Applicability of the Digital Performance Right in Sound Recordings Act of 1995

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I. INTRODUCTION

In today's interactive global market, digital transmissions of songs are implicating complicated copyright issues in a variety of situations. A subscription service sends out a constant stream of music by way of a genre specific channel, which is added to a subscriber's cable service. A movie producer sees the potential for market crossover by including a song clip on a movie's promotional Web site, which can be downloaded by the Web site's visitors. A record company desiring to distribute a band's cover version of another band's song may be interested in selling or making this single available for downloading over the Internet. Prior to late 1995, it would have been unclear exactly how or if current laws applied to these situations. Now, however, each of these scenarios is addressed by the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA," or "the Act").

Congress, by passing the DPRSRA, added a limited right of public performance to the list of exclusive rights enjoyed by sound recording

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copyright owners, and added to the situations where a compulsory license may be obtained. What Congress created is a forward-looking piece of legislation, tailored to fit a very narrow goal. Although it is certainly of limited application today, future implications for emerging technology are significant.

This Comment is a positive examination of the real world implications of the DPRSRA. Part I describes what led to the DPRSRA's enactment. Part II explains new rights and regulations added by the Act. Part III gives examples of the Act's application, using current digital transmission stories taken from the news. This section offers a blueprint to facilitate answering the question, "What do I need to do" as asked by a client who is thinking about becoming involved in the business of transmitting music digitally. Part IV analyzes several emerging technology issues in-depth, to show how the Act is being used currently and how it will be used in the future. This Comment concludes that while the scope of the Act is indeed limited, its implications are beginning to be seen even today, and will become much more significant in the future.[1]

II. BACKGROUND OF THE DPRSRA

A. *The State of Copyright Law Leading up to the Act*

Although Congress has been empowered to protect authors' rights from the beginning,[2] sound recordings were not granted federal copyright protection until the Copyright Act was amended in 1971.[3] When this occurred, the exclusive right of performance was intentionally *not* included as a right to be enjoyed by sound recording

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[1] It is important to note that this Comment analyzes only new rights created by the DPRSRA. Anyone seriously thinking about transmitting sound recordings digitally also needs to be aware of significant pre-DPRSRA rights, including motion picture licenses, music video licenses, and underlying musical works licenses. *See generally* AL KOHN & BOB KOHN, ON MUSIC LICENSING (2d ed. Supp. 1998) and MELVILLE B. NIMMER, NIMMER ON COPYRIGHT (1996).

[2] Congress has the power "to 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." U.S. CONST. art. I, § 8.

[3] *See* H.R. REP. NO. 104-274, at 11 (1995).

copyright owners.[4] The lack of a performance right for sound recordings became the subject of much controversy.[5] While the enactment of the Digital Performance Right in Sound Recordings Act seemingly would assuage the controversy by granting sound recording copyright holders a performance right for the first time, many feel that the Act does not go far enough.[6]

B. *What Motivated the Creation of the Act?*

Although a long-standing plea for the creation of a public performance right in sound recordings existed, it was not until 1995 that Congress created such a right. In so doing, Congress acknowledged that new digital technologies create both advantages and problems that were not previously contemplated.[7] As several commentators have noted, "digital technology allows an individual to transform the detailed information and expression contained within any work, whether visual or musical, into a sequence of bits (binary values of either 0 or 1) which can be stored as data in a computer."[8] Almost

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[4] *See id.* at 11 n.2 (stating that the Act in 1971 specified that the "exclusive rights of the owner of copyright in sound recordings are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under Sec. 106(4)").

[5] *See id.* at 10; *see also* Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. LAW REP. 3, 3-4 (1995).

[6] *See* Sobel, *supra* note 5, at 3-4; Les Watkins, *The Digital Performance Right in Sound Recordings Act of 1995: Delicate Negotiations, Inadequate Protection*, 20 COLUM.-VLA J.L.& ARTS 323 (1996). While this Comment recognizes that the controversy exists, it will not be explored in great depth herein. This Comment instead analyzes the DPRSRA from a positive rather than normative perspective to explore how this complicated piece of legislation will be applied in real world settings.

[7] *See, e.g.*, Andrew Hartman, *Don't Worry, Be Happy! Music Performance and Distribution on the Internet is Protected after the Digital Performance Right in Sound Recordings Act of 1995*, 7 DEPAUL-LCA J. ART & ENT. L. 37, 54 (1996) ("The Copyright Act has always lagged behind technology and copying trends since its enactment in 1909.").

[8] Heather D. Rafter & William S. Coats, *From Sampling of Artistic Works to Music Distribution on the Internet: The Effect of New Digital Technology on Copyright Law*, 471 PRACTICING LAW INST. 137, 139 (1997); *see also* Hartman,

every work of copyright ownership can be encoded into these bits to be transmitted or flawlessly reproduced with relative ease.[9] Because of such things as the superior sound quality of digital recordings, the appearance of interactive services that allow a member of the public to receive a digital transmission of a particular recording, and the possible emergence of a system to provide for the electronic distribution of phonorecords, Congress decided it was time to act.[10] After all, "[t]he relevant technologies will continue to advance."[11] With access to the Internet becoming more and more widespread, the ease with which someone could transmit information quickly and to a large audience (and thus have a significant effect on the market) is also becoming greater.[12]

As is often the case, the new rights owe their creation to advances in technology.[13] This new digital technology, improved in both its quality and its ability to transmit information to an increasingly greater percentage of the population, meant that something had to be done. Congress realized that without copyright protection in the digital environment, the incentive for artists to create new sound recordings could be diminished, which would "ultimately [deny] the public some

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supra note 7, at 46; *see also* Megan M. Wallace, *The Development and Impact of the Digital Performance Right in Sound Recordings Act of 1995*, 14 COOLEY L. REV. 97, 104-06 (1997) (describing some differences between analog and digital forms).

[9] *See* Hartman, *supra* note 7, at 39-40.

[10] *See generally* H.R. REP. NO. 104-274, at 12-13 (1995).

[11] *Id.* at 13.

[12] *See also* Rafter & Coats, *supra* note 8, at 140 ("On the Internet, everything is digitized."); Brian A. Carlson, *Balancing the Digital Scales of Copyright Law*, 50 SMU L. REV. 825, 843 (1997) ("In effect, the Internet completes the digital revolution by allowing the average individual to digitally transmit and receive works with anyone or everyone connected to the network."); Jube Shiver, Jr., *The New Mark@place*, L.A. TIMES, Sept. 14, 1997, at D1 ("With a new generation of improved software for navigating the World Wide Web, potential buyers can now surf vendor sites and see descriptions and color pictures - even hear the sounds - of products offered.").

