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Play It Again, Sam: Webcasters’ Sound Recording Complement as an Unconstitutional Restraint on Free Speech

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Play It Again, Sam: Webcasters’ Sound Recording Complement as an Unconstitutional Restraint on Free Speech

by

AMANDA S. REID

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You must remember this
A kiss is still a kiss, a sigh is just a sigh
The fundamental things apply
As time goes by

As Time Goes By is Becca’s favorite song this week, and she is wondering what it would take to broadcast the song for her 1,000 closest friends. The legal answer of course is “it depends”; it depends on the choices she makes. To find out “what it would take,” she must figure out what version of the song As Time Goes By to broadcast, to whom the copyright belongs, and how she wants to broadcast it.

The words and the musical score, known as the musical composition, were written by Herman Hupfield and are not part of the public domain. Therefore, the musical composition copyright owner has the right to be compensated. And depending on how Becca wants to broadcast the song, she may also have to compensate the owner of a particular sound recorded version. Each recorded version of the song also has a copyright, known as the sound recording, which is a separate copyright from the musical composition. Whether it’s Frank Sinatra’s, Ella Fitzgerald’s, Billie Holiday’s, Harry Nilsson’s or Bryan Ferry’s version, each sound recording copyright may belong to someone different.

Becca has decided that she’s partial to the Billie Holiday version; now she must decide how she wants to publicly perform the song.

Becca’s decision on how to broadcast the song will have other implications. If she sends the song via a traditional, over-the-air, terrestrial broadcast, copyright law provides that she is only responsible for compensating the copyright owner of the musical composition, and not the copyright owner of the sound recording. However, radio broadcast licenses are limited in number and

2. In this section, the term “broadcast” is used colloquially to mean publicly perform or announce to the public. The term is not employed as it is defined in the Copyright Act, “a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.” 17 U.S.C. § 114(j)(3) (2004).
3. See explanation of copyright law infra Part II.
4. No permission is needed to use a musical composition that is in the public domain. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 26 (3rd ed. 2002).
5. See id. at 15 (noting that finding out who controls the rights to a song and with whom to deal to obtain permission to broadcast the song “is not as easy a question to answer as you might expect”).
regulated by the Federal Communications Commission. As a private individual without a license, it is unrealistic for Becca to broadcast the song over terrestrial radio.

Recognizing this, she turns her attention to her desktop computer and considers webcasting the song over the Internet. She soon discovers that webcasters, unlike terrestrial broadcasters, are not exempt from royalty payments to the copyright holder of a sound recording. Terrestrial broadcasters are only responsible for compensating the copyright owner of the musical composition, however webcasters must compensate both copyright owner of the musical composition and the copyright owner of the sound recording. Becca also learns that not only will she have to pay for the musical composition and the sound recording (and who knows how much that will be), but she also has to comply with something called a “sound recording performance complement.”

The sound recording performance complement limits the number of songs that may be played during a three-hour period to no more than three songs from one album, but no more than two songs back to back. To qualify for a “statutory license,” which enables her to webcast any song she likes without having to first negotiate price

8. See explanation, infra Part I. See also Walter S. Mossberg, Getting to Know the ABCs of the WWW to Dazzle Friends, WALL ST. J., Jan. 4, 1996, at B1 (answering common questions about World Wide Web).
9. Librarian of Congress James Billington adopted a flat royalty rate of 0.07¢ per song performed, per listener for all Internet transmissions. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45239, 45272 (June 20, 2002) (to be codified at 37 C.F.R. pt. 261), available at http://www.copyright.gov/carp/webcast_regs.html (July 8, 2002). However, the Small Webcaster Settlement Act (SWSA), signed by President George W. Bush on December 4, 2002, temporarily suspended the obligation of small commercial webcasters to pay statutory royalties and allowed the recording industry and small webcasters, including non-commercial webcasters, to agree to more reasonable retroactive royalty fees. Pursuant to the SWSA, SoundExchange, the music industry’s principal royalty collector, and a group of webcasters negotiated a royalty agreement to pay negotiated fees instead of the fees determined by the Library of Congress. Pub. L. No. 107-321, 116 Stat. 2780 (2002) (codified at 17 U.S.C. §§ 112, 114). See also Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78510 (Dec. 24, 2002). Nearly a year after the SWSA was passed, small webcasters were still unhappy with the fee schedule. Webcaster Alliance, a group of several hundred small commercial webcasters, filed an antitrust suit against the Recording Industry Association of America (RIAA) and the big five record labels, alleging that the royalty rates for small webcasters set up in December 2002 were designed to drive the smaller of the small web radio stations out of business. Webcaster Alliance Sues RIAA, Labels, THE ONLINE REPORTER, Aug. 30, 2003.
10. See infra text and accompanying notes 64-66.
and permission with each copyright owner—so long as she pays the royalty fee\textsuperscript{12}—Becca must comply with the sound recording performance complement and limit the number of songs she plays during any three-hour period. Becca is distressed to learn that she is not only responsible for paying a royalty fee for the musical composition and the sound recording, but she is also limited in the number of songs she can webcast. Terrestrial broadcasters are responsible for paying a royalty fee for the musical composition, however webcasters are additionally responsible for the sound recording royalty fee and complying with the SRPC.

Becca wonders why her freedom of expression in the form and quantity of music she wishes to play is so highly restricted when she is already obligated to compensate the copyright owner for the privilege of playing the music. So long as she is paying the prescribed royalty fee, Becca wants to know why she cannot play as many Billie Holiday songs as she likes in a row. Terrestrial broadcasters do it all the time. Becca believes this is not right; she believes this is not fair; she begins to wonder if it is Constitutional.

