

PERFORMANCE ANXIETY:
THE INTERNET AND COPYRIGHT'S VANISHING
PERFORMANCE/DISTRIBUTION DISTINCTION

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“Technology is a servant who makes so much noise cleaning up in the next room that his master cannot make music.”

—Karl Kraus (1874-1936)¹

I. INTRODUCTION: THE DIGITAL COPYRIGHT CRISIS

By now, it is common knowledge that the advent of the Internet has precipitated a “copyright crisis.” In recent years, high-profile lawsuits against Internet file-sharing operations and a much-publicized wave of litigation brought by the music industry against private individuals for illegal “sharing” have made this fact a popular subject of discussion in the legal and technology communities, as well as among the lay public.² But the crisis in copyright law occasioned by the Internet extends beyond the infamously widespread availability of unauthorized, infringing content and the attendant controversy over the liability of file-sharing services. It goes deeper, to the very question of whether traditional categories and distinctions in copyright law—such as the once obvious distinction among “performances,” “reproductions,” and “distributions”—remain meaningful and applicable in the Internet context at all.

The music industry’s methods of distributing its product to consumers are clearly in the midst of a sea change. According to industry figures, 582 million individual tracks were legally downloaded in the United States in 2006, up from 143 million in 2004—a 300% increase in only two years.³ United States online sales of entire albums rocketed from six million to 33 million—a 450% increase—within the same period of time.⁴ Meanwhile, by comparison, the number of physical CDs sold in the United States declined by 8% from 2004 to 2005, and sales during the first half of 2006 were down 14.3% from the year before.⁵ Without a doubt,

¹ Karl Kraus, *quotation appearing in* BEIM WORT GENOMMEN (1955), *reprinted in* THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., Columbia Univ. Press 1996), *available at* <http://www.bartleby.com/66/62/33162.html> (last visited Sept. 10, 2007).

² *See, e.g., In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 963 (2005) (mentioning the “thousands of suits” filed by the RIAA against private individuals).

³ *See* INT’L FED’N OF THE PHONOGRAPHIC INDUSTRY, 2006 DIGITAL MUSIC REPORT 5 (2006), <http://www.ifpi.org/content/library/digital-music-report-2006.pdf> (last visited Sept. 10, 2007); *See also* INT’L FED’N OF THE PHONOGRAPHIC INDUSTRY, 2007 DIGITAL MUSIC REPORT 5 (2007), <http://www.ifpi.org/content/library/digital-music-report-2007.pdf> (last visited Sept. 10, 2007).

⁴ *See supra* note 3.

⁵ RECORDING INDUSTRY ASS’N OF AMERICA, 2005 YEAR-END STATISTICS (2005),

this represents the beginning of a momentous and historic shift in the business model of commercial music distribution, from the sale of physical copies in “brick and mortar” stores to the sale of music via Internet transmission. Before long, Internet music sales are likely to surpass traditional CD sales, and, one day, perhaps, replace them almost entirely.⁶

Clearly, each of the established players in the “traditional” music industry has a strong interest in maximizing its own share of the total revenues generated under this new distribution model. It may not come as a surprise, then, that there is a great deal of controversy between the various parties who seek to distribute music legally via the Internet and the traditional music industry players who hold the copyrights in the works being distributed concerning which rights under copyright law are implicated in Internet music sales. The answer to this question will determine which licenses Internet music distributors must acquire in order to offer music legally over the Internet, and, consequently, how much those distributors must pay the established players in the music industry in order to do business.

To understand this controversy, we must look back in time. Before the digital age, recorded music reached the public’s ears through two mutually exclusive channels: either through *phonorecords* (the legal term for fixed copies), or through *public performances* (either in person, or via transmissions such as radio broadcasts). A party seeking to make and distribute phonorecords of a copyrighted song needed to license the copyright holder’s exclusive rights of *reproduction* and *distribution* under the Copyright Act; taken together, these two rights are often termed the “mechanical rights.”⁷ Meanwhile, any party seeking to broadcast the song to the public over the airwaves or play it in a public place needed to license the copyright holder’s exclusive right of *public performance*. Every act that resulted in the public experiencing

<http://www.riaa.com> (select Key Statistics; then under “Year-End” select 2005 U.S. Manufacturers’ Unit Shipments and Value Chart) (last visited Mar. 13, 2007); RECORDING INDUST. ASS’N OF AMERICA, 2006 MID-YEAR STATISTICS (2006), <http://www.riaa.com> (select Key Statistics; then under “Mid-Year” select 2006 U.S. Manufacturers’ Unit Shipments and Value Chart) (last visited Mar. 13, 2007).

