The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure out the Copyright Law: The Story of the Music Industry at War with Itself

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by

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Introduction

On April 25, 2001, members of the National Association of Broadcasters ("NAB") and International Webcasting Association ("IWA") met in Las Vegas for the annual NAB convention. Many of those in attendance gathered for a highlight—the IWA panel discussion, Media on the Net from Small Streams to a Sea of Revenue. The message was clear: music webcasting was no longer the domain of renegade “dot.com” entrepreneurs. These panelists, in fact, represented industry leaders, with Microsoft delivering the keynote address and commentary provided by Yahoo, Arbitron, Qwest Digital Media, Internet Wire, and RealNetworks, among others.2

Actually, the tide had shifted back in October 2000 when entertainment giant Bertelsmann A.G. broke ranks with the recording industry to form a strategic alliance with online music provider, Napster. After that, the race began to “snap up online businesses that either own the most rights to independent artists, the best technology infrastructure or the greatest amount of eyeballs or better still eardrums.”3 All of the major record labels that, a year prior, had been engaged in legal battles with Napster,4 were now jumping on the online music bandwagon. In April 2001, a collaboration between RealNetworks, EMI, BMG and Warner promised a music subscription service called MusicNet; Viacom’s MTVi planned to offer a streaming/digital-download service in conjunction with all five major labels; and even Microsoft issued a statement saying that it, too, would become involved in digital music.5

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1. “Webcastings” is defined as:

   real-time transmission of encoded video under the control of the server to multiple recipients who all receive the same content at the same time. This is in contrast to normal web browsing which is controlled from the browser by individual users and may take arbitrarily long to deliver a complete document.


By July 2001, Bertelsmann announced it would acquire Myplay.com, and Vivendi Universal purchased MP3.com. Universal and Sony also promised that their jointly-owned Pressplay system would become active in September. As the industry knew by this time, webcasting held great promise not only for its ability to allow consumers to listen to music and radio over the Internet, but also to stream video and other media, as well.

Unfortunately, at present, webcasting is in a position akin to the old saying, "All dressed up, with no place to go." As IWA Chair, Peggy Miles, told Congress in June 2000, “Despite all of this promise, however, the reality is that American businesses and consumers are unable at present to reap the full benefits of streaming media technology.” The reason? No one has yet been able to agree on the meaning of the copyright laws related to webcast licensing and fees or how to define and treat new technological advances, innovations and uses. As a result, the major industry players continue to hold back until a consensus is reached. In the past, those who dared place a toe into the water found themselves slapped with nasty letters or lawsuits. This situation has resulted in an ongoing and escalating legal war over licensing and fees, complete with villains and heroes, shifting allegiances, backroom deals and moveable fronts, pitting the music industry against itself. As the record labels, publishers, radio stations, and webcasters fight with each other in and out of court, as well as petition Congress and the Copyright Office over interpretations of the Digital Millennium Copyright Act (“DMCA”), they leave behind the artists and consumers as casualties while a promising new technology sits idly by.

6. The purchase price was announced at $372 million. Ipsos-Reid research released in June 2001 revealed that sixty percent of Internet users between the ages of 18-24 downloaded music online; Informa Media Group also estimated that online music sales would hit $9.7 billion by 2006. Norton, supra n. 2.


8. As IWA Chair, Peggy Miles, stated in her Congressional address, webcasting can provide real-time access, over a home or business computer, to television and radio broadcasts, including public safety announcements, emergency information, and breaking news stories; deliver on-line, real-time educational programs; allow consumers the security of being able to view their homes, children, or daycare centers via remote video webcasts; connect people living in remote locations without cable or satellite television; and provide television and film broadcasts. Testimony before Congress, June 2000. International Webcasters Association, IWA News <http://www.webcasters.org/news> (accessed Oct. 12, 2001).

9. Id.

This article will provide background into the history of the copyright law as it relates to music webcasting, including the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")\textsuperscript{11} and the DMCA, explain the various forms of copyright protection held in recorded sound performances and its relation to online transmissions, discuss the history of the complex, legal situation which has resulted, new developments surrounding the proposed Music Online Competition Act ("MOCA"), and offer commentary and suggestions.

\section*{Chapter One: Two Copyrights Embodied in One Musical Recording: A Formula for Conflict}

When an artist goes into the studio to make a musical recording, two copyrightable works are actually embodied and created in the process under the Copyright Act: the musical work copyright and the sound recording copyright.\textsuperscript{12} The first copyrightable work is embodied in the actual musical composition, consisting of the written notes and lyrics. This is referred to as the "musical work."\textsuperscript{13} Usually the songwriter and/or the songwriter's publisher hold the copyright on this musical work. Copies of the musical work, such as sheet music, are sold or licensed to others who wish to perform it publicly, as well. Royalty money is then collected on these individual sales or uses.\textsuperscript{14}

If a performance of the musical work happens to be broadcast over the airwaves such as by a radio station, each play is also worth money, in the form of royalties, to the songwriter and publisher. Unfortunately, it is difficult for songwriters and publishers to keep track of and collect these royalties, particularly since broadcasts occur in many different locations and at various times. In an effort to...

\begin{itemize}
  \item \textsuperscript{12} 17 U.S.C.S. § 102(a) (LEXIS L. Publg. 2001).
  \item \textsuperscript{13} Id. § 102(a)(2). Under section 106 of the Copyright Act, the copyright owner has the exclusive right to do and authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of . . . musical . . . works, to perform the copyrighted work publicly; and in the case of . . . musical . . . works, to display the copyrighted work publicly. Id. § 106, 1-5.
\end{itemize}
monitor performance broadcasts and collect royalties, performing rights organizations such as ASCAP,\textsuperscript{15} BMI,\textsuperscript{16} and SESAC\textsuperscript{17} were formed to protect composers, authors, and publishers. Over the decades, businesses that broadcast musical works, such as restaurants, retailers, bars, clubs, hotels, and terrestrial (i.e., traditional) radio stations, have purchased licenses from these performing rights organizations, authorizing them to perform those musical works found in the organizations’ catalogues. The performing rights organizations collect the appropriate fees from these users and then distribute them in the form of royalties to their members.\textsuperscript{18}

Back in the recording studio, a second copyrighted work is also created during the artistic process. This work is referred to as the “sound recording,” consisting of the actual recording itself.\textsuperscript{19} The sound recording brings the notes and lyrics of the musical work to life by means of the creative efforts and interpretations of the producer, engineer, background musicians and, of course, the performer.\textsuperscript{20} The copyright to the sound recording is typically held by the record company. It is the record company, in fact, that actually signs the artist to the recording contract and places him or her into the studio. Traditionally, the record companies have made money by selling copies of the sound recording, in the form of vinyl albums, and later

\textsuperscript{15} American Society of Composers, Authors and Publishers, founded in 1914. ASCAP shares revenues equally between publishers and writers. Fees are collected on the basis of a general license to radio stations for use of its catalog with the fee of approximately 2-3.5\% of a station’s gross receipts less adjustments, with performance surveys conducted. Krasilovsky & Shemel, supra n. 13, at 192-94; Ryan & Bingaman, supra n. 15.

\textsuperscript{16} Broadcast Music, Inc., was founded in 1940 by broadcasters in an effort to increase the broadcasting industry’s bargaining power with ASCAP and to provide an alternative for writers and publishers not affiliated with ASCAP. Broadcasters are charged licensing fees based on a formula applied to gross receipts at a rate of approximately 2-3.5\%, with performance surveys conducted. Fees are sent equally to songwriters and publishers. Krasilovsky & Shemel, supra n. 13, at 192-94; Ryan & Bingaman, supra n. 13.

\textsuperscript{17} The smallest of the performing rights organizations, SESAC was formed in 1930 as a private licensing company. It differs from BMI and ASCAP in that it bases fees on chart performance rather than on a work’s appearance on a performance survey. Also, songwriter and publisher affiliates share in fifty percent of SESAC’s earnings after expenses. Krasilovsky & Shemel, supra n. 13, at 192-95.

\textsuperscript{18} See supra nn. 14-16.

\textsuperscript{19} “Sound recordings” are 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, such as disks, tapes, or other phonorecords, in which they are embodied. 17 U.S.C.S. § 101; see also id. § 102(a)(7).

\textsuperscript{20} The Recording Industry Association of America, Licensing and Royalties <http://www.riaa.com/Licensing-Licen-3a.cfm> (accessed Mar. 27, 2002) [hereinafter Licensing and Royalties].
cassette tapes and CDs. The record companies then pay the musical artist a percentage of these sales (i.e., the artist's royalties).\textsuperscript{21}

While radio broadcasters pay royalties to publishers and writers for use of the musical work, they have, however, never had to pay any sort of royalty or licensing fee to the actual record companies for use of the sound recording. While the Recording Industry Association of America ("RIAA") opines that this is because the broadcasting industry has had a stronger lobby on Capitol Hill,\textsuperscript{22} it has also clearly been a marriage of convenience: radio broadcasts provide instant marketing of the sound recording, resulting in consumer purchases of the record companies' CDs and tapes. Indeed, record companies habitually flood radio stations with thousands of free copies of new sound recordings each year, hoping that the products will receive needed airplay.\textsuperscript{23}

This "favored status" has not been accorded, however, to the newer, digital technologies such as cable and satellite subscription music services and providers of streaming audio transmissions over the Internet (i.e., webcasters). Since the 1995 Digital Performance Right in Sound Recordings Act ("DPRA"),\textsuperscript{24} webcasters offering subscription music services, for example, had to pay two licensing fees to both publisher and record company for the copyrighted musical work as well as the copyrighted sound recording, unlike their traditional, terrestrial brethren. As a result, a rift began to divide broadcasters into two camps.\textsuperscript{25}

That said, the situation changed, somewhat, in 1998 under the DMCA\textsuperscript{26} when both subscription and non-subscription digital providers were brought under the Act.\textsuperscript{27} Imagine the furor created

\textsuperscript{21} Krasilovsky & Shemel, supra n. 13, at 11-13, 18. In a typical, exclusive artist recording contract, the performing artist signs on in a work-for-hire capacity, assigning all copyright ownership in the sound recording to the record company and, if composer and/or lyricist, copyright ownership of the underlying musical work to a publisher, often an affiliate of the record company.