This article explores Becca’s question whether the statutory license, prescribed by federal copyright law, for webcasters to transmit sound recordings violates the First Amendment. Part I briefly explores webcasting and how the technology works. Part II explains the copyright law as it relates to music, including the Digital Performance Right in Sound Recordings Act of 1995\textsuperscript{13} and the Digital Millennium Copyright Act of 1998.\textsuperscript{14} Part III reviews articles by prominent legal scholars that suggest First Amendment scrutiny should apply to copyright laws and the Supreme Court’s media specific First Amendment analyses. And Part IV discusses why the sound recording complement may not pass judicial review and therefore could be struck down. Part V concludes with another look at Becca and her webcasting options.

\textsuperscript{12} See Kohn, supra note 4, at 421 (explaining that “[B]y properly following the procedure and paying the statutory rate set forth in the compulsory license provision, a person seeking to clear permission will be assured a license without taking any risk of liability for copyright infringement.”).


I. Webcasting and How it Works

Sue Cummings, a writer for the New York Times, notes, “Internet radio is no longer an online version of what Web-types like to call terrestrial radio. It’s live game-playing, it’s community, it’s chat, it’s TV, and it’s as many channels as a site has servers.” While a typical American city has twenty to fifty broadcast radio stations, online listeners can access more than 13,000 sites. Because the Internet is relatively unbounded, the electromagnetic spectrum limitations that constrain terrestrial broadcasters do not apply to webcasters. Unlike terrestrial radio, Web radio is not a scarce medium regulated by the government.

To understand Web radio it is helpful to understand the Web generally. Typical surfing on the Web relies on a “pull” method of transferring Web pages, where a Web page is not accessed or delivered until a browser requests it. Webcasting, on the other hand, uses “push” technology. In the case of webcasting, it means that the songs are sent out over the Internet, even if no one is listening or requesting the song. E-mail is another form of push technology. You receive e-mail messages whether you asked for them or not, because the sender pushes the mail to you.

Similarly, “streaming” transfers data so that it can be processed as a steady and continuous stream. Music sent in this format is not designed to be permanently stored on a user’s computer, but rather enjoyed for the moment like terrestrial radio. An advantage of using streaming technology is that a user can start hearing the song before

15. Sue Cummings, Internet Radio Offers a Wide Choice to a Slim Audience, N.Y. TIMES, October 25, 2000, at 35.
16. Id.
17. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969) (observing that “if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves”).
21. Streaming allows a user to play music files directly over the Web without having to download the file in its entirety before playing it. MP3, WEBOPEDIA.COM, at http://www.webopedia.com/TERM/M/MP3.html (last visited Feb. 3, 2004). See also KOHN, supra note 4, at 1258 (noting that streaming transmissions constitute merely a performance and no copy if made during the transmission, whereas in download transmissions there is a reproduction of the work in the form of a new copy).
the entire digital file is transmitted. For streaming to work, a user’s computer collects data as a steady stream so digital packets can be processed into sound or pictures. In other words, if the user receives the data more quickly than needed, the computer must save the excess data in a buffer. But if the data does not come quickly enough, then the data display will not be smooth. The speed of data display is largely dependent on bandwidth and file size.

Decreasing the file size facilitates a more rapid transfer of data, which in turn helps create a smooth stream of music. To decrease the file size music files are compressed into MP3 format. Superfluous information from the original music file is filtering out, generally with minimal loss in quality. The quality of an MP3 file ultimately depends on the bit rate at which the file is recorded. A file recorded at 128 kbps will sound like a CD track, however, a file recorded at 16 kbps may only sound like AM radio. The inherent trade-off in recording MP3s is that to achieve better sound quality the file size will be larger and may be slower in streaming. Original music files compressed in MP3 are still protected by copyright law.

II. Copyright for Music

Copyright protects an original work of authorship, including music, fixed in a tangible medium of expression from which it can be heard and reproduced. Copyright attaches at the moment a song is recorded, giving the copyright owner a bundle of legal rights. Music

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24. MP3 is an abbreviation for Moving Picture Experts Group (MPEG) 1 Audio Layer 3, and it is the latest of three progressively more advanced coding schemes that use entropy encoding to reduce to a minimum the number of redundant sounds in audio and video files. See The Reference Website for MPEG!, MPEG.ORG, at http://www.mpeg.org/MPEG/ (last visited Feb. 3, 2004). An MP3 file can be up to eleven times smaller than an original raw data file. Kohn, supra note 4, at 1269. See also, Mark Adler & Harald Popp, Introduction to MPEG, at http://www.faqs.org/faqs/compression-faq/part2/section-2.html (last visited Feb. 3, 2004).


27. Id.

does not need to be registered to receive protection since a copyright attaches at the moment of creation; however, registration is generally required before filing suit for infringement and is necessary to receive statutory damages. Music is unique because it embodies two distinct copyrights. There is a copyright in the underlying musical notes and lyrics, which is separate from the copyright in each sound recorded version of a song.

A copyright in the musical notes and accompanying lyrics is called the “musical composition.” The composer and lyricist both hold the copyright for the musical composition. From the moment of creation, the composer and lyricist co-own an undivided interest in the song. The co-owners of the copyright are analogous to tenants in common of real property insofar as each owner has an undivided ownership interest in the entire work. On the other hand, the “sound recording” copyright subsists in the actual fixation or recording of the sounds. The performer, whose performance is fixed, or the record producer, who processes the sounds and then fixes them, or both are the authors of this work. As explained in detail in a later section, to webcast a song, Becca would need permission from both the musical composition copyright holder and the sound recording copyright holder. But to sing her own version of As Time Goes By, Becca would need permission only from the musical composition copyright holder.

