ARTICLES

PODCASTING AND COPYRIGHT: THE IMPACT OF REGULATION ON NEW COMMUNICATION TECHNOLOGIES

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ABSTRACT

With the relative democratization of broadcast communication brought about by the new media technologies of podcasting and Internet broadcasting, new questions have arisen regarding appropriate legal standards for regulatory efforts. In particular, Internet broadcasters and podcasters collide with licensing agencies responsible for implementing U.S. and foreign copyright law. Media convergence has caused confusion amongst policymakers, industry professionals and the public with respect to the application of traditional copyright law to these new technologies.

This article explores how congressional legislation and federal court jurisprudence, combined with the efforts of private licensing agencies such as ASCAP, BMI and SoundExchange, impact the

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development of evolving technologies such as Internet broadcasting and podcasting. Lawmakers and jurists must assess whether the unique characteristics of these technologies justify legal treatment different than that applied to traditional communication media in accordance with long-standing principles. Although holders of copyrights in popular music sound recordings contend that the threat of easy and widespread piracy justifies increasing the rights of copyright holders in the digital world, Internet broadcasting and podcasting raise new questions about whether copyright law is fulfilling its constitutional purpose of promoting progress of artistic expression.

This article first reviews the constitutional purpose of U.S. copyright law and the evolution of the Copyright Act. It then describes the current state of the Internet broadcasting and podcasting industries. Next, it discusses and analyzes the current collision between copyright law and the new podcasting technology. The article concludes with observations about the appropriateness of differential legal treatment based on the unique characteristics of Internet broadcasting and podcasting, and the implications of such a regulatory scheme.

INTRODUCTION

In 1971, Congress for the first time granted creators of sound recordings the exclusive right to reproduce and distribute their recordings.[1] Immediately after passage of the 1971 law, there was some question whether merely assembling the equipment and people to make a sound recording of a copyrighted music composition met the requirement of authorship described in the U.S. Constitution's Copyright Clause.[2] However, a 1972 *per curiam* opinion from a three-judge panel of the U.S. District Court for the District of Columbia observed that "[s]ound recording firms provide the equipment and organize the diverse talents of arrangers, performers and technicians" and concluded that "[t]hese activities satisfy the requirements of authorship found in the copyright clause" of the Constitution.[3] As a result, record companies could prevent others from duplicating and distributing recorded music.

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1. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), *amended and made permanent by* Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified at 17 U.S.C. § 102 (2000)).

2. 17 U.S.C. § 102(a) (2000); U.S. CONST., art. I, § 8, cl. 8.

3. Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D. D.C. 1972).

Congress declined, however, to grant sound recording copyright holders the right of public performance. Thus, broadcast radio stations can play a musical sound recording as many times as they wish without compensating the record labels that produced the recording. The radio stations do, however, have to compensate the holders of the copyrights in the underlying musical compositions—generally songwriters or music publishers.[4] In response to the advent of new communication technologies, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995, which created a limited public performance right for digital audio recordings.[5] After this legislation, Internet radio broadcasting—sometimes called webcasting or streaming—became subject to a statutory licensing regime that compensated record companies each time a copyrighted music recording was played. While broadcast radio stations could continue to engage in traditional over-the-air broadcasting of copyrighted music recordings without paying record labels, stations that also engaged in Internet broadcasting were required to pay record companies for broadcasting those same songs over the Internet.[6]

Despite the application of increased copyright protection to the digital medium, new communication technologies continue to emerge. In 2004, individuals and entities around the globe began creating and distributing their own digital audio programs through the technology of podcasting. Podcasting allows virtually anyone to become a radio broadcaster without the need to procure a license from a government regulatory agency such as, in the United States, the Federal Communications Commission.[7] However, podcasters have largely been unable to broadcast music because of copyright licensing obstacles. Record labels have not been keen to facilitate licensing of copyrighted music to podcasters, and Congress has not yet provided a

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4. *See* H.R. REP. NO. 104-274, at 11 (1995).

5. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

6. *See* Bonneville Int'l. Corp. v. Peters, 347 F.3d 485, 496-500 (3d Cir. 2003) (affirming a district court determination that traditional broadcasters were subject to the 1995 legislation requiring them to compensate sound recording copyright holders for digital transmissions).

7. *See* Byron Acohido, *Radio to the MP3 degree: Podcasting*, USA TODAY, Feb. 9, 2005, at 1B, *available at* http://www.usatoday.com/money/media/2005-02-09-podcasting-usat-money-cover_x.htm

> Like the blogging phenomenon, podcasts have come out of nowhere to attract an enthusiastic grassroots following. They're being generated by a wide cast of characters—from professional broadcasters to rank amateurs. Listeners can download shows to their computers, or, with a bit of know-how, automatically export shows to an Apple iPod—hence the term 'podcast'—or any MP3 player.

mandatory licensing scheme.[8] As it stands, the unauthorized reproduction and distribution of sound recordings would incur liability under the Sound Recording Act of 1971, while the unauthorized public performance of a digital audio recording would incur liability under the Digital Performance Right in Sound Recordings Act of 1995.

The rise of podcasting, like the advent of other communication technologies before it, may force changes in the Copyright Act. Congress responded to digital music technologies in the 1990s by strengthening the rights of copyright holders. As a result, podcasting's early development has focused on talk-oriented programs rather than music. Still, musicians and podcasters are beginning to create a system of "podsafe" music that circumvents large record label companies, perhaps signaling a future in which the record companies must either embrace podcasting or watch their reach and influence decline.[9]

This article seeks to establish a framework to understand the intersection of podcasting and copyright law. Part I discusses the constitutional roots of copyright law. Part II then describes the recent phenomenon of podcasting, and makes observations about the application of the Copyright Act to this new communication technology. Finally, Part III discusses whether copyright law's treatment of podcasting, which differs significantly from the treatment of webcasting, is justified in light of the unique characteristics of the podcasting medium. The question of whether unique medium characteristics justify differential legal treatment is critical not only for podcasting but also for future communication technologies that will arise.

I. U.S. COPYRIGHT LAW

A. Background

Among other powers delegated to the federal legislative branch, the U.S. Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] Legislators, jurists, and scholars have written

8. Michelle Kessler, *Storm clouds gather over podcasting*, USA TODAY, Aug. 4, 2005, at 3B.

9. *See infra* section III.A. for more on "podsafe" music.

10. U.S. CONST., art. I, § 8, cl. 8.

thousands of pages interpreting that single clause, and today, copyright law is less defined by the Framers' vision than by the subsequent gloss placed on the Copyright Clause through 215 years of interpretation. For example, one scholar noted:

> Unlike every other power-granting clause, this was the only power-granting clause that specified the means and purpose to which the power was devoted. Congress was not given the power simply to enact copyrights. Nor was it simply given the power to enact copyrights for limited times. Congress was given the power "to promote the Progress of Science" by granting, not to publishers, but to authors, "exclusive Right[s]" "for limited Times."[11]

In this regard, it has been argued that the current direction of copyright jurisprudence has moved away from the Framers' vision of promoting artistic expression and toward a materialistic concern with compensating corporations that produce and distribute authors' works.[12] Indeed, Congress has consistently strengthened the Copyright Act's protections for copyright holders, despite the potential negative impact on those who build on copyrighted works to create their own works and who thus fulfill the constitutional goal of societal progress. For example, the term of copyrights in 1790 was a mere fourteen years; now the term of copyright protection extends for the life of the author plus seventy years.[13]

The Copyright Act protects expression "in original works of authorship fixed in any tangible medium of expression."[14] Originality does not require a high degree of creativity or exclusivity, only that the author demonstrated some modicum of creative expression, and did not copy the work of another creator.[15] The current version of the Copyright Act protects works of authorship in numerous categories: literary works; musical compositions, including words; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures; sound recordings; and architectural works.[16] The Copyright Act also protects the rights of those who compile the aforementioned works into a new creation, as well as

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11. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001).