\textsuperscript{22} Licensing and Royalties, supra n. 19.

\textsuperscript{23} Record companies do not pay any royalties to artists for records that are given away free for promotional purposes, such as to radio stations, or to distributors. Krasilovsky & Shemel, supra n. 13.

\textsuperscript{24} 109 Stat. at 336. The DPRA amends sections 114 and 115 of the Copyright Act to account for technological changes that were beginning to enable the digital transmission of sound recordings.


\textsuperscript{26} 112 Stat. at 2860.

\textsuperscript{27} Under the DPRA, a compulsory licensing scheme was called for "non-
now when a radio broadcaster, accustomed for decades to paying only one set of licensing fees to the publisher for a traditional (i.e., terrestrial) broadcast, is now told that, if it desires to broadcast the very same music over the Internet (i.e., a webcast), it must also now pay the two licensing fees. The radio station demands to know why; not only will its overhead conceivably double, it is still providing a valuable and, indeed, expanded marketing service to the record companies by means of the Internet broadcast.  

To complicate the scenario, assume next that the web-only stations, most of which have been paying the dual licenses since their inception, feel no sympathy for their “traditional brethren” who must now pay the piper for dabbling in Internet broadcasting, as well. Assume also the allegation that when the DMCA was being drafted and the opportunity presented itself for NAB to lobby on behalf of all broadcasters, whether terrestrial or webcast-only, it chose to represent only the interests of the terrestrial players, creating this fracture in the industry.

Imagine next that the five major record labels, under the auspices of the RIAA which controls approximately 90% of the present music sales in the United States, decide that they, too, wish interactive” Internet audio transmissions intended to be similar to the royalty-collections system already in place for music aired by traditional, terrestrial broadcasters. Unfortunately, the legislation led to furious debates over the definition of “non-interactive” and, as a result, exactly what sorts of on-line music services would be covered under the Act. In 1998, the DMCA attempted to allay this confusion by defining non-interactive uses. Copyright Office Notice on Mechanical Licenses and Internet Music, Docket No. RM 2000-7, 66 Fed. Reg. 14099, 14094 (Mar. 9, 2001) (codified at 37 C.F.R. § 255); see also BNA’s Patent, Trademark & Copyright Journal, vol. 61, no. 1515 (March 16, 2001).


30. Wyllie, supra n. 24; Ryan & Bingaman, supra n. 13.

31. As of 2001, these included Universal, Sony, Warner, EMI and BMG.

to become involved with webcasting game.\textsuperscript{33} Realizing, though, that they would also have to pay the musical-work licensing fee to publishers and songwriters for web broadcasting, they begin to scheme in an effort to pay as little as possible. Publishers and songwriters instantly lash back.\textsuperscript{34}

Finally, compound the problem by the fact that the current copyright law does not set any licensing rates whatsoever for webcasts, nor provide much in the way of definition for the various types of webcasting options available. Members of Congress admit that they don’t know what to do.\textsuperscript{35} The Copyright Office, under siege, asks repeatedly for public comments on the matter.\textsuperscript{36} Lawsuits begin to fire back and forth.\textsuperscript{37} Under intense pressure from record companies, AFTRA,\textsuperscript{38} publishers, songwriters, and artists, smaller webcasters begin closing their doors.\textsuperscript{39} Even mega-terrestrial stations, experimenting with webcasts, start shutting down until a resolution is reached.\textsuperscript{40}

It sounds a bit like an episode from “The Twilight Zone Law.” Unfortunately, this particular episode is true and has been going on since the mid 1990s. To understand the situation better, this article

\textsuperscript{33} Norton, supra n. 2.


\textsuperscript{35} “Help the committees,” Sen. Orrin Hatch (R-Utah) reportedly said after the Napster decision, “because we don’t know what to do.” Snyder, supra n. 4.


\textsuperscript{38} American Federation of Television and Radio Artists.


\textsuperscript{40} See e.g. Joanna Glasner, Webcasters Propose Royalty Plan <http://www.wired.com/news/business/0,1367,42994,00.html> (accessed Apr. 11, 2001) (on the temporary shutdown of the Clear Channel Internet Group).
will next address the genesis of the conflict: relevant portions of the 1995 and 1998 revisions to the Copyright Act.

II

Prior to 1995, recording artists in the United States, and the record companies that owned their work under contract (typically in a work-for-hire arrangement), could not collect royalties for broadcast performances of sound recording. Essentially, the record companies could charge consumers for albums, tapes, and CDs, but once in the hands of the public, no purchaser ever expected to have to pay any additional money every time the album, tape, or CD was played privately. Radio stations expected likewise for their public, analog broadcasts. Indeed, the history of popular music is replete with stories of bribes and payola given to disc jockeys, station managers, music directors and owners by the record companies as they competed fiercely for airplay of their latest releases. After all, airplay meant record sales, and no one in the record industry fought very hard to make radio stations pay licensing fees to do so.

Thus, a peculiar anomaly existed under the Copyright Act: copyright holders had a right to grant licenses and collect fees for public performances in the underlying musical work but not in the sound recording. This anomaly was compounded by the fact that, typically, two different entities usually hold these copyrights: publishers own the musical work copyright and record companies the sound recording copyright. The actual artist usually retains very few intellectual property rights in the work; in a standard recording or publishing contract, the artist serves in a work-for-hire capacity and gives away most existing intellectual property rights to the publisher and/or label in exchange for their efforts of manufacturing, promoting and distributing the work. In exchange, the artist receives a

41. Licensing and Royalties, supra n. 19.
42. Krasilovsky & Shemel, supra n. 13, at 120-25 (discussion of payola).
43. However, the RIAA takes the position that radio broadcasters maintained a stronger lobby on Capitol Hill, resulting in the recording industry's inability to receive royalties on sound recording usage. Licensing and Royalties, supra n. 19. Antitrust consent decrees governing licenses from ASCAP and BMI go back decades. Barry Skidelskys, Music Streaming Webcasts <http://www.streamingmediasig.com/resources.htm> (accessed May 26, 2002).
44. Licensing and Royalties, supra n. 19.
45. Krasilovsky & Shemel, supra n. 13, at 18, 172.
percentage of sales, either negotiated or statutory, called royalties.\textsuperscript{46}

This situation, as it has existed in the United States, is quite different from other parts of the world where copyright holders have enjoyed both rights simultaneously. For example, European radio stations have been obliged by law, for years, to keep meticulous logs and submit detailed airplay reports to artistic collection societies for payment to both right holders.\textsuperscript{47} Bennett Lincoff, senior counsel for Darby & Darby and former ASCAP legal director, explains the political reasons for the difference in the United States:

The U.S. is one of the few countries that does not allow sound recording copyright owners to license performances of their works in analog media. The record labels have lobbied for years to force Radio stations to pay for over-the-air broadcasts of sound performances, and the NAB opposed that by saying the Radio industry was already developed economically, already paying royalties, and it would be unfair to impose this new burden. ASCAP and BMI also opposed the effort because they were afraid the NAB would carry the day on the Hill and argue that broadcasters shouldn't pay anymore, but rather, the money should come out of what ASCAP and BMI already were getting from the industry.\textsuperscript{48}

By the mid 1990s, this discontinuity between the United States and its treaty partners belonging to the European Economic Community required resolution in the form of harmonization and a revision of the Copyright Act. In addition, a new form of technological transmission—commercial music subscriptions by cable and satellite providers, such as DMX and Music Choice, was making headway.\textsuperscript{49} The technology needed for streaming audio and visual media over the Internet, although not yet present in the marketplace, was only months away.\textsuperscript{50}

Thus, in 1995, the Copyright Act was amended by means of the

\textsuperscript{46} Id. at 11-13, 18.
\textsuperscript{48} Ryan & Bingaman, supra n. 13.
\textsuperscript{49} Licensing and Royalties, supra n. 19.
DPRA ("1995 Act"). The DPRA was something of a compromise. Careful not to upset the decades-long balance between the powerful recording and radio broadcasting industries, Congress took a small step. The Act targeted only the new subscription music services offered primarily by digital "newcomers": cable, satellite and, soon, Internet providers. Copyright owners would receive a performance right for those "digital audio transmissions" offered on a subscription basis; however, live performances, audio-visual transmissions such as movies, and traditional terrestrial radio and television broadcasts were excluded.

This meant, essentially, that the only entities clearly envisioned, at the time of the 1995 Act, as being liable to pay fees to the recording companies for use of the sound recordings were the new entities offering digital subscription music services. At the time, the idea seemed a good one. As far as the major players were concerned, the status quo could essentially be maintained between the labels and radio stations; in addition, the United States had made some effort to harmonize with the EEC. According to Ed Ryan and Mark Bigaman, editors of Radio Ink:

The perfect idea that materialized in Washington was to keep the powerful record company lobby happy by finally allowing them their desire to profit from the licensing of their sound recording copyrights. That would be accomplished by tacking fees onto the streaming of sound recordings. Traditional broadcasters would be soothed by the knowledge that their over-the-air fees wouldn't increase, and groups like ASCAP and BMI wouldn't have to share any pieces of their pie. Those bearing the brunt of the cost would be the new Internet companies, who had not yet taken the time to build relationships in Congress and yielded very little political power. It seemed to be a perfect solution until terrestrial broadcasters began to get more aggressive with their streaming efforts.