The legal rights of a copyright owner include the exclusive right (1) to reproduce, (2) to prepare derivative works, (3) to distribute copies to the public, (4) to perform the work publicly, (5) to display the work publicly, and in the case of sound recordings, (6) to perform the work publicly via digital audio transmission. The first five rights are the bundle of rights that all musical composition copyright owners

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29. See id.
32. Id.
33. Kohn, supra note 4, at 407.
34. “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 nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. 17 U.S.C. § 101 (2004).
35. See Musical Compositions and Sound Recordings, supra note 31.
36. See 17 U.S.C. § 106 (2004). See Kohn, supra note 4, at 1258 (explaining that the term digital transmission “accurately describes the delivery of musical works and sound recordings that do not involve the transfer of possession of physical objects”).
enjoy. The sixth right applies only to copyright owners of sound recordings.

Section 106(4) of the Copyright Act grants the copyright owner of the musical composition the exclusive right to “perform the copyrighted work publicly,” such as to play a song over the radio. Therefore, the copyright owner of the musical composition has the exclusive right to authorize a radio station to broadcast a song over the airwaves. Because a copyright owner has the right to exclude others, she can charge a license fee to allow others to publicly perform the work. Radio stations, therefore, pay the copyright owner a fee for the right to broadcast the song. However, Section 106(4) does not extend the exclusive performance right in sound recordings to terrestrial radio or television. A radio station that broadcasts a song must pay the copyright owner for the musical composition, but does not pay the copyright owner of the sound recording. An upcoming section further explains how webcasters are treated differently from terrestrial broadcasters.

A. Recent Statutory Changes to Copyright Law

Recent federal legislation has changed the landscape of copyright law. Before 1972, federal copyright law did not protect sound recordings. Generally, such recordings were protected by common law or in some cases by statutes enacted in certain states. The copyright law was amended to protect sound recordings fixed and first published with the statutory copyright notice on or after February 15, 1972. Four years later, in the Copyright Act of 1976,

I. Digital Performance Right in Sound Recordings Act of 1995

The DPRSA, effective February 1, 1996, created a new limited performance right for certain digital (but not analog) transmissions of sound recordings.\footnote{Sound Recordings, supra note 42.} It added Section 106(6), which granted copyright owners of sound recordings the exclusive right to “perform the copyrighted work publicly by means of a digital audio transmission.”\footnote{17 U.S.C. § 106(6) (2004).} In other words, the owner of a sound recording is now entitled to royalties for public performances of a song via “digital audio transmissions,” but not for public performances over terrestrial radio that use analog transmissions. This new digital performance right in sound recordings applied to “interactive”\footnote{See 17 U.S.C. § 114(j) (2004).} (on demand music) and
“subscription” (fee for service music) transmissions because they had the potential to “adversely affect sales of sound recordings.”

“Nonsubscription transmissions,” such as those sent by webcasters, were not subject to the expanded sound recording copyrights created by DPRSA. As Jane C. Ginsburg, professor of law at Columbia University explains, “[t]he digital transmissions reached by the 1995 expansion of the sound recording copyright turn out to have omitted a principal form of Internet exploitation of sound recordings: audio ‘streaming’ or ‘webcasting’ of recorded performances.” Like terrestrial broadcasters, under the DPRSA webcasters only paid a license for the musical composition, and not for the sound recording. “In what appeared to be a major blunder by the recording industry, authors of the [DPRSA] appear to have assumed that webcasting, or the broadcasting of digital radio stations over the Web, would be primarily supported by subscription fees,” whereas it turned out to be primarily supported by advertising. Therefore, the owners of sound recordings lobbied for more legislation, which they got in the DMCA.

2. Digital Millennium Copyright Act

The webcaster lacuna in the DPRSA was filled by the DMCA. A last-minute addition to the DMCA inserted extremely detailed provisions that eliminated the webcaster exemption from paying

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54. Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 15 (Aug. 4, 1995) [hereinafter Senate Report] (explaining that “[t]his legislation is a narrowly crafted response to one of the concerns expressed by representatives of the music community, namely that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work. Subscription and interactive audio services can provide multichannel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day.”).
57. See id. at 167-68.
58. KOHN, supra note 4, at 1299-1300.
license fees to copyright owners of sound recordings. Webcasters now were required to pay license fees to copyright owners of sound recordings. To avoid having to negotiate price and permission to transmit songs, the 1998 webcaster amendments included a provision for a statutory license to both subscription and nonsubscription digital transmissions that conformed to “exceedingly detailed eligibility requirements.” The new statutory license applied to “eligible nonsubscription transmission,” which included webcasters’ non-interactive sound recording transmissions.

In sum, webcasters were exempt before the DMCA. After the DMCA, to qualify for the statutory license whereby the copyright owners of sound recordings could not deny permission or charge a license fee greater that the statutory rate, webcasters had to conform their transmissions to detailed eligibility requirements. Qualifying for the statutory license means that an owner of sound recording copyright cannot refuse permission to webcast a recording and cannot charge a license fee greater than the fee established by a Copyright Arbitration Royalty Panel. So long as a transmission qualifies for a statutory license, the copyright owner of a sound recording does not have the right to exclude another from transmitting the song.

Transmissions ineligible for the statutory license are subject to the sound recording copyright owner’s full public performance right. This includes the right to prohibit the broadcast or charge whatever fee the market will allow. To be eligible for the statutory license, the webcaster’s transmissions, among other things, must be non-interactive, the primary purpose must be to provide audio or other entertainment programming to the public, and the webcaster must conform the transmissions to the sound recording performance complement.

