Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right

David Nimmer*

It never needed to be that complex. When Congress decided to plug the historical anomaly under which sound recordings lacked any performance right, it could have acted very simply. Instead, it gave birth to a Frankenstein.

To backtrack, copyright protects various species of works, including musical compositions and sound recordings, [1] as well as literary works, sculptures, and a host of other productions.[2] As to almost all of those works, the Copyright Act of 1976 accords five exclusive rights: reproduction, adaptation, public distribution, public performance, and public display.[3]

Some rights are structurally inapplicable to some types of works. Thus, a sound recording is not susceptible to public display.[4] For that reason, the Act accords no such right.[5]

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[1] For the uninitiated, there is a fundamental distinction between a musical work and a sound recording. The former is composed by Beethoven or Sammy Cahn; the latter features the Boston Pops or Natalie Cole interpreting the former's works. In the case of many currently popular recording artists, the same individual produces both species of copyrightable works. *See* text accompanying n.51 *infra*.

[2] 17 U.S.C. § 102(a).

[3] 17 U.S.C. § 106(1) – (5).

[4] By contrast, there is a public display right as to musical works. 17 U.S.C. § 106(5). Although a musical performance is not susceptible to display, presumably, staff notation on paper of a composition can fall within that right.

[5] 17 U.S.C. § 106(5)

Nonetheless, in all cases in which it makes sense to do so, the 1976 Act has accorded all five rights to all categories of works — with one signal exception. From the moment that sound recordings first won statutory copyright protection in 1972,[6] through revision of the copyright laws in the 1976 Act, the copyright owner has enjoyed no right to control the public performance of sound recordings.[7]

Therefore, when a radio station plays a hit song, it implicates the rights of the copyright owner of the musical composition. For that reason, radio stations must take out licenses from the performing rights societies.[8] By contrast, the same exploitation requires no licenses from the copyright owner of the implicated sound recording, notwithstanding that it is equally subject to a public performance when played over the radio.

To confront that historic anomaly, the Copyright Office suggested an amendment to the 1976 Act.[9] Such amendment would require a statute of only a few words.[10] That putative amendment would both redress the historic anomaly and would improve the trade balance of the United States.[11] Thus, a win-win proposition was presented to

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[6] Act of Oct. 15, 1971 , Pub. L. 92-140 , 85 Stat. 391 (effective February 15, 1972).

[7] 17 U.S.C. § 106(4). *See* NIMMER ON COPYRIGHT § 8.14[A].

[8] "Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI." BMI v. CBS, 444 U.S. 1, 5 (1979).

[9] H. Rep. (DPRA), p. 12. The Patent and Trademark Office joined in that recommendation. *Id.* Likewise, the Clinton Administration's White Paper on digital technology recommended, in contrast to the approach ultimately adopted by the Digital Performance Right in Sound Recordings Act of 1995, according a "*full* public performance right." Working Group on Intellectual Property Rights (Bruce Lehman, Chair), *Intellectual Property and the National Information Infrastructure* 225 (1995) (emphasis original).

[10] One could either add the words "sound recording" to 17 U.S.C. § 106(4), or else make that provision resemble the three preceding paragraphs by removing from it the enumeration of copyrightable compositions, thus making it applicable across the board.

[11] The lack of an historic performance right in sound recordings under United States law has long disserved domestic copyright proprietors. Although the worldwide status of royalty collection for performances of sound recording is a most complex subject, as a general matter most important territories afford such protection under the Rome Convention. Most significantly, that treaty includes a performance right for old-

Congress.

But Congress decided to act differently.[12] Instead of simply including sound recordings within the public performance right, Congress added a new sixth right to the Copyright Act. That right, unlike the five rights that preceded, is limited to one type of work — sound recordings. In addition, unlike the other five rights, it is not a general right; instead, it is limited to the domain of "digital audio transmission."[13]

The vehicle that Congress chose to effect that change bears the ponderous caption of Digital Performance Right in Sound Recordings Act of 1995 (DPRA).[14] Congress revisited the terrain again in 1998, amending that 1995 amendment via the Digital Millennium Copyright Act.[15] The resulting framework is frightfully complex.

Before slogging into the jungle, the reader should keep in mind the

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fashioned analog television and radio broadcasting. Foreign — largely European — receipts number in the hundreds of millions of U.S. dollars. Yet because of a lack of reciprocity under longstanding U.S. law, those nations have turned over almost none of the revenue thereby earned to U.S. performers, notwithstanding the large volume of American music heard on European (and other foreign) radio.

NIMMER ON COPYRIGHT § 8.21[D].

[12] Congress had this state of affairs in mind when enacting the DPRA. Had it wished to maximize international revenue to its constituents, Congress would have followed the Copyright Office's recommendation and simply extended the blanket public performance right to sound recordings. Instead, it chose "a careful balancing of interests, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers, and the recognition of the potential impact of new technologies on the recording industry." Cutting through the jargon, Congress' decision to immunize broadcasters from the newly created rights means that no performance revenues will accrue to foreign (or American) recording artists from radio broadcasts of their works within the U.S. Thus, based on current royalty streams, the prospect that this law will loosen a flood of revenue collected from German, French, and other nations' performance royalties, based on a perceived achievement of reciprocity, appear dim indeed.

Id.

[13] 17 U.S.C. § 106(6).

[14] Act of Nov. 1, 1995, Pub. L. 104-39, Sec. 1, 109 Stat. 336. The Act largely took effect on Feb. 1, 1996. *Id.* Sec. 6. *But see* n.209 *infra*.

[15] Act of Oct. 28, 1998, Pub. L. 105-304, Sec. 407, 112 Stat. 2860. The 1998 amendments all took effect upon enactment, except as otherwise specified below. See § D (1)(c) *infra* (one provision takes effect on October 28, 1999); n.358 *infra* (another retroactive to 1995).

choice that Congress did *not* make: simply to add a general right of public performance in sound recordings to the preexisting rights in the Copyright Act. When the industry-specific and commercially tailored rights that follow are compared against that hypothetical regime, the question arises whether Congress was serving the interests of the public, or of particular actors in the affected industries, through its 1995 and 1998 handiwork.

This article describes the twists and turns in that right of digital audio transmission. The very process of doing so will illustrate how tortured this application is. In future installments to this series, the impact on the public interest will be explicitly weighed. For the present, the enterprise is to grasp the impact of this most complex statutory scheme.

A. APPLICATION OF THE RIGHT

1. General Contours

Section 106(6), added to the Copyright Act via the DPRA, creates the right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[16] The key variable in determining how widely this new law casts the performance net is its limitation to "digital audio transmission." Before turning to the statutory definition of those words, consider the following performances of a musical work (as opposed to the sound recordings currently under consideration),[17] each of which would implicate the music copyright owner's public performance right:

- the work is played at a public auditorium;
- the work is played over an AM or FM radio station;
- the work is played over the phone to callers on hold;[18]
- an analog-only version of the work is made available through an

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[16] 17 U.S.C. § 106(6).

[17] *See* n.1 *supra*.

[18] "Section 106(6) is not intended to apply to the transmission of a local radio station's programming free of charge to local or long-distance callers who are put 'on hold' during a telephone call with a business . . . ." S. Rep. (DPRA), p. 20. *See id.* at 23-24.

interactive service;

- an analog-only version of the work is made available to paying subscribers.[19]

Notwithstanding that the public performance right of Section 106(4) reaches each of those *music* exploitations, the new Section 106(6) is so circumscribed that performances of *sound recordings* by any of those means remain outside its scope.

In broad strokes, the new sixth right, applicable in general to digital public transmissions of sound recordings, creates a compulsory license scheme for subscription transmissions,[20] a mandatory scheme of "voluntary licensing"[21] for interactive transmissions, and exempts other usages from liability.[22] That exemption for nonsubscription noninteractive usages was largely categorical in 1995,[23] but is more limited at present.[24]

2. Digital Audio Transmissions

The crucial aspect of the sixth right is its limitation to public performances undertaken "by means of a digital audio transmission."[25] Each of the three words in the phrase "digital audio transmission" conveys an important limitation.[26]

a. Overhaul of the Transmission

To begin the process of giving content to this phrase, the 1995 amendments add a new definition at the outset of the Act:

A "digital transmission" is a transmission in whole or in part in a

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[19] One need simply imagine a "celestial jukebox" that delivers recordings with audiocassette fidelity, rather than CD quality.

[20] *See* § C *supra*. As to the later 1998 amendment, see § D *infra*.

[21] On that oxymoronic category, see § E *supra*.

[22] H. Rep. (DPRA), p. 20.

[23] *See* § B(1)(a) *infra*.

[24] *See* §§ B(1)(b), D(1)(d) *infra*.

[25] 17 U.S.C. § 106(6).

[26] "The precise language of the new right is intended to exclude from coverage digital transmissions of audiovisual works, analog transmissions, and performances that are not transmitted." H. Rep. (DPRA), pp. 19-20.

digital or other non-analog[27] format.[28]

That broad definition, by itself, is not limited to the audio subspecies to which the new sound recording public performance right applies.[29] The statute therefore goes on to specify as follows:

A "digital audio transmission" is a digital transmission . . . that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.[30]

In case there were any doubt from the limitation to "audio," that last sentence makes explicit[31] that the transmission of a motion picture, for example, lies outside the scope of the instant public performance right.[32]

Although the current Act defines "transmit" (as well as "transmission program"), it contained at enactment no general definition for "transmission."[33] The DPRA adds the noun form to the bestiary of defined terms: "A 'transmission' is either an initial transmission or a retransmission."[34] Insofar as it goes, that definition is tautological; but it

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[27] *See* H. Rep. (DPRA), p. 25 ("any other nonanalog format that might currently exist or be developed in the future"); S. Rep. (DPRA), p. 33 (same).

[28] 17 U.S.C. § 101, added by Act of Nov. 1, 1995, Pub. L. 104-39, Sec. 5(a), 109 Stat. 336.

[29] "Digital transmission" also plays a role in the concurrent expansion of the mechanical compulsory license. *See* NIMMER ON COPYRIGHT § 8.23[A][2].

[30] 17 U.S.C. § 114(j)(3) (1995), *recodified as* 17 U.S.C. § 114(j)(5).

[31] The bill was amended to make this point clear. S. Rep. (DPRA), p. 33.

[32] "[N]othing in the bill creates any new copyright liability with respect to the transmission of a motion picture or other audiovisual work, whether digital or analog, whether subscription or nonsubscription, and whether interactive or noninteractive." H. Rep. (DPRA), p. 25. *See* S. Rep. (DPRA), p. 33. Of course, the absence of new copyright liability does not validate the subject conduct — movie transmission to the public already implicates the performance right encompassed by previous law. *See* NIMMER ON COPYRIGHT § 8.14.

[33] 17 U.S.C. § 101. In addition, special pre-existing definitions — applicable solely within the statutory section regulating secondary transmissions — apply to "primary transmission" and "secondary transmission." 17 U.S.C. § 111(f). *See* NIMMER ON COPYRIGHT § 8.18.

[34] 17 U.S.C. § 114(j)(15). That definition, drawn from the 1998 amendments made via the Digital Millennium Copyright Act, *see* n. 15 *supra*, slightly reworks the original version of the Digital Performance Right in Sound Recordings Act of 1995: "A 'transmission' includes both an initial transmission and a retransmission." 17 U.S.C. § 114(j)(9) (1995). The legislative history offers no rationale for the

does expand the covered domain to include retransmissions, which it further defines as follows:

A "retransmission" is a further transmission of an initial transmission, and includes any further retransmission of the same transmission.[35]

Thus, it extends, for example, to an initial transmission by a satellite carrier that is further transmitted by a cable system.[36]

This definition further provides that "a transmission qualifies as a 'retransmission' only if it is simultaneous[37] with the initial transmission."[38] Therefore, delayed rebroadcast (even for the sake of airing programs at a given time slot in the various zones across the country) fails to qualify as a retransmission.[39] But this latter feature is qualified such that it is overridden in specified instances.[40]

b. Retuning the Distributor

These new "transmission" definitions are accreted onto a statute

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change. *See* Conf. Rep. (DMCA).

[35] 17 U.S.C. § 114(j)(6) (1995), *recodified as* 17 U.S.C. § 114(j)(12).

[36] H. Rep. (DPRA), p. 26.

[37] The legislative history from both chambers comments that "[a]lthough there may be momentary time delays resulting from the technology used for retransmission, such delays do not affect the status of the retransmissions as simultaneous." H. Rep. (DPRA), p. 26; S. Rep. (DPRA), p. 34. That point governs "simultaneous" occurrences throughout these 1995 amendments. *Id.* ("retransmissions that are essentially simultaneous"). *See* n.140 *infra*.

[38] 17 U.S.C. § 114(j)(6) (1995), *recodified as* 17 U.S.C. § 114(j)(12). Another portion of the same definition further specifies:

> Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

Id. That proposition appears to convey nothing beyond the truism that a transmission is not exempt if it is not exempt. On exempt transmissions, see § B *infra*.

[39] Nonetheless, over-the-air broadcasts are immune from liability. *See* § B(1)(b) *infra*.

[40] The qualification pertains except to the extent otherwise provided solely in Section 114. 17 U.S.C. § 114(j)(6) (1995), *recodified as* 17 U.S.C. § 114(j)(12). Note that 17 U.S.C. § 114(d)(1)(A)(ii) extends to retransmissions of "prior" transmissions. *See* § B(2) *infra*. *See also* text accompanying n.115 *infra*.

that, as was just mentioned, already defines in general the right to "transmit."[41] At its outset,[42] the current Act defines "transmit" in the performance context as "communicat[ing a work] by any device or process whereby images or sounds are received beyond the place from which they are sent."[43] It is useful to contrast the new public performance right in sound recordings, which is limited to digital audio transmission, with another species of copyrightable works that is not so limited — motion pictures. The public performance right for films is not limited to transmission. Therefore, publicly screening the film at a theater, for example, implicates the copyright owner's performance right.[44] By contrast, the current limitation to transmissions means that publicly performing a digital sound recording within the confines of an auditorium, for example, remains non-actionable. For in the auditorium context, the sounds are *not* "received beyond the place from which they are sent."

Although this public performance right in sound recordings is wholly inapplicable outside the realm of transmissions, it hardly follows that the DPRA can be dismissed as insignificant. Potentially captured within the transmission right are such forms of diffusion as over-the-air broadcast, telecast over cable or satellite, and modem or other telephone communication. The Internet, it should be specifically noted, allows for transmission, and hence potentially implicates this newly created performance right.[45] In all of these contexts, therefore,

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[41] *See* § A(2)(a) *supra*.

[42] 17 U.S.C. § 101. Note that this definition was included in the Act at its drafting in 1976, as opposed to the 1995 additions of specific definitions for "transmission" and "retransmission." *See* § A(2)(a) *supra*.

[43] 17 U.S.C. § 101. *See* § A(1) *supra*.

[44] Note that the statute divides the right to "perform" into two components: (1) performance at a place where a substantial group beyond the family circle may be gathered, and (2) transmission or other communication by means of a device whereby members of the public may receive it in the same or separate places. 17 U.S.C. § 101 (definition of performing or displaying a work "publicly"). Right (1), implicated as to films in the above context, is distinct from (2), the transmission right.

[45] The Internet weighed in to only a minor degree in the DPRA. *See* n.154 *infra*. By the time of the amendments wrought by the Digital Millennium Copyright Act, by contrast, references to the Internet – and to webcasting in particular — fill the legislative history. *See* Conf. Rep. (DMCA), pp. 82, 89.

the DPRA creates the theoretical possibility of liability. Nonetheless, the statute is further riddled with exemptions and compulsory licenses, making its actual reach much narrower than the bare limitation to transmissions connotes.[46]

3. Negation of Collateral Consequences

Beyond explaining what this new right is, it is equally essential to focus on what it is not. The pertinent provisions of the DPRA belabor their intention to exert no impact outside the limited sphere of digital audio transmissions of sound recordings.[47] They affect neither copyrightable subject matter apart from sound recordings nor rights apart from public performance via digital audio transmission.

a. No Spill-Over to Musical Works.

Sound recordings, as a class of copyrightable subject matter, are technically capable of embodying subject matter not otherwise subject to protection.[48] Nonetheless, as a practical matter sound recordings almost invariably piggy-back on another category of protectible works: musical compositions.[49] This is not to say that the music handled on the recording is itself still always subject to copyright protection — one need simply invoke any opus by Handel to prove the opposite. But much recorded music, particularly current hits,[50] embodies dual protection: a sound recording copyright, plus a distinct musical copyright.[51]

Rights created under the DPRA exert no impact whatsoever on

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[46] *See* §§ B-E *infra*.

[47] The 1998 amendments are to the same effect. *See* n.15 *supra*.

[48] One need simply imagine a stroll through zoological gardens with the "record" button pressed on a tape recorder. The resulting braying, mewing, and cawing is subject to copyright protection solely via its fixation on the magnetic tape.

[49] Less common, but by no means rare, are books recorded on tape, in which case the relevant underlying work is literary, rather than musical. *See* NIMMER ON COPYRIGHT § 8.12[B][7][c].

[50] The only current music ineligible for protection under U.S. law would be published works emanating from those few countries with which the United States still lacks any copyright relations. *See* NIMMER ON COPYRIGHT § 5.05[B][2].

[51] It should be recalled that the copyright for a musical composition extends to both its music and lyrics, if any. *See* NIMMER ON COPYRIGHT § 2.05[B].

musical copyrights. Thus, just as pre-1995 utilization of Handel's *Semele* required no permission because of its public domain status, so after passage of these amendments that composition remains free to use. By the same token, to the extent that a radio station or concert hall, prior to February 1, 1996,[52] required an ASCAP license or direct contractual arrangements with composers to carry on its business, it must continue to do so at present.[53] Clearance of the music and of the sound recording are wholly distinct undertakings. Either may be used, as applicable, by compulsory license, by direct license, by statutory exemption, by virtue of the fair use doctrine, or because of its public domain status, in any permutation or combination. The point is that each exercise must be undertaken independently. Whatever privileges the digital audio transmission right creates apply solely to the sound recording component.

Apart from leaving unaffected the legal right to exploit music whilst enabling sound recording exploitation, the DPRA goes further — its drafters also wished to "dispel the fear that license fees for sound recording performance may adversely affect music performance royalties . . . ."[54] To avoid any spill-over in the computation of royalties (including those reached by copyright arbitration royalty panels)[55] otherwise payable to music proprietors, the statute itself expresses Congress's intent "that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)."[56]

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[52] *See* n.14 *supra* (effective date of 1995 amendments).

[53] "Under existing [*i.e.*, pre-enactment] principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work." H. Rep. (DPRA), p. 22.

[54] H. Rep. (DPRA), p. 24.

[55] *See* NIMMER ON COPYRIGHT § 7.27. *See also* § C(2)(b) *infra*.

