

Abstract

Susan A. Russell is currently completing her LL.M. in Intellectual Property Law at the University of California, Berkeley School of Law. In the fall of 2004, she will begin the J.S.D. program at the Berkeley School of Law. Below, Ms. Russell focuses on one facet of the Internet—webcasting. Part I of this article gives an overview of webcasting itself. Part II identifies the groups and their arguments in the debate over webcasting. Part III provides a critical review of the legislative history on webcasting by looking at the various acts passed by Congress. As webcasting significantly resembles radio broadcasting, the question is raised as to why Congress requires webcasters to pay royalty fees on any music they distribute over their lines, while not requiring the same for radiobroadcasters. Ms. Russell addresses this perplexity by providing comprehensible insight into the future of webcasting in Part IV.

THE STRUGGLE OVER WEBCASTING – WHERE IS THE STREAM CARRYING US?

I. Introduction

The terminology that comprises intellectual property law with regard to the Internet is so new that it has yet to be incorporated into the pages of *Black's Law Dictionary*. The fact that the Internet is constantly changing and expanding, coupled with the fact that it is still in its infancy, leaves lawmakers and those with an interest in the future and direction of the Internet struggling to meet these novel challenges. This article focuses on one facet of the Internet—webcasting. Part I of this article gives an overview of webcasting itself. Part II identifies the groups and their arguments in the debate over webcasting. Part III provides a critical review of the legislative history on webcasting. Finally, Part IV discusses the future of webcasting.

II. Overview of Webcasting

In order to understand webcasting it is important to understand its terminology. According to the Recording Industry Association of America (“RIAA”),¹ webcasting is defined as “the streaming of audio on the Internet, such as with Internet radio.”² Webcasting is also

¹ See *infra* Part II.A.

² Webcasting, RIAA, at <http://www.riaa.com/issues/music/webcasting.asp> (last visited Mar. 10, 2004); see also Frequently Asked Questions—Webcasting, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp#whatis (last visited Mar. 10, 2004).

referred to as “Internet radio.” Webcasters are “Internet-only services that transmit several different channels of highly-themed genres or retransmitters of over-the-air broadcasts.”³

III. Groups Involved in the Webcasting Debate: Islands in the Stream

There are two diametrically opposed groups that unequally share the webcasting spotlight. The groups in the debate over webcasting are those that support the governmental regulation of webcasting, such as the RIAA, and those that oppose the governmental regulation of webcasting, such as Boycott-RIAA.

A. Groups in Support of Governmental Regulation of Webcasting

The RIAA leads the movement for governmental regulation of webcasting and “works to protect intellectual property rights [of artists] worldwide.”⁴ It is a trade group that represents member companies that “create, manufacture, and/or distribute approximately 90%, [totaling \$15 billion], of all legitimate sound recordings produced and sold in the United States.”⁵ The RIAA asserts that “[i]ts mission is to foster a business and legal climate that supports and promotes our members’ creative and financial vitality.”⁶ However, the RIAA’s goals of protecting the financial and intellectual property rights of artists reach far beyond the tangible and into the constitutional by ensuring that artists’ First Amendment rights are not infringed upon.⁷ The RIAA will also “conduct consumer industry and technical research...and monitor and review state and federal laws, regulations and policies.”⁸

³ *Id.*

⁴ *About Us*, RIAA, <http://www.riaa.com/about/default.asp> (last visited Mar. 10, 2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

1. Piracy

According to the RIAA, there are a number of problems facing webcasting that beg for government regulation as a remedy. The RIAA portrays itself, its members, and its artists as victims of unregulated webcasting.⁹ The RIAA uses the term “pirate” to refer to unlicensed radiobroadcasters and webcasters that broadcast music over the Internet without authorization or compensation to the artist.¹⁰ Piracy is “the illegal duplication and distribution of sound recordings.”¹¹ The RIAA lists four specific categories of music piracy:

