor.com/tag/wxyc/ (last visited Apr. 16, 2011).

[108] Alex Cosper, *The History of Internet Radio*, TANGENT SUNSET, http://www.tangentsunset.com/internetradio.htm (last visited Apr. 16, 2011).

[109] *Id*.

[110] *See* Field, *supra* note 50, at 60 (citing MSN MUSIC, http://entertainment.msn.com/Stations). For contemporary equivalents, *see*, *e.g.*, *About Last.fm*, LAST.FM, http://www.last.fm/about (last visited Apr. 16, 2011); *Pandora FAQ*, PANDORA RADIO, http://blog.pandora.com/faq/ (last visited Apr. 16, 2011). *See also* Marks, *supra* note 60, at 314 (citing P.J. Hufstutter, *Web Surfing for the Next Wave in Radio*, L.A. TIMES, Aug. 2, 1999, at C3).

[111] Delchin, *supra* note 9, at 354-55.

[112] Bonneville Intern. Corp. v. Peters, 347 F.3d 485, 487-88 (3d Cir. 2003).

[113] GROOVESHARK, http://listen.grooveshark.com/ (last visited Apr. 2, 2010).

uploading copies of songs from their own computers.[114] If the website has a particular song in its database, any user can hear it on demand an unlimited number of times.[115] Users can also skip to any point within a song.[116] In addition, users can build and maintain their own playlists and can access these playlists easily and quickly.[117] However, Grooveshark does not provide users with a means to make digital copies of the songs by downloading them to their own personal hard drives.[118] This prevents users from, for example, hearing the songs at will when an Internet connection is not available. Furthermore, users are unable to use Grooveshark to play songs on their traditional portable mp3 players because these players can only play songs that are stored within the players themselves. The traditional mp3 player, however, is quickly becoming a thing of the past. New generations of portable music devices come equipped with Internet capability, even in places where ordinary Internet access is unavailable.[119] It is likely that portable handheld devices with high speed Internet access may soon become standard fare.

As Internet access becomes easier, cheaper, more widespread, and more versatile, music listeners who use services like Grooveshark will have little or no need to keep digital copies of the songs they want to hear. Indeed, Grooveshark currently offers a downloadable version of its software for smart phone brands such as Android and BlackBerry.[120] The fact that users are

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[114] *See* Duncan Riley, *Grooveshark Launches Web Media Player*, TECHCRUNCH, (Apr. 15, 2008), http://techcrunch.com/2008/04/15/grooveshark-launches-web-media-player/.

[115] *Id.*

[116] Paul Bonanos, *Grooveshark Has a New Look, But It's Still Streaming Unlicensed Content*, GIGAOM, (Oct. 26, 2009), http://gigaom.com/2009/10/26/grooveshark-has-a-new-look-but-its-still-streaming-unlicensed-content/.

[117] *Id.*

[118] Instead, Grooveshark directs users who want to obtain a physical copy of a song to other websites where they can purchase the music. GROOVESHARK HELP, http://help.grooveshark.com/customer/portal/articles/2173-can-i-get-grooveshark-music-on-my-ipod-mp3-player- (last visited Mar. 22, 2011).

[119] Smart phones are a good example. *See generally* Jo Best, *Analysis: What is a smart phone?*, SILICON.COM, (Feb. 13, 2006), http://www.silicon.com/technology/mobile/2006/02/13/analysis-what-is-a-smart-phone-39156391/.

[120] *See* Amay Kulkarni, *Grooveshark Mobile Music Now Available for Android and BlackBerry*, HOTCELLULARPHONE.COM, (Jan. 2, 2010), http://hotcellularphone.com/blackberry/grooveshark-mobile-music-android-blackberry/. While there is a free version of Grooveshark for use on computers, Grooveshark requires smart phone application users to pay a monthly fee. *Id.*

unable to obtain actual copies of songs from Internet radio services like Grooveshark will probably not weigh heavily in determining whether a website is interactive according to the Copyright Act. This is because in most situations, users do not need actual copies of the songs in order to listen to them.