[56] 17 U.S.C. § 114(i) ("shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works").

b. No Impact on Five Traditional Rights of Copyright Exploitation

In addition to avoiding any collateral impact on musical works,[57] Congress also wished to negate any diminution of the five traditional rights conferred on copyright owners — reproduction, adaptation, public performance, public distribution, and public display — through its addition in 1995 of a sixth right. Thus, at the same time that it accorded the public performance right in sound recordings via digital audio transmissions explored herein, Congress provided that nothing in its handiwork should annul or limit in any way any other rights or remedies afforded under the Copyright Act, as such may have existed "either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995."[58]

In addition to that special savings provision, the DPRA also makes explicit its limitation to the performance right. Thus, it in no way limits or annuls the reproduction, adaptation, or public distribution right[59] accorded to "a sound recording or the musical work embodied therein."[60] (No negative pregnant should be drawn concerning diminution of rights in the *literary work* embodied in a sound recording, as Congress apparently failed to consider that recordings may render poems and novels no less than symphonies and rap songs).[61]

Of course, the new law does affect public performance rights — namely, by conferring a digital audio transmission right on sound recordings, which previously lacked any form of public performance right. Nonetheless, even that alteration should not be deemed to annul or limit any antecedent right — notably, the public performance right in musical works.[62] Even with respect to digital audio transmission of

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[57] *See* § A(3)(a) *supra*.

[58] 17 U.S.C. § 114(d)(4)(B)(iii).

[59] What of the display right? As a matter of simple practicality, sound recordings have never been accorded any display right. *See* n.5 *supra*. Presumably, no diminution in display rights was contemplated under the 1995 amendments.

[60] 17 U.S.C. § 114(d)(4)(B)(ii). The proposition appears to be restated in 17 U.S.C. § 114(d)(4)(C). Indeed, that whole latter provision seems merely to restate the two previous subparagraphs of the statute.

[61] *See* n.49 *supra*.

[62] *See* § E(1)(d) *infra*.

music[63] — as opposed to digital audio transmission of the sound recording rendering such music — no change in the public performance right is intended.[64]

B. EXEMPTIONS FROM THE DIGITAL TRANSMISSION RIGHT

Certain activities, even though they may constitute "performance of a sound recording publicly by means of a digital audio transmission," nonetheless remain exempt from liability.[65] These exemptions are matters of specific enumeration — to the extent that an activity falls within one of them, it is immune. By contrast, if not expressly enumerated, the DPRA directs that nothing in its structure or form be deemed to create an implicit exemption from the exclusive right to perform a sound recording publicly by means of a digital audio transmission.[66]

The most salient aspect of this exemption is that it is lost in each instance if the subject conduct occurs "as a part of an interactive service . . . ."[67] Such interactive services, instead, are subject to statutorily regulated "voluntary licenses," discussed below.[68]

1. Nonsubscription Transmissions

a. Application as of 1995

At enactment in 1995, the DPRA's exemption applied to three domains. First was an exemption for performances that occur as part of "a nonsubscription transmission other than a retransmission."[69]

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[63] *See* § A(3)(a) *supra.*

[64] 17 U.S.C. § 114(d)(4)(B)(i).

[65] 17 U.S.C. § 114(d)(1). This exemption extends solely to the right of public performance via digital audio transmission. To the extent that any other right is implicated (reproduction, distribution, etc.), the instant limitations are unavailing. 17 U.S.C. § 114(d)(4)(C) ("Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106.") *But see* § F *infra.*

[66] 17 U.S.C. § 114(d)(4)(A).

[67] 17 U.S.C. § 114(d)(1).

[68] *See* § E(1)(a) *infra.*

[69] 17 U.S.C. § 114(d)(1)(A)(i) (1995). That provision meant that even if a sound

That immunity attached only to an initial transmission, not to a retransmission. Second, a separate provision applied to such retransmissions.[70] Specifically, it immunized from liability "an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental[71] transmission that is not made for direct reception by members of the public."[72]

The Digital Millennium Copyright Act eliminated those two features.[73] Congress explained that the deleted provisions "were either the cause of confusion[74] as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped with other exemptions (such as the exemption . . . for nonsubscription broadcast transmissions)."[75] That deletion "is not intended to affect the exemption for nonsubscription broadcast transmissions."[76]

Third, the DPRA contained an exemption for broadcast transmission. That provision still remains in effect, to which we turn next.

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recording was initially transmitted in digital format, that activity was immune from liability if made available to the general public free of charge, as opposed to being sold to subscribers.

[70] *See* § A(2)(a) *supra* (discussing definition of "retransmission").

[71] "Incidental transmissions" play a role in the other major provision of the 1995 amendments. *See* NIMMER ON COPYRIGHT § 8.23[D][3].

[72] 17 U.S.C. § 114(d)(1)(A)(ii) (1995).

[73] Act of Oct. 28, 1998, Pub. L. 105-304, Sec. 405(a), 112 Stat. 2860. *See* n.15 *supra*.

[74] In particular, the second provision quoted above contains exquisitely qualified language. Its practical thrust was most difficult to divine. One might think it applicable to a network feed or "backhaul" transmission; but those are governed by a separate portion of the statute. *See* n.117 *infra*. All that is clear is that its immunity pertained even if the retransmission related to a transmission that was previously sent. 17 U.S.C. § 114(d)(1)(A)(ii) ("a *prior* or simultaneous incidental transmission") (emphasis added). By allowing time delay, that stipulation countermanded the default definition of "retransmission," which elsewhere provides that "a transmission qualifies as a 'retransmission' only if it is simultaneous with the initial transmission." 17 U.S.C. § 114(j)(6). *See* n.37 *supra*.

[75] Conf. Rep. (DMCA), p.80. *See* § B(2) *infra*.

[76] Conf. Rep. (DMCA), p.80. *See* § B(1)(b) *infra*.

b. Current Limitation to Broadcast Transmissions

The exemption in the DPRA that survived its 1998 amendment applies to a performance that is part of "a nonsubscription broadcast transmission."[77] In a bit of drafting overkill, the statute defines a "nonsubscription transmission" as "any transmission that is not a subscription transmission."[78] Such subscription transmissions are subject to statutory licensing, as discussed below.[79] Thus, the statute's definition is discussed in that context.

For present purposes, suffice it to say that to be exempt, the subject transmission cannot be made to a limited class of paying subscribers. Putting aside the "nonsubscription" component, it remains to define the second half. The statute defines a "broadcast" transmission as one "made by a terrestrial broadcast station licensed as such by the Federal Communications Commission."[80]

To give some concrete examples, to the extent that a traditional radio station in Denver or television station in Miami broadcasts programs that include performances of sound recordings, that activity is exempt from liability.[81] To qualify for the exemption, the transmission must be geared to the public at large rather than to individual subscribers, and must be non-interactive. Note that even if such sound recordings are broadcast wholly in digital format, they are still exempt because of their nonsubscription character.[82]

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[77] 17 U.S.C. § 114(d)(1)(A), *recodified from* 17 U.S.C. § 114(d)(1)(A)(iii) (1995).

[78] 17 U.S.C. § 114(j)(5) (1995), *recodified as* 17 U.S.C. § 114(j)(9).

[79] *See* § C *infra*. Nevertheless, the exemption is lost to the extent that an interactive service is at issue. 17 U.S.C. § 114(d)(1).

[80] 17 U.S.C. § 114(j)(2) (1995), *recodified as* 17 U.S.C. § 114(j)(3).

[81] S. Rep. (DPRA), pp. 18, 19 ("classic example of such an exempt transmission"). The foregoing reference includes television stations, inasmuch as a sound recording can be subject to transmission as part of the audio portion of a telecast. To the extent that sounds are used from a music video, by contrast, the subject of the performance is an audiovisual work, which is governed by the Copyright Act as drafted in 1976, rather than by the instant 1995 amendments. *See* NIMMER ON COPYRIGHT § 8.14[A]; § A(2)(a) *supra*.

[82] S. Rep. (DPRA), p. 19.

2. Retransmission of Radio Transmissions

A separate statutory exemption applies to "a retransmission of a nonsubscription broadcast transmission."[83] That provision extends the nonsubscription broadcast transmission exemption, encountered above,[84] to the retransmission realm as well. By virtue of this provision, if an initial transmission is made to the public at large, it is noninfringing to retransmit it even on a subscription basis. The Senate Report explains the intent here (subject to the special rules for radio retransmissions)[85] "that all noninteractive retransmissions of noninteractive nonsubscription broadcast transmissions be exempt from the new digital sound recording performance right."[86]

Nonetheless, this particular exemption is subject to a massive proviso (to be explicated momentarily) "in the case of a retransmission of a radio station's broadcast transmission."[87] Given that television stations, no less than radio, are technologically equipped to render digital audio transmissions of sound recordings, that proviso does not entirely swallow this exemption.[88] Nonetheless, inasmuch as radio far more often than television transmits whole songs and albums, the proviso will typically govern the retransmission of a nonsubscription broadcast transmission.

Turning to this proviso, it can be met through four separate means. The first way to be eligible for the exemption is for the radio station's broadcast transmission not to be "retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."[89] An occasional transmission may exceed that radius; to avoid "a dangerous trap for the uninitiated or inattentive,"[90] the exemption is vitiated only by

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[83] 17 U.S.C. § 114(d)(1)(B).

[84] *See* § B(1)(b) *supra*.

[85] Those special rules are explicated at length below.

[86] S. Rep. (DPRA), p. 19. The exemption applies even if cable systems and other multichannel programming distributors, which "often offer retransmissions of nonsubscription broadcasts to their customers," limit the retransmission to certain customers and charge a fee to receive the retransmission. *Id.*

[87] 17 U.S.C. § 114(d)(1)(B).

[88] S. Rep. (DPRA), p. 19. *See* n.81 *supra*.

[89] 17 U.S.C. § 114(d)(1)(B)(i).

[90] S. Rep. (DPRA), p. 20. For the addition of a parallel feature in 1998, *see* n.269 *infra*.

conduct undertaken "willfully or repeatedly."[91] That 150-mile limitation is itself subject to a further statutory exception:[92] "[A] radio station's broadcast transmission may be retransmitted by another FCC-licensed broadcast station (or translator or repeater) on a nonsubscription basis without regard to the 150-mile restriction."[93]

The second way to be eligible for the exemption is if the retransmission is of radio station broadcast transmissions that are "obtained by the retransmitter over the air."[94] The purpose of exempting such "all-band" retransmissions is "to permit retransmitters (such as cable systems) to offer retransmissions to their local subscribers of all radio stations that the retransmitter is able to pick up using an over-the-air antenna."[95] Having been so obtained, such signals in addition must not be "electronically processed by the retransmitter to deliver separate and discrete signals."[96] Moreover, such retransmission can be made only locally.[97] That last stipulation might at times afford relief to all-band retransmissions that are picked up over the air beyond the

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[91] 17 U.S.C. § 114(d)(1)(B)(i). The Senate Report intends that qualification to be understood the same way as the comparable phrase used in 17 U.S.C. § 111, explicated in H. Rep., p. 93. S. Rep. (DPRA), p. 20. *See* NIMMER ON COPYRIGHT § 8.18[E][9][a] N. 319.

[92] The language of the statute is that the 150-mile limit is inapplicable "when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission." 17 U.S.C. § 114(d)(1)(B)(i)(I). In those instances, "the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter." 17 U.S.C. § 114(d)(1)(B)(i)(II). But that rule is limited to "the case of a subscription retransmission of a nonsubscription broadcast retransmission . . . ." *Id.* "This means that a cable system (or other subscription retransmitter) can, without incurring liability under section 106(6), retransmit a broadcast retransmission within 150 miles of the transmitter site of the station, translator, or repeater that is making the retransmission." S. Rep. (DPRA), p. 20.

[93] S. Rep. (DPRA), p. 20.

[94] 17 U.S.C. § 114(d)(1)(B)(ii)(I).

[95] S. Rep. (DPRA), p. 20.

[96] 17 U.S.C. § 114(d)(1)(B)(ii)(II). *See* S. Rep. (DPRA), p. 20, referencing 37 C.F.R. § 201.17(b)(4).

[97] 17 U.S.C. § 114(d)(1)(B)(ii)(III) ("within the local communities served by the retransmitter").

150-mile limit applicable under the first provision previously noted.[98]

Third, a grandfather exemption applies to satellite carriers that had been retransmitting the subject radio station's broadcast transmission to cable systems[99] on January 1, 1995.[100] To be eligible on this basis, which is similarly immune from the 150-mile limit applicable under the first provision,[101] the subject retransmission must have been "retransmitted by cable systems as a separate and discrete signal . . . ."[102] In addition, the satellite carrier must obtain the radio station's broadcast transmission in an analog format.[103] Finally, this exemption is forfeited if the broadcast transmission being retransmitted embodies the programming of more than one radio station;[104] in other words, the station must not be "multiplexed."[105]

Fourth, "noncommercial educational and cultural radio programs" may qualify for the exemption,[106] again without regard to the 150-mile limit.[107] To invoke the exemption under this fourth avenue, various technical requirements apply.[108] In sum, this provision "exempts both simultaneous and nonsimultaneous retransmissions of broadcast transmissions originally made by federally funded noncommercial educational radio stations, provided that the retransmissions are car-

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98 S. Rep. (DPRA), p. 20.

99 The statute here cross-references the statutory definition of that term in 17 U.S.C. § 111(f). 17 U.S.C. § 114(d)(1)(B)(iii). *See* NIMMER ON COPYRIGHT § 8.18[E].

100 17 U.S.C. § 114(d)(1)(B)(iii). An example is Chicago radio station WFMT. S. Rep. (DPRA), p. 21. A future installment comments on the company-specific nature of this enactment. *See* ns. 191, 276, 456 *infra*.

101 S. Rep. (DPRA), pp. 20-21.

102 17 U.S.C. § 114(d)(1)(B)(iii).

103 17 U.S.C. § 114(d)(1)(B)(iii).

104 17 U.S.C. § 114(d)(1)(B)(iii).

105 S. Rep. (DPRA), p. 21.

106 17 U.S.C. § 114(d)(1)(B)(iv).

107 S. Rep. (DPRA), p. 21.

108 The full text of this subsection provides that it applies when

> the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission.

17 U.S.C. § 114(d)(1)(B)(iv). *See* n.113 *infra*.

ried out through nonsubscription terrestrial broadcasts."[109]

3. Other Exempt Transmissions

The discussion above addresses two broad types of exemptions from the digital transmission right in sound recordings, both clustered around nonsubscription transmissions.[110] The DPRA also includes a catch-all paragraph conveying four other exemptions,[111] applicable to both the subscription and non-subscription contexts, and regardless if the subject transmission is in a digital format.[112]

First to be exempted is "a prior[113] or simultaneous transmission incidental[114] to an exempt transmission."[115] The statute itself lists, as an example, "a feed received by and then retransmitted by an exempt transmitter."[116] The legislative history invokes the case of a network feed.[117] Because the purpose of this "incidental" exception is to facilitate exempt (re)transmissions,[118] the law further mandates that such incidental transmissions must not include "any subscription transmis-

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[109] S. Rep. (DPRA), pp. 21, 91.

[110] *See* §§ B(1)-B(2) *supra.*

[111] 17 U.S.C. § 114(d)(1)(C).

[112] S. Rep. (DPRA), pp. 21, 22.

[113] This instance is another exception when a retransmission need not be simultaneous in order to be exempt. *See* n.40 *supra*. *See also* n.108 *supra*.

[114] *Cf.* NIMMER ON COPYRIGHT § 8.23[D][3].

[115] 17 U.S.C. § 114(d)(1)(C)(i). Included in the exemption would be "transmissions of a broadcast station that both broadcasts its signal to the public and, either immediately or through intermediate terrestrial links, transmits or retransmits that signal by satellite to other broadcast stations for their simultaneous or subsequent broadcast to the public." S. Rep. (DPRA), pp. 21-22.

[116] 17 U.S.C. § 114(d)(1)(C)(i).

[117] H. Rep. (DPRA), p. 20.

> For example, a radio or television station may receive a satellite feed from a network or from another station that provides programming to the station; a station or network may receive a 'backhaul' transmission from a sports or news event at a remote location; or a station may deliver a clean feed of its broadcast transmission to a cable system to ensure that the cable system's retransmission will be of the highest technical quality.

S. Rep. (DPRA), p. 21.

[118] S. Rep. (DPRA), p. 22. One such purpose is to facilitate an otherwise exempt transmission to a business establishment, as described in the text below. *Id.*

sion directly for reception by members of the public."[119]

Second, the statute exempts "storecasts,"[120] *i.e.*, a transmission within a business establishment[121] that often includes pre-recorded music.[122] But this exemption applies only to the extent that the transmission is confined to the premises of that business "or the immediately surrounding vicinity."[123] Taking cognizance of the large volume of cases litigating the Copyright Act's *Aiken* exception,[124] the Senate Report explains that this provision is designed "[t]o leave absolutely no doubt that the new section 106(6) right is not intended to create any comparable right in the owners of copyright in sound recordings[125] regarding 'storecasts' . . . ."[126]

Third to be exempted is "a transmission to a business establishment[127] for use in the ordinary course of its business."[128] Included are such usages as background music played in offices, retail stores, and restaurants.[129] Related to the previous category, it is explicitly prescribed that nothing in the instant exemption should be deemed to limit the scope of the previous exemption.[130] Like its predecessor, this

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[119] 17 U.S.C. § 114(d)(1)(C)(i). "Thus, a retransmission that is available for general reception by the public (for example, through the Internet), which is not being used to facilitate an exempt transmission or retransmission, would not qualify as an 'incidental' retransmission under this section." S. Rep. (DPRA), p. 22. *See* n.154 *infra*.

[120] H. Rep. (DPRA), p. 20; S. Rep. (DPRA), p. 22.

[121] 17 U.S.C. § 114(d)(1)(C)(ii).

[122] S. Rep. (DPRA), p. 22.

[123] 17 U.S.C. § 114(d)(1)(C)(ii).

[124] 17 U.S.C. § 110(5). *See* NIMMER ON COPYRIGHT § 8.18[C][2]. The Fairness in Music Licensing Act, which subsequently revamped the *Aiken* exception, left this realm unaffected. *See* NIMMER ON COPYRIGHT § 8.18[C][2][b].

[125] As to music owners, by contrast, this new provision is intended to effect no change. S. Rep. (DPRA), p. 22. *See* § A(3)(a) *supra*.

[126] S. Rep. (DPRA), p. 22.

[127] "If the same subscription transmission service programming is being transmitted to both business establishments and nonbusiness consumers, then only the transmission of that service to the business establishment would qualify for an exemption . . . ." S. Rep. (DPRA), p. 23.

[128] 17 U.S.C. § 114(d)(1)(C)(iv).

[129] S. Rep. (DPRA), p. 23.

[130] 17 U.S.C. § 114(d)(1)(C)(iv). The Digital Millennium Copyright Act subjects this provision to statutory licensing, to the extent that ephemeral recordings re-

exemption requires that the business recipient not retransmit the transmission[131] "outside of its premises or the immediately surrounding vicinity."[132] In addition, the transmission must not exceed "the sound recording performance complement."[133] That latter term, which the statute defines at painstaking length, is discussed below.[134]

The last exemption[135] simplifies licensing practices by according a "through to the listener" exemption[136] intended to permit such entities as "cable systems, direct broadcast satellite (DBS) service providers and other multichannel video programming distributor (MVPD's)[137] . . . simultaneously to retransmit to the listener noninteractive music programming provided by a licensed source."[138] This exemption applies only to "a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission."[139] It is further limited to instances in which "the retransmission is simul-

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sult. *See* § F *infra*.

