

BONNEVILLE INTERNATIONAL CORP. V. PETERS: CONSIDERING COPYRIGHT RULES TO FACILITATE LICENSING FOR WEBCASTING

By Tomomi Harkey

Among the many questions about the legal landscape for webcasting, *Bonneville International Corp. v. Peters*¹ clarifies how copyright law applies to the “listen live” function on your favorite AM or FM radio station’s website. On October 17, 2003, the Third Circuit held that such “AM/FM webcasts”² must pay a public performance royalty to owners of sound recordings, thus narrowly defining the digital public performance right exemption for a “nonsubscription broadcast transmission” codified at 17 U.S.C. § 114(d)(1)(A). This decision is prudent for webcasting because it denies terrestrial radio stations a royalty exemption that would provide them with an unfair competitive advantage over web-only stations. Furthermore, AM/FM webcasting is already recovering from the deadly blow that *Bonneville* was predicted to be,³ showing that fair competition can promote healthy markets online as elsewhere.

Positive though it may be, the *Bonneville* decision sorts out only one small strand within the intricate web of rules and exemptions that Congress has woven to create the limited rights available for sound recordings.⁴ The complex statutory compulsory licensing scheme that currently administers the digital public performance right seems out of sync with facilitating the exchange of licenses—presumably its purpose. Thus, as some copyright rules for webcasting become clearer, the system overall remains too byzantine to allow the online broadcasting industry to stabilize.

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1. 347 F.3d 485 (3d Cir. 2003) [hereinafter *Bonneville II*].

2. This Note uses “AM/FM webcast” in accordance with *Bonneville* to refer to simultaneous streaming over the Internet of a traditional AM/FM broadcast by established radio broadcasters. *Id.* at 489. See *infra* Part I.A for descriptions of other forms of webcasting.

3. See, e.g., Azine Farzami, *Bonneville v. Register of Copyrights: Broadcasters’ Upstream Battle Over Streaming Rights*, 1 COMM.LAW CONSPECTUS 203, 215 (2003) (predicting that royalty requirements imposed by the *Bonneville* decision would be detrimental, and possibly crippling, to AM/FM webcasting); Raffi Zerounian, Note, *Bonneville Int’l v. Peters*, 17 BERKELEY TECH. L.J. 47, 64 (2002) (same).

4. See *infra* Part II for a discussion of the evolution of limited rights in sound recordings.

This Note examines the implications of *Bonneville*, both for AM/FM webcasting directly and as an indicator of the progress of the online broadcast industry. Part I describes the webcasting industry, including its structure, economic dynamics, and licensing arrangements. Part II outlines the evolution of the digital performance right in sound recordings under the Copyright Act. Part III discusses the holding in *Bonneville*. Finally, Part IV discusses the practical effects of *Bonneville* and concludes that though *Bonneville* was decided correctly for both legal and policy bases, the current compulsory licensing system must be simplified in practice, or replaced by a private system of exchange, to avoid hindering the growth of a healthy market for online music transmission.

I. INDUSTRY AND ECONOMIC BACKGROUND

Webcasting is a relatively new sector of the music industry that presents a special challenge to music licensing practices as they pertain to online transmission. Key differences between traditional broadcasts and digital broadcasts online have called into question the best legal scheme to support the development of the webcasting industry, while also fairly compensating copyright owners for this new type of transmission of their creative works.

A. A Webcasting Primer

The general term “webcasting” encompasses three distinct types of transmission, none of which apply to traditional radio broadcasts. Although categorical titles differ by author, they can be described as: (1) AM/FM radio webcasting; (2) Internet webcasting; and (3) personalized Internet webcasting.⁵ AM/FM radio webcasting refers to an online simulcast of a local AM or FM radio station’s broadcast, usually via a link on the station’s website.⁶ In this case, the listener has no ability to control or manipulate the broadcast music. Internet webcasting likewise offers the listener no control over music, but has neither a terrestrial source nor radio wave transmission; it exists solely online.⁷ AM/FM radio broadcasts that are not simultaneous with their terrestrial transmission, often by third-party broadcasters, also fall within the Internet webcasting category. Finally, personalized Internet webcasting refers to interactive or subscription sites that provide on-demand Internet radio, often described as the “Celes-

5. Zerounian, *supra* note 3, at 53-54.

6. *Id.*

7. *Id.* For example, see Winamp Radio for a list including many Internet-only radio stations at Nullsoft, *Nullsoft Winamp*, at <http://www.shoutcast.com/waradio.phtml> (last visited Feb. 25, 2005).

tial Jukebox.”⁸ Some of these sites provide multiple services, including both the ability to program your own webcast radio station and buy songs by digital download.⁹ In the context of this Note, personalized Internet webcasting refers to services for on-demand Internet streaming, or *performances*, and not on-demand *purchase* of downloadable songs. *Bonneville*, and the legal rule it implements, deals specifically with the first category: AM/FM webcasting, or the online simulcast of a terrestrial transmission.

B. Deciding the Nature of a Legal Entitlement and Its Licensing Framework—Property or Liability?

Along with the creation of a new “entitlement,” such as the digital public performance right for sound recordings, Congress must also determine the nature of administering such a right. To discuss the impact of the current legal framework for administering the digital public performance right, this Note borrows tools from law and economics models. Applying Calabresi and Melamed’s legal entitlements theory to the digital performance right for sound recordings, Congress had a choice of two general methods with which to enforce the right: “property rules” or “liability rules.”¹⁰ This model defines a “property rule” as an absolute right assigned to a certain party.¹¹ Property rules are akin to the standard concept of private property: no one can take the entitlement from its owner unless the owner sells it willingly for an acceptable subjective price.¹² Liability rules, on the other hand, allow others to use an entitlement so long as they pay a standard objective price to the owner.¹³ Prices in such “use now, pay later” systems are often determined and administered by an external third party, such as a court or government agency, to facilitate transfer.¹⁴ For example, compulsory licensing systems embody the characteristics of a liability rule.

8. See PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 199 (1995) (describing future interactive technology as “a technology-packed satellite orbiting thousands of miles above Earth, awaiting 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 office receiver . . .”).