V. PROBLEMS WITH THE PREDICTABILITY STANDARD

In *Arista Records*, the court interpreted the updated definition of "interactive" that Congress provided in the DMCA.[121] This Section will show that the predictability standard upon which the court ultimately settled is problematic for several reasons. First, it fosters uncertainty for other Internet radio websites and web services as to whether they must acquire licenses directly from sound recording copyright holders (most of which are recording companies).[122] This uncertainty has potential chilling effects on those who might otherwise be willing to try their hand at providing an Internet radio service, and will deprive those already in the business of valuable repose in the knowledge that they are safe from lawsuits. Second, the technical nature of Internet radio will likely make litigation more expensive for all involved parties. The LAUNCHcast service uses a complex algorithm to deliver music to its users.[123] Other Internet radio services may decide to use very different, but equally complex algorithms. Future courts are unlikely to be able to meaningfully apply the highly fact-specific holding in *Arista Records* to those Internet radio services that are substantially different from LAUNCHcast. Finally, and again due to the highly technical nature of Internet radio and webcasting services, other entities, such as Congress or the Copyright Office, may be better equipped than judges to handle the types of distinctions and decisions which swiftly changing technologies necessitate.

A. The Standard Fosters Uncertainty and Makes Litigation Expensive.

The method LAUNCHcast uses to populate its playlists is extremely complex.[124] Under the predictability standard, a webcasting service is interactive if users are using it as a substitute for actually purchasing music.[125] In *Arista Records*, the court explained in detail the information users can give

[121] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 162 (2d Cir. 2009).

[122] *Id.* at 161.

[123] *Id.* at 157.

[124] *Id.* at 157-60.

[125] *Id.* at 161.

to LAUNCHcast, as well as what the webcasting service does with that information.[126]

It is difficult to divine a generalized holding from the opinion that would be applicable to other Internet radio websites with different playlist generation algorithms. For example, it is reasonable to envision a website which does not make use of a hashtable or that allows for regeneration of playlists some, but not all, of the time. The percentages upon which the court relies might be easily shifted in either direction. Future lawsuits are likely to be decided on a case-by-case basis with an equally detailed analysis of the particular webcaster's business model. Analyzing the interactive nature of websites individually, without an overarching standard, may arguably be the surest way to comport with the statute's plain meaning and the intentions of Congress.[127] However, this approach leaves other webcasters in the dark as to their potential liability.

When disputes are resolved on a case-by-case basis, litigation is inevitably more expensive for all parties involved.[128] Litigants, uncertain of which aspects of the webcasting service a court will choose to emphasize, will likely spend time and effort on as many arguments as possible. Meanwhile, courts may also tend to spend more time on each case than they would if there were a simple standard to implement. The ultimate harm would appear to befall the general public, who must pay for administrative costs both directly and indirectly. In addition, the increased cost of operating webcasting services might drive some of those services out of the market, resulting in fewer choices for consumers.

B. Judges Are Not in the Best Position to be Making these Kinds of Technical Distinctions.

Many emerging technologies have challenged copyright law in the past. Any time a new device or idea fails to fit neatly into the existing regime, courts have generally chosen to defer resolution of the issue to Congress.[129] They do

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[126] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 157-60 (2d Cir. 2009).

[127] *See* 17 U.S.C. § 114 (2002); S. REP. NO. 104-128, at 10 (1995); H.R. REP. NO. 104-274, at 14 (1995); H.R. REP. NO. 105-796, pt. 2, at 87-88 (1998) (Conf. Rep.).

[128] *See* Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. DCL L. REV. 671, 676 (2003) ("Case-by-case analysis reduces errors, but is more expensive for regulators and applicants.").

[129] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) ("Sound policy, as well as history, supports [the court's] consistent deference to Congress when major technological innovations alter the market for copyrighted materials.").

so because Congress has the opportunity to hear from, and sometimes to delegate decision-making authority to, knowledgeable experts who can make informed policy decisions. Courts, on the other hand, must draw from a smaller pool of resources, often relying entirely on the parties involved. The DMCA does not describe in adequate detail how to handle Internet radio websites like LAUNCHcast;[130] if it did, then the opinion in *Arista Records* would certainly be more succinct.[131] It would seem, then, that the DMCA is therefore inadequate in light of the new technologies that have developed since its enactment. Lawmakers, rather than judges, are in the best position to decide which webcasting services are interactive.

