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# WILL CONGRESS KILL THE PODCASTING STAR?

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## I. INTRODUCTION

Podcasting, a method whereby individuals post audio content[1] on the Internet for automatic download, has recently emerged as a new technology poised to shake up the digital audio world. Podcasting does not easily fit into any of the current statutory or regulatory schemes that control the broadcast of copyrighted material; it is a classic example of new wine in old bottles. Although podcasting's populist appeal gives it the potential to change the world of radio and music, its uncertain legal status may prevent it from doing so.

This Article examines how podcasting comports with current copyright law. Part II considers the history and technology behind podcasting. Part III discusses how webcasting once threatened the radio and the music industry, as podcasting is now doing, and how federal regulation quashed the potential of webcasting. Part IV addresses the legal issues presented by podcasting and argues that current statutes and regulations are inadequate to govern its development. Part V concludes that the Copyright Act should be amended to define more clearly the rights of podcasters, copyright holders, and their audiences. Podcasting was born into a legal regime ill-equipped to govern it effectively. Congress should update the law to keep pace with this new technology.

1. Although the vast majority of current podcasts provide audio content, a number of podcasters have started to post video content, and many expect that video podcasting will soon become widespread. *See* Pascal Pinck, *Podcasters Prepare to Launch Video Era*, REUTERS, Oct. 13, 2005, http://go.reuters.com/newsArticle.jhtml?type=technologyNews&storyID=9918985.

## II. A PODCASTING PRIMER

### *A. Origins*

Podcasting allows both professional and amateur broadcasters to distribute their own audio programming over the Internet. It has been described as a cross between radio, blogging, and TiVo.[2] Using audio editing software, a podcaster creates an MP3 (or other audio format) file, containing recorded speech, music, or both. He then uploads the file to the Internet, where listeners can choose to have their "pod-catching" software automatically download the file to their computer or portable audio player. Individual podcasters have unlimited freedom to create original audio content and listeners have the freedom to listen at their leisure — rewinding, pausing, and fast-forwarding as they please.

Former MTV personality Adam Curry and software developer Dave Winer are considered the founding fathers of podcasting.[3] Curry noticed the increasing popularity of audioblogging — recording one's thoughts in an audio file and posting it on the Internet — and recognized that of the absence of a straight-forward means for facilitating portability was keeping Internet-based audio from realizing its full potential. In August 2004, he enlisted the help of Winer and other open-source programmers in developing syndication software that automatically downloads a listener's preferred audio content.[4] Curry's software automated the delivery of online MP3 files to portable audio players.[5] Suddenly, audioblogging evolved into podcasting, and Curry earned the nickname "the Podfather."[6]

The term "podcasting" is a portmanteau of "broadcasting" and "iPod," the name of Apple's popular audio player. The word was first seen in print in a February 2004 article of *The Guardian*.[7] Newspapers

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2. *See, e.g.*, Byron Acohido, *Radio to the MP3 Degree: Podcasting*, USA TODAY, Feb. 9, 2005, at 1B; Brian Braiker, *TiVo for Your iPod*, NEWSWEEK, Dec. 7, 2004, http://msnbc.msn.com/id/6640519/site/newsweek; David Carr, *Big Media Wants a Piece of Your Pod*, N.Y. TIMES, July 4, 2005, at C1; Peter J. Howe, *Computer Microphone, iPod Make Broadcasting Personal*, BOSTON GLOBE, Dec. 20, 2004, at A1; Kate Zernike, *Tired of TiVo? Beyond Blogs? Podcasts Are Here*, N.Y. TIMES, Feb. 19, 2005, at A1.

3. *Cf.* Alex Beam, *Bickering Among the 'Pod Squad,'* BOSTON GLOBE, May 26, 2005, at D1 (describing the tension between Curry and Winer, as each claims credit for developing podcasting).

4. *See* Cyrus Farivar, *New Food for iPods: Audio by Subscription*, N.Y. TIMES, Oct. 28, 2004, at G5; Andy Goldberg, *The People's Radio*, INDEPENDENT (London), Dec. 8, 2004, at 11.

5. *See* Clark Boyd, *Podcasts Bring DIY Radio to the Web*, BBC NEWS, Dec. 30, 2004, http://news.bbc.co.uk/1/hi/technology/4120773.stm.

6. *See* Ken Belson, *An MTV Host Moves to Radio, Giving Voice to Audible Blogs*, N.Y. TIMES, May 2, 2005, at C3; Steve Johnson, *Navigating the Podcast Concept*, CHI. TRIB., July 31, 2005, at C1.

7. Ben Hammersley, *Audible Revolution: Online Radio Is Booming Thanks to iPods, Cheap Audio Software and Weblogs*, GUARDIAN (London), Feb. 12, 2004, at 27.

in the U.S. and the U.K. began picking it up in the fall of 2004.[8] In February 2005, a trademark claim was filed on the word "podcast,"[9] but the term is already so generic that the claim will likely fail.

### *B. Technology*

For all its legal and cultural complexity, the technology behind podcasting is fairly simple. Podcasters can create audio files using anything from a professional recording studio[10] to a microphone and free editing software[11] to a specially-equipped cell phone.[12] Many users celebrate podcasting's accessibility and ease of creation as part of its populist appeal,[13] while others see this as the source of podcasting's biggest weakness: large amounts of very low-quality content.[14] After creating the file, the podcaster uploads it to an Internet server. From there, it is all up to the listener.

Back in the days of audioblogging, a listener would have to go to an audioblogger's website, find each audio file, and download it manually. Curry's software, called iPodder,[15] completes all of those steps automatically. Not one to pass up an opportunity to enhance the value of its popular iPods, Apple recently released a new version of its

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8. *See, e.g.*, Susan Carpenter, *Pirate Radio's Next Generation*, L.A. TIMES, Oct. 14, 2004, at E4; Steve Pain & Andrew Sparrow, *Boom in Internet Audio Material*, BIRMINGHAM POST (U.K.), Oct. 19, 2004, at 18; *see also* Rob Greenlee, *Podcast: Time-Shifted Radio Gets a New Name*, WEB TALK RADIO, Oct. 23, 2004, http://www.webtalkradio.com/news/inter2.php?news=17 (discussing the importance of a good name for time-shifted Internet-based audio). Some online accounts of podcasting's history claim that the first use of the term in connection with Curry's syndication software was by Dannie J. Gregoire in September 2004. *See, e.g.*, Wikipedia, *Podcasting*, http://en.wikipedia.org/wiki/Podcast (last visited Nov. 21, 2005).

9. USPTO Trademark Application, Serial No. 78564869 (filed Feb. 10, 2005), *available at* http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=78564869.

10. *See, e.g.*, Farivar, *supra* note 4 (reporting that radio stations KOMO in Seattle and WGBH in Boston are releasing some of their radio shows via podcast); Matt Kettmann, *Will Podcasting Kill the Radio Star?*, TIME, Dec. 13, 2004, at 76 (stating that the BBC and Air America are dabbling in podcasting).

11. *See, e.g.*, Marco R. della Cava, *Podcasting: It's All Over the Dial*, USA TODAY, Feb. 9, 2005, at D1 (discussing a popular podcast which originates from a living room in Wisconsin); Anna Johns, *Wave Goodbye to Radio*, PORTLAND TRIB. (Oregon), Feb. 8, 2005, *available at* http://www.portlandtribune.com/archview.cgi?id=27858 (profiling a podcaster who creates his content in his Portland apartment).

12. *See* Mobilepodcast.org, http://mobilepodcast.org (last visited Nov. 21, 2005) (providing a podcast created through the use of a Treo 650 Smartphone).

13. *See, e.g.*, Matthew Fordahl, '*Podcasting' Lets Masses Do Radio Shows*, A.P. ONLINE, Feb. 7, 2005, *available at* http://www.usatoday.com/tech/news/2005-02-07-podcasting_x.htm ("By bringing the cost of broadcasting to nearly nothing, it's enabling more voices and messages to be heard than ever before.").

14. *See, e.g.*, David Rowan, *Since the New iPodder Software, Hundreds of Radio Channels Have Emerged in Cyberspace*, TIMES (London), Nov. 6, 2004, at Times Magazine 14 (quoting one pundit as calling many unprofessional podcasts "a pile of steaming doo-doo").

15. *See* Adam Curry, *iPodder: A Brief History*, http://www.ipodder.org/history (last visited Nov. 21, 2005) (recounting Curry's own story of how he turned to open-source development after finding his own efforts to be inadequate).

free iTunes software that incorporates its own podcast-searching and downloading features, and it has updated the iPod software to include a special podcasting menu.[16] Using podcatching software like iTunes or iPodder, the listener simply subscribes to a list of podcasts he is interested in, and the software, using the Really Simple Syndication ("RSS") technology Winer helped develop, automatically downloads each new file as it is posted online. Even better, it can also automatically transfer the downloaded podcasts to the listener's portable audio player the next time it is synced with the computer.

In sum, podcasting technology uses a simple upload-download model.[17] The podcaster puts a copy of the audio file on a server with a syndication tag, and a potentially unlimited number of users are invited to download it to their own computers or portable audio players. There is no streaming involved in podcasting. Although a podcaster can remove a file from the server, once a listener has downloaded it, he has permanent control over that copy and could potentially distribute further copies.[18]

### *C. Growth and Practice*

Podcasting's popularity has grown exponentially during its brief existence. Currently, there may be as many as 10,000 podcasts.[19] That number is expected to grow to 300,000 by year's end and possibly as many as 13 million by the end of the decade.[20] A March 2005 survey found that twenty-nine percent of all adult owners of portable MP3 players had downloaded a podcast — amounting to a current podcast audience estimated to exceed 6 million people.[21] Apple reported that in the first two days after the launch of its iTunes podcasting feature,

16. *See* John Markoff, *Apple Offers New Access To Podcasts*, N.Y. TIMES, June 29, 2005, at C5; David Pogue, *In One Stroke, Podcasting Hits Mainstream*, N.Y. TIMES, July 28, 2005, at C1; Nick Wingfield, *Podcasting for Dummies*, WALL ST. J., June 29, 2005, at D1.

17. *But see* MGM Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2790 (2005) (Breyer, J., concurring) (listing user-created podcasts as one of many possible legitimate uses of peer-to-peer file-sharing systems, which is a different model for podcast distribution than the one adopted for the purposes of this Article).

18. Podcasters might place limitations on listeners' ability to control podcasts by utilizing digital rights management technology. For a general discussion of digital rights management and its potential impact on podcasting, see *infra* Part IV.B.5.

19. *See* Karen Tumulty et al., *Al Gore, Businessman; What's on the Former Veep's Agenda These Days? Investments and a New TV Network*, TIME, Aug. 8, 2005, at 32.

20. *See* Antony Bruno, *Podcasting Bonanza Lures Wary Music Biz*, BILLBOARD, June 18, 2005, at 17.

21. Data Memo on Podcasting from Lee Rainie & Mary Madden, Pew Internet & Am. Life Project (Apr. 2005), *available at* http://www.pewinternet.org/pdfs/PIP_podcasting.pdf (estimating that 29% — plus or minus 7.5% — of the 22 million Americans who own iPods have downloaded a podcast).

over a million people subscribed.[22] A number of websites have attempted to catalog most or all regular podcasts, each offering different schemes of categorization and different methods of keeping track of new podcasts.[23]

Although corporations and other professional broadcasters are jumping on the podcasting bandwagon with increasing frequency,[24] a large number of podcasters are still private individuals. Content varies as widely as do personal interests, and many podcasts seem to be nothing more than musings and banter. Many of the early podcasts focused on podcasting itself, but as the medium has matured, more podcasters have found a niche audience of listeners interested in a specific topic. Examples include investing,[25] snowmobiling,[26] Christianity (a niche that has inspired the term "Godcast" and includes official podcasts from the Church of England and Pope Benedict XVI),[27] wines,[28] hunting,[29] obituaries,[30] and even the law.[31] Corporations have

22. *See* Alex Mindlin, *At the Podcast Party, More Guests Arrive*, N.Y. TIMES, July 18, 2005, at C3; James Gilden, *The Internet Traveler: Audio Tours on iPod that Could Be Music to a Tourist's Ears*, L.A. TIMES, July 24, 2005, at L3.

23. *See, e.g.*, Apple iTunes: Podcasts, http://www.apple.com/itunes/store/podcasts.html (last visited Nov. 21, 2005); Blinkx, http://www.blinkx.com (last visited Nov. 21, 2005); Indiepodder.org, http://www.ipodder.org (last visited Nov. 21, 2005); Live365, Free Podcasts, http://www.live365.com/podcasts (last visited Nov. 1, 2005); Odeo, http://www.odeo.com (last visited Nov. 21, 2005); Podcast Bunker, http://www.podcastbunker.com (last visited Nov. 21, 2005); Podcast.net, http://www.podcast.net (last visited Nov. 21, 2005); Podcast Directory — Podcasts from Around the World, http://www.podcastdirectory.com (last visited Nov. 21, 2005); PodcastAlley.com, http://www.podcastalley.com (last visited Nov. 21, 2005). Yahoo! has also recently introduced an audio-based search engine. While not specifically centered on podcasts, it touts its ability to search audio files on the web, including podcasts, and produce relevant results. *See* Saul Hansell, *Yahoo Introduces Search Service for Music*, N.Y. TIMES, Aug. 4, 2005, at C2; Jonathan Thaw, *Yahoo Tests Search for Audio Files; Web Portal Hopes To Boost Music Service*, WASH. POST, Aug. 5, 2005, at D05; Yahoo! Podcasts, http://podcasts.yahoo.com (last visited Nov. 21, 2005).

24. *See* Anjali Athavaley, *Mainstream Media is Tuning in to 'Podcasting'; Corporate America Overtakes a Popular Grass-Roots Digital Format*, WASH. POST, July 18, 2005, at A01; Carr, *supra* note 2; Michelle Kessler, *Podcasting Goes from Indie to Mainstream Overnight*, USA TODAY, July 13, 2005, at B1.

25. *See, e.g.*, High Octane Trading (HOT) Radio, http://feeds.feedburner.com/hotradio (last visited Nov. 21, 2005).

26. *See, e.g.*, SledHead Radio, http://www.sledheadradio.com (last visited Nov. 21, 2005).

27. *See, e.g.*, The GodCast Network, http://www.godcast.org (last visited Nov. 21, 2005); CatholicInsider.com, http://www.catholicinsider.com (last visited Nov. 21, 2005); *see also* Jonathan Petre, *The iGod: Stay-at-Home Worshippers Are Downloading Sermons to Listen to at Their Leisure*, DAILY TELEGRAPH (London), Aug. 5, 2005, at 9.