⁶ Indeed, there were over 13,000 new “digital-only” album releases in the U.S. during the first half of 2006, accounting for as much as 36% of all new album releases during that period. By comparison, there were only 16,580 new “digital-only” releases in the entire year of 2005. 2007 DIGITAL MUSIC REPORT, *supra* note 3, at 15.

⁷ While “reproduction” and “distribution” are *different* rights under the Copyright Act, I will often lump them together throughout this article as “reproduction-and-distribution,” “reproduction/distribution,” or “the mechanical rights,” as both of these rights are implicated in the creation and dissemination of phonorecords, and both of these rights are generally licensed in tandem (see Part II.B.3 *infra*). In addition, as a shorthand, I will often refer to the distinction between the public performance right and the mechanical rights simply as the “performance/distribution distinction.”

recorded music was cognized under the Copyright Act as either a reproduction-and-distribution or a public performance, but never both.

The arrival of the Internet changed all this. Today, transmitting a musical performance over the Internet (e.g., via a “webcast” or Internet “radio station”), unlike transmitting a performance over the analog airwaves, requires creating a momentary “copy” of the work in the receiving computer’s RAM (random access memory) so that the receiving computer’s software can render the performance—a process called “buffering.” Because of these short-lived “copies,” some allege that all performances transmitted via the Internet, unlike traditional analog transmissions, implicate the copyright holder’s *reproduction* and *distribution* rights, in addition to the obviously implicated public performance right. Conversely, delivering a permanent copy of a song to a purchaser as an Internet download, unlike selling a physical copy in a store, involves *transmitting* that song over wires or a wireless network. Because the work is “transmitted,” just as works are “transmitted” when they are publicly performed over traditional analog radio, some parties within the music industry allege that all sales of copies of music via download, unlike sales of CDs, implicate the copyright holder’s *public performance* right, not just the reproduction/distribution rights. Consequently, some argue, Internet performers of music, unlike their analog radio counterparts, need to pay extra for reproduction and distribution licenses; symmetrically, Internet distributors of music, unlike their record-store counterparts, need to pay extra for performance licenses. Understandably, many Internet performers or distributors of music vigorously disagree. As the statistics on music downloading make clear, many billions of dollars potentially hang in the balance.

The courts and the legal literature have discussed for over a decade whether the short-lived “copies” of works that are made in RAM in the course of ordinary computer uses are legally cognizable copies under copyright law.⁸ The lower federal courts

⁸ See generally *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 621-22 (S.D.N.Y. 2007) (holding that buffer copies qualify as “copies” under the Copyright Act); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that buffer copies qualify as “copies” under the Copyright Act); *Advanced Computer Servs., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D.Va. 1994) (holding that buffer copies qualify as “copies” under the Copyright Act); I. Trotter Hardy, *Computer RAM “Copies”: A Hit or a Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 423 (1997); Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447 (2003); David G. Post, *New Wine, Old Bottles: The Case of the Evanescent Copy*, AM. LAW., May 1995, at 103; U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO §104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, at xxi-xxvi (2001) [hereinafter COPYRIGHT

that have considered this question have repeatedly answered it in the affirmative,⁹ and some parties in the music industry have pointed to these decisions in order to support their claims that every public performance on the Internet is also a reproduction and distribution of copies under the meaning of the Copyright Act.¹⁰ The Clinton Administration's National Information Infrastructure Task Force, in its 1995 evaluation of copyright law in the Internet age, also seized upon these court decisions in suggesting that every display of a work transmitted over a network (and thus, presumably, every performance, as well) entails a reproduction.¹¹ The United States Copyright Office has also cited these decisions in opining that "the temporary copy [of a work] made [in RAM] in streaming audio does in fact implicate the reproduction right."¹² However, these decisions and opinions have been much criticized,¹³ on the grounds that the Copyright Act's text and legislative history specify that in order to be "reproduced," a new, tangible fixation of the work must be created that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*[,] "¹⁴ which is arguably not true of ephemeral RAM "copies."¹⁵

OFFICE REPORT ON §104 OF THE DMCA] (arguing that incidental RAM copies are "fair uses"), *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (last visited Sept. 10, 2007).

⁹ *See Twentieth Century Fox*, 478 F. Supp. 2d at 621-22; *Peak Computer*, 991 F.2d at 511; *Advanced Computer Servs.*, 845 F. Supp. at 356.