12. *See* Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters*, 2002 BYU L. REV. 1155, 1157 (2002).

13. Lessig, *supra* note 11, at 1063.

14. 17 U.S.C. § 102 (2000).

15. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

16. 17 U.S.C. § 102(a) (2000).

those who prepare derivative works.[17] The Copyright Act grants certain exclusive rights to copyright holders, meaning only the creators of the work or their designees can engage in certain activities with respect to the copyrighted works: reproduction, preparation of derivative works, distribution of copies, and public display.[18]

B. The Right of Public Performance in Sound Recordings

The Copyright Act also grants a public performance right, but the reach of that right depends on the technology involved in transmitting the public performance. If the work is literature, a musical composition, or a motion picture, then the copyright holder has the exclusive right to publicly perform the work.[19] Sound recordings, however, do not carry a general public performance right; only digital audio transmissions are protected under the Copyright Act.[20] This is why terrestrial broadcast radio stations can play songs as many times as they want without additionally compensating the record companies that own the copyrights in the sound recordings. The recording industry calls this lack of a broad public performance right for sound recordings "an historical accident" that is unique to the United States.[21] The industry further maintains that this situation persisted, despite lobbying efforts for a broad sound recording performance right, because "broadcasters were simply too strong on Capitol Hill."[22]

In reality, there is ample evidence that Congress made a reasoned and logical choice not to grant a public performance right for sound recordings. Despite heavy lobbying by the record industry that began as early as the 1920s, Congress decided not to grant this right to sound recording copyright holders because the threat of piracy would be mitigated by the other rights afforded under the Copyright Act.[23] Those rights include protection against unauthorized reproduction, distribution, and preparation of derivative works.[24] Congress concluded that the Copyright Act—even without a public

17. 17 U.S.C. § 103 (2000).

18. 17 U.S.C. § 106 (2000).

19. 17 U.S.C. § 106(4) (2000).

20. 17 U.S.C. § 106(6) (2000).

21. Recording Industry Association of America, Frequently Asked Questions—Webcasting, http://www.riaa.com/issues/licensing/webcasting_faq.asp#terr (last visited Nov. 9, 2005).

22. *Id.*

23. *See* H.R. REP. NO. 104-274, *supra* note 4, at 11.

24. *Id.*

performance right for analog sound recordings—served broadcasters, composers and the record industry alike because radio stations provided, in essence, free advertising for copyrighted music that led to album purchases.[25]

Perhaps another reason for not granting a broad public performance right for sound recordings is the lingering notion that copyright in sound recordings is "thin."[26] The Supreme Court explained that copyright is thin when it involves very little creative expression on the part of the creator.[27] Thus, the creator of a telephone directory had only a thin copyright because the compilation of facts for a telephone directory involved little originality; telephone book white pages arranged alphabetically are not "remotely creative" because alphabetical arrangement is "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course."[28] This principle may be similarly applied to sound recordings, in which the creative expression largely comes not from the record label that records the music, but from the artists who write and perform it.[29]

II. PODCASTING: THE RISE OF PERSONAL BROADCASTING

Internet broadcasting, a term commonly used to refer to several different methods of digital content delivery via the Internet, has recently emerged as a low cost alternative to traditional broadcasting. Although there are many delivery methods, two specific methods have shown an exceptional ability to deliver high quality audio content to audiences both large and small: streaming and podcasting. Streaming emerged as a viable delivery method in the last decade, but podcasting seems on the surface to be the younger brother that will break all the records.

Streaming and podcasting share many common technological aspects, but are also quite different. These similarities and differences

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25. *Id*. at 12. *See also* Raffi Zerounian, *Bonneville International v. Peters*, 17 BERKELEY TECH. L.J. 47, 69 (2002). The relationship has been called "symbiotic . . . between the record companies and the radio stations who 'promote these songs to 75 percent of Americans who listen to the radio each day.'" *Id*. (quoting *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 140 (2000) (statement of Edward O. Fritts, President, National Association of Broadcasters)).

26. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).

27. *Id*.

28. *Id*. at 363.

29. *But see* Shaab v. Kleindienst, 345 F. Supp. 589 (D. D.C. 1972).

raise questions as to their current and future treatment in copyright legislation. Further, it seems at this early stage that the availability of certain podcasting content is seriously inhibited by complicated and vague licensing procedures and regulations; many podcasters that would serve up music format shows have been relegated to the waiting line, waiting for licenses that may never come. This section outlines the background and technical aspects of streaming and podcasting, with an emphasis on podcasting. First, we consider streaming, highlighting the legal challenges this technology has faced. Then, we present podcasting with technical explanations to point out its similarities to and differences from streaming. Finally, we consider the current trends in streaming and podcasting so as to assess the potential impact on copyright legislation, the recording industry, and traditional radio.

A. Streaming

Streaming (also known as webcasting, web radio, Internet broadcasting, and Internet radio) delivers *real time* digital audio content from a server to a listener across the Internet.[30] A listener can use software to "tune in" to a specific Internet station and listen to what is currently being played at that moment, much like traditional radio. Broadcast Internet stations can be described in essentially two basic categories: (1) AM/FM re-broadcasters—broadcasters of traditional terrestrial radio stations who concurrently channel (using live streams or archives) their broadcasting message via the web; and (2) webcasters (or Internet broadcasters)—individuals or groups who broadcast an audio message exclusive to the Internet, via streaming technology.

The advent of streaming technology came to center stage in 1995, when RealNetworks introduced the RealAudio player, which allowed Internet users to "tune in" to web broadcasts. On the day of introduction, 100,000 users downloaded the player.[31] Internet radio was soon in regular usage by millions of Americans.[32] Today, in addition to the RealAudio player, users can tune in to Internet streams using a wide range of software tools. Like RealNetworks, companies

30. Jim Heid, *Streaming Audio – Lots of music, no wait. Find out how Internet radio gets from the Web to your PC without delay*, PC WORLD, Apr. 10, 2000, http://www.pcworld.com/howto/article/0,aid,16060,pg,1,00.asp.

31. Joshua Quittner, *Radio Free Cyberspace; Broadcasters are Taking Their Shows to the Internet. Has the Silicon Age of Radio and Television Begun?*, TIME, May 1, 1995, at 91.

32. Emily Harwood, *Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L. J. 673, 678 (2004).

such as Apple and Microsoft also develop and provide free software that allows users to simply connect to a unique Internet stream address (analogous to visiting a website or tuning in to an FM station) and listen in.

When considering copyright principles, it is important to note two aspects of streaming. First, by necessity, a stream uses *file compression* to reduce the amount of data needed to be transferred second by second.[33] This in turn reduces the bandwidth costs and allows users to hear fairly high quality sound on a low bandwidth connection—even at dialup modem speeds.[34] The end result is audio of a reduced quality compared to the original recording.

Second, when using an Internet stream, the sound files are *not downloaded*. The streaming software is designed to receive packets of data in a sequence and then play them through the computer's speaker in the designated order. Once the packets are played, they are discarded to make room for the other packets to follow. As explained by one reporter, "[s]treaming protocols make sure you get the notes of the song in the right order and at exactly the right time."[35] At any given moment the station may be broadcasting a live event, such as a music concert, or pre-recorded material, such as a playlist of songs. In either case, the audio content is passed to the listener as it happens (i.e. in real time), without the need for a long download.