1. Pirate recordings are the unauthorized duplication of only the sound of legitimate recordings, as opposed to all the packaging, i.e. the original art, label, title, sequencing, combination of titles[,] etc. This includes mixed tapes and compilation CDs featuring one or more artist.
2. Counterfeit recordings are unauthorized recordings of the prerecorded sound as well as the unauthorized duplication of original artwork, label, trademark and packaging.
3. Bootleg recordings (or underground recordings) are the unauthorized recordings of live concerts, or musical broadcasts on radio or television.
4. Online piracy is the unauthorized uploading of a copyrighted sound recording and making it available to the public, or downloading a sound recording from an Internet site, even if the recording isn't resold. *Online piracy may now also include certain uses of “streaming” technologies from the Internet.* (emphasis added).¹²

2. Why CD Prices Remain High

The RIAA contends that piracy creates a problem for both the recording industry and the public because of the “factors that go into the overall price of a CD.”¹³ However, the RIAA concedes that the actual price of the physical disc is inexpensive, and has decreased in recent years.¹⁴ Nonetheless, the RIAA asserts that the price of CDs remains considerably high because

⁹ Anti-Piracy, RIAA, at <http://www.riaa.com/issues/piracy/default.asp> (last visited Mar. 10, 2004).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Cost of a CD*, RIAA, at <http://www.riaa.com/news/marketingdata/cost.asp> (last visited Mar. 10, 2004).

¹⁴ *Id.*

of the invaluable efforts of the artist in creating the music; fees that the label incurs signing new artists; recording costs, studio fees, studio musicians, sound engineers and producers; marketing and promotion costs, including “video clips, public relations, tour support, marketing campaigns,” and radio promotions; artwork for packaging and promotional materials; concert tour; and risk, because not all CDs are profitable due to indirect costs of production.¹⁵ For instance, less than 10 percent of all new CDs that enter the market each year are profitable.¹⁶

B. Groups in Opposition to Governmental Regulation of Webcasting

The groups in support of governmental regulation of webcasting are centralized around the well-funded RIAA. However, groups in opposition to governmental regulation of webcasting tend to be more fragmented, have considerably less funding, and can be characterized as having a more grassroots-movement quality. One of the more vocal groups for unregulated webcasting is Boycott-RIAA. Boycott-RIAA provides specific and insightful information about the RIAA and webcasting.¹⁷

Boycott-RIAA examines the history of the music industry and the future of music.¹⁸ The RIAA views the recording companies and its artists as victims to piracy. However, Boycott-RIAA views the public and aspiring artists as the victims while depicting the RIAA, recording companies, and distribution monopolies as the villains.¹⁹ According to Boycott-RIAA, “with huge media mergers continuing to consolidate the decisions of what to play and promote, it becomes more and more difficult for artists to gain exposure through the few remaining coveted

¹⁵ Id.

¹⁶ Id.

¹⁷ See Boycott-RIAA, at <http://www.boycott-riaa.com> (last visited Mar. 10, 2004).

¹⁸ Id.

¹⁹ See Facts—The Truth, Boycott-RIAA, at <http://www.boycott-riaa.com/facts/truth> (last visited Mar. 10, 2004).

radio spots.”²⁰ Webcasting presents the opportunity for musicians to distribute their music with minimal manufacturing and distribution costs and provides instant access to an international audience. Thus, groups against governmental regulation of webcasting appear to be arguing that Congress has overextended the intent of the recognized, limited monopoly of copyright protection.²¹ Although copyright law is meant to provide an incentive to create artistic works and to produce a wide range of creative expression for society as a whole, recent webcasting laws stifle artistic creativity by inhibiting artists' musical works from reaching the public instead of encouraging artists' productions of those works.²² This strikes at the very heart of the social bargain upon which copyright protection is predicated.

Boycott-RIAA claims that the special interest group, the RIAA, has a conflict of interest because RIAA claims to lobby on behalf of artists while representing and receiving funding from major record companies.²³ Boycott-RIAA contends that these interests are irreconcilable because both artists and record companies are battling over a single slice of the pie. In other words, both the record companies and the artists are concerned with receiving the most amount of money from the music produced; sometimes, these interests can be conflicting when an artist wants to promote her music inexpensively by distributing it over the Internet. According to Boycott-RIAA, the RIAA cannot represent the artists and the record companies and claim the

²⁰ Id.