¹⁰ *See, e.g., Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 19-20 (2001) [hereinafter *DMCA Section 104 Report Hearing*] (prepared statement of Carey Ramos, on behalf of the National Music Publishers' Association and the Harry Fox Agency), *available at* <http://commdocs.house.gov/committees/judiciary/hju766690.000/hju766690.HTM>.

¹¹ NAT'L INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 64-5 (1995), *available at* <http://www.uspto.gov/web/offices/com/doc/ipnii/lawcopy.pdf> (last visited Sept. 10, 2007).

¹² *DMCA Section 104 Report Hearing*, *supra* note 10, at 7. Note, however, that the Copyright Office opined that such "copies" were nonetheless fair uses.

¹³ *See, e.g.,* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 42-43 (1994) (arguing that "the better view of the law is that the act of reading a work into a computer's [RAM] is too transitory to create a reproduction within the meaning of section 106(1)").

¹⁴ 17 U.S.C. § 101 (2006) (definition of "fixed") (emphasis added); *See also* H.R. REP. NO. 94-1476, at 61 (1976).

¹⁵ Moreover, section 115 of the Copyright Act (of which more later), which applies to "digital phonorecord deliveries" (i.e., certain downloads), contains the following language: "[a] digital phonorecord delivery does *not* result from a real-time . . . transmission [i.e., streaming] of a sound recording where no reproduction . . . is made from the inception of the transmission through to its receipt . . . in order to make the sound recording audible." 17 U.S.C. § 115(d) (2006) (emphasis added). This proviso would arguably be superfluous if RAM copies were legally cognizable reproductions under the Copyright Act, as *every* streaming transmission requires RAM buffering in order to

In any event, the debate continues. For the present, while some parties in the music industry maintain that RAM “copies” created during Internet streaming performances qualify as true copies under the Copyright Act, the Music Publishers’ Association of America has voluntarily agreed to forgo its alleged right to license these RAM “copies” when created in radio-style, *non-interactive* streaming Internet performances. It continues to insist that these “copies” must be licensed when made in the course of *interactive* streaming performances (wherein recipients are able to choose which songs are to be performed).¹⁶

Until recently, comparatively little attention had been given to the opposite question—whether an Internet distributor of phonorecords (i.e., a download provider) “publicly performs” under copyright law when delivering a music file to a customer. In fact, no court had addressed the issue at all until April 2007, when Judge William C. Conner of the Southern District of New York, considering the question in the context of a summary judgment motion in *United States v. American Society of Composers, Authors and Publishers, Inc.* (“*United States v. ASCAP*”), answered it in the negative.¹⁷ While I believe Judge Conner’s conclusion and reasoning are essentially correct, the opinion in *United States v. ASCAP*—weighing in at less than ten pages in the Federal Supplement—hardly lays out the most complete and airtight case possible for the conclusion it ultimately draws, i.e., that a “pure” download is not a public performance. Furthermore, Judge Conner did not address certain arguments advanced by ASCAP regarding difficult-to-categorize “hybrid transmissions” that resemble both downloads and streams. Consequently, after surveying the general background of copyright law and ownership in the music industry in Part II, this article considers the “download-as-performance” question in detail in Part III, applying the major techniques of statutory interpretation to the relevant portions of the Copyright Act to more firmly justify Judge Conner’s result and examine the arguments of ASCAP and supporting *amici* that the court did not address.

Finally, in Part IV, this article argues that a legislative amendment of the Copyright Act is necessary, both to settle this

render the digital data into audible sound.

¹⁶ *DMCA Section 104 Report Hearing*, *supra* note 10, at 19-20. Regardless of whether the MPAA is correct under the language of the present statute, the MPAA is on to something—the difference between *interactive* and *non-interactive* transmissions is critical to the future of copyright. Indeed, in Part IV, *infra*, I argue that the interactive/non-interactive distinction should replace the performance/distribution distinction, obviating the need for this dispute.