[131] The legislative history explains that if a business establishment retransmits the transmission in an unauthorized manner, then its retransmission loses the exemption; but if undertaken without prior authority, knowledge, or inducement from the entity that sent the transmission to it, then that entity incurs no liability, and in particular does not lose its initial exemption for transmitting to the business. S. Rep. (DPRA), p. 23.

[132] 17 U.S.C. § 114(d)(1)(C)(iv).

[133] 17 U.S.C. § 114(d)(1)(C)(iv).

[134] 17 U.S.C. § 114(j)(7) (1995), *recodified as* 17 U.S.C. § 114(j)(13). *See* § C(1)(c) *infra*.

[135] 17 U.S.C. § 114(d)(1)(C)(iii), *citing* 47 U.S.C. § 522(12). For clarity, the discussion above rearranges the statutory order.

[136] ASCAP's consent decree contains a parallel provision. *See* NIMMER ON COPYRIGHT § 8.19. *See also* text accompanying n.418 *infra*.

[137] More accurately, this exemption refers to "a retransmission by *any retransmitter*, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 . . . ." 17 U.S.C. § 114(d)(1)(C)(iii) (emphasis original). Thus, an entity that can qualify as a retransmitter may take advantage of the exemption, even it is not a multichannel video programming distributor.

[138] S. Rep. (DPRA), p. 22.

[139] 17 U.S.C. § 114(d)(1)(C)(iii). The legislative history cites an example of "the affiliates of a licensed transmitter" giving "a 'through the listener' exemption." H. Rep. (DPRA), p. 20.

taneous[140] with the licensed transmission and authorized by the transmitter."[141] An example would be "where a noninteractive music programmer transmitter has obtained a public performance copyright license from the copyright owner of the sound recording, and the retransmitter has not obtained such a license but is authorized by the music programmer transmitter to retransmit the sound recording."[142]

C. STATUTORY LICENSES FOR SUBSCRIPTION SERVICES — 1995 RECENSION

The various exemptions from the sound recording digital transmission right canvassed above apply primarily to the nonsubscription context.[143] As to subscription transmissions, which by definition fall outside those exemptions,[144] the law creates a compulsory license scheme[145] — which the DPRA labels "statutory licensing."[146]

One of the primary innovations of the Digital Millennium Copyright Act to the Digital Performance Right in Sound Recordings Act of 1995 concerns the instant realm of statutory licenses.[147] It is therefore necessary to approach this domain historically.[148] The discussion herein canvasses the law as of the 1995 amendment.[149] The succeeding subsection turns to its current application.[150]

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[140] "For purposes of this exemption, retransmissions are deemed to be 'simultaneous' even if there is some momentary time delay resulting from the technology used for transmission or retransmission." S. Rep. (DPRA), p. 23. *See* n.37 *supra*.

[141] 17 U.S.C. § 114(d)(1)(C)(iii).

[142] S. Rep. (DPRA), p. 23.

[143] The residual exemptions canvassed above are not all geared explicitly at subscription transmissions. *See* § B(3) *supra*. To the extent that a subscription transmission were able to fall within such an exemption, it would have no need to invoke the statutory licensing scheme described here. 17 U.S.C. § 114(d)(2) (applying licensing to "not exempt" subscription transmissions).

[144] *See* § B *supra*.

[145] *Cf.* NIMMER ON COPYRIGHT §§ 8.18[E], 8.18[F].

[146] 17 U.S.C. § 114(d)(2).

[147] Note the current application of statutory licensing beyond the subscription context. *See* § D(1)(d) *infra*.

[148] For a comparison of both schemes, see § D(3) *infra*.

[149] For a summary of when the old scheme governs and when the new one, see § D(3) *infra*.

[150] *See* § D *infra*.

1. Transmissions Eligible for Statutory License

We begin with eligible transmissions under the DPRA (prior to its 1998 amendment).

a. General Requirements

The public performance of a sound recording by means of a digital audio transmission may invoke the statutory license in the case of subscription transmissions, *i.e.*, those "for which subscribers are charged a fee."[151] More technically, the statute provides:

A "subscription" transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of[152] the recipient to receive the transmission or a package of transmissions including the transmission.[153]

The mechanism for delivery is immaterial.[154] Clearly, it is inapplicable to "traditional over-the-air broadcast transmissions," which are neither limited as to recipients nor subject to charge.[155] A covered activity, by contrast, is "a cable system's transmission of a digital audio service, which is available only to the paying customers of the cable system."[156]

Apart from applying to the subscription context, the 1995 version of the statutory license depends on satisfaction of five additional criteria. First, just as interactive services disqualify any transmission from *exemption*,[157] likewise a transmission that is part of an interactive

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[151] H. Rep. (DPRA), p. 20. The monetary consideration could be an "a la carte" fee for a specific audio service, or "a fee for an overall package of services that includes the digital audio services (e.g., a cable system's tier of services for a fee)." S. Rep. (DPRA), p. 36.

[152] A parent might pay for the subscription of a child who lives away from home, for example. S. Rep. (DPRA), p. 36.

[153] 17 U.S.C. § 114(j)(8) (1995), *recodified as* 17 U.S.C. § 114(j)(14).

[154] The House Report cites delivery "by cable, wire, satellite or terrestrial microwave, video dialtone, the Internet or any other digital transmission mechanism . . . ." H. Rep. (DPRA), p. 27. *See* n.119 *supra*.

[155] H. Rep. (DPRA), p. 27.

[156] H. Rep. (DPRA), p. 27; S. Rep. (DPRA), p. 36.

[157] *See* § B *supra*.

service renders the *statutory license* unavailable.[158] Second, the statutory license is forfeited to the extent that the transmitting entity tips off its subscribers in advance as to the particular[159] titles[160] it intends to perform, whether via publication of an advance program schedule or through prior announcements.[161]

Third, the transmitting entity must not "cause any device receiving the transmission to switch from one program channel to another."[162] Applicable only if such switching occurs both "automatically and intentionally,"[163] this prohibition forestalls attempts to evade the sound recording performance complement[164] by switching a subscriber from one channel to another.[165] Moreover, this entire program-switching provision has no application to transmissions to a business establishment.[166]

b. Copyright Status Information

The fourth requirement to be eligible for the statutory license hearkens back[167] to the Audio Home Recording Act of 1992[168] by

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[158] 17 U.S.C. § 114(d)(2)(A) (1995). Note that this provision has been recodified as 17 U.S.C. § 114(d)(2)(A)(i). *See* § D(1)(a) *infra*.

[159] This limitation is not intended to prevent advertisements of illustrative titles to be performed. S. Rep. (DPRA), pp. 24-25.

[160] The statute is limited to advance notification of "the titles of the specific sound recordings . . . . 17 U.S.C. § 114(d)(2)(C) (1995). The Senate Report, by contrast, casts the net more broadly: "A preannouncement that does not use the title of the upcoming selection would still come within this limitation so long as it sufficiently identifies the selection through other information, such as the artist's name and the song's well-known current chart position." S. Rep. (DPRA), p. 24. Query whether that sensible suggestion comports with the actual statutory language.

[161] 17 U.S.C. § 114(d)(2)(C) (1995). Note that this provision has been recodified as 17 U.S.C. § 114(d)(2)(B)(ii). *See* § D(1)(b) *infra*.

[162] 17 U.S.C. § 114(d)(2)(D) (1995). Note that this provision has been recodified as 17 U.S.C. § 114(d)(2)(A)(ii). *See* § D(1)(a) *infra*.

[163] 17 U.S.C. § 114(d)(2)(D) (1995). This prohibition is part and parcel of the statute's desire to avoid solicitation of home taping. H. Rep. (DPRA), p. 21. *See* § C(1)(c) *infra*.

[164] *See* § C(1)(c) *infra*.

[165] S. Rep. (DPRA), p. 25.

[166] 17 U.S.C. § 114(d)(2)(D) (1995).

[167] From the opposite perspective, *i.e.*, moving forward, this provision sets the

mandating respect for such copyright status information as the copyright owner[169] may have embodied into phonorecords containing its sound recording.[170] Such information might identify the title of the sound recording or the featured recording artist who performs on it.[171] It also encompasses "related information, including information concerning the underlying musical work and its writer."[172] To invoke the statutory license, the transmission of the sound recording must be accompanied by such information. Of course, an authorized[173] phonore-

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stage for certain aspects of copyright management information concurrently added by the Digital Millennium Copyright Act. *See* NIMMER ON COPYRIGHT § 12A.08.

[168] *See* NIMMER ON COPYRIGHT, Chap. 8E. Note that the Recording Industry Association of America had long championed this requirement. *See* Register of Copyrights, *Copyright Implications of Digital Audio Transmission Services* 77 (1991).

[169] Only status information encoded "by or under the authority of the copyright owner" need be respected. 17 U.S.C. § 114(d)(2)(E) (1995). Note that this provision has been recodified as 17 U.S.C. § 114(d)(2)(A)(iii). *See* § D(1)(a) *infra*.

[170] The statute actually refers to "information encoded in that sound recording." 17 U.S.C. § 114(d)(2)(E) (1995). That language would seem to betray conceptual confusion. *See* Woods v. Bourne Co., 60 F.3d 978, 986 n.3 (2d Cir. 1995). *Cf.* Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. Copr. Soc'y 401, 412-33 (1999). One can speak of a personal inscription in the flyleaf of a "book," but not in a "literary work," which is an idealized type that can only bear such a personalized inscription when fixed in book (or diskette, videotape, or other) form. Likewise, one can speak of information encoded in a "phonorecord" to accompany the sound recording also embodied therein, but not about ancillary information encoded into the "sound recording," which after all is supposed to be an idealized type. The distinction between "phonorecord" and "sound recording" is sometimes evanescent. *See* NIMMER ON COPYRIGHT § 2.03[C] N. 40.

[171] 17 U.S.C. § 114(d)(2)(E) (1995). Curiously, the DPRA does not contemplate that the copyright owner may have incorporated information literally about copyright status — is the work protected by a subsisting copyright, and for how long? — the most basic type of information contemplated by the Audio Home Recording Act of 1992. *See* NIMMER ON COPYRIGHT § 8B.03[C][1].

[172] 17 U.S.C. § 114(d)(2)(E) (1995). Although the Senate Report disclaims any obligation on transmitting organizations to transmit information apart from that enumerated in the statute, S. Rep. (DPRA), p. 25, the vagueness of the term "related information" creates little comfort in that regard.

[173] What if the particular phonorecord in the defendant's possession lacks such information, notwithstanding that the copyright owner intended to encode it? If that phonorecord constitutes an authorized copy, the copyright owner is presumably out

cord lacking any status information requires no information to accompany its transmission.[174]

This requirement of transmitting copyright status information is subject to an exception: No such information is needed when not required by the pertinent provision of the Audio Home Recording Act of 1992.[175] The referenced provision contains an exemption for transmitting entities from the obligations that it otherwise imposes;[176] but it also provides that one who undertakes to transmit copyright status information — although not required to do so under that 1992 amendment — must do so accurately.[177] What does it mean for the instant obligation to be subject to an exception as provided in that 1992 context? The intention is obscure.[178] Perhaps, given that the information required under the 1995 amendments differs from the copyright status flags contemplated by the 1992 amendments, the meaning is that the latter information need not be conveyed.[179]

c. Sound Recording Performance Complement

The fifth and final prerequisite for a subscription transmission to invoke statutory licensing under the terms of the DPRA is that it must not exceed "the sound recording performance complement."[180] That term is crafted "to encompass certain typical programming practices

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of luck for having failed to police its manufacture adequately.

[174] S. Rep. (DPRA), p. 25. "This provision does not obligate the copyright owner of the sound recording to encode such copyright management information in the work, nor does it limit the copyright owner's ability to select the types of information (e.g., artist, title) to be encoded." *Id.*

[175] 17 U.S.C. § 114(d)(2)(E) (1995) ("except as provided in section 1002(e) of this title").

[176] *See* NIMMER ON COPYRIGHT § 8B.03[C][2][b].

[177] *See* NIMMER ON COPYRIGHT § 8B.03[D][3].

[178] The legislative history provides no guidance, explaining only that "nothing in this section affects the provisions of section 1002(e)." S. Rep. (DPRA), p. 25.

[179] *See* n.171 *supra*.

[180] 17 U.S.C. § 114(d)(2)(B) (1995). Note that this provision has been recodified as 17 U.S.C. § 114(d)(2)(B)(i). *See* § D(1)(b) *infra*. In addition, it underlies the regulation of new services operated under the revamped statutory license. *See* § D(1)(c) *infra*.

such as those used on broadcast radio."[181] Essentially, it disallows a subscription service from taking advantage of the statutory license if it performs (on any given channel)[182] albums in their entirety, or even a substantial number of different selections[183] over a short period of time from a given artist or phonorecord.[184]

A remarkably detailed statutory definition for this term[185] applies it (as distilled from the legislative history) to the performance in any rolling three-hour period of three selections[186] from[187] a single record

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[181] H. Rep. (DPRA), p. 26.

[182] "[E]ach channel of a multichannel service is a separate 'transmission.'" S. Rep. (DPRA), p. 24.

[183] The Recording Industry Association of America had previously proposed a "single-cut rule." *See* Register of Copyrights, *Copyright Implications of Digital Audio Transmission Services* 79 (1991).

[184] H. Rep. (DPRA), p. 26.

[185] The statute defines that term of art as follows:

> the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—
>
> (A)3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or
>
> (B)4 different selections of sound recordings—
>
> (i)by the same featured recording artist; or
>
> (ii)from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,
>
> if no more than three such selections are transmitted consecutively:
>
> *Provided*, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

17 U.S.C. § 114(j)(7) (1995), *recodified as* 17 U.S.C. § 114(j)(13).

[186] The statute refers to "3 different selections." 17 U.S.C. § 114(j)(7)(A) (1995), *recodified as* 17 U.S.C. § 114(j)(13) (A). "The requirement of 'different selections' permits the performance of the same selection in excess of the numerical limits." H. Rep. (DPRA), p. 27. That nuance refrains (for better or worse) from smothering radio stations that subject their listeners to endless repetition of the same selections under guise of a "top 40" format. *Id.*; S. Rep. (DPRA), p. 36.

[187] Liability attaches only if the selections come "from" a particular phonorecord. H. Rep. (DPRA), p. 27. Thus, to the extent that a service selects different songs from various phonorecords, which as luck would have it just happen to correspond to the numbers gathered together in that artist's "greatest hits" album (or in a compilation of various recording artists), the sound recording complement is not ex-

album,[188] with no more than two selections transmitted consecutively,[189] or of four selections[190] by a single featured artist[191] or from a

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ceeded. *Id.* But the legislative history limits that immunity to instances that transpire "in the absence of an intention by the performing entity to knowingly circumvent the numerical limits of the complement." *Id.*

That discussion gives content to the final proviso of the statute, affording a safe harbor to a "service that selects from multiple sources and happens to exceed these limits . . . ." H. Rep. (DPRA), p. 21. A further exegetical flourish gives content to that proviso's focus on the time of "programming of the multiple phonorecords" rather than upon the time of transmission. 17 U.S.C. § 114(j)(7) (1995), *recodified as* 17 U.S.C. § 114(j)(13). "This avoids imposing liability for programming that occurs such as a week or two in advance of transmission that unintentionally exceeds the complement such as where, between the time of the programming and transmission, a phonorecord or set or compilation of phonorecords may be released that embodies selections previously programmed by the transmitting entity from multiple phonorecords." H. Rep. (DPRA), p. 27. *See* S. Rep. (DPRA), p. 35.

[188] In an era of multimedia and breakdown of barriers, query whether "single record albums" marks meaningful territory. CD's, in a comparatively short time-span, have edged out rival analog media, such as vinyl and cassettes. H. Rep. (DPRA), p. 12. In the future, why should performers be limited to cutting a 12-song "album" or releasing a three-disc "boxed set," both of which are simply throwbacks to the time when delivery of recorded music was constrained by physical media? Singers of the future might simply direct 7 hours, or 70, of musical delight however they wish. *See also* n.192 *infra*.

[189] "Whether selections are consecutive is determined by the sequence of the sound recordings transmitted, regardless of whether some tones or other brief interlude is transmitted between the sound recordings." H. Rep. (DPRA), pp. 26-27.

[190] "[W]here the transmitting entity willfully plays within a 3-hour period five selections of a single featured recording artist, regardless of whether they were played from several different phonorecords, and regardless of whether the transmitting entity knew that the transmission included more than three songs from a single album, the transmission does not come within the complement." S. Rep. (DPRA), p. 35.

[191] As with virtually every other aspect of the sound recording performance complement, this term has its own elaborate specifications, which can best be appreciated by example:

> For example, the Eagles would be the "featured recording artist" on a track from an Eagles album that does not feature Don Henley by name with equal prominence; but if the same sound recording were performed from "Don Henley's Greatest Hits," then Don Henley and not the Eagles would be the "featured recording artist." Where both the vocalist or soloist and the group or ensemble are identified as a single entity and with equal prominence (such as "Diana Ross and the Supremes"),

single boxed set,[192] with no more than three transmitted consecutively.[193] This definition, together with other features of the statutory licensing scheme (such as the bar on publishing advance schedules),[194] is geared to prevent subscription services from effectively diminishing sales of pre-recorded music[195] by virtue of the statutory license.[196]

2. License Terms

The statute provides two methods for determining the rates applicable to statutory licenses for exploitation of the affected performance right.[197] The first is negotiation by mutual agreement of the affected parties. Absent such agreement, the second is for the convening of a copyright arbitration royalty panel.[198]

a. Negotiated Agreement

The statute empowers "any copyright owners of sound recordings and any entities performing sound recordings affected by this section [to] negotiate and agree upon the royalty rates and license terms[199] and conditions for the performance of such sound recordings . . . ."[200]

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both the individual and the group qualify as the "featured recording artist." S. Rep. (DPRA), p. 36. *See* n.100 *supra.*

[192] As observed previously, in an era of multimedia and breakdown of barriers, the concept of "boxed sets" is problematic. *See* n.188 *supra.*

[193] H. Rep. (DPRA), p. 21. *See id.* p. 26; S. Rep. (DPRA), pp. 34-35.

[194] *See* § C(1)(a) *supra.*

[195] These bars primarily discourage the soliciting of home taping. In addition, they can prevent more exotic schemes that would obviate sales — such as an audio channel devoted exclusively to one group of recording artists, such that listeners would no longer feel the need to buy their albums.

[196] H. Rep. (DPRA), p. 21.

[197] The statutory license, implicating solely performances, is wholly inapplicable to the reproduction and distribution rights. S. Rep. (DPRA), p. 29. *See* § A(3)(b) *supra. But see* § F *infra.*

[198] *See* NIMMER ON COPYRIGHT § 7.27.