C. The Standard is Inconsistent with the Stated Intention of Congress in Enacting the DMCA.

When Congress wrote the interactivity distinction into the DMCA, it was protecting traditional record sales.[132] The court in *Arista Records* recognized that digital downloading software such as Napster was causing a reduction in record sales.[133] However, the court distinguished downloading programs from streaming programs, such as LAUNCHcast, by indicating that webcasting services actually increase record sales.[134] There are, however, more current competing studies that show the opposite to be true.[135] It is more obvious with some webcasting services than with others why they might be acting as substitutes for record sales instead of boosting them. For example, Grooveshark allows users to search for and listen to any song in its database any number of times.[136] Many music listeners may be much more likely to use

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[130] *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[131] *See generally Arista Records*, 578 F.3d. at 148.

[132] H.R. REP. NO. 105-796, pt. 2, 87 (1998) (Conf. Rep.).

[133] *Arista Records*, 578 F.3d at 161 n.19 (citing Anita Hamilton, *The Pirates of Prime Time*, TIME, Feb. 25, 2002, at 54).

[134] *Id*. (citing Jeb Gottlieb, *Pandora Lifts Lid on Personalizing Online Radio*, BOSTON HERALD, Feb. 26, 2008, at 32; *SoundExchange Open to Bill Targeting Small Webcasters*, COMMC'NS DAILY, May 3, 2007).

[135] *See* Derek Thompson, *Why Aren't Kids These Days Downloading Music?*, THE ATLANTIC MAGAZINE, July 13, 2009, *available at* http://business.theatlantic.com/2009/07/kids_these_days_arent_downloading_music_anymore.php (noting that digital sales have increased, while physical album sales continue to decrease).

[136] *See* Christian Cawley, *Finding and Playing Free Music with Grooveshark*, DEVICE MAGAZINE, Feb. 24, 2011, *available at* http://www.devicemag.com/2011/02/24/finding-and-

Grooveshark and similar services than genre-based Internet radio stations as a substitute for actually purchasing music. Therefore, Grooveshark seems much more likely to be "interactive" according to the definition in the Copyright Act. However, even websites like Pandora, which are more similar to LAUNCHcast than to either Grooveshark or genre-based stations, appear to be diminishing part of the music sales market.[137]

It is possible that services like LAUNCHcast and Pandora are simultaneously invigorating and detracting from record sales. Some users will buy the music they hear on these services (and, but for Internet radio, may not have otherwise heard). Other users would rather listen to music on Pandora or LAUNCHcast than buy it outright, perhaps because they prefer the varied listening experience of Internet radio to the control that comes with direct ownership of songs.[138] If this is the case, and if both factors affect the market with approximately equal force, the effect of noninteractive Internet radio stations on the market is currently a *shift* in record sales as opposed to an increase or decline.[139] When Congress chose to implement the interactivity distinction, it probably did not envision such a shift. Further, the factors tending to cause a decline in record sales will likely become more and more problematic as the Internet becomes faster, easier to use, cheaper and more portable. Internet radio websites, even those that are noninteractive, are more likely to detract from traditional record sales in the near future than they are to supplement them. Thus, the interactivity distinction does not further the goal of protecting traditional record sales because interactive websites will sometimes increase record sales, and because non-interactive websites will sometimes decrease them.

playing-free-music-with-grooveshark/.

[137] *See* Thompson, *supra* note 135 (observing that teen use of music-streaming websites is increasing).

[138] One such service even uses the unpredictability of its generated playlists as a positive selling point. FLYFI FREQUENTLY ASKED QUESTIONS, http://www.flyfi.com/press_room/flyfi_fact/ (last visited Apr. 16, 2011) (noting that FlyFi's music recommendations are "far more relevant yet far less predictable," and that "the music discovered with FlyFi is targeted and full of delightful surprises – not just more of the same.").

