

---

---

## COPYRIGHT LAW IN THE NEW MILLENNIUM: DIGITAL DOWNLOADS AND PERFORMANCE RIGHTS

### I. INTRODUCTION

Sales of music Cds at retailers such as Wal Mart . . . have dropped 19% while digital downloads on sites such as Apple's . . . iTunes have risen 60% since last June. Retail sales of music have been declining for almost a decade as many consumers turn to new ways to get their songs such as from digital downloads.<sup>1</sup>

The fact that more and more people are turning to the Internet to obtain music rather than purchasing music from traditional retailers is not really news to anyone at this point. It is also widely known that this change in the landscape of the retail side of the music industry has forced copyright law to adapt to the development of these new technologies.<sup>2</sup> What most people do not know is that some of the more complex legal issues involving copyright owners' specific legal rights in the Internet realm still remain relatively unaddressed. These issues are highly significant to copyright owners, as the level of compensation that they receive for the use of their works varies depending on the different rights such usage implicates.<sup>3</sup> As the number of music consumers who use the Internet to obtain their music continues to increase, these issues, which once seemed trivial, have become increasingly problematic and now demand resolution.

The purpose of this Comment is to draw further attention to the issue of whether consumer downloads implicate performance rights under U.S. copyright law and to propose some potential solutions to this issue. The issue of downloads and public performance rights presents an all-too-familiar legal paradox that occurs when logic and a strict interpretation of the law do not necessarily provide the same result. This Comment asserts that although downloads do not implicate performance rights from a logical standpoint, under the broad statutory language of the Copyright Act, downloads may indeed implicate such rights. As a result of this conflict, legislative reform is needed to clarify the rights of copyright owners in this realm of the online marketplace.

This Comment proceeds as follows: Part II provides an overview of the present state of the law governing performance rights, including all relevant statutes, legislative history, and case law. Part III discusses the various statutory arguments and points out the weaknesses in the reasoning of the courts that have

---

1. *CD Sales Drop as Digital Music Rises*, INVESTREND, July 6, 2007, <http://investrend.com/articles/article.asp?analystID=0&id=59329&level=160&topicID=160>.

2. See, e.g., Nari Na, Note, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J.L. & PUB. POL'Y 417, 421 n.27 (2007) (noting copyright law's developmental tradition of tracking emerging technologies).

3. See *infra* notes 26–30 and accompanying text for a discussion of the significance of copyright issues in the digital realm from the perspective of artists and the recording industry.

addressed the issue. Finally, Part IV suggests a common sense approach to the issue, including a call for new legislation to clarify the law in this realm.

## II. OVERVIEW

### A. *Interpreting the Copyright Act and the Digital Performance Right in Sound Recordings Act of 1995*

The issue of whether computer downloads of digital works infringe a copyright owner's exclusive right to perform its work, as granted under the Copyright Act of 1976<sup>4</sup> ("Copyright Act" or the "Act"), is a question of statutory construction. Under the Act, copyright owners are granted a bundle of exclusive rights including, among other things, the right to reproduce, distribute, perform, and display the copyrighted work.<sup>5</sup> This Comment focuses primarily on the exclusive right of copyright owners in musical works "to perform the copyrighted work publicly."<sup>6</sup> As defined in the Act, "[t]o 'perform' a work means to recite, render, [or] play . . . it, either directly or by means of any device or process."<sup>7</sup> Additionally, the Act states that "[t]o perform . . . a work 'publicly' means . . . to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process."<sup>8</sup> Lastly, the Act defines "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."<sup>9</sup>

In 1995, Congress amended the Act by enacting the Digital Performance Right in Sound Recordings Act<sup>10</sup> ("DPRSRA") to ensure that the rights of

---

4. United States Copyright Act, 17 U.S.C. §§ 101–1332 (2006).

5. 17 U.S.C. § 106. Section 106 of the Copyright Act states:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

*Id.*

6. *Id.* § 106(4).

7. *Id.* § 101. See *infra* Part III.A.1 for a discussion of the definition of a "performance."

8. 17 U.S.C. § 101. See *infra* Part III.A.2 for a discussion of the "any device or process" language.

9. 17 U.S.C. § 101. See *infra* Part III.A.2 for a discussion of the definition of a "transmission."

10. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

copyright owners are adequately protected as new technologies continually change the way others use the owners' creative works.<sup>11</sup> The DPRSRA created the term "digital phonorecord delivery" ("DPD") and defined the term as follows:

A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.<sup>12</sup>

Because downloads are digital transmissions that are DPDs under the language of the DPRSRA, the fact that Congress acknowledges in the DPRSRA that a digital transmission may also be a public performance has led some commentators to infer that downloads may indeed be public performances.<sup>13</sup>

As the statutory language of the Copyright Act does not clearly resolve the issue at hand, an analysis of the Act's legislative history is necessary to attempt to better understand Congress's intent with regard to the scope of performance rights. In House Report 1476,<sup>14</sup> Congress states that to "perform" a work . . . includes . . . singing or playing music."<sup>15</sup> The report then goes on to state that:

A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.<sup>16</sup>

In addition, the report clarifies that "[t]he definition of 'transmit' . . . is broad enough to include all conceivable forms and combinations of wired or wireless communications media."<sup>17</sup> Lastly, the report addresses the scope of performance rights under the Act by stating that "[e]ach and every method by which the images or sounds comprising a performance or display are picked up

---

11. S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357.

12. 17 U.S.C. § 115(d). The Copyright Act defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* § 101. The Act defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.*

13. *E.g.*, Bob Kohn, A Primer on the Law of Webcasting and Digital Music Delivery (Oct. 1998), <http://www.kohnmusic.com/articles/newprimer.html> (noting that one could infer from language of Copyright Act that "digital phonorecord delivery" may involve public performance of musical work).

14. H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

15. *Id.* at 63.

16. *Id.*

17. *Id.* at 64.

and conveyed is a 'transmission,' and if the transmission reaches the public in my [sic] form, the case comes within the scope of clauses (4) or (5) of section 106."<sup>18</sup>

The legislative history of the DPRSRA also illuminates how Congress intended the DPRSRA to affect the exclusive rights granted under the Copyright Act in a new era of digital delivery of media. For example, Senate Report 104-128 states:

The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works . . . .<sup>19</sup>

Because Congress has analogized digital deliveries of phonorecords to the distribution of records, cassettes, and CDs, and stated that the DPRSRA is not intended to substitute or duplicate performance rights in these works, one could infer from this report that Congress recognized that these types of digital deliveries may indeed implicate performance rights.