[199] What distinguishes "terms" from "rates"? The former refers to details as to how and when payments are to be made and when other accounting matters are required. S. Rep. (DPRA), p. 30. If the parties fail to negotiate such terms, arbitration panels may impose them. *Id. See* § C(2)(b).

[200] 17 U.S.C. § 114(e)(1).

Those parties may further agree to the "proportionate division of fees paid among copyright owners."[201] Moreover, the statute authorizes them to designate common agents[202] on a nonexclusive basis[203] in order to negotiate, agree to, pay, or receive payments.[204] For all these purposes,[205] Congress grants interested parties an exemption[206] from any provision of the antitrust laws.[207]

The statute also directs the Librarian of Congress to notice the initiation of voluntary negotiations by publication in the *Federal Register*.[208] These negotiations control the time period beginning on February 1, 1996 (the effective date of the 1995 amendments)[209] and ending on December 31, 2000.[210] The statute allows affected parties to sub-

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[201] 17 U.S.C. § 114(e)(1).

[202] Note that the RIAA represents 90% of affected copyright owners. *See* Recording Industry Ass'n of Am. v. Librarian of Congress, 176 F.3d 528, 531 (D.C. Cir. 1999).

[203] This requirement dilutes the antitrust exemption to be noted below. H. Rep. (DPRA), p. 22. *See* n.207 *infra*. It preserves "the ability to negotiate directly with and seek to secure a statutory license from a copyright owner directly." H. Rep. (DPRA), p. 22-23; S. Rep. (DPRA), p. 28.

[204] 17 U.S.C. § 114(e)(1). Note the more limited focus of the antitrust exemption that applies in the voluntary licensing context. *See* § E(3) *infra*.

[205] H. Rep. (DPRA), p. 22 ("those actions must be taken in conjunction with the statutory license only").

[206] Patterned after antitrust exemptions contained in existing copyright law, S. Rep. (DPRA), p. 28, see, *e.g.*, NIMMER ON COPYRIGHT § 8.18[E][4][d][ii], "this is a very limited antitrust exemption." H. Rep. (DPRA), p. 22.

[207] 17 U.S.C. § 114(e)(1). This exemption contains the single proviso that common agents be appointed only non-exclusively. S. Rep. (DPRA), p. 28. *See* n.203 *supra*. Congress therefore anticipated that it would not result in anticompetitive terms being imposed on consumers; but if such supracompetitive rates were attempted, then copyright arbitration royalty panels could come to the rescue. H. Rep. (DPRA), p. 22. *See* § C(2)(b) *infra*.

[208] 17 U.S.C. § 114(f)(1) (1995).

[209] Note that the 1995 amendments took effect on February 1, 1996, except for 17 U.S.C. §§ 114(e) &114(f), both of which took effect immediately upon enactment in order to facilitate the negotiation/arbitration process. *See* n.14 *supra*.

[210] 17 U.S.C. § 114(f)(1) (1995). The regulations to be adopted by the Librarian of Congress are also to notice negotiations at 5-year intervals commencing in January 2000. 17 U.S.C. § 114(f)(4)(A)(ii) (1995). The expiration of the old period at the end of 2000 and the provision to crank up the machinery anew during that year creates a potential gap, which a 1997 technical amendment fills. *See* Act of Nov. 13,

mit pertinent contracts to the Librarian,[211] and specifies that all parties to the negotiation proceeding will bear their own costs.[212] Last, the statute specifies that terms and rates to be negotiated "shall distinguish among the different types of digital audio transmission services then in operation."[213] But that distinction does not require, or even suggest, that the terms and rates ultimately established must be different.[214]

b. Arbitration Royalty Panel

Absent timely[215] agreement via negotiation,[216] the statute empow-

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1997, Pub. L. 105-80, Sec. 3(1), 111 Stat. 1529, amending 17 U.S.C. § 114(f)(1). As explained in the legislative history to the latter amendment,

> The Digital Performance Right in Sound Recordings Act of 1995 directed that the rates established in 1996 are to expire on December 31, 2000. New rates are to be established during 2000. However, it is possible that the work of the copyright arbitration royalty panel ("CARP") and of the Librarian of Congress in reviewing the CARP's report will not be concluded by December 31, 2000, thereby creating a period in which no rates apply. Subsection (1) avoids this result by stating that the effective date of the rates set in 1996 last until December 31, 2000, or until 30 days after the Librarian has published in the Federal Register his or her decision to adopt or reject the CARP's rate adjustment decision. Resorting to this second option will be unnecessary if a CARP is not convened, or if the CARP and the Librarian conclude their functions before December 31, 2000.

H.R. Rep. No. 105-25, 105th Cong., 1st Sess. 11 (1997).

[211] [T]he Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel. S. Rep. (DPRA), p. 29.

[212] 17 U.S.C. § 114(f)(1) (1995), *recodified as* § 114(f)(2)(A).

[213] 17 U.S.C. § 114(f)(1) (1995) , *recodified as* § 114(f)(2)(A). Interested parties may file new petitions whenever "a new type of digital audio transmission service on which sound recordings are performed is or is about to become operational." 17 U.S.C. § 114(f)(4)(A)(i) (1995). In that event, the Librarian of Congress is directed to prescribe regulations governing repeat notices within 30 days of the initiation of voluntary negotiation proceedings. *Id.*

[214] *See* S. Rep. (DPRA), p. 29.

[215] The statute references the "60-day period commencing 6 months after publication of the notice" in the *Federal Register* mentioned above. 17 U.S.C. § 114(f)(2) (1995). *See* § C(2)(a) *supra*. Recall also that § 114(f), together with § 114(e), took effect immediately upon enactment, unlike the balance of the 1995 amendments. *See* n.209 *supra*.

ers the Librarian of Congress, upon the filing of a petition in proper form,[217] to convene a copyright arbitration royalty panel in order "to determine[218] a schedule of rates and terms . . . binding on all copyright owners of sound recordings and entities performing sound recordings."[219] The statute explicitly subordinates those arbitrated rates to license agreements voluntarily negotiated "between one or more copyright owners of sound recordings and one or more entities performing sound recordings . . . ."[220] Even if the negotiation culminates after arbitrated rates have already been reached, the latter are superseded by the parties' bargained agreement.[221] Thus, arbitration binds only those parties who do not enter an agreement.[222] In this way, it is hoped that industry-wide agreement will ultimately emerge, thus obviating the need for arbitration panels.[223]

With respect to such arbitration proceedings, the statute specifies that, in addition to the objectives that govern such procedures generally in the copyright ambit,[224] "the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary

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[216] *See* § C(2)(a) *supra*.

[217] As with voluntary negotiations (*see* § C(2)(a) *supra*), the Librarian of Congress is to prescribe regulations for the filing of petitions during a 60-day period commencing six months after publication of a notice of the initiation of voluntary negotiation proceedings. 17 U.S.C. § 114(f)(4)(B)(i)(I) (1995). Such petitions initiate anew the process of invoking a copyright arbitration royalty panel. 17 U.S.C. § 114(f)(4)(B)(i) (1995). The process also goes forward automatically on July 1, 2000 and at 5-year intervals thereafter. 17 U.S.C. § 114(f)(4)(B)(i)(II) (1995).

[218] An earlier version of the statute contained the words "and publish in the Federal Register" at this juncture. A 1997 technical amendment removed that "inadvertent mistake, since only government agencies may publish in the Federal Register. Any decision of a CARP [*i.e.*, Copyright Arbitration Royalty Panel] will be published by the Librarian of Congress pursuant to the provisions of chapter 8 of the Copyright Act." H.R. Rep. No. 105-25, 105th Cong., 1st Sess. 15 (1997).

[219] 17 U.S.C. § 114(f)(2) (1995).

[220] 17 U.S.C. § 114(f)(3). Note that this provision is unaffected by the 1998 amendments. *See* § D(2) *infra*.

[221] 17 U.S.C. § 114(f)(3) ("at any time").

[222] H. Rep. (DPRA), p. 23; S. Rep. (DPRA), p. 29.

[223] S. Rep. (DPRA), p. 29.

[224] 17 U.S.C. § 801(b)(1), referenced by 17 U.S.C. § 114(f)(2) (1995).

license agreements negotiated" between the parties.[225] These proceedings are concluded in accordance with the statutory scheme[226] that generally regulates copyright arbitration royalty panels.[227]

Finally, the statute directs the Librarian of Congress to establish "requirements by which copyright owners may receive reasonable notice of the use of their sound recordings . . . and under which records of such use shall be kept and made available by entities performing sound recordings."[228] Case law allows the Copyright Office to impose terms on the RIAA as collective agent for copyright owners of sound recordings.[229]

3. Payment of Fees

Because this statutory licensing scheme constitutes a compulsory license, the statute explicitly provides that "[a]ny person who wishes to perform a sound recording publicly by means of a nonexempt[230] subscription transmission[231] . . . may do so without infringing the ex-

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[225] 17 U.S.C. § 114(f)(2) (1995).

[226] 17 U.S.C. § 802, referenced by 17 U.S.C. § 114(f)(4)(B)(ii) (1995).

[227] In the first such proceeding, the Recording Industry Association of America requested a royalty rate set at 41.5% of an affected service's gross revenues from U.S. residential subscribers. The digital audio subscription services retorted that the rate should be set between 0.5% and 2%. The Panel determined to impose a rate of 5%. The Librarian, upon recommendation of the Register of Copyrights, rejected the Panel's methodology, and instead adopted a statutory rate for the digital performance of sound recordings of 6.5% of gross revenues from U.S. subscribers. 63 Fed. Reg. 25,394, 25,413 (May 8, 1998).

That ruling largely survived judicial review. *See* Recording Industry Ass'n of Am. v. Librarian of Congress, 176 F.3d 528 (D.C. Cir. 1999). The court held that the statute requires "reasonable" rates, not "market" rates, and that the Librarian's rates qualified under that standard. *Id.* at 533.

[228] 17 U.S.C. § 114(f)(2) (1995). This aspect has been recodified as 17 U.S.C. §114(f)(4)(A) (1998).

[229] Recording Industry Ass'n of Am. v. Librarian of Congress, 176 F.3d 528, 535 (D.C. Cir. 1999) (vacating imposition of terms not supported by the record).

[230] Exempt transmissions definitionally require no payment whatsoever. *See* § B *supra*.

[231] As noted above, the 1995 version of the statutory license applies only to subscription transmissions. *See* § C(1)(a) *supra*.

clusive right of the copyright owner of the sound recording."[232] To invoke this procedure, that person must comply with the regulations promulgated for this purpose by the Librarian of Congress.[233] Obviously, he must also pay all applicable royalty fees determined by voluntary negotiation or panel arbitration.[234] To the extent that no fees have yet been set in that manner, he may still invoke the statutory license by "agreeing to pay such royalty fees as shall be determined . . . ."[235]

In any event, once the pertinent royalty rate is set, there can be no excuse to withhold timely payment. The statute provides that "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set."[236] Failure to timely pay that fee renders the subject conduct infringing *ab initio*, and thereby subject to the full panoply of copyright remedies.[237]

4. Allocation of Receipts

Once the copyright owner of the digital transmission right[238] receives its statutory licensing royalties, whether such be the product of voluntary negotiation[239] or panel arbitration,[240] the statute directs it to

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[232] 17 U.S.C. § 114(f)(5)(A) (1995). For the 1998 amendment to that language, see n.353 *infra*.

[233] 17 U.S.C. § 114(f)(5)(A)(i) (1995), *recodified as* § 114(f)(4)(B)(i)

[234] 17 U.S.C. § 114(f)(5)(A)(i) (1995), *recodified as* § 114(f)(4)(B)(i). *See* H. Rep. (DPRA), p. 21

[235] 17 U.S.C. § 114(f)(5)(A)(ii) (1995), *recodified as* § 114(f)(4)(B)(ii). Whether this language requires any advance token of future willingness to pay (along the lines of "I hereby solemnly bind myself before these witnesses to pay such royalty payments as in the future may be set") is left unclear. No enlightenment on this issue comes from the legislative history. *See* H. Rep. (DPRA), p. 23.

[236] 17 U.S.C. § 114(f)(5)(B) (1995), *recodified as* § 114(f)(4)(C).

[237] S. Rep. (DPRA), pp. 30-31 ("may disqualify the entity for a statutory license"). *Cf.* NIMMER ON COPYRIGHT § 8.04[J][2].

[238] 17 U.S.C. § 114(g)(2) ("copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission").

[239] *See* § C(2)(a) *supra*.

[240] *See* § C(2)(b) *supra*.

allocate its receipts[241] to recording artists according to set formulae.[242] The copyright owner may retain half; the other 50% is divvied up among recording artists, musicians and vocalists.

The legislative history furnishes background regarding this allocation:

> In the absence of the applications of the work made for hire doctrine of the copyright law, record companies, as authors of the sound engineering, and performers, as authors of their recorded interpretations, are joint authors of a sound recording. However, the work made for hire doctrine often applies to recorded performances.[243] Under this doctrine, upon creation of the sound recording, record companies are authors of both the performance and the sound engineering portions of the sound recordings, and thus the sole rightsholders. Performers, in these cases, receive their compensation for the performance from the rightsholder on a contractual basis. The Committee intends the language of section 114(g) to ensure that a fair share of the digital sound recording performance royalties goes to the performers according to the terms of their contracts.[244]

Most importantly, 45% of the total receipts are to be allocated "to the recording artist or artists[245] featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings)."[246] That determination is to be made "on a per sound recording basis."[247]

There remains 5%. Of that sum, half is to be distributed to non-featured musicians who have performed on sound recordings.[248] Note that, in contrast to the payment of 45% to the actual featured artists on the particular sound recording accounting for payment, the instant

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[241] The Senate Report defines such "receipts," in the case of collecting rights society (such as ASCAP), as all moneys the copyright owner receives, therefore excluding "administrative fees either deducted by or paid to the collective." S. Rep. (DPRA), p. 31.

[242] 17 U.S.C. § 114(g)(2).

[243] *See Nimmer on Copyright* § 5.03.

[244] H. Rep. (DPRA), p. 23-24.

[245] For parallel divisions of royalties, in the context of the Audio Home Recording Act of 1992, into the sound recording and musical work funds, see NIMMER ON COPYRIGHT § 8B.05[A].

[246] 17 U.S.C. § 114(g)(2)(C).

[247] 17 U.S.C. § 114(g)(2)(C).

[248] 17 U.S.C. § 114(g)(2)(A).

2½% is set apart for the general category of nonfeatured musicians, rather than being allocated to the particular nonfeatured musicians who performed on the implicated sound recordings. The statute contemplates that this 2½% is to be deposited into an escrow account managed by an independent administrator.[249] The final 2½% of the receipts is to be distributed in parallel fashion to nonfeatured vocalists.[250] Again, the statute mandates an escrow account managed by an independent administrator to benefit that class.[251]

D. STATUTORY LICENSES FOR SUBSCRIPTION AND OTHER NONEXEMPT SERVICES – CURRENT LAW

Aided by the foregoing understanding as to how the statutory license worked for subscription services under the DPRA as enacted,[252] we can now proceed to consider the amendments made to the statutory scheme by the Digital Millennium Copyright Act,[253] effective upon enactment on October 28, 1998.[254] The legislative history notes that the amendment "extends the availability of a statutory license for subscription transmissions to cover certain eligible nonsubscription transmissions."[255] In other words, whereas previous law exempted all services that were neither subscription nor interactive, some services

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[249] 17 U.S.C. § 114(g)(2)(A). That administrator is to be "jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) . . . ." *Id.* Note that the nonfeatured musicians to whom the moneys are ultimately distributed need not be members of the American Federation of Musicians. *Id.* "The Committee believes that it will be especially important for these independent administrators to identify and pay those vocalists and musicians who are not members of the union. They must establish procedures designed to enable all eligible parties to receive royalties, including nonunion members." H. Rep. (DPRA), p. 24.

[250] 17 U.S.C. § 114(g)(2)(B).

[251] 17 U.S.C. § 114(g)(2)(B). The pertinent entity here, in place of the American Federation of Musicians, is the American Federation of Television and Radio Artists. With that alteration, and the designated beneficiary being nonfeatured vocalists instead of musicians, this provision is identical to the previous provision, with its intended scope reaching nonunion as well as union members. *See* n.249 *supra*.

[252] *See* § C *supra*.

[253] *See* n.15 *supra*.

[254] *Id.*

[255] Conf. Rep. (DMCA), p.80.

are now subject to mandatory licensing, even if nonsubscription.[256]

1. Transmissions Eligible for Statutory License

The statutory license here under discussion is inapplicable to the extent that the conduct in question falls within an exemption.[257] Absent an appropriate exemption, the license specifies at the outset that it applies in three circumstances, "each of which contains conditions of a statutory license for certain nonexempt subscription and eligible nonsubscription transmissions."[258]

The first applies to a transmission "that is made by a preexisting[259] satellite digital audio radio service."[260] The second is to the "performance of a sound recording publicly by means of a subscription digital audio transmission . . . ."[261] The third is to "an eligible nonsubscription transmission."[262]

a. General Criteria.

What criteria allow invocation of the statutory license in its 1998 guise? The first part of the statute reshuffles three paragraphs from the 1995 recension and makes them applicable here.[263] First, in order to qualify for the statutory license, the subject transmission must not be part of an interactive service.[264] Second, the transmitting entity must not automatically and intentionally cause any device receiving

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[256] For a comparison of the effects under the 1995 and 1998 versions of the law, *See* § D(3) *infra*.

[257] *See* § B *supra*. Note that the exemptions were much broader before the 1998 amendment. *See* § B(1)(a) *supra*.

[258] Conf. Rep. (DMCA), p.80.

[259] The question immediately arises as to the operative date which allows a service to qualify as "preexisting." *See* § D(1)(b) *infra* (explaining that date is July 31, 1998).

[260] 17 U.S.C. § 114(d)(2). *See* § D(1)(b) *infra*.

[261] 17 U.S.C. § 114(d)(2). *See* § D(1)(c) *infra*. If the subject service is preexisting, it is governed by the previous category. Accordingly, the instant category applies only to new services. *Id.*

[262] 17 U.S.C. § 114(d)(2). *See* § D(1)(d) *infra*.

[263] Conf. Rep. (DMCA), p.80.

[264] 17 U.S.C. § 114(d)(2)(A)(i). *See* § C(1)(a) *supra*.

the transmission to switch from one program channel to another.[265] Third, the transmission of the sound recording must be accompanied by the pertinent copyright status information.[266]

Apart from those general criteria, transmitting entities must comply with separate features of the statute, depending on whether they were already in operation as of (shortly before)[267] the 1998 amendment.[268] In addition, the House-Senate conferees set forth their view as to proper interpretation of the statutory license. Albeit not codified into law, these observations are worth considering:

> The conferees intend that courts considering claims of infringement involving violation of the requirements set forth in section 114(d)(2) should judiciously apply the doctrine of *de minimis non curat lex*. A transmitting entity's statutory license should not be lost, and it become subject to infringement damages for transmissions that have been made as part of its service, merely because, through error, it has committed nonmaterial violations of these conditions that, once recognized, are not repeated.[269] Similarly, if a service has multiple channels, the transmitting entity's statutory license should not be lost, and it become subject to infringement damages for transmissions that have been made on other channels, merely because of a violation in connection with one channel. Conversely, courts should not apply such doctrine in cases in which repeated or intentional violations occur.[270]

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[265] 17 U.S.C. § 114(d)(2)(A)(ii). Note that all the same provisions apply here as under previous law, including the lack of applicability of this feature to transmissions to a business establishment. *See* § C(1)(a) *supra*.