[13] *See* S. Rep. No. 104-128, at 11 (1995) ("[D]igital technology gave new life to the performance right initiative."); *see also* Carlson, *supra* note 12 at 834 (noting that historically, Congressional action has been necessary to amend the Copyright Act because of the important role new technology played in the domestic and international economy).

of the potential benefits of the new digital transmission technologies."[14] "Trends within the music industry. . .suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future."[15] Recognizing that copyright law at the time was "inadequate" to address the issues being raised by new digital technologies, Congress sought to create a "carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings."[16] Congress recognized the importance of having protection in place before the technology to duplicate and distribute digitally becomes too readily available to the public.[17] In so doing, Congress attempted to amend the Copyright Act in a way that would be helpful today, but that would also create a system broad enough to deal with future digital technologies.[18]

III. UNSCRAMBLING THE DPRSRA - WHAT THE ACT SAYS

President Bill Clinton signed the DPRSRA into law on November 1, 1995. As the title of the legislation indicates, the DPRSRA creates a new exclusive right to be enjoyed by copyright owners.[19] However, it has been suggested that the title of the Act is "something of a misnomer."[20] The DPRSRA actually makes two separate and

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[14] H.R. REP. NO. 104-274, at 13 (1995); *see also* Rebecca F. Martin, *The Digital Performance Right in Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 742 (1996) ("The new phase of digital technology . . . seriously threatens the incentive to create sound recordings by displacing the traditional market for 'hard' copies sold in record stores.").

[15] H.R. REP. NO. 104-274, at 12.

[16] *Id. See also id.* at 14 (explaining that copyright owners of sound recordings should enjoy protection with respect to interactive performances and some subscription performances, but not free over-the-air broadcast services).

[17] *See* Martin, *supra* note 14, at 743.

[18] *See* Hartman, *supra* note 7, at 40 (stating that this Act was "crafted broadly enough to encompass interactive networks like the Internet . . . .").

[19] *See* 17 U.S.C. § 106(6) (1994 & Supp. 1995).

[20] Sobel, *supra* note 5, at 3 (suggesting that the new law should have been called the "Musical Digital Transmission Act of 1995," because it deals with much more than simply sound recording performances).

important changes in the way copyright law handles emerging digital technologies. First, the DPRSRA creates an exclusive right, "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[21] As shall be explored shortly, in the same breath that gives it life, significant limitations and exclusions immediately restrict this performance right for sound recordings. Second, the DPRSRA amends another section of the Copyright Act by stating that "[a] compulsory license . . . includes the right . . . to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission . . . ."[22] These changes to the Copyright Act shall be explored separately.

A. *The Digital Performance Right*

1. Grant of the exclusive right

Most copyright owners have enjoyed the exclusive right to perform their copyrighted works publicly since at least 1909.[23] However, until 1995, while the Copyright Act granted this right to the owners of the copyrights to musical compositions, it specifically denied this exclusive right to the owners of the copyrights to sound recordings.[24]

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[21] 17 U.S.C. § 106(6).

[22] *Id.* § 115(c)(3)(A).

[23] *See* NIMMER, *supra* note 1, at § 8.14[A] n.21; *see also* 17 U.S.C. § 106(4) (stating that the copyright owner has the exclusive rights "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly").

[24] *See, e.g.*, Joshua D. Levine, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 627 (1996). A sound recording is one of two entities into which a song is split. The sound recording is the actual final product, namely what is heard on a tape or compact disc. The other entity that makes up a song is a musical composition. The musical composition is most commonly thought of as the notes and the lyrics, and is usually represented as the sheet music of a song. Bruce Springsteen wrote and recorded "The Ghost of Tom Joad" in 1995. Rage Against the Machine recorded a "cover version" of this song in 1997. When you play Rage Against the Machine's recording "The Ghost of Tom Joad" on a compact disc using your stereo system at home, you are performing the song, both the sound recording by Rage Against the

The DPRSRA covers new ground in that it grants to the copyright owner the exclusive right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[25] The right to receive compensation when sound recordings are performed publicly is a significant addition to the rights enjoyed by copyright owners. The significance of this amendment to the Copyright Act is lessened, however, by the precise language employed in crafting the grant,[26] and by subsequent portions of the DPRSRA itself. Although the DPRSRA is directed at digital audio transmissions, certain digital audio transmissions are exempted from the new right, and thus not subject to the licensing framework at all. Other digital audio transmissions, subscription transmissions, are subject to the licensing framework, but are entitled to statutory licenses. A third category of digital audio transmissions, interactive transmissions, is subject to a voluntary licensing system. These three categories of transmissions, as well as the licensing and royalty system in general, will now be explained.

2. Certain transmissions are exempt

Even though a sound recording is performed publicly by means of a digital audio transmission, it might be completely exempted from the new right.[27] "Nonsubscription transmissions" are one category of transmissions that are exempt from the new right.[28] These are transmissions such as television, and more importantly, radio broadcasts for which there is no charge (no subscription).[29]

Machine, and the underlying musical composition written by Bruce Springsteen. *Cf.* KOHN & KOHN, *supra* note 1, at 1173.

[25] 17 U.S.C. § 106(6).

[26] As an example, a public performance right is granted to owners of the copyrights of "sound recordings" that are performed publicly by means of a "digital audio transmission." Both of these terms, by their definitions, specifically exclude audiovisual works from being swept into their meanings. It seems clear that works categorized as "audiovisual works" were not intended to fall within the scope of the new exclusive right. *See id.* §§ 101, 114.

[27] *See id.* § 114(d)(1).

[28] *Id.* § 114(d)(1)(A)(i).

[29] *See* S. REP. NO. 104-128, at 18 (1995).

Retransmissions of these nonsubscription transmissions[30] are also exempt, provided certain criteria are satisfied.[31] This exemption holds true even if the retransmission of the radio broadcast is itself a subscription retransmission under the Act.[32] A transmission within a business establishment is granted an exemption, as long as the transmission is confined to the establishment's premises or the immediately surrounding vicinity.[33] Thus, a store, office or restaurant turning on a radio for its customers and employees to hear will be exempt, even if the transmission is digital.[34] A transmission to a business establishment for use in the ordinary course of its business is exempt as long as it is not retransmitted outside the establishment's premises, and does not exceed the sound recording performance complement.[35]

3. Certain transmissions qualify for statutory licensing

A subscription transmission is one that is controlled and sent to a limited number of recipients, who have paid to receive the transmission.[36] "A typical transmission that would qualify as a 'subscription transmission'. . . is a cable system's transmission of a digital audio service, which is available only to the paying customers of the cable system."[37] While subscription transmissions are not exempted from the new right, they might qualify for a statutory license if they are of the following nature.[38]

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[30] *See* 17 U.S.C. § 114(d)(1)(B).

[31] *See id.* § 114(d)(1)(B)(i) - (iv) (including among the criteria that these broadcast transmission must not be willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the broadcast).

[32] *See* S. REP. NO. 104-128, at 19.

[33] *See* 17 U.S.C. § 114(d)(1)(C)(ii).

[34] *See* KOHN & KOHN, *supra* note 1, at 203.