9. For example, see *Rhapsody*, at <http://www.listen.com> (last visited Feb. 28, 2005).

10. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1092 (1972).

11. *Id.* at 1105.

12. *Id.*

13. *Id.* at 1105-06.

14. See *id.*

In addition to providing a definitional framework, this model helps determine which type of rule—liability or property—should be implemented for a given entitlement. Determining which rule would foster efficiency and facilitate exchange, two main goals for a new entitlement framework, is not an exact science.¹⁵ In fact, scholars disagree as to when to prescribe a liability rule over a property rule.¹⁶ In the case of the digital performance right for sound recordings, Congress chose to implement a statutory compulsory licensing system—or liability rule.¹⁷ This differs from the property based system that traditional radio wave broadcasters were provided, which eventually spurred the creation of a private Collective Rights Organization (CRO) for managing royalty payments to composers and songwriters, which is described in further detail below.¹⁸

C. Economic Characteristics of the Market for Online Broadcasting

Although webcasting and radio wave broadcasting share certain market characteristics, they also exhibit significant differences that are important when considering how the law should impose royalties upon online music transmission. Both the Third Circuit in *Bonneville* and Congress in legislating the digital performance right for sound recordings have given great weight to preserving the traditional radio market, tending to blur the

15. *Id.* at 1093. Efficiency considerations include administration and enforcement costs, as well as maximizing social utility. *Id.* at 1093-94. Other considerations in the Calabresi and Melamed framework include distributional goals and “other justice reasons”; however, this Note focuses on efficiency analysis. *Id.* at 1098-105.

16. Calabresi and Melamed prescribe liability rules to overcome high transactions costs that hinder private exchange. *Id.* at 1119. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 91-95 (4th ed. 2003) (discussing different types of transactions costs such as search, bargaining, and enforcement costs). This comports with the Normative Coase Theorem, which states that the law should be structured so as to remove impediments to private agreements and to maximize the surplus that is gained from the voluntary exchange of property rights. COOTER & ULEN, *supra*, at 97. Professor Robert Merges argues that other circumstances, such as long-run relationships, can overcome barriers to bargaining without incurring the risks of liability rules, such as inflexibility and error in pricing. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1303-09 (1996). But see Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasian Trades*, 104 YALE L.J. 1027, 1033 (1995) (arguing that liability rules can also encourage private bargaining).

17. See 17 U.S.C. § 114(d)-(f) (2000).

18. See Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y 332, 350 (1986) (describing the creation and function of Collective Rights Organizations (CRO)).

lines between traditional and web radio;¹⁹ however, the distinct character of the online music industry should not be obscured.

One similarity between online and radio wave broadcasting is the sheer number of musical authors, works, and patrons involved. This wide scope of the broadcast industry provides for two related market characteristics: 1) high transaction costs for individual negotiations—in this case, sound recording performance licenses;²⁰ and 2) a natural economy of scale.²¹ Economies of scale are generally advantageous for producers, in this case broadcasters, because they reduce incremental costs, but scale economies also require greater coordination of inputs such as required licenses to begin business; this can be a difficult hurdle to overcome when many aspiring broadcasters are competing for the same territory.²² Even when coordination is reached, privately or through government regulation by bodies such as the Federal Communications Commission (FCC),²³ scale economies also erect high barriers into the industry and tend to reduce competition.²⁴ Such barriers to entry have rendered the traditional industry, especially traditional radio broadcast, one in which a small number of large organizations dominate the field.²⁵

19. See *Bonneville II*, 347 F.3d 485, 488 (3d Cir. 2003) (discussing mainly Congress's concern with the traditional relationship between broadcasters and the recording industry).

20. See COOTER & ULEN, *supra* note 16, at 94 (explaining that transactions costs are high when numerous parties are involved in negotiation).

21. An economy of scale is defined as "a condition of production in which the greater the level of output, the lower the average cost of production." *Id.* at 35 (discussing also the relationship between economies of scale and monopolistic markets).

22. See Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 810, 830 (1987) (discussing the use of government regulation where scale economies and the tragedy of the commons prevent coordination).

23. In radio wave broadcasting, the Federal Communications Commission (FCC) is the government body that regulates entry into the industry by providing an effective monopoly within a geographical area to prevent overcrowding. See generally, About Us, Fed. Communications Comm'n, available at <http://www.fcc.gov/aboutus.html> (last updated Sept. 14, 2004).

24. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 5 (2002); Gillette & Hopkins, *supra* note 22, at 830. A barrier to entry is "any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering." AREEDA & HOVENKAMP, *supra*, at 57-58.

25. Joseph P. Kendrick, Comment, *Does Sound Travel in Cyberspace?*, 8 J. SMALL & EMERGING BUS. L. 39, 41 (2004) (describing traditional radio broadcasting as nearing oligopoly). There has been some evidence that the consolidation of commercial radio, caused by the deregulation in the Telecommunications Act of 1996, has negatively af-

Although some market characteristics—high transaction costs and economies of scale—are similar for webcasters and terrestrial radio, the landscape of online broadcasting thus far has been significantly different because it has supported many smaller webcasters. Because webcasting does not require an FCC license, and in the past did not require sound recording licenses, the cost of webcasting on the Internet has been relatively low.²⁶ And though this flourishing landscape of small webcasters in a large, noncompetitive territory is often touted as the advantage of web radio,²⁷ it is not a static characteristic inherent in online broadcasting. As operational costs increase with inputs, such as the newly required sound recording performance licenses, coordination becomes increasingly difficult, transaction costs increase, and scale economies begin to favor larger organizations.²⁸

Such costs may be especially debilitating for web radio because it lacks a critical private institution that the radio wave market uses to systemize and manage the large volume of copyright licenses—a CRO. The three CROs in the United States are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.²⁹ CROs assemble large numbers of intellectual property owners and use their expertise in the industry to set standard bulk rate licenses through extensive negotiations.³⁰ These blanket licenses generally

fected consumers. Future of Music Coalition, *Commercial Radio Station Ownership Consolidation Shown to Harm Artists and the Public* (Nov. 18, 2002), at <http://www.futureofmusic.org/news/prradiostudy.cfm>.

