

DOWNLOAD, STREAM, OR SOMEWHERE IN BETWEEN: THE POTENTIAL FOR LEGAL MUSIC USE IN PODCASTING

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ABSTRACT

Podcasting is an increasingly popular new digital technology with the potential to be a great conduit of expression. Currently, the use of music is limited in podcasting due in large part to uncertainty as to what rights must be licensed before copyrighted music can be used legitimately. This iBrief examines what legal rights are implicated by podcasting by analyzing U.S. copyright law and comparing related technologies. This iBrief concludes that onerous licensing requirements are unnecessary, and for podcasting to realize its potential, a simple licensing framework must be established.

INTRODUCTION

¶1 Podcasting is a rapidly developing new medium for digital media production that brings the creation and distribution of information to anyone with a computer, a microphone, and an Internet connection. Podcasting involves recording an audio or video program into a digital media file, which is then made available on the Internet. When an individual subscribes to a podcast the content is transmitted to the subscriber's computer once it is available. However, unlike radio listeners or television viewers, podcast subscribers choose when and where they listen to or view the program on their computer or MP3 player.² This listener control has played a large part in the early success of podcasting. However, there is still a great deal of unrealized potential in the medium.

¶2 Although a number of mainstream media providers such as NPR and ABC News have begun to distribute podcasts,³ most content made available via podcasting currently consists of commentary by independent

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² See Wikipedia.org, Podcasting, <http://en.wikipedia.org/wiki/Podcasting> (last visited Mar. 10, 2006).

³ See NPR Podcasting Directory, <http://www.npr.org/podcasts>; ABC News Podcasting Homepage, <http://abcnews.go.com/Technology/Podcasting/>.

creators,⁴ making a podcast a kind of audio blog or downloadable talk radio show. Many podcasters are looking for ways to expand the medium, though. Specifically, there are many who wish to add music to their programming without incurring expensive licensing fees.⁵ However, media producers are wary of the consequences of allowing music to be freely included in podcasts,⁶ just as they were wary of prior technological advances such as peer-to-peer file sharing, the Internet, and even the VCR.⁷ They worry that music contained in podcasts could be easily separated from the file and damage the market for their content.⁸ Thus, the future of music in podcasts depends on striking a balance between podcasters' desires to use copyrighted music and music producers' rights to be compensated for such a use. It must be determined whether an appropriate balance can be achieved under current content licensing frameworks, since podcasting is arguably of a different character than any other form of media distribution currently regulated.

¶3 Including musical works in a digital transmission implicates a number of exclusive rights under the U.S. Copyright Act.⁹ Licensing systems have developed around many of these rights to facilitate the distribution of royalties and generally ease the licensing process.¹⁰ However, with many different rights over the same works, it is often unclear which clearances are required to make legitimate uses of copyrighted work, and the relative novelty of podcasting makes this uncertainty increasingly apparent. This iBrief examines possible frameworks for a system that will allow media producers to be compensated for the use of their work while ensuring that podcasters are able to express themselves through music. To develop this framework, this iBrief will look to other established systems for the distribution and licensing of digital media and will compare these models to the new case of podcasting. It concludes that while comparisons

⁴ John Borland, *Hopes for Legal Music Podcasts Rise*, CNET NEWS.COM, June 16, 2005, http://news.com.com/2102-1027_3-5749988.html.

⁵ *Id.*; see also Bret Fausett, *How to Podcast RIAA Music Under License*, LEXTEXT, Jan. 4, 2005, <http://blog.lextext.com/blog/archives/2005/1/4/225172.html>.

⁶ Borland, *supra* note 4.

⁷ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (peer-to-peer file sharing); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984) (VCRs).

⁸ Borland, *supra* note 4.

⁹ Copyright Act of 1976, 17 U.S.C. §§ 101–115 (2000).

¹⁰ See, e.g., Harry Fox Agency, License Home, <http://www.harryfox.com/public/licenseHome.jsp> (Last visited Mar. 10, 2006) (statutory licensing scheme for mechanical licenses); SoundExchange, *Licensing 101*, <http://www.soundexchange.com/licensing101.html> (last visited Mar. 10, 2006) (statutory licensing scheme for digital performance license).

may be drawn to music downloads, radio, and webcasting, the extent of clearances required for the licensed use of copyrighted works in podcasts is still unclear. Therefore, this iBrief will also synthesize an equitable rule that will best serve the interests of all parties involved.

