

# LET IT BE? THE CHALLENGES OF USING OLD DEFINITIONS FOR ONLINE MUSIC PRACTICES

*By Joshua Keesan*

## I. INTRODUCTION

The music industry, once robust and profitable, is in the midst of a crisis. Its prevailing business model struggles to keep up with changing technology in a world in which the Internet has become music's central medium. More consumers are listening to music on the web than ever before, mostly in the form of streaming web radio stations and digital downloads of their favorite artists. For example, about fifty-five million Americans listen to internet radio every week, up twenty-six percent from last year alone.<sup>1</sup> This shift away from traditional music channels, such as radio stations and record stores, has forced the industry to completely re-conceptualize its business model. Record labels, publishers, and artists are struggling to earn a profit in the music industry's new online age.

The intellectual property rights attached to music have always been complex because every song actually contains two separate protectable works: the underlying musical composition and the sound recording. Consequently, various separate and distinct rights organizations have formed to collect royalties and licensing fees for each of the rights embodied in a single song. These organizations formed with generally shared understandings of the various ways music could be used and the rights that those uses implicated. As the Internet becomes music's primary medium, however, new uses have arisen for which the old definitions do not so directly apply. Consequently, this system of rights administration has become ever more complex.

This Note offers an understanding of the current system of internet music-rights administration in light of recent case law and developments in industry practices in the digital space. Part II will serve as a primer on the basics of music copyright, explaining the divergent rights involved in a piece of music and tracing the development of the collective rights organizations that formed to administer these rights. Part III will provide a background on two major points of controversy in the area of digital rights for music: 1) the problem of "double dipping" as it has arisen in the context of downloads and online streaming and 2) the issue of how much the licenses

---

© 2008 Joshua Keesan.

1. Shaun Assael, *Online and on the Edge*, N.Y. TIMES, Sept. 23, 2007, at Arts 32.

and royalties should cost for internet-based purveyors of music. Part IV will explain the current status of these issues, as reflected in recent litigation and policy-making decisions. This Note will conclude, in Part V, with an exploration of how the record labels and collective rights agencies could make vital changes to their business models in order to remain current, and how such changes would function within the new understandings of online music licensing.

## II. COPYRIGHT AND MUSIC: STATUTORY FRAMEWORK

This Part will explain the basics of music copyright law, including in particular a discussion of the various rights embodied within a single song. It will then examine the various organizations that formed to administer each of these rights.

Under copyright law, a musical recording includes two works: a “musical composition” and a “sound recording.”<sup>2</sup> The “musical composition” is the underlying composition of a song, such as the sequence of notes and rhythms put together by the songwriter. A “sound recording” is a recorded performance of a musical work. It is a “fixation of sounds, including a fixation of a performance of someone playing [and/or] singing a musical work.”<sup>3</sup> The song’s composer and lyricist own the musical composition copyright jointly, but they typically assign this right to a publishing house, which manages all rights and royalty distribution.<sup>4</sup> Likewise, the artist’s record label, not the artist himself, typically owns the song’s sound recording right.<sup>5</sup>

Under § 106 of the Copyright Act, the holder of each of these rights has the exclusive rights to, among others, reproduce the song and perform the song publicly (either as a live performance or by means of audio transmission).<sup>6</sup> There are, however, exceptions to the exclusivity of these rights. The holder of the copyright in the musical composition is required to license the composition to anyone who wants to use it in a “phonorecord” (a term defined in § 115 of the Copyright Act as “material objects in which sounds . . . are fixed . . . and from which the sounds can be per-

---

2. 17 U.S.C. §§ 102(a)(2), (7) (2000).

3. R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies*, 55 U. MIAMI L. REV. 237, 241 (2001). The sound recording right is designated as ©.

4. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 206-11 (6th ed. 2006).

5. Congress created this “sound recording” copyright in 1972, in an effort to curtail music piracy. See PASSMAN, *supra* note 4, at 309.

6. 17 U.S.C. § 106 (2000).

ceived, reproduced, or otherwise communicated”) and at a price set by the Copyright Office.<sup>7</sup> This is known as a mechanical compulsory license, and it is what will allow any other artist to make a “cover” recording of the song, that is, to create a new version of a pre-existing musical composition with different musicians.<sup>8</sup> Most musicians who wish to cover a song will likely negotiate the compulsory license through the Harry Fox Agency (HFA).<sup>9</sup> HFA formed in 1927 to administer the musical composition reproduction right.<sup>10</sup> It is the largest such agency in the nation and deals primarily with music publishers, who tend to own the copyright in the musical composition. The National Music Publisher’s Association established HFA to deal specifically and solely with the administration of the reproduction and distribution right for musical compositions.<sup>11</sup> Traditionally, reproduction and distribution licenses only addressed rights for musical compositions, not sound recordings. Thus, if someone wished to include (and distribute) Whitney Houston’s recording of “I Will Always Love You” on a CD compilation, he would need to license the composition from HFA, and also obtain permission directly from the sound recording rights-holder, who would be allowed to charge whatever she wished.<sup>12</sup> The costs of the compulsory mechanical licenses are set by statute, and the HFA charges an additional processing fee of \$15 for each composition licensed.<sup>13</sup>

Licensing the right to reproduce and distribute a song on a CD compilation is entirely separate from the right to publicly perform a copyrighted work. Public performance, under the Copyright Act, is “to perform or display [a work] at a place open to the public . . . or to transmit or otherwise communicate a performance or display of the work . . . to the public by means of any device or process.”<sup>14</sup> Public performance, unlike reproduction, does not carry a compulsory license.<sup>15</sup> In the early years of the twen-

---

7. 17 U.S.C. § 115 (2000).