#### B. *United States v. American Society of Composers, Authors & Publishers*

The United States District Court for the Southern District of New York, in *United States v. American Society of Composers, Authors & Publishers*,<sup>20</sup> is the only court that has squarely addressed this issue. In *American Society*, the music membership association widely known as ASCAP<sup>21</sup> applied to the court "for a determination of a reasonable fee for the use of its media in . . . online services."<sup>22</sup> This application came about as a result of the inability of ASCAP and several online media companies who were seeking performance licenses from ASCAP to agree on an appropriate licensing fee.<sup>23</sup> The court had jurisdiction over this issue by virtue of a consent decree entered decades

---

18. *Id.*

19. S. REP. NO. 104-128, at 37 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 384.

20. 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

21. ASCAP provides the following biographical information on its website:

ASCAP is a membership association of more than 350,000 U.S. composers, songwriters, lyricists, and music publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also represents hundreds of thousands of music creators worldwide. ASCAP is the only U.S. performing rights organization created and controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from the membership.

ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP's licensees encompass all who want to perform copyrighted music publicly. ASCAP makes giving and obtaining permission to perform music simple for both creators and users of music.

About ASCAP, <http://www.ascap.com/about/> (last visited Apr. 20, 2009).

22. *Am. Soc'y*, 485 F. Supp. 2d at 441.

23. *Id.*

earlier.<sup>24</sup> After discovery, “the parties cross-moved for partial summary judgment on the issue of whether the downloading of a digital music file embodying a particular song constitutes a ‘public performance’ of that song within the meaning of the United States Copyright Act, 17 U.S.C. § 101, *et seq.*”<sup>25</sup>

The implications of the decision were extremely significant to members of the recording industry on all sides of the spectrum.<sup>26</sup> The numerous associations that represent the interests of the recording and electronics industries asserted that ASCAP was “overreaching” or “double dipping” by seeking performance royalties as a result of digital downloads in addition to the mechanical royalties that all parties agree they are entitled to under the Act.<sup>27</sup> The main legal argument of these associations was that downloads are transmissions of inaudible copies rather than performances, as a transmission of a performance requires that the transmission is capable of being heard simultaneously.<sup>28</sup>

In support of ASCAP, the performing rights organizations (“PROs”) argued that downloads fall within the plain language of §§ 106(4) and 101 of the Act, and that, given this language, the court should not impose an additional

---

24. *Id.* at 440–41. *American Society* is procedurally unique in that, in 1941, a civil action brought by the United States against ASCAP for alleged antitrust violations was settled by entry of a consent decree, which was then amended in 1950 to form the “Amended Final Judgment.” *Id.* at 440. This judgment gave the United States District Court for the Southern District of New York exclusive jurisdiction over the implementation of the terms of the judgment, which regulated the way in which ASCAP could operate within the music industry. *Id.* The judgment was then amended again in 2001, and shortly thereafter several online media groups such as AOL LLC, Yahoo! Inc., and RealNetworks, Inc. applied to ASCAP for a license to publicly perform some of its media. *Am. Soc’y*, 485 F. Supp. 2d at 440–41.

25. *Id.* at 441.

26. *See id.* at 439–40 (listing numerous organizations and associations that submitted amicus briefs). Amicus briefs in support of ASCAP’s position were submitted to the court by various performing rights organizations such as Broadcast Music Inc. (“BMI”), SESAC, Inc. (originally the Society of European Stage Authors & Composers), the Songwriters Guild of America and the Nashville Songwriters Association, the Association of Independent Music Publishers et al., and the Society of Composers, Authors and Publishers of Canada (“SOCAN”). *Id.* Similarly, numerous amicus briefs were also submitted in support of the online media providers’ position by representatives of the recording and electronic industries, including the Recording Industry Association of America, Inc. (“RIAA”), the Digital Media Association, the Entertainment Merchants Association et al., the Consumer Electronics Association, and CTIA—The Wireless Association (“CTIA”). *Id.*

27. Brief for CTIA—The Wireless Ass’n as Amicus Curiae Supporting Plaintiff at 17, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) (noting that allowing downloads to be considered performances would lead to unwarranted double compensation); Brief for the Digital Media Ass’n et al. as Amici Curiae Supporting Plaintiff at 2–3, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) [hereinafter Brief for the Digital Media Ass’n] (noting that ASCAP and other performing rights organizations have been overreaching for years in their pursuit of performance royalties for downloads). *See infra* note 123 and accompanying text for a definition and discussion of “mechanical royalties.”

28. *See* Brief for the Digital Media Ass’n, *supra* note 27, at 3 (noting that performance must be capable of being heard); Brief for the Recording Industry Ass’n of America, Inc. as Amicus Curiae Supporting Plaintiff at 4–5, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) [hereinafter Brief for the RIAA] (noting that right of public performance is implicated only when rendition or playing of sound recording is transmitted so that recording can be heard).

“contemporaneous perception” requirement.<sup>29</sup> Moreover, the PROs stressed the policy argument that the multiple streams of income that artists receive from the different exclusive rights granted to them under the Copyright Act must be vigorously protected in the digital era to ensure their continued livelihood.<sup>30</sup>

The district court in *American Society* concluded that “in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception.”<sup>31</sup> Although the court acknowledged that the term “perform” as used in the Copyright Act should be construed broadly,<sup>32</sup> based on the common meanings of the terms left undefined by the Act, including “recite,” “render,” and “play,”<sup>33</sup> the court stated that it could not “conceive of [any] construction that extends [“perform”] to the copying of a digital file from one computer to another in the absence of any perceptible rendition.”<sup>34</sup>

Rather than characterizing a download as a performance, the court chose to characterize it as a method of reproducing a music file.<sup>35</sup> In support of this conclusion, the court noted that other courts that addressed copyright infringement suits involving the downloading of music on the Internet using peer-to-peer software such as Napster held that Internet users violated copyright owners’ reproduction rights.<sup>36</sup>

---

29. See Brief for BMI as Amicus Curiae Supporting Defendants at 4, 8, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) [hereinafter Brief for BMI] (noting that download constitutes transmission to public and that “the Act does not contain any ‘simultaneous audibility’ requirement”); Brief for SESAC, Inc. as Amicus Curiae Supporting Defendants at 6–7, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) [hereinafter Brief for SESAC] (noting that whether download is simultaneously heard is irrelevant as a “download is the ‘rendering’ of a musical work by ‘transmitting’ it through a digital ‘process’ by which members of the public ‘receive’ it”).

