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HOW THE DIGITAL PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT OF 1995 PROTECT COPYRIGHT OWNERS ON THE INTERNET*

Lynne B. Lubash†

I. PROTECTION OF SOUND RECORDINGS UNDER THE COPYRIGHT ACT

Until 1995, when the Digital Performance Rights in Sound Recordings Act was passed, the rights of copyright holders to sound recordings were not entirely clear with regard to Internet usage. Concerns about record piracy and improved methods of duplication had led to the passage of the Sound Recordings Act of 1971.¹ This Act amended § 102 of the Copyright Act to add “sound recordings,”² thereby adding them to the list of works of authorship that receive protection. However, sound recording copyright owners were still not given the full bundle of rights usually associated with copyrights. While sound recordings were now provided reproduction, adaptation and distribution rights, they were not granted rights of performance.

II. MUSIC ON THE INTERNET

There are many music sites on the Internet where fans can download music sound bytes. Even record companies have started to place their artists’ music on their websites in order to promote their albums, but in these cases, the recording artists have implicitly contracted to allow their companies to promote their products in a digital fashion through standard contractual language encompassing methods “now or hereafter known.” However, record companies naturally are concerned that unauthorized digital transmissions of sound re-

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1. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), amended by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102).

2. 17 U.S.C. § 102 (7) (1998).

cordings will interfere with their revenues and the livelihoods of their recording artists.

With the proliferation of music on the Internet came the problem of defining a download of a sound recording on a computer so that copyrights could be protected.³ Is such a digital dissemination a “reproduction”? If so, it would be covered by § 106 of the Copyright Act. Or, is the digital dissemination of music on the Internet a “distribution”? Unauthorized distribution also constitutes infringement under § 106.

A strong argument could be made that the best possible classification for a digital dissemination is as a “performance.” A digital transmission of music seems to be a performance because a performance is “public” if it takes place somewhere that is open to the public — even if only a few people are in attendance at the time, and, even if the audience does not receive the performance all at the same time.⁴ So, a file containing digitized music that is downloaded by different users at different times can still be a performance.⁵ And, since playing a record or other device in public qualifies as a public performance, a computer being used to download music is a “device” through which a performance may take place.⁶ Yet, defining a digital dissemination of music as a performance was problematic because, as explained *supra*, sound recordings were never given the full rights of performance. Thus, legislative action was needed.

III. THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT

Due to advances in digital technology, the Copyright Act had to be amended. On September 15, 1993, President Clinton established the United States Advisory Council on the National Information Infrastructure (NII); part of the NII’s agenda was to investigate how to

3. See Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 112-114 (1996).

4. “To perform or display a work ‘publicly’ means . . .

(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 (1998).

5. Segal, *supra* note 3, at 117.

6. *Id.*

“prevent piracy and to protect the integrity of intellectual property.”⁷ The final report from the NII, entitled the “White Paper,” was issued in the fall of 1995.

Some of the White Paper’s proposals were then incorporated into the Digital Performance Right in Sound Recordings Act, which was signed into law on November 1, 1995.⁸ The Act added a new clause to § 106 of the Copyright Act. This new clause provides that, in the case of sound recordings, the copyright owner has the exclusive right to perform the work publicly by means of digital audio transmission.⁹ Another section was added as well, which when read in conjunction with § 101, defines a “digital audio transmission” as a transmission in a digital format “that embodies the transmission of a sound recording.”¹⁰ Thus, in this Act, the longed-for legislative action to protect copyright holders of sound recordings on the Internet was finally taken.

What are the remedies for infringement of copyrighted sound recordings downloaded from the Internet? The Act also took the measure of incorporating the remedies for infringement found in Chapter 5 of the Copyright Act. Thus, § 503, allowing for the impounding and destruction, or other reasonable disposition, of “all copies or phonorecords found to have been made or used in violation of the copyright owner’s exclusive rights...or other articles by means of which such copies or phonorecords may be reproduced.”¹¹ now also applies to sound recordings illegally downloaded by users on the Internet. Theoretically, this remedy would allow confiscation of an individual’s computer.