¹⁷ *United States v. Am. Soc’y of Composers, Authors and Publishers* (*United States v. ASCAP*), 485 F. Supp. 2d 438, 440-47 (S.D.N.Y. 2007).

particular controversy and, more fundamentally, to address the indeterminate status of performance, reproduction, and distribution rights in the Internet age—the deeper problem of which, I allege, the “download-as-performance” controversy is merely one symptom. In essence, I argue that Judge Conner’s opinion, while a correct interpretation of present law, is merely a stopgap solution. This article suggests that in the Internet context, the traditional dichotomy between performance rights and mechanical (reproduction/distribution) rights be abandoned altogether, and that these separate rights (along with the right of display, which is not immediately relevant to recorded music) be collapsed into a right of “digital communication to the public” encompassing all digital transmissions and communications. This broad right would then be subdivided into *interactive* and *non-interactive* communication sub-rights, depending on whether or not a given transmission or communication allows members of the public to experience a work of their choice at the time of their choice. In the Internet context, not only is the distinction between interactive and non-interactive communication clearer and more analytically sound than the traditional distinction between performance and reproduction/distribution, but moreover, it more faithfully serves the fundamental goals of copyright law.

II. TECHNOLOGICAL AND LEGAL BACKGROUND

A. “Pure” Downloads Distinguished From Other Internet Transmissions

As a threshold matter, it is important to distinguish between three types of Internet music transmissions, each of which may (and, as I will argue, *does*) implicate different rights under the Copyright Act.¹⁸ A “pure download” occurs when a distributor digitally transmits a phonorecord—i.e., a music file—to a customer’s computer (or other device) *without* any contemporaneous playback of the song. That is, the song is not automatically made audible at the time of the download. Rather, the result of the transmission is the creation of a permanent (or at least long-term) physical copy of the song on the user’s device. The customer must take some subsequent action to make the song audible. Or, as ASCAP has described it in a brief before Judge Conner:

¹⁸ As a disclaimer, the names of these three categories are not legal terms of art. They are, however, fairly widespread in the legal literature and in common use in the technological community at the present time.

Downloads [including “pure” downloads] involve a series of steps. First, the client computer establishes an Internet connection with the server computer. The client or the server then specifies that a particular “file,” which comprises the digital information, is to be transmitted from the server to the client. The server transmits the digital information to the client over the Internet. Finally, the client stores or “saves” the transmitted digital information on local storage media[] (e.g., the computer’s hard drive), where it can be accessed by programs and “played,” i.e., translated into audible sounds.¹⁹

Some pure downloads are unrestricted (in that no limitations or conditions are placed on the customer’s subsequent use of the purchased audio file), and other pure downloads are restricted or “conditional” downloads. Some typical conditions placed on pure downloads include restricting the number of times the song can be played, imposing an expiration date after which the file will not play, conditioning the ability to play the song on the customer’s continued subscription to a paid music service, and the “tethering” of a downloaded file to a particular media device so that it will play solely on that device.²⁰

Meanwhile, in “pure streaming” (or “webcasting”), unlike in a pure download, the work in question *is* made contemporaneously audible at the time of transmission. The playing of the work is effected by the same customer action that initiates the transmission. Another difference is that in pure streaming, a permanent physical copy of the work *does not* remain on the user’s device after the transmission (and contemporaneous playback) has occurred. Still another difference is in the “transmission protocols” that govern how the server computer and the client (i.e., recipient) computer communicate: while in a pure download, the digital information constituting a music file is delivered to the client as fast as the network permits, in streaming, the server delivers the digital information in “real time,” such that each incoming bit of digital information is played back as it is received.²¹ In other words, in streaming, the bits encoding the sounds playing at the three-minute mark of a song are received three minutes into the transmission, no matter how fast the client’s connection *could* receive the transmission in theory, and

¹⁹ ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment at 3, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)) [hereinafter ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment] (citations omitted).

²⁰ *Id.* at 3-4.

²¹ *Id.* at 4.

the transmission lasts exactly as long as the song plays.²²

Last are so-called “hybrid” transmissions, which show aspects of both pure downloads and pure streaming transmissions. For example, in a “progressive” download, a type of hybrid transmission, a permanent copy of the work is left behind after the transmission, as in a pure download, but the work is *also* made contemporaneously audible to the user at the time of transmission, as in pure streaming. While hybrid transmissions (including progressive downloads) will be addressed in Part IV of this article, they are irrelevant to the question at issue in *United States v. ASCAP* and addressed in Part III—whether a “pure” download *simpliciter* entails a public performance under the Copyright Act.²³

B. A Brief Overview of Music Copyright Law and Ownership

1. “Musical Works” Versus “Sound Recordings”: Two Separate Copyrighted Works

For the purposes of copyright law, every recorded song has a double identity: both as a *musical work* and as a *sound recording*. The “musical work” is the abstract musical composition (lyrics and notes), as distinguished from any performer’s particular rendition of it.²⁴ The “sound recording,” on the other hand, is the actual sequence of sound waves resulting from a specific performing artist’s rendition of the musical work on a particular occasion.²⁵ Copyright law treats the concrete sound recording and the underlying, abstract musical work as separate copyrightable works, although they both reside together on the same phonorecord (whether a traditional phonorecord, such as a CD, or a digital music file on a computer).