60. See Kohn, supra note 4, at 1336-37. See also Ginsburg, supra note 56, at 166.
61. Ginsburg, supra note 56, at 168-69. The 1998 amendments did not extend to interactive digital transmissions and therefore owners of sound recordings, who have the exclusive right to license digital audio transmissions, have exclusive control to determine price and permission for such transmissions.
64. See Ginsburg, supra note 56, at 169.
65. See 17 U.S.C. § 114(d)(2) (2004). This section also outlines several other criteria for eligibility that are not pertinent to the focus of this article.
The “sound recording performance complement” is defined as the transmission during any three-hour period of no more than three different songs from any one album, if no more than two selections are transmitted consecutively. It is also defined as a selection of four different songs by the same recording artist or from any box set or compilation, if no more than three songs are transmitted consecutively during any three-hour period.66 Basically, more than three songs by an artist in three hours makes the transmission ineligible for the statutory license. A transmission ineligible for a statutory license means that the copyright owner of the sound recording can charge whatever license fee she likes or even deny permission to transmit all together.67

What was a nonexistent right until 1972, turned into a narrow right under the DPRSA, and now offers only a narrow exception to terrestrial broadcasters. Per the DMCA amendments, only a “nonsubscription broadcast transmission,” defined as a transmission made by a terrestrial broadcast station licensed by the FCC, is exempt from the statutory license fee and sound recording complement restriction.68 Under the DPRSA, only interactive transmissions where users could access songs on demand and subscription transmissions were subject to the royalty fee, but now under the DMCA only traditional radio stations are exempt. The DMCA flipped the narrow sound recording right provided by the DPRSA into a narrow exception for traditional, terrestrial broadcasters. To illustrate how narrow the exception is for terrestrial broadcasters, it does not apply to songs simulcast over the Web. Radio stations that simulcast over the Web are also subject to the sound recording copyright fee.69 The rationale for broadening the scope of protection for sound recordings was premised on a fear that if consumers could access the songs they

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66. 17 U.S.C. § 114(j)(13) (2004). There is also a good-faith-type clause that provides if the transmission exceeds the numerical limits from multiple phonorecords, it nonetheless qualifies as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations. Id.

67. If you are a bit turned around, you are in good company as David Nimmer, a prominent copyright scholar, described the resulting framework from the 1995 and 1998 amendments to be nothing short of “frightfully complex.” David Nimmer, Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right, 7 UCLA Ent. L. Rev. 189, 191 (2000).


69. AM and FM radio stations that simulcast transmissions over the Internet are not exempt “nonsubscription broadcast transmission,” and therefore must pay the public performance royalty fee. See Bonneville Int’l Corp. v. Peters, 153 F. Supp. 2d 763, 771 (E.D. Pa. 2001).
want on demand then this would undermine the sound recording owner’s revenue from record sales.

B. Legislative History for Recent Copyright Law Changes

In the DPRSA Senate Report of 1995, the Committee on the Judiciary explained that it intended “to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies . . . .”[70] The report also showed the Committee’s mindfulness of the need to strike a balance among all of the interests affected. The Committee was concerned that granting too broad of a performance right in sound recordings “would make it economically infeasible for some transmitters to continue certain current uses of sound recordings.”[71] According to the legislative history, this concern was accommodated by various limitations on the exclusive right.[72] The statutory license is such a limitation on the exclusive right.

As previously discussed, the DMCA deleted the exemption for webcasters.[73] A House of Representatives Report explained that the 1998 amendments were intended to achieve two purposes. First, to further Congress’s objective when it passed the DPRSA in 1995 to ensure recording artists and record companies would be protected as new technologies affect the ways that their creative works were used.[74] And second, “to create fair and efficient licensing mechanisms that address[ed] the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.”[75]

70. Senate Report, supra note 54, at 15. Interactive transmissions were seen as the biggest threat to owners of sound recordings:
Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales. The Committee believes that sound recording copyright owners should have the exclusive right to control the performance of their works as part of an interactive service, and so has excluded interactive services from these limitations on the performance right.

Id.
71. Id.
72. Id.
73. For a thorough examination of the legislative history of the DMCA, see generally David Nimmer, Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary, 23 CARDOZO L. REV. 909 (2002).
75. Id. at 79-80.
Whether these are the true motivating factors for Congress is open to speculation. Neil Netanel, professor of law at University of Texas, casts doubt on the reliability of these pronouncements because of the high level of industry involvement in lobbying for this legislation. He noted, “especially given the DMCA’s unprecedented expansion of content provider rights and industry’s hand in drafting the Act’s legislative history, that statement of legislative purpose ought not be taken at face value.” Other commentators have also suggested that Congress may not have fully considered competing interests affected by the DMCA beyond the powerful lobbying organizations before them.

Prior to the DPRSA and DMCA, sound recording artists and producers were compensated only from sales of records. Radio broadcasts advertised the recordings, thereby stimulating record sales. In the digital environment, however, some argue that webcasting may not serve the same function of stimulating sales of tangible copies. Professor Ginsburg noted, “[t]he more easy it becomes to access and experience works of authorship by means of digital transmission, the less necessary, and perhaps also the less desirable, it becomes to possess retention copies.” This may have been just the scenario that prompted some in Congress to afford greater protection for copyright owners of sound recordings. However, the question remains whether the method of providing such protection is constitutional, irrespective of the laudable intent.

I. First Amendment Scrutiny & Copyright

A. Applying First Amendment Scrutiny to Copyright Law

Copyright has been generally immunized from First Amendment scrutiny, however Professor Netanel argues that not only have courts consistently gotten it wrong, but that “copyright’s judicial exoneration

78. Id.
79. See, e.g., KOHN, supra note 4, at 1337.
80. Ginsburg, supra note 56, at 170.
81. Id.
seems to rest largely on historical accident.”

