

Preparing Your Music Client For Web Distribution

by
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Introduction

"[D]igital technology allows an individual to transform . . . expression contained within any [musical] work . . . into a sequence of bits (binary values of either 0 or 1), which can be stored as data in a computer."¹ Music industry trends point toward digital transmission of recordings as an extremely important method of distribution in the near future.² What was originally thought by participants in the music industry in 1997 as "inevitable," selling recordings over the Internet has already become a reality.³ As this method of distribution becomes increasingly common, attorneys practicing in this industry will be compelled to advise their clients of the choices available in releasing their musical expressions on the Internet.

This article will provide a basic overview of the digital transmission process, discuss the current state of copyright protections for musicians and the failings in those protections and will present other viable options that allow for the protection of a client's interests.

I

The Digital Process

Copyrighted works can easily be encoded into a digital format. Digital music is nothing more than an organized collection of ones and zeros. Once the music is encoded, it can then be transmitted and reproduced easily and flawlessly.⁴ Digital transmission can be in a variety of forms, but the form most likely to impact traditional sales is referred to as an "interactive service." An "interactive service" is one

1. 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 P.L.I. 137, 129 (1997).

2. See H.R. REP. NO. 104-274, at 12 (1995). The music business grosses more money than any other industry on the Internet. See Rafter & Coats, *supra* note 1, at 143.

3. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 378 (1997).

4. See 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, 39-40 (1996).

where a person can shop for music and place a request to receive a transmission of a particular selected sound recording.⁵

The major restriction to those who want to upload and download music files through the Internet is the amount of time it takes to make such a transfer. Digital audio is very data intensive, but compression schemes are beginning to make transfers much less time consuming.⁶ One compression scheme is the MP3 file format. Short for Motion Picture Experts Group Audio Layer 3, MP3 files are the result of a type of audio data compression that can reduce digital sound files by up to a twelve to one ratio.⁷ For example, a typical CD song is 50 megabytes, but through the MP3 technology it can be compressed to approximately 4.5 megabytes.⁸ This reduction in size results in virtually no loss in audio quality from that which is provided by a compact disc.⁹ The MP3 format also allows the user to make unlimited digital copies of a single recording.¹⁰ More than 5 million MP3 players have been downloaded from the Internet and the search term, MP3, is the third most popular term on the AltaVista search engine, according to Mark Mooradian, a consumer analyst at Jupiter Communications.¹¹ Another 3.5 million LiquidAudio players, which use a slightly different format, have been

5. See Derek M. Kroeger, Comment, *Applicability of the Digital Performance Right in Sound Recordings Act of 1995*, 6 UCLA ENT. L. REV. 73, 82-83 (1998).

6. See George Newman, *Watermarks Could Thwart Internet Piracy: Embedded Messages Contain Copyright Information*, BILLBOARD, June 13, 1996, reprinted at Musiccode.com (visited Feb. 24, 2000) <<http://www.musiccode.com/local/billb.htm>>.

7. See MP3 (last modified April 26, 1999) <<http://webopedia.internet.com/TERM/M/MP3.html>>. This means that a 60-megabyte file can be compressed to one that is less than 5 MBs, making it much easier and less time consuming to transfer. See Mo Krochmal, *Music Industry Unprepared for MP3* (July 16, 1998) <<http://www.techweb.com/wire/story/TWB19980716S0010>>.

8. See M. William Krasilovsky, *Contending with E-Commerce: Combating E-Piracy*, REPLICATION NEWS (May 1998) at 14, available at <<http://www.musiccode.com/local/repnew01.htm>>.

9. See MP3, *supra* note 7.

10. See Krochmal, *supra* note 7.

11. See *id.* Downloading refers to the transfer of information from the Internet to a personal computer. See Mary Ann Shulman, Comment, *Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?*, 27 GOLDEN GATE U.L. REV. 555, 558 15 (1997).

downloaded.¹² This current level of MP3 utilization is, however, seen as just a beginning. As interest continues to increase, other compression schemes continue to be developed and will provide artists with numerous distribution options.¹³

These new digital distribution technologies create both advantages and disadvantages that are entirely new to the music industry.¹⁴ Artists see digital distribution as opening up their work for exposure in a way that has never occurred before. At times, an artist will even choose to post a recording for free distribution. This occurs when the artist is looking for publicity and exposure to a wide range of listeners without having to overcome the hurdle of being signed by a major record label.¹⁵ This free distribution process often appeals to bands on independent record labels or bands with no record contracts at all. It allows musicians to make their works available to large, international audiences at relatively low cost without the help of the (once logistically mandatory) major distributors. The digital format also allows for cheap recording and editing,¹⁶ allowing musicians to overcome one more hurdle to the distribution of their product.

This digitization has great appeal to many new artists for whom the more traditional distribution networks for musical expression are closed. It allows musicians to be “only a high-speed Internet connection away from being in the music distribution business.”¹⁷ MP3 and other forms of digital distribution can create a platform for artists who would

12. See *Music Industry Unprepared for MP3* (last modified July 16, 1998) <<http://www.techweb.com/wire/story/TWB1998071650010>>.

13. See, e.g., Douglas F. Gray, *Lucent's Digital Music Player to Challenge MP3*, CNN INTERACTIVE (April 22, 1999) <<http://www.cnn.com/TECH/computing/9904/22/lucent.idg/>>. Lucent has developed another compression device called the Enhanced Perceptual Audio Coder (EPAC). See *id.* Lucent developed its format, focusing on improving the quality of the sound, and believes the quality of EPAC is superior to that of MP3. See *id.* Other technology leaders, such as IBM and Sony are also developing systems, but their systems are focusing on increasing the copyright protections in the format. See *id.*

14. See Hartman, *supra* note 4, at 54.

15. Large record companies control traditional methods for distribution of recorded music through record stores and the artists represented by these record companies dominate traditional radio stations. New, smaller record companies have been distributing music cost effectively over the Internet allowing new artists a way for their music to be heard and distributed.

16. See Rafter & Coats, *supra* note 1, at 143.

17. *Id.*



otherwise never be distributed on a national basis allowing them to make large profits. The number of already active sites that assist musicians in their distribution efforts show that the artists and consumers have cast their votes for web distribution.¹⁸

Musicians are not, however, entirely happy with the extreme rise in the prevalence of the digital transfer of music files. When music is encoded in the digital format, it causes perceptions of value to change. No material object exists that physically holds the artistic expression. If no actual object trades hands, the public has a tendency to believe that no value has changed hands. It is this change in perception that poses a large, immediate threat to the ability of musicians to receive value for their efforts.¹⁹

II

Balancing Artist Protections and Consumer Demands

All of this new interest in alternative distribution strategies is in response to the demands of increasingly savvy music consumers. According to Tom McPartland, CEO of TCI Music, a digital-media company owned by cable producer TCI, “[Consumers] want the ability to manipulate what they . . . hear with some granularity.”²⁰ As the digital format becomes more sophisticated, consumers are provided with a valid option to make musical purchasing choices which are not captured in a physical carrier, like a CD, but in a format

18. The following websites are a very limited sample, but provide an illustration of the breadth of services available. MP3.com is a site that has more than 21 million downloads available for free download by listeners. The available downloads are posted by artists from numerous genres and from all around the world. *MP3.com* (visited Feb. 24, 2000) <<http://mp3.com/>>. The Internet Underground Music Archive website (IUMA) allows consumers to buy songs from numerous independent artists for downloading. *Internet Underground Music Archive* (IUMA) (visited Feb. 24, 2000) <<http://www.iuma.com>>. N2K also provides recordings that are sold and downloaded directly from the website. See Krasilovsky, *supra* note 8, at 14. Musicmaker.com is a joint effort that provides Platinum Records with a venue from which their entire catalog of over 2500 entire albums can be downloaded. *Musicmaker.com, Platinum Readying New MP3 Download Service* (Feb. 16, 1999) <<http://www.musiccode.com/pr17.htm>>. Their website caters to well-known artists including the Beach Boys and KC and the Sunshine Band, allowing consumers to purchase singles of their favorite hits.