Indeed, the Radio industry, at first, had not even envisioned itself as being a part of the "new media" in 1995. Former ASCAP counsel, Bennett Lincoff, commented,

52. Id.
53. Id.
When I was at ASCAP in 1995, I talked with top people in the legal departments of CBS and ABC, trying to get them to take licenses for their affiliates. They were not going to do it because they were distancing themselves from any use of music on their websites. He surmises that "[t]hey did not appreciate the opportunity."56

In April 1995, however, the floodgates were opened. Multimedia software developer, Progressive Networks, released RealAudio, the first technology for streaming audio. From there, RealNetworks created the RealPlayer software, handling both audio and visual streaming.57 The technology was now in place to produce digital audio transmissions over the Internet—and webcasting arrived. The playing field was initially wide open; anyone with an updated PC and a few pieces of relatively inexpensive equipment could now operate a cyber-radio station from home—or freely download and share music.58 No laws on point existed to regulate the practice.

The new technology, along with its various Internet applications, spread quickly. Suddenly, online-only webcasters were streaming digital music over the Internet—not merely on the envisioned subscription basis like satellite and cable companies, but also on a non-subscription basis by means of paid advertisements, like ordinary radio programming.59 Not surprisingly, digital broadcasters successfully argued that they were not liable for royalties because non-subscription transmissions were not covered under the 1995 Act.60

Feeling the rug pulled out from under it, the recording industry began to lobby for another revision to the Copyright Act—this time to account for both subscription and non-subscription digital audio transmissions. In what was becoming an increasing source of contention surrounding the right of streaming digital audio content,

55. Id.
56. Id. at 4.
57. Bartimo, supra n. 49, at 160-61.
58. In 2001, the RealPlayer software had been downloaded by 200 million people and licensing agreements signed with thousands of Web sites. RealNetworks CEO, Robert Glaser, states that, "RealPlayer is the second most frequently-found application on a PC, after Windows." Bartimo, supra, n. 49, at 160-61.
60. Id.
the RIAA sought compensation for its copyright holders from webcasters, in particular, those who were already streaming major-label music on a non-subscription basis.

III

Chapter Three: An Eleventh-Hour Deal

It was apparent that the DPRA had proved insufficient and that the Copyright Act was now in need of amendment on another front, specifically, for harmonization with World Intellectual Property Organization ("WIPO") treaties regarding Internet piracy and security. When Congress was nearing completion of this revision, called the Digital Millennium Copyright Act, the recording industry intensified its lobbying efforts for an insertion of additional language relevant to the digital audio transmission question. The recording industry became threatening now, promising litigation if smaller music-industry parties did not cooperate and even pressuring Congress that if its webcasting language could not be inserted into the revision, it would no longer be able to release its content.

In an effort to appease the RIAA, Congress permitted a last-minute hearing on the matter. The main players were hastily assembled in 1998. They included: the RIAA, representing the major labels; the NAB; the National Music Publishers Association, Inc. ("NMPA"); the Songwriter's Guild of America ("SGA"), and the Digital Media Association ("DiMA")—all of whom would soon be pitted against each other once the new Act was passed.

RIAA President and Chief Executive Officer, Hillary Rosen, argued that the changes were instituted in order to facilitate webcasting. Not all parties felt that way, however. Seth Greenstein, attorney for DiMA, a trade organization representing digital media

61. The Digital Millennium Copyright Act (available at <http://www.mgm.musin.ed>); Digital Millennium Copyright Act (WIPO Implementing Legislation), National Music Publishers' Association, Inc. at 1, 4-5 (available at <http://www.nmpa.org>) [hereinafter WIPO Implementation Legislation].


64. Snyder, supra n. 4; Webcaster Goes Intellectual, supra n. 24.

65. "This is an important right for artists and record companies. We look forward to working with the broadcasters for a smooth transition into this marketplace." Wyllie, supra n. 24.
broadcasters, explained that it had only a few days to prepare before the hastily-convened hearing. Worse, DiMA could not afford the RIAA’s threatened litigation in the event the DMCA amendments failed to pass. Worried that potential webcast investors would be frightened off by a legal fight with the RIAA, DiMA conceded more than it should have.7

With few options at the moment, DiMA sought to simplify, rather than contest, the licensing payment process. It negotiated for a compulsory license under the statute, which would allow webcasters to pay the licensing fees to a single clearinghouse—the RIAA. Receiving this compulsory license was critical for webcasters; the alternative would require a webcaster to seek out all of the copyright holders of each piece of music played in order to make individualized royalty payments.8 At the time, NAB’s loyalties laid primarily with analog, terrestrial radio broadcasters. NAB did nothing to help DiMA—as far as NAB was concerned, the licensing provision did not apply to ordinary radio broadcasters—even those who might wish, on occasion, to provide an Internet simulcast.

Also backed against a wall, NMPA and its allies fought to keep what they had. They managed to negotiate for and obtain language specifying that these new, clarified rights of the recording companies would in no way impair the rights of publishers and songwriters holding copyrights to the underlying musical works. In particular, nothing in the DMCA amendments “annuls, limits, impairs, or otherwise affects in any way the existence of value of any of the exclusive rights of the copyright owners” of musical works, including the exclusive right to reproduce and distribute a digital work (by digital phonorecord or otherwise) under sections 106(1), 106(3), and 115 of the Copyright Act.9

66. The so-called “Net-only casters.” Ryan & Bingaman, supra n. 13; Hylton, supra n. 62.
67. Hylton, supra n. 62.
68. The notion of a compulsory license, preventing the unauthorized copying of sound recordings, was codified under the 1976 Copyright Act, based on prior federal court interpretations involving record piracy cases. These federal cases were brought primarily by the Harry Fox Agency, the mechanical licensing firm acting on behalf of most publishers in the United States. The Register of Copyrights has observed that a compulsory license is particularly severe on the copyright holder: “Once he exploits his right to record his music, he is deprived of control over further recordings. He cannot control their quality nor can he select the persons who will make them. There have been many complaints of inferior recordings and of recordings by financially irresponsible persons.” Krasilovsky & Shemel, supra n. 13, at 118-19, 151-52.
69. WIPO Implementation Legislation, supra n. 60.
At the eleventh hour, without House or Senate debate,\textsuperscript{70} the music industry persuaded Congress to include this additional language into the DMCA. At the time, it seemed conclusive; it addressed the issues regarding digital audio transmission licensing, taking into account the new webcasting technology, including both subscription and non-subscription services, and defining rules for a compulsory license.\textsuperscript{71} It would not prove, however, to be a solution.

IV

Chapter Four: The History Continues: \textit{The Digital Millenium Copyright Act of 1998}

On October 28, 1998, the DMCA was signed.\textsuperscript{72} Congress' primary goal in drafting this revision of the Copyright Act was to allow the United States to participate in two new WIPO treaties: the Copyright Treaty and the Performances and Phonograms Treaty, which updated international copyright standards on Internet technology security and anti-piracy measures.\textsuperscript{73} Congress' secondary goal of pleasing the recording industry by permitting last-minute language on webcasting would soon become a thorn in its side.

The RIAA believed that the language was clear on its face: (1) webcasters who provided a non-interactive service (i.e., one in which listeners had no ability to alter or select the musical programming) and (2) followed strict guidelines regarding programming and transmission, would be entitled to seek a compulsory license under the statute. This license would ease the burden of having to locate and pay all of the individual record companies that held the sound recording copyrights to the various musical selections transmitted: the RIAA agreed to serve as the single clearinghouse for all of its member major labels.\textsuperscript{74} If a webcaster did not meet the requirements, then it would be obligated to locate and pay all of the copyright holders, on its own.

Under the DMCA, the specific requirements were as follows:

\textsuperscript{70} Hylton, supra n. 62, at 2.
\textsuperscript{71} See e.g. Wyllie, supra n. 24.
\textsuperscript{72} 112 Stat. at 2860.
\textsuperscript{73} Major amendments include: (1) an anti-circumvention provision designed to outlaw the trafficking in cyber-era "burglar tools," such as blackbox devices that thwart anti-piracy encryption and scrambling; (2) protection of copyright management information (CMI); and a clarification of service provider liability for online piracy. \textit{The Digital Millennium Copyright Act}, supra n. 60; \textit{WIPO Implementation Legislation}, supra n. 60.
\textsuperscript{74} Jones, supra n. 27.
First, only webcasters who offered non-interactive (i.e., not on-demand or personalized) programming would be allowed the statutory license. Second, the webcaster had to be in the business of offering primarily audio or other entertainment programming as opposed to selling particular products or services. For the most part, these requirements were an easy fit for the traditional, terrestrial radio station interested in webcasting (i.e., those whose interests NAB supported). On the other hand, on-line music providers that allowed users to select and download music of their choice were intentionally left out of the licensing loop, as well as some then-existing, and certainly future, innovative and entrepreneurial providers of streaming audio technology.

The RIAA also demanded, and received, a laundry list of program and transmission conditions that webcasters would have to meet in order to receive the compulsory license. First, they would agree to pay royalties. The problem, however, was that the DMCA did not stipulate an amount. The Act provided only that, if the parties could not contractually agree on a rate, then a Copyright Arbitration Royalty Panel (CARP) would be convened to set it. Upon the CARP decision, royalties would then be payable at the determined rate, retroactive to October 1998. At the time, no one seemed overly disturbed by this, largely because the coming explosion of webcasting had not been anticipated.