26. See Eleanor Lackman, *The Silenced Minority: When the RIAA Charges College Radio for Online Broadcasts, Will the Public End Up Paying?*, 21 CARDOZO ARTS & ENT. L.J. 413 (2003) (illustrating the viability of webcasting for small college radio stations).

27. See, e.g., Joseph E. Magri, *New Media—New Rules: The Digital Performance Right and Streaming Music Over the Internet*, 6 VAND. J. ENT. L. & PRAC. 55, 55 (2003) (describing the potential for choice and variation provided to the consumer by Internet radio).

28. See Lackman, *supra* note 26, at 416-18, 420-21 (arguing that higher costs, which were subsequently lowered, would prevent college radio stations from simulcasting online).

29. Korman & Koenigsberg, *supra* note 18. SESAC, originally an acronym for Society of European Stage Authors and Composers, is now simply referred to as SESAC. See Darcie-Nicole Wicknick, *Performance Rights Societies: ASCAP or BMI?*, MUSICBIZADVICE.COM, Nov. 19, 2004, *previously at* http://www.musicbizadvice.com/feature_home.htm (copy on file with author).

30. See generally PAULA SCHEPENS, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG. (UNESCO), *GUIDE TO THE COLLECTIVE ADMINISTRATION OF AUTHOR'S RIGHTS* (2000) (explaining the role and functioning of CROs as an aid for developing

give a music user unlimited access to a CRO's licensed repertoire for a contractual period of time, in exchange for a fee based on the type of music user.³¹ In practice, a CRO works similarly to a compulsory licensing system, or liability rule, but the crucial difference is that the association's members, and not a third party, set the price menu for blanket licenses.³² Rates are also adjusted frequently through administrative procedures within the CRO.³³ Because the collective price-setting mechanisms of CROs make them prone to conflict with antitrust laws, many CROs operate under consent decrees.³⁴

As private organizations, CROs require a certain amount of energy and market need to develop. The impetus for the first CRO in the United States, ASCAP, came from Italian composer Puccini, who mentioned the importance of Italian performing rights societies to his American publisher.³⁵ His publisher then promoted the idea to colleagues, and in October 1913, eight writers, a publisher, and a lawyer met in New York City and agreed to form ASCAP.³⁶ It took ASCAP seven years after creation before revenues exceeded expenses and royalties could be distributed to members.³⁷

Radio wave and web broadcasts also create a similar product, which requires the same inputs—songs and performance licenses. For both forms of broadcasting, this product is a joint product, or one that involves re-

nations), available at http://portal.unesco.org/culture/en/ev.php-URL_ID=7784&URL_DO=DO_TOPIC&URL_SECTION=201.html.

31. For example, the radio broadcast industry pays a higher rate for licensing musical compositions than a restaurant because it is categorically a more intensive music user. Barry M. Massarsky, *The Operating Dynamics Behind ASCAP, BMI and SESAC, The U.S. Performing Rights Societies*, available at <http://www.cni.org/docs/ima.ip-works-hops/Massarsky.html> (last visited Nov. 19, 2004).

32. Merges, *supra* note 16, at 1328.

33. *Id.*

34. ASCAP operates under a consent decree which requires: (1) non-exclusive rights; (2) nondiscrimination for users; and (3) guaranteed licensing for all users. *United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950)*, amending *United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941)*. BMI also operates under a consent decree. *United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966)*. And, more recently, European CROs are preparing to defend themselves against antitrust claims. Paul Meller, *Europe to Consider Complaints About Online Music Royalties*, NYTIMES.COM, Nov. 15, 2004, at <http://www.nytimes.com/2004/11/15/technology/16musicnd.html?oref=login&oref=login>.

35. Korman & Koenigsberg, *supra* note 18. This is not surprising because established CROs existed in other countries before the founding of ASCAP. *See id.*

36. *Id.*

37. *Id.*

source interdependence.³⁸ The music, or joint product, that a consumer receives necessarily requires resources from both the broadcaster and the recording industry. This provides a high incentive for these parties to cooperate with each other.³⁹ Coupled with the relatively small number of key players in the industry, long-run relationships between these parties play an important role.⁴⁰ However, these parties can differ between terrestrial radio wave broadcasters and web broadcasters. One of the key players for terrestrial radio wave broadcasts has been the advertisers, who have provided much of the funding that sustains the terrestrial wave broadcasts' free nonsubscription format.⁴¹ This option is available for some webcasters, but the differences in broadcasting have left Internet advertising for broadcasting an underdeveloped model.⁴² This illustrates that these industries may be similar, but the dynamics and relationships involved are not the same.

The divide between digital and analog broadcasts has traditionally been based in the nature of the product—including its large geographic scope and the consumer's ability to make infinite, perfect copies of digital music.⁴³ This divide may be shrinking as multinational radio conglomerations such as Clear Channel increase their geographic scope, and digital rights management technologies make digital products more difficult to reproduce.⁴⁴ Still, other market differences described above should be

38. See generally Terje Gaustad, *Joint Product Analysis in the Media and Entertainment Industries: Joint Value Creation in the Norwegian Film Sector*, in MEDIA FIRMS: STRUCTURES, OPERATIONS, AND PERFORMANCE 11, 21-22 (Robert G. Picard ed., 2002) (describing joint products in music); Jonathan David Tankel & Wenmout Williams, Jr., *Resource Interdependence: Radio Economics and the Shift from AM to FM*, in MEDIA ECONOMICS: THEORY AND PRACTICE 157 (Alison Alexander et al eds., 1993) (describing resource interdependence as a model for the radio wave broadcast industry).

39. See Gaustad, *supra* note 38, at 12 (describing cooperation among the motion picture industry).

40. See generally COOTER & ULEN, *supra* note 16, at 225-35 (describing long-run relationships).

41. See Thomas H. White, UNITED STATES EARLY RADIO HISTORY, *Financing Radio Broadcasting (1898-1927)*, at <http://earlyradiohistory.us/sec020.htm> (last visited Feb. 28, 2005) (explaining how "advertising-supported private stations became the standard for U.S. broadcasting stations").