The historical accident to which he refers is the courts reliance on Professor Melville Nimmer’s 1970 law review article wherein he concludes that copyright law posed no First Amendment conflict. Nimmer reasoned that the First Amendment protects the dissemination of ideas—not any particular form of the idea, and copyright protects the form of the expression—not the underlying ideas, therefore it is likely that other words are available to express the same idea.

Today’s copyright law looks very different from the 1970’s version Professor Nimmer was writing about. Professor Netanel explains the current “copyright law’s primary internal safety valves—the idea/expression dichotomy, fair use privilege, and limited term—provide far weaker constraints on copyright holder prerogatives than they did in 1970.” As a result, he argues, “First Amendment challenges to copyright law warrant a far more rigorous analysis, and that copyright’s speech-burdening effects should be subject to considerably more exacting First Amendment scrutiny than courts have accorded thus far.” He suggests that copyright law should be subject to the “exacting scrutiny” the Supreme Court enunciated in *Turner Broadcasting System, Inc. v. FCC*.

In the 1994 *Turner* case, cable television operators challenged the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 as an unconstitutional violation of their First Amendment rights. The must-carry provisions required cable systems to carry local commercial and noncommercial television stations. The Court held that the Cable Act’s must-carry rules were content-neutral because they were unrelated to the...
content of the cable operators' programs. However, the Government needed to show that the economic health of local broadcasting was in genuine jeopardy and in need of the protections afforded by must-carry provisions. The Court applied a content-neutral, intermediate scrutiny to the regulation, but it added teeth to the test by requiring a factual showing of economic necessity. In a later section of this article, the economic jeopardy standard will be discussed again.

First Amendment analysis changes, depending on whether a regulation is content-based or content-neutral. While Professor Netanel classifies copyright law as content-neutral, rather than content-based regulation, not all scholars agree. Professors Mark Lemley and Eugene Volokh, from the University of Texas Law School, argue that intellectual property rights, including copyright, are a form of content-based, government-imposed speech restriction that should not be exempt from conventional First Amendment scrutiny. They posit that Congress’s power to create copyright, as provided by the Constitution, does not “ exempt copyright law from all First Amendment scrutiny.” Since the purpose of the Bill of Rights was to restrain the federal government’s exercise of its enumerated powers, the professors reason that Congress is subject to First Amendment constraints, and thus copyright law “must be bound by the First Amendment too.”

B. Media Specific First Amendment Analyses

Webcasters have First Amendment rights. Freedom of speech, broadly conceived to include expressive conduct and symbolic speech, also applies to music. The Court has noted that music is one of the oldest forms of human expression and as a form of expression and communication it is protected under the First Amendment. Because

91. Id. at 664-65.
92. See Netanel, supra note 77, at 56-58.
93. See id. at 48.
95. U.S. CONST. art. I, 8, cl. 8.
96. Lemley & Volokh, supra note 94, at 190.
97. Id. (noting that while the government has the enumerated power to run the post office, it cannot refuse to carry communist propaganda, similarly the government has power to regulate interstate commerce, but it cannot impose content-based restrictions on the interstate distribution of newspapers).
webcasters have First Amendment rights, the next question is what level of protection the Web receives.

The Supreme Court applies different levels of First Amendment protection to different forms of mass communication. The Court has “long recognized that each medium of expression presents special First Amendment problems.”\footnote{99} As far back as 1949, Justice Jackson acknowledged that “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers” and “[e]ach . . . is a law unto itself.”\footnote{100} And over time the Court has established different standards for different media, including broadcast radio and television,\footnote{101} print,\footnote{102} drive-in movie theatres,\footnote{103} billboards,\footnote{104} telephone,\footnote{105} cable television,\footnote{106} and the Internet.\footnote{107}

1. Print Media Model

First Amendment jurisprudence erects a “virtually insurmountable barrier” between the government and the print media to regulate matters affecting the exercise of journalistic judgment about what to print.\footnote{108} Editorial choices and judgment of what material to include in a publication is at the core of what the First Amendment protects. In one of the most prominent newspaper cases, the Supreme Court held Florida’s “right of reply” statute\footnote{109} unconstitutional because it violated the First Amendment’s guarantee of a free press.\footnote{110} The Court reasoned that compelling an editor or

108. Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring). Justice White explained that the balance struck by the First Amendment is important because “[a]ny other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.” Id. at 260.
109. See Fla. Stat. § 104.38 (1973). The statute provided that if a candidate’s personal character or official record was attacked by a newspaper, the candidate had the right to demand that the newspaper print, free of charge, any reply the candidate made to the newspaper’s criticisms. Miami Herald, 418 U.S. at 244.
110. Id.
publisher to publish certain material was as repugnant as a state command forbidding a newspaper to publish certain content.\textsuperscript{111} The Court observed that “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”\textsuperscript{112} Desirable goals are insufficient when a regulation fails First Amendment scrutiny.

2. \textit{Broadcasting Model}

In 1969, the Court unambiguously stated, “[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”\textsuperscript{113} The Court distinguished broadcasting, which includes radio and television, from print media, insofar as broadcasting uses spectrum, a limited public resource.\textsuperscript{114}

Unlike a First Amendment right to free speech or freedom of the press, the Court said “[n]o one has a First Amendment right to a license or to monopolize a radio frequency.”\textsuperscript{115} Because of the scarcity of radio frequencies, the right of the viewers and listeners, not the broadcasters, is paramount.\textsuperscript{116} While recognizing that each medium of expression presents special First Amendment problems, in 1978, the Court explained that of all forms of communication, broadcasting, “has received the most limited First Amendment protection.”\textsuperscript{117} The Court reasoned that such restrictions on this form of communication are justified because “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” and “broadcasting is uniquely accessible to children, even those too young to read.”\textsuperscript{118} Restrictions that are permissible on broadcasters are not necessarily permissible on other media that do not share similar characteristics, such as spectrum scarcity or pervasiveness.