8. Reese, *supra* note 3, at 242.

9. *Id.* at 243.

10. Harry Fox Agency, About HFA, <http://harryfoxagency.com/public/HFA.jsp> (last visited Jan. 24, 2008).

11. *Id.*

12. Reese, *supra* note 3, at 243. This permission is also known as the “master use” right. *Id.*

13. Harry Fox Agency, Frequently Asked Questions, <http://harryfoxagency.com/songfile/faq.html> (last visited Jan 24, 2008). The current statutory rate is \$0.091 per song per unit for compositions up to five minutes in length. For compositions over five minutes in length, the rate increases by \$0.0175 per minute or fraction thereof. *Id.*

14. 17 U.S.C. § 101 (2000).

15. Reese, *supra* note 3, at 245.

tieth century, performing rights societies formed to administer the public performance rights of a musical composition. These societies were created to address the impossibility of artists being able to bargain with every single place of public accommodation and media entity that wished to play their songs.<sup>16</sup> Songwriters' rights are usually held by their publishers, who contract with the performing rights societies to license these public performances, and in turn, to dole out blanket licenses to the organizations that engage in public performances, such as radio stations and restaurants.<sup>17</sup> The American Society of Composers and Publishers (ASCAP) is the largest such organization in the United States. ASCAP formed in 1914, the days of Tin Pan Alley and John Phillips Sousa.<sup>18</sup> Throughout its history, ASCAP's goal has been to assure that the creators of musical compositions are fairly compensated for the public performance of their works and that their rights are protected.<sup>19</sup> In addition to issuing blanket licenses, ASCAP monitors songs played across various public outlets and divvies up the proceeds based on a pro rata formula.<sup>20</sup> In 1939, another performing rights society, Broadcast Music Incorporated (BMI), formed for the purpose of serving a similar function.<sup>21</sup> The third performing rights organization is SESAC, which was formed in 1930 and was originally named the Society of European Stage Authors and Composers.<sup>22</sup> SESAC, which is based out of Nashville, controls only about one percent of public performance rights.<sup>23</sup> The performing rights societies deal with the public performance rights in the composition; the public performance rights for sound recordings are managed by an entity called SoundExchange, which was formed in 2000.<sup>24</sup>

The major entities involved in each of these rights are represented in the following table:

---

16. See Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1328 (1996).

17. The performing rights societies cannot, however, collect large-scale public-performance monies for music used in, for example, domestic motion pictures. PASSMAN, *supra* note 4, at 227.

18. ASCAP, History of ASCAP: The Early 1900s, <http://www.ascap.com/about/history/1900s.html> (last visited Jan. 24, 2008).

19. ASCAP, History of ASCAP, <http://www.ascap.com/about/history> (last visited Jan. 24, 2008).

20. Merges, *supra* note 16, at 1329.

21. BMI, Tradition, <http://www.bmi.com/about/entry/C1508> (last visited Jan. 24, 2008).

22. SESAC, About Us, <http://www.sesac.com/aboutsesac/about.aspx> (last visited Feb. 28, 2008).

23. PASSMAN, *supra* note 4, at 225.

24. Sound Exchange, <http://www.soundexchange.com> (last visited Jan. 24, 2008).

Specific Right	Administered by:	In the form of:	Triggered by, for example:
© Reproduction	Harry Fox Agency (HFA)	Compulsory mechanical license	Reproduction of a song in a compilation record (underlying composition) or making a cover recording of an existing composition
Ⓜ Reproduction	No middleman—direct from rights-holder	Master use license	Reproduction of a song in a compilation record (sound recording)
© Public Performance	Performing rights societies—ASCAP, BMI, SESAC	Blanket license	Playing or performing a song in a bar (underlying composition)
Ⓜ Public Performance	SoundExchange	Statutory royalties set by Copyright Royalty Board (CRB)	Playing or performing a song in a bar (sound recording)

This is the framework that has developed over the last century, during the pre-internet age. As will be discussed in Part III, these rights have consequently become muddled by the rise of new uses for music scarcely conceivable at the time of the framework's inception.

### III. POINTS OF CONTROVERSY UNDER THE EXISTING FRAMEWORK

The statutory framework for music copyright law has been shaken by the rise of the Internet. The problem with the use and distribution of music on the Internet is that no one is quite sure which new activities correspond

to the *traditional* understandings of activities that trigger certain licenses and royalties. One point in agreement is that the transmission of any song on the Internet will require rights clearances for both the underlying musical composition (copyright), and the sound recording (phonorecording right), assuming neither of those is in the public domain.<sup>25</sup> Yet, as discussed below, the traditional middlemen—HFA, ASCAP and the performing rights societies, and Sound Exchange—argue that certain ambiguous categories fall under their purview, and that the rights holders they represent should receive full compensation for use of music by these new activities. Specifically, HFA argues that the stream of a song online is a reproduction, while performing arts societies contend that a download of an .mp3 file constitutes a public performance.<sup>26</sup> This results in a situation in which, if everything is paid out according to their suggestions, rights-holders are engaging in “double dipping,” that is, being paid twice when their music is only used once.<sup>27</sup> Such a practice over-compensates the rights-holders and simultaneously makes the use of music cost-prohibitive for most internet broadcasters. This Part examines the developments in digital copyright since the mid-1990s that have led to this predicament.