42. See Magri, *supra* note 27 (discussing the potential for advertising to fund Internet music); see also Lackman, *supra* note 26, at 416 (explaining that soliciting advertising is not a viable option for college radio stations and their webcasts).

43. See Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 103-29 (2002/2003) (discussing the shift from analog to digital technology).

44. See generally Adam J. van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire*, 88 MINN. L. REV. 627 (2004); *Digital Rights*

considered when developing a system of exchange and enforcement for a new copyright entitlement, such as the digital performance right for sound recordings.

II. LEGAL BACKGROUND: EVOLUTION OF THE DIGITAL PERFORMANCE RIGHT FOR SOUND RECORDINGS AND ITS EXEMPTIONS

The digital performance right for sound recordings is relatively new, established only in 1995. Today's version of the right developed gradually as Congress successively added many intricate amendments to the Copyright Act. This Part delineates the history of this right and illustrates how it has become so complex.

A. The Beginning of Sound Recordings and Their Limited Rights

In 1908, the U.S. Supreme Court first recognized the category of "sound recordings" as distinct from musical compositions when considering questions of copyright protection.⁴⁵ This recognition, however, was followed by a long period where Congress resisted extending any rights to sound recording owners, a gap in the copyright scheme so striking that Professor David Nimmer described it as "historical anomaly."⁴⁶ It took over sixty years and the threat of record piracy before Congress finally gave federal copyright protection to sound recordings in the Sound Recording Act of 1971.⁴⁷

The Sound Recording Act established only limited protection because it lacked a public performance right.⁴⁸ In 1971, copyright owners for other creative works enjoyed the exclusive right to public performance or dis-

Management, WIKIPEDIA: THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/Digital_rights_management (last modified Feb. 8, 2005).

45. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (holding that the perforated rolls used to make the sounds of a musical work in a mechanical piano are separate from the underlying musical work). Today, sound recordings are defined as:

works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

17 U.S.C. § 101 (2000).

46. See David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000).

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

48. See *id.*

play.⁴⁹ But Congress opted not to include this right in the Sound Recording Act because it considered a public performance right unnecessary to accomplish the Act's purpose of protecting against record piracy.⁵⁰ The limited scope of the Sound Recording Act was partly due to intense lobbying from the radio broadcast industry, which preferred to continue broadcasting performances of sound recordings without paying a royalty.⁵¹

When Congress amended the Copyright Act again in 1976, the recording industry and the Copyright Office advocated adding a public performance right for sound recordings.⁵² Although the 1976 Act amended the public performance right generally, Congress still refused to extend that right to sound recordings and retained the same provisions as in the 1971 Act.⁵³ So the Copyright Act remained without a public performance right for sound recordings until 1995.

B. The Digital Performance Right in Sound Recordings Act

The Digital Performance Right in Sound Recordings Act ("DPSRA") first introduced a narrow public performance right for sound recordings in 1995.⁵⁴ Responding to the new threat of piracy from the digital revolution of the 1990s, this amendment to the Copyright Act granted copyright protection to public performances by certain *digital* audio transmissions, and thus created a new source of royalties for the recording industry.⁵⁵ However, concerned with maintaining the existing relationship between traditional radio broadcasters and the recording industry, Congress included three exemptions to the performance right in the DPSRA for direct transmissions:

49. See generally ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 438-42 (3d ed. 2003) (discussing public performance and display rights, which have also morphed as the Copyright Act was amended).

50. H.R. Rep. No. 104-274, at 11 (1995) (explaining that sound recordings "were not granted the right of public performance . . . on the presumption that the granted rights would suffice to protect against record piracy"); see also Pub. L. No. 92-140, 85 Stat. 391 (1971) (expressing the purpose of the amendment as "protecting against unauthorized duplication and piracy of sound recording . . .").

51. Zerounian, *supra* note 3, at 49.

52. See Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 *CARDOZO ARTS & ENT. L.J.* 733, 737-39 (1996).

53. *Id.*

54. Pub. L. No. 104-39, 109 Stat. 336 (1995). The Act added a subsection to 17 U.S.C. § 106 that gives copyright owners the right, "in the case of sound recordings, to perform [or authorize] the copyrighted work publicly by means of a digital audio transmission." *Id.*

55. See H.R. Rep. No. 104-274, at 12-13.

- i) a nonsubscription transmission other than a retransmission,
- ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or
- iii) a nonsubscription broadcast transmission.⁵⁶

The purpose of these technical exemptions, whose application confused many, was to avoid imposing new burdens on established broadcasters that lawmakers reasoned “often promote, and appear to pose no threat to, the distribution of sound recordings.”⁵⁷ Instead, Congress intended the DPSRA to target the threat posed by new Internet broadcasters, especially interactive services, where end users could potentially obtain perfect copies of any song.⁵⁸ This legislation was a “perfect idea” as far as politics was concerned: established key players such as the broadcasters, recording industry, and collective rights organizations were content that the status quo was maintained, while new copyright protections brought added revenue to the recording industry from new Internet companies that wielded little political power at the time.⁵⁹

C. Amending the Digital Performance Right: The Digital Millennium Copyright Act

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to further confront digital piracy.⁶⁰ The DMCA modified the new digital public performance right for sound recordings by eliminating the first two of the three DPSRA exemptions for direct transmissions described above, leaving intact only the exemption for “a nonsubscription broadcast transmission.”⁶¹ Congress intended these deletions to simplify the exemption to the digital performance right, in an effort to clarify any confusion with application of the DPSRA. Congress explained that the

56. 17 U.S.C. § 114(d)(1)(A) (2000). Other exemptions for retransmissions, not quoted here, are also created by the DPSRA. *Id.* § 114(d)(1)(B).

57. H.R. Rep. No. 104-274, at 14.

58. *Id.*

59. Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 12 HASTINGS COMM. & ENT. L.J. 1, 11 (2001).

60. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.); see also H.R. Rep. No. 105-796, at 79-80 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 655-56 (explaining the purpose and scope of the DMCA’s changes to 17 U.S.C. § 114).