[35] *See* 17 U.S.C. § 114(d)(1)(C)(iv). *See also* S. REP. NO. 104-128, at 23.

[36] *See* 17 U.S.C. § 114(j)(8) ("A 'subscription' transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.").

[37] H.R. REP. NO. 104-274, at 27 (1995).

[38] *See* Marie D'Amico, *Turning Trademarks Topsy-Turvy on the Net*, DIGITAL MEDIA, Nov. 29, 1996, at 4 *available in* 1996 WL 9070806 ("The significance of

First, the transmission cannot be part of an interactive service.[39] For instance, the aforementioned cable system's digital audio service must not allow recipients to receive a particular sound recording on request, if the service is to qualify for a statutory license. This provision is in place because interactive services are seen as a greater threat to traditional music sales than services that essentially act as traditional radio stations, but transmit over digital cable wires.

Second, the transmission must not exceed the sound recording performance complement.[40] This newly created term is defined as the transmission during any three hour period of no more than: three different selections from any one phonorecord, assuming no more than two such selections are transmitted consecutively; or four different selections by the same featured artist; or four different selections from any compilation, assuming no more than three such selections are transmitted consecutively. This restriction is designed to prevent traditional record sales from being replaced by digital transmission, since entire album sides are prevented from being played by this performance complement.[41]

Third, the transmitting entity cannot publish a schedule in advance or announce the titles of the specific sound recordings it will be transmitting.[42]

Fourth, the transmitting entity may not automatically and intentionally cause the device receiving the transmission to switch from one channel to another.[43] This limitation is in place so a service

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statutory licensing for transmissions which faithfully follow the five criteria cannot be overstated; it means the record companies cannot say 'no' to their requests for rights to play recorded performances.").

[39] *See* 17 U.S.C. § 114(d)(2)(A).

[40] *See id.* § 114(d)(2)(B).

[41] *See* Julie A. Garcia, *An Analysis of the Digital Performance Right in Sound Recordings Act of 1995*, J. of PROPRIETARY RIGHTS, February 1996, at 14 (pointing out that this restriction is designed to prevent traditional record sales from being replaced by digital transmissions, since entire album sides are prevented from being played by this performance complement).

[42] *See* 17 U.S.C. § 114(d)(2)(C).

[43] *See id.* § 114(d)(2)(D).

will not intentionally try to evade the sound recording performance complement by switching a subscriber's receiver channels.[44]

Finally, if the transmitted sound recording is accompanied by information encoded within it that identifies the title, the artist, or other information, this information must be transmitted along with the sound recording.[45]

If a subscription transmission satisfies these criteria, it will qualify for a statutory license, and will not be required to go through voluntary licensing negotiations with the copyright owner.

4. Remaining transmissions are subject to voluntary licensing

Subscription transmissions that do not meet the criteria set forth in section 114(d)(2) of the Copyright Act, as well as "interactive services"[46] now require voluntary licenses. Of all the new forms of digital transmission services, the ones most likely to have a significant negative impact on traditional record sales are interactive services.[47] Subscribers to interactive services theoretically can hear any sound recording they choose whenever they like, and it is thus believed they will be less likely to make trips to purchase records at traditional stores. To prevent this negative impact on traditional record sales, copyright owners need to be able to control the distribution of their works. Congress felt that "in order to provide a comparable ability to control distribution of their works, copyright owners of sound recordings must have the right to negotiate the terms of licenses granted to interactive services."[48] To encourage the sharing of

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[44] *See* S. REP. NO. 104-128, at 25 (1995).

[45] *See* 17 U.S.C. § 114(d)(2)(E).

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> An "interactive service" is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

Id. § 114(j)(4).

[47] *See* S. REP. NO. 104-128, at 16.

[48] *Id.* at 24.

nonexclusive licensing agreements, the Act imposes no limitations.[49] Although sound recording copyright holders have the right to grant or withhold voluntary licenses for subscription transmissions that do not qualify for statutory licenses and for interactive transmissions, there are still further limitations on their rights to grant exclusive licenses for either of these types of transmissions. "Limits have been [placed] on licenses granted to interactive services in response to concerns that *sound recording* copyright owners might become 'gatekeepers' to the performances of *musical works*."[50]

First, the DPRSRA states that *interactive* services will not be granted exclusive licenses for more than one year by licensors that own more than one-thousand (1000) sound recording copyrights, or for more than two years by licensors that own one-thousand (1000) or fewer sound recording copyrights. However, this limitation does not apply if the licensor grants licenses to five or more interactive services,[51] or if an exclusive license is granted "to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording."[52] Notwithstanding the grant of a license under section 106(6) of the Copyright Act to publicly perform a sound recording by means of a digital transmission, this sound recording may not be performed publicly unless a license has also been obtained from the music publisher for the public performance of the copyrighted musical work that may be contained in the sound recording.[53]

Second, *subscription* transmissions that do not qualify for the statutory license are also subject to a limitation. If the copyright owner licenses the right to public performance of a sound recording to an

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[49] *See* Garcia, *supra* note 41, at 15-16.

[50] H.R. REP. NO. 104-274, at 21 (1995) (emphasis added); *see also supra* note 24 (describing the difference between a sound recording and a musical work).

[51] In addition, it is required that each such license is for a minimum of ten percent of the copyrighted sound recordings owned by the licensor, but in no event less than fifty sound recordings. 17 U.S.C. § 114(d)(3)(B)(i).

[52] *Id.* §144(d)(3)(B)(ii).

[53] *See id.* § 114(d)(3)(C). *See, e.g., supra* note 24.

organization she has an interest in, [54] "the copyright owner must also make the licensed sound recording available . . . 'on no less favorable terms and conditions to all bona fide entities that offer similar services. . . .'"[55] This limitation does not apply if the copyright owner licenses either an interactive service, or an entity to perform publicly no more than forty-five (45) seconds of the sound recording for the sole purpose of promoting the distribution or performance of that sound recording.

5. Licensing and fees

If a transmission qualifies for a statutory license, what will the statutory license fee be? Effective June 1, 1998, the royalty fee for the digital performance of sound recordings by nonexempt subscription digital services is 6.5% of gross revenues resulting from subscribers residing within the United States.[56] This fee is a default position, as voluntary agreements reached subsequent to June 1, 1998 will be given effect.[57]

The DPRSRA also provides for the allocation of a percentage of the statutory license fee received by the copyright owner to be distributed to performers, not songwriters.[58] Two and a half percent of the statutory license fees must be deposited in an escrow account, to be distributed to non-featured musicians who have performed on sound recordings. Two and a half percent of the fees must be deposited in an

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[54] This entity is defined as an "affiliated entity." *See id.* § 114(j)(1) ("An 'affiliated entity' is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.").

[55] *Id.* § 114(h)(1). *See also* Sobel, *supra* note 5, at 7 (describing this limitation as a "most favored nations clause").