19. See Newman, *supra* note 6.

20. Krochmal, *supra* note 7.

entirely distinct from the traditional carrier.²¹ In addition, writable CD drives are becoming less costly, increasing consumer demand for digitized recordings that allow for the creation of personalized “mix-CDs.” The Internet also provides musicians and consumers an affordable means to interact.²² Artists could be severely hindered in reaching their entire target market if they chose to ignore the estimated 90 million computers connected to the Internet worldwide and the consumers that utilize those computers in making purchasing decisions.²³

The traditional role of recording industry giants may become obsolete if electronic delivery continues to become more popular.²⁴ According to Patrick Reilly, a writer for the *Wall Street Journal*, “Online music distribution could eventually help transform the way music is sold.”²⁵ Nonetheless, consumer demand does need to be balanced with providing adequate protection for recording artists’ interests. Artists need to be able to control the distribution of their works to avoid a negative impact on record sales.²⁶ Once a digital copy has been downloaded, it is difficult to determine whether it is distributed further or displayed publicly.²⁷ Currently, every person that has access to the Internet has access to copyrighted musical works for which the artist will

21. See Newman, *supra* note 6. For instance, as data storage is compressed, a terabyte of information can be stored on a device smaller than a stack of 12 credit cards. To translate, a terabyte holds up to around 100,000 minutes of uncompressed music or approximately 1,400 CDs.

22. See Kroeger, *supra* note 5, at 98-100.

23. See Krasilovsky, *supra* note 8, at 14.

24. 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. Some members of the recording establishment have begun to take an “if you can’t beat ‘em join ‘em” stance in response to the increasing popularity of electronic delivery. For example, many major record labels are exploring distributing samples and singles to promote in store record sales. See Don Jeffrey, *Internet sales, DVD Are Key topics for Retailers: Online Debate Rages*, BILLBOARD, March 28, 1998 at 1. See also Doug Reece, *IBM Entry Adds Impetus to Digital Distribution Plans*, BILLBOARD, Aug. 29, 1998 at 5 (discussing a joint venture between record labels and IBM).

25. Patrick M. Reilly, ‘Honey, They’re Downloading Our Song,’ WALL ST. J., July 17, 1997, at B1.

26. See Kroeger, *supra* note 5, at 82.

27. See David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner’s Guide*, 33 U.S.F. L. Rev. 1, 3-5 (1998). See also David L. Hayes, *The Coming Tidal Wave of Copyright Issues on the Internet* (Aug. 13, 1997) <http://www.fenwick.com/pub/tidal_wave.htm>.

never be compensated.²⁸ Even if an artist chooses to bypass Internet distribution, website operators may still distribute the artist's music illegally.²⁹ Musicians cannot just choose to forgo issues involving the availability of music on the Internet. They must respond to the changing technology and learn to utilize the current state of the law and state of technology to protect their interests as well as they currently can and wait for technology and the law to develop protections that will resolve the problems that have yet to be solved. The rest of this article will work to provide an understanding of both the legal structure of our system and the technological world within which the recording artist must operate.

III

Copyright and Other Statutory Protections

A. The Copyright Act

The drafters of our Constitution created the roots of copyright law in the patent and copyright clause of the U.S. Constitution, which states: “[t]he Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for a limited Time to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”³⁰ The Copyright Act is one of the primary methods through which Congress has granted the rights that currently protect the copyright owner's proprietary interest and the economic benefits that result from that creator's inventiveness.³¹

Sound recordings were not afforded federal copyright

28. See Newman, *supra* note 6 (discussing how access is only likely to increase as data storage and file transfer becomes more efficient).

29. The digital music files available on the web can be placed in two categories: 1) those posted for distribution intentionally by an artist and 2) “illegal” files that have been “ripped” from copyrighted compact discs and are made available by third parties. Ripping is the industry term for the process of copying a file from a compact disk and then compressing it to create an MP3 file. According to the president and CEO for the RIAA, Hilary Rosen, “On some college campuses, people are not buying music anymore,” they are downloading free MP3 files. See Krochmal, *supra* note 7.

30. U.S. CONST. art I, § 8, cl. 8.

31. See generally Weiskopf, *supra* note 27, at 3 (detailed discussion of copyright law for attorneys dealing with Internet issues).

protection until the 1971 amendment of the Copyright Act,³² but since that time, the owner of a copyright in music has the exclusive right to reproduce, distribute, display, perform, and license the work that the copyright covers.³³ Copyright infringement occurs when a party violates the copyright owner's exclusive rights granted by the copyright laws.³⁴ Reproductions of copyrighted materials cannot be redistributed or sold without violating the Copyright Act.³⁵ For a plaintiff to be successful in a copyright infringement case she must show the following: 1) her ownership of a valid copyright in the allegedly infringed work; 2) the defendant's copying of the work; and 3) the impropriety of that copying.³⁶ Examples of illegal activities under the Copyright Act include counterfeiting, pirating and bootlegging. Counterfeiting is the unauthorized manufacture and/or sale of recordings under the guise of the authorized manufacturer.³⁷ Piracy is distinct from counterfeiting only in that the recordings are sold on the pirate's label or on no label at all.³⁸ Bootlegging is the sale of unauthorized recordings of live or broadcast performances.³⁹ Parties found guilty of any of these violations of the Copyright Act are subject to both criminal and civil sanctions for their infringing activities.⁴⁰

Every artist should work with an attorney to eliminate ongoing violations and to prevent any future violation of the artist's rights. Copyright owners should be advised to place

32. See H.R. REP. NO. 104-274, at 11 (1995).

33. See Copyright Act, 17 U.S.C. § 106 (1998).

34. See 17 U.S.C. § 106 (1994).

35. Even online discussions and posted comments show public awareness of basic copyright law. See *MP3's and the Law: What Does the Future Hold?* (visited Feb. 24, 2000) <<http://dimensionmusic.com/articles/mp3law.txt>>.

36. See MARSHALL LEAFER, UNDERSTANDING COPYRIGHT LAW § 9.2 (2d ed. 1995).

37. See Krasilovsky, *supra* note 8, at 14. Systematic, unauthorized trading of copyrighted music on the Internet may also be subject to sanctions for trafficking in counterfeit works. See 18 U.S.C. §§ 2319, 2319A (1994).