Second, webcasters had to agree to adhere to a “sound recording performance complement.” In essence, the webcaster would not be allowed to play, in any three-hour-period, (1) more than three songs from a particular album, including no more than two consecutively, or (2) four songs by a particular artist or a boxed set, including no more than three consecutively. Third, prior announcements would not be permitted. Advance song or artist playlists could not be published, and “teaser” announcements using artists' names could not specify

75. "The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—(A)(i) the transmission is not part of an interactive service." 112 Stat. at 2890-91.
76. See e.g. id. at 2893.
77. Id. at 2896.
78. Id.
79. Id.
80. Id. at 2891.
81. Id.
the time a song would be played.42 Fourth, archived programming could not be less than five hours nor reside on a web site for longer than two weeks;43 looped or continuous programs could not be less than three hours in duration.44 Scheduled programs less than one hour in duration could only be performed three times in a two-week period.45 In addition, webcasters also had to agree to identify the sound recording, album and featured artist (this requirement took effect one year later on October 28, 1999),46 and could not suggest a connection in any way between the copyright owner or recording artist and a particular product or service.

Finally, webcasters had to agree to take proactive steps to protect the copyright holder’s rights in the sound recording.47 For instance, if

82. “In the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) 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, 1988—(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, 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 artists.” Id. at 2891-92.

83. “(iii) the transmission—(I) is not part of an archived program of less than 5 hours duration; (II) is not part of an archived program of 5 hours or greater in duration that is made available for a period not exceeding 2 weeks;” Id. at 2892.

84. “(III) [the transmission] is not part of a continuous program which is of less than 3 hours duration;” Id.

85. “(IV) [the transmission] is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or (bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration,” Id.

86. “(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, 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.” Id. at 2894.

87. “(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;” Id. at 2893.

88. “(viii) the transmitting entity accommodates and does not interfere with 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
a webcaster became aware that a listener/recipient was copying music and the webcaster possessed the technology to disable the copying, it would be obliged to do so, as well as to take care not to induce or encourage copying efforts by any transmission recipients. Webcasters would also be required, if no substantial burden were imposed, to accommodate technical protection measures of copyrighted works, and to cooperate with copyright owners to prevent recipients from using scanning devices on transmissions to detect particular artists or recordings. Webcasters would not be allowed to cause a device receiving the transmission to switch from one program channel to another, and transmissions needed to be accompanied by the information encoded in the sound recording by the copyright owner identifying the song title, featured artist and any other related information.

If that was not enough, another question was raised: what about the copies of sound recordings that had to be made on the webcaster’s server in order to transmit the sound recordings? Was a separate fee required for those so-called “ephemeral recordings,” as well? The

transmitted by the transmitting entity without imposing substantial costs on the transmitting entity.” *Id.* at 2893-94. 89. “(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making of the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;” *Id.* at 2893.

90. *Id.*
91. *Id.* at 2893-94.

92. “(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, 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.” *Id.* at 2893.

93. “(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another;” *Id.* at 2891.

94. “(iii) . . . the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;” *Id.*

95. “(b) EPHEMERAL RECORDINGS—Section 112 of title 17, United States Code, is amended—(1) by redesignating subsection (e) as subsection (f); and (2) by inserting after subsection (d) the following: (e) STATUTORY LICENSE.—(1) 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) or
Act provided an exemption for one ephemeral recording if (1) the webcaster making the ephemeral recording held the statutory license to transmit the recording (i.e., qualified under the above)\textsuperscript{96} and (2) met the exemption conditions, including exclusive use of the ephemeral recording by the webcaster and destruction of the copy (unless retained for archival purposes) within six months.\textsuperscript{97}

That said, the battle was ready to begin.

V

Chapter Five: The Games Begin:
November 1998—December 2000

After the DMCA was passed on October 28th, the first order of business called for the RIAA and broadcasters to negotiate an appropriate licensing fee. In the event they could not reach an agreement, the Act provided that a CARP would be convened to do so.\textsuperscript{98} It took less than two weeks for the first shot to be fired. NAB, arguing on behalf of terrestrial radio broadcasters, argued that Internet simulcasts of a radio station's signal were not covered under the Act and, thus, subject neither to royalty payments nor compliance with transmission and programming rules under the compulsory

\textsuperscript{96} Relevant language in the DMCA stated:

In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice... and upon the filing of a petition... the Librarian of Congress shall... convene a copyright arbitration royalty panel to determine and publish in the Federal Register, a schedule of rates and terms which... shall be binding on all copyright owners of sound recordings and entities performing sound recordings... In establishing rates and terms... the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated.

\textsuperscript{97} Id. at 2899.

\textsuperscript{98} Id.

\textsuperscript{99} Id. at 2894-95.
license requirements. The RIAA argued that they were. Negotiations broke down almost immediately, and on November 8th, NAB filed for Copyright Office intervention.99

Essentially, the parties could not agree on definitions within the statutory language as to who or what services were subject to the royalty provisions and transmission restrictions, much less on the actual licensing fees. For the better part of 1999, the issue centered on whether terrestrial radio broadcasters, who wished to retransmit their own signals over the Internet (i.e., a web simulcast), were providing a "service"\textsuperscript{100} subject to the statutory licensing provisions governing public performances of sound recordings by means of digital audio transmissions, under the DMCA.\textsuperscript{101}

The RIAA insisted that they were and, thus, should pay the applicable royalty provisions and obey programming restrictions, just like any other webcaster.\textsuperscript{102} Commentary some months later by Frank Davis, Media Director of EMI's Astralwerks label, summed up the RIAA's position: "The major labels don't want to be able to tune into a webcast and hear the latest... recording being played in its entirety every hour on the hour."\textsuperscript{103} NAB continued to argue that they were not subject to the royalty fees.\textsuperscript{104}

Finally, the RIAA filed a petition with the Copyright Office asking them to make a determination, along with any necessary statutory modifications (i.e., a rulemaking), on the issue.\textsuperscript{105}

\textsuperscript{99.} As a result of the NAB filing, proceedings involving the copyright arbitration panel were placed on hold. Wyllie, supra n. 24.\textsuperscript{100.} See e.g. DMCA Takes a Swing at Radio, supra n. 24; Jones, supra n. 27.\textsuperscript{101.} Id.\textsuperscript{102.} Id.\textsuperscript{103.} Id.\textsuperscript{104.} Id.; see infra nn. 105-06.\textsuperscript{105.} On November 27, 1998, the Copyright Office published, in the Federal Register, notice of initiation of voluntary proceedings under the new statutory license of ephemeral records, under section 405(b). 17 U.S.C. § 112(e). U.S. Copyright Office, Register's Statement, May 25, 2000 (Statement of the Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on Judiciary, United States House of Representatives, May 25, 2000) (available at <http://www.loc.gov/copyright/docs/regstat52500-2.html>). On September 20, 1999, the Copyright Office revised section 504(a), codified at 37 C.F.R § 260, with respect to notice and record keeping, along with initiation of CARP proceedings regarding the use of sound recordings in digital transmissions under the compulsory license. Id. Interim regulations were published June 24, 1998, and amended on September 20, 1999. Id. In November 1999, the Copyright Office filed its Notices of Intent to Participate regarding the issuance of new regulations on the statutory license for ephemeral records found in section 405(b) (17 U.S.C. § 112(e)). Id. The proceeding stayed pending resolution of the rulemaking proceedings regarding the definition of "service" for purposes of a statutory license governing the public performance of a sound recording by means of a digital audio transmission. Id.
On March 16, 2000, the Copyright Office responded to the RIAA petition, agreeing to initiate a rulemaking. In less than two weeks, NAB attempted to circumvent the outcome: on March 27th, it filed suit in a United States District Court in New York to have the same issue adjudicated by the court rather than the Copyright Office. NAB also requested that the Copyright Office suspend its rulemaking proceedings until the court issued a final decision. "Jeff Baumann, NAB’s executive vice president of legal and regulatory affairs, stated: “We believe that the applicable statute, which is the 1995 Copyright Act and the later DMCA, provides that we are exempt from paying a performance fee... That’s why we argued that way in front of the Copyright Office, and that’s why we filed suit in New York.”

The Copyright Office, in the meantime, refused NAB’s request; it would take up the matter. Concurrently, the RIAA filed a motion to dismiss the complaint in the court case, which was subsequently denied. The RIAA took the position that the difference was one of analog versus digital. Steve Marks, RIAA’s senior vice president of business and legal affairs, replied:

We disagree with the NAB’s arguments and the copyright office agreed with us. The 1995 law and the DMCA amendments grandfathered over-the-air Radio broadcasts but made clear that other digital transmissions of sound recordings are subject to the performance rights of the sound recording copyright owners. In the context of Webcasting, the fact that the programmer has an FCC license for over-the-air broadcasting should not give their Webcasts special status.

In the meantime, another argument was brewing, this one regarding the definition of “consumer-influenced” (i.e., interactive)

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106. On March 16, 2000, the Copyright Office responded to an RIAA petition and initiated a rulemaking to determine whether radio stations that transmit their own signals over the Internet (i.e., simulcasts) are “services” subject to the royalty provisions and programming restrictions of the DMCA. Id.
107. The Digital Media Association (DiMA), Broadcasters Seek Exemption from Webcasting License—Update <http://www.digmedia.org/whatsnew/broadcasters.html> (May 2000) [hereinafter Broadcasters Seek Exemption].
108. Id.; supra n. 106.
110. Broadcasters Seek Exemption, supra n. 106.
111. The case was later argued on May 29, 2001. See e.g. Ryan & Bingaman, supra n. 13; Broadcasters Seek Exemption, supra n. 106.
112. Ryan & Bingaman, supra n. 13.
webcasts. The fracture within the broadcasting industry between terrestrial and online broadcasters was now coming home to roost. When NAB negotiated the original DMCA language with the RIAA, it ignored the then-fledgling DiMA and its Internet-only webcasters; rather, it envisioned, along with most other parties at the table, webcasts with a traditional, radio-station format: either a direct simulcast or pre-programmed format without a listener’s ability to modify or select the music received online. As a result, the DMCA provided that only such non-interactive webcasts could qualify for the compulsory license and its benefit of the single, RIAA clearinghouse; any other webcast offering a consumer-influenced service would not be eligible. Now that more terrestrial stations were becoming interested in operating a side channel on the Internet, however, the tables were beginning to turn for NAB.