28. *See, e.g.*, Talking About Wine, http://www.talkingaboutwine.com (last visited Nov. 21, 2005).

29. *See, e.g.*, Huntingwithjoe.com Podcast, http://www.huntingwithjoe.com/blog1/podcast.html (last visited Nov. 21, 2005).

30. *See, e.g.*, KRCW: Final Curtain, http://www.kcrw.com/show/fc (last visited Nov. 21, 2005).

31. *See, e.g.*, May It Please the Court, http://www.mayitpleasethecourt.com (last visited Nov. 21, 2005).

turned to podcasting as a new method of advertising their products.[32] As with other popular new media, pornography has quickly seized a sizeable market share,[33] no doubt heartened by the lack of FCC content control. Other podcasts serve as university lecture supplements,[34] summaries of last night's television programming,[35] director's commentary on television shows,[36] political speech archives,[37] campaign propaganda,[38] tour and museum guides,[39] or even serialized novels.[40] One article even suggests podcasting might be the "new wave" of continuing legal education.[41]

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32. *See, e.g.*, GM FastLane Blog, http://fastlane.gmblogs.com/archives/podcasts/ (last visited Nov. 21, 2005); Pepsi Max No Sugar Windup, http://www.podcastalley.com/podcast_details.php?pod_id=1549 (last visited Nov. 21, 2005); Heineken Music, http://www.heinekenmusic.com (last visited Nov. 21, 2005).

33. *See, e.g.*, Pod-Porn.com, http://www.pod-porn.com (last visited Nov. 21, 2005); *see* Nick Summers, *Podcasting: Talking Dirty on Your iPod*, NEWSWEEK, Aug. 1, 2005, at 10.

34. *See* Andy Breen, Letter to the Editor, *Local Learning*, GUARDIAN (London), June 23, 2005, at 23 (describing efforts of the University of Wales at Aberystwyth to podcast lectures); Peter Hamilton, *Some UC Davis Lectures Now Available via Podcast on Campus*, CAL. AGGIE, Sept. 29, 2005, *available at* http://www.californiaaggie.com/article/?id=10192.

35. *See, e.g.*, Fox Broadcasting Company: FOXCAST, http://www.fox.com/foxcast (last visited Nov. 21, 2005); Podcasts on MSNBC.com, http://www.msnbc.msn.com/id/8132577 (last visited Nov. 21, 2005).

36. *See, e.g.*, Battlestar Galactica Podcast Downloads, http://www.scifi.com/battlestar/downloads/podcast (last visited Nov. 21, 2005) (offering real-time commentary for the SciFi Channel's series, *Battlestar Galactica*).

37. *See, e.g.*, Alan Cooperman & Brian Faler, *Democrats Explore Their Spiritual and Technological Sides*, WASH. POST, July 20, 2005, at A04 (discussing House Democrats' foray into podcasting); California Governor Arnold Schwarzenegger's Weekly Radio Address, http://features.governor.ca.gov/index.php/podcast/ (last visited Nov. 21, 2005) (providing California Governor Arnold Schwarzenegger's weekly podcast).

38. *See, e.g.*, Press Release, Change The Party, DNC Candidate Donnie Fowler Launches "Podcasting Series" (Jan. 11, 2005), http://www.changetheparty.com/index.php?option=com_content&task=view&id=67&Itemid=57 (describing a podcast series, called "FireWire Chats," produced by Donnie Fowler to support his candidacy for the chairmanship of the Democratic National Committee).

39. *See, e.g.*, Diane Haithman, *Say it Again, Omar*, L.A. TIMES, July 31, 2005, at E31 (describing a new audio tour providing commentary for the Los Angeles County Museum of Art's King Tut exhibit); Randy Kennedy, *With Irreverence and an iPod*, *Recreating the Museum Tour*, N.Y. TIMES, May 28, 2005, at A1 (describing a new podcast providing commentary for New York's Museum of Modern Art); *Virgin Atlantic Launches Travel Guides via Podcasting Service*, NEW MEDIA AGE (London), June 30, 2005, at 10; Virgin Atlantic Podcast, http://virginatlantic.loudish.com (last visited Nov. 21, 2005) (introducing a growing series of podcasts offering audio tour guides to various Virgin Atlantic destination cities); Millennium Park Audio Tour, http://www.antennaaudio.com/millenniumpark.shtml (last visited Nov. 21, 2005) (offering a podcast tour of Chicago's Millennium Park).

40. *See, e.g.*, PAUL STORY, TOM CORVEN (2005), http://www.dreamwords.com/TomCorven.htm (claiming to be "the world's first novel written for podcasting"). Scott Sigler also claimed to have written the world's first podcast-only novel, *Earthcore*; following the novel's publication in 2005, however, *Earthcore* is no longer podcast-only. *See* SCOTT SIGLER, EARTHCORE (Dragon Moon Press 2005), *available at* http://www.scottsigler.net/earthcore; Steve Johnson, *Navigating the Podcast Concept*, CHI. TRIB., July 31, 2005, at C1 (reporting on Scott Sigler's claim that *Earthcore* is the world's "first podcast-only novel").

41. Robert J. Ambrogi, *Could Podcasting Be CLE's New Wave?*,BENCH & B. MINN., Apr. 2005, at 16.

The opportunity to expand their audiences has been a draw for traditional broadcast radio producers, many of whom are turning their regular broadcast radio shows into podcasts so listeners can access them at their leisure. Some of the more prominent broadcast radio shows that are being podcasted are ESPN Radio,[42] Air America's "Al Franken Show,"[43] "The Rush Limbaugh Show,"[44] highlights from ABC News's "Nightline" and "Good Morning America,"[45] the BBC's "In Our Time,"[46] Minnesota Public Radio's "Future Tense,"[47] and WGBH-Boston's "Morning Stories."[48] Traditional public radio stations report a surprisingly enthusiastic response to their podcasts, and it is likely that an increasing number of broadcast radio shows and adapted television shows will comfortably make the transition into podcasting.[49]

Despite all of its comparisons to traditional radio, surprisingly little music is being podcasted. According to Podcast Alley's user voting only three of the top fifty podcasts were specifically music-centric as of November 2005.[50] Even those podcasts that are music-centric do not include the same types of music or adhere to the same format as conventional radio programs. "Coverville," one of the most popular music podcasts, is a half-hour program featuring obscure covers of well-known songs.[51] Other music podcasts specialize in music produced by independent and unknown artists that are not traditionally played on broadcast radio.[52] The prevalence of spoken-word podcasts is probably due not only to the relative ease of recording speech, but also to podcasters' recognition that licenses are required to podcast copyrighted music, and such licenses are difficult or impossible to

42. *See* ESPN Podcasts, http://sports.espn.go.com/espnradio/podcast/ (last visited Nov. 21, 2005).

43. *See* Farivar, *supra* note 4; Air America Radio: The Al Franken Show, http://www.podcastalley.com/podcast_details.php?pod_id=584 (last visited Nov. 21, 2005).

44. *See* Rush 24/7 Media Center, http://www.rushlimbaugh.com/home/podcastlandingpage.guest.html (last visited Nov. 21, 2005).

45. *See* ABC News: Podcasting, http://abcnews.go.com/Technology/Podcasting/ (last visited Nov. 21, 2005).

46. *See* Hammersley, *supra* note 7; BBC Radio 4, In Our Time, http://www.bbc.co.uk/radio4/history/inourtime (last visited Nov. 21, 2005).

47. *See* Braiker, *supra* note 2; Future Tense from American Public Media, http://www.publicradio.org/columns/futuretense (last visited Nov. 21, 2005).

48. *See* Farivar, *supra* note 4; WGBH, Morning Stories, http://www.wgbh.org/article?item_id=2020890 (last visited Nov. 2, 2005).

49. *See* Howe, *supra* note 2 (reporting that podcast downloads of "Morning Stories" increased 12,000-fold in two months).

50. *See* Top Podcasts on PodcastAlley.com, http://www.podcastalley.com/top_podcasts.php?num=50 (last visited Nov. 2, 2005).

51. *See* Coverville, http://www.coverville.com (last visited Nov. 21, 2005).

52. *See, e.g.*, TartanPodcast, http://www.tartanpodcast.com (last visited Nov. 21, 2005); ACIDPlanet.com: Podcasts, http://www.acidplanet.com/podcasts (last visited Nov. 21, 2005); The Rock and Roll Geek Show, http://www.americanheartbreak.com/movabletype (last visited Nov. 21, 2005).

secure for the average podcaster.[53] Indeed, even sophisticated radio behemoths like NPR and Rush Limbaugh have omitted their traditional bumper music from the segments they offer as podcasts.[54]

For the time being, then, podcasting is generally not in direct competition with broadcast radio or record companies, at least not in the sense that they are offering the same products. Most commentators have not predicted a slowdown in radio, let alone a crisis.[55] Some 22 million Americans — about eleven percent of the population — own a portable MP3 player.[56] Portable audio players, however, are still far from reaching the saturation level that radios have attained; the average American household in the 1990s had five radios, and most Americans listened to the radio at least once a week.[57]

Nevertheless, the radio and music industries are wary. Podcasting and satellite radio (or at least their specters) have been implicated as possible reasons for Infinity Broadcasting's $10.9 billion write-down in assets and Clear Channel's $4.9 billion write-down in radio licenses, both in February 2005.[58] With so much on the line, the radio and music industries are paying close attention to podcasting, and a legal battle may erupt at any time. As tensions rise, both sides will look to the analogous battle that has been fought over webcasting.

## III. WEBCASTING: THE FATE PODCASTING WANTS TO AVOID

### *A. Introduction and History*

In the mid-1990s, webcasting, an Internet streaming technology allowing users to transmit audio content over the web, became popu-

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53. *See* Randall Stross, *The Battle for Eardrums Begins with Podcasts*, N.Y. TIMES, July 3, 2005, Sec. 3, at 3 (stating that "podcasts are not the place for aspiring disc jockeys to realize their fantasies" because of copyright limitations). See *infra* Part IV.C for a discussion of copyright licenses for podcasting.

54. *See* Bruno, *supra* note 20; Jon Healey, *Talk Radio Icon Says Ditto to Podcast*, L.A.TIMES, June 4, 2005, at C1; *cf.* Phil Rosenthal, *Dahl's Podcasts Halt Amid Stream of Legal Issues*, CHI. TRIB., May 6, 2005, at C3 (explaining that The Steve Dahl Show has stopped podcasting re-broadcasts of the radio show due to copyright concerns).

55. *See, e.g.*, Antonia Zerbisias, *Don't Push Panic Button for Regular Radio*, TORONTO STAR, June 6, 2005, at D01 (arguing that podcasting and satellite radio cannot replace traditional radio's local and live flavor). Howe, *supra* note 2 ("[Ted Jordan, general manager of Boston's WBZ-AM] [has] a hard time imagining podcasting supplanting a format that's as habitual and as famous for appointment listening as radio is."). *But see* Martin Miller, *Does Radio Have a Future?*, L.A. TIMES, July 30, 2005, at E1 ("'Radio faces a huge problem. It can't compete with the variety and convenience of technology,' said Michael Harrison, editor of the radio industry magazine Talkers. 'It can't be stopped. It's like a mighty river. It's the tide of history.'").

56. Rainie & Madden, *supra* note 21.

57. Douglas Gomery, *Radio Broadcasting and the Music Industry*, *in* WHO OWNS THE MEDIA? COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY, 286 (Benjamin M. Compaine & Douglas Gomery eds., 2000).

58. *See* Heather Green et al., *The New Radio Revolution*, BUS. WK., Mar. 14, 2005, at 32.

lar.[59] The topic of webcasting is very broad, and this Article does not attempt to describe its technology or development in detail, focusing instead on the legal regulations that have prevented it from becoming the powerful force it might have been. For these purposes, we will consider webcasting as a streaming model, where audio is transmitted over the Internet bit by bit, but never as a complete file. This way, the listener cannot record or save a copy of the audio file.[60] Some webcasts are interactive, allowing the user to exercise some control over the music played, while others allow no control over the content that is streamed beyond choosing the station. Functionally, webcasting is very much like radio broadcasting; the main difference is the delivery technology.

When webcasting was born, it was heralded as a tool to bring radio production to the masses and allow more specialized content[61] — much like podcasting is now. One commentator predicted that webcasting "has the power to make the Internet into a global system of radio on demand, one that will eventually let baseball fans and opera freaks, for instance, access any games or performances live, even if the event itself is happening far away and isn't on conventional TV or radio."[62] While podcasting lacks webcasting's capability to broadcast events live, it does share the ability to cater to the niche interests of the public.

Similar to the current optimism surrounding podcasting, commentators in the 1990s had high hopes for the future of webcasting. Media industry insiders, however, had different ideas. They were concerned about webcasting's potential to cut into CD sales. Although they recognized that radio airtime actually promoted record sales, they suspected that the more individualized and often interactive nature of webcasting would serve as more of a substitute for rather than as a promoter of CD sales. The music and media industries therefore pushed for the development of the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[63] and the Digital Millen-

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59. *See* Chuck Taylor, *Real-Time Audio Livens Radio Station Web Sites*, BILLBOARD, June 8, 1996, at 6.

60. "Streamripping" software exists that allows users to save copies of a streaming webcast. *See, e.g.*, Real Networks, Inc. v. Streambox, Inc., 2000 WL 1273111 (W.D. Wash 2000) (discussing one such product). This Article will not consider the legal implications of such products.

61. *See, e.g.*, Andrew North, *Don't Ditch the Tranny Yet; You Can Now Listen to the Radio on Your PC*, INDEPENDENT (London), Mar. 19, 1996, at 8 (stating that web-based radio might "open up broadcasting to all-comers").

62. Daniel Akst, *Postcard from Cyberspace; The Cutting Edge; RealAudio Gives Rise to Online Radio Programs*, L.A. TIMES, July 8, 1996, at D1.

63. Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–115 (2000)).

nium Copyright Act of 1998 ("DMCA"),[64] which together proved to be the beginning of the end for webcasting.

### *B. A Tangled Web of Webcasting Law*

#### 1. Rights Under Copyright Law

Before grappling with the issues central to webcasting, it is useful to step back and review the relevant copyright law. The content of most webcasts, just like that of most radio broadcasts, is music.[65] Under copyright law, there are two rights in each musical recording. First, there is a copyright in the musical work itself.[66] This encompasses the lyrics and music as they are written by the lyricist and composer. Most composers license the rights to their musical works to one of the three major performing rights societies: ASCAP, BMI, or SESAC.[67] The performing rights society then has the power to negotiate the licensing of the song.