The copyrights in the sound recording and in the musical

²² Obviously, streaming cannot occur over a connection that is too slow to convey the digital information encoding a song in real time. This explains why streaming transmissions arrived relatively recently compared to downloads.

²³ In ASCAP’s briefs, an unrestricted download (i.e., a download that is not a “conditional” download) is confusingly termed a “pure download.” This article, on the other hand, does *not* use the term “pure download” in that sense. Rather, this article uses the phrase “pure download” in contradistinction to “hybrid transmission,” which indicates a *blend* between a download and a streaming transmission, and is in that sense “impure.” A conditional or restricted download that is not a “hybrid” transmission, by my logic, is still a “pure download,” even according to ASCAP’s own definition of “download,” so it does not make sense to speak of such non-hybrid conditional downloads as “impure.” Hence, this article assumes that all transmissions fall within the trichotomy of pure *downloads*, pure *streams*, and hybrid transmissions, and that both pure downloads and hybrid transmissions (e.g., progressive downloads) alike can be either unrestricted or conditional downloads.

²⁴ See 17 U.S.C. § 101 (2006) (definition of “musical work”).

²⁵ *Id.* (definition of “sound recording”).

work are almost always held by different entities: generally, the relevant *record company* owns the sound recording copyright (having contractually “signed” the performing artist and financed the recording session), and a *publishing company* holds the musical work copyright (having acquired the rights from the songwriter). Consequently, if a download provider wants to offer a music file for transmission to its customers via the Internet, the provider needs to secure both permission from the record company to use the sound recording *and* permission from the publisher to use the musical work embedded therein.²⁶

2. The Rights Protected by Copyright

When a party holds “the copyright” in a particular work, that party actually holds a bundle of several exclusive rights. Each of the exclusive rights in this bundle can be separately licensed or transferred outright to other parties.²⁷ Section 106 of the Copyright Act lists the six separate rights. With respect to the download-as-performance controversy, the four relevant rights are:

§ 106(1): the exclusive right to *reproduce* the work;

§ 106(3): the exclusive right to *distribute* copies of the work to the public;

§ 106(4): for some kinds of works (including musical works, but not sound recordings), the exclusive right to *publicly perform* the work;

§ 106(6): for sound recordings only, the exclusive right to publicly perform the work “by means of a digital audio transmission.”²⁸

Note that unlike the reproduction and distribution rights, which apply to all types of copyrighted works, the traditional, long-standing § 106(4) public performance right applies to musical works but *not* to sound recordings. Note also that the § 106(6) right of public performance “by means of a digital audio transmission” (added to the Copyright Act in 1995) obviously applies only in the digital context, and unlike the traditional public performance right in § 106(4), it *does* apply to sound recordings (and *only* to sound recordings—not, for example, to musical works).²⁹

²⁶ See generally AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING chs. 12, 17 (3rd ed. 2002).

²⁷ H.R. REP. NO. 94-1476, at 61 (1976).

²⁸ See 17 U.S.C. §§ 106(1), (3), (4), (6) (2006).

²⁹ 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. (2000)). The upshot is that sound recordings (though not their underlying musical works) may be freely performed outside the ambit of copyright law, except when performed by means of a

3. How the Section 106 Exclusive Rights Are Licensed in the Music Industry

Further complicating the picture, while the record companies directly control and license all the relevant rights (performance, distribution, and reproduction) in their sound recordings, the publishing companies, in general, do *not* directly license the relevant rights in their musical works. Rather, each publishing company licenses the relevant rights in its catalog of musical works by way of two separate intermediary organizations.

The first intermediary is the Harry Fox Agency (HFA), a subsidiary of the National Music Publishers' Association, which handles the licensing of the *reproduction* and *distribution* rights (i.e., the mechanical rights) to the publishers' various musical works. The licenses granted by HFA, which allow reproduction and distribution of the publishers' musical works in phonorecords, are called "mechanical licenses." The second intermediary that each publishing company uses is one of three entities known as "performing rights societies" or "performing rights organizations" (PROs): The American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc.³⁰ As the term suggests, the PROs handle the licensing of the *public performance* rights to the publishers' musical works.