²¹ See Consumers Against the RIAA, CAR, at www.geocities.com/riaasucks (last visited Mar. 10, 2004). Under “[t]he RIAA’s obscene copyright policy,” these advocates against governmental regulation over webcasting seem to argue that the RIAA’s “strict policy on the ownership of copyright music” boils down to nothing but economic gain for the RIAA while leaving the musicians and vocalists with nothing for any re-released material. Id. Though this website represents the more crass viewpoints of anti-RIAA groups, it nevertheless provides insight into the magnitude of pro-webcasting advocates.

²² See Richard D. Rose, Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution, 42 IDEA 313 (2002) (providing an overview of copyright laws and how music can be used legally on the Internet).

²³ See FAQ, Boycott-RIAA, at <http://www.boycott-riaa.com/faq> (last visited Mar. 10, 2004).

same benefit for both parties.²⁴ Some proponents of the RIAA argue that the RIAA may represent both parties and let it decide how to divide the proceeds. However, the fact remains that the record companies have more power and influence than do its artists, and opponents of the RIAA argue that the artists need their own independent representation in order to level the playing field.

1. Promotion

Groups in opposition to governmental regulation of webcasting maintain arguments similar to those used by groups in support of sharing music files through websites such as Napster, Gnutella, Kazaa, Morpheus, and Aimster. In fact, many of the organizations supporting file sharing are the same organizations that support unregulated webcasting.²⁵ A strong argument in defense of webcasting is that unregulated, free webcasting benefits the public by providing music over the Internet in a fashion similar to radio and also benefits the music industry by providing free advertisement of music. However, the RIAA is likely to argue that webcasting has absolutely no promotional value, but rather negatively affects the sales of CDs and infringes their monopoly rights.

Congress and the RIAA view webcasting as dissimilar to radio broadcasting because webcasting involves the transmission of signals over closed lines to specific computer addresses whereas traditional radiobroadcasts over open lines, or airwaves, to anyone with a radio.²⁶ In

²⁴ Id.

²⁵ See John Borland, Kazaa Finds Friends in File-Swapping Fight, NEWS.COM, http://news.com.com/2100-1023-914983.html?legacy=cnet&tag=pt.rss..feed.ne_9908760 (last modified May 16, 2002).

²⁶ See *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 775 (E.D. Pa. 2001); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); see also Frequently Asked Questions-Webcasting, RIAA, at http://riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 10, 2004). The RIAA states:

A statutory license is an exception to copyright because it takes away the normal right of a copyright owner to determine whether and how to grant a license. For example, the statutory license for webcasters allows any webcaster merely to file a notice with the Copyright Office in order to begin using hundreds of thousands of copyrighted sound recordings. Statutory licenses are limited in nature so as not to

reality, it appears as though Congress has taken the position that webcasting is different from radio broadcasting to appease the RIAA and its supporters; perhaps this is due to greater lobbying power of the recording industry. This treatment of webcasting is perplexing because the only difference between webcasting and radio is that webcasting signals are received by a computer and the other by radio.

2. The Price of a CD

As stated above, the RIAA claims that the price of CDs has remained high because of the risk that the record companies take when producing an album that fails completely, and therefore never returns a profit.²⁷ However, Consumers Against the RIAA (“CAR”) claim that the record companies’ direct expenses for CDs are minimal.²⁸ CAR asserts that a new artist typically receives 35¢ for each CD sold, while a well-known artist may receive \$1 to \$2 for each CD sold.²⁹ Retailers may add \$2 to \$3 per CD as an overhead/inventory fee.³⁰ A mass manufactured CD only costs about 30¢ to 40¢ to produce and package.³¹ Finally, most promotion costs (touring, transportation, administration, costumes, makeup, studio time, studio engineers, musicians’ salaries, making videos, background dancers, stage crew, sound technicians and the

limit too drastically the rights of copyright owners, and that is why the statutory license for webcasters is limited to certain types of programming. In other words, the copyright owner is unable to refuse to license, but the licensees must abide by certain conditions in order to avail themselves of its benefit. This is the essence of a statutory license. The terms of the webcasting statutory license were agreed to by representatives of webcasters and record companies. The terms were not imposed by one side or the other. It was an achievement reached by working together to arrive at something fair for both sides.