38. See Krasilovsky, *supra* note 8, at 14.

39. See *id.*

40. For example, criminal copyright infringement through the Internet may lead to felony prosecution and can result in both a fine and a jail sentence. See 18 U.S.C. § 2319 (1994). Infringement of over ten copies valued at more than \$2,500 carries a maximum sentence of three years for the first offense. Infringement of one or more copies with a value of more than \$1000 carries a maximum sentence of one year. See 18 U.S.C. § 2319(b) (1994) amended by Pub. L. No. 105-47, § 2(d), 111 Stat. 2678, 2679 (1997).



copyright warnings on any works they wish to post on the Internet.⁴¹ Likewise, copyright holders should send notice to the infringing party as soon as they learn of an allegedly infringing activity. Once notice is received, a future defendant is much more likely to be found to have had sufficient knowledge to impose liability.⁴²

The recording industry is very active in pursuing violators of the Copyright Act. Broadcast Music Inc. ("BMI") has developed a program called "MusicBot" that searches the web for sites containing music files.⁴³ Once sites are discovered, they are reviewed for copyright violations.⁴⁴ The Recording Industry Association of America (hereinafter, the "RIAA") has also been instrumental in assisting artists whose rights are being harmed by illegal distribution.⁴⁵ The RIAA is very involved in the policy formation associated with the prevention of Internet piracy. To reach its desired ends, the RIAA allocates 80% of its anti-piracy budget to preventing copyright violation through new technologies.⁴⁶ The RIAA's current strategies to prevent Internet copyright violations include monitoring the Internet and notifying websites of their violations.⁴⁷ Additionally, the RIAA will sue to force infringing parties to discontinue their activities. An entertainment attorney should follow industry developments and reactions to understand how those actions relate to her client's distribution options and protections.⁴⁸

41. See Weiskopf, *supra* note 27, at 30.

42. Establishment of knowledge is especially important when a plaintiff is seeking damages for contributory liability. See *id.*

43. See BMI's "Robot" Scans the Web for Copyright Infringers, WALL ST. J., Oct. 16, 1997, at B11.

44. See *id.*

45. The RIAA represents the large commercial interests of the half-dozen companies that together control approximately ninety percent of the distribution of recorded music in the United States, not the creative aspects of the recording industry. See Recording Industry of America, Inc. & Alliance of Artists and Recording Companies v. Diamond Multimedia Systems, Inc., 29 F. Supp. 2d 624, 625 (C.D. Cal. 1998).

46. See Krasilovsky, *supra* note 8, at 14.

47. See *id.*

48. For example, five major labels have recently announced a plan to digitally encrypt their music so you can't download it unless you pay for it. See Margaret Quan, *IBM Rings in Secure System for Net-Music Downloads*, ELECTRONIC ENGINEERING TIMES (Feb. 15, 1999) Issue 1048, available at <<http://www.techweb.com/se/directlink.cgi?EET19990215S0030>>. The record companies are focusing on having a secure mode to distribute their

As digital distribution technology advances, the application of the Copyright Act will become more difficult. For example, making digital reproductions of a work in the process of reading, viewing, listening to, learning from, sharing, improving, and reusing that work may be unavoidable.⁴⁹ The Act, however, makes any reproduction unlawful. A consumer cannot avoid receiving a digital “copy” of a work on her own computer when he or she chooses to purchase music through the Internet. It is often in the best interests of the artist that the law not foreclose this digital reproduction.

The First Sale doctrine of the Copyright Act is also problematic. This doctrine states that copyright owners cannot control the disposition of a copy of their work after the initial sale.⁵⁰ In the context of Internet distribution, the artist should be extremely concerned with a literal interpretation. Generally, in initial transfers of works embodied on CD, the original remains in its original location. In secondary transfers, however, the actual embodiment of the work, the CD itself, is transferred. If artists lose control after the first sale, they cannot force removal of any resulting copies.

The Fair Use doctrine is similarly problematic. Though Section 107, the source of the fair use defense, does not explicitly allow other uses of copyrighted materials, the

artists' recordings. See Ron Harris, *Industry Takes the Initiative: 5 Recording Companies Hatch Plan to Fight Online Piracy*, ABC.com (visited Mar. 2, 2000) <<http://abcnews.go.com/sections/tech/DailyNews/recording981215.html>>. The Secure Digital Music Initiative is being sponsored by a coalition, which includes representatives from BMG Entertainment, EMI Recorded Music and Sony Music Entertainment, and hopes to create a digital-music standard. See Phillip Taylor, *Recording Association Rallies Industry Around Digital-Music Plan* (visited Feb. 24, 2000) <<http://www.freedomforum.org/speech/1998/12/17digitalmusic.asp>>. Additionally many major artists such as Tom Petty, Public Enemy and Alanis Morissette already post MP3 files on the Internet. See Otto Luck, *I Want My MP3* (visited Feb. 24, 2000) <<http://www.nyrock.com/features/mp3.htm>>. A rising artist needs to follow the industry and learn from experienced artists and distributors.

49. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, at Sec. IV (1996), available at <<http://www.msen.com/~litman/revising.htm>> (arguing that a reproduction, in light of technology, is no longer an appropriate way to measure infringement). It is established law that electronic communication, in the form of “a stream of electrons [equivalent to] a collection of information that includes data” is fixed to the degree necessary to constitute a tangible means of expression. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

50. See generally 17 U.S.C. § 109 (1994).

statute is viewed as providing an allowance for a person to copy material which he or she has purchased.⁵¹ The digital format makes it extremely simple for a consumer to make numerous copies with no reduction in the sound quality. Clients distributing over the Internet should be warned that the application of the fair use doctrine is unpredictable and that their interests may be harmed substantially if liberal copying occurs.⁵² Additional legislation beyond what is discussed below is necessary to combat the problems associated with the new technology. Until this legislation and its application are more certain, music industry attorneys must explain these concerns to their clients.

B. The Audio Home Recording Act

In 1992, Congress amended the Copyright Act by enacting the Audio Home Recording Act (hereinafter, the "AHRA") in response to concerns about serial copying – the ability to reproduce a large number of almost perfect replications from a single copy of digital music.⁵³ In legislating these protections for copyright owners, Congress hoped to "benefit American consumers, creators and innovators [by] protect[ing] the legitimate rights of our songwriters, performers, and recording companies to be fairly rewarded for their tremendous talent, expertise, and capital investment."⁵⁴

The AHRA restricts the use of digital audio recording devices. A "digital audio recording device" is a device that was designed or marketed for the primary purpose of making digital copies of recordings for private use.⁵⁵ Congress did not

51. See 17 U.S.C. § 107 (1998). When determining if a usage is exempted from copyright law restrictions the courts consider (1) the purpose and character of the defendant's use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used by a defendant relative to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or the value of the copyrighted work. See *id.*

52. See generally Weiskopf, *supra* note 27, at 38-41.

53. Serial copying is defined as "the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording." 17 U.S.C. § 1001(11).

54. Statement by President George Bush Upon Signing S. 1623 [the AHRA], 28 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 2188 (November 2, 1992), 6 U.S. C. C. A. N. 3609 (1992).