30. See, e.g., Brief for the Songwriters Guild of America and the Nashville Songwriters Ass’n International as Amici Curiae Supporting Defendants at 5, *Am. Soc’y*, 485 F. Supp. 2d 438 (No. 41-1395) (noting that songwriters are not sustained by one source of income and that no one stream alone provides enough income to support themselves).

31. *Am. Soc’y*, 485 F. Supp. 2d at 443.

32. *Id.* (citing *United States v. Am. Soc’y of Composers, Authors & Publishers*, 870 F. Supp. 1211, 1218 (S.D.N.Y. 1995)).

33. The court noted:

Merriam-Webster’s Dictionary defines “recite” as “to repeat from memory or read aloud publicly[.]” . . . “render” and [sic] is defined as “to reproduce or represent by artistic or verbal means[.] depict . . . to give a performance of . . . to produce a copy or version of” . . . and “play” is defined as “to perform music (*play* on a violin) . . . to sound in performance (the organ is *playing*) . . . to emit sounds (the radio is *playing*) . . . to reproduce recorded sounds (a record is *playing*) . . . to act in a dramatic production.”

*Id.* (quoting Merriam-Webster Online Dictionary, <http://m-w.com>).

34. *Id.* at 443–44.

35. *Id.* at 444. See *supra* note 5 for the exact language of the reproduction right under 17 U.S.C § 106.

36. *Am. Soc’y*, 485 F. Supp. 2d at 444 (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Maverick Recording Co. v. Goldshteyn*, No. CV-05-4523, 2006 WL 2166870, at \*3 (E.D.N.Y. July 31, 2006); *London-Sire Records v. Armstrong*, No. 3:05cv1771, 2006 WL 2349615, at \*1 (D. Conn. July 28, 2006)).

The court also relied in large part on what it referred to as “responsible authorities” in its reasoning.<sup>37</sup> First, the court found persuasive the United States Copyright Office’s 2001 report to Congress on the effect of new and developing technologies on United States copyright law. The report stated:

[T]o the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process . . . . [I]t is our view that no liability should result under U.S. law from a technical “performance” that takes place in the course of a download.<sup>38</sup>

Second, the court also found persuasive the 1995 report of the United States Department of Commerce’s Information Infrastructure Task Force. This report stated that “[w]hen a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user’s computer without the capability of simultaneous ‘rendering’ or ‘showing,’ it has rather clearly not been performed.”<sup>39</sup>

Based on its interpretation of the statutory language, the analogous case law, and the views adopted by the secondary authorities, the court dismissed ASCAP’s argument that a performance can be effectuated by means of “any device or process.”<sup>40</sup> Rather, the court held that the transmission of a performance, and not simply the transmission of data, is required to implicate the performance rights granted under the Copyright Act.<sup>41</sup> Additionally, the court openly agreed with the RIAA’s position in its amicus brief that a download constitutes a mechanical reproduction of a “digital phonorecord delivery,” and also clarified that although a “digital phonorecord delivery” may be a reproduction and a performance, there was no basis for reaching such a conclusion in this particular case.<sup>42</sup>

### C. Other Relevant Case Law

Although *American Society* is the only case to date that has dealt squarely with the issue of downloads and performance rights, other cases have addressed the rights implicated by downloads under copyright law.<sup>43</sup> For example, in a landmark decision that transformed the nature of online file sharing, the Ninth

---

37. *Id.*

38. *Id.* at 445 (quoting U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 147–48 (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> [hereinafter SECTION 104 REPORT]).

39. *Id.* at 445 (quoting BRUCE A. LEHMAN, U.S. DEP’T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 71 (1995), available at <http://www.uspto.gov/go/com/doc/ipnii/front.pdf>).

40. *Id.* at 445–46.

41. *Am. Soc’y*, 485 F. Supp. 2d at 446.

42. *Id.* at 446–47.

43. See *supra* note 36 for a list of cases addressing downloads and copyright law.

Circuit held, in *A&M Records, Inc. v. Napster, Inc.*,<sup>44</sup> that users who downloaded copyrighted material from Napster's website violated the copyright owners' reproduction rights.<sup>45</sup> Similarly, in *Maverick Recording Co. v. Goldshteyn*,<sup>46</sup> the United States District Court for the Eastern District of New York held that downloading of files from a peer-to-peer website violated the copyright owners' reproduction and distribution rights.<sup>47</sup> Although neither of these courts suggested that the users in these cases violated the copyright owners' performance rights, it is important to note that both of these cases were brought by recording companies, which do not profit from performance rights in any way, and the issue of performance rights was not presented.

In addition to the case law that specifically addresses downloading, there are also analogous cases that involve other forms of transmissions that provide some insight as to the ways in which courts generally interpret performance rights under the Copyright Act. For example, the United States District Court for the Southern District of New York, in *David v. Showtime/The Movie Channel, Inc.*,<sup>48</sup> held that Showtime/The Movie Channel, Inc. ("SMC"), a cable television service provider, had publicly performed plaintiff's works where SMC transmitted its programming to cable system operators, who in turn broadcasted the programming directly to the public.<sup>49</sup> The court reasoned that based on the statutory language and legislative history of the Copyright Act, "Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience."<sup>50</sup> In a similar case, *National Football League v. Primetime 24 Joint Venture*,<sup>51</sup> the Second Circuit incorporated the reasoning from *David* into its holding when it stated that "PrimeTime's uplink transmission of signals captured in the United States is a step in the process by which NFL's protected work wends its way to a public audience."<sup>52</sup>

---

44. 239 F.3d 1004 (9th Cir. 2001).

45. *Id.* at 1014.