[139] Even if these opposing factors do not affect the market equally, so long as both are present to some degree a shift in sales occurs alongside an absolute increase or decline in sales.

VI. PROPOSED SOLUTIONS

Scholars and other interested parties have suggested several schemes to make the interactivity distinction less problematic. Some suggest different ways to implement the interactivity distinction for webcasting services.[140] Others have suggested that the interactivity distinction, at least in the context of Internet radio, should be abandoned in favor of full performance rights for the copyright holders of sound recordings.[141] This note suggests two other possible solutions. First, Congress might instead abandon the copyright in sound recordings and use the musical work copyright instead. Second, Congress might choose to replace the interactivity distinction with a blanket compulsory licensing scheme.

A. Interactivity as a State of Mind

One proposed solution suggests that the degree of interactivity of a webcasting service should be judged based on the user's "state of mind" instead of on "whatever enabling technology is present."[142] The meaning of interactivity surfaced in an Appellate Court decision in the context of violent video games. The city of Indianapolis passed an ordinance requiring minors to be accompanied by an adult when playing violent video games in public places.[143] The city argued that "because the games were interactive, studies showed that they had an enhanced and irresistible effect on children."[144] Announcing the opinion of the court, Judge Posner responded that literature in general is interactive, including printed material, movies and video games, because successful literature "draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own . . . ."[145] In other words, the interactivity of the video game (or any other type of literary work) depends on the user's reactions and emotional responses instead of on the technologies that the game itself implements.

One possible solution to the problems the interactivity distinction creates is to apply this "state of mind" definition of interactivity to the public

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[140] *See generally* Field, *supra* note 50.

[141] *See, e.g.*, O'Dowd, *supra* note 35, at 249.

[142] Field, *supra* note 50, at 59.

[143] INDIANAPOLIS, IND., CODE OF ORDINANCES § 831-5(i) (1996); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

[144] Field, *supra* note 50, at 59.

[145] *Id.* (quoting *Am. Amusement Mach. Ass'n*, 244 F.3d at 577.).

performance rights of digital audio transmissions.[146] Accounting for the subjective intent of the user in determining whether a webcasting service is interactive, however, is likely to introduce costs beyond those already associated with an arguably vague predictability standard.[147] Discovering the subjective intent of individuals is a notoriously expensive task, both for the parties involved and for presiding courts.[148]

The "state of mind" approach also fails to remedy the problem of uncertainty. If anything, the outcome of potential lawsuits would be even more uncertain for webcasting services like LAUNCHcast under the "state of mind" approach than under the predictability standard. This is due mostly to the fact that under the "state of mind" approach, whether a service is interactive depends not on the methods implemented by the service itself, but instead on the way in which that service's listeners make use of it.[149] On the one hand, it may seem more accurate to say that the level of interactivity of an Internet radio website should depend at least in part on the way that a typical user experiences it. It might make sense, at first glance, to say that a website should be deemed "interactive" only if its users are actually interacting with it, by actively offering input and receiving output in return.

The problem is one of definitions. If Congress had left the definition of "interactive" to be determined by another entity, then perhaps the simplest, most obvious definition of the term would govern today. However, Congress chose not to leave the definition for judges to work out themselves. Instead, Congress provided a definition that clearly focuses on the way webcasting services structure their programs or songs for transmission to their users, and says nothing about the way in which users experience such services.[150] Unless Congress abandons its definition of what makes a webcasting service interactive, the "state of mind" approach appears to be at odds with the language of the Copyright Act.[151]

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[146] *Id.* ("[W]here interactivity is legally determinative, the statutory definition can be supplemented and informed by the actor's state of mind and intent.").

[147] *See* Easter House v. Felder, 852 F.2d 901, 916 n.16 (7th Cir. 1988) ("[T]he prospect that the court will consider subjective factors when evaluating a qualified immunity motion at the conclusion of the evidence may also make it more expensive . . . .").

[148] *See*, *e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials.").