[266] 17 U.S.C. § 114(d)(2)(A)(iii). Note that all the same provisions apply here as under previous law, including the exceptions contemplated by the Audio Home Recording Act of 1992. *See* § C(1)(b) *supra*.

[267] *See* n.272 *infra*.

[268] For pre-existing services, see § D(1)(b) *infra*. For newly operating services, see § D(1)(c) *infra*.

[269] This provision embroiders on a previous point from the DPRA. *See* n.90 *supra*.

[270] Conf. Rep. (DMCA), p.80. The report further notes,

> The conferees note that if a sound recording copyright owner authorizes a transmitting entity to take an action with respect to that copyright owner's sound recordings that is inconsistent with the requirements set forth in section 114(d)(2), the conferees do not intend that the transmitting entity be disqualified from obtaining a statutory license by virtue of such authorized actions.

Id.

b. Preexisting Services

The second part of the statute reshuffles two paragraphs from the 1995 recension and makes them applicable here.[271] But these provisions apply only to certain preexisting services: "a subscription transmission . . . that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998"[272] and "a transmission . . . that is made by a preexisting satellite digital audio radio service."[273] The statute elaborately defines both a "preexisting satellite digital audio radio service"[274] and a "preexisting subscription service."[275] Only a very few services were intended to be

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[271] "Thus, preexisting satellite digital audio radio services and the historical operations of preexisting subscription services are subject to the same five conditions for eligibility for a statutory license, as set forth in subparagraphs (A) and (B), as have applied previously to these services." Conf. Rep. (DMCA), p.81.

[272] How was that date chosen? In terms of the statute and its legislative history, it simply comes out of thin air. One must therefore turn elsewhere.

> On Thursday, July 23, 1998, representatives of the RIAA and DiMA [Digital Media Association] and other music industry groups met with the U.S. Copyright Office in Washington, D.C. and were told by the Register of Copyrights that they had until the following Friday, July 31, 1995, to draft the legislation they were seeking. Miraculously, on August 4, 1998, the House of Representatives passed an amendment to the [Digital Millennium Copyright] Act which included the legislation drafted and agreed upon by the RIAA and DiMA just days, and perhaps hours, earlier.

Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 Ent. L. Rptr. 4, 5 (1998).

[273] 17 U.S.C. § 114(d)(2)(B).

[274] The statute defines that term as a "subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license . . . ." 17 U.S.C. § 114(j)(10). It also "may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service." *Id.*

Note that a "preexisting satellite digital audio radio service" does not qualify under the separate definition of "preexisting subscription services" for the reason that "they had not commenced making transmissions to the public for a fee on or before July 31, 1998. Only two entities received these licenses: CD Radio and American Mobile Radio Corporation." Conf. Rep. (DMCA), p.88.

[275] In this instance, the definition extends to "a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a

grandfathered in under those provisions.[276]

With respect to qualifying preexisting services of both varieties just enumerated, the statute places two restrictions. First, the transmission must not exceed the sound recording performance comple-

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fee on or before July 31, 1998. . . ." 17 U.S.C. § 114(j)(11). As in the foregoing definition, it also "may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service." *Id.* The legislative history explains the rationale here:

> A "preexisting satellite digital audio radio service" and "preexisting subscription service" may both include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service. Such sample channels are to be treated as part of the subscription service and should be considered in determining the royalty rate for such subscription service. The conferees do not intend that the ability to offer such sample channels be used as a means to offer a nonsubscription service under the provisions of section 114 applicable to subscription services. The term "limited number" should be evaluated in the context of the overall service. For example, a service consisting of 100 channels should have no more than a small percentage of its channels as sample channels.

Conf. Rep. (DMCA), pp.88-89.

[276] For examples of preexisting satellite digital audio radio services, *see* n.274 *supra* As to the other category,

> Only three services qualify as a preexisting subscription service — DMX, Music Choice and the DiSH Network. As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite.
>
> In grandfathering these services, the conferee's objective was to limit the grandfather to their existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided. Thus, if a cable subscription music service making transmissions on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service. If, however, a subscription service making transmissions on July 31, 1998, were to offer a new service either in the same or new transmission medium by taking advantages of the capabilities of that medium, such new service would not qualify as a preexisting subscription service. For example, a service that offers video programming, such as advertising or other content, would not qualify as a preexisting service, provided that the video programming is not merely information about the service itself, the sound recordings being transmitted, the featured artists, composers or songwriters, or an advertisement to purchase the sound recording transmitted.

Conf. Rep. (DMCA), p.89. *See* n.100 *supra*.

ment.[277] Second, the transmitting entity must not tip off subscribers in advance as to titles of specific sound recordings to be transmitted.[278]

Why is the statute drafted to draw a distinction between preexisting and new services? The legislative history explains.

> The purpose of distinguishing preexisting subscription services making transmissions in the same medium as on July 31, 1998, was to prevent disruption of the existing operations by such services. There was only three such services that exist: DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak). As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite. The purpose of distinguishing the preexisting satellite digital audio radio services is similar. The two preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation, have purchased licenses at auction from the FCC and have begun developing their satellite systems.[279]

c. New Services

The third part of the statute spells out the governing standards for new services.[280] More precisely, at issue here[281] is a subscription transmission "that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998."[282] For these purposes, the statute defines the term "new subscription service" as a "service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscrip-

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[277] 17 U.S.C. § 114(d)(2)(B)(i). Note that all the same provisions apply here as under previous law. *See* § C(1)(c) *supra*.

[278] 17 U.S.C. § 114(d)(2)(B)(ii). Note that all the same provisions apply here as under previous law. *See* § C(1)(a) *supra*.

[279] Conf. Rep. (DMCA), pp.80-81.

[280] This provision is an alternative to the one set forth previously regarding preexisting services. *See* § D(1)(b) *supra*. Note that "a service is subject to the conditions in one or the other . . . ." Conf. Rep. (DMCA), p.80. In either event, the service is subject to the general criteria culled from prior law. *Id. See* § D(1)(a) *supra*.

[281] As will be set forth below, the same criteria also apply to eligible nonsubscription transmissions. *See* § D(1)(d) *infra*.

[282] 17 U.S.C. § 114(d)(2)(C)

tion service or a preexisting satellite digital audio radio service."[283]

Nine conditions apply to the services that fall within this new framework.[284]

(1) In this instance as well as the one governing preexisting services,[285] the transmission must not exceed the sound recording performance complement.[286] But that requirement is made expressly inapplicable to "a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission."[287] Nonetheless, if certain conditions are present, then the requirement of observing the sound recording performance complement is reactivated. The first occurs when "the broadcast station makes broadcast transmissions that regularly exceed the sound recording performance complement."[288] In addition, the retransmitter is disqualified from making its transmissions under a statutory license[289] if "the sound recording copyright owner or its representative has notified the transmitting entity in writing[290] that broad-

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[283] 17 U.S.C. § 114(j)(8). For the definition of those pre-existing entities, see § D(1)(b) *supra*.

[284] Conf. Rep. (DMCA), p.81. A future installment will comment on the overblown nature of these particulars. The general purpose seems to be avoiding consumers being able to cherry-pick sound recordings that they wish to record at home. Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. RPTR. 4, 14 (1998).

[285] *See* § D(1)(b) *supra*.

[286] 17 U.S.C. § 114(d)(2)(C)(i). *See* § C(1)(c) *supra*. Note that the statutory definition of that term "is unchanged by this amendment." Conf. Rep. (DMCA), p.81.

[287] 17 U.S.C. § 114(d)(2)(C)(i). *See* Conf. Rep. (DMCA), p.81.

[288] 17 U.S.C. § 114(d)(2)(C)(i)(I). Actually, the statutory text is even more minute. The triggering factors occur with respect to transmissions "in digital format that regularly exceed the sound recording performance complement," 17 U.S.C. § 114(d)(2)(C)(i)(I)(aa), and " in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement," 17 U.S.C. § 114(d)(2)(C)(i)(I)(bb).

[289] Conf. Rep. (DMCA), p.81.

[290] What of a notification that is formally compliant (in writing, containing the necessary verbiage) but is substantively untrue? The statute fails to address that contingency. Presumably, truth should be considered an element of an effective notification.

cast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement . . . ."[291]

(2) "Services may not publish advance program schedules or make prior announcements of the titles of specific sound recordings or the featured artists to be performed on the service."[292] The transmitting entity must not cause to be published[293] in advance[294] the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists . . . ."[295] Nonetheless, that provision "does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period. . . ."[296] In addition, it was not the intent here to "preclude a transmitting entity from identifying specific sound recordings immediately before they are performed."[297]

Moreover, "in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission," the prohibition on advance announcements is inapplicable to "a prior oral announcement by the broadcast station. . . ."[298] It is equally inapplicable to "an advance program schedule published . . .by the broadcast sta-

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[291] 17 U.S.C. § 114(d)(2)(C)(i)(II). "Once notification is received, the transmitting entity making the retransmissions must cease retransmitting those broadcast transmissions that exceed the sound recording performance complement." Conf. Rep. (DMCA), p.81.

[292] Conf. Rep. (DMCA), pp.81-82.

[293] Also included here are inducing or facilitating that publication. 17 U.S.C. § 114(d)(2)(C)(ii). "[S]ervices may not induce or facilitate the advance publication of schedules or the making of prior announcements, such as by providing a third party the list of songs or artists to be performed by the transmitting entity for publication or announcement by the third party." Conf. Rep. (DMCA), p.82.

[294] The statute refers to "an advance program schedule or prior announcement." 17 U.S.C. § 114(d)(2)(C)(ii). The legislative history applies the prohibition to "announcements, in text, video or audio, that may be made by a service under the statutory license." Conf. Rep. (DMCA), p.81.

[295] 17 U.S.C. § 114(d)(2)(C)(ii).

[296] 17 U.S.C. § 114(d)(2)(C)(ii).

[297] Conf. Rep. (DMCA), p.82.

[298] 17 U.S.C. § 114(d)(2)(C)(ii).

tion . . . ."[299] But that last provision applies only when "the transmitting entity does not have actual knowledge and has not received written notice[300] from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule. . . ."[301]

(3) Notwithstanding the previous provision, Congress wished to allow services generally to use "the names of several featured recording artists to illustrate the type of music being performed on a particular channel."[302] It therefore set up an elaborate scheme to allow use of representative names, and at the same time minutely prescribed proper utilization. In brief, the statutory license is forfeit if it is possible to identify programs in advance with too much specificity. But how much is too much? To understand the picayune regime that governs here, it is necessary at the outset to quote the two new definitions added to the statute.

> An "archived program" is a predetermined program[303] that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings,[304] as

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[299] 17 U.S.C. § 114(d)(2)(C)(ii).

[300] Again, Congress failed to contemplate that such written notice might be inaccurate and to specify the consequences. *See* n.290 *supra*.

[301] 17 U.S.C. § 114(d)(2)(C)(ii). Tacked onto the end of this statutory provision is an ambiguous clause: "or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998." *Id.* The legislative history does nothing to explicate why the statute includes this special provision geared at classical music, or indeed whether Congress meant to immunize or penalize advance schedules in that context.

[302] Conf. Rep. (DMCA), p.82.

[303] In the words of the legislative history, it is "prerecorded or preprogrammed." Conf. Rep. (DMCA), p.86.

[304] This exception

> is intended to allow webcasters to make available on demand transmissions of recorded events or broadcast shows that do not include performances of entire sound recordings or feature performances of sound recordings (such as a commercially released sound recording used as a theme song), but that instead use sound recordings only in an incidental manner (such as in the case of brief musical transitions in and out of commercials and music played in the background at sporting events). Some broadcast shows may be part of series that do not regularly feature perform-

> long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.[305]
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> * * *
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> A "continuous program" is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.[306]

What standards govern here? In the case of a continuous program, the "program generally takes the form of a loop whereby the same set of sound recordings[307] is performed repeatedly; rather than stopping at the end of the set, the program automatically restarts generally without interruption."[308] The statutory license is lost in the with respect to any continuous program "of less than 3 hours duration."[309] But longer programs may take advantage of the statutory license. As explained by the legislative history, "A listener to a continous [sic] program hears that portion of the program that is being transmitted to all listeners at the particular time that the listener accesses the program, much like a person who tunes in to an over-the-air broadcast radio sta-

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> ances of sound recordings but that occasionally prominently include a sound recording (such as a performance of a sound recording in connection with an appearance on the show by the recording artist). The recorded broadcast transmission of the show should not be considered an "archived program" merely because of such a prominent performance in a show that is part of a series that does not regularly feature performances of sound recordings. The inclusion of this exception to the definition of "archived program" is not intended to impose any new license requirement where the broadcast programmer or syndicator grants the webcaster the right to transmit a sound recording, such as may be the case where the sound recording has been specially created for use in a broadcast show.

Conf. Rep. (DMCA), pp.86-87.

[305] 17 U.S.C. § 114(j)(2).

[306] 17 U.S.C. § 114(j)(4).

[307] Note the qualification in the legislative history that "[m]inor alterations in the program should not render a program outside the definition of 'continuous program.'" Conf. Rep. (DMCA), p.87.

[308] Conf. Rep. (DMCA), p.87. The distinction here with "an archived program (which always is accessed from the beginning of the program), [is that] a transmission recipient typically accesses a continuous program in the middle of the program." *Id.*

[309] 17 U.S.C. § 114(d)(2)(C)(iv).

tion."[310]

Turning to archived programs, the legislative history explains the scheme at issue here.

> Archived works often are available to listeners indefinitely or for a substantial period of time, thus permitting listeners to hear the same songs on demand any time the visitor wishes. Transmissions that are part of archived programs that are less than five hours long are ineligible for a statutory license.[311] Transmissions that are part of archived programs more than five hours long are eligible only if the archived program is available on the webcaster's site or a related site for two weeks or less.[312] The two-week limitation is to be applied in a reasonable manner to achieve the objectives of this subparagraph, so that, for example, archived programs that have been made available for two weeks are not removed from a site for a short period of time and then made available again. Furthermore, altering an archived program only in insignificant respects, such as by replacing or reordering only a small number of the songs comprising the program, does not render the program eligible for statutory licensing.[313]

To be eligible for the statutory license, the subject transmission must not be part of "an identifiable program in which performances of sound recordings are rendered in a predetermined order[314] that is transmitted at [sic] (a) more than three times in any two week period, which times have been publicly announced in advance, if the program is of less than one hour duration,[315] or (b) more than four times in any two week period, which times have been publicly announced in advance, if the program is one hour or more."[316] In this regard, the House-Senate conferee's noted their intent that the two-week limitation "be applied in a reasonable manner consistent with its purpose so

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[310] Conf. Rep. (DMCA), p.82.

[311] *See* 17 U.S.C. § 114(d)(2)(C)(iii)(I).

[312] *See* 17 U.S.C. § 114(d)(2)(C)(iii)(II).

[313] Conf. Rep. (DMCA), p.82.

[314] 17 U.S.C. § 114(d)(2)(C)(iii)(IV). This provision is inapplicable "in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement." 17 U.S.C. § 114(d)(2)(C)(iii)(IV) *in fine.*

[315] 17 U.S.C. § 114(d)(2)(C)(iii)(IV)(aa).

[316] Conf. Rep. (DMCA), p.82. *See* 17 U.S.C. § 114(d)(2)(C)(iii)(IV)(bb).

that, for example, a transmitting entity does not regularly make all of the permitted repeat performances within several days."[317]

(4) The next paragraph provides

> that the transmitting entity may not avail itself of a statutory license if it knowingly performs a sound recording, as part of a service that offers transmissions of visual images contemporaneous with transmissions of sound recordings, in a manner that is likely to cause a listener to believe that there is an affiliation or association between the sound recording copyright owner or featured artist and a particular product or service advertised by the transmitting entity.[318] This would cover, for example, transmitting an advertisement for a particular product or service every time a particular sound recording or artist is transmitted; it would not cover more general practices such as targeting advertisements of particular products or services to specific channels of the service according to user demographics. If, for example, advertisements are transmitted randomly while sound recordings are performed, this subparagraph would be satisfied.[319]

(5) The next provision requires the transmitting entity to cooperate in order to prevent "a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient. . . ."[320] Such cooperation need only extend

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[317] Conf. Rep. (DMCA), p.82.

[318] There is a partial disconnect here between the legislative history, which in the language quoted above refers, *inter alia,* to listener confusion between the artist and the product, and the statute itself, which refers, *inter alia,* to listener confusion between the artist and the transmitting entity. 17 U.S.C. § 114(d)(2)(C)(iv).

What is the result if every time a Shania Twain song is played, there is a link to a place to buy the album on which that song appears? Shania might have consented to be associated with that album (the product), but not with this particular webcaster's link to it (the transmitting organization). She also might object to the particular online store that is purveying her album. It is therefore possible that the disconnect could produce disparate results in this circumstance.

It would seem that the better argument automatically validates that type of link, even without Shania's consent (as long as the album itself is authorized, as opposed to a bootleg). On the other hand, if a webcaster created a link to an unrelated product (a medicine, a vacation getaway, computer components *etc.*) every time Shania's songs played, then it would forfeit the statutory license.

[319] Conf. Rep. (DMCA), pp.82-83. *See* 17 U.S.C. § 114(d)(2)(C)(iv).

[320] 17 U.S.C. § 114(d)(2)(C)(v).

as far as "feasible without imposing substantial costs or burdens. . . ."[321] The purpose of this provision is geared towards future development of technology.[322]

(6) The transmitting entity forfeits the statutory license to the extent that it takes "affirmative steps to cause or induce the making of a phonorecord by the transmission recipient. . . ."[323] The statute also provides that "if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity [must set] such technology to limit such making of phonorecords to the extent permitted by such technology."[324] As opposed to the future orientation of the provision confronted immediately above, that provision seems aimed at technology contemporary with its enactment.[325]

(7) The next paragraph[326]

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[321] 17 U.S.C. § 114(d)(2)(C)(v). In addition, this clause does "not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998." 17 U.S.C. § 114(d)(2)(C)(v).

[322] In the future, a device or software may be developed that would enable its user to scan one or more digital transmissions to select particular sound recordings or artists requested by its user. Such devices or software would be the equivalent of an on demand service that would not be eligible for the statutory license. Technology may be developed to defeat such scanning, and transmitting entities taking a statutory license are required to cooperate with sound recording copyright owners to prevent such scanning, provided that such cooperation does not impose substantial costs or burdens on the transmitting entity.