Second, there is a separate copyright in the recorded performance of the song, called the sound recording.[68] This applies to the recorded audio produced by the performers. In the commercial music world, the performer usually licenses this right to a record label. The Recording Industry of America ("RIAA") represents nearly all American record labels and, among other things, administers licensing agreements collectively on their behalf.[69] In order for webcasters (and others) to play a recorded piece of music, they must obtain licenses for both of these copyrights.

Various statutes enacted in the 1990s expanded and altered both the musical work right and the sound recording right, as the music industry reacted to the developing technology of the Internet and webcasting. This Section will discuss these laws in some detail, with an eye to assessing their application to podcasting in the next Part.

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64. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

65. *Cf.* Live365 Internet Radio, http://www.live365.com (last visited Nov. 2, 2005) (listing thirty-three genres of music webcasts and only two genres of non-music webcasts).

66. *See* 17 U.S.C. § 102(a)(2) (2000) (listing "musical works, including any accompanying words" as a category for which copyright protection subsists).

67. *See* Cydney A. Tune, *The Myriad World of Music Licenses*, ENT. & SPORTS L., Spring 2004, at 5, 6.

68. *See* 17 U.S.C. § 102(a)(7) (2000) (listing "sound recordings" as a separate category for which copyright protection subsists).

69. *See* Recording Industry Association of America, *available at* http://www.riaa.com/about/ (last visited Nov. 21, 2005).

2. The Digital Performance Right in Sound Recordings Act

In 1995 Congress passed the DPRA.[70] The principal purpose of this legislation was to establish a sound recording right in digital audio transmissions.[71] Prior to this legislation, there was no copyright law specifically restricting the public performance of a sound recording (conceivably the copyright on the underlying musical work still could have prevented public performance without a license).[72] After the passage of the DPRA, the law required a license for public performances of musical recordings transmitted by digital means.

The music industry pushed the DPRA specifically to reduce the threat posed by interactive and subscription webcasting services. Record executives feared that allowing listeners to hear the songs of their choice on demand would cut into record sales. Congress responded to these powerful industry interests. The Senate declared that it "sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business."[73] The House of Representatives report stated that the DPRA was a "response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work."[74] The interests of webcasters — not to mention the interests of the listening public — apparently did not factor strongly into Congress' deliberations.

In order to achieve the objectives of the music industry with minimal disruption to the existing copyright law, the new sound performance right created by the DPRA was narrowly drawn and fraught with exceptions. Essentially, the law created three categories of digital audio transmission, each with its own level of regulation. For interactive services, the category most dangerous to the music industry, the DPRA provided no exceptions. Instead, it required an interactive webcaster to negotiate a license with the holder of the copyright in the sound recording, who could legally choose to withhold permission.[75]

The second category of transmissions, non-interactive subscription services (where the user pays money in order to access the transmission, but does not have control over the content), was not quite as

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70. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

71. *See* 17 U.S.C. § 106(6) (1994 & Supp. I 1995) (defining a sound recording right in digital audio transmissions).

72. *See* Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763, 766 (E.D. Pa. 2001).

73. S. REP. NO. 104-128, at 13 (1995).

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

75. *See* 17 U.S.C. § 114(d)(1) (Supp. I 1995) (amended 1998) (specifying that interactive services are not encompassed in the exceptions laid out in § 114(d)).

threatening to the music industry. These services therefore became subject to a statutory license,[76] the rate of which could be negotiated privately or, in the event that private negotiation failed, determined by a federal Copyright Arbitration Royalty Panel ("CARP").[77] This statutory license, however, could be forfeited if the transmitter violated certain conditions.[78]

Third, the DPRA created a category of digital audio transmissions that does not require a license royalty. These non-subscription transmissions were defined so as to include digital radio and TV broadcasts.[79] The wording of the statute also exempted non-subscription, non-interactive webcasts (that is, free webcasts that do not allow listener control over the content) — an oversight that was soon rectified.

3. The Digital Millennium Copyright Act

In 1998 Congress enacted the DMCA,[80] a large and complex piece of legislation, in response to pressure from copyright holders who were concerned that new technologies might threaten their intellectual property assets. Among many other things, the DMCA further tightened the reins the DPRA put on digital audio transmissions, making continued operation even more difficult for webcasters.

The DMCA moved many types of transmissions from the third category (where they were exempt and unregulated) to the second category (where they became subject to a statutory license). Only non-subscription broadcast transmissions (essentially, radio and TV) were left in the third, exempt category.[81] Because webcasts are not broadcast transmissions, webcasters of non-subscription, non-interactive content, who had been exempt from the sound performance right under the DPRA, now had to negotiate and pay for a statutory license to continue transmitting copyrighted content (See Table 1). The statute's conference report shows that Congress intended to remove the exemption "especially [for] webcasters,"[82] in order "to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used."[83]

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76. *See id.* § 114(d)(2) (amended 1998).

77. *See infra* Part III.B.4 (discussing CARPs).

78. *See* 17 U.S.C. § 114(d)(2)(B), (C), (E) (Supp. I 1995) (amended 1998).

79. *See id.* § 114(d)(1); *see also* H.R. REP. NO. 104-274, at 14 (1995) (explaining that the exemption for nonsubscription transmissions was intended to cover digital radio and television broadcasts).

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

81. *See* 17 U.S.C. § 114(d)(1)(A) (Supp. IV 1998).

82. H.R. REP. NO. 105-796, at 80 (1998) (Conf. Rep.).

83. *Id.* at 79.

| Table 1: Comparing the DPRA and the DMCA | | |
|---|---|---|
| **1995 (DPRA)** | | |
| **Voluntary License** | **Statutory License** | **Exempt** |
| Interactive Webcasts | Subscription Webcasts | Radio<br>TV<br>Radio Webcasts<br>Other Webcasts |
| | | |
| **1998 (DMCA)** | | |
| **Voluntary License** | **Statutory License** | **Exempt** |
| Interactive Webcasts | Subscription Webcasts<br>Radio Webcasts<br>Other Webcasts | Radio<br>TV |

The statutory license that Congress created in the DPRA came with very specific conditions.[84] The DMCA made these conditions still more specific, varying them slightly depending on whether the transmitter was already operating as of July 31, 1998.[85] If a webcaster fails to comply with the conditions, the statutory license is lost, and the webcaster's only recourse is a voluntary license on the terms and at the whim of the copyright holder. To make matters worse for radio stations that retransmitted their content as webcasts, the Third Circuit held in 2003 that such retransmissions are not included in the exempt category of digital transmissions, and are thus subject to a statutory license.[86]

4. Copyright Arbitration Royalty Panels

The DMCA forced webcasters and copyright holders to accept a statutory licensing scheme that neither found satisfactory. The statute

84. *See* 17 U.S.C. § 114(d)(2) (Supp. I 1995) (amended 1998).
85. *See* 17 U.S.C. § 114(d)(2)(B), (C) (Supp IV 1998).
86. Bonneville Int'l. Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003).

specified that the copyright holder had no choice but to issue a license; however, it left negotiating the royalty rate to the individual parties. If the parties could not reach an agreement, the statute directed the Librarian of Congress to convene a CARP.[87] The parties would then be bound by the terms of the license agreement that the CARP set.[88]

The details of the CARP process were set out by statute.[89] Following a limited discovery period, the Librarian of Congress would choose two arbitrators from a certified pool, and they in turn would choose a third arbitrator to be the chairperson of the CARP.[90] The CARP had 180 days to hear written and oral testimony and recommend a royalty rate to the Librarian of Congress.[91] The Librarian of Congress then had 90 days to review the CARP's report and accept or reject it.[92] If the Librarian of Congress rejected the CARP report, he or she would have another thirty days to issue a final and binding decree.[93] Appeals to the D.C. Circuit were available within thirty days.[94]

The convening of a CARP was never a common event; it happened less than once per year.[95] Usually, the parties were able to settle at some point during the negotiation process. The CARP process was by definition a last resort, and it often resulted in a compromise holding that was unsatisfactory to both parties. Where the parties were obstinate or antagonistic, however, it was necessary.

Throughout its life, the CARP system was subject to both internal and external criticism.[96] It was expensive (the parties paid their own costs, resulting in the exclusion of smaller participants), its ad hoc nature resulted in unreliability and inconsistency, it lacked subject

87. *See* 17 U.S.C. § 114(f)(1)(B) (Supp. IV 1998) (amended 2004).
88. *See id.*
89. *See* 17 U.S.C § 802 (1994 & Supp. IV 1998) (amended 2004).
90. *Id.* § 802(b).
91. *Id.* § 802(e).
92. *Id.* § 802(f).
93. *Id.*
94. *Id.* § 802(g).
95. *See CARP ("Copyright Arbitration Royalty Panel") Structure and Process: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, of the H. Comm. on the Judiciary*, 107th Cong. 81 (2002) (statement of Marybeth Peters, Register of Copyrights) [hereinafter Peters Statement] (stating that from the inception of the CARP system in 1993 until June 2002, only nine full CARP proceedings had taken place). The Copyright Office website indicates that the 2002 webcasting CARP decision was the CARP's final decision. *See* U.S. Copyright Office, Licensing and CARP Information, http://www.copyright.gov/carp/ (last visited Nov. 21, 2005).
96. *See, e.g.*, Peters Statement, *supra* note 95, at 82–84; Stuart M. Maxey, Note, *That CARP is No Keeper: Copyright Arbitration Royalty Panels — Change is Needed, Here is Why, and How*, 10 J. INTELL. PROP. L. 385 (2003); R. Larson Frisby, *New Federal Law Eliminates Arbitration of Copyright Royalty Disputes*, DISP. RESOL. MAG., Winter 2005, at 34, 34; Emily D. Harwood, Note, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L.J. 673 (2004).

matter expertise, its discovery rules were weak, and it was an overly burdensome process for small claims.[97]

After more than ten years of criticism, Congress finally scrapped the system. On November 30, 2004, President George W. Bush signed into law the Copyright Royalty and Distribution Reform Act of 2004,[98] which went into effect on May 30, 2005. This new legislation essentially reinstates the days of the Copyright Royalty Tribunal, establishing a full-time panel of three expert administrative law judges to handle copyright royalty disputes. The new law is quite specific in its qualification requirements and directives for the judges, but only time will whether it will be superior to the CARP system. The new legislation specifically leaves the decisions previously reached by the CARP system in place, including the now-infamous webcasting decision.[99]

### *C. The Webcasting CARP Decision and Its Aftermath*

After the passage of the DMCA in 1998, webcasters found themselves forced to negotiate with the music industry for the terms upon which they could continue their operations. It quickly became apparent that no voluntary settlement would be reached, and a CARP was convened to establish a royalty rate that all webcasters would pay to copyright owners in exchange for a license to transmit musical sound recordings over the Internet. Many months and $25 million in litigation costs later,[100] the CARP issued its final report on February 20, 2002. It recommended that radio broadcasters that retransmit their broadcasts over the Internet should pay 0.07 cents per performance, and that all other webcasters should pay 0.14 cents per performance, with a minimum of $500 per year.[101]

Webcasters felt that these rates would put them out of business. One Arbitron official prophesied:

> If the proposed fees are enacted, we foresee that very few companies if any would be able to pay the

97. *See* Peters Statement, *supra* note 95, at 82–84; Maxey, *supra* note 96, at 395; Sara J. O'Connell, Note, *Counting Down Another Music Marathon: Copyright Arbitration Royalty Panels and the Case of Internet Radio*, 8 MARQ. INTELL. PROP. L. REV. 161, 174–76 (2004).

98. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341.

99. *See id.* § 6(b)(1) (stating that the Copyright Royalty and Distribution Reform Act of 2004 would not affect any commenced decisions).

100. Philip S. Corwin, *Outlook for Copyright and Digital Media Legislation in the 108th Congress*, 11 MEDIA L. & POL'Y 98, 113 (2003).

101. Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the CARP, No. 2000-9, app. at A-1 (Feb. 20, 2002), (interim version) *available at* http://www.copyright.gov/carp/webcasting_rates.pdf (follow "A-1" hyperlink on page vii).

> cost. . . . The proposed fees are likely to create a business/regulatory environment that will limit competition, stifle innovation, reduce consumer choices and diminish diversity by concentrating the distribution of music to a handful of sources.[102]

An RIAA official, on the other hand, quipped, "If you don't have a business model that sustains your costs, it sounds harsh, but that's real life."[103]

After an outburst of passionate protest from webcasters who believed the rates to be unjustly high,[104] James H. Billington, the Librarian of Congress, rejected the CARP's proposal.[105] He soon issued a final order in the matter, setting the rate at 0.07 cents per performance for all types of webcasts, thereby eliminating the distinction between those webcasters who retransmit their radio programming and those who operate solely on the Internet.[106]

The determination of the Librarian of Congress, while more sympathetic to webcasters than the original CARP decision, still met with complaints and opposition from the webcasting community. It was frequently noted that the rate had been set by comparison to a deal between the RIAA and Yahoo!'s webcasting operation.[107] Yahoo! is a giant Internet corporation in a unique situation and is not representative of most webcasters, who tend to be small or independent.[108] Because performances of sound recordings are tracked per listener, the costs add up quickly for popular webcasts. Therefore, smaller webcasters are likely to be the ones put out of business by royalty payments. Finally, the determination ordered webcasters to make immediate back-payments for their transmissions dating back to 1998, when the DMCA became effective.[109]

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102. John Borland, *Small Webcasters Campaign for Survival*, CNET NEWS, Apr. 1, 2002, http://news.com.com/Small+Webcasters+campaign+for+survival/2100-1023_3872765.html (internal quotation marks omitted).

103. Jefferson Graham, *Royalty Fees Killing Most Internet Radio Stations*, USA TODAY, July 22, 2002, at D1 (internal quotation marks omitted).

104. *See* Harwood, *supra* note 96, at 685.

105. Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Order (May 21, 2002), *available at* http://www.copyright.gov/carp/webcasting-rates-order.html.

106. Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions, 37 C.F.R. § 261 (2005) [hereinafter Final Rate Determination].