61. Pub. L. No. 105-304, § 405, 112 Stat. at 2890 (1998) (codified at 17 U.S.C. § 114).

deletion eliminated exemptions that “were either the cause of confusion as to the application of the DPSRA to certain nonsubscription services (especially webcasters) or which overlapped with the other exemptions (such as the exemption in subsection (A)(iii) for nonsubscription broadcast transmissions).”⁶² It also emphasized that this change was not intended to affect the remaining exemption for “nonsubscription broadcast transmissions.”⁶³

Despite Congress’s effort to improve the law’s clarity with its amendments, many parties remained unhappy or unclear as to their obligations. Specifically, small webcasters voiced concern with the proceedings for determining statutory licenses, which led to further legislation such as the Small Webcaster Settlement Act of 2002⁶⁴ and the Copyright Royalty and Distribution Reform Act of 2004.⁶⁵ At the same time, the recording industry and established radio broadcasters disagreed on the interpretation of the one remaining exemption to the digital performance right for sound recordings as it applied to AM/FM webcasts. The recording industry demanded royalties while the broadcasters maintained that they were exempt. This dispute led to *Bonneville*.

III. *BONNEVILLE INT’L CORP. V. PETERS*

A. Facts and Procedural History

The *Bonneville* case arose from a challenge to a rulemaking on the digital sound recording performance right by the Copyright Office.⁶⁶ In March of 2000, the Recording Industry Association of America (RIAA) petitioned the Copyright Office to clarify whether AM/FM webcasting was exempt from paying a digital audio performance royalty.⁶⁷ This inquiry turned on whether AM/FM webcasting qualified as a “nonsubscription broadcast transmission,” the remaining exemption to the right codified at § 114(d)(1)(A).⁶⁸ In response to this request, the Copyright Office published a Proposed Rulemaking for comment.⁶⁹ In December of 2000,

62. H.R. Rep. No. 105-796, at 80 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 656.

63. *Id.*

64. Pub. L. No. 107-321, 116 Stat. 2780 (2002) (codified at 17 U.S.C. § 114(f)(5)); *see also* David Nimmer, *Codifying Copyright Comprehensively*, 51 UCLA L. REV. 1233, 1339-43 (2004) (discussing the Small Webcaster Settlement Act of 2002).

65. Pub. L. No. 108-419, 118 Stat. 2341 (2004) (to be codified at 17 U.S.C.).

66. For a discussion of the implications of the Copyright Office as a rulemaking authority, *see* Zerounian, *supra* note 3.

67. *Bonneville II*, 347 F.3d 485, 489-90 (3d Cir. 2003).

68. *Id.*

69. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 14,227 (Mar. 16, 2000). Commentators included many broadcasters, collective

the Copyright Office promulgated a finalized rule establishing that AM/FM webcasting was not exempt from paying public performance royalties.⁷⁰ This prompted the plaintiffs, the National Association of Broadcasters (NAB) and some of its members (collectively "Broadcasters"), to seek judicial review of the Copyright Office's decision.⁷¹ The RIAA, also interested in this litigation, joined the case as an intervenor-defendant.⁷²

The district court held that the Copyright Office's rulemaking was due judicial deference and accordingly upheld it.⁷³ The court assessed the scope of the exemption in § 114(d)(1)(A) and found it, at best, ambiguous.⁷⁴ This authorized the Copyright Office to reasonably interpret the exemption in its capacity as administrator of the statutory licensing scheme.⁷⁵ The court also concluded that the Copyright Office's interpretation of § 114(d)(1)(A) was reasonable.⁷⁶ Thus, the district court upheld the Copyright Office's rule and granted summary judgment to the defendants.⁷⁷ The broadcasters subsequently filed an appeal.

B. The Third Circuit's Analysis

The Third Circuit affirmed the district court's decision.⁷⁸ It declined to determine whether the district court used the correct standard for deference, and it held instead that the Copyright Office's interpretation of § 114(d)(1)(A) was correct regardless of the level of deference the court

rights organizations, the RIAA, DiMA, and others. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000).

70. *Bonneville II*, 347 F.3d at 490.

71. *Id.* The National Association of Broadcasters (NAB) originally asked the Copyright Office to suspend its rulemaking as the NAB sought declaratory judgment from a federal district court of New York that AM/FM webcasting was exempt from public performance royalties. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 770 (2001) [hereinafter *Bonneville I*]. That suit was dismissed and the Copyright Office did not suspend its proceedings. *Bonneville II*, 347 F.3d at 490.

72. *Bonneville II*, 347 F.3d at 490.

73. *Bonneville I*, 153 F. Supp. 2d at 773. The court based its analysis on the two-pronged *Chevron* test for determining whether an agency action warrants judicial deference. This test first directs a court to determine whether Congress's unambiguously expressed its intent in regard to the issue before it. If, however, Congress's intent was silent or ambiguous, the court must determine whether the agency's interpretation was reasonable. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council Inc.*, 467 U.S. 837, 842-45 (1984)).

74. *Id.* at 779.

75. *See id.*

76. *See id.*

77. *Id.* at 784-85.

78. *Bonneville II*, 347 F.3d 485, 486 (3d Cir. 2003).

accorded.⁷⁹ The court came to this conclusion through statutory interpretation that included analyzing the plain meaning of the exemption in § 114(d)(1)(A), the meaning of that exemption in light of other portions of § 114, and the legislative history of the exemption.

1. *Plain Meaning of § 114(d)(1)(A)*

The Third Circuit defined the necessary factors for exempting a webcaster from the performance right by parsing the terms of § 114(d)(1)(A).⁸⁰ It determined that AM/FM webcasting would be exempt from the digital audio performance copyright if it was: (1) noninteractive, (2) nonsubscription, and (3) broadcast.⁸¹ Because both parties agreed that AM/FM webcasting is not interactive or subscription, the crux of the dispute became whether AM/FM webcasting is a “broadcast transmission.”⁸²

The court defined “broadcast transmission” by looking to its definition in 17 U.S.C. § 114(j)(3): “a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.”⁸³ Its application of this definition focused on whether “broadcast station” refers to the broadcasting entity as a whole or a discrete, physical broadcasting facility.⁸⁴ If “broadcast station” referred to the entity, as the broadcasters argued, then established radio stations would be exempt from the digital public performance royalty by their very nature.