We know of many webcasters who have developed software that automatically programs in a manner compliant with the terms of the statutory license. We are also aware of many companies who are developing inexpensive software to make available to webcasters so that they can create compliant playlists. *Id.*

²⁷ *Cost of a CD*, RIAA, at <http://www.riaa.com/news/marketingdata/cost.asp> (last visited Mar. 10, 2004).

²⁸ *Consumers Against the RIAA*, at www.geocities.com/riaasucks (last visited Mar. 10, 2004).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

cleanup crew) are deducted from the artist's royalty check.³² Thus, it is the artists that incur the majority of the expenses for promotion costs, which are paid out of their royalty checks, leaving the majority of the money gained from CD sales to the record companies.

IV. Webcasting Legislation

According to the United States Constitution, the purpose of intellectual property law is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³³ It has been argued that this Constitutional provision “encourages people to devote themselves to intellectual and artistic creation by granting authors limited control over many aspects of their work.”³⁴ The intention of the Founders was not necessarily “to reward the author, but rather to promote the best interest of the public by ensuring that innovative works were made available.”³⁵

Since webcasting is a new and unexpected medium, using cutting edge technology, the legislature did not anticipate a problem concerning this new phenomenon. Although there are many international, federal,³⁶ and a few state laws addressing intellectual property rights, this

³² *Id.*

³³ U.S. CONST. art. I, § 8, cl. 8

³⁴ Rose, *supra* note 22, at 320.

³⁵ *Id.*

³⁶ See 17 U.S.C. §§ 101-22 (2000); 18 U.S.C. § 2319 (2000); see also *Copyright Laws*, RIAA, available at <http://www.riaa.com/issues/copyright/laws.asp> (last visited Mar. 6, 2004). The RIAA states:

Federal law protects copyright owners from the unauthorized reproduction, adaptation, performance, display or distribution of copyright protected works.

Penalties for copyright infringement differ in civil and criminal cases. Civil remedies are generally available for any act of infringement without regard to the intention or knowledge of the defendant, or harm to the copyright owner. Criminal penalties are available for intentional acts undertaken for purposes of "commercial advantage" or "private financial gain." "Private financial gain" includes the possibility of financial loss to the copyright holder as well as traditional "gain" by the defendant.

Where the infringing activity is for commercial advantage or private financial gain, sound recording infringements can be punishable by up to five years in prison and \$250,000 in fines. Repeat offenders can be imprisoned for up to 10 years. Violators can also be held civilly liable for actual damages, lost profits, or statutory damages up to \$150,000 per work.

article focuses on the current federal laws applicable to digital music law. The relevant digital music laws include the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act.

A. Digital Performance Right in Sound Recordings Act of 1995

In 1995, Congress established the first performance rights for digitally transmitted sound recordings by passing the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”).³⁷ The Act calls for royalty payment on digital audio transmissions offered through subscription services such as cable and satellite.³⁸ However, the DPRA does not address the “issue of webcasting or other nonsubscription based song services offered on the Internet.”³⁹

The Federal Anti-Bootleg Statute {18 USC 2319A} prohibits the unauthorized recording, manufacture, distribution, or trafficking in sound recordings or videos of artists' live musical performances. *Violators can be punished with up to 5 years in prison and \$250,000 in fines.*

Two important legal concepts, especially pertaining to the Internet, should be kept in mind—contributory infringement and vicarious liability.

Contributory infringement may be found where a person, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. For example, a link site operator may be liable for contributory infringement by knowingly linking to infringing files.

Vicarious liability may be imposed where an entity or person has the right and ability to control the activities of the direct infringer and also receives a financial benefit from the infringing activities. Vicarious liability may be imposed even if the entity is unaware of the infringing activities.

Fair Use Doctrine {USC Title 17, Sec 107} The "fair use doctrine" of federal law is a complicated area. Basically, it limits the extent of property interest granted to the copyright holder.

There are some limitations. Whether the court allows you to reproduce, distribute, adapt, display and/or perform copyrighted works depends upon the nature of the use (commercial purposes, non-profit, educational), the length of the excerpt, how distinctive the original work is, and how the use will impact the market for the original work.

Generally speaking, one is not allowed to take the "value" of a song without permission, and sometimes that value is found even in a three-second clip. When in doubt, it is always wise to check with the copyright owner, because in many cases even a small clip of a song may not be "fair use."