Congress has made changes to the copyright law in the last decade in an attempt to clarify how certain new activities square with traditional understandings of music copyright. In 1995, Congress updated the statutory understanding of musical “reproduction” to include the reproduction and distribution of musical works via a “digital phonorecord delivery,” (DPD) which the Copyright Act defined as a digital transmission that results in a file being stored on a hard drive (i.e., a download).<sup>28</sup> The compulsory license thus gave the right to make DPDs of musical works, but not the right to make DPDs of sound recordings. Additional permission would be necessary in order to download a sound recording of a particular work.<sup>29</sup> Thus, in order to download an .mp3 of Whitney Houston’s “I Will Always Love You,” a license for the DPD of the underlying composition would be required, as well as permission from the record label that owned the rights in Whitney Houston’s sound recording of that composition.

---

25. Reese, *supra* note 3, at 251, 258.

26. *See* United States v. Am. Soc’y. of Composers, Authors, & Publishers, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

27. *See generally* Laurence R. Helfer, *World Music on a U.S. Stage, A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 116 (2000).

28. 17 U.S.C. § 115 (2000).

29. Reese, *supra* note 3, at 243.

Also in 1995, Congress updated sound recordings owners' public performance right by adding a right to a "digital audio transmission."<sup>30</sup> This new right addressed the contemporaneous streaming of music on the Internet, subject to certain limitations.<sup>31</sup> Congress recognized four distinct types of digital audio transmissions: a transmission made by an "interactive service" at the user's request (an on-demand model such as Rhapsody, in which users pay a monthly fee to stream any of the recordings in Rhapsody's catalog<sup>32</sup>), and three types of "non-interactive service" transmissions: non-subscription broadcast transmissions, online-only non-interactive transmissions, and web stations that exclusively play the music of one artist.<sup>33</sup>

Although interactive digital transmissions certainly trigger the sound recording right-holder's digital transmission performance right, Congress struggled over whether this right is also implicated by the three types of non-interactive transmissions. The first of this type, non-subscription broadcast transmissions, result when traditional terrestrial radio stations stream their broadcasts over the Internet. Congress originally left these transmissions exempt from the digital transmission performance right. After a petition from the Recording Industry Association of America in 2000, the Copyright Office, which is the agency charged with administering Congress's copyright provisions, changed its regulations and decided that internet simulcasts by terrestrial radio stations were *not* exempt from the digital transmission performance right.<sup>34</sup> Based on the Copyright Act's designation of the exclusive right to perform sound recordings "publicly by means of a digital audio transmission," the Copyright Office felt that it made sense for record labels to receive royalties for all songs streamed over the Internet. The National Association of Broadcasters unsuccessfully challenged the Copyright Office's decision in *Bonneville International Corp. v. Peters*,<sup>35</sup> in which the Third Circuit held that the transmission of

---

30. As of 2003, SoundExchange is designated by the Copyright Office as the only collective permitted to distribute the royalties resulting from the sound recording owner's public performance rights under 17 USC § 114(g)(2). *See* Sound Exchange, Notice of Designation as Collective Under Statutory License, <http://www.soundexchange.com> (last visited Jan. 24, 2008).

31. Reese, *supra* note 3, at 246.

32. *See* Rhapsody, What is Rhapsody, [http://learn.rhapsody.com/?src=rcom\\_navside](http://learn.rhapsody.com/?src=rcom_navside) (last visited Jan. 24, 2008).

33. Reese, *supra* note 3, at 247-9.

34. *Id.* at 247-48.

35. *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003); *see also* Tomomi Harkey, Note, *Bonneville International Corp. v. Peters: Considering Copyright Rules to Facilitate Licensing for Webcasting*, 20 BERKELEY TECH. L.J. 625 (2005).

AM/FM streaming was not exempt from the sound recording public performance right.<sup>36</sup>

The next category of non-interactive services involves online-only non-interactive transmissions, which are not exempt from the digital performance transmission right, but are nevertheless subject to a compulsory license of that right.<sup>37</sup> This was Congress's attempt to deal with the activities of internet radio stations and webcasters. As understood at the time, a transmitter that qualified for this compulsory license for the musical composition would also need to obtain a public performance license from one of the performing rights societies, since the compulsory license only addressed the sound recording digital transmission performance right.<sup>38</sup> In order to qualify for this compulsory license, the webcasters had to meet a variety of conditions, including requirements that they provide no advance notice of what was being broadcast (to prevent listeners from recording upcoming songs), and that they refrain from transmitting more than three tracks from the same album or four tracks from the same artist within a three-hour period.<sup>39</sup> The majority of web radio stations, in addition to popular services such as Pandora, fall under this category.<sup>40</sup>

The final category involves non-interactive transmissions that are not terrestrial broadcast transmissions and do not meet the rather stringent compulsory license requirements for webcasters. This category, which Congress established in 1995, includes online radio stations devoted to playing the music of, for example, exclusively one musician. These radio stations do not qualify for any statutory compulsory license, and so permission must be obtained directly from the rights-holders for both the sound recordings and the underlying musical compositions.<sup>41</sup>

As a whole, the rights implicated by the use of music on the Internet have been hotly debated from the outset. One central argument has been whether streaming transmissions constitute both public performance of the works transmitted *and* reproduction of the works.<sup>42</sup> Most commentators believe that a stream is clearly a public performance because it is akin to the traditional definition of public performance, because it is a transmission to "the public, by means of any device or process, [where] members

---

36. *Bonneville*, 347 F.3d at 500.