B. Podcasting

Podcasting is a way to distribute digital audio content over the Internet with the end goal that the content will be *downloaded* by a subscriber using subscription software such as iTunes, then synced to the listener's portable MP3 player for later listening. The term "podcasting" comes from Apple's ubiquitous iPod, because of the notion that podcasts would likely be played on an iPod. However, an iPod is only one of many ways to listen to the shows. Each individual podcast episode is a single MP3 file of audio content, which is downloaded to the computer of the listener. Listeners can listen to the shows on their computers, directly from the web, or on a portable MP3 player. One online encyclopedia provides the following description for podcasting:

> Podcasting is [a] blanket term used to describe a collection of technologies for automatically distributing audio and video

33. Heid, *supra* note 30.
34. *Id.*
35. *Id.*

> programs over the internet via a publish and subscribe model. Podcasting enables independent producers to create self-published, syndicated "radio shows," and gives broadcast radio programs a new distribution method. In the podcasting model, the publisher publishes a list of programs in a special format, known as a "feed", on the web. A user who wants to see or hear the podcast subscribes to the feed in special "podcasting" software (a type of aggregator), which periodically checks the feed and automatically downloads new programs as they become available. Typically, the podcatching software also transfers the program to a desktop or portable media player.[36]

The most distinctive quality of podcasting is the ability to "time-shift" digital audio content.[37] Time-shifting is the result of downloading an audio program for later listening.

It is difficult to identify a logical starting point from which to describe the evolution of podcasting. Many macro factors could be included, such as the development of the Internet, the rise of file transfer software, or the emergence of the CD and its accompanying digital storage format. Streaming has enjoyed some success due to these and other factors. Yet, when considering the adoption of podcasting, there are three macro factors that have made notable contributions: audio compression, bandwidth, and the iPod.

The MP3 format is now well established as an audio format.[38] It allows for relatively high quality audio to be compressed into roughly 1 Megabyte (MB) per minute (about 10 percent of its full-quality size), with very little perceivable loss in quality.[39] In full-quality form, a 30-minute recording could be over 300 MB, rendering it unusable for quick Internet exchange, whereas its compressed form could be 30 MB or less. Further, many software recorders allow the option of changing the bit rate (the quality of the recording) of audio files. Shorter podcasts may use a higher bit rate for the recording which will mean larger, but still manageable, files. Longer podcasts, especially talk shows, can use a low bit rate, which can greatly reduce the final file size with very little loss in quality.

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36. Wikipedia, *Podcasting*, http://en.wikipedia.org/w/index.php?title=Podcasting&oldid=28332345 (last visited Nov. 14, 2005).

37. Acohido, *supra* note 7.

38. Nancy Bogucki Duncan & Mark A. Fox, *Computer–aided Music Distribution: The Future of Selection, Retrieval and Transmission*, FIRST MONDAY, Apr. 2005, http://firstmonday.org/issues/issue10_4/duncan (last visited Nov. 10, 2005).

39. Heid, *supra* note 30.

The second important development contributing to the rise of podcasting is bandwidth improvement. The proliferation of high-speed Internet connections means that a podcast can be easily and quickly transferred to many listeners. A 30-minute podcast is generally 15-30 MB in size, depending on the compression technique. At a common transfer rate, a 20 MB file may take less than two minutes to download.

In October 2001, Apple Computer introduced the iPod, a "breakthrough MP3 music player" designed to hold 1,000 songs in an ultra-portable device.[40] Apple also developed accompanying software, iTunes, to ease the transfer of songs from the computer to the iPod. Although podcasts can be listened to on any device that will play a compressed audio file (e.g., iPods, other portable MP3 players, palm pilots, and computers), the portability and ease of use of both the iPod and iTunes seem to be major contributors to the rise of podcasting. Meanwhile, the iPod remains the industry leader in portable MP3 players, capturing 70 percent of the U.S. market.[41]

In September 2002, Dave Winer of Userland Software (a maker of server blogging systems) released RSS version 2.0, which allowed for web syndication with attachments.[42] The ability to attach audio files to a blog constituted the birth of podcasting. Winer was in part responding to requests from a user of Userland Software, former MTV VJ Adam Curry, who began adding attachments to create a podcast called the Daily Source Code.[43] Winer also began releasing his own content. At the Democratic National Convention in 2004, Winer collected audio recordings and published them as attachments on his blog. "There was starting to be enough content to catch people's attention," one reporter noted.[44]

However, their job was not yet complete; the audio files could be accessed and played through the web, but there was still no way to download the attachments and put them onto a portable MP3 player. It was at that point that Curry created the first version of iPodder software, designed to specifically "catch" (i.e. download) the podcast

40. Press Release, Apple Computer, Apple Presents iPod (Oct. 23, 2001), *available at* http://www.apple.com/pr/library/2001/oct/23ipod.html (last visited Nov. 9, 2005).

41. Sean Captain, *My Songs, My Format*, N.Y. TIMES, Oct. 6, 2005, at C9.

42. Wikipedia, *supra* note 36. *See also* RSS at Harvard Law, http://blogs.law.harvard.edu/tech (last visited Dec. 15, 2005).

43. Wikipedia, *supra* note 36.

44. Andy J. Williams Affleck, *Podcasting: The People's Radio*, TIDBITS, Feb. 14, 2005, http://db.tidbits.com/getbits.acgi?tbart=07986 (last visited Nov. 11, 2005).

file and then facilitate the transfer to a portable device.[45] With both the upload and download methods in place, podcasting was launched. The term "podcasting" was first used in September 2004, and by December the term could be easily found in the press.[46] In September 2004 the Google hit count for "podcasts" was 24 hits; in September 2005 it was over 61 million.[47]

In June of 2005, podcasting was pushed into the mainstream with the release of iTunes 4.9, which added both a podcast receiver and a podcast listing service to the iTunes software, allowing it to be used to both receive podcasts and sync the files to the iPod.[48] This had a dramatic effect on listenership. Curry noted that this change would "introduce tens of millions of new listeners to the world of Podcasting."[49] In only three weeks, over five million users subscribed to podcasts through iTunes.[50]

Podcasting owes its roots to blogging. Essentially, podcasting is an extension of web log ("blog") technology, with one important difference: the addition of an attached file. The attached file is handled through the use of a Really Simple Syndication (RSS) feed. To understand how podcasting works, it is helpful to also discuss blogging, syndication, and the importance of the RSS file.

A blog can be used as an efficient way to add text content to a website to create a daily journal. Bloggers add new entries through a simple web-site interface that immediately publishes the entry to a web page. Many bloggers also choose to syndicate their content, which is simply a way to make periodic content available to many outlets from one publisher. Web syndication is also a way to deliver *standardized* web content to other websites or software aggregators.[51] An aggregator is a software program that receives the syndicated web content and may either be a computer program (like iTunes) or a

45. Sheri Crofts, Jon Dilley, Mark Fox, Andrew Retsema & Bob Williams, *Podcasting: A new technology in search of viable business models*, FIRST MONDAY, Sept. 2005, http://firstmonday.org/issues/issue10_9/crofts/index.html (last visited Nov. 9, 2005).

46. Affleck, *supra* note 44.

47. Wikipedia, *supra* note 36.

48. Press Release, Apple Computer, Apple Takes Podcasting Mainstream (Jun. 28, 2005), *available at* http://apple.com/pr/library/2005/jun/28podcast.html (last visited Nov. 14, 2005).

49. Press Release, Apple Computer, iTunes Podcast Subscriptions Top One Million in First Two Days (Jun. 30, 2005), *available at*
http://apple.com/pr/library/2005/jun/30podcast.html (last visited Nov. 2, 2005).

50. Aline van Duyn, *Podcasters make easy listening*, FINANCIAL TIMES, Aug. 29, 2005, at 10.

51. Standardization refers to content that conforms to a consistent format from feed to feed. The content itself varies.

website. Aggregators are also known as "news readers" or, in the case of podcasting, "podcatchers." Blogs can deliver their content through syndication using the "Really Simple Syndication" (RSS) format.