[149] *See* Field, *supra* note 50, at 59.

[150] *See* 17 U.S.C. § 114(j)(7) (2006).

[151] The intent of the recipient of webcasting services appears nowhere in the definition of "interactive service." *Id.*

B. A Full Performance Right for Digital Audio Transmissions

Another solution to the interactivity problem is to do away with the interactivity distinction entirely and instead accord sound recording copyright holders full public performance rights. Some scholars suggest that sound recordings, with respect to public performance, are indistinguishable from other categories of copyrightable works.[152] At least one scholar maintains that it was only by historical coincidence that the Copyright Act came to treat sound recordings differently from other copyrightable works.[153] Instead of requiring courts to determine whether a service is interactive as defined by the statute for licensing purposes, it might be simpler to require all such licenses to be negotiated directly with the copyright holder. The Copyright Office, the agency charged with administering the Copyright Act, has in fact recommended that Congress implement a licensing scheme providing sound recording copyright holders with full public performance rights.[154]

There has been a general trend toward full performance rights. Holders of sound recording copyrights initially had no performance rights under the SRA.[155] The DPRA gave sound recording copyright holders performance rights, but in a limited way.[156] The DMCA amended the DPRA to require traditional over-the-air broadcasters to obtain licenses for the same programs streamed over the Internet.[157] More recently, several members of Congress have, on multiple occasions, proposed an amendment to the Act that would remove the broadcast exemption entirely, requiring even over-the-air digital audio transmissions to be licensed.[158] While according copyright holders full

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[152] O'Dowd, *supra* note 35, at 259-60.

[153] *Id*. at 251-54.

[154] Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 420 (2008) (citing David O. Carson, Statement Made to General Counsel, U.S. Copyright Office, before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 108th Congress 12-13 (July 15, 2004), *available at* http://www.copyright.gov/docs/carson071504.pdf (citing Report of the Registrar of Copyright, Copyright Implications of Digital Audio Transmission Services (Oct. 1991))).

[155] *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[156] Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336, 336 (1995) (adding, "in the case of sound recordings," the right "to perform the copyrighted work publicly by means of a digital audio transmission" to the list of exclusive rights given to copyright holders).

[157] H.R. REP. NO. 105-796, pt. 2, at 80 (1998) (Conf. Rep.).

[158] Noh, *supra* note 17, at 86-87 (citing Performance Rights Act, H.R. 848, 111th Cong.

performance rights regardless of interactivity would inevitably be simpler and cheaper for courts, it poses subtle dangers as well. Congress chose a narrow definition of an interactive service in light of the important goal of "making development of new media and forms of distribution 'economically [ ]feasible.'"[159] This goal stems ultimately from the Constitutional power granted to Congress 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."[160] Protecting "traditional record sales"[161] thus must stand in the shadow of the promotion of progress in the development of new technologies and forms of distribution.

It is also true that other types of developing technology are seriously affecting traditional record sales. Recently, smart phones have made their way into the hands of a remarkably large percentage of the population.[162] These devices come with the important new feature of Internet access at reasonable speeds, even where wireless networks are unavailable. The 3G networks are expanding every day, and still faster networks are currently in their beginning stages of development.[163] The ubiquity and facility of the Internet enables music fans to listen to songs without having actual control of physical copies of them. Studies have shown that fewer people are downloading songs (legally or illegally) in part because of webcasting services such as LAUNCHcast, Pandora and Grooveshark.[164] When users can take Internet radio stations like Grooveshark with them anywhere they go, who needs physical copies of the songs themselves?

The portion of the Copyright Act which grants performance rights to sound recording copyright holders currently has nothing to say about these emerging

(2d Sess. 2009)).

[159] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 154 (2d Cir. 2009) (citing H.R. REP. NO. 104-274, 14 (1995)).

[160] U.S. CONST. art. I, § 8, cl. 8.

[161] *Arista Records*, 578 F.3d at 154.