\textsuperscript{111} See \textit{id.} at 256.
\textsuperscript{112} \textit{id.} at 256-58.
\textsuperscript{113} Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (citation omitted).
\textsuperscript{114} \textit{id.} at 388 (noting “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).
\textsuperscript{115} \textit{id.} at 389.
\textsuperscript{116} \textit{id.} at 390. Broadcasters are public trustees insofar as broadcast frequencies are limited and, therefore, are “necessarily considered a public trust.” \textit{id.} at 400.
\textsuperscript{118} \textit{id.} at 748-49.
3. Internet Model

Regulating content on the Internet presents new issues for the Court. In Reno v. ACLU, the Court stated that the material on the Internet is “as diverse as human thought.” According to the Court, the Internet is a new marketplace of ideas that has experienced and continues to experience phenomenal growth and expansion. As such, the Court presumed that government regulation of the content of speech on the Internet was “more likely to interfere with the free exchange of ideas than to encourage it.”

The uniqueness of the Internet as a new medium, where old rules and old burdens may not necessarily apply, was emphasized in the Ashcroft v. ACLU decision by three justices concurring in the plurality decision, Justice O’Connor in a concurrence, and Justice Stevens in the dissent. In the Court’s most recent pronouncement regarding the Internet, Justices Kennedy, Souter and Ginsburg noted that the jurisprudence of other media may be of limited utility for Internet-based cases, because “[t]he economics and technology of Internet communication differ in important ways from those of telephones and mail.” Justice O’Connor agreed with Justice Kennedy that “given Internet speakers’ inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech... may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.” Justice Stevens was also struck by the fact that “[t]he Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once.” In sum, five justices clearly ascribe to the notion that the Internet is fundamentally different from

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120. See id. at 885. For a judicial exposition of the marketplace of ideas theory see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).
123. See id. at 591 (Kennedy, J., concurring in the judgment).
124. See id. at 586 (O’Connor, J., concurring in part and concurring in the judgment).
125. See id. at 602 (Stevens, J., dissenting).
126. Id. at 595 (Kennedy, J., concurring in the judgment).
127. Id. at 587 (O’Connor, J., concurring in part and concurring in the judgment).
128. Id. at 605 (Stevens, J., dissenting).
other media and that brick-and-mortar rules should not be blindly applied to the Web.

The print model is given heightened First Amendment protection because of the editorial control and judgment exercised over the content and the minimal barriers to entry into the market.\textsuperscript{129} Webcasting may have an even stronger claim to First Amendment protection of content, because the barriers to entry are so minimal: those who can access material on the Web can also disseminate material via the Web. This is a bright-line distinction between the Internet, print, and broadcasting models. Many people may access print, broadcasting, or cable outlets, but few people may disseminate via these outlets. The barrier between being a speaker and a listener on the Web is as permeable as a user wishes it to be.\textsuperscript{130}

What does this media-specific First Amendment analysis mean for webcasters? It means that the Internet’s unique technological features deserve broad protections to ensure that the full potential of the medium is not retarded. It also means that the statutory license restrictions, in the form of the sound recording complement placed on webcasters, may be unconstitutional.

\textbf{IV. Discussion}

The level of scrutiny a court uses to review government regulation often depends on the type of speech, such as whether it is political, commercial, or obscene, and the type of regulation, such as whether it is content-based or content-neutral. However, the Court explained that “[d]eciding whether a particular regulation is content based or content neutral is not always a simple task.”\textsuperscript{131} A court reviewing the constitutionality of the sound recording complement

\textsuperscript{129} See Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

\textsuperscript{130} The Future of Music Coalition, a not-for-profit collaboration between members of the music, technology, public policy, and intellectual property law communities, highlights the value of Webcasting: “In this increasingly consolidated and concentrated radio marketplace, webcasting represents an opportunity to break the bottleneck.” Future of Music Coalition, Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?, FutureofMusic.org, at http://www.futureofmusic.org/news/senatejudiciarywebcasting.cfm (last visited Feb. 2, 2004). The organization also identifies three unique attributes of Webcasting. First, it offers the opportunity for programming diversity. Second, it has low barriers to entry and to legitimate competition. And third, Webcasting offers the global reach of the Internet. \textsuperscript{Id}.

\textsuperscript{131} Bartnicki v. Vopper, 532 U.S. 514, 526 (2001). The Court’s selection of a level of scrutiny is often thought to be as determinative of the outcome of the case as any weighing of particular interests. See Matthew D. Bunker, \textit{Justice and the Media: Reconciling Fair Trials and a Free Press} 31 (1997).
would need to make the threshold determination about the nature of the copyright regulation.

A. Sound Recording Complement as a Content-Based Restriction

If the regulation were content-based, then courts would apply a more restrictive, strict scrutiny test. Content-based regulations control speech because the government favors or disfavors the message. Content-based regulation is subject to the most stringent First Amendment test because courts are suspicious of viewpoint restrictive regulations in a society that prizes intellectual freedom. To prevail under a strict scrutiny analysis, the government must show that its regulation is (1) necessary to serve a compelling state interest and (2) is narrowly drawn to achieve that end. According to the Court, “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”

Restricting the number of songs played within a three-hour period could be deemed a content-based regulation. The restriction is triggered by the identity of the artist. The restriction limits the content that a webcaster may transmit because no more than three songs by an artist can be played within a three-hour period. The three songs per three-hour limitation may have a disproportionate effect on niche markets because the number of artists within the genre may be smaller. There may be a larger pool of songs and artists to choose from in the mainstream genres, such as classic rock, as opposed to niche or emerging genres. The songs and artists of traditional musical styles are favored by this regulation because finding a sufficient supply of songs to fill the three-hour playlist may not be a challenge. However, less well-known or favored musical formats may struggle to find enough songs and artists to complete a three-hour playlist before a fourth song by an artist can be played.