Agreeing instead with the Copyright Office, the Third Circuit held that a “broadcast station” refers to a physical broadcasting facility.⁸⁵ It found that a “terrestrial” station more plausibly refers to an earthbound facility, distinguished from satellites—and not an earthbound business or entity.⁸⁶ The broadcasters countered by arguing that physical buildings are not “licensed as such by the [FCC],” but the court disagreed, finding only a “superficial appeal” in this argument.⁸⁷ Finally, the court noted that using

79. *Id.* at 490. The Third Circuit considered standards of deference given by *Chevron*, 467 U.S. at 837, and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Bonneville II*, 347 F.3d at 486.

80. Section 114(d)(1) states, “The performance of a sound recording publicly by means of a digital audio transmission, *other than as a part of an interactive service*, is not an infringement of section 106(6) if the performance is part of—(A) a *nonsubscription broadcast transmission*.” 17 U.S.C. § 114(d)(1) (2000) (emphasis added).

81. *Bonneville II*, 347 F.3d at 491.

82. *Id.* at 491-92.

83. *Id.* at 492.

84. *Id.*

85. *Id.* at 495.

86. *Id.* at 493.

87. *Id.* at 494.

“broadcast station” to refer to the broadcasting entity would make the exemption overly broad, allowing any radio station with at least one FCC-licensed station to have “carte blanche to digitally perform recordings via any conceivable transmission medium.”⁸⁸

2. *Interpreting § 114(d)(1)(A) in Light of Other Portions of § 114*

Next, the court considered other portions of § 114 to assess which interpretation of § 114(d)(1)(A) provided harmony within the statute. Specifically, the court considered § 114(d)(1)(B), which exempts certain retransmissions from the digital audio performance right.⁸⁹ This exemption refers to retransmission by “a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the [FCC].”⁹⁰ This bolstered the court’s ruling that “broadcast station” referred to the physical station because § 114(d)(1)(B) listed “broadcast station” with other physical facilities (translators and repeaters).⁹¹ Further, § 114(d)(1)(B) used “licensed by the [FCC]” to modify those other physical facilities, diminishing the argument that a physical facility cannot be “licensed.”⁹²

Section 114(d)(1)(B) also limits the exemption for retransmission of a nonsubscription broadcast to a radius of 150 miles. The Third Circuit agreed with the district court’s analysis, stating that it would make little sense “to exempt AM/FM webcasting, which is global in nature, while simultaneously limiting retransmission to a 150-mile radius.”⁹³ Thus, the court held that the more harmonious reading of § 114 is to not exempt AM/FM webcasting from the digital audio performance right.

3. *Legislative History of § 114*

Finally, the court looked to the legislative history of the DPSRA and DMCA to complete its statutory interpretation of § 114(d)(1)(A). The court noted that Congress, in knowing opposition to the comprehensive performance right preferred by the Copyright Office, intended to create “*a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.*”⁹⁴ The court reasoned that Congress’s purpose for this narrow exemption was to avoid “new and unrea-

88. *Id.* at 493.

89. *Id.* at 495.

90. 17 U.S.C. § 114(d)(1)(B) (2000).

91. *Bonneville II*, 347 F.3d at 495-96.

92. *Id.* at 496.

93. *Id.*

94. *Id.* at 497 (citing S. Rep. No. 104-128, at 13 (1995) (emphasis in original)).

sonable burdens on radio and television broadcasters.”⁹⁵ But the court found that this concern was directed specifically at traditional over-the-air broadcasts and not AM/FM webcasting.⁹⁶

The court also looked to the DMCA, which deleted two prior exemptions to the DPSRA. When making these deletions, Congress expressly stated that “the digital sound recording performance right applies to non-subscription digital audio services such as webcasting.”⁹⁷ However, this language did not specifically address the question of nontraditional transmissions by traditional broadcasters. The broadcasters argued that the exemption was for “broadcasting *and related transmissions*,” but the Third Circuit remained unconvinced.⁹⁸ It instead held that the exemption was meant to protect over-the-air broadcasts, whether in a “digital or nondigital format.”⁹⁹ Thus, the court maintained that Congress’s intended exemption was narrow—to protect only the symbiotic relationship between *established* over-the-air radio broadcasts and the recording industry.

IV. DISCUSSION

The Third Circuit in *Bonneville* reached the correct result on both legal and policy bases by carefully following the direction and intent of the legislature embodied in § 114(d)(1)(A) and extending the performance right to AM/FM webcasters. Considering the symbiotic relationship between radio broadcasters and recording companies that influenced the exemptions to the digital performance right, the court reasonably determined that AM/FM webcasting was not intended to be exempt from the digital performance royalty.¹⁰⁰ Although the limited holding in this case withstands analytic scrutiny, questions remain about the prudence of the immensely complex statutory licensing system that implements the digital public performance right.

A. AM/FM Webcasting Survives the *Bonneville* Decision

In *Bonneville*, the Third Circuit properly gave a narrow construction to the § 114(d)(1)(A) exemption for a “nonsubscription broadcast transmission.”¹⁰¹ In essence, the court determined that this exemption was meant to apply solely if established radio broadcasters decide to upgrade their *ter-*

95. *Id.* (citing S. Rep. No. 104-128, at 15).

96. *Id.* at 499.

97. H.R. Rep. No. 105-796, at 80 (1998).

98. *See Bonneville II*, 347 F.3d at 498.

99. *Id.* at 498 (citing S. Rep. No. 104-128, at 19).

100. *Id.* at 490.