37. Reese, *supra* note 3, at 248.

38. *Id.* at 249.

39. 17 U.S.C. § 114(d)(2)(C) (2000).

40. Pandora, About Pandora, <http://www.pandora.com/corporate> (last visited Jan. 24, 2008).

41. Reese, *supra* note 3, at 249.

42. *Id.* at 252.



of the public . . . receive it in the same place or in separate places and at the same time or at different times.”<sup>43</sup> Likewise, these same commentators believe that a download of a song is clearly a reproduction because it is akin to the traditional notion of reproduction: a song is reproduced and then distributed to an end user.<sup>44</sup> The fact that different organizations control these rights, however, has led such organizations to claim that both activities implicate their rights. This creates the problem of double dipping.<sup>45</sup> For example, although a stream is like a traditional public performance, HFA claims that streaming is also a reproduction because, as it is being streamed, a song is also temporarily stored in a listener’s random-access memory (RAM).<sup>46</sup> Thus, as early as 2000, HFA has argued that every streaming transmission is a reproduction as well as a public performance due to RAM storage.<sup>47</sup>

On the other hand, downloads have been generally understood to be reproductions from the outset. Downloading a copyright-protected song is understood to involve a reproduction of a sound recording, for which permission is required from the copyright owner.<sup>48</sup> In addition, permission is required to make a phonorecord of the underlying musical work by means of a DPD, which would come in the form of a compulsory mechanical license or through the HFA.<sup>49</sup> While it is generally accepted that downloads are reproductions, the debate is whether they are also performances. The performing rights associations have been quick to assert that downloads *do* implicate the public performance right, in part because home users can begin to listen to a song as it is being downloaded.<sup>50</sup> Many fall on the other side of the debate, however. In 2000, the Clinton Administration’s White Paper, which addressed intellectual property rights, stated clearly that download transmissions do not involve public performance rights.<sup>51</sup>

---

43. 17 USC § 101 (2005).

44. Reese, *supra* note 3, at 259.

45. *See id.* at 252; *United States v. Am. Soc’y. of Composers, Authors & Publishers (ASCAP)*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

46. Reese, *supra* note 3, at 252.

47. *Id.* at 254.

48. *Id.* at 258.

49. *Id.*

50. *ASCAP*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007); Posting of David Oxenford to Broadcast Law Blog, District Court Finds No Public Performance In Download - Could Affect Fees on Podcasts and Video Downloads, <http://www.broadcastlawblog.com/archives/on-line-media-district-court-finds-no-public-performance-in-download-could-affect-fees-on-podcasts-and-video-downloads.html> (Apr. 29, 2007).

51. UNITED STATES PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP

The Copyright Office echoed this view in 2001, stating, “We do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place. . . . It is our view that no liability should result from a technical ‘performance’ that takes place in the course of a download.”<sup>52</sup> The Copyright Office’s position was based on its view that any “performance” occurring during a download is “merely a technical by-product of the transmission process that has no value separate from the value of the download.”<sup>53</sup> This report repudiated the theory that a download could be considered a musical broadcast merely because a user could listen to pieces of the song as it was downloading,

Since double dipping results in a demand for licenses and consequently much higher costs for internet broadcasters and download providers, another major issue involves the actual cost of royalties and licenses. The Copyright Act sets the cost of the compulsory mechanical licenses needed for a DPD. From 1909 to 1976 (a pre-DPD world), the statutory rate for compulsory mechanical licenses (for phonorecords) remained at \$0.02 per song.<sup>54</sup> In 1976, the rate was raised to \$0.0275, and the Copyright Royalty Board (CRB) was created to administer future changes.<sup>55</sup> The CRB is composed of three administrative judges who set the rates for all compulsory licenses.<sup>56</sup> Traditionally, changes in rates happened infrequently (every ten years, for example), although the CRB has been moving towards an approach in which rates are set for shorter periods to account for a digital age in which everything is changing rapidly.<sup>57</sup>

The cost of mechanical licenses remains central to arguments over rights in the digital age because an increased number of rights logically means an increased cost.<sup>58</sup> Moreover, the CRB’s growing propensity for making changes to the costs of these licenses greatly impacts the online purveyors of music. For this reason, the CRB’s recent decisions cannot be ignored, as discussed further in Part IV below.

---

ON INTELLECTUAL PROPERTY RIGHTS 71 (1995), available at <http://www.uspto.gov/go/com/doc/ipnii/>.

52. U.S. COPYRIGHT OFFICE, DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT TO THE UNITED STATES CONGRESS xxvii-xxviii (2001).

53. See *ASCAP*, 485 F. Supp. 2d at 445.

54. 1909 Copyright Act § 1(e) (1909).