RSS is the backbone of syndicated blogging, which is itself the backbone of podcasting. Essentially, RSS is nothing more than a standardized way of handling web content: an RSS file is written in XML code that simply sets out a format for the syndication feed information. In simpler terms, it is a formatting plan. When an aggregator, such as iTunes, requests the RSS "feed," the web server sends the formatted content to the aggregator. In the case of a podcast, the content contains an attachment (the audio file).

When all of these aspects are orchestrated properly, an audio file can be easily uploaded to a public location, published through a web interface, and then automatically downloaded by a listener. Once the file is downloaded, the listener can sync it to their iPod simply by plugging the iPod into the computer.

C. Similarities and Differences Between Podcasting and Streaming

Both streaming and podcasting make file transfer possible by using a form of compression to reduce the size of the audio file. Compression ratios are selected by the sender and the original full-quality audio (if it exists) cannot be extracted by the receiver. In other words, what is sent is exactly what is received.

Streaming and podcasting do differ in some significant ways, however. First, streaming content is analogous to an AM/FM broadcast in that it is delivered through a stream that can only be listened to once: at the time of delivery. In contrast, a podcast is analogous to the TiVo digital video recorder for a television broadcast in that it is downloaded and can be time-shifted—meaning the content can be listened to at will, paused, and rewound.

Second, because of the necessity for embedded time-code information, synchronous transmission, such as the type used for streaming, uses more bandwidth than asynchronous transmission, which is the delivery method for podcasts. Since podcasts are downloaded asynchronously, downloads are delivered at the maximum speed of the server, varying over time.[52] The variable

52. Tampa Bay Interactive, http://telecom.tbi.net/sync-async.htm (last visited Nov. 2, 2005).

speed results in lower usage of server bandwidth and translates to lower cost, allowing podcasters to broadcast to a large audience with relatively little overhead.

The following table identifies the similarities and differences:

Streaming	Podcasting
High quality compressed digital audio content	High quality compressed digital audio content
Real-time (or live) content	Time-shifted content
Synchronous file transfer (streams have an embedded time code and hence higher bandwidth usage)	Asynchronous file transfer (downloads spread over time, resulting in less bandwidth usage)
No file downloads	One downloaded MP3 file per podcast

D. Podcasting and Copyright Law

The music composition performance rights societies—ASCAP, BMI, and SESAC—and the composition mechanical rights licensing agency, Harry Fox, have not given clear guidance to podcasters about the need for or the manner of obtaining licenses for podcasting copyrighted music recordings. The Harry Fox Agency, which licenses rights of reproduction and distribution—but not public performance—of the musical compositions underlying sound recordings, wrote in its May 2005 *Soundcheck* newsletter that it planned to "continue to monitor the development of podcasting and associated licensing opportunities."[53] It seems debatable whether podcasts would have to obtain licensing agreements with the Harry Fox Agency, but Harry Fox itself tentatively concluded that "[s]ince users download podcasts, it seems that music distributed through this

53. *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.

platform—assuming it is not altered (e.g. fragmented or interspersed with other audio content), accompanied by visual content or used for commercial purposes—would appropriately be licensed as [digital phonorecord deliveries]."[54]

A digital phonorecord delivery, or DPD, is defined by the Harry Fox Agency as a "full, permanent download."[55] In other words, it is "each individual delivery of a phonorecord by digital transmission of a sound recording (embodying a musical composition) resulting in a reproduction made by or for the recipient," and it "reside[s] on a recipient's computer indefinitely."[56] Harry Fox treats podcasts the same as physical phonorecords for the purposes of statutory licensing, meaning a podcaster would pay the same as a traditional broadcaster for the right to play a musical composition embodied in a recorded song.[57] Thus, podcasters would pay Harry Fox 8.5 cents per download for songs under 5 minutes or 1.65 cents per minute for songs over five minutes.[58] Every three months, the podcaster would have to submit to Harry Fox a royalty payment along with a royalty layout (an Excel spreadsheet provided by Harry Fox and filled out by the podcaster).[59] The podcaster must make the payments for each download regardless of whether the podcaster charges his or her users.[60]

Additionally, at the outset of the relationship between the podcaster and Harry Fox, the podcaster is required to fill out a one-

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54. *Id.*

55. Harry Fox Agency, Frequently Asked Questions – Definitions, http://www.harryfox.com/public/infoFAQDefinitions.jsp (last visited Nov. 2, 2005).

56. *Id.* The Copyright Act similarly defines digital phonorecord delivery as:

> each 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, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

17 U.S.C. § 115(d) (2000).

57. Harry Fox Agency, Frequently Asked Questions – Digital Licensing, http://www.harryfox.com/public/infoFAQDigitalLicensing.jsp (last visited Nov. 2, 2005).

58. Harry Fox Agency, Frequently Asked Questions – Licensee Services, http://www.harryfox.com/public/licenseeServices.jsp (last visited Dec. 2, 2005).

59. *Id.*

60. *See* Harry Fox Agency, Frequently Asked Questions – Digital Licensing, http://www.harryfox.com/public/infoFAQDigitalLicensing.jsp (last visited Nov. 2, 2005).

page application form, plus any necessary attachments.[61] The form requires basic personal and corporate information as well as a business plan, estimate of annual gross receipts, a "security white paper" describing copyright protection measures such as encryption, and credit references.[62] Additionally, the form queries would-be podcasters about whether they have also obtained a master use license from the record companies in order to reproduce, distribute, and perform the sound recordings.[63]

Meanwhile, the public performance rights in musical compositions—but not sound recordings—are administered by ASCAP, BMI, and SESAC. At the beginning of 2005, ASCAP announced two new "experimental" versions of its Internet music licensing agreement: Non-Interactive 5.0 and Interactive 2.0.[64] Non-Interactive 5.0 is designed for "sites and services that perform ASCAP music in a non-interactive manner," meaning that "users cannot select individual songs or collections of song [sic] unless the performance is not more than sixty (60) seconds in duration."[65] According to ASCAP, Non-Interactive 5.0 may be used for webcasts, brief Flash introductions, and song samples less than a minute long.[66] This description seems to exclude music podcasts, which presumably would be interactive in nature, and would more likely be covered under Interactive 2.0.[67]

Interactive 2.0 is designed "for sites and services that permit their users to select individual songs or collections of songs, such as an album."[68] Examples given for Interactive 2.0 include on-demand Internet jukeboxes, custom radio, and pay-per-play services.[69] Non-Interactive 5.0 requires a minimum annual fee of $288, annual reports, and quarterly payments;[70] Interactive 2.0 requires a minimum

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61. *See* Harry Fox Agency, New Media Application Form, http://www.harryfox.com/docs/newMediaApplication.pdf (last visited Oct. 8, 2005).

62. *Id.*

63. *Id.*

64. *See* Podcasting News, ASCAP Posts Podcasting Licensing Agreements for Music, http://www.podcastingnews.com/archives/2005/02/ascap_posts_pod.html (Feb. 8, 2005).

65. American Society of Composers, Authors and Publishers, ASCAP Internet License Agreements, http://www.ascap.com/weblicense/ (last visited Nov. 10, 2005) [hereinafter ASCAP].

66. *Id.*

67. *See* Podcasting News, *supra* note 64.

