BONNEVILLE INTERNATIONAL V. PETERS

By Raffi Zerounian

Copyright law is a creature of technology. The invention of machines that produced direct copies of original works led to the creation of copyright law. As technology has evolved, so has copyright doctrine.[1] Copyright law strives to achieve a difficult balance between encouraging societal access to such works and encouraging authors to create them.[2] In *Bonneville International v. Peters,*[3] Judge Berle Schiller ruled that AM and FM radio stations broadcasting transmissions over the Internet are not exempt "nonsubscription broadcast transmissions," and thus have to pay a public performance royalty.

In upholding the Copyright Office's administrative "final ruling," the district court allowed the Copyright Office to make a decision unprecedented in its history. Furthermore, the district court's decision did not fully consider the policy differences between various forms of music transmission over the Internet, and the evolution of sound recording rights. Historically, sound recordings had not received copyright protection because they did not affect record sales. In 1995, the Copyright Act was amended to include a narrow digital performance right for sound recordings. This right only included transmissions of sound recordings that affected record sales because of their "on demand" or "interactive" character.

This Note first examines the Copyright Office's novel rulemaking authority.[4] The analysis then turns to the increasing complexity of Copyright law as evidenced by the contradictory provisions of the Digital Millennium Copyright Act.[5] Finally, this Note examines the policy considerations that favor an exemption for radio stations that transmit their broad-

1. *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 430 (1984) ("[I]t was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.").

2. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The primary objective in conferring the Copyright monopoly is the general benefit received by the public from the work of authors. When the literal terms of the Copyright Act are rendered ambiguous, it must be construed in light of the primary objectives of conferring the Copyright monopoly.").

3. 153 F. Supp. 2d 763 (E.D.P.A. 2001).

4. *See infra* Part III.A.

5. *See infra* Part III.B.

casts over the Internet because they do not threaten the sale of recorded music.[6]

I. BACKGROUND

The following section discusses music delivery models of sound recording broadcasts over the Internet, in order to illustrate the different policy implications of each model. The evolution of musical copyrights is then described. The final section discusses the literature surrounding deference to an administrative agency in order to better understand the district court's decision to defer to the Copyright Office's "final rule."

A. The Evolution of Copyright Protection for Transmission of Sound Recordings

Copyright law has long recognized the right of public performance of a musical composition.[7] Only recently has copyright law begun to protect sound recordings embodying musical compositions. Under the 1909 Copyright Act, the public performance right for musical works was limited to performances made "for profit."[8] With the Sound Recording Act of 1971,[9] Congress extended limited federal copyright protection to sound recordings in order to counter the unauthorized duplication and sale of sound recordings that resulted from advances in duplicating technology.[10] This limited protection did not include a public performance right,[11] even though the issue had been debated extensively.[12] Congress' amendment to the Copyright Act of 1971 did not include a public performance right be-

6. *See infra* Part III.C.

7. *See* 17 U.S.C. § 106(4) (Supp. 2001).

8. SHELDON HALPERN ET. AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 88 (1999).

9. Pub. L. No. 92-140, 85 Stat. 391 (1971).

10. H.R. REP. NO. 104-274, at 2 (1995); S. REP. NO. 92-72, at 3 (1971) (noting that the reason for creating a limited right in sound recordings was "the pirating of records and tapes").

11. A public performance right affords the copyright owner the exclusive right to the public performance of his or her work or to charge a royalty for such a transmission. *See* 17 U.S.C. § 106(6) (Supp. 2001).

12. *See* David W. Wittenstein & M. Lorrane Ford, *The Webcasting Wars*, J. INTERNET L. (Feb. 1999), *at* http://www.gcwf.com/articles/journal/jil_feb99_2.html ("Broadcasters argued that record companies are more than adequately compensated for the use of their music by receiving free advertising in the form of their music being broadcast to mass audiences over the radio."). The recording industry replied that some musical recordings do not receive these benefits and that "performers should be compensated for the commercial use of their property." *Id.*

cause the rights granted were sufficient to "protect against record piracy."[13] Furthermore, a public performance right was not granted, in large part, because of intense lobbying from the radio broadcast industry.[14] The Copyright Act of 1976 then eliminated the "for profit" limitation, but added many specific exemptions, including licensed broadcast transmissions.[15]

1. *Digital Performance Right in Sound Recordings Act*

Public performances of sound recordings were not afforded copyright protection until the passage of the Digital Performance Right in Sound Recordings Act ("DPSRA") in 1995.[16] The DPSRA included copyright protection for public performances of sound recordings by means of digital audio transmission.[17] The legislation was narrowly crafted to address concerns about the impact of certain types of subscription and interactive audio services on record sales.[18] Furthermore, the DPSRA did not address "free over-the-air broadcast services."[19]

Under 17 U.S.C. § 114(d)(1), transmissions that were perceived to pose little threat to record sales, such as nonsubscription transmissions, were exempted from the digital performance right.[20] Subscription digital

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13. H.R. REP. NO. 104-274, at 11 (1995).

14. JOHN HAZARD, COPYRIGHT LAW IN BUSINESS AND PRACTICE § 4.04 (rev. ed. 1999) (noting that the radio broadcast industry lobbied in order to evade paying "royalties to the owners of sound recording copyrights for the right to broadcast these works"); Kevin Featherly, *Broadcasters Must Pay Webcast Royalties, Judge Rules*, NEWSBYTES, Aug. 8, 2001, *available at* http://www.newsbytes.com/news/01/168650.html (noting that "a powerful broadcast lobby many years ago successfully convinced Congress to set aside" public performance rights for radio).

15. HALPERN, *supra* note 8, at 88.

16. *See* 17 U.S.C. § 106(6) (Supp. 2001).

17. S. REP. NO. 104-128, at 17 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 364. This performance right did not cover broadcasting or related transmissions. *Id.*

18. *Id.* at 15 (stating that the legislation was concerned with how subscription and interactive services could "adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work"). The Senate Report of 1995 reads:

> It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmission, without hampering the arrival of new technologies, and without imposing new unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.

Id. at 14.

19. *Id.* at 15.

