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Music Included on Software Downloaded From the Internet: Public Performance or Private Use?

by

CHRISTOPHER PAUL MOORE*

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Introduction

This paper addresses the applicability of the public performance right when software creators license copyrighted music to include on software that is sold and delivered directly over the Internet. This happens when the maker of a computer game licenses a popular song to play along with the action on the computer screen. The thesis of this paper is that when the software is bought from a site on the Internet, and then digitally downloaded to a consumer, a public performance has occurred under section 106(4) of the Copyright Act.¹

The first section of this paper will address the overlapping classifications of our hypothetical game and accompanying music, and how the public performance right in the underlying musical composition is involved. Next will follow a discussion of current Internet technology and how electronic commerce may implicate the public performance right under the Copyright Act. Finally, this note will discuss the Copyright Act's legislative history, the relevant positions taken by the Clinton Administration, and the reactions of the legal community that shed light on whether a public performance has taken place when one downloads software including copyrighted music from the Internet.

I
Classification of Computer Games That Include Accompanying Sounds Under Copyright Act Sections 101 and 102

Section 102 of the Copyright Act sets forth eight broad categories that qualify as "works of authorship" under the Copyright Act.² The legislative history explains that the categories are "overlapping in the sense that a work falling within one class may encompass works coming within some

² These are: 1) literary works; 2) musical works, including any accompanying words; 3) dramatic works, including any accompanying music; 4) pantomimes and choreographic works; 5) pictorial, graphic, and sculptural works; 6) motion pictures and other audiovisual works; 7) sound recordings; and 8) architectural works. 17 U.S.C. § 102 (1995).
or all of the other categories.\textsuperscript{3}

Our hypothetical game implicates several of the categories listed in section 102 including literary works, musical works (including accompanying words), sound recordings, and audiovisual works.\textsuperscript{4}

The following sections will address how these classifications may overlap and create concurrent rights in our hypothetical computer game. This will explain how the public performance right in musical compositions is implicated by the digital downloading of a software program that includes copyrighted music.


Although computer programs are usually considered “literary works" under the definition in section 101 of the Copyright Act,\textsuperscript{5} computer games that have sequential visual images synchronized with sounds have been labeled audiovisual works by the courts.\textsuperscript{6}

Audiovisual works are defined under section 101 of the Copyright Act as follows:

\textit{Works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.}\textsuperscript{7}


\textsuperscript{4} See id.

\textsuperscript{5} Section 101 of the Copyright Act defines a literary work as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” 17 U.S.C. § 101 (1995); see also Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1247 (3d Cir. 1983). This case concerned the copyright to an “operating system program” which is defined as a program that generally manages the internal functions of the computer or facilitates an application program. See id. at 1243-44.

\textsuperscript{6} See Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 278 (4th Cir. 1989) (holding that video games are copyrightable as audiovisual works.). The subject program in this case is distinguished from the program in Apple Computer that did not show a series of related images along with accompanying sounds. 714 F. 2d. at 1243-44.

Because video games consist of related images intended to be viewed through computers together with accompanying sounds, they are considered audiovisual works.\(^8\) Our hypothetical computer game that includes licensed copyrighted music is an audiovisual work because its images are intended to be shown on a computer along with the copyrighted music. Note also that in our hypothetical game, the music is synchronized with the action, and is not simply background music taking place during some operation, such as searching or booting up. It is, therefore, an audiovisual work.\(^9\)


Many software manufacturers who create video games played on computers include copyrighted music in their games. Often, music by a particular artist can enhance the value of the game to the consumer. This section explores the classification of the underlying composition when it is conjoined with a computer game under 17 U.S.C. § 103.

Section 101 of the Copyright Act defines a derivative work as one that is “[B]ased upon one or more preexisting works, such as a . . . sound recording . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of . . . modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”\(^{10}\) The maker of the computer game must have made a substantial, not merely trivial, contribution to the preexisting music to consider the game derivative under section 101.\(^{11}\) In our hypothetical computer game with accompanying copyrighted music, video has been enhanced by audio and vice-versa. This would not be a trivial contribution because the resultant program transforms the visual portion of the game from a literary work to an audiovisual work, and the musical work is transformed into an audiovisual work.

**C. Copyright in the Underlying Composition is Not Affected by**

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8. See id.
11. See id.
Derivative Works

Section 103 of the Copyright Act ensures that the copyright in the underlying composition remains unaffected. Section 103 of the Copyright Act provides that:

[the copyright in a ... derivative work ... does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.]