46. No. CV-05-4523, 2006 WL 2166870 (E.D.N.Y. July 31, 2006).

47. *Maverick Recording Co.*, 2006 WL 2166870, at \*3; see also *London-Sire Records v. Armstrong*, No. 3:05cv1771, 2006 WL 2349615, at \*1 (D. Conn. July 28, 2006) (noting that unauthorized downloading violates reproduction rights of copyright owner).

48. 697 F. Supp. 752 (S.D.N.Y. 1988).

49. *David*, 697 F. Supp. at 754, 759.

50. *Id.* at 759.

51. 211 F.3d 10 (2d Cir. 2000).

52. *Nat'l Football League*, 211 F.3d at 13; see also *Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc.*, 772 F. Supp. 614, 651 (D.D.C. 1991) (following *David*, holding that "transmission by cable programmers of programming containing copyrighted music constitutes public performance"). In their amicus brief in support of ASCAP's position, BMI asserted that the holdings of the *David* and *National Football League* courts, "in which transmissions to non-hearing, non-seeing inanimate objects such as satellites were held to constitute actionable public performances," indicate that there is no requirement that transmissions be simultaneously perceivable. Brief for BMI, *supra* note 29, at 10.



D. *Relevant Secondary Authorities*

As the court in *American Society* pointed out, the few secondary and administrative authorities addressing this issue have declined to endorse the proposition that downloads implicate performance rights under the Copyright Act.<sup>53</sup> The first of the executive branch studies referred to in *American Society*, a 1995 report by the Working Group on Intellectual Property Rights commissioned by the Clinton administration, stated that “[a] distinction must be made between transmissions of *copies* of works and transmissions of *performances* or *displays* of works.”<sup>54</sup> The report draws this distinction by stating that transmissions that are not capable of “simultaneous ‘rendering’ or ‘showing’ . . . [have] rather clearly not been performed.”<sup>55</sup> The second, a 1998 report by the Copyright Office on § 104 of the Digital Millennium Copyright Act, stated that any performance aspect of a transmission in the form of a download “is merely a technical by-product of the transmission process that has no value separate from the value of the download.”<sup>56</sup>

Despite this seeming agreement, in 2007 Marybeth Peters, the Register of Copyrights, noted in her statement to the House Committee of the Judiciary that the PROs were engaged in active litigation to resolve the issue.<sup>57</sup> Peters suggested that “[a] far simpler and more direct approach to the problem would be for Congress to amend the law to clarify which rights are implicated in the digital transmission of a musical work.”<sup>58</sup>

Various commentators have also weighed in on this issue.<sup>59</sup> Bob Kohn, a specialist in music licensing and digital media,<sup>60</sup> notes that various arguments exist on both sides of the debate.<sup>61</sup> First, Kohn points out that if Congress

---

53. See *supra* notes 37–39 and accompanying text for a brief discussion of administrative authorities.

54. LEHMAN, *supra* note 39, at 71.

55. *Id.*

56. SECTION 104 REPORT, *supra* note 38, at 147.

57. *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 21 (2007) (statement of Marybeth Peters, Register of Copyrights), available at <http://judiciary.house.gov/hearings/printers/110th/34178.PDF>.

58. *Id.*

59. See, e.g., W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 857–60 (2007) (noting that as practical matter considering download performance makes little sense); Michael A. Einhorn & Lewis Kurlantzick, *Traffic Jam on the Music Highway: Is It a Reproduction or a Performance?*, 49 J. COPYRIGHT SOC’Y U.S.A. 417, 432–34 (2001) (noting that allowing downloads to implicate performance rights would create “economically inefficient burden[s] on providers of digital phonorecords”); Kohn, *supra* note 13 (pointing out various positions on each side of issue).

60. Bob Kohn, <http://www.kohnmusic.com/people/bkohn.html> (last visited Apr. 20, 2009) (listing Kohn’s background and credentials).

61. Kohn, *supra* note 13; see also Stephen M. Kramarsky, *Internet Music Stream vs. Download: Confronting the ‘Public Performance’ Issue*, ENT. L. & FIN. (ALM Law Journal Newsletter, San Francisco, Cal.), Aug. 2007, at 1, 4–5 (noting that, though court’s analysis in *American Society* was intuitively correct, it is difficult to square with precise statutory language).

wanted to make it clear that a digital phonorecord delivery such as a download constitutes a performance, it could have easily done so within the language of the DPRSRA.<sup>62</sup> Second, Kohn takes an interesting approach to the interpretation of the statutory language by asserting that because “sound recordings” are defined as “works that result from the fixation of a series of sounds,” a download constitutes a transmission of a fixation of sounds rather than a performance or rendering of them.<sup>63</sup> Kohn states, however, that the PROs have a good argument that a download is part of a “process” that results in a “rendering” or “playing” of work, fitting it within the broad language of the statute that to perform a work means to render or play it “by means of a device or process.”<sup>64</sup>

Other commentators have noted that requiring the transmitter of the digital media to obtain two separate licenses for reproduction rights and performance rights would impose additional burdens and costs of negotiation and administration.<sup>65</sup> The PROs’ actions in seeking dual licenses for these individual rights have led some to accuse them of “double-dipping.”<sup>66</sup> In his article *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, W. Jonathan Cardi notes that by putting together the statutory definitions of “to perform” and “transmission,” a download can be considered a “digital rendering of a song via transmission” [that] arguably constitutes a performance.<sup>67</sup> According to Cardi, although this proposition is “reasonable as a technical matter of statutory interpretation,” a download is intended to reproduce a copy of a musical work rather than to convey a performance of that work, and therefore such a proposition “[a]s a practical matter . . . makes little sense.”<sup>68</sup>

In his article *Advanced Copyright Issues on the Internet*, David L. Hayes analyzes another facet of the issue that makes resolution even more complicated, namely, to what extent must a download be capable of something close to an immediate conversion to a moment-by-moment performance.<sup>69</sup> Hayes notes that the definitions set forth in § 101 of the Copyright Act were drafted at a time when most transmissions were “isochronous transmissions,” or those capable of

---

62. Kohn, *supra* note 13.

63. *Id.*

64. *Id.* (quoting 17 U.S.C. § 101).

65. *See, e.g.*, Einhorn & Kurlantzick, *supra* note 59, at 433 (noting that “double-dipping” places “economically inefficient burden” on digital music providers).