20. 17 U.S.C. § 114(d)(1) (Supp. 2001); H.R. REP. NO. 104-274, at 14 (1995). Requirements for exemption included: being a nonsubscription broadcast transmission, a

audio transmissions not exempt under 17 U.S.C. § 114(d)(1),[21] and not part of an interactive service, were subject to a statutory license.[22] Upon meeting certain requirements, such as not publishing advanced schedules of the recordings, the "transmitters are guaranteed a license so long as they pay royalties (at rates to be negotiated, or if necessary, arbitrated) and comply with the other provisions of section 114."[23] Transmitters that use sound recordings as part of an interactive service are required to obtain a license from the copyright holder.

2. *Digital Millennium Copyright Act*

In 1998, Congress further amended the Copyright Act with the passing of the Digital Millennium Copyright Act ("DMCA").[24] In addition to a variety of provisions aimed at limiting digital piracy,[25] Congress abrogated two exemptions that had been included in section 114(d)(1)(A) under the DPSRA.[26] This deletion was "not intended to affect the exemption for nonsubscription broadcast transmissions."[27] Contemporaneously, Con-

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retransmission of a nonsubscription broadcast transmission not willfully or repeatedly transmitted more than a radius of 150 miles from the site of the radio broadcast transmission, or a noncommercial educational broadcast station. 17 U.S.C. § 114(d)(1) (Supp. 2001).

21. Section 114(d)(1) provides exemptions for retransmissions of nonsubscription broadcast transmissions.

22. 17 U.S.C. § 114(d)(2) (Supp. 2001).

23. H.R. REP. NO. 104-274, at 21 (1995).

24. H.R. REP. NO. 105-796, at 80 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 656. The House of Representatives Report reads:

> The amendments to sections 112 and 114 of the Copyright Act . . . bill are intended to . . . further a stated objective of Congress when it passed the . . . ("DPSRA") to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.

Id.

25. H.R. REP. NO. 105-551, at 25 (1998) ("In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws.").

26. *Id.* Congress made clear that the deleted provisions "were either the cause of confusion as to the application of the DP[S]RA to certain nonsubscription services (especially webcasters) or which overlapped with the other exemptions (such as the exemption . . . for nonsubscription broadcast transmissions)." H.R. CONF. REP. NO. 105-796, at 80 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 656.

27. H.R. CONF. REP. NO. 105-796, at 80 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 656.

gress expanded the category of transmissions that would qualify for a statutory license. The exemption for "nonsubscription broadcast transmission[s]" was not amended.[28]

The DMCA amendment to section 114(d)(2) extended the statutory license umbrella for subscription broadcasts to cover certain eligible nonsubscription transmissions.[29] "Eligible nonsubscription transmissions" are defined in section 114(j)(6).[30] The DMCA amendment divides section 114(d)(2) into three subparagraphs. Subparagraph 114(d)(2)(A) dictates three conditions for a statutory license applicable to all nonexempt subscription and eligible nonsubscription transmissions.[31] Subparagraph (B) includes provisions applicable only to "nonexempt subscription transmissions" made by a preexisting subscription service in the same transmission medium as was used by the service on July 31, 1998.[32] Subparagraph (C)(i) eliminates the requirements of conformity with the sound performing complement[33] for retransmissions of over-the-air broadcast transmissions "by a transmitting entity that does not have the right or ability to

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28. 17 U.S.C. § 114(d)(1)(A) (Supp. 2001).

29. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22[d][3]; *see also* 17 U.S.C. § 114(d)(2) (Supp. 2001).

30. H.R. CONF. REP. NO. 105-796, at 87 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 663. The Conference Report requires that "[e]ligible nonsubscription transmission" meet the following criteria:

> First, the transmission must be noninteractive and nonsubscription in nature. Second, the transmission must be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings. Third, the purpose of the transmission service must be to provide audio or entertainment programming, not to sell, advertise, or promote particular goods or services.).

Id.

31. The conditions pertinent to this discussion are that :

> retransmissions by a transmitting entity must not have the right or ability to control the programming of the broadcast station making the broadcast transmission, to the extent that such identifying information was included in the original broadcast transmission and to the extent that it is technically feasible for the transmitting entity to retransmit that information.

17 U.S.C. § 114(d)(2)(A) (Supp. 2001).

32. *Id.* § 114(d)(2)(B).

33. The "sound recording complement" is "the performance in any three-hour period of three selections from a single record album, with no more than two selections transmitted consecutively, or of four selections by a single featured artist or from a single boxed set, with no more than three transmitted consecutively." H.R. REP. NO. 104-274, at 21 (1995).

control the programming of the broadcast station making the initial broadcast transmission, subject to two limitations."[34]

The DMCA also includes an ephemeral recording exemption that permits a transmitting organization to make one copy of a sound recording without infringing any copyrights.[35]

3. *Rulemaking Authority of an Administrative Agency*

The Administrative Procedure Act ("APA") reflects a broad determination by Congress to subject the decisions of government agencies to review by the courts.[36] Although courts maintain the final word on interpretations of law, they often defer to an administrative agency's interpretation of its enabling legislation. Courts defer to an agency's interpretation particularly when Congress has empowered the agency, either implicitly or explicitly, to interpret the laws the agency enforces, and the agency has done so over a period of time.[37]

A court reviewing an agency's construction of a statute that it administers must apply the following two-prong analysis. A court must first ascertain whether "Congress has directly spoken to the precise question at issue."[38] If the intent of Congress is clear, the court's evaluation ends, and Congress' unambiguously expressed intent is given effect. "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[39] The final authority on a statute's interpretation and its applicability, whether constitutional or statutory, remains with the courts.[40]

More specifically, in determining the amount of deference courts give to an agency interpreting its own statute, "courts have looked to the degree

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34. Ronald H. Gertz, *Client Memo Re: Text of Sections 114 and 112 of the Copyright Act as Amended*, 640 PLI/PAT 75, 80 (March 12, 2001); *see also* 17 U.S.C. § 114(d)(2)(C) (Supp. 2001) (listing the two limitation to subparagraph (C)(1) as: (1) retransmissions in digital format that regularly exceed the sound recording performance complement are not eligible for a statutory license, and (2) retransmission broadcast transmissions that violate the sound performance complement on a weekly basis not be eligible for a statutory license).

35. 17 U.S.C. § 112(a)(1) (Supp. 2001). This copy can only be used "for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security." *Id.* § 112(a)(1)(B).

36. 5 U.S.C. § 701 (1994).

37. United States v. Mead Corp., 121 S.Ct. 2164 (2001).

38. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

39. *Id.* at 843.