This is significant because owners of the underlying musical composition in our hypothetical game may be able to exercise their exclusive right to public performance when the game is downloaded from the Internet. Even though the underlying composition has become part of an audiovisual work, section 103 operates to preserve the exclusive rights granted a copyright owner in all preexisting material. Therefore, owners of the underlying composition included in our hypothetical game retain the exclusive right to publicly perform the audiovisual work that contains their compositions.

D. Copyright in the Underlying Musical Composition is Distinct from the Copyright in the Sound Recording

Section 101 does not define "musical works" because its meaning is self-evident. House Report 94-1476 explains that a musical composition is copyrightable regardless of whether it is embodied electronically or in some other concrete form.

13. Id.
17. See id.
The underlying musical composition is separate and distinct from "sound recordings" which are defined in section 101 of the Copyright Act as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work," regardless of the material objects . . . in which they are embodied.9

One author has used a cookie chef analogy to describe the difference between the underlying musical composition and the sound recording.20 After a chef has baked a particularly tasty batch of cookies, he may choose to write the recipe down.21 A consumer cannot eat the recipe itself, but any other chef may use the recipe to make cookies that taste similar.22 The cookie recipe is analogous to an underlying musical composition, and similar tasting cookies created by another chef's use of the recipe are analogous to a sound recording.23

As with the cookie recipe, when a songwriter fixes her work of authorship in a tangible medium such as a tape-recording or sheet music, a copyright is created in the underlying composition.24 Another musician, however, may use the sheet music to learn the song and then create his own sound recording which is separately copyrightable.25 Even when such a new sound recording is created, the copyright in the underlying composition remains inviolate. Both rights coexist.

The author that introduced the cookie recipe analogy also gave the specific example of the Beatles' version of the song

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18. Note that although the definition of "sound recording" specifically excludes those accompanying an audiovisual work (which we have determined captures the essence of our hypothetical computer game), section 103 preserves any preexisting copyright in the sound recording because the game is a derivative work. 17 U.S.C. § 103 (1995).
21. See id.
22. See id.
23. See id.
"Twist and Shout."\textsuperscript{26} The song was written by Phil Medley and Bert Russell. Medley and Russell own the underlying composition. The Beatles created a separate sound recording of the composition which is also protected under 17 U.S.C. \S\ 102.\textsuperscript{27} As a result, if someone wants to license the Beatles' "Twist and Shout" to play along with the action on a video game, he or she must negotiate a synchronization license from the owner of the underlying composition, and then get a separate synchronization license from the owner of the sound recording.\textsuperscript{28}

II

The Exclusive Right to Public Performance

Under 17 U.S.C. \S\ 106(4)

Section 106 of the Copyright Act grants the copyright owners the exclusive rights to reproduction, adaptation, distribution, display, and public performance.\textsuperscript{29} Although digitally delivering our hypothetical computer game implicates some of the other rights listed, this note deals only with the right to public performance of the underlying composition.

The right of public performance under section 106(4) extends to musical compositions and audiovisual works.\textsuperscript{30} Section 101 of the Copyright Act defines "perform" as follows:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.\textsuperscript{31}

In the case of our hypothetical game with accompanying music, the audiovisual work is "performed" within the

\begin{thebibliography}{99}
\bibitem{26} See Mets, supra note 20 at 373-74.
\bibitem{27} "Copyright protection subsists ... in original works of authorship ... [which] include ... sound recordings." 17 U.S.C. \S\ 102 (1995).
\bibitem{28} A synchronization license is required when one wants to synchronize music with a visual work. Whether the music will be synchronized with a visual work is significant because mechanical licenses for music-only recordings are mandatory, that is, they must be granted by the owner of the underlying composition at a maximum rate set by statute. Synchronization licenses are not mandatory and can be negotiated freely or refused. See 17 U.S.C. \S\ 115 (1995).
\bibitem{29} 17 U.S.C. \S\ 106 (1995).
\bibitem{31} 17 U.S.C. \S\ 101 (1995).
\end{thebibliography}
meaning of the statute whenever its images are shown or the sounds accompanying it are made audible. A more complex and difficult determination is whether the performance was "public." If the performance is deemed "public," then the copyright holders of the audiovisual work, and in the case of a derivative work, the copyright owners of any preexisting works, maintain an exclusive right under 106(4) of the Copyright Act.