IV. THE WIPO TREATY AND PIRACY ON THE INTERNET

With these types of new legislative protections, it is more likely that Internet service providers, such as America Online, will be held liable for actions by individual copyright violators who use their networks to illegally download sound recordings. That type of suit

7. *Id.* at 121 (quoting Information Infrastructure Task Force, THE NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION (1993)).

8. Pub. L. 104-39, 109 Stat. 336 (1995).

9. “[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106(6) (1998).

10. “A ‘digital audio transmission’ is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.” 17 U.S.C. § 114(j)(3) (1998).

11. 17 U.S.C. § 503(a) (1998).

would be reminiscent of *Religious Technology Center v. Netcom*, in which Netcom was an Internet service provider that was sued for direct and contributory infringement because of the actions of one of Netcom's users.¹² Since the service providers are usually considered "deep pocket" defendants, it is usually these Internet companies that are seen as the most attractive targets for infringement suits, rather than the users that committed the infringing acts.

Therefore, these service providers are lobbying the Clinton Administration to provide them with some sort of protection when users violate copyrights on the Internet. One example of this is the current opposition that Internet service providers, as well as software companies and regional telephone networks, are voicing to the current WIPO treaty — opposition likely to remain unless they would gain exemptions from all illegal acts committed by people using their services.¹³

The treaty in question was developed by the World Intellectual Property Organization (WIPO)¹⁴ in December 1996 to set international standards to protect owners of all types of intellectual property, including copyrights. The WIPO treaty attempts to emphasize record companies' reproduction rights to include the Internet, and to provide that record companies charge royalties when their music is played via the Internet.¹⁵ However, in order to support this treaty which expands and clarifies the copyrights of sound recording owners on the Internet, the service providers — quite naturally — wish to be left out of liability for infringements, by their users, of these expanded rights.

On July 28, 1997, President Clinton recommended to the Senate that they "give early and favorable consideration" to the WIPO treaty.¹⁶ Indeed, he stated that the treaty is in the best interests of the United States because it ensures "important protection against piracy for U.S. rightsholders in the areas of music, film, computer software and information products."¹⁷ Yet, as of July 1998, the United States

12. *Religious Tech. Ctr. v. Netcom Online Communications Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

13. See K. Dawn Rutledge, *Internet Advocates Question Music Treaty*, NASHVILLE BUS. J., May 19, 1997, at 4.

14. WIPO is an organization made up of the United States and over 160 other countries. See *id.* For full text viewing of various treaties and conventions administered by WIPO, visit <<http://www.wipo.org/eng/iplex/index.htm>>.

15. *Id.*

16. *Clinton Notice to Senate on WIPO*, U.S. NEWSWIRE, July 28, 1997.

17. *Id.*

has not yet ratified the WIPO treaty,¹⁸ so the expansion of rights relating to digital downloads of sound recordings has not yet occurred.

V. CONCLUSION

It took until 1995 for the United States to recognize the specific rights of sound recording copyright owners on the Internet because the law lagged behind the technology. Despite the current protections gained from the Digital Performance Rights in Sound Recordings Act, these same copyright owners must still see their rights violated in other countries. Thus, international action along the lines of the WIPO treaty is needed.

Access to music on the Internet provides enjoyment for the public and a new source of income for music performers. These are benefits that should be available on a global scale. The WIPO treaty should be modified to allow the infrastructure providers to give access to these benefits through the Internet without fear of liability for copyright violations beyond their control which may be practiced by individual users.

18. See, e.g., Brooks Boliek, *House Reopens WIPO Talks; Copyright Industry Exec: "There's Some Hope Now" For a Deal*, HOLLYWOOD REPORTER, July 17, 1998.