107. *Id.*

108. *See, e.g.*, Louise Kehoe, *Stay Home, Save a Job: Silicon Valley Workers Have Little to Celebrate over Their Enforced Independence Day Break*, FIN. TIMES, July 3, 2002, at 15. There is also evidence that Yahoo! purposely agreed to rates that would drive smaller webcasters out of business. *See* Paul Maloney & Kurt Hanson, *Cuban Says Yahoo!'s RIAA Deal Was Designed to Stifle Competiton!*, June 24, 2002, http://www.kurthanson.com/archive/news/062402.

109. Final Rate Determination, *supra* note 106.

As soon as the final order was issued, webcasters started closing their operations in droves.[110] Many made little or no revenue, and the new royalty payments were significantly greater than their annual budgets.[111] Within two weeks of the effective date of the order, at least 200 webcasters had shut down, and many more followed in the ensuing months.[112] Regulation was silencing webcasting.

Fortunately, Congress heard the appeals of distressed webcasters after the CARP process ended and responded by passing the Small Webcasters Settlement Act of 2002 ("SWSA").[113] This legislation enabled small webcasters to individually negotiate their royalty rates with the recording industry, resulting in a rate lower than the one set by the CARP process. The new rate would be based on a percentage of revenue or expenses and must specify a minimum payment.[114] A settlement was quickly reached, whereby small commercial webcasters could elect to pay eight percent of their gross revenue or five percent of their total expenses in lieu of the statutory license fee.[115] The RIAA reached an agreement with noncommercial webcasters a few months later, requiring a minimum flat fee plus a small per-performance royalty.[116]

### *D. Where Is Webcasting Today?*

Reports of webcasting's complete demise after the 2002 CARP determination have been exaggerated, but not greatly. In contrast to other countries, the number of American webcasters has declined sharply.[117] In the twelve months preceding April 2005, well over 1,000 American webcasters shut down their operations.[118] One industry expert remarked, "As long as this copyright issue continues to hang over the heads of U.S.-based webcasters we foresee the current decline continuing."[119] Many webcasters are passing the royalty costs on to their listeners, offering only a few channels for free, and charging a subscription fee for access to a wider variety of channels.[120] Furthermore, smaller webcasters are being driven out of business.

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110. *See* Graham, *supra* note 103.

111. *See id.*

112. *See id.*

113. Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

114. *Id.* at 2782.

115. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002).

116. *See* Justin Oppelaar, *RIAA Sets Webcast Royalty Rate*, DAILY VARIETY, June 4, 2003, at 6.

117. *See* Press Release, BRS Media, Inc., BRS Media's Web-Radio Reports a Steep Decline in the Number of Stations Webcasting (Sept. 12, 2002), *available at* http://www.brsmedia.fm/press020912.html.

118. *Id.*

119. *Id.*

120. Harwood, *supra* note 96, at 690.

Arbitron, which tracks online radio usage, reports that Yahoo!'s Launch.com and AOL's Radio@AOL are by far the most popular webcasts on the Internet, each accounting for more than four times as many listeners as Microsoft's MSN Radio, the third-place webcast.[121] All of these top webcasts are supported by the deep pockets of major corporations. The vision of webcasting as an everyman's free-for-all has not become a reality.

The most jarring aspect of the webcasting fiasco was that it resulted in a system that treats webcasters differently than radio broadcasters. Radio and webcasting perform essentially the same function: they allow listeners to hear a continuous stream of music. The only difference is the medium through which the music is sent. Traditional broadcast radio (even if it uses modern digital technology) is specifically exempt from the digital sound performance right created by the DPRA as amended by the DMCA.[122] Whereas a radio station need only acquire a blanket license for the musical works copyright from the performing rights societies, webcasters — even radio stations that stream the exact same content they broadcast over the air[123] — must pay an additional fee to the record companies for the sound performance copyright.

It should be borne in mind that the rates set by the CARP only apply to non-interactive webcasting. Interactive webcasting, under the DPRA and the DMCA, is still ineligible for a statutory license. If a record company does not want to license its recordings to an interactive webcaster, it does not have to. Congress anticipated that record companies would find it in their interest to grant licenses, despite the threat that interactive webcasting poses to record sales. Most record companies, however, have been reluctant to grant licenses, and, if they have granted any all, have done so on a limited basis.[124] Unfortunately, federal regulation largely destroyed the potential of webcasting by making it difficult for webcasters to effectively compete with radio, and as a result, interactive webcasting is all but dead.

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121. *See* Press Release, comScore Networks, Newly Measured Live365 Reaches More Than 400,000 People Per Week in January (Mar. 8, 2005), *available at* http://www.comscore.com/press/release.asp?press=565.

122. *See* 17 U.S.C. § 114(d)(1) (2000).

123. *See* Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 496 (3d Cir. 2003) (holding that radio stations' retransmissions of their broadcast content via webcasting is not exempt from the sound performance right). There is a limited exception to the requirement to pay the statutory royalties determined by the CARP process for broadcast radio stations that retransmit their content in a webcast. If the web transmission does not reach farther than 150 miles from the main terrestrial broadcast transmitter or any retransmitter, or if the radio station is officially recognized as devoted exclusively to educational or cultural programming, it is exempt from the statutory license. 17 U.S.C. § 114(d)(1)(B). The web, however, is a global phenomenon, and it is difficult to see how a radio station could geographically limit the range of its webcast.

124. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 105 (2004).

Before the DPRA and DMCA, webcasting was in the same position that podcasting is in today. Currently, no regulation specifically targets podcasting. Podcasters fear that the government will impose an onerous licensing or regulatory scheme on them, as it did on webcasters, thereby destroying a medium with a potentially infinite range of content.

## IV. PODCASTING'S POOR FIT WITH THE CURRENT LEGAL REGIME

Podcasting, like webcasting in its infancy, currently sits in a legal limbo. This is simply one more chapter in a well-worn history; copyright laws have rarely clearly applied to new technologies when they are developed. The law, after all, is famously slow in adapting to change.[125]

Copyright was essentially unheard of before the invention of the printing press because copying itself was difficult.[126] New technologies that challenged old laws include the invention of photography,[127] player piano rolls,[128] recorded audio,[129] cable television,[130] videocassette recorders,[131] and Internet file distribution,[132] to name a few. The history of copyright is one of new wine in old bottles, and Congress has traditionally had to update the bottles when they break. Podcasting is the newest wine of all, and the bottles, predictably, are cracking.

### *A. Podcasting and the Creation of Copyright*

Podcasts are clearly copyrightable. The copyright statute declares: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[133] It goes on to specifically state that "sound recordings" are encompassed by copyright.[134] A podcast is a sound

125. *See* Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1754 (1997).

126. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430–31 & n.12 (1984).

127. *See* Burrow-Giles Lithography v. Sarony, 111 U.S. 53 (1884).

128. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

129. *See* Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 28 COLUM. J.L. & ARTS 1, 10–11 (2004).

130. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974); *Sony*, 464 U.S. at 430 n.11.

131. *See generally Sony*, 464 U.S. 417.

132. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

133. 17 U.S.C. § 102(a) (2000).

134. *Id.* § 102(a)(7).

recording — whether of music, spoken words, or some combination of the two — fixed in the electronic medium of a digital audio file.[135] To the extent that the podcaster is the originator of the content of the podcast (for example, if the podcast is a recording of the podcaster's spoken words or the podcaster's performance of his own original music), he holds the copyright to the podcast from the moment the audio file is created.[136]

Assuming for the moment that the podcaster either is the originator of, or has the legal right to use, all of the audio content in his podcast, the copyright in the podcast encompasses various rights, including the right to reproduce the podcast, distribute copies of the podcast, and digitally transmit the podcast as a sound recording.[137]

### *B. Podcasting and Original Content*

This Section will first consider the copyright implications of original content contained in a podcast, setting aside for the moment the implications of a podcaster's incorporation of someone else's material into his podcast. Many podcasts are composed mostly or wholly of original content, as they are often nothing more than recordings of the voice of the podcaster himself.

#### 1. Reproduction and Implied Licenses

When a listener downloads a podcast, he does not simply gain access to the audio from the original copy of the work; he gains access to the actual file in which the audio information is stored. The situation is akin to file-sharing, where one user places a copy of a file on a central server or personal computer connected to the Internet, and other users then make their own copies. Potentially hundreds, thousands, or even millions of copies of each podcast could be made by users other than the copyright holder. If this procedure were followed without the permission of the copyright holder, it would constitute infringement of the right of reproduction.[138]

Unlike with the file-sharing cases, however, the copyright holder would not be opposed to the downloading and copying of the file. Indeed, the copyright holder is usually the person who is offering it for download. The podcaster has the exclusive right to make copies of his podcast under copyright law, but he obviously consents to others

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135. *See Napster*, 239 F.3d at 1011 (discussing the nature of the MP3 format and treating it as a fixed medium for copyrightable audio works).

136. *See* 17 U.S.C. § 102 (2000); *see also, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487–88 (2004).

137. 17 U.S.C. § 106 (2000).

138. *See Napster*, 239 F.3d at 1014 (holding that downloading MP3 files from the Napster service constitutes violation of the reproduction right granted by copyright).

making copies (for the purpose of downloading the podcast) as well. In general, the more listeners who make copies of a podcast, the better. Although he may have a right to do so, as a practical matter, no rational podcaster would bring an action under the copyright statute for infringement based on a listener downloading his podcast.[139]

As a legal matter, a podcaster would probably be precluded from bringing such an action against a listener. When a podcast is posted where it can be downloaded by the general public, the podcaster is arguably offering an implied license to copy his work. When a listener accepts that offer by downloading the file, the contract is complete and an implied license is created. Ideally, however, Congress would amend the copyright statute to provide unambiguous protection for podcast downloaders.

One fundamental question is whether state contract law is superceded in this instance by federal copyright law. Most of the debate about private ordering of intellectual property rights and copyright-based preemption of state contract law focuses on private parties making their rights *more* restrictive, not *less*. The discussion examines such issues as one-sided clickwrap agreements,[140] digital rights management technology,[141] software license prohibitions against reverse engineering,[142] and so forth. Implied licensing of statutory rights under copyright law is a slightly different matter and remains unclear.

The law does make clear the ability of a copyright holder to transfer or license his rights, exclusively or nonexclusively. Section 201(d) of the Copyright Act reads: "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . ."[143] The next clause makes this even more explicit: "Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights . . . may be transferred . . . and owned separately."[144] Indeed, Congress indicated that the 1976 revision of the copyright statute was meant to embrace "[t]he principle of unlimited alienability of copyright."[145] A copyright holder has the ability to transfer an exclusive or nonexclusive license to any person at any time. Thus, when a license is created through an express contract, an exception to the copyright holder's rights is created.

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139. *See generally* 17 U.S.C. § 501(b) (2000) (providing a cause of action for copyright holders against copyright infringers).

140. *See* J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999).

141. *See* Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003).

142. *See* David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543 (1992).

143. 17 U.S.C. § 201(d)(1) (2000).

144. *Id.* § 201(d)(2).

145. H.R. REP. NO. 94-1476, at 123 (1976).

Does the same process still hold true for licenses created through implied contracts (e.g., the implied contract between podcasters and their listeners)? The copyright statute provides that exclusive licenses must be in writing,[146] suggesting that implied or non-written licenses may exist and must be nonexclusive. This nonexclusivity does not pose a problem for podcasting, since any implied license to download a podcast is also nonexclusive — no podcaster would want to restrict his audience to solely one person.

Case law confirms the existence of an implied nonexclusive copyright license. In *Effects Associates v. Cohen*, the Ninth Circuit held that because a special effects company had prepared and delivered some action sequences to a filmmaker, it thereby granted him an implied nonexclusive license to use the footage in his film, although no express deal existed.[147] The court cited a well-known treatise on copyright to support the existence of such a license.[148] In another case, the Seventh Circuit, also citing Nimmer, held that an architect granted an implied nonexclusive license to a construction company when he delivered building plans to them.[149] Many other cases have presented arguments that a copyright holder has granted an implied nonexclusive license.[150] Although the results of these cases varied according to their individual fact patterns, none of the courts questioned the availability of implied nonexclusive licenses.

Still, it remains somewhat unclear whether a court would find such a license inherent in podcasting. In most of the cases that have found implied nonexclusive licenses, the copyrighted work was created at the express request of the implied licensee in order to be incorporated into another work or used in a particular way.[151] Many of the cases in which courts declined to find an implied nonexclusive license

146. *See* 17 U.S.C. § 204(a) (2000) (requiring that transfers of copyright ownership be in writing); *id.* § 101 (defining "transfer of copyright ownership" to include exclusive licenses); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 556–57 (9th Cir. 1990).

147. *See Effects Assocs.*, 908 F.2d at 558–59.

148. *See id.* at 558 ("The leading treatise on copyright law states that '[a] nonexclusive license may be granted orally, or may even be implied from conduct.'" (quoting 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 10.03[A], at 10-36 (1989)).

149. *See* I.A.E., Inc. v. Shaver, 74 F.3d 768, 772 (7th Cir. 1996).

150. *See, e.g.*, John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26 (1st Cir. 2003); Atkins v. Fischer, 331 F.3d 988 (D.C. Cir. 2003); Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505 (4th Cir. 2002); Foad Consulting Group v. Musil Govan Azzalino, 270 F.3d 821 (9th Cir. 2001); Johnson v. Jones, 149 F.3d 494 (6th Cir. 1998); Lulirama Ltd., Inc. v. Axcess Broad. Servs., 128 F.3d 872 (5th Cir. 1997); Fosson v. Palace (Waterland), Ltd., 78 F.3d 1448 (9th Cir. 1996); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769 (3d Cir. 1991).

151. *See, e.g.*, *Effects Assocs.*, 908 F.2d 555; *I.A.E.*, 74 F.3d 768; *Lulirama*, 128 F.3d 872; Korman v. HBC Fla., Inc., 182 F.3d 1291 (11th Cir. 1999).

were so decided specifically because such a direct and specific relationship was not found.[152]

In fact, the judicial test that has emerged reflects the factual differences between the two lines of cases: "An implied license will arise where (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes the particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work."[153] This framework was not meant to capture every instance of an implied license, and indeed podcasting does not fit into it well. The listener does not request the creation of the podcast, and the podcaster does not directly deliver it to the listener.

In the case of podcasting, it might be more effective to focus on the test's third prong. After all, "[t]he touchstone for finding an implied license . . . is intent."[154] It can hardly be disputed that podcasters universally intend their listeners to copy their podcasts by downloading them. Despite the fact that the established decision-making framework for finding an implied nonexclusive license suggests that podcasting does not involve such a license, a court considering the matter may very well find that such a license exists. In so doing, however, the court would necessarily overrule or alter previous jurisprudence on implied nonexclusive licenses. This difficulty could be prevented by creating a statutory license for podcast downloads.