[56] *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25, 394 (1998) (to be codified at 37 C.F.R. pt. 260).

[57] *See* 17 U.S.C. § 114(f)(3).

[58] *See id.* § 114(g)(2). Songwriters are treated by copyright law as if they and the performers of the song are two different people, even though they may in actuality be one and the same. Songwriters are compensated under the musical composition payment structure, not the sound recording structure.

escrow account, to be distributed to non-featured vocalists who have performed on sound recordings. Forty-five percent of the fees shall be allocated, "on a per sound recording basis," to the featured recording artists on each sound recording.[59] The remaining half of the statutory license fees that are received by sound recording copyright owners (record companies) may be retained.[60]

In contrast with fees brought in by a subscription transmission that received a statutory license, fees brought in by a voluntary license to a copyright owner are not subject to reduction by any set percentage. Instead, "a featured recording artist who performs on a sound recording that has been [voluntarily licensed] . . . [is] entitled to receive payments from the copyright owner of the sound recording *in accordance with the terms of the artist's contract.*"[61] Similar treatment is accorded to non-featured recording artists.

B. *The Digital Distribution Right*

Although the title of the new Act makes reference solely to the creation of the digital performance right, the DPRSRA seeks to deal with emerging digital technology issues in another way as well. The DPRSRA amends the compulsory licensing section of the Copyright Act, adding the right to distribute songs by digital transmissions.[62] In general, this section provides that when a copyright owner publicly distributes a phonorecord, others may obtain a compulsory license to make and distribute another phonorecord of that musical composition.[63] The compulsory license is extended to a new category

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[59] *Id.* § 114(g)(2)(C).

[60] *See* Sobel, *supra* note 5, at 6.

[61] 17 U.S.C. § 114(g)(1)(a) (emphasis added). This should serve to highlight the potential importance of the lawyer drafting the contract provisions in this area.

[62] *See id.* § 115(c)(3)(A).

[63] *See* Martin, *supra* note 14, at 748; *see also* Sobel, *supra* note 5, at 8 ("[This section] gives record companies the right to make new recordings - referred to in the industry as 'cover recordings' - of previously-recorded songs, on terms and conditions established by law rather than by negotiation with the owners of the copyrights to those songs."). Note that this right to distribute the musical composition does not extend to the sound recording. As an example, getting a mechanical license for "The Ghost of Tom Joad" doesn't give Epic the right to distribute Bruce Springsteen's

of transmissions called "digital phonorecord deliveries."[64] To illustrate this newly created term, a noninteractive subscription transmission consisting of a continuous program of music selections chosen by the transmitting entity, transmitted in real time, for which a consumer pays a flat monthly fee, will not be a "digital phonorecord delivery," so long as no reproduction is required to make the sound recording audible.[65] This extension of the compulsory licensing system was effectuated to "maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and [compact discs]."[66]

A digital phonorecord delivery prior to December 31, 1997 incurred the same compulsory mechanical license fee that was payable previously for the distribution of compact discs and audiocassettes.[67] Voluntary negotiations are ongoing to determine the mechanical royalty rate for deliveries of digital phonorecords occurring during 1998 and beyond. [68] In addition, the U.S. Copyright Office is

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sound recording of the musical composition, but it does give them the right to distribute Rage Against the Machine's sound recording of the musical composition. *See supra* note 24.

[64] A 'digital phonorecord delivery' is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. *See* 17 U.S.C. § 115(d).

[65] S. REP. NO. 104-128, at 44-45 (1995); *see also* Sobel, *supra* note 5, at 8-9 (explaining that it was important for Congress to differentiate between digital transmissions that are *distributions* of recordings and digital transmissions that are merely *public performances* because of a disparity in the price of licensing fees for the two types of activities, and because the licenses and fees are policed by different agencies).

[66] S. REP. NO. 104-128, at 37.

[67] *See* 17 U.S.C. § 115(c)(3)(A)(i); *see also* Sobel, *supra* note 5, at 8.

[68] *See* Digital Phonorecord Delivery Rate Adjustment Proceeding, 63 Fed. Reg. 35, 984 (1998).

preparing to convene a Copyright Arbitration Royalty Panel to determine reasonable royalty rates for parties not involved in the voluntary negotiations.[69] Generally, the provisions of voluntarily negotiated licensing agreements will be given effect in lieu of the statutory rates.[70]

IV. FORMULATING A BLUEPRINT FOR APPLYING THE ACT

It has been noted that the DPRSRA is not the easiest piece of legislation to digest.[71] However, with digital technology advancing at the phenomenal rate that it is today, it seems likely that the applicability of the Act will eventually be tested. This section proposes a blueprint to be used in analyzing how and when the DPRSRA will apply. This Act is geared toward the party that is engaged in the "transmitting" of music, not the party receiving the music. As such, this section will serve as a blueprint that will be most helpful to someone looking to transmit a sound recording digitally, who is wondering if they will need a license under the DPRSRA to do so. This could be a fan debating about whether to put music on their homepage, a business person seeking to go into the music distribution business, or an attorney researching a question for a record company. For any possible application of the Act, it is first necessary to answer

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[69] *See id.*

[70] *See* 17 U.S.C. § 115(c)(3)(E)(i). *But see id.* § 115(c)(3)(E)(ii) (stating that unless certain exceptions are met, such as satisfying a grandfather clause or agreeing on the fee after the sound recording has already been fixed in a tangible medium, "controlled composition clauses," where an artist agrees to accept a lower mechanical royalty rate when their record company makes and distributes phonorecords which include recordings of the artist's compositions, shall not be given effect even though they are voluntarily negotiated licensing agreements).

[71] "[T]he organization of the new Act makes it appear that each subsection was written on a separate 5-by-7 inch card, and that the cards were spilled on the floor and accidentally reassembled out of order just before the bill was retyped in the form in which it was enacted." Sobel, *supra* note 5, at 3; *see also* Garcia, *supra* note 41, at 13 (stating that the mandates of the Act are somewhat vague and how it will be interpreted remains unclear). *But see* Sobel, *supra* note 5, at 3 (recognizing that the convoluted language of the Act was likely required by the nature of the specific problems addressed by the Act, and that it is indeed extremely important legislation).

threshold questions to determine if the issue at hand is one that fits within the definition of what the DPRSRA addresses. Assuming that these threshold definitional hurdles are cleared, then the central questions address how the DPRSRA deals with the issue substantively.

A. *Threshold Questions*

Given the precise and limited nature of the DPRSRA, in analyzing an issue, the first question that should be asked is "Does the issue come under the Act at all?" The answer to this question will depend upon whether the issue at hand can be analyzed using the definitions contained in the DPRSRA. The DPRSRA grants the copyright owner the exclusive right to perform the copyrighted work publicly by means of a "digital audio transmission."[72] Recognize that the threshold issue is that the transmission must be classified as a digital audio transmission. "A 'digital audio transmission' is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work."[73] So, first and foremost, there must be a transmission,[74] and this transmission must be a digital transmission.[75] As a fairly obvious example of a case that would certainly not be subject to the DPRSRA, consider the case of a company that allows you to visit their Web site for the purpose of creating a customized compact disc that will then be pressed and sent to you.[76] This fact pattern involves digital technology in the form of a compact disc and

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[72] *See supra* text accompanying note 21.