Conf. Rep. (DMCA), p.83

[323] 17 U.S.C. § 114(d)(2)(C)(vi).

[324] 17 U.S.C. § 114(d)(2)(C)(vi).

[325] The conferees note that some software used to "stream" transmissions of sound recordings enables the transmitting entity to disable such direct digital copying of the transmitted data by transmission recipients. In such circumstances the transmitting entity must disable that direct copying function. Likewise, a transmitting entity may not take affirmative steps to cause or induce the making of any copies by a transmission recipient. For example, a transmitting entity may not encourage a transmission recipient to make either digital or analog copies of the transmission such as by suggesting that recipients should record copyrighted programming transmitted by the entity.

Conf. Rep. (DMCA), p.83.

[326] 17 U.S.C. § 114(d)(2)(C)(vii).

> requires that each sound recording transmitted by the transmitting entity must have been distributed to the public under authority of the copyright owner or provided to the transmitting entity with authorization that the transmitting entity may perform such sound recording.[327] The conferees recognize that a disturbing trend on the Internet is the unauthorized performance of sound recordings not yet released for broadcast or sale to the public. The transmission of such pre-released sound recordings is not covered by the statutory license unless the sound recording copyright owner has given explicit authorization to the transmitting entity. This subparagraph also requires that the transmission be made from a phonorecord lawfully made under the authority of the copyright owner. A phonorecord provided by the copyright owner or an authorized phonorecord purchased through commercial distribution channels would qualify. However, the transmission of bootleg sound recordings[328] . . . is ineligible for a statutory license.[329]

(8) The next provision matches the anti-circumvention features of the Digital Millennium Copyright Act, concurrently added to the Copyright Act along with the instant amendment.[330] To take advantage of the statutory license, a transmitting entity must accommodate[331]

> the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital sig-

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[327] This provision also contains an exception, along the lines confronted several times above, that "the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement." 17 U.S.C. § 114(d)(2)(C)(vii).

[328] *See* NIMMER ON COPYRIGHT Chap. 8E.

[329] Conf. Rep. (DMCA), pp.83-84.

[330] *See* NIMMER ON COPYRIGHT § 12A.03.

[331] In addition to accommodating, it must "not interfere with" that transmission of those technical measures. 17 U.S.C. § 114(d)(2)(C)(viii). What is the difference between the two? The meaning is as obscure here as in the other aspect of the Digital Millennium Copyright Act adding those twin requirements. *See* NIMMER ON COPYRIGHT § 12B.02[B][3].

nal . . . .[332]

This requirement is subject to a grandfather clause with respect to operating or licensed satellite digital audio services.[333]

The legislative history explains that this provision applies to "widely used forms of identifying information, embedded codes, encryption or the like. . . ."[334] It requires the transmitting entity to ensure that those not be removed during the transmission process.[335]

(9) Finally, the statute contains a requirement[336] for

> transmitting entities eligible for the statutory license to identify in textual data the title of the sound recording, the title of the album on which the sound recording appears (if any), and the name of the featured recording artist. These titles and names must be made during, but not before, the performance of the sound recording. A transmitting entity must ensure that the identifying information can easily be seen by the transmission recipient in visual form. For example, the information might be displayed by the software player used on a listener's computer[337] to decode and play the sound recordings that are transmitted.[338]

Unlike the previous eight categories, the instant one did not take effect until one year after enactment of the Digital Millennium Copyright Act, which translates to October 28, 1999.[339] The reason for the delay is that although, as of the date of enactment, "[m]any webcasters already provide such information," Congress wanted to "give those

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[332] 17 U.S.C. § 114(d)(2)(C)(viii).

[333] 17 U.S.C. § 114(d)(2)(C)(viii) ("shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners").

[334] Conf. Rep. (DMCA), p.84.

[335] Conf. Rep. (DMCA), p.84. Of course, that requirement is subject to the statutory features concerning feasibility, undue burden, and degradation of signal quality. *Id.*

[336] 17 U.S.C. § 114(d)(2)(C)(ix).

[337] The statutory language is open-ended: "in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity." 17 U.S.C. § 114(d)(2)(C)(ix)

[338] Conf. Rep. (DMCA), p.84.

[339] 17 U.S.C. § 114(d)(2)(C)(ix). *See* n.15 *supra.*

who do not an adequate opportunity to do so . . . ."[340]

In addition, this feature of the law is geared at further penetration of the subject technology. The statute therefore provides that it does not pertain,[341] even after October 28, 1999, "in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace."[342]

d. Nonsubscription Transmissions Requiring Licensing

The third part of the statute discussed above[343] also applies to "eligible nonsubscription transmissions."[344] Note that the same nine conditions apply here as to the "new services" confronted above.[345]

The statute defines "eligible nonsubscription transmissions" to consist of

> a noninteractive nonsubscription digital audio transmission . . . that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.[346]

Thus, an "Internet radio station" that transmits music for its entertainment value qualifies here. Moreover, the license is not forfeit, even if such webcasting incorporates the option to purchase that music. But a seller of non-musical goods could not use music on its website in order to make surfing there a more enjoyable experience.

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[340] Conf. Rep. (DMCA), p.84.

[341] In addition, this provision, like several confronted above, "shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission." 17 U.S.C. § 114(d)(2)(C)(ix).

[342] 17 U.S.C. § 114(d)(2)(C)(ix).

[343] *See* § D(1)(c) *supra*.

[344] 17 U.S.C. § 114(d)(2)(C).

[345] 17 U.S.C. § 114(d)(2)(C). *See* § D(1)(c) *supra*. The general criteria also apply. *See* § D(1)(a) *supra*.

[346] 17 U.S.C. § 114(j)(6).

The legislative history explains the operative intent here:

> Thus, for example, an ordinary commercial Web site that was primarily oriented to the promotion of a particular company or to goods or services that are unrelated to the sound recordings or entertainment programming, but that provides background music would not qualify as a service that makes eligible nonsubscription transmissions. The site's background music transmissions would need to be licensed through voluntary negotiations with the copyright owners. However, the sale or promotion of sound recordings, live concerts or other musical events does not disqualify a service making a nonsubscription transmission. Furthermore, the mere fact that a transmission service is advertiser-based or may promote itself or an affiliated entertainment service does not disqualify it from being considered an eligible nonsubscription transmission service.[347]

The net effect, not surprisingly, is to benefit those companies that have the business profile of members of the trade group that lobbied for this provision.[348]

2. Other Provisions

The above discussion of the 1995 statutory license canvasses its features relating to license terms for negotiated agreements,[349] arbitration royalty panels,[350] payment of fees,[351] and allocation of receipts.[352] The Digital Millennium Copyright Act amends some of those provisions, while leaving others largely intact (sometimes subject to recodification of the applicable section numbers).[353]

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[347] Conf. Rep. (DMCA), p.87.

[348] *See* Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. RPTR. 4, 20, 22 (1998). Given that this statutory license serves as the springboard for an additional statutory license, see § F *infra*, the benefits cascade.

[349] *See* § C(2)(a) *supra*.

[350] *See* § C(2)(b) *supra*.

[351] *See* § C(3) *supra*.

[352] *See* § C(4) *supra*.

[353] On recodifications relating to payment of fees, see the footnotes of § C(3) *supra*. The one language change here is that whereas under former law "[a]ny person who wishes to perform a sound recording publicly by means of a *nonexempt subscription transmission* . . . may do so without infringing the exclusive right of the copyright owner of the sound recording," the 1998 amendment replaces the italicized language with "transmission eligible for statutory licensing." *Compare* 17 U.S.C. § 114(f)(5)(A) (1995) with 17 U.S.C. § 114(f)(4)(B) (1998). The reason for

With respect to the "procedures applicable to subscription transmission by preexisting[354] subscription services and preexisting satellite digital audio radio services,"[355] the amendment simply updates the law procedurally.[356] For instance, as previously noted, the first window for voluntary negotiations lasted from February 1, 1996, until December 31, 2000.[357] As amended,[358] the terminus now runs until December 31, 2001.[359] By the same token, "the initiation of the next voluntary negotiation period shall take place in the first week of January 2001 instead of January 2000."[360] In other regards, most previous aspects of the statute are substantively unaffected.[361] As noted by the House-Senate conferees, these newly revised provisions apply "only to the three services considered preexisting subscription services, DMX, Music Choice and the DiSH Network, and the two services considered preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation."[362]

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the change, of course, is that the statutory license now applies to a broader category than simply subscription transmissions. *See* § D(1)(d) *supra*.

354 17 U.S.C. § 114(f)(1)(A). *See* § D(1)(b) *supra*.

355 Conf. Rep. (DMCA), p.85.

356 17 U.S.C. § 114(f)(1). *See* Conf. Rep. (DMCA), p.85.

357 *See* § C(2)(a) *supra*.

358 Alone among the amendments effectuated by the Digital Millennium Copyright Act, this one exerts retroactive impact, Act of Oct. 28, 1998, Pub. L. 105-304, Sec. 405(a)(5), 112 Stat. 2860 ("shall be deemed to have been enacted as part of the Digital Performance Right in Sound Recordings Act of 1995").

359 17 U.S.C. § 114(f)(1)(A). *See* Recording Industry Ass'n of Am. v. Librarian of Congress, 176 F.3d 528, 530 (D.C. Cir. 1999). "These extensions are made purely to facilitate the scheduling of proceedings." Conf. Rep. (DMCA), p.85.

360 Conf. Rep. (DMCA), p.85. *See* 17 U.S.C. § 114(f)(1)(C)(i)(II). Additional provisions provide for repetition of those procedures at five-year intervals, starting on July 1, 2001. 17 U.S.C. § 114(f)(1)(C)(ii)(II).

361 For instance, "procedures for arbitration in the absence of negotiated license agreement, continues to provide that a copyright arbitration royalty panel should consider the objectives set forth in section 801(b)(1) as well as rates and terms for comparable types of subscription services." Conf. Rep. (DMCA), p.85.

362 Conf. Rep. (DMCA), p.85. "That rate currently applies to the three preexisting subscription services, and the Conferees take no position on its applicability to the two preexisting satellite digital audio radio services." *Id.*

The other major part of the revised statutory license[363] relates to new services or those that for other reasons do not qualify as preexisting.[364] As explained by the legislative history, these provisions[365] address

> procedures applicable to eligible nonsubscription transmissions and subscription transmissions by new subscription services. The first such voluntary negotiation proceeding is to commence within 30 days after the enactment of this amendment upon publication by the Librarian of Congress of a notice in the Federal Register. The terms and rates established will cover qualified transmissions made between the effective date of this amendment and December 31, 2000, or such other date as the parties agree.[366]

Those rates are subject to adjustment every two years, unless otherwise agreed by the parties.[367] "These two-year intervals are based upon the conferees' recognition that the types of transmission services in existence and the media in which they are delivered can change significantly in a short period of time."[368]

The innovation here is that rates and terms must "distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation . . . ."[369] The legislative history in this regards recognizes

> that the nature of qualified transmissions may differ significantly based on a variety of factors. The conferees intend that criteria including, but not limited to, the quantity and nature of the use of sound recordings, and the degree to which use of the services substitutes for or promotes

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[363] As detailed in the legislative history:

Section 114(f) is divided into two parts: one applying to transmissions by preexisting subscription services and preexisting satellite digital audio radio services (subsection (f)(1)), and the other applying to transmissions by new subscription services (including subscription transmissions made by a preexisting subscription service other than those that qualify under subsection (f)(1)) as well as eligible nonsubscription transmissions (subsection (f)(2)).

Conf. Rep. (DMCA), p.84.

[364] *See* § D(1)(c) *supra*.

[365] 17 U.S.C. § § 114(f)(2)(A) – 114(f)(2)(C)(iii).

[366] Conf. Rep. (DMCA), p.85.

[367] 17 U.S.C. § 114(f)(2)(C)(i)(II). Those intervals start on July 1, 2000. 17 U.S.C. § 114(f)(2)(C)(ii)(II).

[368] Conf. Rep. (DMCA), p.86.

[369] 17 U.S.C. § § 114(f)(2)(A).

> the purchase of phonorecords by consumers may account for differences in rates and terms between different types of transmissions.[370]

In any event, however, the statute commands that a minimum fee be set for each type of new service,[371] albeit not for preexisting subscription services and preexisting satellite digital audio radio services.[372]

It was noted previously that the 1995 recension of the statute subordinates arbitrated rates to license agreements voluntarily negotiated "between one or more copyright owners of sound recordings and one or more entities performing sound recordings . . . ."[373] The 1998 amendments leave that provision unaltered.[374]

The statute sets forth procedures in the absence of a negotiated license agreement for rates and terms for qualifying transmissions.[375]

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[370] Conf. Rep. (DMCA), p.85.

[371] 17 U.S.C. § § 114(f)(2)(A).

> A minimum fee should ensure that copyright owners are fairly compensated in the event that other methodologies for setting rates might deny copyright owners an adequate royalty. For example, a copyright arbitration royalty panel should set a minimum fee that guarantees that a reasonable royalty rate is not diminished by different types of marketing practices or contractual relationships. For example, if the base royalty for a service were a percentage of revenues, the minimum fee might be a flat rate per year (or a flat rate per subscriber per year for a new subscription service).

Conf. Rep. (DMCA), pp.85-86.

[372] The minimum requirement is absent from the coordinate provision setting rates for preexisting services. *See* § D(1)(b) *supra*. The legislative history comments that although the statute is silent in that regard,

> the Conferees do not intend that silence to mean that a minimum fee may or may not be established in appropriate circumstances when setting rates . . . for preexisting subscription services and preexisting satellite digital audio radio services. Likewise, the absence of criteria that should be taken into account for distinguishing rates and terms for different [preexisting services] does not mean that evidence relating to such criteria may not be considered when adjusting rates and terms for preexisting subscription services and preexisting satellite digital audio radio services in the future.

Conf. Rep. (DMCA), p.86.

[373] 17 U.S.C. § 114(f)(3). *See* § C(2)(b) *supra*.

[374] Actually, the Digital Millennium Copyright Act completely revamps this whole area of the statute, including the provision under scrutiny. Nonetheless, on inspection, the newly enacted text of 17 U.S.C. § 114(f)(3) is identical to its prior text.

[375] 17 U.S.C. § 114(f)(2)(B).

As under existing law, it calls for convening a copyright arbitration proceeding to determine reasonable rates and terms binding on all parties.[376] Again, the statute requires drawing distinctions among different types of services, and setting a minimum fee.[377] In this regard, the statutory text itself commands the panel to compute "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[378] It also directs the copyright arbitration royalty panel to base its decision on "economic, competitive and programming information presented by the parties."[379]

3. Applying the Old and the New

The rights of copyright owners to control the audio transmission of their sound recordings has progressed significantly. As enacted, the Digital Performance Right in Sound Recordings Act of 1995 exempted from liability all nonsubscription, noninteractive utilizations.[380] By tightening the exemptions[381] and expanding the provision on statutory licensing,[382] the 1998 amendment regulates the field more tightly. It provides that certain nonsubscription, noninteractive performances are subject to mandatory licensing, and others fall within the scope of the copyright owner's exclusive rights.[383]

How do these progressive schemes apply in practice? Conduct that

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376 17 U.S.C. § 114(f)(2)(B).

377 17 U.S.C. § 114(f)(2)(B).

378 17 U.S.C. § 114(f)(2)(B).

379 17 U.S.C. § 114(f)(2)(B). The statute enumerates the following factors:

(i)whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii)the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

Id.

380 *See* § B(1)(a) *supra.*

381 *See* § B(1)(b) *supra.*

382 *See* § D(1)(d) *supra.*

383 Nonetheless, even with these liberalizations, the sixth statutory right remains so highly regulated as to stand apart from the other five rights that attended the Copyright Act as of its passage in 1976.

took place from February 1, 1996 through October 28, 1998, is governed by the initial scheme. All interactive services were subject to voluntary licenses.[384] As to noninteractive services, subscription services were subject to statutory licenses.[385] As to noninteractive, nonsubscription services, they were exempt.[386]

Conduct that has occurred since October 28, 1998, is governed by the current scheme. As formerly, interactive services remain subject to voluntary licenses.[387] As to noninteractive services, subscription services remain subject to statutory licenses.[388] Note that the current scheme draws a distinction between "new" and "preexisting" subscription services."[389] The latter date back to July 31, 1998, roughly two months prior to the amendment's effective date.[390]

The primary innovation of the current scheme applies to the noninteractive, nonsubscription domain. Whereas formerly subject to a blanket exemption, current law defines it more restrictively.[391] Accordingly, most noninteractive, nonsubscription services apart from broadcasts now remain outside the scope of that exemption. As to those nonexempt activities, webcasting that focuses on music (whether for its entertainment value or to advertise its sale) is eligible for the statutory license.[392] Those noninteractive, nonsubscription services that are neither exempt nor eligible for the statutory license are regulated as voluntary licenses.[393]

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384 *See* § E *infra*.

385 *See* § C *supra*. Some subscription services were exempt. *See* § B(1) *supra*.

386 *See* § B *supra*. That state of affairs may have stemmed from "a negotiating error by the record industry." Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. RPTR. 4, 4 (1998).

387 *See* § E *infra*.

388 *See* § D(1) *supra*.

389 The 1995 version of the law made various provisions applicable. The 1998 amendment took some of those ingredients and repurposed them, depending on whether the service at issue qualifies as new or preexisting.

390 Therefore, conduct that took place in August and September 1998 is governed by the 1995, rather than the 1998, version of the law. Nonetheless, to the extent that it continues past October 1998, it is considered "new" rather "preexisting" under the statutory framework.

391 *See* § B *supra*.

392 *See* § D(1)(d) *supra*.

393 *See* § E *infra*.

E. VOLUNTARY LICENSES FOR INTERACTIVE SERVICES AND BEYOND

The 1976 Act conferred various rights in the nature of copyright, subject to enumerated exemptions, and also to limited compulsory licenses. If an exploitation fell within neither an exemption nor a compulsory license, then it belonged to the copyright proprietor, who was free to license it, to withhold licensing, or to craft licenses however she chose. A copyright owner could arbitrarily grant rights to some and decline to license others; she could give one license for a pittance and charge another similarly situated an exorbitant premium. For, as a species of intellectual property, copyrights are property belonging to their owners, who can do with them what they will.[394]

The Digital Performance Right in Sound Recordings Act of 1995 introduces a new constraint into the property framework. Instead of allowing copyright owners who escape the law's exemptions and compulsory licenses to enter contractual arrangements on whatever terms they can obtain from consenting third parties, the law itself regulates the content of such contracts.

These provisions apply to services that are neither exempt[395] from the digital audio transmission right nor subject to statutory licensing.[396] Leaving the right to engage in nonexclusive licensing untrammeled,[397] the law basically limits exclusive licenses of interactive rights to 12 months at a time (24 months in the case of small licensors).[398] This provision responds to the concern "that sound recording copyright owners might become 'gatekeepers'[399] to the performances of musical works."[400]

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394 *See* NIMMER ON COPYRIGHT Overview.

395 *See* § B *supra*.

396 *See* §§ C-D *supra*.