40. 5 U.S.C. § 706 (1994).

of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[41] Implicit delegation of authority to an agency can also be apparent:

> from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result.[42]

When the circumstances exist to give an agency rulemaking authority, a court reviewing an agency decision may not reject an agency's interpretation "simply because the agency's chosen resolution seems unwise, but it is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."[43]

B. Webcasting Technology

Music broadcast on the Internet can be divided into three music delivery models: 1) AM/FM Radio Webcasting, 2) Internet Webcasting, and 3) Personalized Internet Webcasting.[44] Copyright law treats each music delivery model differently. Accordingly, the copyright holder's rights under each medium are different.

The first music delivery model, AM/FM Radio Webcasting, is the transmission of AM/FM radio broadcast signals over the Internet by that radio station. AM/FM Radio Webcasting is the simultaneous transmission of the identical AM/FM broadcast signal without a playlist, skip forward function, method to influence playlists,[45] or search engine.

The second music delivery model, Internet Webcasting, includes music played solely to an Internet audience and third-party broadcasts of AM and FM radio station transmissions.[46] Internet Webcasting is not interactive or on-demand. Some Internet Webcasters have a format similar to that

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41. *Id.*

42. *Mead*, 121 S.Ct. at 2171.

43. *Id.* at 2172.

44. Different commentators have used different names for these delivery models.

45. Except through traditional means, such as calling the radio station and making a "request" or "dedication."

46. A radio station website such as KIISFM.com also falls into this category. KIISFM.com offers chats with listeners, as well as videos and concert tickets, on the web. AM/FM radio stations that create Internet-only programs also fall into this category.

of an AM/FM broadcaster, which includes a predetermined format. Other Internet Webcasters have skip forward functions and playlists.[47]

Personalized Internet Webcasting, the third model, is the music delivery model closest to Professor Paul Goldstein's "Celestial Jukebox."[48] This model includes musical services which require a subscription or payment, are on-demand,[49] or are interactive.[50] For example, a user can hear a whole radio show of only one artist for a three-hour period.[51] Listen.com is an example of a subscription service that permits a user to listen to on-demand, commercial-free Internet radio programming.[52]

II. CASE SUMMARY

A. Facts and Procedural History

In *Bonneville*, AM and FM radio station broadcasters brought an action against the Recording Industry Association of America ("RIAA") and the Copyright Office.[53] Previously, the RIAA had petitioned the Copyright Office to adopt a rule "clarifying that a broadcaster's transmission of its AM or FM radio station over the Internet is not exempt from copyright

47. For example, Listen.com is broken up by genre such as electronica, country, jazz, and folk. It also contains tour dates and other information. Users who click on oldies can then choose between "Beach Boys and similar artists" or "the Doors and similar artists." *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 119 (2000) (statement of Hilary Rosen, President, Recording Industry Association of America).

48. The "celestial jukebox" is a metaphor that expresses the possibilities of the future: "a technology-packed satellite orbiting thousands of miles above Earth, a subscriber's order-like a nickel in the old jukebox, and the punch of a button-to connect him to any number of selections from a vast storehouse via a home or officer receiver." PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 199 (1995).

49. An "on-demand" service is a musical service that allows a user to hear a particular artist "on demand."

50. An "interactive" musical service allows a user to narrowly tailor particular music preferences.

51. Launch.com and MTVi allow users to click a button if they do not like a song; the use never has to hear the song again. Christopher Jones, *True Consciousness of Stream*, WIRED, Apr. 6, 2000, *available at* http://www.wired.com/news/technology/0,1282,35122,00.html.

52. Brad King, *Songs Arrive in the Key of Fee*, WIRED, Dec. 3, 2001, *available at* http://www.wired.com/news/mp3/0,1285,48734,00.html.

53. Bonneville Int'l v. Peters, 153 F. Supp. 2d 763 (E.D.P.A. 2001).

liability under section 114(d)(1)(A)."[54] The RIAA also contended that until the Copyright Office made such a ruling, "the parties [would] not agree on who qualifies for the Section 114 performance license" and thus who should attend the rate setting arbitration panels.[55] On March 16, 2000, the Copyright Office published a notice of proposed rulemaking, finding for the RIAA. On December 21, 2000, the Copyright Office denied the National Association of Broadcaster's ("NAB") motion to suspend the rulemaking, and announced that "a transmission by an FCC-licensed broadcaster of its AM or FM radio broadcast over the Internet is not exempt from the limited public performance right for digital transmissions under section 114(d)(1)(A)."[56]

B. The Copyright Office's Administrative "Final Rule"

Rejecting the Broadcaster's assertions that the Copyright Office's previous decisions were not as expansive as its decision in *Bonneville*,[57] the Copyright Office stated that it does have the authority to make such a final rule. Amending the rule as urged by the RIAA, the Copyright Office held that Congress intended the exemption for "nonsubscription broadcast transmission" to apply only to radio stations transmitting their signals "over the air" made within the broadcasters' local service area.[58] The Copyright Office relied on its

> responsibility to conduct CARP ["Copyright Arbitration Royalty Panel"] proceedings to establish rates and terms for the section 114 license, as provided in section 114 itself and chapter 8 of the

54. Public Performance of Sound Recordings, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (codified at 37 C.F.R. pt. 201.35).

55. *Id.* Accordingly, the Copyright Office postponed the pending rate adjustment proceeding. The purpose of these proceedings "is to set the rates and terms for the public performance of a sound recording by means of digital audio transmissions under the section 114 statutory license and to establish the rates and terms for the making of an ephemeral recording in accordance with the section 112 statutory license." *Id.* The Copyright Arbitration Panel ("CARP") proceedings, which set the rates, are adversarial in nature. It is crucial that all interested parties and users are represented so that the panel can have a complete evidentiary record to render its decision. *Id.* at 77294.