68. ASCAP, *supra* note 65.

69. *Id.*

70. American Society of Composers, Authors and Publishers, ASCAP Experimental License Agreement for Internet Sites & Services – Release 5.0,

annual fee of $340 and similarly, annual reports and quarterly payments.[71]

Both agreements also require higher annual fees if justified by revenues or site visits. For example, Non-Interactive 5.0's minimum annual fee of $288 would not apply to sites with annual revenue of more than approximately $15,567; instead, the annual fee for these sites would be calculated as 1.85 percent of revenues.[72] The Non-Interactive 5.0 minimum fee likewise would not apply to any service with more than 480,000 individual site visits in a given year.[73] In that case, the annual fee would be calculated as the number of individual site visits multiplied by $.0006.[74] Interactive 2.0's rate calculation is somewhat more complicated because it includes three options for calculating the annual fee. However, the Interactive 2.0 minimum fee would not apply to any podcast or other service with more than $11,333 in revenues (in that case, the fee is three percent of revenues) or 377,777 annual site-visits (in that case, the fee is individual site visits multiplied by $.0009).[75]

On May 9, 2005, BMI attempted to respond to podcasting's popularity by announcing a podcast series called "See It Hear First."[76] At the same time, BMI announced that its "licensing website has been expanded to provide a clear path for podcasters to get more information on licensing music for their programs and to obtain BMI licenses 24 hours a day, 7 days a week."[77] BMI also revealed it had already been licensing podcasters for one year, and that notable podcasters such as Coverville.com and Keener13.com had signed on to the BMI podcasting agreement.[78] In reality, BMI's "Website

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http://www.ascap.com/weblicense/release5.0.pdf (last visited Nov. 10, 2005) [hereinafter License 5.0].

71. American Society of Composers, Authors and Publishers, ASCAP Experimental License Agreement for Interactive Sites & Services – Release 2.0,
http://www.ascap.com/weblicense/release2.0.pdf (last visited Nov. 10, 2005).

72. License 5.0, *supra* note 70.

73. A site visit or session is defined as a discrete visit of less than one hour in duration. According to ASCAP, a user who visits a site twice in one day—once for 40 minutes and once for 15 minutes—has generated two site visits. Meanwhile, a user who visits a site once for 2 hours and 30 minutes has generated three site visits. *See id*.

74. *Id*.

75. ASCAP, *supra* note 65.

76. BMI, BMI Launches New Songwriter/Artist Podcast; Licenses Podcasters in Nationwide Initiative, http://bmi.com/news/200505/20050509a.asp (May 9, 2005).

77. *Id*.

78. *Id*.

Music Performance Agreement" is used both for webcasting (streaming) and podcasting.[79]

Under the 12-page BMI Website Music Performance Agreement, podcasters and other webcasters pay licensing fees according to their revenues. If annual revenue is less than $15,000, podcasters will pay the annual minimum fee of $283.[80] For podcasts with annual revenue over $15,000, the license fee would be calculated as 1.75 percent of gross revenues or as a factor of music revenues.[81] Podcasters with under $50,000 in annual revenues must account for royalties annually, while podcasters with more than $50,000 in revenues must account quarterly.[82] Perhaps reflecting recognition that its Website Music Performance Agreement did not address the specific situation of podcasters, BMI said in May 2005 that "BMI plans on rolling out additional licensing programs [for podcasting] as it grows."[83]

The six-page "SESAC Internet License," like the similar license agreements by BMI and ASCAP, does not specifically address podcasting.[84] The minimum annual fee is $168.[85] Given that BMI, ASCAP, and SESAC all represent different composers, or songwriters, it would appear that any podcaster playing a variety of music recordings would need to comply with the licensing agreements of all three agencies. Compliance would give the podcaster permission to publicly perform the compositions. Paying the annual minimum fee to all three performance rights agencies would cost about $791. The podcaster also may need to comply with the Harry Fox licensing agreement in order to have permission to reproduce and distribute the compositions. However, in order to gain permission to publicly perform the sound recordings the podcaster would have to go to the record labels that own the sound recording copyrights, or their designees. This is where podcasters seem to hit a brick wall.

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79. *See* BMI, BMI Licensing: Webcasters, http://bmi.com/licensing/webcaster/ (last visited Oct. 31, 2005).

80. BMI, Website Music Performance Agreement, at 2-3, http://bmi.com/licensing/forms/Internet0105A.pdf (last visited Oct. 31, 2005).

81. *Id.*

82. *Id.*

83. BMI, BMI Launches New Songwriter/Artist Podcast; Licenses Podcasters in Nationwide Initiative, http://bmi.com/news/200505/20050509a.asp (May 9, 2005).

84. SESAC, SESAC Internet License, http://www.sesac.com/pdf/internet_2005.pdf (last visited Oct. 8, 2005).

85. *Id.*

A company called SoundExchange administers statutory licensing for sound recording copyright owners. SoundExchange members include major record labels such as Sony BMG and Warner, as well as more than 1,000 independent record companies.[86] SoundExchange notes that there is no statutory license scheme for podcasters, as the statutory license only covers sound recording public performances by non-interactive webcasters, digital radio, and digital and cable television.[87] Since podcasts do not qualify for the statutory license because they are interactive in nature, podcasters, in addition to complying with the licensing requirements of the Harry Fox Agency and SESAC, BMI and ASCAP, would have to obtain a master use license agreement from individual record companies.[88] The prospect of having to negotiate a master use license for each individual sound recording is, in the words of one blogger, "a disaster, of course."[89]

Assuming that podcasters qualified for a statutory license as eligible small webcasters, whose annual revenues must be less than $1,250,000, the annual minimum fee would be $500.[90] But there is a significant debate about whether podcasts are "interactive" within the definition of the Copyright Act. If they are not interactive, they might qualify for the statutory license, and SoundExchange would have to begin working with podcasters. If they are interactive, then SoundExchange is correct in asserting that podcasters would have to obtain master use licenses, unless Congress modifies the Copyright Act to include podcasters as among those eligible for the statutory license.

Section 114 of the Copyright Act specifies the services that are eligible for statutory licensing.[91] Podcasting conceivably could come under the definition of a "subscription digital audio transmission" if

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86. SoundExchange, SoundExchange Background, http://www.soundexchange.com/about/about.html (last visited Oct. 31, 2005).

87. SoundExchange, Licensing 101, http://www.soundexchange.com/licensing101.html#a3 (last visited Nov. 4, 2005).

88. *Id.*

89. Posting of David Luebbert to How to Podcast RIAA Music Under License, http://blog.lextext.com/blog/_archives/2005/1/4/225172.html#204574 (Jan. 6, 2005, 12:20 PST).

90. *See* SoundExchange, Notice of Election to Pay Royalties as an Eligible Small Webcaster, at 1, http://www.soundexchange.com/licensee/Notice_of_Election_Eligible_Small_Webcaster_2005.pdf.pdf (last visited Oct. 31, 2005); s*ee also* Notification of Agreement Under the Small Webcaster Agreement of 2002, 67 Fed. Reg. 78510, 78,511-12 (Dec. 24, 2002).

91. 17 U.S.C. § 114(d)(2) (2000).

the podcaster charges his or her users.[92] Even though podcast listeners must "subscribe" to the podcast by indicating they want to receive the RSS feed, podcasts still may not qualify because a subscription transmission is one "that is controlled and limited to particular recipients, and one for which consideration is required to be paid. . . ."[93] More likely, a podcast could be "an eligible nonsubscription transmission."[94] However, in order to fit this description, podcasts would have to meet multiple requirements.

First, the podcast must be noninteractive.[95] Interactive means that the content is "specially created for the recipient," or the recipient is able to request and select a particular sound recording.[96] Assuming that the content is determined by the creators without regard to a particular recipient, podcasts would seem to qualify as noninteractive.