I. COPYRIGHT IN MUSIC

¶4 Before a comparison can be made between the licensing of musical works in existing frameworks and the potential framework for podcasting, it is important to understand the various rights associated with the use of a musical work. There are a number of exclusive rights granted to an author of a creative work, which are enumerated in § 106 of the Copyright Act of 1976.¹¹ Of the rights laid out in this section, the ones that apply to musical works are (1) the right “to reproduce the copyrighted work in copies or phonorecords,” (2) the right “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,” (3) the right “to perform the copyrighted work publicly,” and (4) the right “to perform the copyrighted work publicly by means of a digital audio transmission.”¹² Each of these rights is licensed separately and under different licensing structures, and thus the applicability of each right must likewise be determined individually.

¶5 Further, there are rights in two different aspects of a given piece of recorded music. There is a right in the musical composition itself, which includes the notes, lyrics, and arrangement of a musical work. This copyright vests in the songwriters, composers, and publishers of a song. Second, there is a right in a sound recording of a musical work. This copyright belongs to the recording studio or artist that records a performance of a song. The combination of the rights enumerated under the Copyright Act and the two types of copyrights in a musical work results in four separate licenses governing different aspects of the use of a musical work.

¶6 First is the “master use license,” which is the right to reproduce a sound recording of a copyrighted work.¹³ This type of license is often referred to as a voluntary or direct license since it must be negotiated directly with the copyright holder.¹⁴ Such a license poses a potential problem for those wishing to distribute the works of another because the

¹¹ 17 U.S.C. § 106.

¹² *Id.*

¹³ Sheri Crofts et al., *Podcasting: A New Technology In Search Of Viable Business Models*, 10 FIRST MONDAY (2005), http://www.firstmonday.org/issues/issue10_9/crofts/.

¹⁴ Recording Industry Association of America, *Voluntary vs. Statutory Licensing*, http://www.riaa.com/issues/licensing/vol_stat.asp (last visited Mar. 10, 2006).

decision and the power to grant the license rest with the copyright holder, along with the fee to be charged for the use. Thus, when dealing with copyright owners who wish to restrict how their works are used, the process may be uncertain and expensive.

¶7 Second is the right to distribute copies of the musical composition in a copyrighted work, also known as a mechanical use right. Unlike the master use license, this right is covered by a compulsory license under the Copyright Act rather than a voluntary license, meaning anyone who pays the statutory fee may distribute copies of the work to the public under the provisions of the statute.¹⁵ The licensing of this right is subject to a statutory rate and is thus fairly easy to manage.¹⁶ The Harry Fox Agency was established “to license, collect, and distribute royalties on behalf of musical copyright owners,”¹⁷ thus relieving the copyright owners from having to deal with the licensing process themselves. These “mechanical licenses” arranged through the Harry Fox Agency allow licensees to use copyrighted works on CDs, records, tapes, and certain digital configurations,¹⁸ including digital downloads.¹⁹

¶8 Third is the right to perform a copyrighted work publicly. This right applies to the underlying musical composition and is implicated whenever a rendition of the work is performed. Due to the immense number of copyright holders in musical works and the absence of a compulsory licensing provision for performance rights, a handful of performance rights organizations have developed as convenient intermediaries between those wishing to have their music heard and those wishing to make use of the music. In the United States, the organizations that handle the bulk of performance rights licensing are the American Society of Composers, Authors, and Publishers (ASCAP),²⁰ Broadcast

¹⁵ 17 U.S.C. § 115.

¹⁶ For 2004–2005, the statutory mechanical royalty rate is 8.50 cents for songs five minutes or shorter or 1.65 cents per minute or fraction thereof for songs over five minutes, and is scheduled to increase for 2006. See Harry Fox Agency, *Statutory Royalty Rates*, <http://www.harryfox.com/public/licenseeRateCurrent.jsp> (last visited Mar. 10, 2006).

¹⁷ Harry Fox Agency, *Mechanical Licensing*, <http://www.harryfox.com/public/licenseeServicesMechanical.jsp> (last visited Mar. 10, 2006).