[73] 17 U.S.C. § 114(j)(3); *see also* H.R. REP. NO. 104-274, at 19-20 (1995) ("The precise language of the new right is intended to exclude from coverage digital transmissions of audiovisual works, analog transmissions, and performances that are not transmitted.").

[74] To transmit a performance is "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101.

[75] "A 'digital transmission' is a transmission in whole or in part in a digital or other non-analog format." *Id. See e.g., supra* note 8 and accompanying text (giving a brief example of how digitization works).

[76] *See* Brett Atwood, *Made-To-Order CDs Available On The Web*, BILLBOARD, Sept. 6, 1997, at 92 (stating that customized compact discs have arrived as a potential alternate method of distribution of songs).

the Internet; however, that does not necessarily qualify it for analysis under the DPRSRA. The compact disc is delivered to you through the mail; with no digital transmission of a sound recording, the DPRSRA does not apply.

In addition, the digital transmission must not involve the transmission of any audiovisual work. The DPRSRA specifically states that audiovisual works[77] do not to come under the Act.[78] This exclusion of audiovisual works extends to music video subscription services that are beginning to appear on the Internet. Subscription services offer full-length music videos to members of the public who pay a monthly fee. Users have access to videos at the site, although the videos cannot be permanently stored on the user's hard drive.[79] Although this is an interactive service involving a song, it is not an interactive service involving a *sound recording*, and is not subject to the licensing structure of the DPRSRA. A music video fits the definition of an "audiovisual work,"[80] and is thus specifically not included in the definition of a sound recording.[81] Assuming the issue

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[77] "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101.

[78] "[N]othing in the bill creates any new copyright liability with respect to the transmission of a motion picture or other audiovisual work, whether digital or analog, whether subscription or nonsubscription, and whether interactive or noninteractive." H.R. REP. NO. 104-274, at 25.

[79] *See generally* Brett Atwood, *VidNet Bows Clips-On-Demand Service*, BILLBOARD, Sept. 20, 1997, at 56.

[80] While it seems clear that a music video consists of images intrinsically intended to be shown with music, this Comment proposes that someone who runs a website should not be permitted by courts to manipulate this language and merely attach random visual images to an otherwise infringing transmission, simply to work around the law.

[81] The public performance of a music video may require a license, but this right is not one addressed by the Digital Performance Right in Sound Recordings Act of 1995, and is hence beyond the scope of this Comment.

B. *Central Questions*

1. Is a "digital phonorecord delivery" involved?

Once the threshold question has been affirmatively answered, figuring out how the DPRSRA applies to a transmission is the next step in the analysis. The primary distinction to be drawn relates back to the two changes the DPRSRA makes to the Copyright Act. These two changes are best expressed by asking "Does the issue at hand deal with: (1) the public performance of a sound recording, and/or (2) the delivery of a digital phonorecord?"[82] In both cases, there will be a transmission. In one case, it will be called a "public performance." In the other, it will be called a distribution, or more specifically, a "digital phonorecord delivery." Knowing the difference between the two is the key step towards realizing which rights have been implicated. In fact, both sets of rights may be activated by the same transmission.

A digital delivery is accomplished where a digital transmission of a sound recording results in a "specifically identifiable reproduction"[83] of a phonorecord by or for a transmission recipient. A transmission by a noninteractive subscription service that takes place in real time, and consists of music selections chosen by the transmitter would not be a digital phonorecord delivery as long as there was no reproduction at any point in the transmission in order to make the sound recordings audible.[84] Thus, a distinction is drawn between a song that is merely transmitted for the recipient to hear, and a song that is transmitted for the recipient to store on their hard drive, enabling the recipient to listen to it again later. In the second case, it is more than a performance (although the transmission can also be a performance), and under the

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[82] *See also supra* note 64.

[83] H.R. REP. NO. 104-274, at 30 (1995) ("The phrase 'specifically identifiable reproduction,' as used in this definition, should be understood to mean a reproduction specifically identifiable to the transmission service.").

[84] *See* S. REP. NO. 104-128, at 45 (1995); *see also* H.R. REP. NO. 104-274, at 28 ("Digital phonorecord delivery . . . may also constitute a public performance but it does not include real-time non-interactive subscription transmission where the recorded performance and music are merely received in order to hear them.").

compulsory licensing system, the mechanical royalty rate becomes involved.

2. Is the transmission exempt?

If the issue deals with the public performance of a sound recording by means of a "digital audio transmission," then the next set of questions will determine where the issue fits among the Act's various exemptions and licensing structures. The first question to ask is "Does the digital audio transmission fit within any of the statutory exemptions?" Nonsubscription transmissions are exempt from the new right. When a person surfs the Internet, and visits a site that starts playing a tune, is that person experiencing a subscription or nonsubscription transmission? This is a key distinction, because nonsubscription transmissions are specifically exempted from the DPRSRA and licenses for the public performances of any sound recordings will not have to be obtained.

A subscription transmission is one that is controlled and limited to particular recipients who have paid for the transmission.[85] In support of the subscription argument, it has been noted that users of the Web site have had to pay a service provider[86] in order to be able to receive the transmission.[87] In support of the nonsubscription argument, a Web site publisher is likely to state that they do not charge a specific access fee to reach their Web site, so the user is not really paying to receive the transmission. The courts have not answered this issue yet, although because it is such an important distinction, it seems inevitable that an answer will be forthcoming.[88] Accordingly, when advising someone setting up a music-playing Web site that doesn't charge a fee over and

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[85] *See supra* note 36 and accompanying text.

[86] Though ideas on the Internet can come from anyone with access to a computer, ultimately the accessibility of the ideas "to other users on the Internet requires connection to one or more on-line service providers, such as America Online (AOL), Compuserve, Netcom, or Bulletin Board Services (BBS)." Keith Stephens & John P. Sumner, *Catch 22: Internet Service Providers' Liability for Copyright Infringement Over the Internet*, COMPUTER LAWYER, May 1997, at 1.

[87] *See* D'Amico, *supra* note 38.