55. See Audio Home Recording Act, 17 U.S.C. § 1001(3). According to the legislative history, a digital audio recording device must be a machine or device that has a recording function that is designed or marketed for the primary

want to eliminate the fair use exemption from this area of copyright law through the AHRA⁵⁶ and therefore incorporated the idea by retaining the right of consumers to make analog or digital copies of sound recordings for personal use.⁵⁷ Therefore, a recording device itself is not prohibited because the recording of legally obtained original works at home is allowed under copyright protection. The primary restriction on these devices is the requirement that all recording devices capable of serial recording include a Serial Copy Management System (hereinafter, "SCMS").⁵⁸ SCMS is a type of code that can be included in a recording that causes the recording to be incapable of subsequent recordings or causes the subsequent recordings to be of lower quality. The programmed code

purpose of making "digital audio copied recording[s]." S. REP. NO. 102-294, at 47 (1992). The Act defines a "digital musical recording" as "a material object— (i) in which are fixed, in a digital recording format, only sounds, . . . and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 1001(5)(A).

56. See 137 CONG. REC. 21015 (1991) (statement of Rep. Brooks) ("With regard to consumers, the bill specifically provides that private, noncommercial home audio recording by consumers is immune from copyright infringement actions."); 40 J. COPYRIGHT SOC'Y U.S.A. 1, 38 (1992) (quoting Rep. Hughes "[The Act] gives consumers a complete exemption for noncommercial home copying of both digital and analog music . . ."); H.R. REP. NO. 102-873(I), at 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3578 ("In the case of home taping, the exemption protects all noncommercial copying by consumers of digital and analog musical recordings").

57. See S. REP. NO. 102-294 at 86-87 (1992). The AHRA expressly immunizes that activity in 17 U.S.C. § 1008.

58. 17 U.S.C. § 1002 (1999). Section 1002(a) provides:

No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to --

(1) the Serial Copy Management System;

(2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or

(3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

Section 1003(a) provides:

No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

See also S. REP. NO. 102-294 at 86-87.



should limit the ability to make numerous high quality replications and the ability to play those replications. Such a system must be incorporated on hardware and comprise circuitry that prevents copying from copies of digital audio recordings.⁵⁹ As will be discussed in Section IV, this Act does not provide adequate protections to the artist.⁶⁰

C. The Digital Performance Right in Sound Recordings Act

In 1995, Congress responded to industry concerns about protecting performance rights by enacting the Digital Performance Right in Sound Recordings Act of 1995 (hereinafter "DPRSRA").⁶¹ Congress realized that it was important to protect artists before the technology to digitally duplicate and distribute became more common.⁶² The DPRSRA grants an additional limited right of public performance by sound recording copyright owners.

According to the statute, the artist has an exclusive right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."⁶³ A "digital audio transmission" is a digital transferal that embodies the conveyance of a sound recording.⁶⁴ To understand the implications of this enactment for your client, think of a sound recording as two separate entities: 1) the actual final product that you hear, and 2) the musical composition. Both are protected. There are two times when the DPRSRA is invoked. First, the Act is triggered whenever there is a public performance of a sound recording.⁶⁵ Second, the Act's protections are incurred whenever there is a delivery of a digital recording.⁶⁶ A digital delivery occurs when there is a digital transmission of a sound recording for a recipient

59. See Gary K. Krugman, *Audio Home Recording Bill Becomes Law*, (last modified Feb. 24, 2000) <<http://www.sughrue.com/articles/copy/homerec.html>>.

60. See *infra* text accompanying footnotes 115 through 119.

61. See H.R. Rep. No. 104-274, at 10 (1995).

62. See 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, 743 (1996).

63. 17 U.S.C. § 106(6) (1994 & Supp. 1995).

64. 17 U.S.C. § 144(j)(5) (1994 & Supp. 1995).

65. See 17 U.S.C. § 115(d) (1994 & Supp. 1995).

66. See 17 U.S.C. § 115(d) (1994 & Supp. 1995).

who chooses to receive the “subscription transmission.”⁶⁷ A subscription transmission is a transmission that is controlled by and limited to the recipient who has paid for the receipt of that transmission.⁶⁸ Additionally, for the purposes of the DPRSRA, the transmission must result in a “specifically identifiable reproduction” of the original work.⁶⁹ For example, the DPRSRA is triggered when a consumer surfs the web, finds a recording, and purchases that selected digital recording over the Internet.

The second influential portion of the DPRSRA, for the purposes of this article, is the change it makes to the licensing structure. The Act adds to the situations where a compulsory license may be obtained. Under the Copyright Act, a license is required for any interactive digital music service, but there is no compulsory licensing structure for this digital distribution.⁷⁰ Most current Internet music distribution sites fall into the interactive category. The visitor requests that a particular selection be downloaded and thereby receives the transmission. When drafting the DPRSRA, Congress wanted copyright owners to have the ability to negotiate the terms of licenses for interactive services so that they could retain control over distribution.⁷¹ Therefore, if the party receiving the transmission does not fall into a DPRSRA defined category that provides for a compulsory license, a voluntary license must be negotiated with the sound recording copyright holder.

The DPRSRA creates a structure that applies specifically to digital types of distribution.⁷² If the sound recording owner enters a nonexclusive licensing agreement, the DPRSRA imposes no limitations.⁷³ In other cases, a compulsory license or a voluntary license must be created. The DPRSRA provides “a compulsory license . . . [which] includes the right . . . to distribute or authorize the distribution of a phonorecord of a

67. 17 U.S.C. § 114(j)(8) (1994 & Supp. 1995).

68. *See id.*

69. H.R. Rep. No. 104-274, at 30 (1995).

70. An interactive service is one that allows a member of the public to request a particular recording. *See* 17 U.S.C. § 114(j)(4) (1994 & Supp. 1995).

71. *See* S. Rep. No. 104-128, at 24.

72. *See* 17 U.S.C. § 115(c)(3)(A).

73. *See* Julie A. Garcia, *An Analysis of the Digital Performance Right in Sound Recordings Act of 1995*, 8 J. PROPRIETARY RTS 13, 15-16 (1996).

nondramatic musical work by means of a digital transmission”⁷⁴ This statutory license is limited in that the license applies when the transmission is not interactive and when it does not exceed the performance complement.⁷⁵ Furthermore, according to this Act, information about the creative artist encoded within the sound recording must be transmitted at the same time as the sound recording.⁷⁶ If the transmission is a subscription transmission, it does not qualify for this statutory license.⁷⁷ A consumer or web distributor may then enter into a voluntary license, a license negotiated with the artist. The changes to the licensing structure embodied in the DPRSRA do not affect how these voluntary licenses are created.