101. *See id.*

restrial analog broadcast technology to digital technology.¹⁰² This interpretation is prudent because it takes a step toward a “level playing field” for webcasters with regard to royalty obligations for the music they transmit.¹⁰³ *Bonneville* was not just a case of radio broadcaster versus recording industry; had radio broadcasters won this battle, they would have also gained a large advantage over non-radio station webcasters.¹⁰⁴ Congress added the § 114(d)(1)(A) exemption so that the new digital performance right would not disrupt the well-established radio broadcasting industry—not to create new advantages for radio broadcasters online.¹⁰⁵ Of any webcaster, large and politically powerful radio broadcast stations seem the least justifiable beneficiaries of such a competitive advantage. The court denied this advantage, effectively making public performance royalties universal to all webcasters.¹⁰⁶

Despite earlier predictions that *Bonneville* would be the death knell for AM/FM webcasting,¹⁰⁷ a significant portion of radio stations still provide a “listen live” option on their websites.¹⁰⁸ There are many reasons, including infrastructure, personnel, and additional exposure to liability, that may explain why all radio stations do not provide AM/FM webcasts,¹⁰⁹ but AM/FM webcasting is far from dead. Without further study, it is unclear whether any characteristics of a radio station correlate with providing an AM/FM webcast. A wide variety of AM/FM webcasts are available, including popular commercial stations, public radio stations, college radio

102. See *id.*

103. See Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4, 18 (1998), available at <http://www.kohnmusic.com/articles/newprimer.html>.

104. See *id.*

105. See H.R. Rep. No. 104-274, at 14 (1995).

106. See *Bonneville II*, 347 F.3d at 490.

107. See, e.g., Farzami, *supra* note 3, at 215. These predictions also foretold an easier adjustment to the royalty requirement for small webcasters that had the flexibility to adapt their business models; however, adjustment has yet to be attained as small webcasters continue to fight difficult battles before Congress. See, e.g., DiMA, at <http://www.digmedia.org/content.cfm?id=7206> (last visited Jan. 25, 2005) (listing the organization’s participation in legislation concerning small webcasters and royalties).

108. See Radio-Locator, at <http://www.radio-locator.com/cgi-bin/locate?select=city&city=94704&state=&sid=&x=0&y=0> (last visited Dec. 20, 2004) (providing a search function that creates a list of streaming sites and their signal strength in your area). According to Radio-Locator, twenty-four of sixty-five radio stations provide AM/FM webcasts within close listening range of Berkeley, California, on December 20, 2004. *Id.*

109. See generally PEGGY MILES, *INTERNET WORLD GUIDE TO WEBCASTING: THE COMPLETE GUIDE TO BROADCASTING ON THE WEB* (1998) (discussing business opportunities and costs in webcasting).

stations, news/talk stations, and religious stations.¹¹⁰ Like terrestrial broadcasts, it also seems that stations' financing of AM/FM webcasting varies: some websites ask for contributions from listeners, some thank corporate contributors, and some provide no information.¹¹¹ Because the ability to webcast is a relatively new phenomenon, it may simply take time before other stations provide AM/FM webcasts. In any case, it seems royalty costs are not prohibiting a number of various radio stations from providing an AM/FM webcast.

B. The Bigger Picture: Reconsidering the Liability Rule and Refocusing on its Purpose

Although the court interpreted § 114(d)(1)(A) correctly and AM/FM webcasting has survived the Copyright Office's rulemaking, *Bonneville* does not address whether the liability-based compulsory licensing system for digital performance rights in sound recording created through the DPSRA and its various amendments serves the needs of the stakeholders in the first place. Congress chose to institute a compulsory licensing scheme, presumably to facilitate licensing and develop a healthy market for music transmission online where private negotiations would otherwise have been difficult.¹¹² But, it seems the purpose of this liability system—to *simplify* exchange—has been lost somewhere between amendments. Congress's back and forth attempts to use information from opposing industry lobbyists, such as the broadcasters and RIAA, in determining the proper copyright scheme has created a "Frankenstein."¹¹³

Even assuming that a liability system was necessary to overcome the barriers to bargaining in online broadcasting at the outset of the digital performance right, this complex scheme provides a great example of the risks to avoid when implementing such a liability system. The goal of a liability system is to create exchange where there otherwise would be none due to market failures.¹¹⁴ But this system has left parties either pursuing further legislation, like the Small Webcaster Settlement Act of 2002,¹¹⁵ or

110. See Radio-Locator, *supra* note 108.

111. See e.g., 106 KMEL: Hip Hop & R&B, at <http://www.kmel.com/main.html> (last visited Mar. 18, 2005); KALX 90.7 FM Berkeley, at <http://kalx.berkeley.edu> (last visited Mar. 18, 2005); KQED Public Radio, at <http://www.kqed.org/radio> (last visited Mar. 18, 2005).

112. See Calabresi & Melamed, *supra* note 10, at 1119 (discussing that liability rules should be used to overcome transactions costs).

113. Nimmer, *supra* note 46, at 189.

114. Calabresi & Melamed, *supra* note 10, at 1119.

115. See, e.g., Pub. L. No. 107-321, 116 Stat. 2780 (2002) (codified at 17 U.S.C. § 114(f)(5)).

litigation against the results, as in *Bonneville*.¹¹⁶ The procedures for determining licensing fees are difficult to comprehend, slow to change, and many parties still complain about inadequate pricing.¹¹⁷ Furthermore, judicial deference to the Copyright Office's arbitration proceedings makes successfully challenging any incorrect pricing difficult.¹¹⁸

It has been nearly ten years since the passage of the DPSRA and nearly seven since the DMCA, yet questions about the administration of the statutory licensing system are just beginning to be answered by the courts, through cases such as *Bonneville* and *Beethoven.com*,¹¹⁹ and legislation, through acts such as the Copyright Royalty and Distribution Reform Act of 2004.¹²⁰ While the historical context is different, even privately organized ASCAP, built from the ground up, outdid this result by completing coordination and distributing profits in about seven years.¹²¹

Although there are great sunk costs in the time spent on the statutory compulsory licensing scheme, one possible solution would be to encourage the creation of a CRO or the expansion of existing CROs to include record labels and exchange of sound recording performance licenses. Currently, obtaining statutory licenses is more difficult than obtaining a license from a CRO, which still leaves large radio stations—with the resources to pursue these licenses—with the very competitive advantage on the broadcasting side that the rule in *Bonneville* sought to avoid for sound recording licenses.¹²² Also, because negotiations have largely been with Congress or the Copyright Office, and not between interested industry parties, diminished intra-industry communication seems to be hindering the coordination necessary to “jump-start” the online broadcast industry. Such a start often requires more ephemeral characteristics than a statutory scheme can provide. For example, the credibility or charisma of a person or entity beginning a private standard or scheme can create momentum for

116. See, e.g., *Bonneville II*, 347 F.3d 485, 485 (3d Cir. 2003).

117. See, e.g., *Beethoven.com v. Library of Congress*, No. 02-1244, 2005 U.S. App. LEXIS 667, at *1 (D.C. Cir. Jan. 14, 2005) (illustrating dissatisfaction with pricing and the timeline for challenging such procedures); see also *Merges*, *supra* note 16, at 1303-09 (1996) (arguing that the risks of inflexible and incorrect pricing by liability rules should be avoided if possible).