¹⁸ *Id.*

¹⁹ Harry Fox Agency, *Digital Licensing*, <http://www.harryfox.com/public/licenseeServicesDigital.jsp> (last visited Mar. 10, 2005).

²⁰ The American Society of Composers, Authors and Publishers, <http://www.ascap.com> (last visited Mar. 10, 2006).

Music, Inc. (BMI),²¹ and SESAC.²² These performance rights organizations issue blanket licenses that provide broadcasters the right to “perform” the copyrighted works.²³

¶9 Finally, there is the right to perform a copyrighted work publicly by means of digital audio transmission, a right which was added to the Copyright Act by the Digital Performance Right in Sound Recordings Act of 1995.²⁴ Like the mechanical use rights, the digital performance right is governed by a statutory licensing scheme under the Copyright Act.²⁵ And just like the statutory licensing scheme for mechanical licenses, a licensing organization, SoundExchange in this case, was created to collect and distribute the statutory licensing fees.²⁶

¶10 The rights granted by the Copyright Act, however, are not unlimited since copyright is a state-sponsored monopoly and the framers of the Constitution did not want intellectual property rights to interfere with other interests more than is necessary. Thus, copyright owners’ right to control the uses of their works as detailed above does not apply when the use of the work is determined to be outside the reach of copyright law. There are a number of examples of such “fair uses” enumerated in the Copyright Act, such as news reporting or classroom use.²⁷ In addition, the Copyright Act provides that other uses beyond the enumerated fair uses may likewise be considered fair upon a consideration of a number of factors including but not limited to the following: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the copyrighted work used, and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁸ The recognition of fair uses provides a check against unreasonable extensions of the rights granted by the Copyright Act.²⁹

¶11 For each technology that makes use of musical works, it must be determined what rights are affected and thus what licenses must be obtained

²¹ BMI.com: Home for Songwriters, Composers, & Publishers, <http://www.bmi.com> (last visited Mar. 10, 2006).

²² Welcome to SESAC, <http://www.sesac.com> (last visited mar. 10, 2006).

²³ A “performance” can include a number of things from a radio or television broadcast, streaming over the internet, or a live band’s rendition of a song. *See* Business Using Music: BMI and Performing Rights, <http://www.bmi.com/licensing/license.asp> (last visited Mar. 10, 2006).

²⁴ Pub. L. No. 104-39, 2, 109 Stat. 336 (1995).

²⁵ Copyright Act of 1976, 17 U.S.C. § 114(d)(2) (2000).

²⁶ SoundExchange—Artists Home, http://www.soundexchange.com/artist_home.html (last visited Oct. 31, 2005).

²⁷ 17 U.S.C. § 107.

²⁸ *Id.*

²⁹ *See* Eldred v. Ashcroft, 537 U.S. 186, 197 (2003).

to make legal use of the works. The first technology that will be examined is digital music downloading.

II. DOWNLOADING MUSIC

¶12 The MP3 format used for podcasts makes it easy to compare the technology to the download of digital music files. The explosion of peer-to-peer file sharing technology shows the ease and convenience of transferring compressed music files over the Internet.³⁰ And while the first incarnations of the peer-to-peer networks developed under a cloud of piracy,³¹ a number of companies have developed websites and programs more recently to allow the licensed distribution of music files through a similar medium, including iPod developer Apple with its iTunes software and retail superpower Wal-Mart.³² These pay-per-download services attempt to supplant free file sharing networks to allow the online flow of copyrighted music while ensuring that the copyright holders of the music downloaded are compensated for the material taken.

A. Licensing Framework

¶13 Of the bundle of rights conferred by the Copyright Act, the ones of particular relevance to music downloading are the exclusive right to reproduce the copyrighted work³³ and the right to distribute copies of the copyrighted work to the public.³⁴ Due to the dynamics of the music industry, these rights are often assigned to music publishers and record companies, which then license the rights individually under a variety of frameworks.³⁵

¶14 First, the right to reproduce the copyrighted work must be negotiated directly with the copyright owner. Copyright owners are under no obligation to grant a license to reproduce their work, which means arranging this right can be expensive. Fortunately, the second right implicated by music downloads—the right to distribute copies of the copyrighted musical works—is governed by the statutory mechanical

³⁰ See Wikipedia.org, Napster, <http://en.wikipedia.org/wiki/Napster> (Last visited Feb. 27, 2006).