There are definite benefits available to an artist who chooses to negotiate nonexclusive voluntary licenses.⁷⁸ When the artist chooses to utilize the compulsory licensing structure, he is subject to statutorily defined fee structures. For example, the royalty fee for a subscription transmission of a digital performance of a sound recording by nonexempt, subscription digitalservices is 6.5% of gross revenues.⁷⁹ The

74. 17 U.S.C. § 115(c)(2)(A) (1994 & Supp. 1995).

75. The transmitter cannot publish an advanced schedule. Furthermore, the receiving device cannot automatically switch channels.

76. See S. Rep. No. 104-128, at 24.

77. The criteria for subscription transmission can be found in 17 U.S.C. § 114(d)(2) (1994 & Supp. 1995). The limits placed on licenses to interactive services do not apply if the 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.” 17 U.S.C. § 114(d)(3)(B)(ii) (1999). This allows an artist to choose numerous Internet distributors and participate in the websites that allow artists to market their albums using a short sound clip.

78. These benefits include the lack of a statutory, upper payment limit for agreements that result from bargaining. See Kroeger, *supra* note 5, at 94-95. When, however, a particular Internet site is the only entity licensed to perform the sound recording in the digital format, an exclusive license has been created. When an exclusive license exists, limitations may be imposed. See H.R. Rep. No. 104-274, at 21 (1995). For example, exclusive licenses may not be for more than one year for licensors that own more than 1000 sound recording copyrights and not for more than two years for licensors that own 1000 or fewer recordings. See 17 U.S.C. § 114(d)(3)(A) (1999). These limitations will not be imposed if the licensor grants licenses to five or more interactive services. See 17 U.S.C. § 114(d)(3)(B)(i) (1999). Limitations will also be imposed if an exclusive license is for promotion of an album that meets certain restrictions. See 17 U.S.C. § 114(d)(3)(B)(ii) (1999). The license must be restricted to public performances that are 45 seconds or less. See *id.*

79. See Determination of Reasonable Rates and Terms for the Digital

royalty fee for a voluntary license on the other hand is not statutorily defined, but is determined through voluntary negotiations.⁸⁰ The artist will “receive payments from the copyright owner of the sound recording in accordance with the terms of the artist’s contract.”⁸¹ Any entertainment lawyer who is assisting a client in making decisions related to licensing must be aware of the distinctions between compulsory and negotiated licenses. They must make sure the royalty structure in the initial recording contract is drafted so that their client receives remuneration correctly.

D. Digital Millenium Copyright Act

Even after the AHRA and the DPRSRA, the White House was still concerned about copyright protections in the context of digitization. It created the National Information Infrastructure Task Force to determine if concerns were warranted and to suggest additional changes. The “White Paper” is the final report drafted by this committee.⁸² The White Paper analyzed the state of current copyright laws in light of the digital environment and suggested changes that would further reduce the risks for copyright holders in the

Performance of Sound Recordings, 63 Fed. Reg. 25, 413 (1998) (to be codified at 37 C.F.R. pt. 260). The gross revenues are calculated as those resulting from subscribers residing within the U.S. *See id.* This percentage is divided as follows: two and a half percent in an escrow account to be distributed to non-featured musicians, two and a half percent in an escrow account to be distributed to non-featured vocalists, forty-five percent on a per sound recording basis to the featured recording artist and the remaining half to the sound recording copyright owners (generally record companies). *See* 17 U.S.C. § 114(g)(2).

80. *See* Digital Phonorecord Delivery Rate Adjustment Proceeding, 63 Fed. Reg. 35, 984 (1998). A digital phonorecord delivery is an individual delivery of a phonorecord by digital transmission of a sound recording that results in an identifiable reproduction, regardless of whether the digital transmission is also a public performance of the musical work. *See* 17 U.S.C. § 115(d).

81. 17 U.S.C. § 114(g)(1)(A).

82. *See* Bruce A. Lehman (chair), Information Infrastructure Task Force, INTELLECTUAL PROPERTY AND THE NATIONAL INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE (1995) (hereinafter, “White Paper”). The White Paper is very similar to the analysis that can be found in the Working Group on Intellectual Property’s “Green Paper.” *See* INFORMATION INFRASTRUCTURE TASK FORCE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE PRELIMINARY DRAFT (1994). *See also* Pamela Samuelson, *WIPO Panel Principal Paper: The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369 (1997).

digital environment.⁸³

According to Pamela Samuelson,⁸⁴ a nationally recognized expert in this area, the White Paper promotes four key things: 1) copyright holder control over the temporary copying associated with browsing or using; 2) expansion of liability for infringing activities embodied in lengthened statutes of limitation, increased online service provider liability, and limitations on the fair use exemption paired with more simplified licensing; 3) protections for the integrity of copyrighted material through encoding that denotes copyright ownership and licensing instructions; and 4) prohibitions against the creation of devices that are used to circumvent protection systems.⁸⁵ If the White Paper's suggestions were enacted, any digital transmission would be considered a distribution to the public which copyright owners would have the exclusive right to control;⁸⁶ however, the White Paper's proposed legislation was defeated in Congress.⁸⁷

83. *See id.*

84. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Cross Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999). *See also* Samuelson, *supra* note 82, at 379 n.65, 380-81 (discussing the four stated objectives and stating that the White Paper authors also hoped to give copyright owners control over every transmission of a work in digital form and to eliminate the "first sale" doctrine because of the fear of electronic forwarding).

85. The White Paper suggests that it should be illegal to remove this code. *See id.*

86. *See* White Paper, *supra* note 82, at 67-69, 213 (recommending that copyright law state that digital transmissions are distributions of copies for purposes of the Copyright Act).

87. The major controversies triggered by the proposed legislation were in relation to the harsh treatment of circumvention technologies, concerns about public access and public domain, and the fear of technology creation being controlled by copyright holders. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Coors Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999). These controversies center around concerns that the proposals were over-broad and the result of a lack of knowledge of the technical reality. *See* Pamela Samuelson, *Intellectual Property Issues Raised by the National Information Infrastructure*, PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES, 454 PLI/PAT 43, 48, 56-57 (1996). The White Paper and the Task Force researching the topic for the Administration was, however, influential in the drafting of the World Intellectual Property Organization [hereinafter, "WIPO"] Copyright Treaty. *See* WIPO Copyright Treaty, WIPO Doc. CRNR/DC/94 (Dec. 10, 1996). This treaty was adopted at the closing of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions held in Geneva, December 2- 20, 1996, and is available online at WIPO, *Texts of Treaties Administered by WIPO*, (visited April

Instead of the White Paper proposal, Congress enacted the Digital Millennium Copyright Act.⁸⁸ The Digital Millennium Copyright Act focuses its restrictions on two activities: 1) the act of circumventing copyright protections; and 2) the act of creating a device that is designed to circumvent copyright protections. The restriction on circumventing copyright protections has numerous exceptions such as security testing, government testing, and testing with the permission of an owner of a protections system. This has resulted in a “rag tag” system of exceptions that only fit the needs of various special interest groups who lobbied effectively in regards to concerns about their own particular situation.⁸⁹ The second restriction focuses on the development of circumvention technologies. The Act makes it illegal to provide a new technology or product if it is “primarily” designed to circumvent copyright protections, has no purpose besides circumvention, or is marketed to circumvent. This restriction also fails to achieve the objective of efficiently protecting copyright holders.⁹⁰ Like the other enactments seeking to prevent misuse of copyrighted works in the digital era, the Digital Millennium Copyright Act has created uncertain terrain for artists and for the consumers that wish

5, 1999) <<http://www.wipo.org/eng/ipex/index.htm>>. The WIPO treaty is an attempt to balance the interests of copyright owners and the interest of society in original and creative works. See Samuelson, *supra* note 82, at 375 (quoting from the WIPO Copyright Treaty). The treaty, however, has had very little effect on the current status quo in American courts and for this reason will not be addressed in this paper. The WIPO treaty may compel other countries to prosecute infringers more stringently. For purposes of this paper, a detailed international perspective will not be presented. An attorney analyzing the issues associated with digital distribution for their music client should be aware that there are international implications.