55. *PASSMAN*, *supra* note 4, at 203.

56. *Id.*

57. *Id.* at 204.

58. See *Reese*, *supra* note 3, at 265.

The debates over royalty costs and the rights implicated by downloading and streaming music on the Internet highlight the ways in which new uses of music have created ambiguity and controversy. A working knowledge of how these controversies developed provides the necessary background for understanding the most recent developments in each of these debates.

#### IV. CURRENT DEBATE OVER DOUBLE DIPPING AND ROYALTIES

Though major policymakers have asserted for years that double dipping must be avoided, the issue is still disputed and ambiguous. This Part will explore recent developments surrounding double dipping with respect to downloading, streaming, and the updates and changes in royalty rates and fees. Specifically, it will address whether or not downloads should be considered “public performances” and whether the streaming of songs should be considered “reproductions” under the Copyright Act. This Part will then address the current debate over how much internet-based uses of music should actually cost.

##### A. Downloading

Various sources, such as the Copyright Office and the White Paper, have contended that the act of downloading a music file does not constitute a “public performance.”<sup>59</sup> In April 2007, the U.S. District Court for the Southern District of New York decided a case that brings some temporary resolution to the issue.<sup>60</sup> As a result of ongoing antitrust enforcement dating back to 1941, this court now resolves disputes arising over ASCAP’s fees and rates.<sup>61</sup> *United States v. ASCAP* arose from a disagreement between ASCAP and three purveyors of music on the Internet: AOL, Yahoo!, and RealNetworks.<sup>62</sup> AOL, Yahoo!, and RealNetworks (“the Applicants”) distributed music to their subscribers through both streams and downloads.<sup>63</sup> The parties sought a determination of the royalty fees payable to ASCAP for the use of music in their catalog in the Applicants’ services.<sup>64</sup> After the rate proceeding began, the parties each moved for partial

---

59. UNITED STATES PATENT & TRADEMARK OFFICE, *supra* note 51; U.S. COPYRIGHT OFFICE, *supra* note 52.

60. *United States v. Am. Soc’y. of Composers, Authors & Publishers (ASCAP)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

61. *Id.* at 440; *see also* Merges, *supra* note 16, at 1340.

62. *ASCAP*, 485 F. Supp. 2d at 440.

63. *Id.* at 441.

64. *Id.*

summary judgment on the divided question of whether the downloading of a music file constituted a public performance for which ASCAP would need to be compensated.<sup>65</sup> The court held that it did not constitute such a performance.<sup>66</sup>

The court looked to the § 101 definition of public performance in order to make its decision. It found that “[t]he statutory language itself . . . makes clear that the *transmission of a performance*, rather than just the transmission of a data constituting a media file, is required in order to implicate the public performance right in a copyrighted work.”<sup>67</sup> The issue was whether the “transmission of a signal not capable of contemporaneous perception, but designed to deliver a digital file that the recipient can later play at his pleasure, constitutes a performance.”<sup>68</sup> To bolster its argument, ASCAP cited *David v. Showtime/The Movie Channel, Inc.*, a case in which the defendant broadcasted ASCAP-licensed music to local cable broadcasters, who then transmitted that signal to consumers’ homes.<sup>69</sup> The court held that such a broadcast was a public performance, but only in terms of the transmissions to the local cable broadcasters.<sup>70</sup> Consequently, the ASCAP court did not find the *David* decision useful in deciding whether or not the transmission *itself* was a public performance, an issue that the *David* court did not address.<sup>71</sup> ASCAP also argued that downloads could be considered a performance because the consumer who purchases the download can begin to listen to the music file after a certain amount of data has been transmitted to the consumer’s computer, while the download is still in progress.<sup>72</sup> The court dismissed this argument by way of analogy: “Surely ASCAP would not contend that if a retail purchaser of musical records begins audibly playing each tape or disc as soon as he receives it the *vendor* is engaging in a public performance.”<sup>73</sup> The court ultimately held that neither situation would constitute public performance: “We can discern no basis for ASCAP’s sweeping construction of section 101.

---

65. *Id.*

66. *Id.* at 442. Although the issue of streaming was not under consideration in this summary judgment proceeding, the court acknowledged in dicta that the streaming of a musical work constitutes a public performance (without addressing if streaming also involved reproduction). *Id.*

67. *Id.* at 446.

68. *Id.*

69. *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 758 (S.D.N.Y. 1988).

70. *Id.* at 759.

71. *ASCAP*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

72. *Id.*

73. *Id.*

Moreover, in light of the distinct classification and treatment of reproductions under the act, we agree . . . that Congress did not intend the two uses to overlap to the extent proposed by ASCAP in the present case.”<sup>74</sup>

The *ASCAP* holding brought at least temporary resolution to the issue of downloading double dipping. As a result of the decision, ASCAP is currently precluded from collecting public performance royalties for downloads.<sup>75</sup> Prior to the case, ASCAP and the other performing rights societies had provided public performance license agreements for downloads to music services, some of which signed them under the assumption that they owed royalties for these downloads.<sup>76</sup> If the District Court’s decision is not overturned, it will mean that a service that provides music downloads will only need reproduction licenses, which require permission from the copyright holders in both the sound recording (typically the record company) and the underlying composition (typically through the publishing company or HFA).<sup>77</sup> Thus, the District Court decision has brought some tentative resolution to ambiguities surrounding the rights implicated in a download because it is the first authoritative body that has definitively ruled against ASCAP’s position, thus shutting down the possibility of double dipping in the context of downloading services.