³¹ See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2782 (2005); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002).

³² See Apple—iPod + iTunes, <http://www.apple.com/itunes/> (last visited Mar. 10, 2006); Wal-Mart.com—Music Downloads, <http://musicdownloads.walmart.com/> (last visited Mar. 10, 2006).

³³ Copyright Act of 1976, 17 U.S.C. § 106(1) (2000).

³⁴ 17 U.S.C. § 106(3).

³⁵ Michelle Spaulding, *Copyright Protection for Music on the Move*, BERKMAN PUBLICATION SERIES (1999), <http://cyber.law.harvard.edu/mp3/>.

licensing scheme managed by the Harry Fox Agency. If the user pays for the mechanical license and is able to negotiate the reproduction right for the sound recording, the user can distribute digital copies of a copyrighted musical work.

B. Differences Between Podcasting and Music Downloading

¶15 Because podcasts are downloaded to the user's computer or MP3 player, it might seem logical to require podcasters using copyrighted content in their programming to follow the licensing procedure as if they were offering the musical works themselves for download. Despite the obvious similarities to music downloading, there are also some differences that render it inconsistent to require podcasters to fall under the application of the music downloading licensing model. While on a technical level, podcasts are distributed as files of the same kind as those distributed through iTunes, the format of the programming is certainly of a different character. The growth of podcasting has not resulted from an attempt to find new methods of music distribution; rather podcasts act as a conduit for discussion on a variety of topics. And while some of these discussions would benefit from the ability to incorporate copyrighted works for theme songs, background music, or other such uses, podcasting is not considered a substitute for music purchases.

¶16 However, despite this difference in the content format of podcasts and music downloads, the character of the use only comes into consideration if podcasting is justified under the fair use provisions of the copyright statute.³⁶ Generally, the intended uses of music in podcasting include background and theme music, or basic performance, neither of which could reasonably be considered criticism, comment, research, or any other commonly accepted fair use. Moreover, the use of music in podcasting will often be of a commercial nature, bringing the use even more squarely within the dominion of the Copyright Act. With no apparent exception to protection on fair use grounds, the fact that actual copies of the copyrighted works are made with each download of a podcast indicates that both a mechanical license and the master use license may be required for the use of copyrighted music in podcasts.

III. BROADCASTING

¶17 Although similarities exist between music downloading and podcasting, the inquiry does not end with the assignment of mechanical and master use licenses. At the other end of the music distribution spectrum is the idea that the use of copyrighted music in podcasts should be classified similarly to radio broadcasting rather than music downloading, a

³⁶ 17 U.S.C. § 107.

comparison that is especially apparent in the case of radio personalities wishing to make rebroadcasts of their shows available as a podcast.³⁷ Beyond the similarity in the type of content, there are also technical similarities between broadcasting and podcasting that are not included in the downloading inquiry.

A. Public Performance Licensing

¶18 Since no copy of the sound recording or the copyrighted work is transmitted in a radio broadcast, the mechanical and master use licenses are not required for radio. However, the bundle of rights under the Copyright Act includes the right to perform the copyrighted work publicly.³⁸ The public performance right covers any type of performance, from using a CD player at a restaurant to incorporating music into a television broadcast or website.³⁹ Obtaining a license from the performance rights organizations (ASCAP, BMI, and SESAC) enables a user to perform the copyrighted works, no matter what form the performance may take. In the context of radio broadcasts, this is the right to play the songs on the air.

¶19 Generally, the price paid for the public performance license depends on both the format of the broadcast (news, talk, music, etc.) and the commercial nature of the broadcaster.⁴⁰ For example, noncommercial radio stations pay an annual fee determined by the Copyright Office, news and talk stations often pay a per program license that changes based on the amount of broadcast that contains music, and commercial radio stations generally pay a percentage of their annual revenue for a blanket license that covers all uses of music.⁴¹ Thus, the burden imposed by this right varies somewhat based upon the character of the use as well as the user's ability to pay.