Section 101 of the Copyright Act explains that to perform a work "publicly" means:

1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Public performance covers not only the initial rendition, but any subsequent transmission. A public performance thus occurs in all of the following situations: when a musician performs the song in front of an audience, when a broadcasting network transmits that performance (whether simultaneous or from a tape recording), when a local broadcaster transmits that network broadcast, and when a cable television company retransmits that performance to its subscribers. It is clear from the above example that many separate public performances can take place from what at first blush seems to be one occurrence. One musician sings a song, and several people listen and view the performance at their home. Although this may appear to be one public performance, each broadcaster is engaging in a separate public performance from the one committed by the musician.

In Columbia Pictures Industries, Inc. v. Redd Horne, Inc, the defendant provided private screening rooms for up to four

36. See id.
people to watch movies on videotape. The movies were played on a video player at a central location and then piped into the screening rooms. The question for the court was whether the performance was public. Defendant argued that since the screening rooms were only accessible to the individuals who rented the rooms, the performance could not be public. The Redd Horne court, however, found that the transmission of a performance to members of the public even in private areas constitutes a public performance.

The House Report which accompanies the Copyright Revision Act of 1976 explains that "a performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission." The Report goes on to explain that even when the audience is a very limited portion of the public such as hotel room occupants or cable television subscribers, the same principles apply.

In the case of a cable television subscription, the House Report's determination that it creates a public performance rests upon the assumption that cable television is transmitted to the public. Even though each viewer may see the broadcast alone in the privacy of his or her home at different times, cable television is disseminated to the public, and therefore creates a public performance for the purposes of section 106(4) of the Copyright Act.

The following section will evaluate relevant technology and the process by which consumers can have computer games digitally delivered to their home computers. Then, the question of whether copyrighted music included in those games is publicly performed during this delivery will be

37. 749 F.2d 154 (3d Cir. 1984).
38. See id.
39. See id. at 157.
40. See id.
41. See id. at 159
43. See id. at 65.
44. See id
45. See id.
addressed.

III
Delivery of Computer Programs Containing Copyrighted Music Over the Internet

The Internet was originally created by the Department of Defense in 1969 for the purpose of creating a computer network system capable of functioning regardless of whether portions of the system were disabled. Because the network is designed to route itself around the disabled areas and continue to function, there is no way to "turn off" the Internet as long as any systems are functioning on the network. In 1981, the Internet was a network of 300 computers. In 1993 there were over 90,000 computers linked to the Internet. Today the Internet links millions of computers together.

A. Electronic Commerce

In addition to being able to communicate with one another, consumers are utilizing the Internet to conduct commerce. Prominent research companies disagree on how much commerce is actually taking place, but they all estimate that commerce is at minimum doubling every year. For example, Forrester Research estimated that Internet commerce, access, services, software, and hardware accounted for one billion dollars in 1996, and that by the year 2000 Internet activity would account for ten billion dollars.

Today many consumers are making decisions, placing orders for product, and making payment over the Internet. Often delivery of the product is handled through U.S. Mail.

47. See id. at 488-89.
48. See id. at 488.
49. See id.
50. See id.
51. See G. L. Grant, Business Models for the Internet and New Media, 545 PLI/PAT 39, 44 (1999).
52. See id.
53. See id. at 42, 44.
54. See id. at 53.
55. See id. at 55.
But on-line delivery of the product itself, concurrent with payment, is the next logical step in the evolution of Internet commerce.\textsuperscript{56} To effect this transaction, the goods purchased obviously must be reducible to digital form, and cannot be tangible like computer hardware. Computer software and music are both conducive to this type of transaction, and therefore may one day be exclusively distributed through this medium. Because of this possibility, copyright owners are anxious to assert rights that are implicated by downloading product to a home computer.

\textbf{B. Delivery of Product on the Internet}

Much of the discussion of public performance rights to copyrighted material downloaded from the Internet pertains to sound recordings.\textsuperscript{57} With recent improvements in technology, it has become possible to transmit CD-quality music over the Internet.\textsuperscript{58} Because a sound recording embodies a musical composition, and our hypothetical game with accompanying copyrighted music is considered an audiovisual work, derived for the purposes of section 103 of the Copyright Act from the underlying composition therein,\textsuperscript{59} the discussion of commentators on the applicability of the public performance right to sound recordings is relevant. That is, the same factors that determine whether a sound recording is publicly performed during a digital download will determine whether an audiovisual work is publicly performed during a digital download.