On April 17, 2000, another Petition for Rulemaking was filed with the Copyright Office: this time by the DiMA. DiMA asked the Copyright Office to adopt a rule interpreting the definition of “interactive service” in Section 14(j)(7) of the Copyright Act so as to exclude it from the definition “consumer-influenced” webcasting services, and to determine whether interactive web services should be subject to the licensing requirements and fees. DiMA also requested clarification on “consumer-influenced” websites that catered to specific tastes, such as genre-based formats (Top 40, hip-hop, country, etc.) and whether those had also created an interactive radio service under the DMCA. Three options existed for clarification of this issue: the Copyright Office could adopt a rule; Congress could amend the DMCA to address the interactivity question; or the matter could be pursued in federal court.

On May 23, 2000, the Copyright Office sought comments in response to DiMA’s April 17th Petition. Seven comments followed,

114. Broadcasters Seek Exemption, supra n. 106; Webcasting’s Defining Moment, supra n. 102.
117. Id.; Webcasting’s Defining Moment, supra n. 102.
filed by broadcasting organizations, the RIAA, and the National Music Publishers’ Association (“NMPA”). Publishers, along with the RIAA, were afraid of losing ground. Publishers argued against what they called a “music giveaway,” where if consumers were allowed to customize their online broadcasts, then they would have little or no incentive to purchase the music. The RIAA, in the meantime, argued that DiMA was raising a hypothetical and vague issue that couldn’t possibly be answered. Since DiMA would not provide detailed information about the specific online services it had in mind for the exemption, it was essentially asking for a general rule in which future permutations would be impossible to predict. The RIAA also argued that DiMA was attempting to nullify Congress’ intent to keep the interactive condition separate from compliance with the other conditions needed for receipt of the compulsory license. According to the RIAA and the NMPA, online-service providers of customizable listening options should not be allowed the benefit of the one-stop, “clearinghouse convenience” of the compulsory license. With the Napster case raging at the time, the publishing and recording industries were not about to lose any more profit to online music providers if they could help it.

Predictions indicated that the Copyright Office would agree with this position; as a result, webcasters began approaching the RIAA in attempts to negotiate private licensing deals. The Copyright Office had yet to convene the arbitration panel to determine compulsory licensing rates retroactive to October 1998. This meant that webcast service providers of all types, whether simulcast, subscription, non-subscription, interactive or pre-programmed, still had two choices available to them: they could either negotiate independently with the RIAA for their own, agreed-upon licensing rate and broadcasting terms or, file their intent to comply with the stipulations under the

119. Broadcasters Seek Exemption, supra n. 106.
120. Id.; Webcasting’s Defining Moment, supra n. 102.
122. Id.
123. Id.
statutory compulsory license, wait for the Copyright Office’s determination of rates, and then pay up.26

If webcast service providers negotiated privately with the RIAA, then it might be possible under contract to offer any sort of programming format or service desired while using the RIAA as a licensing-fee clearinghouse for its member-label copyright holders. On the other hand, a private negotiation, without the benefit of a market standard or Copyright Office determination, prevented a webcaster from knowing if its deal with the RIAA, regarding applicable fees and terms relative to the competition, was a good one or not. The RIAA kept the terms of its licensing agreements secret.127

This was too great a risk for many webcast entrepreneurs, including even Mark Cuban, who had previously built broadcast.com into a multi-million dollar operation. Cuban promptly sold broadcast.com and quipped, “What’s the best business in the webcasting industry? Prepackaged bankruptcies to avoid RIAA fees!”128

Regarding these individual deals, allegations also began to fly throughout the fall of 2000 against the RIAA: webcasters argued that the RIAA prohibited them from revealing the royalty fees they negotiated and that the terms of private deals might be used to influence the fees set by the Copyright Office later; that the RIAA refused to deal with small webcasters or that it was not treating everyone equally; and that certain webcasters were jockeying to curry

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126. Relevant language in the DMCA stated:

In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice ... and upon the filing of a petition ... the Librarian of Congress shall ... convene a copyright arbitration royalty panel to determine and publish in the Federal Register, a schedule of rates and terms which ... shall be binding on all copyright owners of sound recordings and entities performing sound recordings. ... In establishing rates and terms ... the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated.

112 Stat. at 2894-95.

127. See Webcasters Caught in RIAA Web, supra n. 27; Webcaster Goes Intellectual, supra n. 27.

unfair favor with the RIAA.\footnote{129} Even Senator Orrin Hatch (R-Utah) was becoming suspicious. His comments to the RIAA included, "We passed the DMCA. We gave you a lot of what you wanted. You told us without it you wouldn’t put your content out. What’s going on? Are you leveraging your copyrights to impede distribution rather than enhance distribution?\footnote{130}"

In the midst of this, the unthinkable happened in October 2000. Entertainment giant, Bertelsmann A.G. (BMG), suddenly broke ranks with RIAA members, and announced that it would form a strategic alliance with the RIAA’s nemesis itself – Napster.\footnote{131} The race was on. By now music moguls understood quite well the enormous economic potential online music services offered—especially if one already held the sound recording rights and didn’t have to worry about the compulsory licensing fees or restrictions currently surrounding webcasting.\footnote{132} Record labels immediately began planning online subscription services that would feature the works of their signed artists.

Only one thing stood in the way. Record companies, as copyright holders of the sound recordings, did not need to pay this particular licensing fee. It was clear, however, that if they wished to get into the on-line music game, then they too would have to pay royalty fees for the underlying musical works. This meant that publishers, once their allies in the legal battles against broadcasters, now stood in the way of unmitigated profit. The NMPA and SGA suddenly found themselves on the opposite side of the fence from the RIAA.

Within one month, RIAA negotiations with publishers over subscription service fees had broken down.\footnote{133} On November 29, 2000, the RIAA again petitioned the Copyright Office, this time with a request for a rulemaking regarding fees payable to publishers for on-line subscription services.\footnote{134} The RIAA, now sounding very much like

\begin{itemize}
  \item Webcasters Caught in RIAA Web, supra at n. 27; Webcaster Goes Intellectual, supra n. 27.
  \item Norton, supra n. 2.
  \item Id.
  \item Webcasters Caught in RIAA Web, supra at n. 27; Webcaster Goes Intellectual, supra at n. 27.
\end{itemize}
the webcasters it had been fighting just a few months before, wanted to know how much it should pay publishers to use their compositions as part of subscription music services, including on-demand streaming and downloadable music services and what licenses, if any, were needed.\textsuperscript{135}

In a strange twist, the RIAA was suddenly allied with webcasters—in particular, on-line music vendor MP3.com—and asking the Copyright Office to approve a “safe harbor” approach to royalties for downloaded music.\textsuperscript{136} Such a plan would allow the Copyright Office to set compulsory licenses for digital content but defer setting the royalty rate.\textsuperscript{137} This action infuriated publishers and songwriters; they immediately argued that such an approach would take away their right to negotiate licenses on their own terms.\textsuperscript{138} As journalist Jay Kumar wryly noted, “The petition calls attention to an interesting juxtaposition for the recording industry. When negotiating licenses with competing webcasters, the record companies try to get the highest rate possible for use of the songs. But as record labels negotiate how much to pay publishers, they are fighting for as low a rate as they can.”\textsuperscript{139}

Shortly before the New Year, on December 11, 2000, the Copyright Office issued a set of rulings that it hoped would resolve the questions posed throughout the past year.\textsuperscript{140} First, it amended its regulations, ruling that radio broadcasters were not exempt from paying the licensing royalties when they simulcast their programs over the Internet. They are subject to a compulsory license and subject to the sound recording copyright owner’s exclusive right to perform the work publicly by means of digital audio transmissions. These rates would be determined sometime in 2001.\textsuperscript{141} This essentially

\textsuperscript{135}Id.
\textsuperscript{136}Krebs, supra n. 33.
\textsuperscript{137}Id.
\textsuperscript{138}Id.
\textsuperscript{139}Kumar, supra n. 133.
\textsuperscript{141}Section 114(d)(1)(A) of Title 17 exempts non-interactive performances of a sound recording by means of a digital audio transmission from the sound recording copyright owner’s exclusive rights when the performance is part of a “nonsubscription broadcast transmission [under § 114(j)(3)] made by a terrestrial broadcast station licensed
leveled the playing field between all broadcasters, terrestrial or web-only. Any party streaming digital audio transmissions over the Internet would now have to pay both the licensing fees for the underlying musical work and for the sound recording.142

Jonathan Potter, Executive Director of DiMA, put a positive spin on this decision, reminding members that the ruling came as no surprise and that it provided more in common now between webcasters and radio broadcasters. Their combined strength could be utilized to build Internet radio, fight piracy, and change those DMCA restrictions that prejudiced broadcast practices.143 “From our perspective,” he commented, “there needs to be a level playing field in the Internet media world. Our competition is all media—TV, Radio, and other Webcasts. It’s bad that a terrestrial broadcaster does not have to pay the same fee as does online Radio. It’s an equities argument.”144

Next, regarding DiMA’s April 17th petition145 on interactive use, the Copyright Office agreed with the RIAA, stating that, “[t]here is no discernable dispute on this point.”146 It did recognize, however, that the “amount and type of influence a consumer has on the programming offered by the transmitting entity will affect whether the activity is characterized as interactive or non-interactive.”147 On this point, the Office acknowledged that certain consumer-influenced (i.e., interactive) webcasting could fall within the statutory licensing requirements, but determined that it would be unable to fashion a set of criteria or guidelines beyond those already set forth in the law.148 The Copyright Office stated that the marketplace was the correct place to decide that issue.149

Finally, the Copyright Office announced that the Library of
Congress had ordered the consolidation of the CARP proceedings to establish rates and terms for: (1) October 28, 1998, through December 31, 2000, and (2) January 1, 2001, through December 31, 2002, for the statutory licenses that allow public performances of sound recordings by means of eligible nonsubscription transmissions, and the making of an ephemeral phonorecord of a sound recording in furtherance of making a permitted public performance of the sound recording.