118. See *Beethoven.com*, 2005 U.S. App. LEXIS 667, at *34-*35.

119. See *id.*; *Bonneville II*, 347 F.3d at 486-87.

120. Pub. L. No. 108-419, 118 Stat 2341 (2004) (to be codified at 17 U.S.C.).

121. Korman & Koenigsberg, *supra* note 18.

122. See Kohn, *supra* note 103, at 22-23.

a burgeoning industry.¹²³ The beginnings of this phenomenon are visible in the marketing of iTunes, where previously untrusting musicians overcame their fear of piracy and provided licenses to their songs because they trusted Apple and Steve Jobs.¹²⁴ Thus, private negotiations over a new copyright licensing system may allow a forum for interaction in which industry members can find the right messenger to create momentum for a solution to the challenge posed by online music transmission. The time and frustration spent dealing with Congress and its statutory licensing scheme, as well-intentioned as the system may be, likely detracts from the energy in the broadcast and music industries that might afford this momentum.

The online broadcast industry is a good candidate for the successful implementation of a CRO, given market characteristics like the importance of cooperation and long-run relationships. Since CROs are now established in music publishing, it would likely take less time to negotiate blanket licenses for digital public performance rights under this scenario. This is not to say that a private exchange system would be problem-free. A CRO is likely to require regulation under antitrust law. Nonetheless, the cost of enacting the requisite legal framework to support the creation or expansion of a CRO for sound recording performance licenses is likely to be limited because existing consent decrees for ASCAP and BMI can provide models for behavior to avoid.¹²⁵ In hindsight, perhaps a property rule at the outset of the new digital performance right for sound recordings would have left private parties confused and unable to bargain or implement a CRO due to transaction costs.¹²⁶ But the liability system, specifically imposed to facilitate bargaining, is also unimpressive. In any case, the question now will be whether Congress and stakeholders will continue to pursue perfection of the statutory system, or whether they will instead turn to private methods.

There are signs of moving toward privatizing webcasting licensing despite the current statutory scheme. ASCAP has signed a deal with the Radio Music License Committee, which represents most of the nearly 12,000

123. See Korman & Koenigsberg, *supra* note 18 (describing the momentum created by the energy and credibility that Puccini and his associates offered to the creation of ASCAP).

124. See Walter S. Mossberg, *The Music Man*, WALL ST. J., June 14, 2004, at B1.

125. See *United States v. BMI*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966); *United States v. ASCAP*, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950), *amending* *United States v. ASCAP*, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

126. See Calabresi & Melamed, *supra* note 10, at 1119.

U.S. commercial radio stations.¹²⁷ Although this is a small portion of Internet broadcast music, it may signal a trend towards the use of CROs like ASCAP for digital public performance rights. Until this point, Congress's time legislating the digital performance right for sound recordings, the music industry's time lobbying for legislation, and everyone else's time attempting to understand the statutory scheme produced little that is helpful at best. And at worst, the complex statutes developed from this effort will become obsolete and difficult to deal with in the future. Thus, whether or not private mechanisms develop independently, Congress should either encourage privatization or at least pursue a simpler liability system that could support meaningful exchange of sound recording performance licenses to minimize further costs to the online music industry. Hindsight is a wonderful lens for such analyses, but it is likely that debate over the choice of legal rules is not over for webcasting, and thus hindsight may yet serve us in planning for the future.

C. Glimpses of the Future: The Impact of the Nature of Legal Entitlements and Licensing for Webcasting

Now that Congress has committed to providing a limited public performance right for sound recordings, it seems only a matter of time before the industry finds a way to efficiently manage intellectual property rights. Perhaps statutory licensing procedures will become more routine as industry lobbyists finally come to an acceptable compromise, possibly through legislation that refines arbitration procedures for statutory licenses.¹²⁸ Or, private CRO models will be expanded or created for digital rights management of sound recordings, which seems more likely given the characteristics of online music and the success of CROs in managing performing rights for traditional broadcasting. Once these types of institutions become regularized, the nature of the online broadcast market will become clearer. For example, one developing question is whether online webcasting will be pushed further toward oligopoly, like terrestrial radio, or whether differences in regulation will allow online broadcasting to become more competitive and to expand choice.¹²⁹ Current decisions about the nature of new copyright rules and institutional procedures for licensing will likely

127. Reuters, *Music Publishers Sign Deal on Web Radio*, MSNBC NEWS, Oct. 18, 2004, available at <http://msnbc.msn.com/id/6274640>.

128. See Pub. L. No. 108-419, 118 Stat 2341 (2004) (to be codified at 17 U.S.C.).

129. See Magri, *supra* note 27 (describing the possibilities in choice provided by Internet radio); Kendrick, *supra* note 25, at 41 (describing traditional radio broadcasting as nearing oligopoly).

affect this outcome, illustrating the importance of analyzing the broader legal landscape for webcasting now.

V. CONCLUSION

The holding in *Bonneville* was consistent with the intent of the public performance right in digital sound recordings and was prudent for the online broadcasting industry in light of the need to provide a level playing field for the industry's future development. Established radio stations have now proven, despite prior skepticism, that they are able to adapt to new technology and the new copyright protection that accompanies it. It is important that Congress does not underestimate this ability to adapt when it considers accommodating established interests such as the broadcast industry in the future. Furthermore, Congress should not allow lobbying to overpower the first priority for any liability system: to facilitate mutually beneficial exchange. This is only the beginning for online broadcasting. As more questions regarding the stability of the copyright framework for webcasting arise in the future, discussions should focus on supporting innovation and capturing possibilities, instead of applying the ill-suited models of traditional broadcasting.