56. *Id.*

57. *Id.*

58. *Id.* at 77,297. The Copyright Office construed the statute narrowly, citing Tasini v. New York Times Co., 206 F.3d 161, 168 (2d Cir. 2000), for the proposition that "any doubt must be resolved against the one asserting the exemption" to preserve the purpose of the provision. *Id.*

> Copyright Act, and the [Copyright] Office's general rulemaking authority granted by section 702 of the [Copyright] Act.[59]

According to the Copyright Office, an agency is allowed to complete its action "where the function of the agency and the particular decision sought to be reviewed involve the exercise of discretionary powers granted the agency by Congress, or require application of special expertise."[60] The Copyright Office also stated that its extensive history of administering and interpreting the Copyright Act,[61] and the necessity of a full and complete record by the CARP proceedings, required that all parties subject to section 114 be identified.[62]

Accordingly, the Copyright Office construed the meaning of "broadcast transmission"[63] to include only over-the-air transmissions made by an FCC-licensed broadcaster.[64] The term "Service" was amended by the Copyright Office to reflect its determination that "any entity that transmits an AM/FM radio station over a digital communications network is subject to the terms of the statutory license set forth in 17 U.S.C. § 114(d)(2)."[65] Dissatisfied with this outcome, the radio station broadcasters sought judicial review of the Copyright Office's administrative "final rule."[66]

C. The District Court's Decision

On appeal, the District Court of the Eastern District of Pennsylvania summarily adjudicated the case in favor of the defendants, and held that the Copyright Office did have the statutory authority to promulgate such a rule.[67] The district court ruled that the Copyright Office's rulemaking was reasonable and that the district court would have independently reached

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59. *Id.* at 77,293,294 (noting that if the "Broadcasters' position were accepted, the Copyright Office's ability to administer section 114 of the Copyright Act will be frustrated.").

60. *Id.* at 77,294 (quoting Miss Am. Org. v. Mattel, Inc., 945 F. 2d 536, 540 (2d Cir. 1991)).

61. *Id.* at 77,294. The Register of Copyrights gave as examples the "definition of gross receipts under section 111 license" and the establishment of "filing regulations for SMATV systems under section 111." *Id.*

62. *Id.* at 77,295.

63. The NAB argued that the pivotal element of the definition of "broadcast transmission" is the designation of the nature of the entity making the transmission. Since an FCC-licensed broadcast station makes the transmission, the method of transmission does not matter. *Id.* at 77,297.

64. *Id.* at 77,301.

65. *Id.*

66. Bonneville Int'l v. Peters, 153 F. Supp. 2d 763 (E.D.P.A. 2001).

67. *Id.*

the same conclusion as the Copyright Office.[68] Basing its decision on the standard set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[69] the district court held that Congress delegated to the Copyright Office interpretive authority over section 114 of the Copyright Act.[70]

With respect to the first prong of the *Chevron* standard,[71] the district court concluded that Congress had not directly addressed the issue of whether AM/FM Radio Webcasters are exempt from the public performance right in section 106 of the Copyright Act.[72] Thus, the district court stated that it was required to defer to Copyright Office's determination if it was reasonable.[73]

Analyzing the statutory language, the Copyright Office concluded that Congress did not intend the term "nonsubscription broadcast transmission" to include AM/FM Webcasting.[74] The court held that a facial reading of the statute, as well as the legislative history of both the 1995 and 1998 amendments to the Copyright Act, demonstrated that it was not likely that Congress even considered the streaming of AM/FM broadcasts, let alone exempted such activities from the public performance rights of section 106.[75] The court reasoned that the term "terrestrial" requires an over-the-air transmission as evinced by Congressional testimony stating that "free over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' license."[76] The court also concluded that the phrase "licensed as such by the [FCC]" did not refer to the nature of the transmitting entity; rather, Congress chose the words to refer to over-the-air broadcasting, a type of transmission. Examining the legislative history, the court noted that the exemption was enacted before the rise of AM/FM Webcasting, and that it was not likely that Congress foresaw such activity.[77] Furthermore, the court stated that Congress never mentioned any other type of

68. *Id.*

69. 467 U.S. 837 (1984). An implicit delegation of power to an administrative agency by Congress would allow the agency "to speak with the force of law when it addresses ambiguity in the statute." United States v. Mead Corp, 121 S.Ct. 2164, 2172 (2001).

70. *Bonneville*, 153 F. Supp. 2d at 772.

71. *See supra* notes 38-39 and accompanying text.

72. *Bonneville*, 153 F. Supp. 2d at 775.

73. *Id.* at 779.

74. *Id.* at 774.

75. *Id.* at 776.

76. *Id.* at 780 (quoting H.R. REP. NO. 104-247, at 13 (1995).

77. *Bonneville*, 153 F. Supp. 2d at 781.

transmission made by an FCC-licensed broadcaster, other than over-the-air transmissions.[78]

The court agreed with the Copyright Office that defining "nonsubscription broadcast transmission" to include streaming of AM/FM broadcasting would conflict with provisions of the DPSRA and the DMCA. Section 114(d)(1)(A) states that a retransmission of a nonsubscription broadcast cannot be retransmitted beyond a 150 mile radius from the site of the radio broadcast transmitter.[79] The court concluded that this provision demonstrates that Congress intended only local retransmission of over-the-air radio broadcasts, and not AM/FM streaming.[80] Where the statute states an exception to the 150 mile limitation,[81] the court concluded that a portion of the statute requiring FCC licensure necessarily limits the geographic area within which the retransmission can extend, and thus it cannot be global.[82]

Finding further conflicts between the contentions of the radio stations and the Copyright Act, the district court affirmed the Copyright Office's finding that a definition of "nonsubscription broadcast transmission" that includes streaming of AM/FM broadcasting is inconsistent with the Copyright Act's ephemeral recording provisions in section 112.[83] Section 112 permits a transmitting organization to make one copy of the transmission embodying the performance, so long as "the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area."[84] The court concluded that the limitation to a local service area makes streaming around the world through the Internet incompatible with the section 112(a)(1) exemption.[85] Since a streaming broadcast is not eligible for the section 112(a)(1)(B) exemption, the court ruled that the broadcaster would have to obtain a statutory license under section 112(e) to make ephemeral copies.[86] However, a broadcaster streaming its broadcast on the Internet is also not eligible to obtain a section 112(e)

78. *Id.*

79. *Id.* at 782.

80. *Id.*

81. 17 U.S.C. § 114(d)(1)(B)(i)(I) (Supp. 2001) ("[T]he 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission.").

82. *Bonneville*, 153 F. Supp. 2d at 782.

83. *Id.*

84. *Id.*; 17 U.S.C. § 112(a)(1)(B) (Supp. 2001).

85. *Bonneville,* 153 F. Supp. 2d at 782.