That said, the brawling music industry parties were not about to end the year quietly. At the eleventh hour on Christmas Eve, December 24, 2000, one last petition was filed with the Copyright Office. This time it was the publishers and songwriters—NMPA and SGA—seeking to establish royalty rates for recordings and asking that a distinction be made between music that is streamed for temporary use and that which is downloaded and stored by consumers. We are not sure, however, whether anyone at the Copyright Office happened to read the petition that same day it was filed.

VI

Chapter Six: The Year 2001: More Warfare with Some Attempts at Peace

After the holiday season, the parties picked up in 2001 almost immediately where they had left off in 2000. On January 8th, MP3.com filed comments with the Copyright Office “supporting an RIAA request that the office conduct an inquiry regarding the application of the Copyright Act to the delivery of music over the Internet.” In a slightly different twist, MP3.com also indicated concern that the current law did not address the consumer's interest in receiving Internet transmissions. Its submission asked the Copyright Office to consider things such as whether “internet services which allow consumers to enjoy online performances of the CDs they have purchased are distinguishable from other music streaming and download services that may be liable for copyright royalty payments.

150. Id.
151. Id.
155. Id.
under current law."156 MP3.com asked the Office to convene a CARP to determine the appropriate level of royalty fees, if any, payable by Internet music services when they deliver on-line music.157

The broadcasters also wasted no time striking back. On January 25th, NAB, CBS's Infinity Broadcasting, and Cox Communications, among others, filed suit in a New York federal district court in an effort to overturn the Copyright Office's December 11, 2000 ruling requiring them to pay licensing fees to the RIAA for broadcasting music over the web.158 Their arguments were simple: the ruling made it expensive for broadcasters to put music over the web; it was unfair to web-only broadcasters who always had to pay two licensing fees, versus terrestrial broadcasters who, unless offering a web simulcast, only had to pay one licensing fee; and it essentially put everyone in the broadcasting industry at the mercy of the RIAA.159 The Copyright Office responded that it had expected the suit and would defend its ruling,160 but cancelled the arbitration hearing scheduled for February 5, 2001.161

NAB's sudden change of heart towards web-only transmitters did not go unnoticed. Attorney Mark Radcliffe commented, "It's likely the entire battle now being waged could have easily been averted if all sides had sat down at a table at the time the DMCA was written to negotiate terms that benefited all sides."162

DiMA's Jonathan Potter was more pointed:

Two and a half years ago the NAB specifically went out of its way to support provisions that were harmful to webcasting because the NAB viewed itself as the National Association of Terrestrial Broadcasters. They didn't view their members as media companies who are going to take advantage of all types of media—they viewed their members as traditional broadcasters...When your members go out to try to do non-FCC-licensed transmissions, and you've participated in the development of bad rules that are aimed at non-FCC-licensed transmissions, then you've really just gotten what's coming to you. Had the NAB sided with DiMA at the time, we could have avoided any compulsory license
at all.\textsuperscript{163}

He also offered the following explanation:

Radio stations are used to having preferred status, due to their FCC license. . . . The NAB did not fight on behalf of webcasting because they didn’t realize their members would be in the webcasting business . . . They fought against webcasting and failed to protect the interests of their radio station members who were in the streaming business.\textsuperscript{164}

Dave Rahn of SBR Creative Media, wryly mused that:

The average person at a radio station, or even the general manager really had no idea that any of this stuff was going on. They didn’t know there was all this legislation in place that could potentially end up costing stations a lot of money in terms of licensing fees. So, it’s sort of a wake-up call. This ruling has brought the issue of the copyright laws, as they relate to Internet streaming, to the forefront for broadcasters.\textsuperscript{165}

"It’s really messy," agreed Jack Moffitt, Vice President of Technology at iCast. "It takes two or three lawyers to figure out if what you’re doing is legal, and even then [the RIAA] may come knocking on your door."\textsuperscript{166} The RIAA, in the meantime, presented an air of detached calm. Chief Hillary Rosen simply responded that she was confident the RIAA would prevail.\textsuperscript{167}

In mid-February, the RIAA, in fact, did win another battle—this time on a related front. The Court of Appeals held that Napster would be liable for the copyright infringement of its users, to the extent that it knew about their actions.\textsuperscript{168} Not everyone was pleased by the decision. Senator Orrin Hatch (R-Utah) described his "gnawing concern that this legal victory for the record labels may prove Pyrric and shortsighted from a policy perspective,"\textsuperscript{169} and

\textsuperscript{163} Id.
\textsuperscript{164} Ryan & Bingaman, supra n. 13.
\textsuperscript{166} Jones, supra n. 27.
\textsuperscript{167} Bonisteel, supra n. 28.
\textsuperscript{168} Snyder, supra n. 4.
\textsuperscript{169} Id.
promised to convene Senate Judiciary Hearings on digital music.  

The Copyright Office, in the meantime, requested public comments, on March 6, 2001, regarding the latest petitions submitted by the RIAA and MP3.com; specifically, an interpretation of the mechanical and digital phonorecord compulsory license to certain digital music services, as well as a determination of the meaning of an incidental DPD (ephemeral recording) under Section 115.  

April proved to be a busy month: first, the Senate Judiciary Hearings on digital music began. The labels were immediately criticized for “moving slowly into online music and failing to license music to smaller competitors.” Mike Farrace, a senior vice president at Tower Records, leveled the charge that the labels’ new services could “ultimately steal our business” and testified that “the deals the record companies seem most interested in pursuing are with each other, or with companies that they all buy a piece of—like MusicNet.” As Aaron Pressmen commented, “[N]one of the independent web services had access to much of the popular music that made Napster an Internet sensation.” The RIAA responded that what appeared to be stalling was merely the working out of how to protect, and receive payment for, online music while it negotiated terms with publishers.  

Napster, in the meantime, under court supervision, found itself upbraided for its “disgraceful” efforts to block unauthorized music trading. No sooner was the charge made, it immediately acquired the file technology of Gigabeat to better block copyrighted songs from its database. The major entertainment players, in the meantime, all of

170. The hearings were scheduled to begin in April 2001.  
171. The request was published on March 6, 2001, centering again over the interpretation of section 115 of Title 17. “However, Congress did not define what constitutes an incidental DPD, and that omission is the source of today’s Notice of Inquiry. . . . Assuming that the Copyright Office does have the authority to act, and assuming that a rulemaking proceedings is the best forum, the RIAA and MP3.com petitions raise a number of questions. Central to RIAA’s petition is a determination of the meaning of an incidental DPD under section 115.” 66 Fed. Reg. 14099, 14099 (37 C.F.R. § 255) (Mar. 9, 2001); see also BNA’s Patent, Trademark & Copyright Journal, vol. 61, no. 15 (Mar. 16, 2001).  
173. Mathews & Wilke, supra n. 171, at 3.  
175. See Mathews & Wilke, supra n. 171 (discussion of implications).  
176. Snyder, supra n. 4.
which had been watching and learning from the Napster debacle—and confident of RIAA support—were preparing now to usher in their own on-line music revolution. RealNetworks, EMI, BMG, and Warner announced a subscription service named MusicNet; Viacom’s MTVi would soon offer a streaming/digital download service in conjunction with all five of the major labels; and even Microsoft prepared a statement that it, too, would be getting into the digital music game.  

Although eager to begin, the major parties realized that an old stumbling block still stood in the way of progress: no one had yet given the Copyright Office a proposal for the actual royalty rates, payable under the compulsory license, for music streamed on-line. Suddenly, old enemies—DiMA, NAB and RIAA—were working together on the same problem.

This issue had both radio and Internet broadcasters worried; fees, at whatever rate, would be calculated back to the earlier of October of 1998 or when the station first began streaming. A number of models were possible: pay-per-play, pay-per-song-per-stream, percentage of revenue, or a combination. Worse, radio stations argued, no one ordered them to keep data from 1998; thus, how could a retroactive fee be accurately reconstructed? Speculations soon began based on known rates for other licenses: ASCAP and BMI were charging approximately 3.5% of gross revenues for musical work licenses, and the sound recording license fees charged to DMX and Music Choice approximated 6.5% of gross revenues.

On April 11, 2001, DiMA, with its key members RealNetworks, AOL, and MTVi, and the RIAA, made up of Universal, Sony, Warner, EMI, and BMG, unveiled contrasting plans for setting the royalty rates. Both proposals were submitted to the Copyright Office with the understanding that, whichever was approved would be retroactive, back to October 1998. Under the DiMA plan, webcaster/on-line radio stations would pay $0.0022 per listener hour.

177. Id. The premise for the major labels' proposed systems was simple: users would sign up, purchasing the right to download a preset number of songs to their computers' hard drives, accessing a preset number of other, streamed songs which could be heard but not stored for later playback; initially, downloaded songs would not be able to transfer to portable MP3 players. Access to download songs would be granted so long as the user remained a subscriber; if the subscription lapsed, a time-based lock would activate. Suzanne Kantra Kirschner, MP3: Just Press Pay, Popular Science 67, 67 (Sept. 2001).