## B. Streaming

Like downloading, some progress has been made in the context of double dipping for streams. The issue of whether the streaming of a song online, through both interactive and non-interactive services, involves the “reproduction” of the musical work was the focus of the Copyright Office in a June 2007 roundtable.<sup>78</sup> The participants considered the use of a statutory license to “make and distribute digital phonorecords, including for a limited period, and to make phonorecords that facilitate streaming.”<sup>79</sup> Royalties for the public performance of a sound recording are already paid through SoundExchange.<sup>80</sup> However, the roundtable focused on when, in a

---

74. *Id.* at 447.

75. *Id.*

76. Oxenford, *supra* note 50.

77. *Id.* Alternatively, such a service could also choose to pay a statutory royalty for the compositions through a complex series of filings through the Copyright Office. *Id.*

78. Notice of Roundtable Regarding the Section 115 Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 72 Fed. Reg. 30039 (May, 30, 2007), available at <http://www.copyright.gov/fedreg/2007/72fr30039.html>.

79. *Id.*; Andrew Noyes, *Antiquated Rule On Music Royalties Defies Reform*, NAT’L J., June 15, 2007, <http://www.nationaljournal.com/pubs/techdaily/pmedition/tp070615.htm#5>.

80. See SoundExchange, *supra* note 24.

digital world, the use of a composition in making a record or CD triggers an obligation to pay a § 115 mechanical license.<sup>81</sup> As a threshold matter, the Copyright Office still has not resolved the question of whether a legal distinction is required between on-demand interactive streaming (through services such as Rhapsody), and non-interactive streaming (webcasting). The Copyright Office acknowledged that the problem with asserting a reproduction right for the streaming of music is that it will result in double dipping, with the songwriters being paid twice for the use of their music.<sup>82</sup>

The June 2007 Roundtable is the most recent movement addressing the problem of double dipping vis-à-vis music streaming. The current lack of resolution will become increasingly important with the rise in popularity of the music streaming services, since these services will be greatly impacted financially if they are required to compensate rights-holders in both the public performance and the reproduction rights.

### C. Royalties

The issue of royalties is inextricably connected to the cost of providing music on the Internet. In March 2007, the CRB raised the royalty fees for internet radio stations, which includes simulcasts of terrestrial stations and online-only radio stations.<sup>83</sup> For every song streamed online, radio stations were ordered to pay \$0.0011 per performance for 2007, \$0.0014 per performance for 2008, \$0.0018 for 2009, and \$0.0019 per performance for 2010.<sup>84</sup> For most internet radio stations broadcasting thousands of songs online a year, this rapid increase in rates would have devastating effects. Before this royalty spike, webcasters that had annual revenues of less than \$1.25 million paid either ten percent of their revenues or seven percent of their expenses to cover their royalties (whereas the larger online radio stations paid per song).<sup>85</sup> However, the CRB's decision meant that all webcasters would be charged on a per-song basis. Not surprisingly, this decision has been met with outrage from internet broadcasters, college DJs and established public radio stations alike.<sup>86</sup> Moreover, Congressional bills have been introduced to strike down the CRB's rate increases.<sup>87</sup> The out-

---

81. Noyes, *supra* note 79; *see also* Oxenford, *supra* note 50.

82. *See* Oxenford, *supra* note 50.

83. *In re* Digital Performance Right in Sound Recordings & Ephemeral Recordings, Docket No. 2005-1 CRB DTRA (U.S. Copyright Royalty Bd. March 2, 2007) (initial determination), available at <http://www.loc.gov/crb/proceedings/2005-1/rates-terms2005-1.pdf>.

84. *Id.*

85. Assael, *supra* note 1.

86. *Id.*

87. H.R. 2060, 110th Cong. (2007); S. 1353, 110th Cong. (2007).

rage is motivated primarily by economic concerns: a recent *New York Times* article profiled a typical hobbyist webcaster whose royalty payments skyrocketed from \$120 a month under the old system to \$6,500 a month under the March 2007 arrangement.<sup>88</sup>

SoundExchange's position on this issue is simple. John Simson, its executive director, made clear: "Our research shows that there is scant evidence that [the webcasters] are getting people to buy music. If our artists aren't making money from CD sales, we think they should make money from those listens."<sup>89</sup> Its position is crucial since the future of many online radio stations will depend on the success of the proposed pieces of legislation and on a potential negotiation with SoundExchange.<sup>90</sup> While SoundExchange's position is understandable given the state of the music industry, amateur web broadcasters seem an unfair target. An alternative solution to blanket rates would be to set rates in a manner somehow proportional to the size and scale of the internet radio station.

The squabble over royalty rates is ultimately analogous to the disagreements over downloading and streaming, with an established middleman (SoundExchange) working to ensure continued profits even in a vastly changed landscape. With ever-shrinking overall revenue from music, the industry players are fighting ever harder to hold onto their pieces of the diminishing pie.