Second, the eligible nonsubscription transmission must provide audio programming primarily for entertainment purposes, rather than "to sell, advertise, or promote particular products or services other than sound recordings. . . ."[97] Podcasts consisting of music and talk apparently would meet this requirement. Third, in order to be an eligible nonsubscription transmission the podcast must not exceed the "sound recording performance complement,"[98] meaning that a podcast could not, within a three-hour period of time, transmit more than three songs from a single album or four songs from a given artist.[99] Fourth, the podcast could not advertise in advance its playlist or program of scheduled songs.[100] Fifth, in order to qualify for the statutory license as an eligible nonsubscription transmission, the podcast must not be an archived program of less than five hours in duration.[101] This requirement may reflect a concern with users being able to identify and extract particular sound recordings from shorter archived programs.[102] Sixth, even if the archived program is longer than five hours, the archive may not be made available for longer than

92. *Id.*
93. 17 U.S.C. § 114(j)(14) (2000).
94. 17 U.S.C. § 114(j)(6) (2000).
95. *Id.*
96. 17 U.S.C. § 114(j)(7) (2000).
97. 17 U.S.C. § 114(j)(6) (2000).
98. 17 U.S.C. § 114(d)(2)(C)(i) (2000).
99. 17 U.S.C. § 114(j)(13) (2000).
100. 17 U.S.C. § 114(d)(2)(C)(ii) (2000).
101. 17 U.S.C. § 114(d)(2)(C)(iii)(I) (2000).
102. Posting of David Luebbert to How to Podcast RIAA Music Under License, http://blog.lextext.com/blog/_archives/2005/1/4/225172.html#204574 (Jan. 6, 2005, 11:22 PST).

two weeks.[103] Seventh, if the program is played in a continuous loop, then it must be longer than three hours.[104]

Perhaps the biggest obstacle for podcasts to overcome, however, would be the requirement that they not take "affirmative steps to cause or induce the making of a phonorecord by the transmission recipient. . . ."[105] Because podcasts do induce recipients to make copies of the programs through downloading, it would seem this requirement could make most podcasts of music sound recordings ineligible for the statutory license through SoundExchange. One blogger commented on this non-inducement rule: "Since the whole purpose of podcasting is to induce a large audience to make a phonorecord (i.e. make a downloadable copy) of a digital transmission, it looks like this clause would disqualify a podcast from receiving the [statutory] license."[106]

While some podcasts apparently have negotiated the licensing process through ASCAP, BMI and SESAC, it is not clear if any podcaster at this point has convinced SoundExchange that podcasting is entitled to the statutory license as an eligible nonsubscription transmission. Keener13.com, which is operated by fans of the 1960s Detroit radio station WKNR, advertises that it is "copyright legal" because it has obtained licensing agreements with ASCAP, BMI and SESAC.[107] However, Keener13.com says nothing about mechanical rights licensing through Harry Fox Agency. With respect to licensing for public performance of sound recordings through SoundExchange, Keener13.com says "we're watching our friends at Coverville closely as they continue their conversations with SoundExchange," and further, Keener13.com will "follow their lead."[108] The *Seattle Post-Intelligencer* wrote that 35 year-old Brian Ibbott, who podcasts on Coverville.com three times a week from his home in Arvada, Colorado, was working through licensing issues with the RIAA in an attempt to get podcast licenses for sound recording public performances.[109]

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103. 17 U.S.C. § 114(d)(2)(C)(iii)(II) (2000).

104. 17 U.S.C. § 114(d)(2)(C)(iii)(III) (2000).

105. 17 U.S.C. § 114(d)(2)(C)(vi) (2000).

106. Posting of David Luebbert to How to Podcast RIAA Music Under License, http://blog.lextext.com/blog/_archives/2005/1/4/225172.html#204574 (Jan. 6, 2005, 11:22 PST).

107. Keener13.com, The Keener Podcast is ASCAP/BMI/SESAC Legal, http://www.keener13.com (last visited Oct. 31, 2005).

108. *Id.*

109. D. Parvaz, *Podcasting puts you in charge of the show*, SEATTLE POST-INTELLIGENCER, Mar. 25, 2005, *available at*

III. EFFECT OF REGULATION ON TECHNOLOGICAL DEVELOPMENT

From the current state of the Internet broadcasting industry, it appears that record labels still don't know what to do with podcasting. For example, FM broadcaster KCRW in Los Angeles currently offers a web stream of their well-known music-format show "Morning Becomes Eclectic." Listeners outside of Los Angeles can tune in to the KCRW web stream of the show, or subscribe to a podcast of KCRW's talk shows. However, "Morning Becomes Eclectic" is not currently offered as a podcast in its original form because no license arrangement is currently available.[110] Apparently, record companies are concerned that granting licenses to podcasters will exacerbate the piracy problems currently already plaguing the industry.[111] Similarly, podcasting around the nation is largely talk-oriented rather than music-oriented because of concerns with copyright issues. Podcasters that do broadcast music seek artists who are not represented by the licensing agencies, in order to gain permission without a raft of contractual and payment issues.

A. Podcasting Goes Talk or Podsafe

A scan in October 2005 of some popular listing sites for Internet broadcasts showed quite a consistent yet polarized view of formats between streaming and podcasting, with a strong bias toward music formats for streaming stations, and a strong bias for talk-based formats in podcasts. Shoutcast, a leader among Internet streaming technologies, lists thousands of Internet streaming stations that use Shoutcast servers.[112] The top twenty streaming stations (rated by number of current listeners) were all music format streams, ranging in genre from "Classical Easy Symphonic" to "Trance Techno Dance."[113] Another popular streaming audio location is Yahoo's radio service, LAUNCHcast Radio, which offers access to over 120 commercial-free Internet radio stations.[114] Many stations listed by LAUNCHcast are free of service charge, and many higher sound

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http://seattlepi.nwsource.com/tv/217426_podcast.html (last visited Oct. 31, 2005).

110. Kessler, *supra* note 8.

111. *Id.*

112. Shoutcast, http://www.shoutcast.com (last visited Oct. 3, 2005).

113. *Id.*

114. LAUNCHcast Radio Station Guide, http://music.yahoo.com/launchcast/stations/default.asp (last visited Dec. 16, 2005).

quality stations can also be accessed for a nominal annual fee.[115] All of the listed stations were music format.

On the podcasting front, however, the scene is much different. Odeo, one popular podcast directory, lists its top forty podcasts by subscription numbers.[116] Of the top twenty, only two were music format programs: #10 – Free Radio Sub Pop,[117] which plays music from the Sub Pop music label, and #15 – Tracks up the Tree,[118] which "only play[s] music from artists' websites who make their tracks available online."[119] It should be noted that many of the talk-format top 20 podcasts, such as Adam Curry's Daily Source Code,[120] play an occasional "podsafe" song during the show, meaning the sound recording copyright owners are not represented by the major performing rights agencies.

Podcast Alley, a podcast listing service, lists the most popular podcasts ranked by votes cast from listeners.[121] Of the top twenty, only the twentieth most popular, MusicNerve, is a music-format podcast.[122] This podcast "is an eclectic mix of just about every type of music. . . . If people call it music and it has a purpose other than filling the pockets of the major labels we hope to share it with you."[123] iTunes Podcast Directory also maintains a list of top subscribed podcasts.[124] Of the top twenty on October 3, 2005, only one was in the "Music" category (#3 – iTunes New Music Tuesday, selected free songs from the iTunes music store), and one other had a music theme (#17 – NPR Music, a music review excerpt).[125] All other programs were non-music based.

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115. LAUNCHcast, http://music.yahoo.com/launchcast/default.asp (last visited Nov. 7, 2005).

116. Odeo.com, The Odeo Top 40 (Oct. 3, 2005), http://www.odeo.com/listen/top-40.

117. *Id.*; Sub Pop Records, http://www.subpop.com (last visited Nov. 5, 2005).

118. Odeo.com, The Odeo Top 40 (Oct. 3, 2005), http://www.odeo.com/listen/top-40; Up The Tree, http://www.upthetree.com (last visited Nov. 5, 2005).