A court could also find that the statutory license is content-based because it, on its face, favors one media over another. The regulation does not favor one webcaster over another; rather it favors traditional broadcasters over webcasters where the barriers to entry are much

lower. The regulation favors one messenger over another. Favoring broadcast stations by imposing an additional fee on Internet radio stations amounts to imposing a special tax on Web radio.

Applying strict scrutiny a court may find that the sound recording complement does not serve a compelling governmental interest and is not narrowly tailored. There is no legislative record indicating a governmental interest in limiting webcasters’ playlist options based on the identity of the artist. The legislative history evinces no compelling government interest; on the contrary, it demonstrates a strong lobbying interest in the sound recording complement. This regulation does not serve a compelling governmental interest and it places a unique and overly intrusive burden on a new medium.

The sound recording complement may also fail strict scrutiny analysis because it is not narrowly tailored. The evil sought to be avoided, namely lost profits, is not furthered by this regulation since webcasters are obligated to pay a license fee. If webcasters pay both music copyright holder’s license fees, then further restricting webcasters’ playlist options to the point that it interferes with their ability to satisfy consumer listening appetites and earn a profit undermines the government purpose. If a webcaster cannot play as many songs as she wants, then this interferes with the webcaster’s ability to maintain user traffic to the site and thereby diminishing advertisers interest in advertising on the Web site.

The sound recording complement impermissibly intrudes on the editorial function of webcasters. Webcasters are unnecessarily restricted in content of their transmissions. If a court applied a content-based strict scrutiny analysis to the sound recording complement it could be struck down as unconstitutional.

B. Sound Recording Complement as a Content-Neutral Restriction

On the other hand, a court could find that the sound recording complement embodied in the Copyright Act is content-neutral. Content-neutral restrictions must be made without regard or

134. One could also, but I will not here, make an equal protection challenge on the grounds that broadcasters and webcasters are treated dissimilarly and that the fundamental right of freedom of expression is at issue. See U.S. CONST. amend. XIV § 1.


136. A substantive due process argument is beyond the scope of this article. See U.S. CONST. amend. XIV § 1.
“reference to the content of the regulated speech.” According to the Court, “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.” A prohibition, such as restrictions on sound trucks from emitting loud and raucous noise in residential neighborhoods, is permissible according to the Court, “if it applies equally to music, political speech, and advertising.” The sound recording complement applies equally to all artists and all genre of music; classical jazz is treated no differently from heavy metal. Therefore, a court may apply a content-neutral, intermediate scrutiny.

Content-neutral regulations are analyzed under a three-part test established by United States v. O’Brien. The government must show that (1) the regulation “furthers an important or substantial governmental interest,” (2) “the governmental interest is unrelated to the suppression of free expression,” and (3) the “incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” The Court also instructed, “[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” There must also be ample alternative channels available for communicating the information.

In applying intermediate scrutiny, a court may find that the statutory history of the copyright acts lack any evidence that the economic health of copyright owners of sound recordings were in genuine jeopardy and in need of the protections afforded by the statutory license and royalty fee. The Court applied this level content-neutral, intermediate scrutiny to the must-carry regulations of cable operators in the 1994 Turner Broadcasting System, Inc. v. FCC case. This content-neutral test has teeth since it requires a factual showing of economic necessity on behalf of those benefited by the regulation. A court is likely to find that there is no economic

139. City of Cincinnati, 507 U.S. at 428 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).
145. See Netanel, supra note 77, at 56-58.
evidence that limiting the sound recording complement to three songs per three hours benefits the recipients of sound recording fees, i.e., the record labels.146

Digital streams of compressed audio over the Web are not as good as original CD quality.147 And since streaming is not a “perfect copy,” not like peer-to-peer file sharing,148 a court may find that webcasting is unlikely to take away from record company sales.149 So long as the artist is compensated by the royalty fee, and the webcast does not directly compete with the sales of original recordings, the government has no substantial interest in limiting a webcasters First Amendment right to free speech through music.

The statutory license’s restrictive sound recording complement places an unacceptably heavy burden on protected speech in light of the fact that copyright owners of both sound recording and musical compositions are compensated under the new royalty provisions in the Copyright Act. The sound recording complement effectively suppresses a large amount of speech, in the form of music, which listeners have a constitutional right to receive as expressive communication. The restriction on this speech is unacceptable because the government does not have a substantial interest in restricting webcasters’ expression.

The Constitution authorizes Congress to grant copyrights and patents in order “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”150 The Court has explained that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the

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146. While record companies may point to a slump in CD sales, it is not clear that accessing music online is to blame. See Jim Hu, Music Sales Dip: Not Seen as Culprit, CNET NEWS.COM, April 16, 2002, at http://news.com.com/2100-1023-883761.html?tag=rn. John Borland, a staff writer for CNET, points to a May 2002 study in which roughly 34 percent of veteran file swappers reported spending more on music than they had before they started downloading files, whereas roughly 14 percent of heavy file traders said they now spent less on music. See John Borland, Study: File Sharing Boosts Music Sales, CNET NEWS.COM, May 3, 2002, at http://news.com.com/2100-1023-898813.html.


149. See Mieszkowski, supra note 147. Rusty Hodge, the general manager of the Internet-only radio station SomaFM explains that Webcasting, which uses compressed audio files, is different from peer-to-peer file sharing and should be treated the same as terrestrial broadcasting. Id.

conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.‘ 151 A court may find that there is no reasonable fit between the goal of creating new works of authorship and restricting the number of songs that a webcaster can play during a three-hour period.