86. *Id.*

ephemeral copy license. Section 112(e) ephemeral copy licenses are only available to those who meet the criteria for a section 114(f) statutory license, and are not available to those who fall under the section 114(d)(1)(A) nonsubscription broadcast transmission category.[87]

Finally, the court held that public policy considerations stated by the Copyright Office reinforce the court's finding that the section 114(d)(1)(A) exemption does not apply to broadcasters who stream their transmissions over the Internet. The court agreed with the Copyright Office's warning that allowing AM/FM radio stations to broadcast their transmissions on the Internet will give them "an unfair advantage in the webcasting market."[88] The Copyright Office also concluded that allowing AM/FM broadcasts to be streamed over the Internet would be incompatible with the goal of preserving the relationship between the record industry and broadcasters.[89]

Under the District Court's holding, the only exemption to the digital performance right is for traditional over-the-air broadcasts made by an FCC licensed broadcaster, limiting its broadcast within the geographically defined areas determined by the FCC.[90] Thus, AM/FM Radio Webcasters are subject to the statutory license set forth in section 114(d)(2).[91]

III. DISCUSSION

This Section demonstrates that, while not directly violating legal doctrine, the district court did not devote sufficient attention to the implications of its decision. Part III.A analyzes the district court's extension of *Chevron* deference to the Copyright Office without sufficient consideration of administrative law and its impact on the future of the Copyright Office, including separation of power issues. The next section illustrates that section 114 cannot be read without self-contradiction because Copyright Law has become increasingly complex. The final section suggests that section 114 should be revisited so as to exempt AM/FM Radio Webcasters.

87. *Id.*
88. *Id.* at 783.
89. *Id.*
90. *Id.*
91. *Id.*

A. It is Unclear whether the Copyright Office's Administrative "Final Rule" is binding under the *Chevron* Doctrine

Although Judge Schiller stated that he would have come to the same conclusion as the Copyright Office's administrative "final rule," it is still important to recognize the implications of this decision. If courts continue to give *Chevron* deference to Copyright Office decisions that are not customarily within the office's powers, the Copyright Office may have unilaterally created authority without sufficient legislative oversight. This may also have created separation of powers consequences.

It is not clear that the Copyright Office has been relegated the authority to interpret section 114 as it did in its administrative "final rule." In order to be binding, Congress must intend that the Copyright Office's interpretations bind the courts.[92] Furthermore, "[w]hen Congress enacts a statute to be administered by an agency, it has delegated to the agency resolution of all policy disputes that arise under that statute that Congress did not itself resolve."[93] According to Kenneth Culp Davis, the first step of the *Chevron* analysis involves deciding whether a dispute of policy, as opposed to law, exists.[94]

1. *Factors that Favor Expansion of the Copyright Office's Rulemaking Authority*

Many considerations support a reviewing court's deference to the Copyright Office's interpretation of section 114, as in *Bonneville*. The Digital Millennium Copyright Act codified the role of the Register of Copyrights as chief of the "hybrid entity that historically has performed both legislative and executive or administrative functions."[95] It is true that "Congress relies extensively on the Copyright Office to provide its technical expertise in the legislative process."[96] Congress did ask the Copyright Office to advise it during implementation of the DMCA, and gave additional rulemaking authority to the Register of Copyrights relating to the

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92. *See* Robert Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990).

93. KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW § 3.3 (3d ed. 1994).

94. *Id.* ("Like the Chevron Court, the Marbury Court recognized that issues of policy are to be resolved by the politically accountable Branches. . . . As long as the Court preserves the principle of legislative supremacy, as it did in *Chevron*, Congress can be relied upon to check the power of the Executive.").

95. H.R. CONF. REP. NO. 105-796, at 77 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 653.

96. S. REP. NO. 101-268, 2d Sess., at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 237, 241.

DMCA's anticircumvention features.[97] Yet, David Nimmer writes that "[t]hough courts frequently invoke their willingness to defer to Copyright Office practices, one gathers the impression that their deference ends as soon as their disagreement begins with the [Copyright] Office's position."[98] Perhaps *Bonneville* reflects a shift in the courts' thinking.[99]

2. *Case Law is Not Dispositive as to the Expansion of the Copyright Office's Rulemaking Authority*

Courts have found application of the *Chevron* doctrine to be a difficult task.[100] Case law is not dispositive as to whether a court should defer to an administrative "final rule" of the Copyright Office. Some of the Copyright Office's decisions have been afforded *Chevron* deference.[101]

No Supreme Court case, however, has held that the Copyright Office's interpretation is to be dispositive. In *De Sylva v. Ballentine*,[102] the Court did not defer to the interpretation of the Copyright Office. The Court stated that weight would ordinarily be given to the interpretation of an

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97. *See* JAY DRATLER JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL CREATIVE, INTELLECTUAL PROPERTY § 5A.01 (2001) ("The DMCA's anti-circumvention provisions prohibit trafficking in measure to circumvent technological protection of copyrighted works, creating secondary liability for copyright infringement.").

98. *See* NIMMER, *supra* note 29, at § 7.26; Fonar Corp. v. Dominick, 105 F.3d 99, 105 (2d Cir. 1997); Marascalco v. Fantasy, Inc. 953 F.2d 469, 473 (9th Cir. 1991).

99. Some of the considerations set forth by the Copyright Office are not dispositive. The consequences of not having every party involved in an arbitration (CARP) is not as disastrous as made out by the district court. The fact that it is critical to a CARP that there be a full and complete evidentiary record which, if absent, would compromise the efficiency of the section 114 license, does not result in the court's finding that the Copyright Office could not exercise its duties and functions without the ability to interpret section 114. A separate CARP proceeding could be held for rates for AM/FM radio webcasters when the issue was resolved by the courts or Congress.

100. DAVIS & PIERCE, *supra* note 93, at § 3.6. ("Judges do not always agree as to its meaning and effect in a particular case but they almost invariably apply its two-step analytical framework to resolve disputes concerning the permissibly of agency construction of agency-administered statutes."). The Supreme Court sometimes "gives *Chevron* powerful effect, sometimes it ignores *Chevron*, and sometimes it characterizes the *Chevron* test in strange and inconsistent ways." *Id.*

101. For example, deciding whether a work is copyrightable, a determination the Register of Copyright makes on a daily basis. Those applying for copyright registration may obtain judicial review of the Register's decision under the Administrative Procedure Act. The Register of the Copyright Office's decisions have been given *Chevron* deference. *See, e.g.*, Custom Chrome, Inc. v. Ringer, No. 93-2634 (GK), 1995 U.S. Dist. LEXIS 9249, *12 (D.D.C. 1995); OddznOn Products, Inc. v. Oman, 924 F.2d 346 (D.C. Cir. 1991) (holding that a work of soft sculpture titled KOOSH ball did not have sufficient creativity beyond the object's basic shape to warrant copyrightability).