119. Up The Tree, http://www.upthetree.com (last visited Nov. 5, 2005).

120. Daily Source Code, http://www.dailysourcecode.com (last visited Nov. 16, 2005).

121. Podcast Alley, Top 50 Rated Podcasts (Oct. 3, 2005), http://www.podcastalley.com/top_podcasts.php?num=50.

122. *Id.*; musicNerve, http://www.musicnerve.com (last visited Nov. 13, 2005).

123. Podcast Alley.com, *supra* note 121.

124. The podcast directory is accessed through the iTunes software application. *See generally*, iTunes – Podcasts, http://www.apple.com/itunes/podcasts/ (last visited Oct. 3, 2005).

125. *Id.*; NPR, NPR: Music, http://www.npr.org/templates/topics/topic.php?topicId=1039 (last visited Nov. 9, 2005).

Through November 2005, Podcast Alley listed a total of 10,820 podcasts,[126] with 2,440 listed in the Music category.[127] iTunes' podcast listing directory, which claims to list 15,000 podcasts, showed 759 podcasts in the music category.[128] Despite the low percentage of music-format shows, many of these podcasts are playing "podsafe" music or are operating without licenses from the requisite agencies.

One notable exception to the trend away from music-format podcasts is the show Coverville, created by Brian Ibbott. Coverville is licensed with ASCAP and BMI, and touts itself as a "podcast, produced three times a week, that focuses on cover songs—a new rendition of a previously recorded song . . . on average, each show runs about 35 minutes and features six selections."[129] Coverville has received much media attention since its birth and has just celebrated its one-year anniversary (having produced 135 biweekly shows).[130] Ibbott, however, is still waiting for a licensing agreement from the record labels.[131]

Podcasters, fed up with record labels' restrictive copyright enforcement, and perhaps not fully comprehending the complicated aspects of copyright licensing, are doing their best to circumvent licensing agencies. The Rock and Roll Geek Show, a well-known podcast from San Francisco, plays podsafe music from independent and unsigned bands.[132] Host Michael Butler told the *San Francisco Chronicle* that in January 2005 alone, he had 156,000 downloads of his show.[133] "It's blowing up," he said; "[i]t's one of the most

126. Podcast Alley, http://www.podcastalley.com/ (last visited Dec. 1, 2005).

127. Podcast Alley, Podcast Genres – Music/Radio, http://www.podcastalley.com/podcast_genres.php?pod_genre_id=3 (last visited Dec. 1, 2005).

128. Podcasting News, iTunes 5 Features 15,000 Podcasts, http://www.podcastingnews.com/archives/2005/09/itunes_5_featur.html (Sept. 07, 2005).

129. Coverville.com, What is Coverville?, http://www.coverville.com/about.html (last visited Nov. 16, 2005).

130. Coverville.com, Coverville 135: The One Year Anniversary Show, http://www.coverville.com/archives/2005/09/coverville_135.html (last visited Nov. 9, 2005).

131. *See* Posting of Brian Ibbott to Podcast Alley Forum, http://www.podcastalley.com/forum/viewtopic.php?t=106 (Dec. 23, 2004 13:17 MST) ("I don't have any agreemenets [sic] yet with SESAC or the RIAA, but I understand that they have some regulations as well.") (last visited Dec. 16, 2005).

132. The Rock and Roll Geek Show, http://rockandrollgeek.podshow.com/ (last visited Nov. 9, 2005).

133. Benny Evangelista, *Homespun Shows Find Big Audience*, S.F. CHRON, Feb. 28, 2005, at E1, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/02/28/BUGJUBGR591.DTL.

exciting things that has happened since the beginning of the Internet."[134]

Adam Curry and his colleagues have orchestrated the PodSafe Music Network,[135] an online meeting place for podcasters and musicians, with the stated intention to "give podcasters access to music, other content and tools to create royalty-free podcasts."[136] The absence of record label control makes podsafe music attractive to podcasters; they can play music that they like, whenever they choose. For unsigned and independent musicians, the PodSafe Music Network gives them the opportunity to be heard by a large audience. Ron Bloom, CEO of PodSafe Music Network's parent company, PodShow, said, "[b]y empowering artists and podcasters, we have created the framework for an entirely new form of music promotion and discovery to emerge."[137] In August 2005, Bloom and Curry collected $8.85 million in venture capital funding.[138]

B. Appropriateness of Medium-Based Regulation

For as long as communication has evolved, governments have sought to regulate each new medium of expression under the belief that technology gave communication some special influence that needed to be kept in check. For example, contemporaneous with the advent of printing in England in the late 15th century, the English Catholic Church, and later the King, asserted the prerogative to approve printed materials before publication.[139] Throughout the 16th and 17th centuries, English publishers chafed under a variety of licensing regimes, including several licensing decrees by the infamous Star Chamber.[140] In 1644, John Milton published *Areopagitica*, a powerful argument against a parliamentary licensing scheme.[141]

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134. *Id*.

135. PodSafe Music Network, http://music.podshow.com/ (last visited Nov. 16, 2005).

136. Dinesh C. Sharma, *Podcast start-up creates music network*, CNET NEWS.COM, Aug. 23, 2005, http://news.com.com/Podcast+start-up+creates+music+network/2100-1027_3-5841888.html.

137. *Id*.

138. *Podcast start-up scores $8.85 million in funding*, CNET News.com, Aug. 16, 2005, http://news.com.com/Podcast+start-up+scores+8.85+million+in+funding/2100-1025_3-5834879.html.

139. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 298 (2001).

140. *Id*. at 298-305.

141. *Id*. at 303-04.

In the American colonies, governments continued the English tradition of licensing. The first American newspaper, Benjamin Harris' *Publick Occurrences Both Forreign and Domestick*, was shut down by the Massachusetts governor and legislature after just one issue in 1690, because it lacked a license.[142] After the adoption of the First Amendment as part of the Bill of Rights in 1791, 140 years passed before the Supreme Court clearly established that government could not engage in prior restraint of the printed word.[143] Alas, even the First Amendment and subsequent Supreme Court jurisprudence did little to defeat the notion that the government could regulate new forms of communication with different constitutional standards.

For example, the Supreme Court in *Mutual Film Corporation v. Industrial Commission of Ohio* did not recognize the right to be free from a motion picture censorship statute, as asserted by an early 20th century Ohio film distributor.[144] Although this case took place before the Supreme Court held the First Amendment applicable to the states under the doctrine of incorporation, its treatment of the protections afforded—or not afforded—to new media is illuminating.[145] Having recognized that the rights to freedom of opinion and expression were "too certain to need discussion," the Court nevertheless concluded that motion pictures, along with "the theater, the circus, and all other shows and spectacles," did not deserve the same protections accorded to the press.[146] The Court regarded the new communications medium of motion pictures as non-expressive conduct that was "amenable to the law," rather than opinion that was free from regulation:

> It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability

142. *Id*. at 314-15.

143. *See* Near v. Minnesota, 283 U.S. 697 (1931) ("Any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.").

144. *See* Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230 (1915).

145. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (asserting that the Fourteenth Amendment's due process guarantee made the First Amendment applicable to the states).

146. *Mutual Film Corp.*, 236 U.S. at 243.