66. *See* SECTION 104 REPORT, *supra* note 38, at 140 (“Demanding a separate payment for the copies that are an inevitable by-product of [downloading] appears to be double-dipping . . . .”); Einhorn & Kurlantzick, *supra* note 59, at 433 (noting that PROs are “double-dipping” through performance right). *But see Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 11 (2005) (statement of Marybeth Peters, Register of Copyrights), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_house\\_hearings&docid=f:21910.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:21910.pdf) (noting that “double dipping” is false characterization as separate rights are involved and separate licensors exist for those rights).

67. Cardi, *supra* note 59, at 857.

68. *Id.*

69. David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 30 (1998).

immediate conversion to performances.<sup>70</sup> As Hayes points out, however, the line between isochronous transmissions and asynchronous transmissions, or those in which a signal is sent faster or slower than the embodied performance, has become “highly blurred on the Internet.”<sup>71</sup> As Hayes states, “through use of buffering in memory or storage of information on magnetic or optical storage . . . even an asynchronous transmission can effect a smooth, moment-by-moment performance at the receiving end.”<sup>72</sup>

R. Anthony Reese takes a different approach in his article *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*.<sup>73</sup> Although Reese notes that “[n]either the language of the Copyright Act, nor its legislative history, appears to resolve this question conclusively, and policy arguments exist on both sides of the matter,” he concludes that resolving this issue “may not, at the moment, be of particular urgency.”<sup>74</sup> As Reese points out, because most websites that engage in downloading of copyrighted works also engage in streaming of copyrighted works, these sites will be publicly performing the works by streaming them and will already need the necessary performance licenses from the appropriate PROs.<sup>75</sup> For sites that provide downloads and do not engage in streaming as well, the impact of the resolution of this issue may be of greater significance.<sup>76</sup>

### III. DISCUSSION

Needless to say, arguments can be made on both sides of the issue of whether downloads implicate performance rights under the Copyright Act, and the scope and importance of the debate is likely to only increase as the issue nears its ultimate resolution. At this point in time, the struggle between the performing rights organizations and the recording and electronic industries rages on, and the outcome may have significant repercussions for the shape of the digital intellectual property landscape for years to come. As a result, Congress should create legislation that resolves the present ambiguities that exist in the statutory language and change the law to make it clear that digital downloads do not implicate performance rights.

#### A. *Downloads Implicate Performance Rights Under the Plain Language of the Act*

An analysis of the relevant statutes and legislative history demonstrates that there are arguments to be made on both sides of the issue. Given that Congress

---

70. *Id.*

71. *Id.*

72. *Id.*

73. R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 260–61 (2001).

74. *Id.* at 260.

75. *Id.*

76. *Id.* at 261.

intended the language of the Act to be interpreted broadly,<sup>77</sup> the statutory arguments in support of the notion that downloads implicate performance rights are more convincing.

### 1. The “Performance” Argument

As the Copyright Act grants copyright owners the exclusive right to perform their work publicly “by means of any device or process,” which includes transmissions of a performance “by means of any device or process,”<sup>78</sup> the key issue is whether a download constitutes the transmission of a performance. There is no question that a download is a transmission, but if it is not a transmission of a *performance*, then it can be argued that the performance right granted under § 106(4) is not implicated. Although the court in *United States v. American Society of Composers, Authors & Publishers*<sup>79</sup> seems to have created a “contemporaneous perception” requirement,<sup>80</sup> in terms of statutory construction, a download should be considered a transmission of a performance if it can be considered a recitation, rendering, or playing of the work by a device or process, regardless of its perceptibility.<sup>81</sup>

Based on the plain meaning of the words “recite” and “play” as used in the statute, it is hard to argue that the transmission of a data file in the form of a download can be considered either a recitation or a playing of a work.<sup>82</sup> The most forceful statutory argument in support of the notion that a download is a performance, therefore, is that a download constitutes a “rendering” of a work. The court in *American Society* noted that Merriam-Webster’s dictionary defines the word “render,” among other things, as “to produce a copy or version of.”<sup>83</sup> A download by its very nature produces a copy or version of a work in the form of a file on a consumer’s computer which he or she can listen to immediately following completion of the download, or at a later time of his or her choosing.<sup>84</sup> Based on this interpretation of the word “render,” it would seem that a

---

77. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 870 F. Supp. 1211, 1218 (S.D.N.Y. 1995) (noting that court has relied on “Congressional intent that ‘public performance’ be construed broadly” in previous case). See *supra* notes 14–19 and accompanying text for evidence of this congressional intent in the Act’s legislative history.

78. 17 U.S.C. §§ 101, 106(4) (2006).

79. 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

80. See *Am. Soc’y*, 485 F. Supp. 2d at 443 (“[P]rinciples of statutory construction, as well as analogous case law and secondary authorities, dictate that, in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception.”).

81. See 17 U.S.C. § 101 (defining “perform” as “to recite, render, [or] play [the work]”); Brief for BMI, *supra* note 29, at 8–9 (asserting that download constitutes transmission to public and that “the Act does not contain any ‘simultaneous audibility’ requirement”); Brief for SESAC, Inc., *supra* note 29, at 7 (asserting that whether download is simultaneously heard is irrelevant as “download is the ‘rendering’ of a musical work by ‘transmitting’ it through a digital ‘process’ by which members of the public ‘receive’ it”).

82. See *supra* note 33 for Merriam-Webster’s definition of the words “recite” and “play.”

83. *Am. Soc’y*, 485 F. Supp. 2d at 443.

84. See Reese, *supra* note 73, at 257 (noting that download allows user to transmit file to computer and to listen to recording embodied in file whenever he or she wants).

download could be considered a performance under the plain language of the Copyright Act.

Although this interpretation of the statutory language seems plausible initially, when considered within the context of the other subsections of § 106 of the Copyright Act, it becomes more problematic.<sup>85</sup> For example, the Recording Industry Association of America, in its amicus brief in support of ASCAP, points out that a construction of the word “render” as “deliver” or “give” would make the performance right granted under § 106(4) largely subsume the distribution right created by Congress in § 106(3).<sup>86</sup> Similarly, a construction of “render” as “reproduce” would make § 106(4) subsume the reproduction right granted under § 106(1).<sup>87</sup> Although these definitions of “render” as “deliver,” “give,” or “reproduce” are not identical to the definition “produce a copy or version of” as used by the court in *American Society*, the implications of the interpretations are the same—the performance right would impermissibly overlap with the other rights granted under § 106 of the Act.