397 S. Rep. (DPRA), p. 25. Assignments are similarly unregulated — the assignee simply assumes all the assignor's limitations concerning permissible scope of voluntary exclusive licenses.

398 H. Rep. (DPRA), p. 21.

399 ASCAP has no option, under its consent decree, to withhold licenses from parties willing to pay. *See* NIMMER ON COPYRIGHT § 8.19. The concern, therefore, became that record companies, unless controlled, could assume the gatekeeper function.

400 H. Rep. (DPRA), p. 21. "The Committee believes that the limits [set forth in

1. Scope of Application

a. Definition of Interactive Services

At its enactment, the Digital Performance Right in Sound Recordings Act of 1995 defined an "interactive service" as being "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[401] The request could come "by telephone, e-mail, or otherwise."[402] Examples include an "audio-on-demand" service,[403] "pay-per-listen" and a "celestial jukebox" service.[404]

Congress did not wish the definition to encompass a listener request to a radio station for a favorite tune to be played on the air. Therefore, the statutory language adopted in 1995 further specified that "[t]he ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive."[405] What if an entity offers both interactive and non-interactive services, either concurrently or at different times? In such instances, the 1995 version of the statute mandated that "the non-interactive component shall not be treated as part of an interactive service."[406] Thus, if a nonsubscription entity, such as a radio station, "chooses to offer an interactive service as a separate business, or only during certain hours of the day, that decision does not affect

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the legislation] appropriately resolve any such concerns." S. Rep. (DPRA), p. 25. *See* n.440 *infra*. Note that, apart from sheet music, musical compositions can be accessed only through the interpretation of a performer. *See* George Steiner, *After Babel* 27 (1998) ("Every musical realization is a new *poiesis*.").

[401] 17 U.S.C. § 114(j)(4) (1995). The individual can arrange for the transmission either to herself or another, individually. S. Rep. (DPRA), p. 18. *See* H. Rep. (DPRA), p. 25.

[402] H. Rep. (DPRA), p. 25.

[403] H. Rep. (DPRA), p. 20.

[404] H. Rep. (DPRA), p. 25. It also applies to "an on-line service that transmits recordings on demand, regardless of whether there is a charge for the service or for any transmission." *Id. See* S. Rep. (DPRA), p. 25.

[405] 17 U.S.C. § 114(j)(4) (1995).

[406] 17 U.S.C. § 114(j)(4) (1995).

the exempt status[407] of any component of the entity's business that does not offer an interactive service."[408]

The Digital Millennium Copyright Act altered the definition applicable here.[409] As currently defined, an "interactive service" is a service that, "enables a member of the public to receive a transmission of a program specially created for the recipient . . . ."[410] In addition, it is one that enables that member of the public to receive, "on request, a transmission of a particular sound recording, whether or not as part of a program,[411] which is selected by or on behalf of the recipient."[412]

In this regard, the House-Senate conferees note, "The recipient of the transmission need not select the particular recordings in the program for it to be considered personalized, for example, the recipient might identify certain artists that become the basis of the personal program."[413] The statute further clarifies that the

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[407] *See* § B *supra*.

[408] H. Rep. (DPRA), pp. 25-26. In most respects, the House and Senate Reports for the Digital Performance Right in Sound Recordings Act of 1995 are quite distinct; in the instant context, the identical language is set forth in S. Rep. (DPRA), p. 34.

[409] Note that this amendment took effect upon enactment, on October 28, 1998. *See* n.15 *supra*.

[410] 17 U.S.C. § 111(j)(7).

> The conferees intend that the phrase "program specially created for the recipient" be interpreted reasonably in light of the remainder of the definition of "interactive service." For example, a service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners.

Conf. Rep. (DMCA), pp.87-88.

[411] This language clarifies that if a transmission recipient is permitted to select particular sound recordings in a prerecorded or predetermined program, the transmission is considered interactive. For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs that comprise the program. Additionally, a program consisting only of one sound recording would be considered interactive.

Conf. Rep. (DMCA), p.88.

[412] 17 U.S.C. § 111(j)(7). The legislative history summarizes the domain here as "personalized" transmissions. Conf. Rep. (DMCA), p.87.

[413] Conf. Rep. (DMCA), p.87.

> ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request[414] or at a time designated by either the transmitting entity or the individual making such request.[415]

As in the prior version of the law, in the case of an entity that offers both interactive and noninteractive services, whether concurrently or at different times, "the noninteractive component shall not be treated as part of an interactive service."[416]

b. Time Limits on Licensing Interactive Services

As noted above, the exemptions and statutory licenses for digital transmissions are wholly inapplicable to interactive services.[417] (Nonetheless, the DPRA does create a "through to the listener" exemption[418] for entities that retransmit digital audio transmissions from an interactive service.)[419] That which is neither exempt nor subject to

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[414] This qualification is intended in order to

> clarify that certain channels or programs are not considered interactive provided that they do not substantially consist of requested sound recordings that are performed within one hour of the request or at a designated time. Thus, a service that engaged in the typical broadcast programming practice of including selections requested by listeners would not be considered interactive, so long as the programming did not substantially consist of requests regularly performed within an hour of the request, or at a time that the transmitting entity informs the recipient it will be performed.

Conf. Rep. (DMCA), p.88.

[415] 17 U.S.C. § 111(j)(7).

[416] 17 U.S.C. § 111(j)(7). This provision

> is intended to make clear that if a transmitting entity offers both interactive and noninteractive services then the noninteractive components are not to be treated as part of an interactive service, and thus are eligible for statutory licensing (assuming the other requirements of the statutory license are met). For example, if a Web site offered certain programming that was transmitted to all listeners who chose to receive it at the same time and also offered certain sound recordings that were transmitted to particular listeners on request, the fact that the latter are interactive transmissions would not preclude statutory licensing of the former.

Conf. Rep. (DMCA), p.88.

[417] *See* §§ B-C *supra*.

[418] *See* n.136 *supra*.

[419] H. Rep. (DPRA), p. 21; S. Rep. (DPRA), p. 26. More particularly, within the

compulsory license may nonetheless be voluntarily licensed. The DPRA recognizes this proposition in oblique language, by expressly disallowing licenses for interactive services that exceed specified time limits, thus implicitly validating shorter licenses.

In general, the statute prohibits the grant of an exclusive license to an interactive service for digital audio transmission of a sound recording for a period in excess of 12 months.[420] But that period is extended to a maximum of 24 months to the extent that the licensor[421] holds the copyright to 1,000 or fewer sound recordings.[422] These licenses are subject to the proviso [423] that once an initial exclusive license expires, the grantee is statutorily ineligible to receive another exclusive license for the performance of the same sound recording until at least 13 months have elapsed.[424] Logically, a 12-month maximum license period followed by a 13-month hiatus entails that at least three separate outlets must exist over time to continuously license the subject performances. For if *A* is licensed from February 1, 1996 to

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context of defining voluntary licenses for interactive services, the statute carves out a narrow exemption under the following circumstances:

> (i)the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and
>
> (ii)the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

17 U.S.C. § 114(d)(3)(D).

[420] 17 U.S.C. § 114(d)(3)(A).

[421] For purposes of the instant voluntary licenses, the term "licensor" is specially defined to "include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings." 17 U.S.C. § 114(d)(3)(E)(i). That definition pertains throughout this subsection. Thus, the computation concerning ownership of fewer than 1,000 sound recordings must include affiliated entities. S. Rep. (DPRA), p. 26.

[422] 17 U.S.C. § 114(d)(3)(A).

[423] It could be argued that the proviso governs both the 12-month and the 24-month maximum licenses; it is also arguable that the proviso governs only the latter, inasmuch as the latter is followed by a colon immediately preceding the proviso. *See* 17 U.S.C. § 114(d)(3)(A). The better view is that it should govern both, as it is even more applicable to the former context of a behemoth licensor.

[424] 17 U.S.C. § 114(d)(3)(A). *See* H. Rep. (DPRA), p. 21.

January 31, 1997, then *B* can be licensed from that point until January 31, 1998; at that point, both *A* and *B* will remain ineligible for relicensing, meaning that a new license could be granted only to *C* at that juncture.

After enunciating those time-bound limitations as to maximum licensing periods, the statute next dispenses with them under two circumstances: (1) the time limitations[425] are inapplicable to promotional transmissions,[426] defined as an exclusive license to perform publicly a maximum of 45 seconds of a sound recording for the sole purpose of promoting its distribution or performance;[427] and (2) the time limitations are also abrogated when the licensor at issue has granted at least five[428] different[429] interactive services the right to engage in public performance of sound recordings by digital audio transmission.[430] But to forestall a large conglomerate from issuing 5 insignificant licenses as a way of circumventing the statute's time limitations, the release is conditioned on two additional circumstances being present. First, "each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor[431] that have been licensed to interactive services."[432] Second, each must pertain to no less than 50 sound recordings.[433]

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[425] Doctrinal distinctions must be maintained; the upshot here is a release from the time limitations applicable to voluntary licenses, not to make the subject promotional activity subject to an exemption. S. Rep. (DPRA), p. 26. *See* § B *supra*.

[426] H. Rep. (DPRA), p. 21.

[427] 17 U.S.C. § 114(d)(3)(B)(ii).

[428] The existence of five different outlets promotes even greater diversity than the three contemplated in the text above.

[429] Presumably, five separate licenses to affiliated entities would fail to qualify here.

[430] 17 U.S.C. § 114(d)(3)(B)(i). Under the statute, the licensor must not only have granted those 5 licenses, but each must also remain in effect. *Id.*

[431] Note the expansive definition of "licensor" to include affiliates as noted above. *See* n.421 *supra*.

[432] 17 U.S.C. § 114(d)(3)(B)(i).

[433] 17 U.S.C. § 114(d)(3)(B)(i). To give an example, a record company can avoid the instant limitations "if it has granted performance licenses for a total of 10,000 sound recordings to five different interactive services, and each service received a performance license for at least 1,000 sound recordings." S. Rep. (DPRA), p. 26. By contrast, a company that owns only 200 sound recordings lacks the requisite inventory to issue sufficient licenses in order to meet the statute's limits. As will

c. Application to Non-Interactive Services

The above discussion has treated voluntary licensing of *interactive* services. It is also possible for *noninteractive* services to fall without the statute's exemptions and statutory licenses. Two examples are a noninteractive subscription service otherwise eligible for statutory licensing but for exceeding the sound recording performance complement[434] and a noninteractive nonsubscription webcast that uses music to advertise sale of something else.[435] Those instances would also seem eligible for voluntary licensing; moreover, inasmuch as the statute contains no time-frame limitations as to those licenses, they are apparently not subject to the above constraints.[436]

d. Limitation to Sound Recordings

Of course, the instant voluntary licenses relate solely to the sound recording copyright; to the extent that the sound recording renders a musical composition subject to copyright protection, its public performance requires separate permission from the owner of the music copyright.[437] As is generally the case, the requisite license to publicly perform the copyrighted musical work, in addition to being conveyed by the copyright owner personally, may equally be granted by a performing rights society[438] representing the copyright owner.[439] In this

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be explained in a future installment, the industry drafters of the bill evidently overlooked "the little guy" in this particular.

[434] *See* § C(1)(c) *supra*.

[435] *See* § (D)(1)(d) *supra*.

[436] *See* § E(1)(b) *supra*. Nonetheless, the statute regulates negotiations even concerning those noninteractive voluntary licenses. 17 U.S.C. § 114(e)(2). *See* § E(3) *infra*.

[437] 17 U.S.C. § 114(d)(3)(C). *See* § A(3)(a) *supra*.

[438] For these purposes, the statute defines a "performing rights society" as "an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc." 17 U.S.C. § 114(d)(3)(E)(ii). *See* H. Rep. (DPRA), p. 21. *See generally* NIMMER ON COPYRIGHT § 8B.05[B][1][a]. Note that this language persists even after amendments undertaken by the Digital Millennium Copyright Act, notwithstanding another amendment the previous day defining the term "performing rights society" for pur-

way, the statute safeguards against record companies becoming "gatekeepers" to interactive services.[440]

The same principle regarding separate clearance of music applies, even outside the realm of voluntary licensing, to the statutory exemptions and compulsory licenses as well: An exemption or license may convey the necessary permission to perform the sound recording; but neither serves to grant public performance rights contained in any musical composition rendered on the sound recording.[441]

2. Licensing of Affiliates

a. Most Favored Nation Clauses

The voluntary contracts described above apply largely, although not exclusively, to licenses of interactive services. In addition, there exists a residual category of voluntary licenses outside the interactive context.[442] To promote competitive licensing,[443] that residual category is subject to a statutory "most-favored nation clause"[444] in the realm of permissible scope of licensing affiliates.

To give content to the "most-favored nation clause," it is first necessary to define the term "affiliated entity." Basically, the term refers to an entity engaging in digital audio transmissions "in which the li-

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poses of the Copyright Act generally. *See* NIMMER ON COPYRIGHT § 8.19.

[439] 17 U.S.C. § 114(d)(3)(C).

[440] H. Rep. (DPRA), p. 21. *See* ns.399, 400 *supra*.

[441] In the instant context, the statute makes the point explicitly only concerning "an interactive service." 17 U.S.C. § 114(d)(3)(C). Given that such interactive services are governed by voluntary licenses, rather than exemptions or statutory licenses, the noninteractive services encompassed by those devices are left unaddressed. But a separate provision of the statute mandates that it is not intended in any way to annul or limit the public performance rights in musical works, even by means of digital audio transmissions. 17 U.S.C. § 114(d)(4)(B)(i). *See* § A(3)(a) *supra*.

[442] *See* § E(1)(c) *supra*.

[443] S. Rep. (DPRA), p. 31. In addition, the strictures of antitrust law may afford protection here when applicable. *Id.*

[444] *Cf.* NIMMER ON COPYRIGHT § 18.06[A][1][b].

censor has any direct or indirect partnership[445] or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock."[446] Definitionally excluded from qualifying as an affiliated entity is any "interactive service."[447]

When the copyright owner of a sound recording licenses an affiliated entity (as defined above) to engage in digital audio transmission, then it must also make the licensed sound recording available "on no less favorable terms[448] and conditions to all bona fide[449] entities that offer similar services . . . ."[450] Nonetheless, the statute allows the copyright owner to establish different terms and conditions[451] for such other services to the extent that "there are material differences in the scope of the requested license with respect to the type of service,[452] the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration . . . ."[453]

b. Inapplicability to Interactive Services

The primary category of voluntary licenses to interactive services

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[445] The Justice Department objected to a prior draft of the bill that evidently lacked a reference to collective control. *See* 141 Cong. Rec. S11962 (daily ed. Aug. 8, 1995) (letter appended to statement of Sen. Leahy).

[446] 17 U.S.C. § 114(j)(1).

[447] 17 U.S.C. § 114(j)(1). If a business that primarily provides interactive services also engages in a noninteractive digital transmission, for that purpose alone it qualifies as affiliated. S. Rep. (DPRA), p. 33.

[448] Thus, a licensor could offer more favorable terms to a new startup for a short period; but the latter could reject that offer and demand the same rates and length of term granted to an affiliated entity. S. Rep. (DPRA), p. 32.

[449] S. Rep. (DPRA), p. 32 ("genuine intention and reasonable capability to provided the licensed services").

[450] 17 U.S.C. § 114(h)(1).

[451] *See* S. Rep. (DPRA), p. 32 ("distinctions drawn among licensees should be applied rationally and consistently . . . and not based on arbitrary distinctions for monopolistic, discriminatory or other anticompetitive purposes").

[452] Thus, granting cable rights connotes no obligation to give satellite rights. S. Rep. (DPRA), p. 32.

[453] 17 U.S.C. § 114(h)(1). The legislative history also lists "differences in geographic region" among "other relevant factors." H. Rep. (DPRA), p. 24. It is perilous, however, to rely on the history to the extent it seems disconnected, as here, from the statute.

is immune from the most-favored nation clause.[454] Why is this clause made applicable only on such a narrow basis? The legislative history explains that this provision "addresses the issue of vertical integration among companies involved in both the music and the subscription service businesses. "[This section] is designed to assure that, if a record company grants a performance license to an affiliated entity, it must make performance licenses available to other similar services on no less favorable terms."[455] Congress evidently harbored no such concern about vertical integration with interactive services.[456] Both its reasons remain unstated.

c. Inapplicability to Short Promotions

Beyond being wholly inapplicable to the interactive context, these limitations are also suspended with respect to licenses for the public performance of 45 seconds or less of a sound recording, for the sole purpose of promoting the distribution or performance of that sound recording.[457] Two features of that exception are to be noted. First, it exactly tracks a parallel exception in the interactive context.[458] Second, it resembles some of the distinctions applicable to nonsubscription, noninteractive services eligible for the statutory license.[459]

d. Payment of Fees

Given that the instant licenses are voluntary, the statute contains no elaborate fee-setting mechanism comparable to those governing statutory licenses.[460] Nonetheless, it does include two provisions allowing the appointment of common agents.

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[454] 17 U.S.C. § 114(h)(2)(A).

[455] H. Rep. (DPRA), p. 24.

[456] *See* S. Rep. (DPRA), p. 32. *See* n.100 *supra*.

[457] 17 U.S.C. § 114(h)(2)(B).

[458] 17 U.S.C. § 114(d)(3)(B)(ii). *See* § E(1)(b) *supra*. Qualifying promotional performances are released only from the "most favored nations" strictures otherwise applicable, not exempted from the performance right generally. S. Rep. (DPRA), p. 32. *See* § B *supra*.

[459] *See* § D(1)(d) *supra* (statutory license available if primary purpose of the service is to sell "sound recordings, live concerts, or other music-related events").

[460] *See* § C(3) *supra*.

First, copyright owners of sound recordings "may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments."[461] Standing alone, that provision adds nothing to previous doctrine, given that the laws of agency presumably apply within the copyright ambit.[462] Its significance lies instead in the succeeding qualification that, in the appointment of such common agents, each copyright owner must establish the applicable royalty rates and "material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings."[463] Thus, in contrast to the antitrust exemption afforded by the coordinate provision geared at statutory licensing,[464] the instant provision limits the freedom accorded copyright owners,[465] rather than simply authorizing them to appoint agents whom they would be at liberty to appoint even in its absence. The limited antitrust exemption thereby accorded is designed "to facilitate the licensing of digital sound recording performances (other than through statutory licenses)[466] by reducing transaction costs."[467]

Second, entities performing sound recordings are also permitted to "designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees."[468] Again, the statute mandates unilat-

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[461] 17 U.S.C. § 114(e)(2)(A). *See* S. Rep. (DPRA), p. 28 ("common agents, such as a clearinghouse").

[462] *Cf.* NIMMER ON COPYRIGHT § 5.03[B][1][a][iii] (Restatement of Agency controls copyright's work-for-hire determination).

[463] 17 U.S.C. § 114(e)(2)(A).

[464] *See* § C(2)(a) *supra*. The bill was amended to avoid a "virtually unlimited antitrust exemption for major record companies to combine to set prices for licensing music." 141 Cong. Rec. S11961 (daily ed. Aug. 8, 1995) (statement of Sen. Leahy).