[88] *See* Garcia, *supra* note 41, at 14 ("Resolution of this ambiguity in the Act will likely require litigation.").

above that which visitors must pay their service provider, an attorney should clearly stress the risks involved.[89]

If there is no charge to the public for the transmission, it is a nonsubscription transmission, and it will not be subject to the right. Retransmissions of nonsubscription broadcast transmissions are also exempt, "whether the retransmissions are offered on a subscription or a nonsubscription basis."[90] Radio stations have also begun to explore the potential of transmitting over the Web.[91] Radio stations sit in a very favorable light under the DPRSRA. A radio broadcast is a "classic" example of a nonsubscription transmission; there is no fee for receiving the transmission. Even if the broadcast is by means of a digital medium, as long as it is not part of an interactive service, this type of transmission should be exempt from the DPRSRA.[92] These free over-the-air broadcasts are noninteractive and nonsubscription, and thus, they are treated as distinctly different from cable transmissions, which are subject to licensing fees under the Act.[93] Retransmissions of radio station broadcast transmissions are included in this exemption, provided certain criteria are met.[94]

Transmissions to or within a business establishment may also be exempt, provided certain criteria are met.[95] Capitol Records has established a private Internet site for the exclusive use of the music industry, including media and retailers.[96] Although this site currently is aimed at industry members who need access to visual assets, such as

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[89] *See* D'Amico, *supra* note 38 ("If your. . .site is free to the public, you can forego licensing and pray you're exempt or, if you're risk adverse, attempt to secure a license."); Hartman, *supra* note 7, at 62 ("Individuals who upload music onto the Internet should reconsider the legality of what they are doing, regardless of the intent.").

[90] S. REP. NO. 104-128, at 19 (1995).

[91] *See* Marc Schiffman, *Radio Weighs RealAudio Benefits; Web broadens reach, but does it help at home?*, BILLBOARD, Aug. 9, 1997, at 59 (describing the personal computer as the world's most expensive radio).

[92] *See* S. REP. NO. 104-128, at 19.

[93] *See id.* at 15.

[94] *See supra* note 31.

[95] *See supra* text accompanying notes 33-35.

[96] *See* Brett Atwood, *Majors Cut Costs Via Industry-Only Sites*, BILLBOARD, Aug. 23, 1997, at 58.

pictures of a band for a news article release, some 30 second sound samples are available generally. Such transmission of sound recordings through a digital medium are not affected by the DPRSRA, because the record company responsible for the transmission is the same one who owns the sound recording copyrights. These companies can put the sound recordings on their Web pages with the knowledge that if someone takes them and transmits them on their own, a mechanism is in place for relief.

3. Does the transmission qualify for a statutory license?

If the digital audio transmission is not statutorily exempt from the DPRSRA, the next step in the analysis is to figure out what type of license is required for the transmission. A transmission will qualify for a statutory license as long as it meets the following criteria: (1) the transmission cannot be interactive; (2) the transmission cannot exceed the performance complement; (3) an advance schedule of the transmission cannot be published; (4) causing the receiving device to automatically switch channels is prohibited; (5) any artist identification information encoded within the sound recording must be transmitted along with the sound recording.[97]

Whether by cable service,[98] or over the Internet, companies have started exploring the possibility of broadcasting music programming by means of digital transmissions. One company, utilizing a cable modem service, offers "instantaneous delivery of CD-quality music . . . ."[99] The idea behind this technology is that listeners can tune in for an audio program while continuing to explore the Internet. Several genre-

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[97] *See* S. REP. NO. 104-128, at 24 (1995) (stating that a "'statutory license' guarantees that every noninteractive subscription transmission service will receive a license to perform the sound recording by means of a digital transmission").

[98] *See* Martin, *supra* note 14, at 743 (describing digital audio cable services that are offered on a monthly, flat-fee subscription basis, and whose services include many channels of original sound recordings; suggesting that part of the allure of this type of service is that, it offers compact disc-quality music without advertising or disc jockeys).

[99] Brett Atwood, *2 Services Offer CD-Quality Net Sound*, BILLBOARD, Aug. 9, 1997, at 52.

specific channels are available for customers to select.[100] Assuming the criteria set forth in the DPRSRA are met, this situation is one where the transmitting entity is entitled to a statutory license.[101] The company, however, should be careful in transmitting the music not to require the recipient to download the sound recording to her computer for later use, thereby subjecting itself to a distribution licensing fee as well as a license for the public performance of the sound recording. As long as the transmission is not part of an interactive service, does not exceed the sound recording performance complement, does not publish a schedule of tracks in advance, does not automatically switch the channels of the recipient's receiving device, and includes any encoded information along with the sound recording, it will qualify for a statutory license.

An argument could be made for this type of service actually being an interactive service (and thus subject to voluntary negotiations for licenses) because an individual is allowed to choose which music genre he wants to receive via transmission. This argument is not persuasive, however. An interactive service is one that allows a member of the public to receive, on request, a particular sound recording chosen by or on behalf of the recipient.[102] When an individual here chooses a particular genre, he is not choosing a particular sound recording, but rather a style of sound recording.

4. Is the transmission subject to voluntary licensing?

If the transmission is part of an interactive service where the recipient has control over the selections he will be receiving, or if the transmission is a subscription transmission that does not qualify for a statutory license, then negotiations must be conducted with the copyright owner to obtain a license for the public performance right.[103] This voluntary licensing framework is something that copyright owners

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[100] *See id.*

[101] It is similar to the situation where a cable service makes available audio only channels for their subscribers. This type of transmission has been described as a "typical transmission that would qualify as a 'subscription transmission'. . . ." H.R. REP. NO. 104-274, at 27 (1995).

[102] *See supra* note 46 and accompanying text.

[103] *See supra* text accompanying note 47.

will seek to extend, because there will be no statutory rate to set the upper limits of the bargaining process. Someone seeking a license for the digital transmission of a sound recording will argue that their transmission is either exempt from the Act completely, or, at the very least, that they are entitled to a statutorily determined licensing rate to avoid voluntary negotiations.

V. APPLYING THE ACT TO EMERGING TECHNOLOGY ISSUES

In deciding whether a digital transmission will be subject to the DPRSRA, it should be stressed once again that the Act is very limited in nature, both by the definitions it employs, and by its statutory exemptions. Congress chose "to create a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings."[104] It seems clear that in cases that are not entirely clear-cut, or in cases dealing with a new technology, the DPRSRA is intended to be read narrowly (which is, of course, consistent with the language of the Act).[105] Given its limited nature, many emerging technological issues will not come under the umbrella of the DPRSRA. This is not to say, however, that the Act has no significance today. As seen in Section III, many stories reported in current news articles can be analyzed under the Act. Giving in-depth attention to several specific uses of developing technology will help illuminate the emerging applicability of the DPRSRA.

A. *A Motion Picture Web Site*

In this increasingly multi-media age, the interplay between the motion picture business and the music business can only be expected to

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[104] S. REP. NO. 104-128, at 13 (1995). The DPRSRA is a "narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work." H.R. REP. NO. 104-274, at 13.