³⁷ See Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995) (amending 17 U.S.C. §§ 101, 106, 111, 114, 115, 119, 801, 802, and 803 (2000)).

³⁸ Kimberly L Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 11 (2001).

³⁹ Rose, *supra* note 22, at 330.

The DPRA is important to webcasting because it served as a basis for Congress when it began formulating the governmental regulation of webcasting through the Digital Millennium Copyright Act (“DMCA”).⁴⁰

B. Digital Millennium Copyright Act

Congress passed the DMCA in response to international pressure from the World Intellectual Property Organization (“WIPO”)⁴¹ to ensure that the United States complies with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁴² The two new WIPO treaties “updated international copyright standards on Internet technology security and anti-piracy measures.”⁴³ Webcasters contended that “their services were similar to traditional radiobroadcasts, and as such they were not required to pay for a license to play the digital sound recordings.”⁴⁴ In response to webcasters, the RIAA and other proponents of governmental regulation of webcasts argued that webcasters should be required to obtain a license for transmission of audio recordings in order to protect the artists' intellectual property rights in their works.⁴⁵ It is reasonable to suggest that Congress passed the Act in part to appease the RIAA, because no government regulation of webcasting was implemented prior to the DMCA.⁴⁶

With regard to webcasting requirements, the DMCA:

⁴⁰ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending Title 17 of the United States Code).

⁴¹ See *Copyright Laws*, RIAA, at <http://www.riaa.com/issues/copyright/laws.asp> (last visited Mar. 6, 2004)) stating:

The Berne Convention for the Protection of Literary and Artistic Works is the keystone for all international copyright agreements. The World Intellectual Property Organization (WIPO) administers the Berne Convention. Today, although there is no such thing as an “international copyright” per se, most countries have agreed to basic copyright protection terms.

⁴² Craft, *supra* note 41, at 15; see also *Copyright Laws*, RIAA, at <http://www.riaa.com/issues/copyright/laws.asp> (last visited Mar. 11, 2004) (“The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) were held in 1996 to address digital issues and are meant to further clarify Berne and TRIPS”).

⁴³ Craft, *supra* note 41, at 15.

⁴⁴ Rose, *supra* note 22, at 330.

⁴⁵ Craft, *supra* note 41, at 15.

⁴⁶ Rose, *supra* note 22, at 330.

limits the liability of Internet Service Providers (“ISP”) and Online Service Providers (“OSP”) from copyright infringement when acting solely as a conduit for transmitting information; creates a new license for sound recordings that are digitally transmitted; and provides a new statutory license for webcasters that do not provide on-demand services and grants recording copyright holders the exclusive right to authorize those webcasts provided on-demand.⁴⁷

The RIAA persuaded Congress that DMCA licensing would be efficient for webcasters because it allows them “to perform all of the sound recordings it wishes to perform without obtaining separate licenses from each copyright owner”⁴⁸ if the licensee qualifies for the DMCA license. It is important to note that the Act does not include any set royalty rates that webcasters would be required to pay. However, as noted in the DMCA requirements, the Act does create statutory licensing categories.

1. DMCA Webcast Licensing

The DMCA licensing scheme allows non-subscription service webcasters to consolidate their licenses from individual copyright owners into one statutory license.⁴⁹ To qualify for the statutory, compulsory license the webcaster must offer a non-interactive transmission and must not be in the business of selling a product or service.⁵⁰ If the webcaster is not able to comply with or qualify for a DMCA license, that webcaster then has the onerous task of applying for a license from each copyright holder.⁵¹ Thus, there may be a chilling effect on webcasting as the variety and sources of transmissions are limited.

⁴⁷ *Id.* at 331.

⁴⁸ *Frequently Asked Questions-Webcasting*, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 11, 2004).

⁴⁹ Rose, *supra* note 22, at 332-33.

⁵⁰ Craft, *supra* note 41, at 16.

⁵¹ Rose, *supra* note 22, at 332-33.