[162] *Smartphone and chip market study*, CIOL NEWS REPORTS, (Feb. 6, 2009), http://www.ciol.com/Semicon/Biz-Watch/News-Reports/Smartphone-and-chip-market-study/6209115647/0/ (predicting a smart phone market penetration in 2013 "exceeding 50% in the major operator-subsidized regions of North American and Western Europe").

[163] *See id*. For a discussion of 4G, a potential 3G network successor, *see generally High speed mobile network to launch in Jersey*, BBC, (Mar. 22, 2010), http://news.bbc.co.uk/local/jersey/hi/people_and_places/arts_and_culture/newsid_8574000/8574436.stm.

[164] *See* Thompson, *supra* note 135.

technologies.[165] While it is certainly possible for Congress to amend the definition of an "interactive" webcasting service in the Copyright Act any time a new technology gains widespread use, it would likely be more efficient to find another way to deal with the competing interests of record labels and the Constitutional goal of promotion of progress in "science and useful arts."[166] A full public performance right for sound recordings would relieve the courts and Congress of the time-consuming responsibility of adapting the definition of interactivity to technologies as they emerge.[167]

However, the problem of transaction costs would become significant if Congress were to implement such a change. The presence of CROs has alleviated – indeed, virtually eliminated – this problem in the case of copyright licenses for musical works.[168] The Copyright Act currently appears to require those webcasting services that are interactive to negotiate with sound recording copyright holders.[169] This requirement has the odd result of preventing CROs from forming with respect to sound recordings. The transaction cost problem is not as daunting in the case of sound recordings as it has been for musical works because recording labels have to a significant extent performed the function of CROs by collecting the sound recording copyrights of the performing artists that have contracts with them.[170] Currently this problem does not exist for noninteractive webcasting services because sound recording copyright holders must license their copyrights under a statutory licensing scheme. A full public performance right would introduce the transaction cost problem to licensing negotiations for noninteractive services in much the same form as it currently exists for interactive services.

A full public performance right would likely also tend to favor major recording companies to the detriment of smaller independent labels. Generally, the more copyrights a recording company owns, the more economically efficient it will be for webcasters to negotiate licenses with them.

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[165] *See* 17 U.S.C. § 114 (2006).

[166] U.S. CONST. art. I, § 8, cl. 8.

[167] For a detailed argument in favor of giving sound recordings full public performance rights, *see* O'Dowd, *supra* note 35.

[168] COHEN ET AL., *supra* note 17, at 446.

[169] *Id*. at 469 (noting that the Copyright Act "authorizes the establishment of common agents to collect or pay fees, but requires that each sound recording copyright owner and broadcast performer set rates and other terms unilaterally.").

[170] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 152 (2d Cir. 2009) (commenting that the holders of sound recording copyrights are "principally recording companies").

Major labels usually own the copyrights in many more sound recordings than do smaller labels simply because they have contracts with many more performing artists.[171] Webcasters might be more willing to negotiate with the major labels for the very reason that they would be able to acquire licenses to publicly perform more songs.[172]

C. Compulsory Licensing for Interactive Digital Audio Transmissions

Doing away with the interactivity distinction is an appealing solution, provided that it adequately serves the interests of copyright holders, webcasting services and the promotion of progress. Instead of shifting rights toward copyright holders by requiring exclusive licenses for digital audio transmissions whether or not they are interactive, an alternative is to shift the balance in favor of webcasters by creating a compulsory licensing scheme for all digital audio transmissions.[173]

A policy that supplants the free market model should never be implemented without careful consideration. Compulsory licensing would require copyright holders to provide licenses to Internet radio websites whether or not they think such a license would be in their best interest. However, this sort of licensing is certainly not without precedent. In the context of performance rights for sound recordings, the Act already has in place a compulsory license scheme for some types of services.[174] The Copyright Act of 1909 set up a compulsory licensing model for the production of piano rolls, in spite of the fact that copyright holders of musical works enjoyed a full production right.[175]

Implementing a statutory licensing scheme in place of the interactivity definition and its accompanying predictability standard would also benefit

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[171] For a discussion of the differences between major and independent labels, *see generally* Rob Cumberland, *DIY and indie, record labels, options, and disadvantages*, http://www.bemuso.com/musicdiy/diyandindependentlabels.html#diyindieandmajorlabelscompared (last visited Apr. 16, 2011).