179. Id.

to cover performance right fees for use of the sound recording. This number was derived by economist, Adam Jaffe, who based it relative to what terrestrial radio stations were paying ASCAP, BMI, and SESAC for use of the underlying musical work (approximately 2% of gross revenues).

Under the RIAA's plan, webcasters would pay considerably more: either $0.004 cents for each song streamed (or, revised later, 15% of the service's gross revenues from such transmissions). The RIAA claimed its rates were based on fees it had previously negotiated with twenty-five individual webcasters.

Dave Rahn provided calculations to illustrate the vast difference in fees under each plan. Assuming a hypothetical webcast that played ten songs per hour, with 10,000 listeners each spending ten hours per month with the stream, at $0.0015 per listener hour, webcasters would pay $150.00 per month, or $1,800.00 per year, under the DiMA plan. Under the RIAA plan, $0.004 per song streamed would amount to $4,000 per month, or $48,000.00 per year.

Rahn then provided an illustration using an existing, highly-successful alternative radio station in a top 20 market. Using data from Arbitron, the station had 19,400 Average Hour Listeners, with 11 songs played per hour, on average. The station billed an average of $11,000,000 per year in advertising revenue. Under the proposed plans, yearly royalties owed would amount to $191,187.00 under DiMA's proposal, and an astonishing $5,608,152.00 (51% of revenue) under the RIAA's plan.

As Rahn concluded, "It begs the question, if the rates proposed by the RIAA would put the 80-year, established, fully-consolidated profitable RADIO industry out of business, how could they possible make sense for the fledgling Webcasting business?"

In the meantime, another problem struck the broadcasting
industry: AFTRA\textsuperscript{188} entered the fray, to the chagrin of the broadcasting industry, demanding royalties from them for its members, as well.\textsuperscript{189} Its argument was straightforward: if record companies were now going to receive royalties for webcasts, then what about the actors or singers heard on webcast commercials? On April 10th, Clear Channel Internet Group, the online arm of Clear Channel Communications, one of the largest radio station operators in the United States, announced it would halt audio streaming on all of its radio station websites.\textsuperscript{190} Streams would be put back, it said, "when it makes legal and financial sense."\textsuperscript{191} Smaller webcasters would begin shutting down, as well.\textsuperscript{192}

The media moguls, in the meantime, were jockeying for position at the on-line starting gate. Some more challengers were gearing up for another round against them, although the impact, for the moment, seemed doubtful. On May 23, 2001, the National Association of Recording Merchandisers (NARM) and the Video Software Dealers Association (VSDA) submitted Reply Comments to the Copyright Office's request of March 6th.\textsuperscript{193} Both argued that the RIAA's position was fallacious regarding limited downloads.\textsuperscript{194} Additional comments were also filed jointly by the publisher/songwriter camp, NMPA and SGA, asking the Copyright Office to convene a CARP to set the terms and rates that should apply to online music services and reject the RIAA's proposal to impose a moratorium on royalty payments for songs downloaded over the Internet.\textsuperscript{195} In addition, they argued that the Copyright Office lacked authority to change the existing licensing or royalty payments scheme.\textsuperscript{196}

During the last week of May, however, the RIAA—along with its entertainment mogul contingency—was probably too busy to notice; the RIAA, in fact, was busy dealing more blows to online rivals, particularly those offering interactive music services.\textsuperscript{197} First, it

\textsuperscript{188} American Federation of Television and Radio Artists. \\
\textsuperscript{189} WebRadio News, supra n. 151. \\
\textsuperscript{190} Glasner, supra n. 39. \\
\textsuperscript{191} Id. \\
\textsuperscript{192} See e.g. Reuters, supra n. 38; WebRadio to Shut Down, supra n. 38. \\
\textsuperscript{193} In re: Mechanical and Digital Phonorecord Delivery Compulsory License, Docket No. RM 2000-7 (May 23, 2001) (Reply Comments of National Association of Recording Merchandisers and Video Software Dealers Association). \\
\textsuperscript{194} Id. \\
\textsuperscript{195} Id. \\
\textsuperscript{196} Id. \\
\textsuperscript{197} The RIAA, incidentally, did not confine its legal attacks to the music industry; in April, it challenged academe as well. The RIAA sent Princeton professor Edward Felten a
brought suit against music portal Launch Media for allegedly failing to seek proper licenses for its personalized web radio service.\textsuperscript{198} The complaint argued that the webcasts violated copyright law "by offering streaming music services that allowed customers to skip through songs and choose what types of music they preferred to hear."\textsuperscript{199} Launch Media, apparently, was too interactive for the RIAA's tastes. Not surprisingly, Launch removed LaunchCast from its web site in response to the suit and immediately entered into settlement negotiations, amidst media response that independent webcasters were being knuckled under by the RIAA.\textsuperscript{200} Next, the RIAA petitioned the Copyright Office asking that personalized-internet radio service webcasters be disqualified from the royalty arbitration.\textsuperscript{201} Finally, it brought legal action against file-sharing Napster-clone, Aimster, arguing that it aided copyright infringement.\textsuperscript{202} (In April, Aimster had taken the offensive against the RIAA, bringing a pre-emptive suit in which it asked the court for a declaratory ruling that it was not responsible for its users' copyright infringements.\textsuperscript{203})

The RIAA-supported major labels lost no time taking more online initiative: Bertelsmann announced it would acquire Myplay.com, and Vivendi Universal bought MP3.com, Emusic, and half of the music portal GetMusic.\textsuperscript{204} A week later, executives from RealNetworks (whose MusicNet technology led to the collaboration with AOL Time Warner, EMI and BMG) and Universal's MP3.com attended a Congressional hearing in which they stunned certain members of Congress and the media by pointedly asking legislators to change the copyright law in their favor.\textsuperscript{205} The hearing focused

\begin{footnotes}
\item[198.] Reuters, supra n. 112.
\item[199.] King, supra n. 36.
\item[200.] Reuters, supra n. 112.
\item[201.] \textit{Id.}; Snyder, supra n. 4.
\item[202.] Snyder, supra n. 4.
\item[203.] \textit{Id.}
\item[204.] Norton, supra n. 2.
\end{footnotes}
primarily on the battlefront between publisher/songwriter rights, who were urging Congress not to become part of a “music giveaway,” and those of interactive, online music providers not eligible for the compulsory license. In essence, MP3.com executive, Robin Richards, told Congress that, without a compulsory license, the task of securing permission from, and negotiating with, all of the various songwriters/publishers who held copyrights on the underlying musical works would be too hard for interactive webcasters to do.\textsuperscript{206} His solution called for the government to dictate a flat fee per song to be used as a royalty rate.\textsuperscript{207} Not all legislators felt sorry; one quipped that he would also like to be guaranteed a flat fee for gasoline prices.\textsuperscript{208}

In the meantime, a new campaign was brewing, this one led by DiMA. Angered by the RIAA’s attack on Launch Media, several non-label affiliated web stations, including Launch Media, Inc., MTVi Group, MusicMatch, Inc., and Listen.com along with Xact Radio LLC and DiMA, filed a countersuit on June 1, 2001, against the RIAA in federal court in San Francisco.\textsuperscript{209} They asked the court to issue a declaratory ruling on the definition of “interactivity,” in an effort to allow interactive stations the ability to participate in the copyright arbitration hearing and, perhaps, seek a compulsory license as well.\textsuperscript{210}

Immediately, the RIAA argued that the countersuit was trying to “improperly shoehorn personalized radio services into the proceeding, which was intended to focus on rates for plain vanilla Web radio.”\textsuperscript{211} In retaliation, three days later the RIAA filed three separate complaints against MTVi, MusicMatch and Xact Radio, in a New York federal court.\textsuperscript{212} The suit asked that the actions be consolidated under one judge—in New York—a move that DiMA and the webcasters had hoped to avoid when filing in their native California.\textsuperscript{213}

By June 11th, on-line music provider, Listen.com, had capitulated. Listen.com dropped its suit against the RIAA and agreed to remove portions of its webcasting service in exchange for being

\begin{thebibliography}{9}
\bibitem{206} Id.
\bibitem{207} Id.
\bibitem{208} Id.
\bibitem{209} Reuters, supra n. 112.
\bibitem{210} King, supra n. 36.
\bibitem{211} Reuters, supra n. 112; see Powers, supra n. 112.
\bibitem{212} King, supra n. 36.
\bibitem{213} Id.
\end{thebibliography}
able to participate in the upcoming royalty rate agreement hearings.\textsuperscript{214} The opening date for the hearings was set for July 30, 2001.\textsuperscript{215}

As the July 30th hearing date grew closer, July proved to be a mixed month: at the Digital Music Conference, "Plug-In," held in New York, Universal announced that its PressPlay system, jointly owned with Sony, would go active in September. This announcement was made despite the fact that no agreement had yet been reached with the publishers and songwriters over licensing fees for the online service.\textsuperscript{216} On July 19th, despite the RIAA’s objections, the Copyright Office ruled that interactive web music providers would be allowed to participate in the arbitration hearings regarding royalty rates.\textsuperscript{217} For some smaller webcasting services, however, it was already too late: on July 23rd, Thomas Baxter resigned as CEO of Audible, an internet audio service, and announced that the company would downsize\textsuperscript{218}; on July 25th, WebRadio announced that it would shut down on August 31.\textsuperscript{219}

As the industry stood poised in anticipation of the long-awaited CARP, it was clear that the music industry was still in a state of fracture. Broadcasters—both radio and Internet—along with the recording industry had turned on songwriters and publishers; broadcasters had turned on each other, “terracasters” versus “webcasters”; webcasters had splintered over interactive versus non-interactive; small webcasters had been devoured by large ones or pressured out by escalating legal and financial worries; and the major labels and software giants rode the coat tails of smaller entrepreneurs who had taken a chance on a new technology. Dazzled by dreams of profit from the online music promise, the music industry behaved shamefully.