102. 351 U.S. 570 (1956).

ambiguous statute by the agency charged with its administration, but that in *DeSylva*, "the Copyright Office's explanation of its practice deprives the practices of any force as an interpretation of the statute, and we therefore do not rely on it in this instance."[103] On the other hand, the Court of Appeals for the District of Columbia Circuit has found "no reason to deny the Copyright Office's legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable."[104]

3. *The Expansion of the Register of Copyright's Rulemaking Authority may Create Separation of Powers Issues*

It is unclear whether the Copyright Office is an executive or legislative agency. The Copyright Office is an arm of the Library of Congress. The Register of Copyrights ("Register") is the head of the Copyright Office, and can be removed by the President.[105] However, removal by the President may not be much of a threat to the Librarian.[106]

The Fourth Circuit has found that the Librarian of Congress is an executive officer because of his appointment by the President.[107] On the other hand, some commentators have written that the Register and Librar-

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103. *De Sylva*, 351 U.S. at 577 (1956). In *De Sylva*, the district court held that the statement "the widow, widower, or children of the author if the author is not living," in 37 C.F.R. 1938 § 201.24(a), gave the widow rights before the children in renewal of a copyright after the author's death. *Id.*

104. Cablevision Sys. Dev. Co. v. Motion Picture Ass'n. of Am., Inc., 836 F.2d 599, 609 (D.C. Cir. 1988).

105. *See* Eltra Corp. v. Ringer, 579 F.2d 294, 300 (4th Cir. 1978); C.H. Dobal, *A Proposal to Amend the Cable Compulsory License Provision of the 1976 Copyright Act*, 61 S. CAL. L. REV. 699, 724 n.153 (1988) ("The Librarian is appointed by the President with the advice and consent of the Senate, and in theory may be removed by the President."). The Librarian of Congress reports to two congressional appropriations committees. *Id.* at 719.

106. Dobal, *supra* note 105, at 724 n.153 ("Yet, since 1897, Librarians have either served for life or voluntarily retired from Office.").

107. *Eltra*, 579 F.2d at 300. In *Eltra*, the court stated that the:

> Office of the Register of the Copyrights is not open to any charge that is violative of the Appointments Clause. The Register is appointed by the Librarian of Congress, who in turn is appointed by the President with the advice and consent of the Senate. By the nature of his appointment the Librarian is an 'Officer of the United States, with the usual power of such officer to appoint such inferior Officers [i.e., the Register], as [he] thinks proper.

Id.

ian are legislative officers.[108] In *Bowsher v. Synar*, the Office of the Comptroller General, was found to be unconstitutional because the Comptroller General was under the "control" of Congress.[109] Arguably, the expanded powers of the Librarian and the Register may result in Congress controlling the interpretation of the Copyright Act, a seemingly unconstitutional departure from the checks and balances system.

4. *The Copyright Office's Scope of Power Should be Defined by the Legislature*

There appears to be no statutory limit to the Register's range of duties.[110] The Copyright Act does not explicitly grant the Copyright Office the power to interpret the Copyright Act.[111] Congress should specifically authorize whether and how the Copyright Office should be afforded such rulemaking authority. The district court erred in finding that Congress has given the Copyright Office authority to interpret section 114 on the grounds that courts have deferred to the interpretation of the Copyright Office regarding issues of registration.[112]

Whether an AM/FM Radio Webcaster is exempt is not an issue of policy, but an issue of law for courts to decide. Thus, deferring to the Copyright Office on such issues of law is problematic because there does not seem to be a statutory limit on the Register's duties.[113] Nevertheless, it would be practical for the Library of Congress, as an expert agency, to have rulemaking authority over copyright issues so long as they are in accord with the intent of Congress. The future of the Copyright Office would be much more secure and stable were the legislature to define the powers, duties, and limits of the Copyright Office.

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108. Dobal, *supra* note 105, at 724 (noting that Congress views the Register and the Librarian as legislative officers, and that the Register and Librarian depend on Congress for appropriations and policy support).

109. 478 U.S. 714, 726 (1986) ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto."). Admittedly, in *Bowsher*, Congress had the power to remove the Comptroller General; in this case an exercise of control occurs nonetheless.

110. 17 U.S.C. § 702 (1994) ("The Register of Copyrights is authorized to "establish regulations not inconsistent with the law for the administration of the functions and duties made the responsibility of the Register under this title.").

111. Dobal, *supra* note 105, at 724 ("[T]hese powers seems to have been appropriated without legislative authority.").

112. Even though courts defer to the Copyright Office's decisions regarding registration, courts are not required to defer to Copyright Office decisions regarding unrelated matters such as the interpretation of section 114.

113. *See* 17 U.S.C. § 702 (1994).

B. Section 114 is Contradictory Regardless of How it is Read

The complexity of section 114 has been discussed by academics.[114] As a practical matter, because an AM/FM RadioWebcaster does not qualify for the "nonsubscription broadcast transmission" exemption, the decision in *Bonneville* leaves the AM/FM Radio Webcaster with four unsatisfactory alternatives: 1) qualify for a statutory license, 2) negotiate separate agreements with copyright owners, 3) allow a third party to retransmit the radio station's broadcast, or 4) cease transmitting its broadcast over the Internet.

To qualify for a statutory license, the AM/FM Radio Webcaster must not exceed the sound performance complement.[115] Thus, the AM/FM Radio Webcaster would not be able to simply retransmit its original broadcast with ease. The AM/FM Radio Webcaster would be forced to change the content of its traditional over-the-air station.[116] Furthermore, abiding by the sound recording complement will result in a radio station that cannot play the songs by the most popular musicians more than once in any three-hour period.