[105] *See* H.R. REP. NO. 104-274, at 13 ("However, to the extent that the language of the bill does not precisely anticipate particular technological changes, it is the committee's intention that both the rights and the exemptions and limitations created by the bill be interpreted in order to achieve their intended purposes.").

grow. Through the use of Web sites, the potential for cross-promotion between the two industries is enormous. A promotional Web site set up by a movie studio can not only have reviews of the film and still photos or clips from the movie, but also can include sound effects, and songs from a movie or its soundtrack. Many of the rights that will be implicated by such Web sites pre-date the DPRSRA, and are well established.[106]

As the technology continues to emerge, one can easily imagine a scenario where the DPRSRA will come into play for a producer inquiring about which licenses will have to be acquired for a promotional Web site. As previously noted, if the music clip being performed at the site is being played in conjunction with visual images, the performance will be considered an "audiovisual work," or a "motion picture,"[107] and a set of rights distinct from the DPRSRA will be implicated. If the song is available without visual images from the movie accompanying it, the chain of analysis would be as follows.

In the abundance of caution, this transmission should be treated as a subscription transmission, because the user paid a service provider to access the site.[108] Does the transmission get a statutory license? If it is interactive, the answer is no. This encompasses most Web sites today, where the visitor clicks on an icon, and thereby chooses to receive the transmission. Thus, a voluntary license will have to be negotiated with the holder of the sound recording copyright. If a nonexclusive license is desired, there will be no limitations attached to the licensing arrangement. However, if this Web site is the only entity licensed to perform the sound recording through a digital medium, an exclusive

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[106] A recent visit to the Web site of a popular movie revealed that the site actually did promote the movie's soundtrack (indeed the soundtrack could be ordered on the Web for delivery by traditional mail). However, because there was no transmission of music, the DPRSRA was not implicated. *See* Fox Searchlight, *The Full Monty* (visited Sept. 10, 1998) <http://www.foxsearchlight.com/fullmonty>.

[107] "'Motion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. § 101 (1994 & Supp. 1995).

[108] This cautious approach is advised until courts address whether payment to a service provider for access to the site precludes the site from being classified nonsubscription.

license is involved, and there are two limitations that may apply.[109] It is likely, however, that copyright holders will be able to avoid either of these limitations on the ability to grant an exclusive license to the promotional Web site. This can be accomplished by making available the sound recording as a sample of no more than forty-five (45) seconds in duration, for the sole purpose of promoting the distribution or performance of that sound recording.

B. *Digital Audio Services*

So far, the type of service closest to that anticipated by Congress in passing the DPRSRA seems to be the digital audio-only service. These services are offered on a monthly flat-fee subscription basis similar to standard audiovisual cable, and transmitted in real-time similar to radio broadcasts. Generally, the services offer several channels of original sound recordings, with the channels divided into different music categories.[110] The channels are delivered via cable wire or satellite, and "act like premium cable movie channels."[111] Presently, interactive pay-per-listen performances of sound recordings are not offered.[112] The purpose of these digital audio services is to transmit songs to be enjoyed as the transmission occurs; there is no digital download of the material, merely performance.

These services involve subscription digital audio transmissions. In fact, this type of transmission was specifically noted by Congress to be "[a] typical transmission that would qualify as a 'subscription transmission.'"[113]

The first question to be addressed is "Does it qualify for a statutory license?" In order to do so, it must meet several criteria. It must not be an interactive service, meaning the recipients cannot request to hear particular sound recordings broadcast to them alone. The transmission must not exceed the sound recording performance complement. No advance schedule of the transmission can be published. The receiving

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[109] *See supra* text accompanying notes 50-55.

[110] *See* Martin, *supra* note 14, at 743.

[111] NIMMER, *supra* note 1, at 8-286.

[112] *See* Martin, *supra* note 14, at 743.

[113] H.R. REP. NO. 104-274, at 27 (1995).

device cannot be automatically switched from channel to channel by the service. Finally, any identification information encoded in the sound recording must be transmitted. Assuming these criteria are adhered to, the digital audio service will receive a statutory license and will not have to negotiate with the sound recording's copyright holder.

C. *Digital Delivery Services*

The Internet provides an enormous opportunity for the distribution of digital works.[114] While some people lacking the legal right will attempt to take advantage of this opportunity, the Internet remains a great place for people who own the right to distribute works to get their works to the public.[115] "In addition to recording and editing more cheaply with digital technology, musicians are only a high-speed Internet connection away from being in the music distribution business."[116] Some "digital phonorecord deliveries"[117] are of course, authorized. One software company is working with artists and record labels to deliver compact disc-quality sound over the Internet.[118] Capitol Records used this service to sell and deliver a single over the Internet.[119] To enjoy this service, users have to download a free copy of the company's software onto their computers. Then, a device is created to ensure that users cannot purchase the songs and distribute copies themselves. Then users can sample songs and buy copies that

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[114] *See* Rafter & Coats, *supra* note 8, at 143 (reporting that music now grosses more money than any other industry on the Internet).

[115] This could be especially true for bands on independent record labels or bands with no record contracts yet. There is an Internet site that claims to allow consumers to buy individual songs from independent artists and have them transmitted to their computers. They then can be kept in a digital format, burned to a compact disc, or recorded to a cassette tape. This type of site offers artists the possibility of great exposure and touts itself as offering affordable, universal space for musicians and their audiences to meet and interact. Internet Underground Music Archive Website (IUMA) (visited Sept. 10, 1998) <http://www.iuma.com>.

[116] Rafter & Coats, *supra* note 8, at 143.

[117] Remember that the basic criteria for a digital phonorecord delivery, as opposed to a performance, are the fact that a copy must be made during a delivery.

[118] *See Playing a New Tune*, WALL ST. J., Oct. 9, 1997, at B8.

[119] *See id.*

are downloaded onto their hard drives.[120] Although the process takes quite a bit of time and uses a lot of hard drive space right now,[121] technology will undoubtedly advance to the point where members of the public might think twice about getting in their cars and driving to record stores to purchase music.[122]

The music industry is increasingly looking to the Internet for a lift.[123] One site offers a service called "e_mod" (encoded music online delivery), which is powered by Liquidaudio.[124] This site allows a visitor to download single tracks to his computer for around 99¢ a track. Currently, downloading time for each track ranges from twenty to forty minutes.[125] At Sony's Web site, soundclips of artists on Columbia, Epic, and Sony Classical music labels can be downloaded.[126] Sony Corporation has reportedly registered the term Netman as a trademark, for a service that would allow users to download music from the Web for later playback and recording to disks.[127] "If successful, on-line music distribution could eventually help transform the way music is sold."[128] It is important to remember

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[120] *See generally id.*

[121] *See id.* (adding that the sound quality is "terrific").

[122] *See* Robert Hilburn & Chuck Philips, *What's Wrong With the Record Industry (And How to Fix it)*, L.A. TIMES, Oct. 12, 1997, Calendar 5 (stating that there is a growing possibility that the traditional record business may become obsolete and suggesting that industry observers should not scoff at the notion of electronic delivery systems becoming more popular). *But cf.* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 378 (1997) ("Although it's inevitable that records will be sold this way in the future, I don't think it will ever replace record stores because there's too much 'experience' and 'vibe' in going to a store.")