B. Differences Between Podcasting and Broadcasting

¶20 Nevertheless, there are too many differences between radio broadcasting and podcasting to require only that the performance of the work be licensed. The relationship between radio broadcasting and podcasting is the opposite of the relationship between music downloading and podcasting. While the character of the programming is similar, the technical form of the distribution is very different. Despite the differences

³⁷ See, e.g., Z100—Podcasting, <http://www.z100.com/cc-common/podcast.html> (last visited Mar. 10, 2006).

³⁸ 17 U.S.C. § 106(4).

³⁹ See BMI Licensing, <http://www.bmi.com/licensing/> (last visited Mar. 10, 2006) (providing list of media uses licensed by BMI).

⁴⁰ ASCAP Radio Frequently Asked Questions, <http://www.ascap.com/licensing/radio/radiofaq.html> (last visited Mar. 10, 2006)

⁴¹ *Id.*

in the distribution, though, it nonetheless appears that the performance right affected by broadcasting may also be affected by podcasting. Performance rights organizations provide licenses for podcasting, suggesting that the performance rights they manage apply to the technology.⁴² Whether these organizations have a legitimate claim to license a performance right in podcasting will be addressed below.

IV. INTERNET BROADCAST

¶21 Since podcasting seems to be of a similar character to radio, perhaps looking next to webcasting, its digital cousin, may provide another step towards a functional framework for licensing copyrighted music in podcasts.

A. Non-interactive Webcasting

¶22 Non-interactive webcasting, or the simple streaming of content,⁴³ is quite analogous to radio broadcasting, and thus much of the preceding analysis applies. In fact, a number of traditional radio stations simulcast their broadcasts over the Internet.⁴⁴ However, the mere fact that the material is streamed over the Internet rather than over the airwaves brings yet another stick from the bundle of rights under the Copyright Act into play—the right to perform the copyrighted work publicly by means of a digital audio transmission.⁴⁵ And while this is yet another obstacle in the path to legitimate use of a work, this license is simple to obtain since, like the mechanical use rights, the digital performance right is governed by a statutory licensing scheme.⁴⁶

⁴² See ASCAP Internet License Agreements, <http://www.ascap.com/weblicense/> (last visited Mar. 10, 2006) (stating that downloads of individual songs or albums require a “Interactive 2.0” license); BMI Podcast License, <http://www.bmi.com/licensing/podcasting/index.asp> (last visited Mar. 10, 2006).

⁴³ “Streaming” is used most often to describe the method for delivering content over the Internet where the content may be heard or viewed, but not downloaded for later playback. For a further description, see Wikipedia.org, Streaming Media, http://en.wikipedia.org/wiki/Streaming_media (last visited Mar. 10, 2006).

⁴⁴ See, e.g., Z100, <http://www.z100.com/main.html> (last visited Mar. 10, 2006) (allowing users to stream the current broadcast); WCPE—Listen Over the Internet, <http://theclassicalstation.org/internet.shtml> (last visited Mar. 10, 2006) (offering a variety of formats for users to listen to the radio broadcast over the internet).

⁴⁵ Copyright Act of 1976, 17 U.S.C. § 106(6) (2000).

⁴⁶ SoundExchange—Licensing 101, <http://www.soundexchange.com/licensing101.html> (last visited Mar. 10, 2006).

B. Interactive Webcasting

¶23 In contrast to non-interactive webcasting, interactive webcasting is more like a digital jukebox, allowing users to specifically request what content they want to hear. The on-demand nature of interactive webcasting changes much of the analysis and brings many of the same rights connected to music downloading back into play. As such, interactive webcasters need to obtain mechanical licenses from the record label or the Harry Fox Agency as well as master use licenses from the individual record labels. Additionally, since the content is still streamed to the user, the performance rights must be licensed to obtain both the general public performance license and the digital audio transmission license. However, the statutory license available for non-interactive webcasts through SoundExchange is not available for interactive webcasts.⁴⁷ The digital audio transmission license must therefore be directly negotiated with the copyright owner, raising the same problems of uncertainty and cost inherent in any voluntary licensing agreement.⁴⁸