88. The text of the Digital Millennium Copyright Act is available at <<http://ftp.loc.gov/pub/thomas/c105/h2281.ih.txt>>. The WIPO treaty requires legislation of copyright protections at the national level by all signatories; the Act is the Congress implementation of the WIPO treaty.

89. See Samuelson, *supra* note 84. According to Samuelson, the drafting is a failure especially since the exceptions fail to protect useful, legitimate purposes for circumventing copyright protection systems. See *id.*

90. The creation of a particular circumvention technology is illegal while certain uses of that same illegal technology are allowed by the Act. The Act’s resulting structure allows only technically proficient parties who create their own circumvention systems for legitimate purposes to take advantage of the Act, while the general population will be restricted from numerous legitimate uses. See *id.* This result is far from an efficient means of protecting copyright holders while making the digital environment welcoming for the general consumer.

to purchase digitalized music.

IV

Failings in Legal Protections and Solutions for the Entertainment Attorney

Congress has attempted to respond to changes created by digital technologies through the Audio Home Recording Act, the Digital Performance Right in Sound Recordings Act and the Digital Millennium Copyright Act. An understanding of this recent legislation is imperative, but an entertainment attorney must be aware that the current statutory scheme does not protect artists adequately from the situation created by the advent of digitalized music distribution.⁹¹ Congress has continued to lag behind technology as it attempts to deal with the ever-changing Internet. Some industry attorneys believe the only way to address new issues presented by advancements in technology is through further legislation.⁹² This paper advocates a different approach. As Michel Overly, an attorney with Foley & Gardner, said, "We don't want to legislate the Internet out of existence by making laws too strict . . . [we should avoid our] tendency to rush in and legislate before we know what's going on with new technology."⁹³

The only certainty in the area of copyright and evolving technology is that the courts and legislatures are having a very difficult time dealing with the complex issues that the Internet creates for copyright holders seeking to retain the value of their creations.⁹⁴ Until the legal structure becomes more certain, there are two options for an artist to consider. One option—contractualizing copyright—adds to the protections found in the umbrella of copyright protection,

91. For example, according to Walter McDonough, a Boston-based entertainment and music-industry attorney, "When the Congress enacted [the Audio Home Recording Act], they never envisioned that people could download and play digital samples from the Internet." Chris Nelson, *RIAA Files Suit To Block New Portable Digital-Audio Player* (October 9, 1998) <<http://www.sonicnet.com/news/archive/story.jhtml?id=502427>>.

92. *See id.*

93. Bobbi Nodell, *Online Thieves Collide with the Law: A look at how copyright theft is being handled in the courts* (July 23, 1998) <<http://www.msnbc.com/news/178744.asp>> (discussing the recent legislative and common law developments in copyright law for cyberspace).

94. *See* Weiskopf, *supra* note 27, at 3.

through two-party agreements. The other option—turning to technology to solve the problems raised by digital distribution—incorporates new digital, code-based protections to make the copyright laws more effective. An attorney should work to have an understanding of technology to deal adequately with the legal issues. Thinking outside of the box of copyright law is necessary. This paper will now outline these two avenues—contract and digital code—through which a client's interests can be protected.

An artist should seek to create a distribution environment where copyright protections are contractualized,⁹⁵ creating a binding relationship between the distributor and the consumer. The predominant means for protecting value in light of Internet distribution is through contract.⁹⁶ Nothing in the legislative history or in the text of the Copyright Act prevents an artist from contracting for copyright protection through private agreements.⁹⁷ Federal protection of intellectual property rights is independent of any duties created by a freely entered contract associated with downloaded musical compositions.⁹⁸ Make sure your client is in a position where contractual claims can be pursued in addition to infringement claims. The online distribution of musical recordings provides the perfect setting for an artist to impose contractual duties on the consumer by making delivery subject to certain conditions.⁹⁹ While the transfer of the ownership of a material object does not of itself convey rights in a copyrighted work, be certain to contractually restrict the rights transferred digitally.

Contracts related to online distribution are, nevertheless,

95. A full discussion of contract principles as they relate to Internet distribution is outside of the purview of this paper. For a more detailed discussion, see Michel A. Jaccard, *Securing Copyright in Transnational Cyberspace: The Case for Contracting With Potential Infringers*, 35 COLUM. J. TRANSNAT'L L. 619 (1997).

96. See Henry H. PERRITT, JR., *LAW AND THE INFORMATION SUPERHIGHWAY: PRIVACY, ACCESS, INTELLECTUAL PROPERTY, COMMERCE, LIABILITY* § 10.22 (1996).

97. See H.R. REP. NO. 94-1476, at 208 (1976) ("Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract."); see Copyright Act, 17 U.S.C. § 101.

98. See Jaccard, *supra* note 95, at 646-647.

99. See RAYMOND T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* 47-50 (3d ed. 1997). Also, contractual protections, over copyright protections, offer the ability to choose applicable law and jurisdiction, avoiding the motley international structure of copyright law.

subject to general contract limitations.¹⁰⁰ Primarily, contractual duties are binding only *inter partes*. When seeking to contractualize restrictions on further distribution, the parties to a contract must be carefully identified. Identification of the buyer is not difficult and should not be an issue that should preclude online distribution. An attorney should make sure that proper procedures are being followed to ensure that the distributor secures the identity of any user before a music file is transferred.¹⁰¹ Online delivery of music involves the transfer of an intangible product unlike more typical physical goods, such as a compact disc. The recently drafted Uniform Computer Information Transactions Act ("UCITA"), formerly U.C.C. Article 2B, incorporates new provisions governing contractual sales of "intangible goods," including online information.¹⁰² State legislatures could adopt UCITA in early 2000.¹⁰³ An entertainment attorney should be familiar with any changes that are made to reflect UCITA suggestions. Additionally, copyright and common law rules may be disrupted by these changes.¹⁰⁴

One method of contractualizing copyright is through licensing.¹⁰⁵ Contract law and breach remedy apply to breaches of a license, but do not preclude a copyright infringement claim for unauthorized uses of a work.¹⁰⁶ Licensing can solve the problems created by the "first sale

100. Contracting parties can assert a variety of defenses including fraud, duress, undue influence, unconscionability and policy concerns such as consumer protection to prevent abuses of bargaining power. The Uniform Computer Information Transactions Act (UCITA) (visited Feb. 24, 2000) <<http://www.law.upenn.edu/bll/ulc/ucc2/ucc2b597.htm>> provides suggestions for state legislation to protect contracting parties in mass-market transactions.