[172] Whether or not Congress intended this result, favoring major labels over smaller ones is primarily a political decision, the wisdom of which this note does not evaluate.

[173] This would, of course, be to the exclusion of those types of digital audio transmissions that are exempt from licensing entirely, including digital over-the-air broadcast transmissions. 17 U.S.C. § 114(d)(1) (2002).

[174] Noninteractive webcasting services are good examples. *See, e.g.*,17 U.S.C. § 114 (2006). Compulsory licenses are also available for the making and distributing of phonorecords of nondramatic musical works. *See* 17 U.S.C. § 115 (2006) (covering, among other things, online music stores that offer digital downloads of songs).

[175] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1075-76 (1909).

courts. Instead of requiring courts to answer the difficult question of whether an Internet radio service is predictable enough to merit direct license negotiation, negotiating parties would instead submit all disputes to a specialized panel for resolution.[176] Shifting the burden in this way from courts to the Copyright Arbitration Royalty Panel might be a more efficient allocation of governmental resources. The Panel would presumably have more specific experience with licensing disputes, and of course the Panel would not need to decide whether a license should issue - only at what price.

Sound recording copyright holders might be concerned about situations in which they would ordinarily opt not to give a license to webcasters at all, and legitimately so. However, sound recording copyright holders already deal with numerous such situations including those involving broadcast transmissions streamed on the Internet and noninteractive Internet radio services. The reality of the situation is that many webcasting services tend to follow the business model of asking forgiveness rather than permission.[177] Many webcasters choose to stream sound recordings to their users without a license to do so, preferring to let the recording companies initiate licensing negotiations.[178] By removing the transaction cost problem associated with individual license negotiations, statutory licensing would make it easier for webcasters that provide interactive services to comply with the law, and thus more likely to acquire licenses for songs *before* transmitting them to users.[179] Recording companies might not receive the compensation they desire in every case, but the compensation they do receive would come free of the potentially large costs of an infringement lawsuit. Statutory licensing may provide the best balance of interests with which the court in *Arista Records* grappled, while also only minimally involving the courts.

D. Abandoning the Sound Recording Copyright Where the Phonorecord is Merely the Recorded Performance of an Underlying Musical Work

Sound recordings themselves are a rather odd addition to the list of copyrightable works. One of the purposes behind making sound recordings copyrightable in the first place was to protect the work of performing artists (and the recording companies that represent them) from piracy when they were

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[176] Field, *supra* note 50, at 54.

[177] Bonanos, *supra* note 116 (noting that the "infringe-litigate-settle-license" model has been successful for some websites).

[178] *See id*.

[179] The transaction cost problem is discussed briefly in JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 426, 469-70 (2d ed. 2006).

not themselves the owners of the copyright for the underlying musical work.[180] It is at least plausible to say that, in the context of Internet radio, a sound recording of a song is nothing more than a derivative work based on an underlying musical work, where a derivative work is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[181]

If a particular sound recording is nothing more than a derivative of the musical work upon which it is based, it might make more sense to apply the "musical work" label to the sound recording in addition to the underlying composition and refrain from involving sound recordings at all.[182] The sound recording copyright would still protect those sound recordings which are not merely the performance of a musical work.[183]

If someone besides the performer owns a valid copyright in the underlying musical work, it might be unclear how a performing artist could obtain a copyright in what is essentially the same thing. In order to obtain a copyright for a derivative work that is based on another work, the author of the derivative work must contribute something new or original.[184] Further, the Copyright Act provides that the copyright in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting

[180] Bonneville Intern. Corp. v. Peters, 347 F.3d 485, 487 (3d Cir. 2003) ("With the Sound Recording Amendment of 1971 . . . a limited copyright in the reproduction of sound recordings was established in an effort to combat recording piracy.").

[181] 17 U.S.C. § 101 (2006). Sound recordings are explicitly listed as candidates for derivative works.