The second alternative, entering into voluntary negotiations, is equally burdensome. The AM/FM Radio Webcasters would be required to enter into voluntary negotiations with every recording artist whose music they want to play. This takes a great amount of time and effort. Since this is voluntary, artists may not allow a radio station to play their music or exact fees that are economically untenable.

The third alternative is for the AM/FM radio station Webcaster to license a retransmitter, such as broadcast.com, who would then have the burden of complying with the compulsory license or obtaining licenses from the performing artists. Many in the radio industry have stated that

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114. David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000); *see* R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI. L. REV. 237, 239 (2001).

115. The "sound recording complement" is "the performance in any three-hour period of three selections from a single record album, with no more than two selections transmitted consecutively, or of four selections by a single featured artist or from a single boxed set, with no more than three transmitted consecutively." H.R. REP. NO. 104-274, at 21 (1995).

116. *See* 17 U.S.C. § 114(d)(2)-114(d)(2)(C)(i) (Supp. 2001) ("[A]n eligible nonsubscription transmission . . . shall be subject to statutory licensing . . . if . . . the transmission does not exceed the sound performance complement.").

Congress could not have intended for this to be the practical result of the DMCA.[117]

The fourth alternative is to abandon webcasting altogether. "Many radio stations have pulled the plug on their online broadcasts, citing . . . the possibility of having to pay royalties for their music."[118] It is not likely that Congress intended to place such an onerous burden on radio stations when it manifested its intent to "provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmission . . . without imposing new unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[119]

Congress was willing to grant copyright owners full control only where there existed the risk of a loss to record sales.[120] Congress granted a public performance right, then severely limited it even when the risk of loss to record sales did not exist. This explains why nonsubscription broadcast transmissions are exempt,[121] while some are subjected to a compulsory license[122] and others only to a voluntary license.[123] The purpose of

117. *See* Ronald Gertz, *Radio Internet Streaming and the DMCA*, 2 E-COMMERCE L. REP. 8, at 3 (Feb. 2000); Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4 (1998).

118. John Borland, *Court Rules That Radio Must Pay Online Fees*, CNET, Aug. 2, 2001, *at* news.cnet.com/news/0-1005-200-6765199.htm.

119. S. REP. NO. 104-128, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 366.

120. H.R. REP. NO. 104-274, at 19 ("The limited right created by this legislation reflects changed circumstances that is, the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public.").

121. *Id.* at 14 (noting that the DPSRA contains exemptions for "nonsubscription transmissions (i.e., transmissions not controlled or limited to particular recipients or for which no consideration is required to be paid), *such as* nonsubscription broadcast transmissions by radio and television stations . . . unless they are part of an interactive service.").

122. H.R. REP. NO. 105-796, at 85 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 661. Subsection (f)(2) directs that rates and terms examine criteria including "the quantity and nature of the use of sound recordings, and the degree to which use of the service substitutes for or promotes the purchase of phonorecords by consumers." *Id.*

123. H.R. REP. NO. 104-274, at 14 (1995) ("The Committee believes that sound recording copyright owners should have the exclusive right to control the performance of their works are part of an interactive service, and so has excluded interactive services from these limitations on the performance right.").

the licenses and exemptions is to ensure that transmissions do not approach interactivity, which would detract from record sales.[124]

Section 114 of the Copyright Act cannot be read as a harmonious whole, regardless of how it is interpreted. The ephemeral recording exemption conflicts with other portions of section 114. For example, the legislative history is not clear on what exactly is meant by the "local service area" requirement and what mediums of transmission falls into this category. A transmitting organization may have a broadcast transmitter almost everywhere in the United States, making section 112(a)(1)(B) superfluous in some situations.[125]

Finally, the DMCA was not sufficiently debated before Congress, and was mainly a compromise between the RIAA and Digital Media Association ("DiMA"). The RIAA and DiMA had competing interests until the two groups made an effort to reach a compromise before the Register of Copyrights on July 23, 1998. The Register gave them until the end of that month to draft the legislation they were seeking. On August 31, 1998, the House of Representatives passed an amendment to the DMCA that included the groups' proposals.[126]

Congress should not fear that AM/FM Radio Webcasters would diminish record sales because they are not "interactive" or available "on demand."[127] Professor Eben Moglen stated that the National Associations of Broadcasters failed to specifically ask Congress to protect its royalty ex-

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124. *Id.* at 19 ("The limited right created by this legislation reflects changed circumstances that is, the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public.").

125. S. REP. NO. 105-190, at 21 (1998) ("The Committee believes that the ephemeral recording exemption should apply to broadcast radio and television stations when they make nonsubscription digital broadcasts permitted by the DP[S]RA.").

126. Kohn, *supra* note 117, at 5. Kohn notes:

> Within days, they reached an agreement that would (1) eliminate the exemption for webcasters set forth in Section 114(d)(1) of the Copyright Act, (2) add a compulsory license scheme for limited kinds of "eligible" transmissions (i.e., those made by webcasters having a profile of members of DiMA), and (3) add language to Section 112 that would make it clear that "eligible" webcasters could make ephemeral recordings of sound recordings for the purposes of facilitating their webcasts.

Id.

127. "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services—but not by broadcasting or related transmissions." S. REP. NO. 104-128, at 13 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 360.

emptions on the Internet.[128] The Internet community should not have fewer AM/FM Radio Webcasting stations to listen to simply because of this oversight.

C. Policy Favors an Exemption for AM/FM Webcasters

Had Congress thoroughly discussed and considered the status of AM/FM Radio Webcasters, it would have exempted them. AM/FM Radio Webcasting should be exempt from the public performance right so long as the transmission is simultaneous and does not allow for a playlist, a skipping forward function, or methods to influence playlists.[129] Such an exemption will likely benefit the recording industry in increased record sales. "[R]ecord companies spend millions of dollars on advertising and promotion to encourage broadcasters to play their records,"[130] and this mutually beneficial relationship ought to not be disturbed.[131]

The scope of the DPSRA was narrow, and transmissions that posed little threat to record sales were exempted from the sound recording performance right.[132] Upon hearing music on the radio, listeners would have to purchase phonorecords when they wanted to listen to music on demand. As had occurred with previous advances in recording devices, the DPSRA sought to curtail illegal copying. The DPSRA was enacted because of fears that digital technology posed.[133] AM/FM radio webcasters should not

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128. Featherly, *supra* note 14.