C. Differences Between Podcasting and Webcasting

¶24 Despite the fact that podcasts are distributed digitally over the internet like a webcast rather than broadcast over the airwaves like terrestrial radio, the ways in which podcasting differ from broadcast radio must also be considered for webcasting. Although the content in a podcast may be similar to a non-interactive webcast, the content is delivered differently. Further, while interactive webcasting may fall somewhere between radio and music downloading, it is different from podcasting because podcasting is not an “interactive service” under the meaning of the Copyright Act:

An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.⁴⁹

Since the user does not provide input regarding the content of a podcast, the inclusion of a musical work is not “selected by or on behalf of the recipient,” and thus a podcast should not be considered interactive. The user’s only input is the decision to download the podcast. Further, since

⁴⁷ *Id.*

⁴⁸ Recording Industry Association of America—Voluntary vs. Statutory Licensing, http://www.riaa.com/issues/licensing/vol_stat.asp (last visited Mar. 10, 2006).

⁴⁹ 17 U.S.C. § 114(j)(7).

podcasts are designed to be distributed automatically to users on a subscription basis, even that level of input is arguably absent.

¶25 Although none of these frameworks adequately cover every aspect of podcasting, the need for licensing of the digital audio performance right from the webcasting context may also apply to podcasting.

V. PODCASTING

¶26 The preceding sections of this iBrief have laid out the ways in which each music distribution method discussed provide for the licensing of protected content, and podcasting shares characteristics of each method of distribution. With the similarities to all of these technologies, all of the rights affected by the other technologies could be affected by podcasting, thus requiring every license.

¶27 First, since a fixed (albeit temporary) copy is made on the recipient's computer or MP3 player, a mechanical license could be required.⁵⁰ Second, while not indisputable, it is likely that podcasting may fall under the definition of "digital downloads" so as to require a master use license from the copyright owner.⁵¹ Third, the performance right may also be affected. According to ASCAP, "performance" includes the downloading of sound recordings,⁵² and each performance rights organization offers licenses for music downloads or even for podcasting specifically.⁵³ And while BMI acknowledges that the download of full-length recordings may not fall within the digital performance right, a transmission constitutes a public performance in a streamed or temporary download.⁵⁴ From the definition of "performance" in § 101, it is uncertain whether downloads are considered performances: "[T]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process."⁵⁵ The performance rights organizations claim that

⁵⁰ Harry Fox Agency, *Digital Licensing*, <http://www.harryfox.com/public/licenseeServicesDigital.jsp> (last visited Mar. 10, 2006).

⁵¹ Recording Industry Association of America—Voluntary vs. Statutory Licensing, http://www.riaa.com/issues/licensing/vol_stat.asp (last visited Mar. 10, 2006).

⁵² Spaulding, *supra* note 35.

⁵³ See ASCAP Internet License Agreements, <http://www.ascap.com/weblicense/> (stating that downloads of individual songs or albums require a "Interactive 2.0" license); BMI Podcasting License, <http://www.bmi.com/licensing/podcasting/index.asp> (last visited Mar. 10, 2006).

⁵⁴ BMI Licensing—Webcasters: Web Sites FAQ, <http://www.bmi.com/licensing/webcaster/webans2.asp#Are19> (last visited Mar. 10, 2006).

⁵⁵ Copyright Act of 1976, 17 U.S.C. § 101 (2000).

the Digital Performance Right in Sound Recordings Act of 1995⁵⁶ rendered all “digital transmissions” performances under the meaning of §101.⁵⁷ If a digital transmission is indeed a performance, the digital media transmission performance right would need to be licensed through the copyright holder (since SoundExchange does not cover podcasting yet), and the performance right in the musical work could be licensed from ASCAP, BMI, or SESAC.

¶28 However, the decision to require such a comprehensive licensing scheme based on the similarities to other technologies is problematic. None of the existing licensing systems perfectly fit the issues presented by podcasting. Thus, despite the similarities to other frameworks, a rigid application of the copyright law to this technology seems overly restrictive. First, although a digital copy is downloaded, the content in a podcast is not the kind of material that should be governed by the reproduction and distribution rights. One application of the fair use provision of the Copyright Act may support this impression. Second, it is not certain that the downloading of a file should be considered a performance, and there is a vibrant debate over the application of the public performance rights to downloads generally.⁵⁸ Finally, the rigid application of copyright is often based on a fear of copyright owners that unlicensed uses will supplant licensed ones and will thus diminish the market for their works.⁵⁹ Perhaps a modification to the technology would help to assuage these fears and allow copyright owners to relent on their insistence on pervasive licensing requirements.