101. See Jaccard, *supra* note 95, at 628. See also *Smith v. Weinstein*, 578 F.Supp. 1297, 1307 (S.D.N.Y. 1984) (comparing contractual rights with rights acquired under copyright law).

102. See The draft of Uniform Commercial Code, Article 2B, Licenses by the National Conference of Commissioners on Uniform State Laws dated May 5, 1997 (visited Feb. 24, 2000) available at <<http://www.law.upenn.edu/bll/ulc/ucc2/ucc2b597.htm>>.

103. See Michael Higgins, *What's the Future Going '2B'? Drafters Eager to Get New UCC Article Going But Questions Remain*, ABA J., Apr. 1999, at 74.

104. Many entertainment and media groups have already noted their concern with the NCCUSL and ALI model. See *id.*

105. See also *supra* text accompanying footnotes 70 through 81 regarding recent changes to licensing schemes.

106. See Jaccard, *supra* note 95, at 636.

doctrine” of copyright law.¹⁰⁷ In the absence of a license, copyright owners are placed in a predicament that their work may be subsequently transferred to other parties beyond the initial consumer while that initial consumer retains the initial copy.¹⁰⁸ Through a license, an online transmission can be differentiated from traditional distribution. The license can prohibit the initial consumer from retaining their copy of the original work or from sending additional copies to third parties.

Creation of contractual restrictions is also relatively simple in the digital environment. Once a party downloads a music file, the music file itself could begin its playback by reviewing the associated licensing terms and requiring acceptance of those terms before playback continues. Alternatively, the user could be required to accept the terms before receiving access to files through an online registration process.¹⁰⁹ Additionally, by merging recent technological developments and licensing procedure, software can be purchased to monitor compliance with copying prohibitions.¹¹⁰

The contractual approach does have flaws. Any time contractual issues are implicated a dispute results in case-by-case analysis that may nullify any contractual agreement that conflicts with the goals of the Copyright Act.¹¹¹ For example, contracts that attempt to broaden the rights granted in Section 106 of the Copyright Act or extend copyright protection are likely to be rejected by the court.¹¹² An attorney

107. Arguably, the “first sale” defense for an alleged copyright infringement may be precluded unless the initial consumer deletes the original copy immediately upon transfer to a second party. See KENT STUCKEY, INTERNET AND ONLINE LAW 6.08[3] (1996).

108. See *supra* discussion of “first sale” doctrine in text accompanying footnote 50.

109. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (“A vendor . . . may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.”)

110. See Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Cross Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999).

111. See Jaccard, *supra* note 95, at 649; Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Cross Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999) (opining that courts may still modify contracts that are against public policy).

112. See Jaccard, *supra* note 95, at 649 (citing Ramona L. Paetzold,

drafting a contract of this type should only seek to protect the rights exclusively granted by the federal copyright laws. Secondly, based on the principle of privity of contract, third parties are not bound by contractual provisions.¹¹³ Third party copyright infringement is less likely to be prevented through contractual protections; however, an artist can rely on copyright protections to pursue these violations.¹¹⁴ The initial consumer will also remain liable/responsible for further distribution of the work in breach of the initial contract.

While contract is one method for adding additional protections to a client's interests, an entertainment attorney must also utilize non-legal solutions to address a client's copyright concerns. Digital distribution of music is one area where understanding the business practice of an industry and the technology driving that practice is even more important than an application of legal principles. The technology itself is certain to be very influential in the enforcement of an artist's rights in the digital medium.¹¹⁵

A technology based approach to preventing illicit transfers focuses on Electronic Copyright Management Systems (hereinafter, "ECMS"). These systems require that transmitted copyright works include information about ownership, status, and permissible use in addition to any other information necessary to assist in the protection of the artist's copyright.¹¹⁶

The AHRA has attempted to legislate technological protections of this type, but these protections have failed in practice.¹¹⁷ The legislative approach was SCMS, which only

Contracts Enlarging a Copyright Owner's Rights: A Framework for Determining Unenforceability, 68 NEB. L. REV. 816, 825-830 (1989), Cf. *Salinger v. Random House, Inc.*, 650 F.Supp. 413, 426 - 27 (S.D.N.Y. 1986) *rev'd on other grounds*, 811 F.2d 90 (2d Cir. 1987) (restricting a contracting party's attempt to restrict non-infringing uses in the literary publishing context).

113. See Jaccard, *supra* note 95, at 657-659.

114. See *id.* at 658.

115. See White Paper, *supra* note 82, at 235-36; see Charles Clark, *The Answer to the Machine is in the Machine*, THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 139, 145 (P. Bernt Hugenholtz Institute for Information Law ed., 1996).

116. See Jaccard, *supra* note 95, at 659.

117. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998) (finding that until the actual recordings can incorporate the AHRA protective systems, it is of no use to prohibit the

restricted the copying of digital source material that had been encoded in a manner that prohibits copyright violations associated with the serial copying of a protected work. For a protection system to be effective, it must be integrated into the music recording itself. Any technological protection system that is separate from the actual musical content can be easily overridden.¹¹⁸ SCMS is a type of subcode technology.¹¹⁹ What this means is that the code is incorporated at a different level in the recording than the actual digital music. Subcode can be deleted from the digital recording and does not survive when a recording is transferred from the digital format to the analog format.¹²⁰ Many digital files currently available through the Internet do not contain the necessary coding because that level of digital information is not transferred with the music file. Thus, a file of this type will not be blocked by a player that has the statutorily required SCMS.

While SCMS systems fail, systems that incorporate ECMS do not have similar problems. One type of ECMS is a watermark. A digital watermark is "an inaudible, uneraseable message that contains copyright information."¹²¹ Watermarking systems seek to identify, authenticate and protect intellectual property and other content in online environments.¹²² For example, ARIS Technologies, Inc. has a system entitled MusiCode.¹²³ It allows recording artists to monitor and control their recordings. The watermark embeds embedded information within the audio recording and

manufacturing of players that fail to detect those systems).

118. According to Samuelson, SCMS fails because the technology is not sufficient protection and any technology of this type can be overridden with some other technological advancement. See Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Cross Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999) (arguing that the law should be to prohibit the infringement, not the create an ineffective system).

119. See Newman, *supra* note 6.

120. See *id.*

121. *Id.* For a listing of other useful articles describing the process and implications of watermarking, see <<http://www.musicode.com/articles.htm>> (visited Feb. 24, 2000).