Although the arguments in favor of an implied nonexclusive license for podcasting are compelling, they are not without opposition. The Ninth Circuit expressed its disdain for implied licenses in the very opinion in which it found such a license to exist:

> Common sense tells us that agreements should routinely be put in writing. This simple practice pre-

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152. *See, e.g.*, *John G. Danielson*, 322 F.3d 26; Design Options, Inc. v. BellePointe, Inc., 940 F. Supp. 86 (S.D.N.Y. 1996).

153. *Atkins*, 331 F.3d at 991–92 (quoting *Lulirama*, 128 F.3d at 879). *Nelson-Salabes* sets out a similar three-pronged test to determine the existence of an implied nonexclusive license:

> (1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts, such as the standard AIA contract, providing that copyrighted materials could only be used with the creator's future involvement or express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.

284 F.3d. at 516. *Cf.* SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc., 211 F.3d 21 (2d Cir. 2000) (stating that "courts have found implied licenses only in 'narrow' circumstances where one party 'created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it'" (quoting *Effects Associates.*, 908 F.2d at 558)).

154. *John G. Danielson*, 322 F.3d at 40.

> vents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one.[155]

Courts' hesitancy to find implied licenses may prove problematic for podcasters.

A few years after the *Effects Associates.* decision, the Ninth Circuit decided another case with facts closer to the podcasting framework. In *MAI Systems Corp. v. Peak Computer, Inc.*, a software manufacturer won a copyright infringement suit against a company that serviced its machines.[156] Alarmingly, the court reasoned that because the operation of the program required the creation of a copy of the program in the computer's random access memory ("RAM"), the company's use of the program constituted a violation of the reproduction right: "[I]n the absence of ownership of the copyright or *express* permission by license, such acts constitute copyright infringement."[157] Under the court's reasoning in *Effects Associates*, it might seem that the copyright holder's intent would be instructive — after all, when a product requires that a copy be made in order to operate, one should be able to infer the license to make such a copy — but the court strictly required an express license for this activity.

Just as software must be copied into the computer's RAM for the program to run, and just as the software manufacturer could not reasonably expect a user of its software not to make such a copy, a podcaster must understand that to listen to his podcast, a listener will necessarily copy it onto his computer or portable audio player. Under *MAI Systems*, there would be no implied nonexclusive license for a listener to do so.

Five years later, however, Congress overruled *MAI Systems,* as part of the DMCA. Section 117 of the Copyright Act now allows for copying of computer software, provided "that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner."[158] This statute, however, does not apply to podcasting. Although podcasts are digital files that can be played on a computer, and although a listener cannot use a podcast until he has made a copy of it, making such a copy is not "an essential step" in the process of the machine's utilization (that is, playback) of the file. Because pod-

155. *Effects Assocs.*, 908 F.2d at 557.
156. 991 F.2d 511 (9th Cir. 1993).
157. *Id.* at 518 (emphasis added).
158. 17 U.S.C. § 117(a)(1) (2000).

cast copies are not RAM copies, the argument against an implied nonexclusive license remains, demonstrating once again that the current law does not meet the needs of new technology. Although most courts would probably find an implied nonexclusive license, the question remains sufficiently unsettled such that anyone who downloads podcasts could end up becoming an infringer — clearly a result that no one intends.

2. Scope of the Implied License

Assuming that the posting of a podcast on the Internet constitutes an implied nonexclusive license to download a copy of the podcast, how far does that license extend? How many copies can a listener make before he becomes liable for infringement? How long can he listen to it? The statutes exist primarily to protect the interests of the copyright holder, a presumption in his favor will probably prevail.

Again, the analysis will turn on the intent of the podcaster. Surely his intent encompasses the making of a copy by each listener. In fact, each listener will probably need to make at least two copies, because the syndication software puts one copy of the file on the computer's hard drive and then puts another copy on the portable audio player. Since the podcaster should anticipate this process, it stands to reason that the implied license will include the making of at least two copies.

Whether further copying is allowed is an open question that neither statutory law nor case law addresses particularly well. It will probably turn on the podcaster's intent, a difficult thing to prove. Here, yet again, is an area where the technology has outpaced the law. There is no way to predict what would happen if a podcaster discovered a user making hundreds of copies of his work. Such a situation could subject unsuspecting podcast listeners to lawsuits, because, "[s]ince a nonexclusive license does not transfer ownership of the copyright from the licensor to the licensee, the licensor can still bring suit for copyright infringement if the licensee's use goes beyond the scope of the nonexclusive license."[159]

More broadly, if the implied nonexclusive license encompasses a right to reproduce, does it also implicitly license away all copyright rights, effectively placing the podcast in the public domain? That may be taking the proposition too far. Since the United States joined the Berne Convention in 1989, copyright has attached automatically once a creative work is fixed in a tangible medium; in order to officially put a work into the public domain, the author has to make an explicit dec-

159. MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 769 (3d Cir. 1991) (citing *Effects Assocs.*, 908 F.2d at 558 n.5).

laration to that effect.[160] The Copyright Act makes the different rights it grants completely severable;[161] the license, waiver or transfer of one is not a license, waiver, or transfer of all. Making a podcast available for download could be a limited waiver of the reproduction right, but it does not follow that it is also a waiver of the right to produce derivative works, for example.

3. Revocation of the Implied License

What would happen if a podcaster decided to revoke his implied license to copy and listen to his podcast? Suppose for example that a podcaster creates a podcast in which he rants against the merits of bicycle helmet laws. He posts it to the Internet and the hundreds of people who subscribe to his podcast download it and listen to it. Weeks later, the podcaster — maybe through intellectual enlightenment, maybe through tragic personal experience — changes his position about bicycle helmets. Suddenly, he is embarrassed by the content of his previous podcast and no longer wants anyone to listen to it, so he yanks it off the server.

At this point, no further copies can be made from the podcaster's original file — it has been removed from the server and now is inaccessible to the public, effectively revoking the implied license to copy it. The problem, however, is that all the people who previously-downloaded the file may still have a copy on their computers or portable audio players. Listeners who have retained a copy have the capability to make additional copies and distribute them. Moreover, these listeners could keep the podcast and continue to listen to it. This Article has discussed the question of how many copies an implied podcast license encompasses; the question of redistribution will be addressed in the next Section. But could the podcaster stop the listeners from listening to his ill-conceived podcast under a theory that the license includes a right to listen to (that is, to perform) the podcast that is subject to expiration or revocation?

The Copyright Act makes clear that the copyright holder has complete control over the terms upon which he can offer a license or transfer of a right.[162] When the license is implied, however, it is difficult to determine its scope, and it is possible that the copyright holder will change his mind about the license's terms. It would be difficult to prove the duration of a podcast license if there is no express agreement.

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160. *See* Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 81 n.176 (1997).

161. 17 U.S.C. § 201(d)(2) (2000).

162. *See id.*

Courts are generally uncomfortable imputing terms into a contract where there are none.[163] Consequently, when the question of the duration of implied intellectual property licenses has come before them, they have deferred to state law. In two cases from two different circuits, this has resulted in the licensor's ability to revoke the license at will.[164] While this seems to be the general rule, the Ninth Circuit has held that copyright licenses that do not specify duration will expire after thirty-five years.[165]

It seems inappropriate to apply either of these rules to podcasting. Podcasting functions much more like a transfer of property. It is hard to say whether the download of a podcast should be considered a transfer of ownership or a license.[166] Because written consent is required for a sale, however, the transaction cannot technically be a transfer of ownership.[167] As we have seen, an implied contract is necessarily a nonexclusive license, and the license is probably limited to the right to copy and listen to the product. Outside of the Ninth Circuit, that license can be revoked at any time, enforceable by an action for infringement.[168]

4. Distribution and the First Sale Doctrine

When a podcaster puts a copy of his podcast on a server, he is exercising his exclusive right to distribution.[169] Courts have held that actual disbursement to other individuals is not necessary to establish distribution. One Fourth Circuit case held that when an individual "makes [a] work available to the borrowing or browsing public, [he] has completed all the steps necessary for distribution to the public."[170] Like the family history library in that case, a podcaster distributes his work when he makes it available over the Internet.

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163. *Cf. supra* text accompanying note 155.

164. *See* Korman v. HBC Fla., Inc., 182 F.3d 1291, 1295 (11th Cir. 1999); Walthal v. Rusk, 172 F.2d 481, 485 (7th Cir. 1999).

165. Rano v. Sipa Express, Inc., 987 F.2d 580, 585 (9th Cir. 1993).

166. Cases involving computer software licenses have come out in different ways. Two cases involving Adobe software have declared that software licenses do not constitute a sale. *See* Adobe Sys. Inc. v. Stargate Software Inc., 216 F. Supp. 2d 1051 (N.D. Cal. 2002); Adobe Sys. Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000). Another case clearly stated that they do. *See* SoftMan Prods. Co. v. Adobe Sys. Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001). These cases are only of marginal value in deciding the podcasting question, however, because they all involved express licenses.

167. *See* 17 U.S.C. § 204(a) (2000); *id.* § 101.

168. *Cf.* David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 298–99 (2001); Christian H. Nadan, *Software Licensing in the 21st Century: Are Software Licenses Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555, 563 n.15 (2004).

169. *See* 17 U.S.C. § 106(3) (2000); Quality King Dist., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 138 (1998).

170. Hotaling v. Church of Jesus Christ of Latter-day Saints, 118 F.3d 199, 203 (4th Cir. 1997).

A further problem for copyright law arises if a listener decides to distribute the podcast he has downloaded. The first sale doctrine allows the legitimate owner of a copy of a copyrighted work to resell it or otherwise dispose of it as he sees fit.[171] Of course a podcast listener technically has no property right in anything — he probably only has the permission of the podcaster to copy the file twice and listen to it. If this is the case, the first sale doctrine is inapplicable to podcasting because the listener does not legally own a copy. In that scenario, the right of the listener to redistribute the podcast would once again depend on the unspoken terms of the implied license, leaving courts in the uncomfortable position of deciding the content of these terms.

If, on the other hand, we were to hypothesize that by downloading a podcast, a listener acquires legal possession of a copy (a proposition that could be accomplished by judicial or legislative fiat), the first sale doctrine would allow the listener to distribute it. The problem is that when the listener distributes the podcast, he is likely to transfer a new copy, rather than the same copy he downloaded. If I have a copy of a podcast and I want my friend to hear it too, it is not very likely that I will transfer ownership of my iPod — where the file is stored internally — to him. Instead, I will probably e-mail him a copy of my copy. Thus, I am not disposing of (i.e., transferring) the copy that I have, but rather creating a new copy and disposing of it. The new copy is of dubious legality, depending on the unknowable terms of the implied contract of sale, because the first sale doctrine (which only allows disposal of legitimately acquired copies) does not directly authorize such a transaction.[172]

There is some debate among copyright experts about how the first sale doctrine should be applied to digital files transmitted electronically.[173] One view holds that the first sale doctrine allows copying and disposal of a digital file if the user deletes his own legitimately acquired copy soon thereafter.[174] Another view argues that the first sale doctrine does not allow creation and distribution of a new copy, even if the legitimately acquired copy is immediately deleted.[175]

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171. *See* 17 U.S.C. § 109 (2000). The exception to this rule, which disallows the commercial renting of sound recordings, is probably irrelevant for free podcasts. Although podcasts are sound recordings, there is no market for commercial podcast rental if they are available for free public download on the Internet. *See id.* § 109(b).

172. *See* William Sloan Coats et al., *Streaming into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 294–95 (2000).

173. Onimi Erekosima & Brian Koosed, *Intellectual Property Crimes*, 41 AM. CRIM. L. REV. 809, 845 (2004).

174. *See, e.g.*, *id.*; David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 99 (1998).

175. *See, e.g.*, LEE A. HOLLAAR, LEGAL PROTECTION OF DIGITAL INFORMATION 145 (2002) (lamenting that the specific terms of the Copyright Act do not allow for any intermediate copies to exist); WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 95 (1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ ("It seems clear that the first sale

Attempts by Congress to settle this debate have failed. The Digital Era Copyright Advancement Act of 1997 would have amended the first sale doctrine to allow creation and distribution of a new copy if the owner "erases or destroys his or her copy or phonorecord at substantially the same time."[176] A 2003 bill would have made essentially the same amendment to the first sale doctrine.[177] Neither of these bills ever made it out of committee, and thus podcasting and other digital media are left in an area of unsettled law.

This debate is more relevant to podcasting than it is to other forms of digital media, such as music or software, because podcasts rarely exist in a physical object other than a hard drive. Music and software are still often sold on CDs or some other tangible medium that can be transferred or sold; podcasts are always downloaded. Podcasts, unlike music and software, are unlikely to ever be distributed in any manner other than electronic file transfer over the Internet.[178] Therefore, the hole in the first sale doctrine swallows podcasting completely.

5. Podcasting and Digital Rights Management

The new technologies of the digital age have made copyright infringement easier than ever.[179] Consequently, many copyright holders feel that their rights are under attack. Laws designed to protect these copyright holders have proven difficult to enforce, since infringement is rampant and individual lawsuits are impractical. Accordingly, some copyright holders have taken self-help measures, such as implementation of Digital Rights Management ("DRM") technology.

Copyright holders use DRM to restrict access to copyrighted works, so they can only be accessed and used on the terms of the copyright holder. These restrictions are enforced not by the law, but by machines reading code, and therefore they have the power to reach

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model — in which the copyright owner parts company with a tangible copy — should not apply with respect to distribution by transmission, because transmission by means of current technology involves both the reproduction of the work and the distribution of that reproduction.").

176. H.R. 3048, 105th Cong. § 4 (1997).

177. *See* Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. § 5 (2003).

178. Of course, it is technically possible that a listener might burn the podcast file onto a CD and transfer it that way, but that adds an unnecessary and inefficient step to the process of transfer. In addition, it adds a burdensome step for the person who receives the podcast on CD: podcasts are meant to be portable, so the recipient would have to rip the audio file from the CD to his computer, and then transfer the file once more from his computer to his portable audio player. This unwieldy process makes this manner of podcast transfer unlikely.

179. *See* Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J.L. & ARTS 371, 382 (2003).

beyond the scope of copyright in their restrictions.[180] Copyright holders employ DRM technology to protect a variety of digital media. For example, DRM technology is used to encrypt content on DVDs so that they only play on authorized machines that prevent DVD copying.[181] Similarly, DRM technologies prevent second-generation copies of digital audio tapes,[182] and restrict e-books from being copied, printed, or read aloud by a computer.[183] These self-help restrictions are intended to place limitations on the use and access of copyrighted content.