129. Except through traditional methods, such as calling the radio station and making a "request" or "dedication."

130. Scott Bain, *Federal Court Rejects FCC-Licensed Broadcasters' Claim of Copyright Exemption for Internet Streaming*, METRO. CORP. COUNS., at 9 (Sept. 2001).

131. Copyright law has a difficult task, to "achieve a finely tuned balance: providing authors and publishers enough control over their work that they are motivated to create and disseminate, while seeking to limit that control so that society as a whole benefits from access to the work." COMPUTER SCI. AND TELECOMM. BD. NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (2000) [hereinafter DIGITAL DILEMMA].

132. 17 U.S.C. § 114(d)(1) (Supp. 2001); H.R. REP. NO. 104-274 at 14 (1995) ("This legislation is a narrowly crafted response to concerns that . . . subscription and interaction audio services might adversely affect sales of found recordings.").

133. H.R. REP. NO. 104-274, at 19 (1995). "The limited right created by this legislation reflects changed circumstances that is, the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public." DIGITAL DILEMMA, *supra* note 131, at 46. Because of these increases in technology "[i]ndividuals find themselves capable of reproducing vast amounts of information, in private, using commonplace, privately owned equipment. A single individual can now do in private what once would have required substantial commercial equipment and perhaps criminal intent." *Id.*

be covered by the DPSRA's narrow scope because AM/FM Radio Webcasts are not likely to be copied.

The DMCA's purpose is to facilitate the development of electronic commerce and maintain strong protection for intellectual property.[134] The legislative history of the DMCA does not discuss AM/FM Radio Webcasting, but it does state that the deletion of two DPSRA exemptions does not "affect the exemption for nonsubscription broadcast transmissions."[135] The DMCA also makes it a crime to circumvent technology used to protect intellectual property. Hence, it is apparent that the concern of the DMCA and DPSRA is with illegal copying of copyrightable works and not with establishing a level playing field between Internet webcasters and AM/FM Radio Webcasters.[136] The intention in securing the rights of authors and performers is to provide incentives to support the greater good, not to be an end in itself.[137]

The district court's analysis did not give sufficient attention to the differences between Internet Webcasters and AM/FM Radio Webcasters. The policy of copyright law only balances fair compensation to the author as secondary to the public benefit.[138] AM/FM radio broadcasters have as their primary market, and thus their primary concern, their "over-the-air listeners."[139] Airwaves only reach a certain distance, which results in between 20 and 50 radio stations in any particular geographic area.[140] To

134. H.R. REP. NO. 105-551, at 28 (1998).

135. H.R. CONF. REP. NO. 105-795, at 80 (1998), *reprinted in* 1998 U.S.C.C.A.N. 645, 669.

136. Ronna Abrahmson, *Court Deals Webcasters a Royal(ty) Blow*, THE STANDARD.COM, Aug. 2, 2001, *at* http://www.thestandard.com/article/0,1902,28450,00.html (noting that DiMA Executive Director Jonathan Potter stated DiMA is concerned with "the anti-competitive impact if broadcasters who were webcasting had an advantage over Webcasters that were Webcasting").

137. Feist Publ'ns v. Rural Tel. Servs., 499 U.S. 340, 349-50 (1991); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The primary objective in conferring the Copyright monopoly is the general benefit received by the public from the work of authors. When the literal terms of the Copyright Act are rendered ambiguous, it must be construed in light of the primary objectives of conferring the Copyright monopoly.").

138. *See Aiken*, 422 U.S. at 156.

139. Reese, *supra* note 114, at 239 ("Over-the-air broadcasters typically need to appeal to a large enough audience to generate significant advertising revenues; on the other hand, Webcasters may be able to target much smaller niche audiences, thus offering music that would not generally be accessible through radio broadcasting.").

140. Sue Cummings, *Internet Radio Offers a Wide Choice to a Slim Audience*, N.Y. TIMES, Oct. 25, 2000, at 35.

survive, an AM/FM radio station must cater to a broad audience[141] and receive revenue through advertising, which results in stations having a wider variety of music.[142] Thus, a listener with a particular preference in music might have to listen to music not of their choosing.[143]

With AM/FM Radio Webcasters, the incentive remains to purchase records.[144] AM/FM Radio Webcasters listeners will find themselves in the same bind of having to choose between broad spectrums of music.[145] The economics of AM/FM Radio Webcasting work the same way as they do for over-the-air broadcasting, a symbiotic relationship between the record companies and the radio stations who "promote these songs to 75 percent of Americans who listen to the radio each day."[146] If the time comes when the lines between radio and the Internet completely blur, or if AM/FM Radio Webcasting threatens to replace the sale of recorded music, this issue should be revisited.

IV. CONCLUSION

Bonneville illustrates that the increasing complexity of the Copyright Act coupled with advances in technology which require secure rights has created much uncertainty. The Copyright Act should be revisited to clarify the ambiguities discussed in this Note. As technology continues to advance, more issues will arise and possibly inhibit growth of beneficial technologies and services. The purpose and history of the Copyright Act, and the traditional, mutually beneficial relationship between radio station

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141. *See* Eric Slater, *Broadcasting on the Internet: Legal Issues For Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL'Y 25, 37 (1997) (stating that Internet-only broadcasters are able to broadcast "more narrowly focused music formats that are not likely to appear on conventional radio, such as industrial, reggae, disco, and punk rock").

142. Reese, *supra* note 114, at 239.

143. Slater, *supra* note 141, at 40. ("In addition to programming mainstream radio formats such as country, modern rock, and classical, [Internet-only broadcasters are] cybercasting more narrowly focused music formats that are not likely to appear on conventional radio, such as industrial, reggae, disco, and punk rock."); Reese, *supra* note 114, at 238 ("'Webcasting' can provide listeners with far greater variety of music than can traditional broadcasters.").

144. Furthermore, Internet webcasters do not only play Oldies, but break this genre down to sub-genres, making it possible to cater to a particular user's tastes.

145. This rule does have exceptions, however, including small country music stations in certain parts of the country.

146. *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).

broadcasters and the RIAA, should not be disturbed. The exemption of AM/FM Radio Webcasters would benefit the public and not impact record sales, the historical basis of protection for sound recordings.

If Copyright Office decisions are to bind courts, the legislature should define the powers, duties and limits of the Copyright Office. This would create greater stability and certainty, and ensure that the Copyright Office does not overstep any of its boundaries.