C. Framing the "Download as Performance" Controversy in Legal Terms

Given this background, the controversy at the heart of this article can now be framed in proper legal terms. When download providers transmit music files over the Internet to customers via "pure download," there is little question that the mechanical rights are implicated, both as to the sound recording and as to the underlying musical work: a download clearly creates a new copy of the sound recording and the underlying musical work on the user's computer (reproduction), and offering such files for download places such copies in the hands of the general public (distribution).³¹ Thus, at a minimum, download providers must

digital audio transmission.

³⁰ See generally KOHN & KOHN, *supra* note 26, chs. 12, 17.

³¹ While there has apparently been no question that a download implicates the § 106 right of reproduction, several commentators have argued that a download does not in fact implicate the *distribution* right, because "to constitute distribution a party's act must involve some *transfer of . . . a material object*." R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM 'Copies'*, 2001 U. ILL. L. REV. 83, 126-27 (2001) (emphasis added); see also Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant's Motion to Dismiss the Complaint at 3-7, *Elektra Entm't Group, Inc. v. Barker*, No. 05 CV 7340 (KMK) (S.D.N.Y. 2006), available at http://www.eff.org/IP/P2P/RIAA_v_ThePeople/elektra_v_barker/elektra-amicus-filed.pdf.

license the *reproduction* and *distribution* rights in the musical works that they offer (through HFA, by means of a mechanical license) and in the corresponding sound recordings that they offer (from the record companies directly).

The question as to whether the public performance rights are implicated by a pure download, on the other hand, is the main question addressed by this article (and the question decided in the negative in Judge Conner's recent opinion in *United States v. ASCAP*). If a pure download does entail a public performance, then the public performance right in § 106(4) of the Copyright Act is implicated as to the *musical work*, and the new § 106(6) right of "public performance by means of a digital audio transmission" is implicated as to the *sound recording*. Therefore, these rights would need to be licensed from the relevant entities as well—for the musical work, from the appropriate PRO, and for the sound recording, as with the reproduction and distribution rights, from the record company directly.³²

D. *The Parties' Positions on the Controversy*

The PROs maintain that *all* digital transmissions of music constitute "public performances"—whether they are pure downloads, pure streaming transmissions, or hybrid transmissions.³³ ASCAP, the largest of the PROs, had claimed years before Judge Conner's recent decision that "[e]very Internet transmission of a musical work constitutes a public performance of that work."³⁴ Therefore, the PROs have long insisted that download providers, in order to transmit music files over the Internet to their customers as pure downloads, are legally obligated to pay them for a public performance license *in addition*

However, the argument that a distribution requires that a tangible object change hands has not been adopted by the courts. *See, e.g.,* A & M Records, 239 F.3d at 1014 ("Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction . . . and distribution") (emphasis added); *Maverick Recording Co. v. Goldshteyn*, No. CV-05-4523, 2006 U.S. Dist. LEXIS 52422, at *8 (E.D.N.Y. July 31, 2006) ("Downloading and uploading copyrighted files from a peer-to-peer network constitutes . . . reproducing and distributing copyrighted material . . .") (emphasis added).

³² Since the record companies directly license both performance and mechanical rights, the record companies do not have a true stake in the "download-as-performance" debate; whether a download is a performance or merely a reproduction/distribution, the download provider must acquire a license for the sound recording from the record company either way, and pay what the record company requests. However, since publishing companies split the licensing responsibilities for their musical works between the PROs (public performance rights) and HFA (mechanical rights), and since HFA may charge only a statutory maximum rate for a *mechanical* license (see Part III.F *infra*), the publishing companies, and obviously the PROs, have a clear interest in establishing that a download entails a public performance.

³³ *See, e.g., DMCA Section 104 Report Hearing, supra* note 10, at 7.

³⁴ ASCAP Frequently Asked Questions About Internet Licensing, <http://www.ascap.com/weblicense/webfaq.html> (last visited Sept. 11, 2007).

to the mechanical license the download provider must already obtain from HFA.³⁵ While some authority can be marshaled in support of this position, it is not ultimately convincing, as Judge Conner concluded and as this article will show in Part III.