## V. POTENTIAL CHANGES FOR THE FUTURE

Moving forward in the midst of disagreements over licensing, broadcasting, and performing music online will require forward-thinking solutions and clear-minded analysis. This Part provides an examination of some of the proposed solutions under consideration by industry players and academics. In particular, this Part explores the possibility of revising the Copyright Act to remove ambiguity, the formation of a unified subscription-based digital music model, and concludes with the suggestion that a streamlined system in which one middleman handled all rights clearances for music on the Internet might be the most efficient solution.

The middlemen—HFA, ASCAP, BMI, SESAC, and SoundExchange—are instigating the current disputes over double dipping and royalty rates. After all, the rights-holders are compensated in some way for the use of their properties, regardless of how their music is being used (whether a performance or a reproduction). Assuming that the ASCAP de-

---

88. Assael, *supra* note 1.

89. *Id.*

90. *See id.*

cision is upheld (or not overturned), it will resolve the issue of whether or not the streaming of music involves a reproduction, and hopefully provide a distinction between interactive and non-interactive streaming services.<sup>91</sup> Barring these resolutions, one way to streamline the system and avoid double dipping would be to designate one agency—one middleman—to collect all royalties for a piece of music used on the Internet. The Register of Copyrights at the June 2007 Roundtable made such a proposition; it suggested that the designated agency represent practically all copyright holders for all internet purposes.<sup>92</sup> This proposal also echoed a suggestion by Professor R. Anthony Reese:

A radical change . . . would be for a new collective licensing agency to emerge. This agency would have the authority to license . . . for any type of Internet transmission . . . . The agency could grant blanket and per-work licenses to all types of Internet transmitters. If the agency represented copyright owners of both musical works and sound recordings, it would essentially provide one-stop shopping . . . .<sup>93</sup>

Such a shift would likely reduce transaction costs for copyright owners and facilitate a much greater ease of digital licensing, as secondary users would only have to deal with one agency to get rights for everything. Reese's hesitation with this suggestion is that "existing licensors may perceive the development of a new collective licensing agency for internet transmissions as a threat, given the possibility that a substantial portion of all music performances and reproductions may shift to the Internet in the not-too-distant future."<sup>94</sup>

Of course, this shift is already substantially underway, so existing licensors may already recognize that they need to get onboard if they do not want to sink. Although a unified licensing agency would eliminate the possibility of double dipping, the Register's suggestion was dismissed.<sup>95</sup> One commentator reporting on the Roundtable noted: "With the various entrenched stakeholders, [the Register's] proposal didn't fly, thus we continue to have different groups representing composers for the public performance of music and for the mechanical royalty."<sup>96</sup> The variety of entrenched stakeholders is precisely the problem, however, and a streamlined system would benefit everyone except some of the existing stake-

---

91. See discussion of ASCAP, *supra* Part III.A.

92. Oxenford, *supra* note 50.

93. Reese, *supra* note 3, at 265.

94. *Id.* at 266.

95. Oxenford, *supra* note 50.

96. *Id.*



holders—specifically, the middlemen—themselves. The benefits of a streamlined approach have already been explored on a micro level in the area of the sound recording performance right, in which SoundExchange is the only recognized middleman.<sup>97</sup> As the Copyright Royalty Board stated in April 2007, “the royalty payment and collection system that we adopt must promote administrative efficiency and economy and reduce transaction costs wherever possible . . . . We find that selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses.”<sup>98</sup> This logic could be applied to the digital licensing system for music on the Internet as a whole. The creation of what one scholar has dubbed an “uber-middleman” could consist of “joint ventures between the various industry interests,” or could be a task assumed by the Copyright Office.<sup>99</sup>

The alternative to streamlining the system is continued ambiguity in the administration and collection of music property rights and escalating costs. Additionally, the presence of so many distinct stakeholders could easily lead to the emergence of a wholly inefficient “anticommons,” defined by Professor Michael Heller as a system in which “multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use.”<sup>100</sup> Heller argues that, “when there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons.”<sup>101</sup> The sheer number of middlemen rights organizations each demanding licenses and royalty payments creates a situation in which providing music on the Internet becomes economically inefficient, and in which the economic conditions in turn discourage innovative new uses of music.<sup>102</sup>

There is also the possibility of a legislative solution. Perhaps 17 U.S.C. § 115, which provides the compulsory license for phonorecords, could be revised or updated to reflect changes in music distribution on the Internet.<sup>103</sup> Additionally, new definitions could resolve the existing ambiguities

---

97. See *supra* Part III.

98. *In re* Digital Performance Right in Sound Recordings & Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24084, 24104 (U.S. Copyright Royalty Bd. April 23, 2007) (final determination) (codified at 37 C.F.R. pt. 380).