On July 30, 2001, the CARP proceedings were slated to begin.\textsuperscript{220} As of that date, the following issues existed:

1) The DMCA amendments related to webcasting were added, without House or Senate discussion, by committee in what was a last-minute decision; as a result, certain parties present did not have an adequate opportunity to prepare, speak or consider the matter in depth;

\textsuperscript{214} Id.; Snyder, supra n. 4.
\textsuperscript{215} Costello, supra n. 179.
\textsuperscript{216} King, supra n. 6.
\textsuperscript{217} WebRadio News, supra n. 151.
\textsuperscript{218} Reuters, supra n. 38.
\textsuperscript{219} WebRadio to Shut Down, supra n. 38.
\textsuperscript{220} Costello, supra n. 179.
2) the recording industry was granted limited antitrust exemptions to pursue licensing agreements with webcasters, while allowed to conduct individual negotiations with webcasters without having to disclose terms,\textsuperscript{221}

3) the RIAA desired to charge licensing fees for the sound recordings far in excess of those received for the underlying musical work; for purposes of performance fees, the recording of a song should not be unreasonably disparate from the creation of that song;

4) the assessment of fees retroactive to October 1998 appeared unreasonable when a) the RIAA participated in the confusion resulting in the Copyright Office's inability to set the rate in a timely manner, and b) broadcasters did not receive adequate notice of any requirement to maintain records regarding such webcasts, thereby making it difficult to compute actual fees owed; and

5) the DMCA imposed unreasonable restrictions upon broadcasters hoping to qualify for the compulsory license, a measure which impeded competition and worked to quash a developing industry and technology.\textsuperscript{222}

The real question now, of course, was what sort of amendment to the DMCA and/or imposed statutory rate could fix a wound that had penetrated so deeply since October 1998.

\textsuperscript{221} Stanford Law School professor, Lawerence Lessig, wrote:

\begin{quote}
[The labels] have no intention of allowing innovation in a means of distribution that they can't control... Congress should listen to what the market says. When innovators controlled the future of online music, billions flowed into that market. Once the courts made it clear that dinosaurs were in control, billions quickly evaporated. Congress could flip this market around in a single legislative stroke: Pass a law setting compulsory rates for Webcasting of whatever form, as well as rates for downloading and distributing music.
\end{quote}

\textsuperscript{222} In 1984, the United States Supreme Court stated, "[The law] has never accorded the copyright owner complete control over all possible uses of his work." \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, 464 U.S. 417, 432 (1984). In \textit{Tricom, Inc. v. Electronic Data Systems Corp.}, the Court of Appeals held that "[a] copyright owner may not enforce its copyright to... use it in any manner violative of the public policy embodied in the grant of a copyright." 902 F. Supp. 741, 745 (E.D. Mich. 1995) (citations omitted). Finally, courts condemned the practice of leveraging copyright power to control behavior not intended by Congress in cases such as \textit{United States v. Paramount Pictures, Inc.}, 334 U.S. 131 (1948), and \textit{Lasercomb Am., Inc. v. Reynolds}, 911 F. 2d 970 (4th Cir. 1990).
Chapter Seven: A Still-Open Book: The Music Online Competition Act ("MOCA") and the Department of Justice Appear on the Horizon

On August 3, 2001, industry headlines broke with an amazing story. Rep. Chris Cannon (R-Utah) and Rep. Rick Boucher (D-Virginia) unveiled their sponsorship of a new bill that would rewrite the music licensing and copyright laws, promote competition among online music service providers, and simplify the buying and selling of digital music.\textsuperscript{223} Chris Cannon said in a statement that he had "watched with dismay as companies such as Musicmaker.com and Riffage.com, which tried to distribute licensed music via the Internet, have gone out of business, often because they could not get content from the labels or the publishers."\textsuperscript{224} Regarding the major labels, he added, "They want to be the owner of the content, the producer, the wholesaler, and the record store online. And with cross-licensing agreements, they are in a position to leverage their collective market power to the exclusion of the competition."\textsuperscript{225}

The proposed Act, MOCA, directly addresses the most difficult issues. The proposed Act offers the following: first, users would be allowed to make backup copies of legally-acquired music files to protect mishaps such as computer crashes.\textsuperscript{226} Second, as opposed to the DMCA which severely limits the number of ephemeral copies allowed for servers and efficient online transmission, online distributors would now be able to create multiple ephemeral recordings.\textsuperscript{227} Third, online providers could go to the Copyright Office to seek licenses rather than obtaining clear publishing rights from songwriters directly.\textsuperscript{228} Fourth, the bill addresses the legal dispute between the publishers and RIAA over royalty payments by channeling those payments directly to the artists who are currently paid by the record companies.\textsuperscript{229} In addition, the major labels, which entered into their online ventures with other firms, would have to


\textsuperscript{225} Id.

\textsuperscript{226} Id.

\textsuperscript{227} Id.

\textsuperscript{228} Id.

\textsuperscript{229} Id.
make similar terms available to independent online music distributors. In essence, the labels would be obliged to license their online music to smaller competitors on terms similar to those they would grant to their own digital distributors.\textsuperscript{230}

Cannon also expressed his opposition to the compulsory license, viewing it as only applicable "as an absolute last resort."\textsuperscript{231} Rather, he envisioned a competitive market in which consumers would pay a moderate sum such as five to ten dollars per month to use online music swapping sites like Napster.\textsuperscript{232}

The RIAA complained immediately that the bill was "essentially a solution—a very bad solution—in search of a problem."\textsuperscript{233} Director Hillary Rosen argued that the new bill "substitutes government regulation for the marketplace," stating that "the marketplace is already moving in the right direction" as consumers "will be served well by both current and coming plans for online music services."\textsuperscript{234}

DiMA, on the other hand, voiced its support, as well as Napster, which said the bill "offered needed direction for the embattled industry."\textsuperscript{235} Manus Cooney, Napster’s Vice President for Corporate and Public Policy Development, commented, "When the legislative process is completed, we hope that MOCA will be the cup of coffee that this nascent industry sorely needs."\textsuperscript{236}

During the announcement of MOCA, Representatives Cannon and Boucher made a portentous remark about the major labels’ two upcoming collaborative online services set to debut in September of 2001. Although they "lauded the upcoming launch of MusicNet and Pressplay," the Congressmen feared that "the two services would dominate the market."\textsuperscript{237} Specifically, they worried about the possibility that the two companies would enter into cross-licensing agreements in order to share their huge catalogues fueled this concern.

The next day, more news riveted the online-music community: the U.S. Department of Justice launched a preliminary antitrust

\begin{itemize}
\item[230.] Mathews & Wilke, supra n. 171.
\item[231.] Stein, supra n. 222.
\item[232.] Id.
\item[233.] Reuters, supra n. 223.
\item[234.] Id.
\item[235.] Stein, supra n. 222.
\item[236.] Id.
\end{itemize}
investigation against the very same online providers, MusicNet\textsuperscript{238} and Pressplay.\textsuperscript{239}

Apparently, the Department of Justice had begun investigating the proposed services for several months.\textsuperscript{240} A source close to the investigation revealed that the Justice Department's antitrust division responded as a result of "disillusionment with the business practices of the record companies" from "multiple parties at every level of the music value chain," including recording artists, retailers, and online music services.\textsuperscript{241}

Indeed, as early as June, the European Commission, the executive body of the European Union, had already launched a probe centering on potentially anti-competitive behavior by the five major labels which, together, control eighty percent of the world's most popular music.\textsuperscript{242} Mario Monti, the European commissioner for competition policy, revealed the investigations during a speech given in Stockholm: "These are important cases for the development of music services offered online to consumers, and there are potentially a number of issues which merit close examination."\textsuperscript{243} He added that consumer interest is clear and that online music services should develop rapidly, "but with a diversity of service providers."\textsuperscript{244}

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239. Pressplay is comprised of: Sony Corp. and Vivendi Universal SA, working with Microsoft Corp. \textit{Id.} Operating under a concept similar to Napster, both online providers would allow users to instantly download music, in exchange for a monthly fee. \textit{Id.} MusicNet and Pressplay had already announced several online partners, including AOL, Napster, and RealNetworks (MusicNet), and Yahoo, MSN, and Mp3.com (Pressplay). \textit{Id.} Mathews & Wilke, \textit{supra} n. 171. A source familiar with the Pressplay venture responded, "We have been contacted by the [DOJ], be we don't know yet the scope of the investigation. Obviously, it's not entirely unexpected that they would look at two joint ventures by two competitors. It's not a shock." \textit{Id.} Warner Music Group stated that it planned on cooperating fully with the DOJ once they made a request. \textit{Id.}

240. IDG, \textit{Source: MusicNet, Pressplay Probe Began Months Ago <http://www.thestandard.com/article/0,1902,28532,00.html> (Aug. 7, 2001) [hereinafter MusicNet, Pressplay Probe]. "The government also is expected to examine the [labels'] use of copyright rules and licensing practices to control online distribution of their music." Mathews & Wilke, \textit{supra} n. 171.

241. \textit{MusicNet, Pressplay Probe, supra} n. 239.


243. \textit{Id.}

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Chapter Eight: Conclusion

As of this writing (August 2001), a number of questions remain open, reading like a veritable alphabet soup: the fate of the DMCA, whether MOCA will pass muster, the results of the CARP, and the DOJ investigation. The real issues, however, concern how soon consumers will be able to enjoy a promising new technology and whether any hope exists for venturesome, online startups willing to compete with the major labels. Public debates on MOCA are set to begin in the fall of 2001. It is hoped that this article, as well as others, will raise public awareness such that those interested in the music business will speak their minds for the benefit of us all.

See e.g. Online Music Legislation, supra n. 222.