Meanwhile, opponents of the PROs' position (obviously including many download providers, but also including the Recording Industry Association of America, itself historically no friend to download providers)³⁶ accuse music publishers of "double dipping," or unfairly seeking to be compensated twice, under two separate licenses—once through HFA, and once through a PRO—for a customer's single act of downloading.³⁷ These opponents of the PROs maintain (and Judge Conner agreed) that while streaming transmissions or hybrid transmissions may entail public performances under the Copyright Act, pure download transmissions do not. This article argues in Part III that this view is the most consistent with the statutory text, the overall structure of the Copyright Act, and the otherwise-expressed intent of Congress.

The United States Copyright Office espouses a somewhat non-committal third view: it does not take a stance on whether a

³⁵ It bears noting that in 2001, ASCAP, BMI and the National Music Publishers Association (NMPA, the parent organization of HFA) issued a joint statement to the effect that they would voluntarily refrain from seeking license fees for downloads meeting the following requirements:

- (a) The musical work [can] not be perceived (i.e., heard) while the transmission [is] taking place;
- (b) The sole purpose of the transmission [is] to deliver a phonorecord of the musical work to the home user;
- (c) The resulting phonorecord received by the home user [is] permanent, capable of further non-commercial duplication by the home user, and not limited by time, usage, further payment, or any other factor; and
- (d) The transmission of the musical work [is] made on demand.

Joint Statement of American Society of Composers, Authors & Publishers (ASCAP), Broadcast Music, Inc. (BMI), The National Music Publishers' Association (NMPA) / Harry Fox Agency (HFA) on Internet Uses of Music (Nov. 2001), <http://www.ascap.com/legislation/jointstatement.html>. In other words, ASCAP has voluntarily agreed not to seek license fees for certain *pure, unrestricted* (non-conditional) downloads. ASCAP reaffirmed this statement in its briefs before Judge Conner. See ASCAP's Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 9, n. 2.

However, ASCAP has never disclaimed the existence *in theory* of a legal obligation to pay a performance royalty on every download, including pure, unrestricted downloads. See *id.* ("[T]he factual question of the value of the performing right in the various forms of . . . download . . . is a separate question from the purely legal question of whether the performing right exists in every form of download.").

³⁶ In fact, the RIAA filed an *amicus* brief in *opposition* to ASCAP in the *United States v. ASCAP* case, which figured prominently in Judge Conner's opinion. 485 F. Supp. 2d 438, 446-47 (S.D.N.Y. 2007); see also *infra* note 105.

³⁷ See Memorandum of Law in Support of Applicants' Motion of Summary Judgment, *supra* note 19, at 15-17 ("To allow ASCAP and its members to collect public performance licensing fees for the very same transmissions as to which fees are already being collected by ASCAP's publisher members under the rubric of mechanical rights licenses would represent a classic 'double dipping,' lacking either legal or economic rationale"); COPYRIGHT OFFICE REPORT ON §104 OF THE DMCA, *supra* note 8, at 140.

pure download “technically” entails a public performance, but claims instead that any “technical” public performance that may result is protected by copyright law’s fair use doctrine. This article will argue at the end of Part III that while it is unnecessary to consider the fair use doctrine in the case of “pure” downloads, which do not even entail *prima facie* performances, the public performances that potentially occur in the course of *hybrid* transmissions are most likely fair uses. However, as this article will show in Part IV, reliance on the fair use doctrine to sort things out is an inadequate solution, and a proactive legislative amendment is necessary.

E. The Courts Finally Speak – United States v. ASCAP

As previously noted, no court had ever opined on the question as to whether a download entails a public performance under the Copyright Act until very recently, in *United States v. ASCAP*.³⁸ Pursuant to a consent decree settling a 1941 antitrust action brought against ASCAP,³⁹ disputes over the appropriate royalty rates ASCAP may charge for various types of public performances are adjudicated by the “ASCAP Rate Court,” a continuation of the court that heard the original 1941 action, presided over by Judge Conner of the Southern District of New York.⁴⁰ In the run-up to the proceeding at issue in this article, three commercial music download providers—America Online, Inc. (“AOL”), RealNetworks, Inc. (which runs the Rhapsody music service), and Yahoo!, Inc.—engaged in negotiations with ASCAP in an attempt to determine a mutually agreeable royalty structure for sales of music over the Internet.⁴¹ When the negotiations proved fruitless, the providers brought the dispute before the Rate Court and Judge Conner in November 1995.⁴² In December 2006, both ASCAP and the providers filed cross-motions for partial summary judgment on the question of law addressed in this

³⁸ As an aside, at the time this article was written and originally submitted for publication, no court had considered the question *at all*. The decision in *United States v. ASCAP* occurred post-submission, obviously necessitating a substantial amount of revision to this article. However, the fundamental structure and arguments of this article are largely unchanged since before the decision.