99. W. Jonathan Cardi, *Uber Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 888 (2007).

100. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

101. *Id.*

102. Cardi, *supra* note 99, at 838.

103. 17 U.S.C. § 115 (2000).

and pave the way for a more efficiently managed system.<sup>104</sup> Such changes could allow for on-demand listener streaming services to become the industry standard, provided that § 115 enabled all of the rights-holders involved to collect for their works. The Register herself testified earlier this year before Congress that such changes were sorely needed.<sup>105</sup> However, the Copyright Roundtable addressed the possibility of legislative reform and concluded that “Congressional action did not look imminent.”<sup>106</sup> As it has been noted, however, Congress is in the best position to make these changes and to force the industry to adopt a more reasonable and efficient licensing framework through legislation with which the industry is required to comply.<sup>107</sup>

Resolution of the ambiguities surrounding music streaming and of whether legal differences exist between interactive and non-interactive streaming services should be considered of paramount importance to an industry in which the new model increasingly involves distributing music online. In response to all of these problems and changes, the music industry appears to be forging ahead with its own solution—the subscription-based model. Recently, legendary producer and Columbia Records’ new co-head Rick Rubin explained what such a model might consist of:

You would subscribe to music . . . . You’d pay, say, \$19.95 a month, and the music will come anywhere you’d like. In this new world, there will be a virtual library that will be accessible from your car, from your cellphone, from your computer, from your television. Anywhere. The iPod [would] be obsolete, but there would be a Walkman-like device you could plug into speakers at home . . . . And once that model is put into place, the industry will grow ten times the size it is now.<sup>108</sup>

This model would require the major labels to band together under one umbrella, so that a monthly subscription would include recordings from every major label’s vast catalog. The subscription would likely operate

---

104. See Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 310 (2006); Skyla Mitchell, Comment, *Reforming Section 115: Escape From the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239 (2007).

105. *Copyright Law in the Digital Age: Hearing on H.R. 5553 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

106. Oxenford, *supra* note 50.

107. Cardi, *supra* note 99, at 890.

108. Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, at Section 6, 14.

akin to Rhapsody, in which music is essentially streamed rather than downloaded, a development that would also encourage the resolution of the debate over streaming rights. Widespread industry acceptance of this model would be a major step towards reconciling the intellectual property rights in music with the ways in which music is purchased and listened.

Doug Morris and Jimmy Iovine, both executives at Universal, have also supported this new subscription-based model, which likely influenced their decision not to renew Universal's annual contract to sell music through iTunes. The record company, like many others, felt increasingly frustrated and constrained by Apple's policies on song pricing (every song is priced the same, regardless of contemporariness or popularity) and the iPod's lack of compatibility with music services other than iTunes.<sup>109</sup> The major record executives' increasingly frequent suggestions of a subscription-based music system signals the likelihood that such a system may be put into practice in the near future. In fact, the classical music world has already implemented it. Naxos Records, one of the biggest names in classical music distribution, offers a service for \$19.95 a year, which provides subscribers with access to all of the Naxos recordings available online. The service currently has eleven thousand subscribers.<sup>110</sup> Klaus Heymann, Naxos' founder, said: "This is the most promising model we have seen. Downloads are limited. In the States, sales are . . . leveling off. In Europe, there is very little traction outside the U.K. Germany is a disaster. So I am looking past downloads to subscriptions."<sup>111</sup>

Nevertheless, downloads remain an important part of the landscape, as they continue to be a lucrative revenue stream for the music industry. For example, in October 2007, Radiohead, freed from their long-term contract with record label EMI, opted to distribute their new album, "In Rainbows," online, letting their fans choose the price of the download. This radical decision was heralded by one music producer as "[a] spiritual model."<sup>112</sup> Of course, such a decision would only be economically viable for a superstar act such as Radiohead. Had the *ASCAP* decision gone the

---

109. In response to record executives' complaints, Steve Jobs of Apple argued that all DRM protection on music sold via iTunes and other channels should be lifted in order to encourage more compatibility with devices/services. Steve Jobs, CEO, Apple Inc., Thoughts on Music (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>.

110. Alex Ross, *The Well-tempered Web*, THE NEW YORKER, Oct. 22, 2007, at 78.

111. *Id.* Most of the compositions sold through Naxos are in the public domain, and so are irrelevant for the purposes of performing arts societies. However, the business model is indeed notable, and *New Yorker* writer Alex Ross notes the improbability of the major labels starting to take cues from "German classical-music producers." *Id.*

112. Jeff Leeds, *In Radiohead Price Plan, Some See A Movement*, N.Y. TIMES, Oct. 11, 2007, at E7.

other way, ASCAP would be able to collect a piece of every download of “In Rainbows.” However, this is only an issue for supporters of ASCAP and the other middlemen, rather than the artists and rights-holders themselves, who are already compensated from the sale of the music.<sup>113</sup>

## VI. CONCLUSION

With legislative reform unlikely, the possibility of a streamlined licensing agency seems both the most feasible and most effective solution. Accepting that the music business has profoundly shifted to the point where the industry’s future rests largely on the Internet, it is only a matter of time before Columbia Records and the other major labels come together to embrace Naxos’s subscription model. Indeed, some form of cooperation will be required in order to bring the industry as a whole into an efficient and profitable new age. The music industry has outgrown the definitions and understandings that led to the formation of distinct rights and collective rights organizations. It is imperative, however, to understand the various rights involved, and to understand how everyone from ASCAP to independent webcasters is affected by the recent litigation and rulings of 2007. The possibility of a streamlined rights organization would significantly reduce transaction costs for all parties, and would provide, at last, some clarity to a tangled imbroglio of rights-holding that has long outgrown its necessity and usefulness. The specter of double dipping would be exorcised, resulting in a fairer system for all. After all this time, this would be a truly pleasant tune.

---

113. *United States v. Am. Soc’y. of Composers, Authors & Publishers (ASCAP)*, 485 F. Supp. 2d. 438 (S.D.N.Y. 2007).