Additionally, the legislative history of the Act lends some support to the notion that Congress did not intend for “to perform” to be construed in this manner. When Congress discussed the meaning of “to ‘perform’ a work,” it stated that this language “includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime [sic].”<sup>88</sup> Congress intended to make it clear that traditional notions of performances would be covered by the Act, and it is from these congressional statements that the court in *American Society* reasoned that for a performance to occur a “contemporaneous perception” is required.<sup>89</sup> Nowhere in the Act, however, will one find any mention of any such requirement. Moreover, when one considers the relevant legislative history of the statute, it becomes clear that Congress, in anticipation of future technological developments, did not intend for the Act to be limited in scope to traditional types of performances.<sup>90</sup>

Even if the transmission of the work in the form of a download is not considered a “rendering,” one could argue that the sound recording itself constitutes the “rendering” of the work and that, as a result, the download is a transmission of a recorded performance.<sup>91</sup> The problem with this argument, as noted by music licensing specialist Bob Kohn, is that the Copyright Act defines “sound recordings” as “works that result from the fixation of a series of

---

85. See *supra* note 5 for a listing of the subsections of § 106.

86. Brief for the RIAA, *supra* note 28, at 8.

87. *Id.*

88. H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677.

89. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 445–46 (S.D.N.Y. 2007).

90. See *supra* notes 14–19 and accompanying text for a discussion of the scope of the Act based on its legislative history.

91. See Kohn, *supra* note 13 (noting that PROs could take position that sound recordings are renderings).

sounds.”<sup>92</sup> According to Kohn, a download may therefore be a transmission of a fixation of sounds rather than a performance or rendering of them.<sup>93</sup> What Kohn fails to mention, however, is that Congress specifically intended for § 106(4) to cover sound recordings, as evidenced in the following excerpt from House Report 1476: “The right of public performance under section 106(4) extends to ‘literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and *sound recordings*.’”<sup>94</sup> Thus, Congress intended for § 106(4) to include sound recordings, and, as argued below, Congress had the foresight to include language in the “transmit clause”<sup>95</sup> that would ensure that transmissions in the form of new technologies, like downloads, that were not in existence at the time of the Act would implicate performance rights.<sup>96</sup>

## 2. The “Transmit” Clause

In the Act, Congress sought to ensure that the definition of “perform publicly” would cover both live performances, like concerts or plays, and performances that are conveyed to audiences through technological processes, like in the case of television or radio broadcasts.<sup>97</sup> The language “any device or process” that appears in the second clause of this definition, which is commonly

---

92. *Id.* (internal quotation marks omitted) (quoting 17 U.S.C. § 101).

93. *Id.*

94. H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676 (emphasis added).

95. See 17 U.S.C. § 101 (2006) (defining “to perform or display a work ‘publicly,’” in part, as “to transmit . . . by means of any device or process”). See *infra* Part III.A.2 for a discussion of the “transmit clause.”

96. See *supra* notes 14–19 and accompanying text for a discussion of the scope of the Act based on its legislative history.

97. Section 101 of the Act defines “to perform . . . a work ‘publicly’” as:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101. House Report 94-1476 states:

Under the definitions of “perform,” “display,” “publicly,” and “transmit” in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

H.R. REP. NO. 94-1476, at 63.

referred to as the “transmit clause,” demonstrates that Congress meant to ensure that the Act could be applied to any sort of technological means of transmission, including those that were not in existence at the time of the Act’s passage.<sup>98</sup> Nowhere is this intent more evident than in House Report 1476, in which Congress stated:

A performance may be accomplished “either directly or by means of any device or process,” including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented. . . .

....

. . . The definition of “transmit”—to communicate a performance or display “by any device or process whereby images or sound are received beyond the place from which they are sent”—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission,” and if the transmission reaches the public in my [sic] form, the case comes within the scope of clauses (4) or (5) of section 106.<sup>99</sup>

This evidence of the congressional intent that the language of the Act be interpreted broadly makes it plausible to read the language of the Act to include downloads. A download is certainly a process by which “sound[s] are received beyond the place from which they are sent.”<sup>100</sup> Furthermore, as Congress intended sound recordings to be treated as performances and included them in § 106(4), a download can be considered a “method by which . . . sounds comprising a performance . . . are picked up and conveyed,” as a download indeed conveys sound recordings.<sup>101</sup>

### 3. Expanding on the “Process” Argument

Another potential angle of the statutory argument that downloads implicate performance rights is that a download is merely one part of “a process that results in a rendering or playing of a work at the recipient’s end.”<sup>102</sup> This argument takes advantage of the fact that the Act includes the language “by means of any device or process” in each of its definitions of “to perform,” “to perform . . . a work ‘publicly,’” and “to ‘transmit’ a performance.”<sup>103</sup> The inclusion of the “any device or process” language in each of these definitions

---

98. See H.R. REP. NO. 94-1476, at 63–64 (noting that phrase “any device or process” includes “any sort of transmitting apparatus . . . and any other techniques and systems not yet in use or even invented”).

99. *Id.* (quoting 17 U.S.C. § 101).

100. 17 U.S.C. § 101.