Congress has set conditions that licensees must meet in order to obtain a statutory license.⁵² First, licensees must agree to pay royalties in addition to licensing fees.⁵³ Second, they must follow Congress' set limitations as to the frequency and the diversity of songs webcast.⁵⁴ Third, webcasters must employ available measures to ensure that the listener does not copy the music broadcast over the Internet.⁵⁵

Webcasters who wish to obtain a "statutory license must first notify sound recording copyright owners by filing an 'Initial Notice' with the Copyright Office."⁵⁶ On June 20, 2002, the Librarian of Congress set the rates for non-subscription webcasters operating under the statutory license, which took effect on September 1, 2002.⁵⁷ Songwriters and publishers have traditionally worked directly with one of three performance rights organizations: the American Society of Composers, Authors and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and the Society of European Stage Actors and Composers ("SESAC") to collect royalty fees from radio stations.⁵⁸ Although webcast licenses are granted through ASCAP, BMI and SESAC, SoundExchange is the organization that Congress has appointed to collect the royalty payments from the statutory licenses of webcasters, and then distribute the collected fees to the record

⁵² See *Frequently Asked Questions-Webcasting*, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 11, 2004) (answer to question 6 lays out the conditions webcasters must meet with regarding to qualifying for DMCA statutory licenses).

⁵³ Craft, *supra* note 41, at 16.

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 18.

⁵⁶ See *Frequently Asked Questions-Webcasting*, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 11, 2004).

⁵⁷ See *Rates and Terms for Statutory License for Eligible Nonsubscription Services*, U.S. Copyright Office, at http://www.copyright.gov/carp/webcasting_rates.html (last visited Mar. 11, 2004); *Frequently Asked Questions-Webcasting*, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 11, 2004) (setting out the "rates for non-subscription webcasters operating under the statutory license" as "set by the Librarian of Congress").

⁵⁸ See ASCAP, at <http://www.ascap.com> (last visited Mar. 11, 2004); BMI, at <http://www.bmi.com> (last visited Mar. 11, 2004); SESAC, at <http://www.sesac.com> (last visited Mar. 11, 2004).

companies and artists.⁵⁹ It is interesting to note that SoundExchange is the brainchild of the RIAA.⁶⁰

2. DMCA Webcasting Royalty Requirements Upheld in Court

In August 2001, a Pennsylvania federal court presided over *Bonneville Int'l Corp. v. Peters* which involved issues concerning whether webcasters should be forced to pay royalties in accordance with the DMCA.⁶¹ Webcasters argued that they should be granted the same copyright royalty exemption enjoyed by radio broadcasters in traditional AM/FM broadcast music stations.⁶² The RIAA and the United States Copyright Office asserted that webcasting should not be treated as ordinary AM/FM transmissions of signals, because webcasting involves the transmission of signals over closed lines to specific computer addresses which differ from traditional radio which broadcasts over open lines to anyone with a radio and because the quality of digital webcasting surpasses the traditional radio transmission, although bandwidth is often a concern.⁶³ The court in *Bonneville* upheld the DMCA licensing requirements enforced through the United States Copyright Office that require webcasters to pay royalties when copyrighted material is digitally played on the Internet.⁶⁴

⁵⁹ See SoundExchange, at <http://www.soundexchange.com> (last visited Mar. 11, 2004); see also *Frequently Asked Questions-Webcasting*, RIAA, at http://www.riaa.com/issues/licensing/webcasting_faq.asp#areli (last visited Mar. 11, 2004) (“[e]ach payment shall be accompanied by a statement of account, on a form to be provided by SoundExchange™). The SoundExchange statement of account form can be accessed at <http://www.soundexchange.com/licensee/forms.html> (last visited Mar. 11, 2004).

⁶⁰ See Gwendolyn Mariano, *SoundExchange Freezes Webcast Royalties*, CNET, May 17, 2001, available at <http://www.news.com.com> (last visited Mar. 11, 2004). See also Cecily Barnes, *Music Industry Casts New Net for Streaming Royalties*, CNET, Nov. 28, 200, available at <http://news.com.com/2100-1023-249124.html?legacy=cnet> (last visited Mar. 11, 2004).

⁶¹ *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001). Note that there are not many cases pertaining to webcasting. This may be due in part to the controversy and media attention given to uploading and downloading of MP3s on peer-to-peer programs such as Napster.

⁶² *Id.* at 765.