The DMCA provides strong support for the implementation of DRM technologies. Congress provides severe penalties for any circumvention of a "technological measure that effectively controls access to a work protected under [copyright law]."[184] As Professor Lawrence Lessig puts it, this provision of the DMCA is "*legal code* intended to buttress *software code* which itself [is] intended to support the *legal code of copyright*."[185] The potential wrongdoing under the DMCA is not copyright infringement, but rather the circumvention of DRM technologies. Because they have the force of law, DRM technologies are powerful protectors of copyright.

There is nothing in the law that prevents a podcaster from incorporating DRM technology into his podcast. Many websites that offer legal downloads of audio files already encrypt the files so that they can be copied only a certain number of times, or only to a limited number of computers.[186] A podcaster who adopted this form of DRM would be in a better position to determine the terms of the implied nonexclusive license whereby listeners are authorized to download his file.

At this time, podcasting is a very free and open movement. Attempts to implement DRM are likely to be met in the podcasting community with scorn and contempt. As a legal matter, however, if podcasters want to maintain an open environment free from DRM limitations, the current law will not support them.

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180. *See* LAWRENCE LESSIG, FREE CULTURE 148 (2004).

181. *See* June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 457–458 (2004).

182. This technology is known as Serial Copy Management System ("SCMS"). *See id.* at 453.

183. *See* Adobe Acrobat eBook Reader Frequently Asked Questions, http://www.adobe.com/support/ebookrdrfaq.html (last visited Nov. 21, 2005).

184. 17 U.S.C. § 1201(a)(1)(A) (2000).

185. LESSIG, *supra* note 180, at 157.

186. Various versions of this kind of technology exist, but one of the most prominent is Apple's "Fairplay" DRM, incorporated into their iTunes online music store. *Cf.* iTunes Music Store: Authorization FAQ, http://www.apple.com/support/itunes/musicstore/authorization/ (last visited Nov. 21, 2005) (explaining that songs purchased on the iTunes Music Store can only be played on five computers at one time).

### *C. Podcasting and Non-Original Content*

Currently, most podcasts are composed of completely original content. One reason for this is because it is simply easier to record your own voice, post it on the Internet, and be done with it. Additionally, podcasters may be fearful of facing litigation for infringing someone else's copyright.[187] Many podcasters do, however, incorporate recorded music into their works. Some podcasters only use "bumper music" (intro and outro theme music, or both) to separate segments,[188] while others have created radio-like programming where the podcaster acts as a disc jockey, simply introducing the songs he plays.[189] Whenever a podcaster uses any audio content that he did not create himself, he is legally obligated to obtain permission from the copyright holder (unless, of course, the work is in the public domain). This Section will analyze the legal details of what happens when a podcaster incorporates someone else's copyrighted music into his podcasts, and will argue that the current law, though it provides some guidance, leaves legal obligations unclear.[190] As we will see, podcasters need to obtain licenses for the reproduction and performance of sound recordings and musical works, and might also be required to obtain licenses for the public performance of sound recordings and musical works.

#### 1. Licensing Rights to Reproduction of Sound Recordings

If a podcaster uses someone else's recorded audio in a podcast, he has a clear legal obligation to obtain a license for the reproduction of the sound recording. After the DPRA, there is a separate copyright in a sound recording (belonging to the performer) and in the underlying

187. Bestkungfu Weblog, *Podcasting, Music, and the Law*, (Feb. 15, 2005) http://www.bestkungfu.com/archive/date/2005/02/podcasting-music-and-the-law (noting that podcasters who ignore copyright are "in for a rude awakening").

188. *See, e.g.*, IT Conversations, http://itconversations.com/series/technation.html (last visited Nov. 21, 2005); Sound of the Day Podcast, http://soundoftheday.blogspot.com/ (last visited Nov. 21, 2005).

189. *See, e.g.*, Coverville, http://www.coverville.com (last visited Nov. 21, 2005); Insomnia Radio, http://www.insomniaradio.net/ (last visited Nov. 21, 2005); The Rock and Roll Geek Show, http://www.americanheartbreak.com/movabletype/ (last visited Nov. 21, 2005); The Sounds in My Head, http://www.thesoundsinmyhead.com (last visited Nov. 21, 2005); Staccato: A Creative Commons Music Show, http://www.staccatomusic.org/ (last visited Nov. 21, 2005); Up the Tree, http://www.upthetree.com/ (last visited Nov. 21, 2005).

190. This Section does not address the issue of fair use. This is because the particular format of podcasting does not introduce any wrinkles into traditional fair use analysis. Instead, this Section makes arguments about whether the law, as applied to podcasting, would (or indeed *could*) result in a finding of copyright infringement or non-infringement. If infringement were found in a particular case, a fair use defense could theoretically be applied, following the standards laid out in 17 U.S.C. § 107 and the case law.

musical work (belonging to the composer and lyricist, or both).[191] The sound recording copyright, of course, includes the exclusive right to reproduce the sound recording. Since podcasting inherently requires the reproduction of the recording, a podcaster needs a license for that right.

Webcasters, in contrast, do not need this license because they do not reproduce the sound recording; they merely stream it over the Internet. The § 114 statutory license for webcasters that was addressed by the 2002 CARP process involved not the reproduction of the sound recording but rather its public performance.[192] There is no analogous statutory license available for reproduction of sound recordings.

This means that licenses must be negotiated between the copyright holder (the individual record label) and the potential licensee (the individual podcaster). This right is available in the form of a master use license,[193] but record companies are under no obligation to grant such licenses. If record companies do grant a master use license, it will be on their terms.[194] Further, unless a podcaster can somehow arrange a collective negotiation through the RIAA, he would probably have to negotiate individually with each record company that owns the copyright for each song he wants to use. This is an onerous process that would probably prove logistically — not to mention financially — infeasible for most music-focused podcasters.[195] Although some podcasters are undaunted,[196] many will likely be left out in the cold, with no right to reproduce sound recordings.

2. Licensing Rights to Reproduction of Musical Works

The Copyright Act provides for a compulsory license that, under certain circumstances, allows a person to make and distribute phonorecords of a musical work (as distinct from a sound recording).[197] Once a composer's work has been legally recorded and distributed to the public, he cannot prevent others from making and distributing

191. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

192. *See infra* Part IV.C.3 for a discussion of the applicability to podcasting of this statutory license for the performance of a sound recording.

193. *See* LaVerne Evans Srinivasan, *Copyright, Music and the Internet*, 758 PLI/PAT 367, 385–86 (2003) (describing master use licenses and explaining where they are needed).

194. Currently, no government body is responsible for resolving a dispute if the parties cannot reach an agreement.

195. *See* Michelle Kessler, *Storm Clouds Gather Over Podcasting*, USA TODAY, Aug. 4, 2005, at B3 (noting that negotiating master use licenses may be impossible).

196. *See* Zernike, *supra* note 2 (reporting that podcaster Brian Ibbott is negotiating such a license with the RIAA).

197. Since the mechanical license refers to the musical work, not the sound recording, mechanical licenses are not necessary to make phonorecords of a song whose musical work copyright has fallen into the public domain.

phonorecords of the copyrighted work.[198] If the compulsory licensee has also obtained a license to reproduce another artist's sound recording, he can distribute copies of that recording under the compulsory license.[199] On the other hand, if the licensee gets nothing but the compulsory license, he cannot reproduce the recording; all he can do is create his own new recording of the song.[200]

There are several statutory conditions to the compulsory license of which podcasters should be aware. First, a recording of the song must be publicly distributed before the license becomes available.[201] If that has not happened, the podcaster will need to negotiate with the copyright holder of the musical work to create the first-ever recording of the song. Second, the podcaster must give notice to the copyright holder within thirty days after making the new phonorecord, and before distributing it.[202] Third, to the extent it is technologically possible, the phonorecord must be accompanied by information about the song, including title, recording artist, album, and composer.[203] This provision applies better to webcasting than to podcasting, because a webcast can display such information on the screen as the music plays, whereas a podcast can only announce it before or after the track plays. Finally, the podcaster must pay the license royalty fee.[204]

The specific type of license necessary depends on the method of distribution. In order to make and distribute physical phonorecords of a work, such as CDs or tapes, a mechanical license is required.[205] A separate license is necessary in order to distribute digital copies of a musical work over the Internet, a process known as making a digital phonorecord delivery ("DPD").[206]

Although the statute allows copyright holders and potential licensees to negotiate the terms of the license,[207] as a practical matter the terms are set and rarely negotiated.[208] The Harry Fox Agency ("HFA") is the entity that grants and collects royalties for mechanical licenses and DPD licenses on behalf of composers and performing

198. *See* 17 U.S.C.S. § 115 (2005).

199. *Id.* § 115(a)(1); *see also id.* § 115(c)(3)(H) (emphasizing that without the proper license for sound recording, digital delivery of a phonorecord of a musical work is actionable).

200. *Id.* § 115(a)(2). The statute allows a recording artist to make his own arrangement of a copyrighted musical work; this is what allows recording artists to make covers of each other's songs. *Id.*

201. *Id.* § 115(a)(1).

202. *Id.* § 115(b).

203. *Id.* § 115(c)(3)(F).

204. *Id.* § 115(c).

205. *See id.* § 115(c)(2) (establishing the statutory royalty rate for mechanical licenses).

206. *See id.* § 115(c)(3)(A) (establishing the statutory royalty rate for digital phonorecord delivery licenses).

207. *Id.* § 115 (c)(3)(B).

208. *See* James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 228 n.217 (2004).

rights societies.[209] Accordingly, licensees must license on HFA's terms. The current rate, in effect until the end of 2005, is either 1.65 cents for each minute or fraction thereof in the recording, or 8.5 cents — whichever is greater.[210] A separate license must be obtained for each song. Mechanical licenses are purchased in bundles of no fewer than 500,[211] but DPD licenses are paid for on a quarterly basis according to usage.[212]

The question for podcasters is which, if either, of these compulsory licenses they must obtain. Because mechanical licenses refer to the physical manufacture of phonorecords such as CDs,[213] they are inapplicable to podcasting, as podcasters do not manufacture physical phonorecords.

Furthermore, it is not completely certain that a podcaster makes a digital phonorecord delivery. A DPD is defined by statute as an "individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording."[214] At first blush podcasts appear to fit within this definition: the process of downloading a podcast is the delivery to the listener of a distinct phonorecord. Indeed, HFA has tentatively taken the position that podcasts require DPD licenses.[215] Despite this, HFA also acknowledges that a DPD license would probably not be appropriate if the song is altered, fragmented, coupled with video content, or used for commercial purposes.[216] Also, it is questionable whether a podcast that incorporates more than one complete song into the same downloadable audio file would satisfy the statute's requirement that a DPD be "individual."[217]

Thus it is unclear whether podcasters are required to pay the DPD license royalty. In the event that the statutory compulsory license for

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209. *See* Harry Fox Agency, What Does HFA Do?, http://www.harryfox.com/public/hfaPurpose.jsp (last visited Nov. 21, 2005).

210. Harry Fox Agency, Digital Licensing, http://www.harryfox.com/public/infoFAQDigitalLicensing.jsp (last visited Nov. 21, 2005) (establishing the current royalty rates for DPD licenses); Harry Fox Agency, Statutory Royalty Rates, http://www.harryfox.com/public/infoRateCurrent.jsp (last visited Nov. 21, 2005) (establishing the current royalty rates for mechanical licenses).

211. Harry Fox Agency, Limited Quantity Licensing, http://www.songfile.com/limited_license_search.html (last visited Nov. 21, 2005).

212. Harry Fox Agency, Digital Licensing, *supra* note 210.

213. See Mario F. Gonzalez, *The Statutory Overriding of Controlled Composition Clauses*, 9 UCLA ENT. L. REV. 29, 44 (2001).

214. 17 U.S.C. § 115(d) (2004).

215. *See Technology News: Podcasting*, HFA SOUNDCHECK (Harry Fox Agency, New York, N.Y.), May 2005, at 3, *available at* http://www.harryfox.com/docs/viewSoundCheck505.pdf.

216. *See id.*

217. *Cf.* Susan Butler, *Licensed To Podcast*, BILLBOARD, June 18, 2005, at 16 (describing one attorney who questions whether podcasts qualify as DPDs).

DPDs does not apply, podcasters would have to negotiate a license directly with the copyright holder of the musical work.

3. Licensing Rights to Performances of Sound Recordings

The DPRA-created copyright in sound recordings includes the exclusive right of public performance.[218] Webcasters can purchase a statutory public performance license for this right at an arbitrated rate as explained in Part III.C., but many webcasters have found this to be cost prohibitive. Congress created the statutory license with webcasters in mind, and its application to podcasters remains unresolved.

If podcasts are public performances, the DPRA requires that podcasters obtain a license for the sound recording. If podcasts can meet the DPRA's additional requirements for the license, they will qualify for the webcasters' statutory license. If, however, they fail to qualify for the statutory license, podcasters must negotiate a sound recording performance license directly with the record labels, in the form of the master use license described above. As previously noted, obtaining such a license may be impossible.

On the other hand, if podcasts are not public performances — and thus do not infringe on the exclusive performance right under the DPRA — they do not require a license for the performance of sound recordings, statutory or otherwise. Hence, a great deal turns on whether podcasts fit the Copyright Act's definition of "public performance." Because the answer is unclear, podcasters are left in a legal limbo where they may end up paying for more licenses than they need.

To perform a work, according to the Copyright Act, is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[219]

From a common-sense standpoint, a podcast is not technically performed until the listener has downloaded it, put it on his portable audio player, and hit the "play" button. Until that point, the sounds comprising the podcasted work are not audible, as the definition of "performance" requires. It would seem that such a performance could not possibly be any more private. The only person who can hear the audible sounds of the podcast is the person with the audio player's headphones in his ears. How could such a performance be considered public? The Copyright Act states that to perform a work *publicly* is:

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218. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

219. 17 U.S.C. § 101 (2000).

> (1) 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
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[220]

This statutory definition of "public performance" could include podcasts. The Copyright Act specifically states that *transmitting* a performance constitutes the public performance of a work, even if recipients of the performance *do not receive it at the same time or place*. Any number of people scattered across the globe could receive the same podcast, even months apart from one another. Each performance does not occur until an individual presses "play" on his portable audio player, but taken as an aggregate, they might fit under the statutory definition of "public performances."[221]

But is it not the listener, rather than the podcaster, who performs when he presses "play"? Perhaps. However, the definition of "performance" allows for performance by means of a process. That process could begin with the posting of the podcast to the server and end with the listener firing up his iPod. In that case, the podcaster would be the performer.