101. H.R. REP. NO. 94-1476, at 64.

102. Kohn, *supra* note 13 (emphasis omitted).

103. 17 U.S.C. § 101.

shows that Congress intended the Act to be interpreted broadly in order to protect the rights of copyright holders.<sup>104</sup> Based on this broad language, numerous courts in analogous cases have held that similar types of transmissions implicate performance rights.<sup>105</sup>

In *National Football League v. Primetime 24 Joint Venture*,<sup>106</sup> for example, defendant, a Canadian satellite carrier, made unauthorized secondary transmissions of plaintiff's copyrighted football broadcasts in the United States to its satellite subscribers in Canada.<sup>107</sup> In response to the plaintiff's assertion that the defendant's transmission violated its performance rights under the Copyright Act, defendant argued that uplinking copyrighted material and transmitting it to a satellite does not constitute a public performance.<sup>108</sup> Rather, defendant contended that any public performance occurs during the "downlink" from the satellite to the home subscriber in Canada.<sup>109</sup> The Second Circuit, relying on a broad reading of the statutory language, rejected defendant's arguments and held that a public performance includes "each step in the process by which a protected work wends its way to its audience."<sup>110</sup>

Just as the uplink of a satellite signal is one step in the chain of the transmission of a performance to a subscriber, a download is one step in the transmission of a sound recording to an end user. The court's holding in *National Football League* should not be interpreted as being limited to satellite transmission cases only, as the court's use of the language "protected work" seems to be demonstrative of a belief that this rationale should be applied to all copyrighted works.<sup>111</sup>

---

104. See *supra* notes 98–99 and accompanying text for an example of Congress's broad conception of the statutory language.

105. See, e.g., *Nat'l Football League v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (concluding that indirect transmissions of television broadcasts are public performances under Copyright Act); *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (holding that merely because plaintiff is intermediate carrier does not immunize it from copyright liability); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 294 (S.D.N.Y. 1991) (finding that prior case law supported finding of copyright liability for indirect transmitters); *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 593 F. Supp. 808, 813 (D. Minn. 1984) (holding that there is no practical basis to exclude indirect transmitters from copyright liability).

106. 211 F.3d 10 (2d Cir. 2000).

107. *Nat'l Football League*, 211 F.3d at 11.

108. *Id.* at 12.

109. *Id.* One of the main reasons that the defendants made this argument is because of the fact that "public" performances that occur outside of the United States cannot trigger liability under U.S. copyright law. *Id.*

110. *Id.* at 13 (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1998)). Multiple courts have rejected similar reasoning. See *WGN Cont'l Broad.*, 693 F.2d at 625 (concluding that Copyright Act definition of "perform publicly" is broad enough to include indirect transmission to the public); *Coleman*, 764 F. Supp. at 294 (holding that "public performance" includes transmissions from cable network that were routed through local cable company before reaching individual subscribers); *Hubbard Broad.*, 593 F. Supp. at 813 (noting that under § 101 of the Copyright Act "a transmission is a public performance whether made directly or indirectly to the public and whether the transmitter originates, concludes or simply carries the signal").

111. *Nat'l Football League*, 211 F.3d at 13.



*B. The Impracticality of the “Contemporaneous Perception” Requirement*

The courts’ treatment of the satellite or cable transmission cases also raises significant questions about the *American Society* court’s “contemporaneous perception” requirement.<sup>112</sup> The uplinks of satellite signals at issue in those cases are invisible and are not capable of being seen by any human.<sup>113</sup> One would think that if the Second Circuit held that transmissions that were not capable of contemporaneous perception implicated performance rights, the District Court for the Southern District of New York would be bound to apply the same rationale to downloads. In *American Society*, however, the district court reasoned that the broadcasting of television signals is more analogous to the streaming of music over the Internet because “[i]n each case, the digital data are transmitted in a form designed to permit real-time perception of the subject performance and, absent some type of recording device, results in the recipient obtaining no physical or digital copy of the data.”<sup>114</sup> The court’s analogizing of the broadcasting of television signals to the streaming of music on the Internet may not be sensible as a technical matter, as satellites do not receive streams of data, but rather entire blocks of programming for later retransmission.<sup>115</sup>

Similarly, it is often the case that a person attempting to stream a song on the Internet will have to wait while the digital file “buffers” before it is played, and in some cases, one can begin listening to a download before the transmission of the file is completed.<sup>116</sup> The difference between how long a listener has to wait to begin hearing a stream and hearing a download may often be only a matter of seconds, a fact that would seem to make reliance on a “contemporaneous perception” requirement impractical.<sup>117</sup> Furthermore, this gap is only becoming shorter as the technology necessary to listen to downloads as they arrive will only continue to improve.<sup>118</sup> Reliance by courts on a “contemporaneous perception” requirement in determining what types of transmissions implicate performance rights is therefore a problematic approach that is certainly not a long-term solution to the problem.

*C. Debunking the “Double-Dipping” Myth*

As technology continued to develop during the 1990s, more and more consumers began to use downloads and other technologies to obtain copies of

---

112. See *supra* notes 31–34 and accompanying text for a discussion of the *American Society* court’s “contemporaneous perception” reasoning.

113. Kramarsky, *supra* note 61, at 5.

114. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

115. Kramarsky, *supra* note 61, at 4.

116. See *generally* Hayes, *supra* note 69, at 30 (noting that all transmissions through Internet are in some sense asynchronous, meaning transmitted signal is sent faster or slower than embodied performance).

117. See Kramarsky, *supra* note 61, at 5, 7 (noting that some streams take three seconds to begin playing and some downloads become audible after seven seconds).

118. *Id.* at 7.

sound recordings without ever acquiring any sort of material object.<sup>119</sup> These developments created major concerns for music publishers and songwriters and it did not take long for Congress to recognize and address these issues.<sup>120</sup>

In 1995 Congress addressed these technological developments by enacting the Digital Performance Right in Sound Recordings Act, which added the term “digital phonorecord delivery” to the language of the Copyright Act.<sup>121</sup> The DPRSRA also created a statutory royalty for publishers and songwriters called the DPD royalty, which applies to digital music downloads.<sup>122</sup> Before the DPD royalty, mechanical royalties—per-unit payments made by record companies to music publishers for the reproduction of their copyrighted works—were only distributed when copies of copyrighted works were reproduced in the form of material objects, or “phonorecords.”<sup>123</sup> Congress, in creating the DPD royalty, intended to “maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD’s.”<sup>124</sup>

Some authorities and commentators have suggested that the attempts by the PROs to secure performance royalties, in addition to the mechanical royalties they receive under the DPD royalty, constitute impermissible “double-dipping.”<sup>125</sup> This argument is belied by the fact that all of the exclusive rights granted in § 106 of the Copyright Act are independent rights, and therefore, to avoid potential infringement, those who wish to make use of copyrighted works must independently bargain for uses that implicate separate rights.<sup>126</sup> Furthermore, Congress simply did not intend to make the DPD royalty and other performance royalties mutually exclusive, as is evident in Senate Report 104-128, which states that “[t]he intention [of the DPRSRA] is not to substitute for or duplicate performance rights in musical works.”<sup>127</sup> Although there may be

---

119. See *CD Sales Drop as Digital Music Rises*, *supra* note 1 (noting that over past decade consumers have increasingly begun to use other ways to get music, like digital downloads).