[182] *See* MELVILLE B. NIMMER & DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT § 2.10 [A][2] (Matthew Bender, Rev. Ed. 2010) (observing that a sound recording is a derivative work in the sense that "the sound recording copyright does not attach to the underlying work *per se*, but only to the aural version of such work as fixed on the material object.").

[183] Speeches, lectures, news reports, and even bird calls would theoretically still be protectable so long as they "result[ed] from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2006). Whether the term "musical" would still have a place in the definition of "sound recordings" is a question that this note does not address.

[184] *See*, *e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (maintaining that a derivative work must contain an "original contribution not present in the underlying work of art").

material employed in the work . . . ."[185] This makes the derivative work copyright subservient to the original copyright: the author of the derivative work must acquire permission from the copyright holder of the original in order to use it.[186]

It is unclear what effect such a change would have on the music industry. Composers would still be able to exert their exclusive right of public performance against webcasters who transmit their musical works.[187] However, performing artists would own a copyright only in that which is new and original to their particular performances.[188] It would appear, therefore, that performing artists could exert *their* exclusive right of public performance against webcasters only to the extent that the webcasters transmit those aspects of the recorded performance which are new and original to the performance, over and above the substance of the underlying musical work. Exactly what percentage of a recorded performance is attributable to the performing artist, as opposed to the composer of the musical work, would therefore become an important (and probably highly fact-specific) question when deciding infringement suits.

This question does not appear on its face to be any easier to answer than the question of whether an Internet radio service is interactive. Further, given that Congress has expressed an intent to protect the livelihoods of both performing artists and record companies, the result of abandoning the sound recording copyright for works that are merely the recorded performance of an underlying musical work would appear to be at odds with this intent.[189] Performing artists and recording companies would be able to exert a full public performance right against webcasters whether or not their services are interactive, but since they would own only a fraction of the work, they would receive only a fraction of benefits. The licensing process itself would be particularly burdensome and confusing because webcasters would be unsure of exactly how much to pay to whom for the right to transmit musical works. It would be difficult, for example, for webcasters and performing artists to decide what portion of the rights in a musical work belong to the performing artists when they change the key and tempo of an underlying musical work, as well as some (but not all) of

[185] 17 U.S.C. § 103(b) (2006).

[186] 17 U.S.C. § 103(a) (2006) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

[187] 17 U.S.C. § 106(4) (2006).

[188] *Batlin*, 536 F.2d at 491.

[189] S. REP. NO. 104-128, at 10 (1995).

its lyrics, during performances. This solution is probably not the best solution to implement because the problems it creates equal or surpass in difficulty the problems it solves.

V. CONCLUSION

The predictability standard promulgated in *Arista Records* is problematic. The real problem, however, is not with the predictability standard, but with the interactivity distinction itself. In a world where technology inevitably outpaces its governing laws, judges are left with complex, verbose definitions which often have little application to the matters at hand. Instead of attempting to position each new technology as it comes on one side or the other of the interactivity line, it would be simpler and more efficient to abandon the interactivity distinction entirely. It would then be up to Congress to define new terms or to apply simpler methods already in place elsewhere in the Copyright Act.

One possible solution would be to give sound recording copyright holders full performance rights. However, implementing such a change would run the risk of chilling the development of new technologies that might better and more efficiently serve the public. Looking to the subjective intent, or "state of mind," of music listeners when determining the interactivity of a webcasting service is at odds with the plain language of the Copyright Act. The implications of abandoning the sound recording copyright and instead designating recorded performances of songs as musical works are unclear. Implementing such a change would probably complicate the musical works licensing process and leave sound recording copyright holders with a much less powerful exclusive right of public performance, which would be contrary to the stated Congressional intent of protecting performing artists and recording companies from music piracy. Removing the interactivity distinction entirely and replacing it with a blanket compulsory licensing scheme stands out among other solutions as the one that best negotiates the balance between, on the one hand, protecting record sales and encouraging the continued creation of music, and on the other, the Constitutional mandate of promoting progress by encouraging the development of new technologies and new media.