⁶³ *Id.* at 775-77.

⁶⁴ *Id.* at 784.

C. Legislation Analysis

The United States Copyright Act provides that artists possess intellectual property rights protecting them against the unauthorized reproduction, adaptation, performance, display or distribution of copyright protected works.⁶⁵ The RIAA fails to make a successful argument that requiring licenses of, and royalties from, webcasters will benefit either the public or the artists when the majority of monies collected are given to the record companies.

Something fishy appears to be taking place in the stream of webcasting as the RIAA and its supporters have convinced Congress that there is an inherent difference between webcasting and radio broadcasting. In fact, there seem to be few differences between the two mediums, except that one requires a radio and the other requires a computer and the quality and ability of duplication may be better obtained with webcasting.

Although it is possible to sell products directly over the Internet, it is also possible to sell products over the radio through advertisements. The RIAA's arguments leave many questions as to why webcasting should be regulated differently than radio broadcasting and why the governmentally provided entity, SoundExchange, is permitted to collect royalties from webcasters instead of allowing the traditional clearinghouses (ASCAP, BMI, and SESAC) to collect royalties as they do for radiobroadcasts.

Perhaps the RIAA is merely trying to create a distraction to soften the blow of otherwise harsh and restrictive legislation. It is true that artists deserve compensation for the works that they create. However, do the laws in fact protect the artists or do they instead line the pockets of the record company executives? It is also important to note that copyright laws were originally created to protect creation, not market-based goods. Sadly, it appears that our intellectual

property laws are being applied arbitrarily and capriciously, if not altogether misapplied. Although SoundExchange is supposed to distribute the collected royalties to both the artists and the labels, it is difficult to imagine that SoundExchange will be able to remain neutral during the distribution process given the dual interests of the artists and the labels in collecting money.

V. The Future of Webcasting

The bickering between the RIAA and groups such as CAR appears on the surface to present artists with one of two positions: money-grubbing and anti-Internet, or poverty stricken, independent and pro-Internet. From an economic position, it is reasonable that the RIAA wants to ensure that its record companies earn royalties from the Internet. Conversely, the distribution of music over the Internet could facilitate the RIAA's goals of economic gain but, as the pro-webcasting groups contend, in a different way. However, there is an option that may satisfy both groups as discussed below.

On one hand, groups such as CAR would like to see that undiscovered artists have the ability to promote their music over the Internet and to ensure that artists actually receive their share of funds from collected royalties. As Congress has already enacted the DMCA's webcasting licensing and royalty requirements into law, government involvement with webcasting is inescapable regardless of whether regulation is warranted. In order to appease both groups in the webcasting debate, Congress should first eliminate SoundExchange and any other private company that is collecting and distributing webcasting royalties and performing governmental functions. Enacting statutes requiring webcasters to pay royalties and then allowing a private company with ties to the RIAA to collect the fees is facially biased. Congress should create a neutral, detached party to collect and distribute the webcasters royalties.

⁶⁵ See U.S. Copyright Law, 17 U.S.C. §§ 101-22 (2000); 18 U.S.C. § 2319 (2000).

Also, Congress should rework the current DMCA provisions pertaining to webcasting by allowing webcasters more of an opportunity to voice their opinions and to participate in setting royalty fees that are more agreeable to both the RIAA and webcasters. It would be helpful to exempt nonprofit webcasters who truly have no advertisements on their websites or in their webcasts from paying royalty fees. Webcasters that do have visual and audio advertisements have less room to argue for free, unregulated webcasting as they are profiting from playing artist's music without compensating the artist.

It is also important to consider what is in the best interest of the public with regard to the future of webcasting. More and more people utilize the Internet as everything from a form of entertainment to a research tool. From science to music, it is of paramount importance that we are able to access as much information as possible as we come to depend more heavily on the Internet in order to remain a knowledgeable society. Laws that require fees for licensing and royalties from webcasters will ultimately serve to restrict webcasting, as many webcasters will be unable to afford the fees. Ultimately, the restriction on webcasters will negatively impact our society by limiting access to a wealth of information and music. Allowing the imposition of royalty and licensing fee requirements will serve as a dam that blocks the vital stream of information which serves to educate our society.