Today music can be delivered by "streaming," or "downloading."\textsuperscript{60} This distinction can be very important when

\textsuperscript{56} See id. at 53.
\textsuperscript{59} See supra Part I.A-C.
\textsuperscript{60} See Rosini & Singer, supra note 58.
debating the applicability of the public performance right.

"Streaming" allows the consumer to listen to music from websites in real time. Much like a jukebox, the consumer chooses the song, and then listens as it is being transmitted. As will be discussed later, it is significant that the transmission is simultaneous with the consumer's perception of the product. There is little dissent from the position that streaming audio creates a public performance.

"Downloading" entails transferring the data to the consumer's hard drive where it is stored in memory. The consumer may choose to perceive the product sooner or later. Whether this creates a public performance is a hotly debated issue.

IV

Does Downloading an Audiovisual Work Create a Public Performance?

Recall that the courts deemed a performance "public" when it was transmitted to the public. Because the public can access a retail website and download digital products that they choose to this transmission would certainly be "to the public," under the reasoning in Redd Horne. The issue that remains is whether a "performance" has occurred when a consumer digitally downloads a purchased audiovisual work from the Internet. Legal commentators disagree on this issue.

A. The Clinton Administration on Public Performance Simultaneous with Transmission

During the Senate Hearings on S.227, the Digital Performance Rights in Sound Recordings Act of 1995, the

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61. See id.
62. See id.
63. See Hayes, supra note 57.
64. See Rosini & Singer, supra note 58.
Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce Lehman, was asked by the committee whether S.227 should define when digital transmission of a copyrighted work amounts to a performance. His reply was that this issue should be decided on a case-by-case basis by the courts. Later in his testimony, Assistant Secretary Lehman said that it was the tentative conclusion of the Information Infrastructure Task Force that both a public performance and a distribution could happen simultaneously on the Internet. But again, Lehman said that whether a transaction creates a public performance, a distribution, or both should be a question for the courts on a case-by-case basis.

The final version of the National Information Infrastructure Report (the “White Paper”) made the distinction between transmissions of copies of works and transmissions of performances of works. According to the White Paper, when a work is shown to a user over the Internet so that he or she may watch it as it is transmitted with or without copying it, a performance has taken place. But when a copy is transmitted so that it is “captured in a user's computer, without the capability of simultaneous 'rendering' or 'showing,' it has clearly not been performed.” Actually, this is not clear at all, and it may be wrong.

B. Congress on Performance Simultaneous with Transmission

During its discussion of voluntary negotiation of reasonable terms and statutory royalty rates for compulsory compositions, the analysis of when a transmission amounts to a performance is equally applicable to both situations.


68. See id.

69. See id. at 50.

70. See id.


72. See id.

73. Id.

74. See discussion infra Part IV.C.
mechanical license under the Digital Performance Right In Sound Recordings Act of 1995 (the DPRSRA), the Senate sought to distinguish between the rate applicable to digital deliveries in general, and digital deliveries that are incident to transmission of a performance.75 This was significant because the Senate suggested in this report that a digital delivery that amounts to a reproduction or distribution under the Copyright Act, in certain circumstances may be primarily a performance, even though it is also technically a reproduction or distribution.

The report explains that if a user's computer has to temporarily store the delivered data in order to execute the transmission of a performance, a reproduction or distribution may have occurred.76 This would be the case even if a transmission system was meant to deliver a performance in real time because a reproduction would be made in order to do so. But the reproduction or distribution is merely incidental to the performance, warranting a lower rate for a mechanical license due to the necessity of acquiring a public performance license from the owner of the work.77 The report suggests that statutory mechanical royalty rates should be lower in cases where the digital delivery is incidental to the transmission whose purpose and effect is to cause a performance.78

This analysis by the Senate Report has caused some commentators to conclude that since you cannot readily tell the difference between a digital delivery that is a reproduction or distribution and one that is incidental to a performance, all digital deliveries of sound recordings and audiovisual works should be regarded as performances.79


76. See id. Note that the exclusive rights to reproduction and distribution under 17 U.S.C. §§ 106(1) (3) in the case of digital delivery of copyrighted works are not addressed here. They are only mentioned to illustrate Congress' cognizance of a performance right to digital deliveries of copyrighted works.