Interpreting the definition of public performance to include podcasting does not seem to comport with traditional conceptions of public performance, which include radio transmissions, nightclub music selections, and elevator music. In each of these traditional examples, the listener does not control the sound, nor is he able to keep a copy, as he would with a podcast. While podcasting looks more like a reproduction than a performance, it may fit in both categories.

Some webcasting technology allows the user to play music aloud while he downloads it. This certainly qualifies as both a reproduction and a performance. The definition of "digital phonorecord delivery" indicates that it is a reproduction, but that it can be a performance as well.[222] As we will see in the next section, performing rights organiza-

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220. *Id.*

221. *See* Bob Kohn, A Primer on the Law of Webcasting and Digital Music Delivery, http://www.kohnmusic.com/articles/newprimer.html (last visited Nov. 21, 2005) (describing how digital phonorecord downloads could be construed as public performances).

222. 17 U.S.C. § 115(d) (2000) (stating that a digital phonorecord delivery is a transmission that results in a reproduction, "regardless of whether the digital transmission is also a

tions have contended that all Internet transmissions of copyrighted works constitute a public performance.

SoundExchange, the entity that administers statutory performance licenses for sound recordings, takes the opposite view: "Downloads are reproductions and are considered a different right not covered by statutory license and thus not part of SoundExchange's responsibilities. Such rights must be licensed directly from the [sound recording copyright owner]."[223] SoundExchange will not grant podcasters sound recording performance licenses, even though they might legally need them. Podcasters' obligation could not be more unclear under current law.

Even assuming that podcasts are public performances, and that SoundExchange is willing to grant podcasters a statutory license, podcasters are still unable or unlikely to comply with the conditions necessary to qualify for statutory licenses. First, and most obviously, the Copyright Act states that a transmitter is eligible for a statutory license only if "the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient."[224] Of course, the whole point of the podcasting process, which requires making a new audio file, is the creation of a phonorecord. One might argue that simply posting a file on the Internet does not constitute causation or inducement to copy it, but this claim rings hollow — particularly after the Supreme Court adopted an inducement theory of contributory liability this past term.[225] Podcasters implement RSS technology on their websites, allowing podcatching software to find and copy new podcasts automatically.[226] It is therefore impossible for podcasters to fulfill this condition for the statutory license.

Second, in order to be eligible for a statutory license, podcasters would be required to use DRM to prevent listeners from making copies of their podcasts. The statute requires that if the transmitter's technology can prevent recipients from making their own digital phonorecords, then it must do so.[227] The technology that most podcasters use is nothing more remarkable than the ubiquitous MP3 file format, which can be controlled by DRM.[228] Using DRM to prohibit listeners from making copies of podcast files, as the statutory license

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public performance of the sound recording or any nondramatic musical work embodied therein").

223. SoundExchange, Artists Home, http://www.soundexchange.com//artist_home.html (last visited Nov. 21, 2005).

224. 17 U.S.C. § 114(d)(2)(C)(vi) (2000).

225. *See* MGM Studios Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2780 (2005).

226. *Cf.* Robbie Hudson, *All Your Web Wishes at One Click*, SUNDAY TIMES (London), Jan. 30, 2005, at Features 13 (describing the automatic nature of RSS and citing podcasting as an example of RSS at work).

227. 17 U.S.C. § 114(d)(2)(C)(vi) (2000).

228. *See* iTunes Music Store: Authorization FAQ, *supra* note 186.

requires, would obliterate the entire upload-download model of podcasting. It is therefore impossible for a podcaster to comply with this provision as well.

Third, statutory licensees must provide title, artist, and album information for each song in text, displayed on the device receiving the transmission "during, but not before, the time it is performed."[229] Congress clearly drafted this provision with webcasts in mind: as the song is playing, the computer screen shows information about the song, so listeners will be better informed about how to buy it on CD. Podcasts that incorporate more than one song, however, cannot currently display the title, album, and artist information of each song as the audio file is playing.

The glimmer of hope for podcasters is that the statute provides an exception "in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace."[230] Portable audio players currently cannot display such textual data when playing audio files. The devices intended for receiving the service provided by a podcaster are iPods (or other portable audio players), which do not have the capability to display such textual data. Therefore, this requirement may not have an impact on podcasters.

Fourth, the Copyright Act imposes unreasonable requirements on podcasts by limiting the availability of archived programs. An "archived program" is "a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning."[231] A podcast would certainly fit into this definition: it is predetermined by the podcaster, it is available whenever a listener wants to download it, and it is the same every time a listener plays it. In order to qualify for a statutory license under the Copyright Act, archived programs cannot be less than five hours in length and cannot be available for more than two weeks.[232] Podcasts generally range between a few minutes and an hour in length. A five-hour podcast would be an exceptionally large file, unwieldy to store and play. Many podcasters leave their files on the server indefinitely; removing them after two weeks would eliminate a large portion of their potential audience. The record labels lobbied for these

229. 17 U.S.C. § 114(d)(2)(C)(ix) (2000).

230. *Id.*

231. *Id.* § 114(j)(2). The definition of "archived program" provides an exception for a program "that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording." *Id.* Therefore, podcasts that use short clips of music without featuring them (as in the case of bumper music) would probably not be considered archived programs and would not have to comply with this requirement.

232. *Id.* § 114(d)(2)(C)(iii)(I)–(II).

requirements precisely because they are unreasonable.[233] They did not want manageable archived files available for webcast or download at any time because they might cut into CD sales. Some podcasters have noticed this statutory provision and have begun making five-hour-and-one-minute podcasts, available for only two weeks.[234] Unfortunately, these conscientious podcasters' compliance with the archived program provisions of the Copyright Act does not immunize them from liability for failure to comply with the other three statutory requirements.

Suppose that somehow a podcaster complied with all four of the statutory license requirements. He still would need to negotiate and pay the royalty rate to obtain the license. The CARP process established a rate for webcasters,[235] but because podcasting technology is so different, it is doubtful the webcasters' rate would apply to podcasters. As in the case of webcasting, the parties must negotiate a rate amongst themselves. Webcasters, however, did not come to an agreement with the recording companies, and it is even less likely that podcasters — often independent individuals — would succeed where the webcasters failed. As noted previously, on May 30, 2005, a system of special administrative law judges replaced the CARP process. These judges will set rates in future copyright disputes.[236] Currently, no one knows how effective the new system will be. Since judges must have some expertise in both copyright and economics, the result may indeed be more fair than the one reached in the webcasting decision. It is hard to imagine that many podcasters would be anxious to take their chances. Statutory licensing is not a realistic option for podcasters.

In summary, if podcasts are public performances, podcasters will need to negotiate a master use license with each record company whose music they wish to use because the statutory license require-

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233. *See* Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 16–17 (2001).

234. *See, e.g.*, Internet Pro Radio, http://www.internet.pro (last visited Nov. 21, 2005). The Internet Pro Radio podcast claims to be "proudly podcasting under the law pursuant to a DMCA statutory license for webcasting from Sound[E]xchange and licenses from BMI, ASCAP, and SESAC." *Id.* The author of this podcast, Bret Fausett, makes a 30- to 40-minute podcast followed by five hours of silence, but because he is not complying with the other requirements for a DMCA statutory license, he is probably treading on thin ice. It is also odd that Fausett claims to have a license from SoundExchange, as SoundExchange specifically disclaims the ability to license downloadable music. *See* SoundExchange, *supra* note 223 and accompanying text. Fausett appears to classify himself as a webcaster who *performs* music, and who has paid the statutory license fee that the CARP process set for webcasters. *See* Podcast: Podcasts and Copyrights, recorded by Bret Fausett for Internet Pro Radio (Jan. 4, 2005), http://blog.lextext.com/_attachments/225172/iProRadio-Podcasts-n-copyrights.mp3.

235. *See* discussion *supra* Part III.C.

236. Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, 118 Stat. 2341.

ments are impossible for them to comply with. If, however, podcasts are determined not to be public performances, podcasters will not need any license for the performance right.

4. Licensing Rights to Performances of Musical Works

The final relevant copyright right is that of exclusive public performance that is inherent in underlying musical works. This is the right to perform a *song*, as distinct from the right to perform a *sound recording*. Again, podcasters' liability turns on whether podcasts fit into the statutory definition of public performance. If podcasts are public performances, podcasters must secure a license for the public performance of musical works. If podcasts are not public performances, no license is necessary.

The performing rights societies (ASCAP, BMI, and SESAC) are responsible for administering the performance rights of musical works on behalf of publishers and composers.[237] Publishers, who obtain copyrights from composers, assign performing rights societies the right and responsibility to license, monitor, and collect royalties for any public performance of the works they cover. Whenever a radio station, a department store, or nightclub plays a copyrighted song, one of the performing rights societies cashes a check — not for the recording, but for the song. The societies offer blanket performance licenses at prices they have determined according to the size of the licensee and the way the music is used.[238]

Since the advent of podcasting, performing rights societies have predictably asserted that podcasters must purchase licenses. BMI has been the most aggressive, specifically targeting its form license agreements to podcasters.[239] BMI's official website makes the following statement:

> Podcasting is the latest wave in online music. BMI offers a new media license that clears the public performing rights for thousands of businesses and individuals with easy, low cost licensing options. BMI's agreement only covers public performance rights to musical works in the BMI repertoire. You will need to secure additional licensing from music publishers and record labels for mechanical rights in the under-

237. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 233 (4th ed. 2000).

238. *See* Robert Meitus, Note, *Interpreting the Copyright Act's Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 774 (1999).

239. *See* BMI Licensing: Webcaster, http://www.bmi.com/licensing/webcaster/ (last visited Nov. 21, 2005) (designating the Website Music Performance Agreement as being "for commercial websites as well as podcasts").

> lying musical works and for uses of master sound recordings in your podcast.[240]

The license agreement grants "a non-exclusive license to perform publicly over the Internet" all of the musical works in the BMI catalog.[241] This is the same license BMI offers to webcasters. The current license fee is $283 for a year[242] — not an exorbitant amount for a serious podcaster. Although the document contains a list of definitions, it does not include a definition of "performance" or "public performance." Clearly, though, because BMI has created a specific web page for podcasters directing them to this license, BMI wants podcasters to believe that they need this license.[243]

ASCAP and SESAC offer similar licenses for web-based performances at substantially the same price,[244] but their respective websites do not specifically mention podcasting. SESAC's license clearly states that its license applies only to "live or archived (on demand) streaming, music videos, and song previews."[245] Podcasting does not fit any of these categories. ASCAP's license is more ambiguous. It defines the term "Internet Transmissions" as "all transmissions of content to 'Users' from or through your Internet Site or Service."[246] The Frequently Asked Questions section of ASCAP's website declares, "Every Internet transmission of a musical work constitutes a public performance of that work."[247] As explained previously, it is possible to construe the statutory definition of public performance to include most, if not every, Internet transmissions of a musical work. Such a construal does not match up well with a common-sense notion

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240. BMI and Podcasting, http://www.bmi.com/licensing/podcasting/ (last visited Nov. 21, 2005).

241. BMI Website Music Performance Agreement § 3A, http://www.bmi.com/licensing/forms/Internet0105A.pdf (last visited Nov. 21, 2005); *see also id.* § 3D (stating that the agreement "grants only public performing rights" and not rights to distribution or reproduction).

242. *Id.* § 5C.

243. BMI is targeting the podcaster crowd. The society has launched its own series of podcasts, entitled "See It Hear First," intended to promote some of BMI's lesser-known recording artists to music industry executives. *See Crib Sheet*, MUSIC WEEK, May 21, 2005, at 15; BMI, See It Hear First, http://music.bmi.com/podcast/200505/ (last visited Nov. 21, 2005).

244. *See* ASCAP Experimental License Agreement for Internet Sites & Services (Release 5.0) § 4, http://www.ascap.com/weblicense/release5.0.pdf (last visited Nov. 21, 2005) (granting the right to "publicly perform" the music in the ASCAP catalog); *id.* at Rate Schedule "A" (indicating the minimum annual license fee is $288); SESAC Internet License § 3A, https://www.sesac.com/pdf/internet_2005.pdf (last visited Nov. 21, 2005) (granting the right to "publicly perform" the music in the SESAC catalog); *id.* at Schedule "A" § 1 (indicating the minimum license fee for a six-month period is $84).

245. SESAC, Internet Licensing Frequently Asked Questions, https://www.sesac.com/licensing/internet_licensing_faq.html (last visited Nov. 21, 2005).

246. ASCAP, *supra* note 244, § 3(b).

247. ASCAP, Frequently Asked Questions About Internet Licensing, http://www.ascap.com/weblicense/webfaq.html (last visited Nov. 21, 2005).

of public performance, but one could conceivably read it to include podcasts. Thus, ASCAP might have a basis for requiring podcasters to purchase public performance licenses.

Obviously, it is in the performing rights societies' interest to claim that podcasts (and other Internet transmissions of musical works) are public performances. BMI and ASCAP (who together handle ninety-nine percent of all American performing rights licensing)[248] seem to be taking a firm stand on the issue. Many podcasters have already taken the bait,[249] probably because ASCAP and BMI blanket licenses are relatively cheap, easy to obtain, and encompass almost any song the podcaster wants to play. On the other hand, Infinity Broadcasting has asked its WCKG-Chicago radio personality Steve Dahl to cease podcasting and prevent access to archived recordings of his show because Infinity does not believe its ASCAP, BMI, and SESAC licenses apply to podcasts.[250]

This confusion results from podcasting's unsettled legal status. If we are able to treat podcasting like we do webcasting, as a public performance, then performance licenses are in order. But if we are to treat podcasting like a pure download model, only reproduction licenses should apply. Congress should step in and clarify the law.

5. The Safe Harbor of Creative Commons

Fortunately for podcasters, some music can be legally incorporated into a podcast without negative ramifications. Many musicians license their music under a system known as Creative Commons in which they can authorize public use of their creative work. The most popular recording artists do not use Creative Commons, so the available music is likely to be unfamiliar to most people. For podcasters looking to create a theme song or bumper music, Creative Commons music is probably enough.