The heightened level of scrutiny that demands a showing of economic need is appropriate because webcasters’ unique characteristics of the medium deserve heightened protection. 152 The barriers of entry are lower for webcasters than they are for traditional terrestrial broadcasters. Unlike the FCC’s regulation of the broadcast industry, no federal agency licenses webcasters. Additionally, little more is needed to webcast music than to listen to it, unlike the asymmetry between a radio station broadcaster and an owner of a radio.

Furthermore, a webcaster’s audience is global, rather than tied to the local area served by an over-the-air radio station. Consequently, webcasters can play to the niche audiences, rather than appealing to the average listener in the local area. 153 According to Jefferson Graham, a USA Today writer, “[u]nlike broadcast stations, which have tight playlists, the new medium of Net radio airs a greater variety of music and has become popular with fans of world music, bluegrass, jazz, blues, independent and alternative rock, and other genres rarely heard on radio.” 154

On a global scale there may be enough listeners for advertisers to support an array of formats. For terrestrial broadcasters, on the other

   The Internet allows both established providers of online music and new market entrants to deliver novel competitive music offerings that are better tailored to the users’ individual music desires than those available through traditional music distribution channels. Online music delivery also brings significant cost reductions and other economic efficiencies and significantly decreases geographical barriers to music distribution. The availability of more music at lower cost than ever would not be possible within the constraints of traditional music dissemination channels (e.g., FM radio and record shops) and also benefits consumers.

Id.

153. For example, SomaFM, based in San Francisco, offers an alternative to the mainstream, offline fare, with streams of ambient down-tempo electronica to about 20,000 listeners a day. See Mieszkowski, supra note 147.
hand, if there are not enough listeners in the local area, then the will not be sufficient advertising revenue to support the niche format. Terrestrial broadcasters must appeal to the lowest common denominator in the local area to generate enough advertising revenue. However, webcasters are not constrained by local audience predilections, therefore they may target the smaller niche markets on a global scale.

The sound recording complement may also fail intermediate scrutiny since ample alternative channels for communicating the music are unavailable. If a small webcaster does not qualify for the statutory license, there is no viable alternative for obtaining copyright permission at a reasonable price. It may be too onerous and burdensome to negotiate permission and price with sound recording copyright owners to broadcast songs, therefore this may not a realistic alternative for webcasters.

A reoccurring mantra in First Amendment jurisprudence is that the government regulations should not burden speech more than necessary. However, this copyright regulation threatens to squeeze small businesses and niche voices out of the marketplace. The Court has noted, “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.” The Court has also stated, “[a] licensing system need not effect total suppression in order to

156. Internet Radio does not offer only music, it also offers a vehicle for the disenfranchised to communicate to the world. See, e.g., Don Rojas, Keeping Diversity in the Media, 33 ESSENCE 146, 146 (2002).

As Black media professionals struggle to build a strong presence within the mainstream, let us embrace the opportunities and potential of new information technology and the Internet to nourish Black opinion and vision. Let’s use the Internet to project our independent, fearless voices to the world. With its inherent interactivity, new media can empower Black communities throughout the country in a way that traditional media cannot. Let’s take the Gil Nobles and put them on the Internet so that the world can hear their voices.

This is part of the legacy that our ancestors bestowed on us: Whenever established forums have shut out our message, we have found other ways to communicate—be it with drums, coded songs or the imagery in quilts or from the pulpit. Internet radio may be our twenty-first century equivalent.

Id.
create a prior restraint.\textsuperscript{158} The sound recording performance complement limitations for qualifying for a statutory license webcasters do not completely ban the streaming of an entire hour filled with songs by a single artist. However, the burden on the webcaster to negotiate price and permission has the effect of an unconstitutional restraint on freedom of expression.

The marketplace of ideas\textsuperscript{159} needs good music, not corporate music.\textsuperscript{160} For example, Adam Baer, a writer for the New York Sun, observes, “Webcasting opera would help the genre reach a young, global audience in a way radio never could.”\textsuperscript{161} For the marketplace of ideas in music to flourish, the new medium of webcasting should be given wide protection. In \textit{Reno v. ACLU}, the Court recently explained that “[a]s a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”\textsuperscript{162} The First Amendment should protect webcasters’ freedom of expression in the form of musical preferences and playlists without unnecessary restrictions.

V. Conclusion

So what does this mean for Becca, the aspiring webcaster? Until the sound recording complement, which restricts the number of songs by an artist that can be played in a three hour period, is successfully

\textsuperscript{158} Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 n.8 (1975). The Court explained, “the evils attendant on prior restraint ‘are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.’” \textit{Id.}.

\textsuperscript{159} Supreme Court Justice Oliver Wendell Holmes introduced the marketplace doctrine into U.S. jurisprudence when he noted, “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\textsuperscript{160} Because of the new royalty scheme and accompanying restrictions “[t]he only [companies] who’ll be able to continue are the conglomerates. For the consumer, that means less choice and (less) exposure to new acts. It’s bad for consumers, bad for artists and bad for the labels,” according to Peter Csathy, president of media software company MusicMatch, which runs the subscription RadioMX service. Graham, \textit{supra} note 154. If webcasters are not allowed to flourish, Web radio may “walk the same dreary path of corporate consolidation as commercial FM.” See Pegoraro, \textit{supra} note 135.


challenged in a court or repealed by Congress it will unduly restrict her First Amendment right to free expression. The full advantages of this new medium to target and appeal to minority interests will continue to be limited until the sound recording complement is eliminated. The Supreme Court has long recognized that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” While the Court was speaking of newspapers, this protected right of dissemination should be no less true for webcasters.