A. *Time-Shifting Content as Fair Use*

¶29 The primary difference between podcasting and digital music downloading is the permanency of the download; unlike the copy of the latest pop song or favorite rock anthem that a user will keep and play repeatedly, podcasts do not generally have much replay value. Much as television viewers record a program to watch later, it is likely that subscribers to podcasts will generally listen to the programs once and then delete them. The one-time-use nature of podcasting draws parallels to the analysis of time-shifting of broadcast television in the landmark intellectual property case *Sony v. Universal City Studios*.⁶⁰ The *Sony* court held that time-shifting a television broadcast—recording the broadcast to watch at a

⁵⁶ Pub. L. No. 104-39, 2, 109 Stat. 336 (1995).

⁵⁷ Spaulding, *supra* note 35.

⁵⁸ Compare Rain: Radio and Internet Newsletter, <http://www.kurthanson.com/archive/news/050605/index.asp> (last visited Mar. 10, 2006), with A and B’s of Podcasting (Too Early for C’s), <http://www.collegebroadcasters.org/podcast.shtml> (last visited Mar. 10, 2006).

⁵⁹ Borland, *supra* note 4.

⁶⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984).

later time and then deleting it—was considered a fair use and thus not a violation of copyright law.⁶¹ Podcasting can be viewed in the same light; subscribing to a podcast is not much different from setting a VCR to record a program. After finding the time to enjoy the program, the user deletes it. The same concerns that are raised in the podcasting debate were in reference to the VCR; a physical copy is being made, and thus the reproduction right could logically be affected.⁶² And yet, the character of the use was enough for the Supreme Court to find time-shifting to be a fair use. Of course, the purely private, non-commercial nature of VCR time-shifting and the fact that copyright holders were compensated for the original broadcast of their content were also important factors in the determination of fair use. Thus, the wide commercial applicability of podcasting may dilute the relevance of the *Sony* decision. Even so, the temporary character of the use in podcasting still may carry some significance in weighing the applicability of the various copyrights in the content used.

¶30 The analogy between VCRs and podcasts is becoming even stronger with the advent of a number of products that allow time-shifting of musical content. The radio SHARK, a commercial consumer electronic device developed by Griffin Technology, allows users to record music and radio programs and converts the content to MP3 files for later use.⁶³ In addition, XM, a provider of satellite radio broadcasting services, plans to roll out its own updated receiver that will allow users to pause and rewind the broadcasts.⁶⁴ The development of these types of commercial products shows that time-shifting occurs in music just as in television, and thus the use of podcasting to listen to content at a later time may be considered a fair use of the works contained therein.

B. Public Performance

¶31 In addition to the fair use argument, some assert that a podcast does not involve a public performance at all and therefore should not implicate

⁶¹ *Id.* at 455.

⁶² *Id.* at 433.

⁶³ Stephanie Watson, *How Podcasting Works*, HOWSTUFFWORKS.COM, <http://computer.howstuffworks.com/podcasting.htm> (last visited Mar. 10, 2006); see also Radio SHARK—Griffin Technology, <http://www.griffintechnology.com/products/radioshark/index.php> (last visited Mar. 10, 2006).

⁶⁴ However, the service provider was concerned over a computer program that allows users to download the service's digital satellite broadcasts to a home computer. Kenneth Li, *Homegrown Satellite Radio Software Draws XM Fire*, USA TODAY, Sept. 24, 2004, available at http://usatoday.com/tech/news/techpolicy/2004-08-24-xmradio-timeshift_x.htm.

the performance rights licensed by the performance rights organizations.⁶⁵ Despite the claims of the performing rights organizations that a digital transmission of a copyrighted work is a performance of that work,⁶⁶ the application of performance rights to this medium does not seem to fit. The definition of public performance found in the Copyright Act is not exactly clear on this question either:

To perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance or display of the work to a place . . . or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁶⁷

And while the statutory definition seems to cover transmissions, calling a file download a “performance” still seems incorrect. Since downloading a file does not play the work and any future performance is left to the discretion of the downloader and not the podcaster, no public performance is being made. The situation is analogous to the simple act of loaning a copy of a CD to a friend. Just as there is no public performance when someone physically passes a CD to a friend, there is no performance when a file containing music is transferred digitally.