[123] *See* Patrick M. Reilly, *'Honey, They're Downloading Our Song,'* WALL ST. J., July 17, 1997, at B1. *See also* Don Jeffrey, *Internet Sales, DVD Are Key Topics for Retailers: Online Debate Rages*, BILLBOARD, March 28, 1998, at 1 (reporting that record labels are exploring the possibility of using the Internet as a promotional tool, distributing samples or singles in order to drive consumers into stores to buy albums).

[124] *See* Music Boulevard, "Download Music" section (visited Oct. 1, 1998) <http://www.musicblvd.com>.

[125] *See id.*

[126] *See* Sony (visited Sept. 10, 1998) <http://www.sonymusic.com>.

[127] *See* Reilly, *supra* note 123.

[128] *Id. See also* Doug Reece, *IBM Entry Adds Impetus to Digital Distribution Plans*, BILLBOARD, Aug. 29, 1998 at 5 (reporting that IBM is working with major

that a digital phonorecord delivery can at the same time be a public performance.

D. *The Performance/Distribution Distinction in Practice*

One of the confusing things about the DPRSRA is the fact that it creates two separate and distinct rights that might be triggered by the same transmission. Keep in mind the ever-important distinction between a sound recording and a musical composition.[129] When a sound recording is transmitted through a digital medium, the performance right is implicated. At the same time though, if a digital phonorecord delivery is achieved, then a compulsory license to make and distribute the musical composition contained in the sound recording may also be available.

To illustrate the interplay between the two new rights created by the DPRSRA, imagine the following scenario: Epic Records wants to offer a digital phonorecord delivery (as defined) of Rage Against the Machine's recent recording of "The Ghost of Tom Joad," a song originally written and recorded by Bruce Springsteen. Under the application of the DPRSRA, the record company must secure two things in order to sell copies of this audio-only transmission. First, since a digital transmission of a sound recording is involved, Epic must secure the right to perform Rage Against the Machine's recording of this song publicly through a digital medium. Because Rage Against the Machine is signed to Epic, this would most likely involve checking the contract to be sure the right was conveyed. Second, because a copy of the song will be transmitted to a recipient's computer, Epic must secure the right to distribute Bruce Springsteen's underlying musical composition. The newly amended compulsory/mechanical licensing section of the Copyright Act will allow them to do this.

Without the DPRSRA, a situation could develop where a compact disc is transmitted from a subscription service to a customer, who could store it, reproduce it and distribute it again. In this way, the

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record labels in developing a new digital distribution platform, which would ideally serve artists who get lost in traditional retail outlets without harming existing retailers).

[129] *See supra* note 24.

compact disc would become widely distributed, and with the exception of the initial purchase of the disc necessary to put it on the Web, the record company that created the compact disc would not be paid for it.[130] Copies of sound recordings can be stored on computer user's system, and once there, technology exists for the music to be transferred to more traditional methods of recording and distribution. In fact, a situation quite analogous to this record company's nightmare reportedly occurred in 1993.[131] One of the goals of the DPRSRA was to prevent this type of situation from happening.

In fact, there are several examples of how the music industry is attempting to protect copyright holders' rights by using the DPRSRA. One goal is to block a visitor's ability to download songs from a Web site. This would categorize the transmission as a performance of the song, rather than as a distribution. It has been reported that Sony Music Entertainment is planning to launch a pay-per-play on-line jukebox on its Web site.[132] Web surfers will be able to pay to hear the songs of various Sony artists performed, but they will not be able to capture the songs on their computers.[133] The DPRSRA seems also to be leading to the development of licensing schemes to handle digital transmissions of sound recordings. The American Society of Composers, Authors and Publishers ("ASCAP") has developed a licensing scheme whereby the licensee may make the song available on its Web site, but may not encourage a visitor to the site to do anything more than listen to the song.[134] This basically serves to grant a performance right, but not a distribution right. While other licenses may be required (such as a license to perform the musical composition), as long as there is no distribution of the musical

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[130] This situation is described in Watkins, *supra* note 6, at 328.

[131] *See* Richard Natale, *The Net is Alive With Pirated Music*, L.A. TIMES, Feb. 2, 1996, at D4 (describing 1993 occurrence where a disc jockey in England downloaded a newly released album—one that had yet to be released in the U.S.—to a fan here, and stating that at the time there was little the record company could do to prevent such incursions).

[132] *See* Reilly, *supra* note 123, at B7.

[133] *See id.*

[134] *See* Hartman, *supra* note 7, at 67-68.

composition, the amended section 115 of the Copyright Act will not be implicated.

Companies concerned with music use on the Internet know now that the DPRSRA allows them to take an aggressive stance against copyright infringers. Broadcast Music Inc. ("BMI") has created a "MusicBot" robot that will comb the Web using a software program to identify sites which contain music files; these sites will then be reviewed for sound clips being used without permission.[135]

Although commercial sites are the likely first targets of such sweeps, a fan that puts a band's song on his site without a license should be concerned as well.[136] While it seems impractical for licensing agencies to go after individual fan-based Web sites that usually serve the purpose of promoting bands, fans should know that legally, this strict stance against infringers is justified. Under the DPRSRA, a cautious fan creating a Web site using a song from his favorite band should be sure that the song does not have to be downloaded in order for the recipient to hear it. If there is no downloading to a recipient's computer, the transmission will amount to a performance of the sound recording. Because an interactive transmission is involved (the recipient clicks on the icon to hear the song), the fan will have to get a voluntary license from the sound recording copyright holder. If downloading of the song is required in order for the recipient to hear it, a distribution of a phonorecord will be involved, and although members of the public have the right to dispose of or sell their copy of a phonorecord after they buy it, they cannot effect a further distribution of the phonorecord without a license to do so. This should be the extent of the fan's concerns stemming from the Digital Performance Right in Sound Recordings Act of 1995, although as noted, several pre-existing sound recording and musical composition rights will also be implicated, and a license will be required from the music publisher.

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[135] *BMI's 'Robot' Scans the Web for Copyright Infringers*, WALL ST. J., Oct. 16, 1997, at B6.

[136] "'*Unless* the site is violating the rights of copyright owners, we view fan sites as essentially a promotional partnership.'" Atwood, *supra* note 96, at 58 (statement of Liz Heller, Capitol's senior VP of new media) (emphasis added).

VI. CONCLUSION

This Comment proposed a method for analyzing the Digital Performance Right in Sound Recordings Act of 1995, and explored the Act's applicability. The blueprint formulated in this Comment can be used to address issues involving the digital transmission of sound recordings, as these issues arise currently and as they develop in the future. The DPRSRA is important even today, because the regulations contained therein set new boundaries within which the licenses to perform and deliver songs digitally will be negotiated and obtained. This Comment concludes that the importance of the Act will more fully be seen within a few years, as digital technology services explore the boundaries set up by the Act and subsequent licensing agreements.