[465] "Each copyright owner and each entity performing sound recordings must establish the royalty rates and license terms on their own. They may use common agents only to perform a clearinghouse function and not for rate-setting." H. Rep. (DPRA), p. 23.

[466] *See* § C *supra*.

[467] S. Rep. (DPRA), p. 28. Although such conduct would presumably not fall afoul of the antitrust laws in any event, Congress wished to avoid deterrence through potential extension of those laws to this conduct. *Id.*

[468] 17 U.S.C. § 114(e)(2)(B).

eral, rather than concerted, action.[469]

3. Allocation of Receipts

In the case of statutory licenses, half the receipts (as previously noted) have been allocated to featured artists and nonfeatured musicians and vocalists.[470] In the context of voluntary licenses, no such absolute solicitude for one party's rights over another's is possible. Nonetheless, the law does contain several limited provisions for the benefit of those categories.

In particular, the law provides that a featured recording artist is entitled to receive "payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract."[471] The legislative history also refers to a "collective bargaining agreement."[472] In any event, this entitlement applies solely to licenses for subscription transmissions, except for subscription transmissions subject to statutory licenses.[473] Inasmuch as those statutory licenses are designed to apply generally to subscription transmissions, this provision applies only to those that are ineligible — primarily consisting of interactive subscription services.[474]

By the same token, nonfeatured recording artists are entitled to payments in accordance with the terms of their contracts.[475] The statute adverts in addition to any "other applicable agreement."[476] This provision (like the preceding one) is limited to the class of licenses for subscription transmissions except for subscription transmissions subject to statutory license, thus similarly applying primarily to interactive subscription transmissions.

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[469] 17 U.S.C. § 114(e)(2)(B).

[470] *See* § C(4) *supra*.

[471] 17 U.S.C. § 114(g)(1)(A). Query what role that provision serves. Even in its absence, would featured recording artists not be entitled to their contractual due?

[472] S. Rep. (DPRA), p. 31.

[473] *See* 17 U.S.C. § 114(g)(1)(A).

[474] It applies in addition to noninteractive transmissions that, for any reason, fall outside the statutory license scheme. An example would be a noninteractive subscription service that exceeds the sound recording performance complement. *See* § C(1)(c) *supra*.

[475] 17 U.S.C. § 114(g)(1)(B).

[476] 17 U.S.C. § 114(g)(1)(B).

F. RECORDINGS OF SOUND RECORDING TRANSMISSIONS FOR BUSINESSES AND WEBCASTING

The above discussion has ventilated the contours of digital audio transmission, a subspecies of the copyright owner's public performance right. In addition, the Digital Millennium Copyright Act[477] effectuates a related amendment to the copyright owner's reproduction right.

Previous law incorporated a right to engage in ephemeral recordings, via Section 112(a) of the Act.[478] The 1998 amendment adds a new Section 112(e), to augment the rights conferred under Section 112(a). A rounded understanding of this domain therefore requires explication of this aspect of the matter, as well.

1. Scope of Application

Section 112(e) entitles a "transmitting organization"[479] to make a phonorecord of an affected sound recording under the terms set forth below

a. Eligible Usages of Sound Recordings

There are two purposes to which this aspect of the ephemeral recording provision applies. The first is to a "transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv)."[480] The subsection thereby referenced is the one that allows "a transmission to a business establishment for use in the ordinary course of its business."[481] As explicated above,[482] that provision permits such usages as background music played in offices, retail stores, and restaurants,[483] so long as the business recipient not

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[477] See n.15 *supra*.

[478] 17 U.S.C. § 112(a).

[479] This undefined term presumably should be interpreted as it is under prior law. *See* NIMMER ON COPYRIGHT § 8.06[A] N. 3.

[480] 17 U.S.C. § 112(e)(1).

[481] 17 U.S.C. § 114(d)(1)(C)(iv).

[482] *See* § B(3) *infra*.

[483] S. Rep. (DPRA), p. 23.

retransmit the transmission "outside of its premises or the immediately surrounding vicinity."[484]

The second permitted usage[485] applies to a transmitting organization entitled to transmit to the public a performance of a sound recording "under a statutory license in accordance with section 114(f)."[486]

b. Conditions

Many of the conditions applicable under Section 112(a)[487] apply under Section 112(e) as well.[488] First, the phonorecord reproduced under this provision must be "retained and used solely by the transmitting organization that made it, and no further phonorecords [may be] reproduced from it."[489] That language replicates a requirement from Section 112(a).[490] Second, the phonorecord must be "used solely for the transmitting organization's own transmissions originating in the United States"[491] under either of the two usages recognized above.[492] That language largely tracks previous language as well.[493] Third, exactly restating a previous requirement,[494] "unless preserved

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[484] 17 U.S.C. § 114(d)(1)(C)(iv).

[485] The legislative history places this usage on an inferior footing.

> The new statutory license in section 112(e) is intended primarily for the benefit of entities that transmit performances of sound recordings to business establishments pursuant to the limitation on exclusive rights set forth in section 114(d)(1)(C)(iv). However, the new section 112(e) statutory license also is available to a transmitting entity with a statutory license under section 114(f) that chooses to avail itself of the section 112(e) statutory license to make more than the one phonorecord it is entitled to make under section 112(a).

Conf. Rep. (DMCA), pp.89-90. Nonetheless, both appear on the face of the statute as equals.

[486] 17 U.S.C. § 112(e)(1). *See* § D *supra*.

[487] *See* NIMMER ON COPYRIGHT § 8.06[A].

[488] *See* Conf. Rep. (DMCA), p.90.

[489] 17 U.S.C. § 112(e)(1)(A). "Thus, trafficking in ephemeral recordings, such as by preparing prerecorded transmission programs for use by third parties, is not permitted." Conf. Rep. (DMCA), p.90.

[490] *See* NIMMER ON COPYRIGHT § 8.06[A][3].

[491] 17 U.S.C. § 112(e)(1)(B).

[492] *See* § F(1)(a) *supra*.

[493] *See* NIMMER ON COPYRIGHT § 8.06[A][3].

[494] *See* NIMMER ON COPYRIGHT § 8.06[A][4].

exclusively for purposes of archival preservation, the phonorecord [must be] destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord."[495]

Another limitation here derives not from Section 112(a), but from the mechanical compulsory license.[496] In particular, Section 112(e) applies only when "[p]honorecords of the sound recording have been distributed to the public under the authority of the copyright owner . . . ."[497] Alternatively, this provision is satisfied to the extent that "the copyright owner authorizes the transmitting entity to transmit the sound recording. . . ."[498] In either event,[499] the transmitting entity must make the phonorecord implicated here "from a phonorecord lawfully made and acquired under the authority of the copyright owner."[500]

c. Number of Phonorecords

The other salient limitation in Section 112(a) is its limitation to one copy[501] or phonorecord.[502] Section 112(e)'s explicit authorization "to make no more than 1 phonorecord of the sound recording" seems, at first blush, to be similarly constrained.[503] But reading further, the statute contains an exception to the extent that "the terms and conditions of the statutory license allow for more" physical reproductions to be made.[504] The legislative history explains that it is this difference that calls forth the need for Section 112(e), rather than simply relegating webcasters to their antecedent rights under Section 112(a):

For example, the conferees understand that a webcaster might wish to

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[495] 17 U.S.C. § 112(e)(1)(C).

[496] 17 U.S.C. § 115(a)(1). *See* NIMMER ON COPYRIGHT § 8.04[C].

[497] 17 U.S.C. § 112(e)(1)(D).

[498] 17 U.S.C. § 112(e)(1)(D).

[499] *See* Conf. Rep. (DMCA), p.90

[500] 17 U.S.C. § 112(e)(1)(D). Much of this language also appears in 17 U.S.C. § 114(d)(2)(C)(vii). *See* § D(1)(c) *infra*.

[501] Section 112(a), being generally applicable, references "copies" along with "phonorecords." By contrast, Section 112(e) is limited to sound recordings, and for that reason is phrased solely in terms of "phonorecords."

[502] *See* NIMMER ON COPYRIGHT § 8.06[A][2].

[503] 17 U.S.C. § 112(e)(1).

[504] 17 U.S.C. § 112(e)(1).

> reproduce multiple copies of a sound recording to use on different servers or to make transmissions at different transmission rates or using different transmission software. Under section 112(a), as amended by this bill, a webcaster with a section 114(f) statutory license is entitled to make only a single copy of the sound recording. Thus, the webcaster might choose to obtain a statutory license under section 112(e) to allow it to make such multiple copies. The conferees intend that the royalty rate payable under the statutory license may reflect the number of phonorecords of a sound recording made under a statutory license for use in connection with each type of service.
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> * * *
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> This paragraph provides that the transmitting organization may reproduce and retain more than one ephemeral recording, in the manner permitted under the terms and conditions as negotiated or arbitrated under the statutory license. This provision is intended to facilitate efficient transmission technologies, such as the use of phonorecords encoded for optimal performance at different transmission rates or use of different software programs to receive the transmissions.[505]

In light of those characterizations, it becomes necessary to scrutinize the statutory license to determine the multiples of copies that it authorizes to be made under various circumstances. Of course, the reference in the legislative history to "terms and conditions as negotiated" is consistent with multiple copies being made — as long as all parties concerned agree to that conduct. But even in the absence of a statutory provision, the parties are always free to enter into voluntary agreements; so that aspect cannot be the innovation to which reference is intended. Instead, we must investigate the terms and conditions as "arbitrated under the statutory license."

The results of that investigation are startling. For the statutory license affords a statutory license to "make *a* phonorecord of *a* sound recording," not to make multiple copies.[506] That phraseology in the singular is little short of amazing, in light of the legislative history's fanfare for this supposed innovation.

Where does this leave us? In theory, the pertinent rulemaking procedure could set a fee of X to "make a phonorecord of a sound re-

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[505] Conf. Rep. (DMCA), p.90.

[506] 17 U.S.C. § 112(e)(7)(A) (emphasis added). A future installment will investigate this phenomenon at greater length.

cording," and a corresponding fee of 5X to make five such copies, or 8X to make twenty copies. It could set a maximum number of copies to be made, or leave the matter open. But regardless of what approach it adopts, the statute's phraseology in the singular opens any such plural implementation to attack, thereby setting at risk the whole rationale for the enactment of Section 112(e).[507] The only conclusion is that abysmal drafting leaves serious problems in its wake, for the courts to muddle through.

d. No Impact on Musical Works

Nothing in Section 112(e) is intended to apply outside the ambit of the ephemeral recording provision and the coordinate right in digital audio transmissions of sound recordings.[508] Except as set forth above, Section 112(e) in no way "annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording. . . or in a musical work. . . ."[509]

The previous reference to musical works brings up an important distinction. Being limited to making phonorecords of sound recordings,[510] Section 112(e) does not apply to making copies of musical compositions.[511] Of course, that distinction does not carry over easily to the real world. For the lion's share of ephemeral recordings of sound recordings that transmitting organizations wish to produce under Section 112(e) will simultaneously embody copyrighted sound re-

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[507] The drafting of this provision is particularly slipshod. Among the major copyright features of the Digital Millennium Copyright Act, this one crept in at the last stage, during the House-Senate conference. In the sole report that explicates it, the text of the bill is set forth incorrectly, moving directly from paragraph (1) to (3); as a result, all explications in the report to paragraphs (2) through (9) are off! *See* Conf. Rep. (DMCA), p.42.

[508] "The conferees intend that the amendments regarding the statutory licenses in sections 112 and 114 contained in section 415 [a typo for "405"] of this bill apply only to those statutory licenses." Conf. Rep. (DMCA), p.91. The statute itself is even more explicit. The provision that amends Section 112(e) exerts no impact on Section 112(a). Act of Oct. 28, 1998, Pub. L. 105-304, Sec. 405(c), 112 Stat. 2860.

[509] 17 U.S.C. § 112(e)(9).

[510] *See* § F(1)(a) *supra*.

[511] On the distinction, *see* n.1 *supra*.

cordings and musical compositions.[512]

For purposes of making a reproduction of the musical composition, the transmitting organization must comply with Section 112(a).[513] The legislative history notes that, pursuant to that provision, "authorization for the making of an ephemeral recording is conditioned in part on the transmitting organization being entitled to transmit to the public the performance of a musical composition under a license or transfer of the copyright."[514]

The language just quoted looks to the performance right. As to the ephemeral recording itself, it falls under the reproduction right. For a transmitting organization to make a phonorecord embodying both a sound recording a musical composition, it must clear reproduction rights to both copyrights. With respect to the sound recording, it can invoke Section 112(e) to make a single phonorecord – or perhaps multiple phonorecords.[515] With respect to the music, it can rely on Section 112(a), which is unambiguously limited to making a single phonorecord.[516]

Of what significance, then, is the vaunted improvement of Section 112(e) over Section 112(a) in purportedly authorizing the reproduction of multiple phonorecords (even assuming that to be the appropriate reading of the statutory language, which instead refers to "a phonorecord" in the singular)?[517] It would seem to be highly limited. The transmitting organization must still take out the appropriate license from the affected music publishers.[518] After having done so, it may decline to take out another license from the affected record compa-

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[512] Conf. Rep. (DMCA), p.90.

[513] "The making of an ephemeral recording by such a transmitting organization of each copyrighted musical composition embodied in a sound recording it transmits is governed by existing section 112(a) (or section 112(a)(1) as revised by the Digital Millennium Copyright Act). . . ." Conf. Rep. (DMCA), p.90.

[514] Conf. Rep. (DMCA), p.90. Such a performance license can emanate from one of the performing rights societies. *See* NIMMER ON COPYRIGHT § 8.19.

[515] *See* § F(1)(c) *supra*.

[516] *See* NIMMER ON COPYRIGHT § 8.06[A][2].

[517] *See* § F(1)(c) *supra*.

[518] Note that a blanket license from the performing rights societies does not suffice here, inasmuch as they grant performance rights, not reproduction rights. *See* NIMMER ON COPYRIGHT § 8.19.

nies.[519] Instead, it may pay those record companies pursuant to the statutory fees that Section 112(e) establishes.[520]

2. Statutory License Fees

The various features relating to ephemeral recordings in the 1976 Act constitute exemptions from liability.[521] By contrast, those who fall within Section 112(e) do not thereby avoid all liability to the copyright owner. Instead, they may claim a compulsory license (here called a "statutory license")[522] to engage in the subject acts of reproduction. The parties may agree on the applicable terms and rates of royalty payments.[523] Otherwise, the "the Librarian of Congress shall. . . convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms. . . ."[524] The task there is to "establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller."[525] In either event, the rates must "include a minimum fee for each type of service offered by transmitting organizations."[526]

Section 112(e) sets forth procedures "parallel to the proce-

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[519] In another context, the legislative history cites the example "where a noninteractive music programmer transmitter has obtained a public performance copyright license from the copyright owner of the sound recording, and the retransmitter has not obtained such a license but is authorized by the music programmer transmitter to retransmit the sound recording." S. Rep. (DPRA), p.23. That snippet recognizes that certain exploitations might be licensed, and others not. In parallel fashion, a patchwork pattern of licensing might be implicated here.

[520] *See* NIMMER ON COPYRIGHT § 8.06[A][2].

[521] *See* NIMMER ON COPYRIGHT §§ 8.06[A] – 8.06[F].

[522] The nomenclature derives from the DPRA. *See* text accompanying n.147 *supra*.

[523] 17 U.S.C. § 112(e)(3). The applicable period here runs from October 28, 1998, to December 31, 2000. *Id.* The same time period applies to arbitrated proceedings. 17 U.S.C. § 112(e)(4). Thereafter, the issues are to be redetermined at two-year intervals, starting in January 2000 for voluntary negotiations, and July 2000 for arbitrated ones. 17 U.S.C. § 112(e)(6).

[524] 17 U.S.C. § 112(e)(4).

[525] 17 U.S.C. § 112(e)(4).

[526] 17 U.S.C. §§ 112(e)(3), 112(e)(4).

dures . . . for public performances of sound recordings"[527] set forth in the DPRA's comparable statutory license.[528] The reader is therefore referred to the discussion above for explication of the applicable language.[529]

3. Other Provisions

Section 112(e) sets forth a waiver from the antitrust laws, to allow collective negotiation among copyright owners of sound recordings and transmitting organizations.[530] That provision "closely follows the language of existing antitrust exemptions in copyright law,[531] including the exemption found in the statutory licenses for transmitting sound recordings by digital audio transmission . . . ."[532]

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[527] Conf. Rep. (DMCA), p.91.

[528] *See* § D *infra*.

[529] There are several areas of overlap here. First, the copyright arbitration royalty panel must "base its decision on economic, competitive, and programming information presented by the parties . . . ." 17 U.S.C. § 112(e)(4). That language, right down to the two factors that the panel must consider (effect on the copyright owner's traditional streams of revenue and relative creative contribution, technological contribution, capital investment, cost, and risk, 17 U.S.C. § 112(e)(4)(A) – (B)) matches the language in DPRA's statutory license. 17 U.S.C. § 114(f)(2)(B)(i) - (ii). *See* § D(2) *infra*.

Second, records must be kept so that copyright owners will receive reasonable notice of the use of their sound recordings. 17 U.S.C. § 112(e)(4). That language likewise matches the language in DPRA's statutory license. 17 U.S.C. § 114(f)(4)(A). *See* § C(2)(b) *infra*.

Third, interested parties may "submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings." 17 U.S.C. § 112(e)(3). That language also matches the DPRA's statutory license. 17 U.S.C. § 114(f)(2)(A). *See* § C(2)(a) *infra*.

Fourth, voluntary agreements trump arbitrated terms, 17 U.S.C. § 112(e)(5), just like with respect to the DPRA's statutory license, 17 U.S.C. § 114(f)(3). *See* § C(2)(b) *infra*.

Finally, royalty payments and arrearages, 17 U.S.C. § 112(e)(7), match those in the DPRA's statutory license, 17 U.S.C. § 114(f)(B). *See* § C(3) *infra*.

[530] 17 U.S.C. § 112(e)(2).

[531] See 17 U.S.C. § 114(e)(1), discussed in § C(2)(a) *infra*.

[532] Conf. Rep. (DMCA), p.91.

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The above discussion has followed the tortured path that Congress outlined concerning digital audio transmissions. Regardless of the identity of the particular entities whose benefit Congress was serving in the process, it is difficult to imagine that strict consideration of the public interest dictated the laborious scheme of exemptions, statutory licenses, and voluntary licenses catalogued above.

These massive amendments are rife with other problems as well. Future installments to this series will discuss (1) the lack of attention to the fundamental public performance right at issue in this domain; (2) the pitfalls of enacting laws drafted by the very entities to be regulated thereby; and (3) the lack of doctrinal coherence in the basic enterprise undertaken by the Digital Performance Right in Sound Recordings Act of 1995. In sum, although the foregoing considerations show that Congress largely subordinated the public interest when enacting the above 1995 and 1998 amendments, the problem investigated here is but one aspect of a larger deficit. For those readers who are still standing, there is more slogging through the jungle ahead.