122. See generally *Welcome to ARIS Technologies* (Feb. 24, 2000) <<http://www.musicode.com/intro.htm>>.

123. SESAC has signed an agreement with ARIS Technologies to incorporate its watermarking technology for use in tracking song performances. See Krasilovsky, *supra* note 8, at 14.

thereby accompanies the recording regardless of its medium or carrier and regardless of whether the current form is analog or digital. It also survives data and dynamic compression.¹²⁴

This system is a solution to the concerns raised by artists. Watermarks can facilitate digital download transactions making them a viable option for an artist.¹²⁵ Watermarks can prevent recording devices from making another copy of the recording.¹²⁶ Another option available through watermarking is limiting the number of reproductions made from an original sound recording through the incorporation of code that lowers the quality of subsequent reproductions.¹²⁷ Additionally, watermarks can embed the name and the credit card number of the initial person who purchased the music over the Internet.¹²⁸ Consumers would be deterred from distributing the copy if they knew that each subsequent copy would contain information indicating they are the source of the copyright violation. A recording artist can easily search the Internet for infringing uses of their music when watermarks are used.¹²⁹ Unlike AHRA mandated SCMS, watermarks cannot be deleted from a digital or analog recording. The watermark is a portion of that recording, not a separate coded entity. If the embedded information is removed, the fidelity of the audio material is damaged significantly.¹³⁰

124. See generally *Welcome to ARIS Technologies* (visited Feb. 24, 2000) <<http://www.musicode.com/intro.htm>>; *MusiCode: Audiophile Quality - Absolute Integrity* (visited Feb. 24, 2000) <<http://www.musicode.com/musicode.htm>>.

125. See generally *Welcome to ARIS Technologies* (visited Feb. 24, 2000) <<http://www.musicode.com/intro.htm>>. See also Krasilovsky, *supra* note 8, at 14.

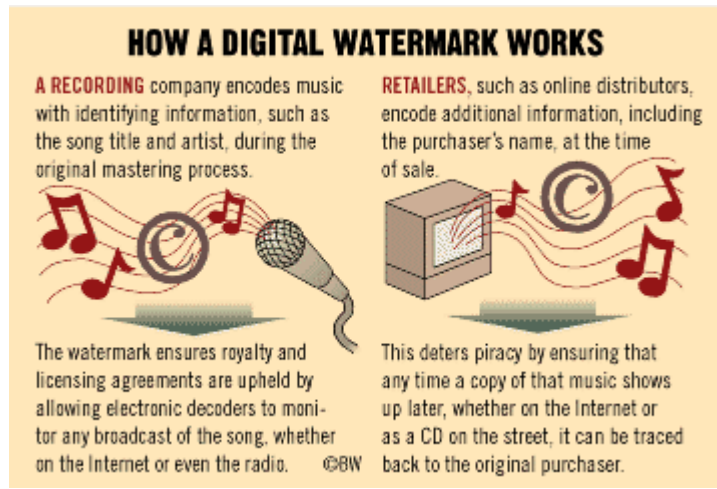
126. See Newman, *supra* note 6. For a complete description of MusiCode see *MusiCode: Audiophile Quality - Absolute Integrity* (visited Feb. 24, 2000) <<http://www.musicode.com/musicode.htm>>. The MusiCode system can also include encoded information which sends a message to the recorder that prevents it from making copies. See *id.*

127. See Jaccard, *supra* note 95, at 659.

128. See Newman, *supra* note 6.

129. See generally, *Welcome to ARIS Technologies Inc.*, (visited Feb. 24, 2000) <<http://www.musicode.com/intro.htm>>; *MusiCode: Audiophile Quality - Absolute Integrity* (visited Feb. 24, 2000) <<http://www.musicode.com/musicode.htm>>.

130. See *id.* Using digital monitoring systems, an artist can search for subsequent use of downloaded files. See Elizabeth Corcoran, *Digital Information*



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Watermarking allows a musician to take advantage of online and digital transmission without fear of unstoppable future infringement.¹³² According to Platinum Entertainment President and Chief Executive Officer Steve Devick, “[t]he use of a copyright-protected watermark in [digitally distributed music] will discourage piracy and consumer copying of downloaded music.”¹³³ Through this technology, artists are empowered to enforce their rights against infringement and to remain connected to the work through ongoing attribution.¹³⁴ Attorneys must remain abreast of technological developments like watermarking and make their clients aware of not only legal, but other pragmatic options as well.

V Conclusion

The Internet is a source of numerous new ideas and new

Protection Proposed; Device Would Stop Electronic Duplication, WASH. POST, Feb. 20, 1998, at G3.

131. See Elizabeth Veomett, *Just Add Watermark*, BUSINESS WEEK, Sept. 1, 1997, at 35.

132. See *MusiCode: Audiophile Quality – Absolute Integrity* (visited Feb. 24, 2000) <<http://www.musicode.com/musicode.htm>>.

133. *Musicmaker.com, Platinum Readying New MP3 Download Service* (visited Feb. 16, 1999) <<http://www.musicode.com/pr17.htm>>.

134. See Michael Leventhal, *Notes for Presentation to the Governor's Conference On The Arts* (visited Feb. 24, 2000) <<http://www.wiredlaw.com/governors.html>>.

approaches to business. These new ideas are creating new business methods for all types of transactions. The Internet has even shown that “free” music may be a profitable venture.¹³⁵ It is likely that music clients will consider Internet distribution at some point in time when they are in the process of marketing their creative product. Even the music industry will eventually be forced to “protect revenue, not bits.”¹³⁶

Powered by this evolution and the underlying driving forces of technology, the music industry and the state of copyright law are in flux. This area of the law will constantly develop as the technology and the Internet continue to grow and change. According to Ken Wirt, Vice President of Corporate Marketing for Diamond Multimedia, “[a]s artists . . . become more comfortable with . . . copyright protections, and the business opportunity for delivering music over the Internet, the entire digital music category is positioned for explosive growth.”¹³⁷

Entertainment attorneys must understand the underlying issues in order to best advise their clients in regard to maximization of the benefits and minimization of the risks associated with this distribution choice. Most important for entertainment clients is an awareness and understanding of their risks and potential rights in works that will be distributed on the Internet. This article provides an overview of the current structure of the law and recent technological advances. Entertainment attorneys must work to remain up to date in this fast growing area, remembering it is up to the musician to determine what level of security they feel is

135. Proof that some believe a market can be dominated by providing something free to the consumer is shown by Netscape. Netscape managed to garner a position controlling 75% of the market by making its software available to users free. Even though on the date of Netscape’s initial stock offering it had not earned a profit, Netscape stock set Wall Street records when it was issued. See Laurence Zuckerman, *With Internet Cachet, Not Profit, A New Stock Is Wall St.’s Darling*, N.Y. TIMES, Aug. 10, 1995, at A1, D5. Numerous artists are cashing in on this idea, hoping to make a name for themselves by distributing tracks without demanding any compensation. See MP3, *supra* note 7.

136. Cf. Pamela Samuelson, *Intellectual Property and the Digital Economy*, Address at the Hardy Cross Dillard Scholar Speaker Program at the University of Virginia Law School (Mar. 22, 1999).

137. *Musicmaker.com, Platinum Readying New MP3 Download Service* (visited Feb. 16, 1999) <<http://www.musiccode.com/pr17.htm>>.

reasonable before beginning online distribution.¹³⁸ Whether it is through contract, through code, or through copyright, your clients must be informed so they can be protected.

138. See *e.g.*, Jaccard, *supra* note 95, at 628.