> and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.[147]

Later, the Supreme Court encountered another new medium of communication: sound amplifiers. When a New Jersey man was convicted of violating an ordinance that prohibited operation of a sound truck emitting "loud and raucous noises" on a public street, the Supreme Court did not act to protect speech interests, but rather held that the regulation was an appropriate exercise of the state's police power.[148] The Court made a distinction between the noisy and raucous sound truck, which it acknowledged might reach more listeners than unmediated speech, and the by-then more traditional forms of communication such as newspapers.[149]

Twenty years later, the Supreme Court justified its differential treatment of broadcast media, not because broadcast communication did not constitute speech, but because of broadcast media's unique characteristics. The Court synthesized in *Red Lion Broadcasting Co. v. Radio Television News Directors Association* the principle that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[150]

The Court did not, however—in *Red Lion* or in any subsequent case—expound a standard for gauging the appropriateness of the differential First Amendment treatment to the unique characteristics of a given new medium. Rather, the Court in *Red Lion* asserted only that the scarcity of broadcast frequencies allowed the government to enforce the fairness doctrine.[151] Thus, the government required broadcasters to allow individuals and groups to respond to personal attacks (made in the presentation of views on issues of public importance), and political candidates to respond to editorials. In later opinions, the Court seemed increasingly focused on broadcast media's pervasiveness and accessibility to children, rather than the scarcity of broadcast frequency, as the unique characteristic justifying medium-based regulation.[152]

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147. *Id.*

148. Kovacs v. Cooper, 336 U.S. 77 (1949).

149. *Id.* at 89.

150. Red Lion Broad. Co. v. Radio Television News Dirs. Assoc., 395 U.S. 367, 386 (1969).

151. *Id.*

152. *See, e.g.*, Fed. Commc'ns. Comm'n. v. Pacifica Found., 438 U.S. 726 (1978).

During subsequent years, the Court perpetuated its failure to articulate any standard for measuring the appropriateness of medium-based regulation, and provided little justification for the differential treatment of new media based on unique characteristics. For example, with respect to cable television, the Court again recognized differences in the characteristics of this medium when compared to other media. In *Turner Broadcasting*, a 1994 decision, the Court stated that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation."[153] This was so because "cable television does not suffer from the inherent limitations that characterize the broadcast medium."[154] But, the Court again failed to expound a test for measuring the extent to which unique medium characteristics justified different constitutional treatment, holding only that the must-carry provisions at issue were not content-based and should therefore be reviewed under an intermediate scrutiny standard rather than under strict scrutiny.[155]

Three years later, the Court concluded that the must-carry provisions were constitutional in that the government had satisfied its burden under intermediate scrutiny to show that it had an important interest in preserving over-the-air local programming, and that requiring cable operators to carry the over-the-air programming was narrowly tailored to that interest.[156] But, the Court made note of another unique characteristic that justified different constitutional standards for cable television: concentrated ownership.[157] The Court stated that the economic characteristics of the cable industry supported Congress' finding that cable television systems would be likely to drop local over-the-air programming.[158]

The most recent major new communications medium to come to the Court's attention was the Internet.[159] In 1997 in *Reno v. ACLU*, the Court took great pains to describe the Internet as it then existed.[160]

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153. Turner Broad. Sys. v. Fed. Commc'ns. Comm'n., 512 U.S. 622, 637 (1994).

154. *Id*. at 640.

155. *Id*. at 640-41.

156. Turner Broad. Sys. v. Fed. Commc'ns. Comm'n., 520 U.S. 180 (1997).

157. *Id.* at 197-200.

158. *See* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA 419 (2004).

159. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997) ("The Internet is a unique and wholly new medium of worldwide human communication."(citation omitted)).

160. The Supreme Court described the Internet of 1997:

> The Internet is an international network of interconnected computers . . . . [Early government-sponsored innovations] provided an example for the development of

Yet, despite its efforts to define the unique characteristics of the Internet when compared with other communications media, the Court once again did not articulate a standard for measuring the extent to which those unique characteristics justified different constitutional treatment. Rather, the Court stated only that the Internet did not suffer from medium scarcity and was not as invasive as radio or television, and therefore was entitled to greater speech freedom than broadcast media.[161]

Given the Copyright Act's current differential treatment of podcasting as compared to streaming, Congress should reassess whether the unique characteristics of podcasting justify this treatment. If there is not a sufficient government interest in refusing to grant podcasters sound recording public performance licenses under the

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> a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world . . . .
>
> The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999. . . .
>
> Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. . . .
>
> The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. . . .
>
> Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
>
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. . . .

Id. at 849-53.

161. *Id*. at 868-70.

statutory scheme, then Congress should remedy the situation. Due to podcasting's potential for serving the constitutional purpose of copyright law by promoting the progress of artistic expression, development of this new technology should not be unduly stifled by regulation.

Copyrights in recorded music pose a particular risk of hampering the ability of future creators to build on previous works of authorship. For works of literature the idea-expression dichotomy protects the ability of future authors to use and build on the ideas of others.[162] In contrast, for recorded music both the idea (in the form of the copyrighted musical composition) and the expression of the idea (in the form of the sound recording) are protected by the current iteration of the Copyright Act.[163] In some sense, this provides particularly strong copyright protection for recorded music that is not present in other formats. In light of this, lawmakers should be especially vigilant about not providing too many protections to the digital format that are not present in the analog context. Granting too much control to authors and creators may pose the risk of undermining the ability of future authors and creators to serve copyright's constitutional purpose of advancing the progress of society through the creation of new works.

Even as Congress and the music industry attempt to understand how podcasting will affect copyright law, the judiciary must contemplate how to measure the appropriateness of regulation of communication media based on unique medium characteristics. Perhaps jurists may choose to employ a modified version of the test already used to gauge the appropriateness of content-based regulation of communication.[164] This modified test would measure the constitutionality of the differential treatment among media by

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162. The U.S. Supreme Court has responded to the claim that copyright law poses the threat of stifling speech by saying First Amendment values are protected because only expression—not ideas and facts—are subject to copyright. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). The idea-expression dichotomy, or definitional balancing, was illustrated in the case of a book publisher who sued the owner of *The Nation* magazine for publishing unauthorized excerpts from a forthcoming autobiography of President Gerald R. Ford. *Id*. Although the magazine argued that the excerpts contained historical facts, the Court concluded that *The Nation* had infringed the publisher's copyright by reproducing President Ford's original expression about those facts. Nevertheless, the Court reiterated that "First Amendment protections [were] embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas. . . ." *Id*. at 569.

163. *See supra* notes 1-6 and 14-29 and accompanying text.

164. *See generally* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

examining: (1) the government's asserted interest in treating one communications medium differently than others; and (2) the fit between the medium-based regulation at issue and the unique characteristics of the given medium. If a given medium's characteristics are not closely related to the government's substantial interest, and if the means chosen are not narrowly tailored to achieve the ends sought, then courts should not allow the government to discriminate among media.

CONCLUSION

Currently, podcasters largely gravitate toward talk-oriented programs rather than music-oriented programs. This appears to be due in large part to the copyright licensing agencies' complicated licensing procedures, as well as the belief that podcasters are not entitled to statutory licenses under the Copyright Act. Meanwhile, some podcasters have circumvented the record labels and their licensing agencies by locating and broadcasting "podsafe" music. The complicated and costly licensing regimes administered by the performance rights agencies may be less about providing an incentive for progress in creative expression and more about compensating large corporations that hold sound recording copyrights.

The issue of whether medium-based regulation is appropriate will continue to be important as technology evolves. The music industry may contend that podcasting's unique characteristics—high quality compressed digital audio, interactivity, time shifting, asynchronous delivery and ease of reproduction and distribution—justify treating podcasting differently than streaming, and that therefore podcasters should be required to negotiate master use licenses rather than simply complying with statutory license requirements. However, Congress and the courts must not allow podcasting to be treated differently without closely examining the unique characteristics of podcasting before making a principled determination of whether those characteristics justify different treatment. Currently, the courts have no mechanism to determine whether differential treatment based on technology is justified. In the future, advances in technology will demand that such a test be devised and applied, or continuing pressures by copyright holders will take the Copyright Act even further from its constitutional roots.