120. See *supra* note 30 and accompanying text for policy implications of developments. See *supra* notes 10–12 for a discussion of Congress’s response to the increasing use of downloads by music consumers.

121. 17 U.S.C. § 115(d) (2006). See *supra* note 12 and accompanying text for a definition of “digital phonorecord delivery.”

122. 17 U.S.C. § 115(c).

123. See Kevin Zimmerman, Understanding Mechanical Royalties, [http://songwriter101.com/articles/2614\\_0\\_6\\_0\\_M](http://songwriter101.com/articles/2614_0_6_0_M) (last visited Apr. 20, 2009) (defining mechanical royalties).

124. S. REP. NO. 104-128, at 37 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 384.

125. See *supra* notes 65–68 and accompanying text for a discussion of “double-dipping” argument.

126. See *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 21 (2007) (statement of Marybeth Peters, Register of Copyrights), available at <http://judiciary.house.gov/hearings/printers/110th/34178.PDF> (observing that characterization as “double dipping” is false, as separate rights with separate licensors are involved).

127. S. REP. NO. 104-128, at 37. The court in *American Society* reasoned that a “digital phonorecord delivery” could be both a reproduction and a performance, but stopped short of agreeing

plausible arguments against the notion that downloads implicate performance rights, the argument that this constitutes “double-dipping” on the part of the PROs is not one of them.

#### IV. THE NEED FOR A COMMON SENSE APPROACH

Although from a purely statutory perspective a download implicates performance rights, in practice, this outcome seems to defy logic. The end result of a download is that the consumer retains a copy of the protected work, whereas a performance, by its very nature, involves a limited exposure to the work in which the audience does not retain a physical copy of the work. Statutory arguments aside, it is hard to imagine that Congress intended performance rights to be implicated when the end user retains copies of the protected work.

Today, more and more music consumers are obtaining their music over the Internet using digital downloads, a practice that threatens the very existence of traditional retail outlets.<sup>128</sup> As a result, the time has come for Congress to amend the Copyright Act and make sure that the language of the Act reflects a logical approach to the issue. As noted above, the “contemporaneous perception” requirement is not a practical solution to this problem.<sup>129</sup> The most sensible way to make clear what types of uses implicate the different § 106 rights is to base these distinctions on what the end user receives.<sup>130</sup> If the end user receives a copy of a protected work that he or she retains and can play at a later time, as is the case when music is downloaded over the Internet, then the transmission of the protected work should implicate reproduction rights but not performance rights. Where transmissions of protected works allow end users to listen to protected works only once without retransmission, as is the case when music is streamed over the Internet, the transmission should implicate performance but not reproduction rights. This approach is far more sensible than basing the distinction on the nature of the transmission, as technological development in the digital realm continues to blur the lines between different types of digital transmissions.<sup>131</sup>

One potential suggestion for a statutory provision addressing this issue would be the following:

Anytime a digital phonorecord delivery is made where the transmission of the phonorecord results in the delivery of that phonorecord to an end user, such that the end user retains the phonorecord for his or her own future use, such

---

that downloads represented such a case. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 446–47 (S.D.N.Y. 2007).

128. See *CD Sales Drop as Digital Music Rises*, *supra* note 1 (noting that retail sales have been dropping over past decade as consumers use other ways to get music, like digital downloads).

129. See *supra* Part III.B for a discussion of the impracticality of the “contemporaneous perception” requirement.

130. See Kramarsky, *supra* note 61, at 7 (asserting that distinction should be based on “end user’s eventual bundle of rights”).

131. See Hayes, *supra* note 69, at 30 (noting that whether public performance has occurred should be judged on what recipient receives, not transmission technology used, especially when transmitting party controls what recipient receives).

---

---

transmission shall be considered a reproduction of the phonorecord for purposes of § 106. Any potential performance of the phonorecord during the process of the transmission shall be deemed incidental to the transmission, and shall not be considered a performance under § 106, but rather a component of the reproduction of the phonorecord.

This language takes into account the fact that when a consumer downloads a copyrighted work, the consumer does so in order to retain the reproduction of the work for their own future use. While the consumer might enjoy a performance of the work while it is being transmitted, such performance is not the purpose of the download. If the consumer only wanted to observe a performance of the work once without retaining a reproduced copy of the work, the consumer could stream the work rather than downloading it. Additionally, this language makes unnecessary the difficult task of determining whether a transmission is actually a performance.

#### V. CONCLUSION

Lawmakers face a difficult challenge when attempting to create laws that regulate areas in which technological development is virtually continuous. In the entertainment industry in particular, where cassette tapes have become compact discs and VHS tapes have become DVDs, new ways of providing content to consumers seem to be developed every year. Nothing has sparked this development quite like the Internet, as consumers of entertainment media now have an unprecedented level of access to this media. Unfortunately, during the course of these developments the rights of the copyright holders are often lost in the shuffle. It is the difficult task of the legislature to react to these developments as quickly as possible in order to ensure the continuing protection of the rights of copyright owners.

At this time, the legislative attempts at clarifying which rights are implicated by different forms of online technologies have not been sufficiently comprehensive.<sup>132</sup> As this Comment has sought to point out, in the area of downloading alone, numerous intellectual property issues remain unresolved. With the music industry and musicians themselves both struggling to ensure that their rights are protected and compensated in this new technological era, the legislature can no longer afford to leave copyright owners to fend for themselves.

This Comment suggests that a legislative effort is needed to clarify statutory language that seems to produce an illogical result.<sup>133</sup> Congress must specify which rights are implicated by different types of Internet technologies like downloads and streams, so that the owners of copyrighted works can be fairly compensated. Until this step is taken, the battle between the recording industry and the performing rights organizations over the countless dollars created by online consumption of music will only intensify.

*Jesse Rendell*

---

132. See *supra* Part II.A for a discussion of the relevant statutes and legislative history.

133. See *supra* Part IV for a discussion of potential legislative reform.