77. See id.

78. See id. “[S]tatutory mechanical royalty rates shall distinguish between ‘incidental’ digital phonorecord deliveries that take into account the different purpose and effect of these transmissions and digital phonorecord deliveries in general.”

79. See Bob Kohn, A Primer on the Law of Webcasting and Digital Music Delivery 20 No. 4 ENT. L. REP. 4, (1998) (explaining that the performance rights societies who administer the public performance rights for songwriters and publishers, such as BMI, ASCAP, and SESAC, have made this argument).
C. Isochronous and Asynchronous Transmissions

Further explicating the distinction explained in the White Paper between simultaneous “rendering” of a digital transmission and downloading a transmission to be perceived at a later time by the user, legal commentators have used the terms “isochronous” and “asynchronous.” A transmission that is immediately converted into a playback of the work, is technically referred to as an isochronous transmission. However, if the transmission is either faster or slower than the perception of the work by the end user, then the transmission is considered asynchronous. As we saw from the discussion in the White Paper, this distinction can have important implications for the determination of whether a performance has taken place. However, this distinction may be a faulty one for really ascertaining the difference between whether a performance has occurred or not.

Due to the nature of Internet technology, and due to the reality that different computers receive and transmit information at varying speeds, all transmissions through the Internet are at least partly asynchronous. This has led some commentators to the conclusion that the determination of whether a performance has occurred should be based on what the user receives, instead of the transmission technology used. This would be consistent with the above-cited Senate Report, which suggests that quick transmissions that require brief memory storage before prompt playback may be public performances.

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82. Id.
83. See infra text accompanying notes 73-75.
84. See Hayes, supra note 80.
85. See id.
87. See id. "[If a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose,) delivering the phonorecord to the transmission recipient would
Kent Stuckey argues that although recipients of asynchronous transmissions may "render" the work as soon as they get it, or at a later time, the transmitter hasn't performed the work any more than has the retailer who sells a CD to a consumer who then opens the CD and immediately plays his purchase in a portable CD player. Since audiovisual works and sound recordings embody performances, Stuckey points out that if the isochronous requirement were not adhered to, then any transmission of audiovisual works and sound recordings would amount to a performance.

Other commentators claim that even though a work can be downloaded to a user's computer without ever "rendering" the work, it would be ignoring reality to maintain that no performance took place. This is because the purpose of downloading the sound recording or audiovisual work is to perform it.

The harm that would occur if the public performance right was extended to digital transmissions of audiovisual works and sound recordings is that the music industry would be "double-dipping." That is, a webcaster already paying for a digital phonorecord delivery would also be required to pay for a transmission, even if the phonorecord is not rendered during the transaction. This may require the webcaster to pay several more cents per transmission. Note, however, that this cost can be passed on to the consumer who benefits from the increased convenience of the digital delivery of product.

In light of the White Paper and Senate Report, it appears that the technology of "streaming" discussed above would implicate the public performance right, whereas "downloading" would not. Unfortunately, the Internet is not that simple.

The problem with this approach is that because of the

89. See id. at 512.
91. See id.
limitations of Internet technology, a case-by-case determination must be made whether, under the Senate Report's language, the recipient perceives the work *substantially* at the same time as transmission. Playing back the work the next day is probably not "substantially" at the same time as transmission. Playing back the work a few seconds after transmission probably is. But what about one or two minutes later? How about ten? If and when courts make a bright line distinction that everyone can adhere to, Internet sites will have a financial incentive to create a delay in the digital delivery of copyrighted works in order to obviate the need to secure a public performance license. When technologies of broadcasting, communication, and entertainment merge, this could have a chilling effect on the purpose of copyright: to promote the useful arts by giving authors exclusive rights in their writings. As companies introduce the requisite delay, the public performance right is no longer an exclusive right held by the author.

V

Conclusion

As audiovisual works, computer games that contain copyrighted compositions are performed when digitally downloaded to the public. Although this conclusion contradicts the analysis of the White Paper, and of many legal scholars, to hold otherwise would put the exclusive right to public performance in jeopardy in this time of quickly evolving technology. To endanger the right of public performance is to chill the incentive of songwriters to create. This certainly contradicts the purpose of the Copyright Act.

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93. See H.R. REP. No. 94-176 at 47.