Creative Commons was founded in 2001 to allow authors of creative works to voluntarily waive certain rights granted by copyright law.[251] It provides a framework under which authors can license indi-

248. PASSMAN, *supra* note 237, at 233.

249. *See, e.g.*, Closet Deadhead, http://www.penguinradio.com/podcasting/index.php?iid=556 (last visited Nov. 21, 2005); Keener13, http://www.keener13.com (last visited Nov. 21, 2005); Internet Pro Radio, http://www.internet.pro (last visited Nov. 21, 2005); Coverville, http://www.coverville.com (last visited Nov. 21, 2005); see also Mike O'Connor, *Music Licensing — April 2005*, SEX AND PODCASTING, Apr. 6, 2005, http://www.sexandpodcasting.com/licensing.mp3 (last visited Nov. 21, 2005); Fausett, *supra* note 234 (advising other podcasters that securing licenses from the performing rights societies is the right thing to do).

250. *See* Rosenthal, *supra* note 54; The Steve Dahl Show, Where are the Rebroadcasts?, http://www.dahl.com/podcast/hiatus.asp (last visited Nov. 21, 2005).

251. *See* Creative Commons, About Us, http://creativecommons.org/about/history (last visited Nov. 21, 2005).

vidual elements of their copyright for public use. Creative Commons licenses are available not just for music, but for all forms of creative work, including images, video, and text.

Podcasting has become popular amongst musicians using Creative Commons licenses.[252] In fact, podcasts exist that exclusively play Creative Commons-licensed music.[253] Creative Commons offers the ability to incorporate free music into a program without fear of legal retaliation. If the current statutory scheme stands, Creative Commons may be the safest alternative for podcasters wanting to incorporate free music into their programming.

6. Public Domain Music

A slightly more work-intensive option for podcasters would be to find music that has fallen into the public domain. If a podcaster can find a song with an expired musical work copyright, he does not need a compulsory mechanical or DPD license to make his own arrangement or recording of it. Recordings of musical works in the public domain are still likely to be subject to a sound recording copyright, unless the recording itself has fallen into the public domain. Internet resources are already available that can help podcasters find creative works in the public domain.[254] A Bach toccata, for example, may be used in a podcast without legal ramifications, provided the podcaster makes his own recording of it.

7. Licensing Other Audio Content

Audio content can be categorized as copyrighted content, Creative Commons-licensed content, or public domain content. One subcategory of copyrighted content deserves special mention. Some copyrighted audio exists outside of performing rights societies, HFA, and record labels. All expression fixed in a tangible medium is automatically copyrighted,[255] but not all copyrights in fixed audio expression get assigned to record labels and performing rights societies. The two most relevant types of this kind of audio content are independent music and podcasts themselves.

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252. *See* Adrian McCoy, *A Net Gain: Web Logs Move onto the Airwaves via Podcasting*, PITTSBURGH POST-GAZETTE, Apr. 26, 2005, at D-1.

253. *See, e.g.*, Staccato: A Creative Commons Music Show, http://staccatomusic.org (last visited Nov. 21, 2005); The Revolution: A Creative Commons Music Podcast, http://indieish.com/revolution/ (last visited Nov. 21, 2005).

254. *See, e.g.*, Public Domain Music, http://www.pdinfo.com (last visited Nov. 21, 2005); Public Domain Music Works, http://www.pubdomain.com (last visited Nov. 21, 2005).

255. 17 U.S.C. § 102(a) (Supp. 2004).

Many musicians — composers and performers — have made recordings of their original music without assigning any of the rights. Their songs same have the same copyrights as songs owned by record labels — rights covering reproduction, distribution, and performance of both the sound recording and the underlying musical work. In order to incorporate such music into a podcast, the musician must grant permission to the podcaster. With independent music, this is far easier to accomplish.

Podcasters can negotiate directly with independent performers for a license to the reproduction of the sound recording, and with independent composers for a mechanical license to make additional phonorecords of the musical work. If podcasting is classified as a public performance, the performer can grant a license to perform the sound recording, and the composer can grant a license to perform the musical work. The parties are likely to have equal bargaining power, and many independent musicians will eagerly seek the publicity podcasting provides.

The difficulty is bringing podcasters and musicians together. Nevertheless, in the short time podcasting has existed, a preliminary solution to that problem has emerged. The Association of Music Podcasting ("AMP") seeks out independent musicians and solicits licenses from them for podcasting.[256] By directly granting AMP a license to the necessary rights under copyright, a musician gives AMP-member podcasters access to his independent music content.

The problems presented by podcasters copying each other's podcasts are even simpler to solve. Imagine two podcasters, Annie and Zeke. Annie thought Zeke had a particularly insightful commentary in last week's program. She wants to quote him by including a clip from Zeke's podcast in her own. Zeke, of course, owns the copyright in his podcast — both in the underlying literary work (the words he said) and in the sound recording (the MP3 file of him saying them). His copyrights, like those of a musician, include the rights of reproduction, distribution, and performance. Here, the licensing negotiations are even simpler, because Zeke owns all the copyrights himself, whereas a piece of independent music may have a separate composer and performer. Annie simply needs to contact Zeke and get his permission. Most likely, Zeke will be grateful for the exposure.

8. Contributory Infringement

A podcaster who violates a copyright in his podcast may be liable for contributory infringement when his listeners download copies of it. Suppose a podcaster includes copyrighted music in his podcast

256. *See* Association of Music Podcasting, http://www.musicpodcasting.org/about.php (last visited Nov. 21, 2005).

without permission and posts it on the Internet where people download it. The resulting copies held by the listeners also infringe. Although the rule of contributory infringement is not spelled out in the Copyright Act, it is well-established in judicial doctrine.[257] The Internet revolution has brought a host of contributory infringement cases to the attention of the public, but the case of an infringing podcaster is much simpler than any of those cases.[258] *Grokster* clarified the requirements for contributory liability for copyright infringement: "[O]ne infringes contributorily by intentionally inducing or encouraging direct infringement."[259] The court adopted an inducement test for contributory liability, holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[260] The test focuses on showing intent to encourage direct infringement by others.[261] An infringing podcaster intends that others download his podcast, thereby creating additional copies. He will therefore be liable for their infringing copies.

Unlike the distributors of the *Grokster* software, Adam Curry and the makers of the iPodder and iTunes software are probably safe from contributory liability even if their software is used to distribute infringing material. They would not necessarily know of the podcasters' infringement, and certainly it would be difficult to show intent to induce third-party infringement.

Finally, the DMCA includes provisions intended to shield Internet service providers ("ISPs") from vicarious liability for webcasting and file-sharing,[262] and these provisions should adequately protect them from liability for infringing podcasts as well. The law now creates a safe harbor for ISPs that serve merely as a conduit through which infringing material passes.[263] Therefore, a listener's ISP will not be liable when he downloads an infringing podcast. Furthermore, a podcaster's ISP would not be liable for storing an infringing podcast on its servers, so long as it never had actual knowledge of the pres-

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257. *See* MGM Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35 (1984).

258. *See, e.g.*, *Grokster*, 125 S. Ct. at 2764; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

259. *Grokster*, 125 S. Ct. at 2776.

260. *Id.* at 2780.

261. *See id.* at 2779–80.

262. *Cf.* Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) (discussing application of the safe harbor provision of the DMCA, which protects ISPs from copyright infringement liability in passive and automatic actions by a user without knowledge of the provider).

263. 17 U.S.C. § 512(a) (Supp. 2004). The statute does place some conditions on this safe harbor status, most dealing with the automation of the system and the ISP's lack of control over content.

ence of the infringing material, and, upon receipt of a take-down notice, it removes the infringing material from the server as required by the statute.[264] Unlike most copyright law, this portion of the DMCA requires no alteration to accommodate podcasting technology.

## V. CONCLUSION AND RECOMMENDATIONS

### *A. Congress Should Act to Help Podcasting*

The future of podcasting is uncertain. Podcasting's popularity has grown exponentially, and it has the potential to change the way people listen to music and radio. Podcasting offers a fresh alternative to the nationally homogenized formats of commercial broadcast radio. Podcasts can feature less popular forms of music. They can be informative, educational, and entertaining. They foster free speech, allowing podcasters to shout their opinions to whomever is listening. Because podcasts are Internet-based, they have the potential to reach a global audience. There is no telling how the world will change if podcasting is allowed to catch on with an even broader segment of the public. It is a technology that should be nurtured, not suppressed.

The commercial music industry is likely to hold a different view. It has even more incentive to crush podcasting than it did for webcasting. When a listener downloads a music podcast, he acquires a copy of the song without purchasing it. Record companies do not consider this free advertising, as they do radio; they see it as a threat to their primary revenue source — record sales. Hence the music industry is likely to propose podcasting legislation similar to that which has crippled webcasting.

Consequently, Congress needs to act now to protect and nurture this fledgling technology. It is important to protect the interests of the record companies and the copyright holders, but as has been demonstrated throughout this Article, the law as it now stands is insufficient to define the boundaries between the rights of podcasters and the rights of the other parties with whom podcasters must interact. Technology has outgrown the law, so it is time for the law to adapt.

### *B. Action Items for Congress*

#### 1. Implied Nonexclusive License

Congress should explicitly create an implied nonexclusive license to reproduce a copyrighted work when the copyright holder offers to make a copy of his copyrighted work by digital means and another

264. *Id.* at § 512(c).

person accepts that offer.[265] This would clarify the legal liability that might occur when a listener downloads a podcast. Although it is currently likely that an implied nonexclusive license is created, making the provision explicit would eliminate a lot of confusion.

Such an implied nonexclusive license should only allow the licensee to make two copies of the copyrighted work unless otherwise specified by the parties.[266] Certainly Congress does not want to allow unlimited copying through an implied license; a limit of two will suffice for podcast listeners (one copy for the computer and one for the portable audio player).

Congress should also provide that this implied nonexclusive license will endure for the life of the copyright unless otherwise specified by the parties.[267] If the parties want to specify a different duration, they should do so before acceptance of the offer to copy. This would reconcile the Ninth Circuit's rule with that of the other circuit courts. A rule that the license lasts for the duration of the copyright is more sensible than either the Ninth Circuit's thirty-five-year rule or the rest of the country's revocable-at-will rule. If the license is allowed to expire at any time before the copyright expires, there would be serious problems with enforcement, especially in a situation where the copyright holder has offered his work for public copying. How could he track down everyone who downloaded his file? How could he provide each person with notice of his intent to revoke the license? It would be far better to imitate the legal implications of a sale even though the non-explicit nature of the transaction demands that it constitute a license and not a transfer of ownership. Listeners consider copies of works that they have downloaded to be their property; the law should reflect that.

2. Digital First Sale Doctrine

A variation on the first sale doctrine should be applied to digital works.[268] It should allow the making of one additional copy for distribution to another party if the licensee destroys all of his copies at substantially the same time. The third party recipient of the new copy should then be permitted to make one additional copy for his personal use. This provision will allow listeners to transfer ownership of specific podcast copies, and allow the second listener to have one copy for his computer and one for his portable audio player, just like the original listener was allowed under the implied nonexclusive license. As explained above, this kind of a provision has already been pro-

265. *See supra* Part IV.B.1.
266. *See supra* Part IV.B.2.
267. *See supra* Part IV.B.3.
268. *See supra* Part IV.B.4.

posed in Congress in order to bring the first sale doctrine into the digital age. It is high time such a provision was enacted.

3. Digital Rights Management

The provisions of the DMCA concerning DRM, contained in § 1201 of the Copyright Act, should be construed to apply to holders of podcast copyrights.[269] Congress need not act to make this happen. Nothing in the DMCA indicates that its DRM provisions are inapplicable to podcasts; a court would probably be better suited to make such a declaration, if it is to be made explicit. Nonetheless, Congress should still consider whether it would be good policy to extend DRM protection to podcasts. It would probably find that allowing and protecting DRM in podcasts would make it easier for podcasters to control the terms upon which they offer their works to the public. With more explicit download agreements, DRM might be an ideal way for a podcaster to alter the terms of the implied license. Although it is unlikely that many podcasters (at least at this time) would want to incorporate DRM into their podcasts, it is wise public policy to allow them to do so.

4. Are Podcasts Digital Phonorecord Deliveries?

As explained previously, podcasts probably fit the current statutory definition of digital phonorecord delivery.[270] Congress should amend the definition to specifically include or exclude podcasts. It would be better policy to include podcasts in the definition. If they are not included, the compulsory license laid out in § 115 of the Copyright Act is inapplicable to them, thereby requiring podcasters to negotiate directly with copyright holders for a license the copyright holders are not obligated to grant.

5. Statutory License for Reproduction of Sound Recordings

If the recording industry does not voluntarily do it first, Congress should provide podcasters with a new statutory license for the right to digitally reproduce a phonorecord of a specific sound recording.[271] The rates for this license could be set according to the procedures described in the Copyright Royalty and Distribution Reform Act of 2004. Currently, record companies have the power to refuse permission for podcasters to reproduce their sound recordings and can there-

269. *See supra* Part IV.B.5.
270. *See supra* Part IV.C.2.
271. *See supra* Part IV.C.1.

fore either stop podcasts from including music or exact harsh fees and terms under master use licenses.

6. Are Podcasts a Public Performance?

Congress should amend the statutory definition of "performance" to specifically state whether it includes the downloading, copying, or distribution of a phonorecord in digital file format.[272] Much depends on this definition; if specifically excluded from the public performance definition, podcasts would need neither the statutory license described in § 114 of the Copyright Act nor a blanket license from any performing rights society. If included in the definition, they would.

Defining podcasts as public performances would mean that a podcaster must obtain four licenses instead of two (performance licenses for both the musical work and the sound recording in addition to reproduction licenses for the musical work and the sound recording). This entails more expense and effort, and will do little to incentivize legal podcasting.

Additionally, excluding podcasts from the definition of public performances would be a good way to help copyright law distinguish between performances and reproductions. Most technology is either one or the other, and the law should reflect that. This would probably also require changing the statutory definition of digital phonorecord deliveries, which currently allows for the possibility that this type of reproduction could be a public performance.

### *C. Fade Out*

These amendments will ensure that podcasting does not meet the same fate as webcasting. They will provide clarity with regard to the copyright interests of copyright holders, podcasters, and their audiences. Furthermore, clarifying the implications of music licensing will give podcasters the ability to include more music in their podcasts with legal confidence, and allow podcasting to reach its full potential. As long as technology continues to develop, Congress will be called upon to update the copyright laws to reflect these advances. Record companies will do their best to kill podcasting. Only Congress can save the podcasting star.

272. *See supra* Parts IV.C.3, V.C.4.