C. *Digital Rights Management*

¶32 Just as content providers feared the use of peer-to-peer file sharing, content providers fear that music contained in podcasts will be stripped from the download and provide users with unlicensed digital copies of musical works much in the same way.⁶⁸ However, just as the content industry has acted to make music downloading legitimate, the same method could be used to prevent podcasts from being disassembled. The development of licensed music download programs such as iTunes was facilitated by the use of “digital rights management” (DRM): Music distribution programs such as iTunes and RealPlayer employ proprietary file formats that prevent users from modifying or sharing the content protected.⁶⁹ And while some are quick to point out the problems with the

⁶⁵ A and B’s of Podcasting (Too Early for C’s), <http://www.collegebroadcasters.org/podcast.shtml> (last visited Mar. 10, 2006). (responding to debate with the Radio and Internet Newsletter).

⁶⁶ ASCAP Internet Licensing: Frequently Asked Questions, <http://www.ascap.com/weblicense/webfaq.html> (last visited Mar. 10, 2006).

⁶⁷ Copyright Act of 1976, 17 U.S.C. § 101 (2000).

⁶⁸ Borland, *supra* note 4.

⁶⁹ See EFF: The Customer is Always Wrong, <http://www.eff.org/IP/DRM/guide/> (last visited Mar. 10, 2006).

use of DRM schemes,⁷⁰ such protection has helped copyright holders breathe more easily when it comes to allowing digital music downloads. A DRM scheme for podcasts that include copyrighted music could be used to prevent end users from extracting individual works from the aggregated sound file. This scheme would address the concern of some copyright owners that music included in podcasts could compete with album sales and licensed digital downloads just as peer-to-peer networks had. Thus, a requirement of DRM protection on podcasts would comfort copyright owners who fear that podcasting will become yet another conduit for piracy.

CONCLUSION

¶33 All of the uncertainty and confusion relating to this issue has created an unfortunate result: Many podcasters are simply not using music in their broadcasts. While the technology is gradually becoming more mainstream, a large portion of the podcasting community consists of individuals who simply want to be heard. Home podcasters of this sort generally do not have corporate sponsors and revenue streams to fund large-scale licensing programs, nor do they have the legal expertise to even understand which rights their use might be infringing. As a result, those who recognize the cost of licensing do not have the resources to incorporate music in their work, and many more simply are so afraid of the costs of violating copyrights that they refrain from using music at all.

¶34 To enable the inclusion of musical works in podcasting, there needs to be a framework for the licensing of copyrighted works. And while the above analysis shows that there are similarities to many existing frameworks, the different nature of podcasting precludes the simple application of another model. The examination of other technologies also shows justifications for requiring a license for every right in a musical work as well as reasons for requiring none. Regardless of any comparisons, the enumerated copyrights do not seem to fit the unique nature of the technology. And while it is uncertain how to apply the kind of quasi-reproduction and quasi-performance rights embodied in podcasting, there should be some way to reimburse the owners of both the copyright in the musical composition and that in the sound recording for the use of their work.

¶35 Thus, a licensing organization in the mold of ASCAP, BMI, SESAC, or SoundExchange should be created to manage the use of music in podcasting. The use of such an organization would streamline the licensing process by providing a way to acquire the right to use musical works while compensating creators, ideally at a rate that recognizes the

⁷⁰ Why DRM Sucks, http://www.info-mech.com/drm_flaws.html (last visited Mar. 10, 2006).

unique character of the medium as well as the economic limitations of most independent podcasters. Perhaps the use of DRM schemes will further enable the system to find a balance between the rights of the copyright owner and the public's desire to use the works.

¶36 The major media distributors will find a way to incorporate music into podcasting, even if they must license every right granted under the Copyright Act. But until the system for licensing works for podcasting becomes cheaper and easier, it is unlikely that music will find its way into unfunded independent podcasts any time soon. This result is unfortunate because music is a universal tool of communication, and limiting how it can be used in such an expressive medium (or eliminating its use entirely) cuts out a large portion of creative potential from podcasts.