³⁹ See *United States v. Am. Soc’y of Composers, Authors and Publishers*, Civ. No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941). This explains the otherwise confusing facts that the named plaintiff in the recent Southern District of New York proceeding is the *United States* and that the docket number of the proceeding, Civ. Action No. 41-1395 (WCC), suggests a filing date in 1941.

⁴⁰ See Stephen M. Kramarsky, *A Download is Ruled Not a Performance*, 237 N.Y.L.J. 5 (2007); *United States v. ASCAP*, 485 F. Supp. 2d at 440-41.

⁴¹ *United States v. ASCAP*, 485 F. Supp. 2d at 441.

⁴² Letter from John LoFrumento, Chief Executive Officer, ASCAP, to ASCAP members (May 8, 2007), available at http://www.ascap.com/press/2007/050807_court_decision.html.

article—i.e., whether a pure download implicates the public performance right under the Copyright Act.⁴³

Judge Conner's response, issued on April 25, 2007, was a relatively terse "no"—he held, in brief, that as a matter of statutory interpretation, a "performance" under the Copyright Act requires "contemporaneous perceptibility," and that a pure download, which is by definition inherently incapable of being contemporaneously perceived, thus cannot constitute a performance—let alone a *public* one.⁴⁴

This decision immediately caused the simmering controversy to boil over into the pages of the industry and mainstream media—one news publication surmised that it "may be the most important music royalty legal [decision] in decades."⁴⁵ At the time this article went to press, ASCAP had not announced its intention to appeal the decision to the United States Court of Appeals for the Second Circuit, but had suggestively noted in a public statement that once Judge Conner reaches a final decision on royalty rates for the applicants' other performances—which is scheduled to occur by early October 2007—"it will be possible for ASCAP to appeal the decision regarding downloads, as well as any other aspects of the case."⁴⁶ Given the amount of money obviously at stake—especially as increasing Internet bandwidth invariably prompts the downloading of television shows and motion pictures to supplant live broadcasts in the coming years, thus cutting into a significant present source of performance royalties for the PROs⁴⁷—it seems improbable that ASCAP will not appeal. If it does, the Second Circuit should affirm Judge Conner's opinion for the reasons examined at length in Part III.

⁴³ *Id.*; United States v. ASCAP, 485 F. Supp. 2d at 441.

⁴⁴ United States v. ASCAP, 485 F. Supp. 2d at 443.

⁴⁵ Mark Northam, *ASCAP Loses Major Download Royalty Case*, FILM MUSIC WKLY., May 1, 2007, at 3, available at http://www.filmmusicweekly.com/issues/FM_Weekly_050107.pdf.

⁴⁶ Letter from John LoFrumento, Chief Executive Officer, ASCAP, to ASCAP members (May 8, 2007), available at http://www.ascap.com/press/2007/050807_court_decision.html (emphasis added).

⁴⁷ See Susan Butler, *ASCAP Blue After Royalty Ruling*, THE HOLLYWOOD REP., Apr. 26, 2007, available at http://www.hollywoodreporter.com/hr/content_display/business/news/e3i036db8c219c8d65727dba62722b35b39.

III. STATUTORY INTERPRETATION OF THE RIGHT OF PUBLIC PERFORMANCE UNDER THE COPYRIGHT ACT

A. *The Definition of “Public Performance”*

As noted above, sections 106(4) and 106(6) of the Copyright Act both grant owners of copyright in a work the exclusive right “to perform the copyrighted work publicly[.]”⁴⁸ To “perform” a work is defined as “to recite, render, play, dance, or act it, either directly or by means of any device or process.”⁴⁹ Critically, only *public* performances fall under the exclusive domain of the copyright owner; unlicensed *private* performances of a work (e.g., playing a CD alone in one’s home) do not constitute infringement. To perform a work “publicly” means either:

- (1) to perform . . . 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 . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.⁵⁰

Clearly, if an Internet download is to constitute a “public” performance, it must qualify under clause (2)—often called the “transmit” clause—and not under clause (1), often called the “public place” clause. Therefore, this article will largely disregard the “public place” clause and focus on clause (2), the “transmit” clause.

B. *The PROs’ Reading of the “Transmit” Clause Begs the Question*

The PROs’ central argument as to why a pure download entails a public performance is based on the “transmit” clause. The PROs point out that download providers are *transmitting* works to the public by means of a device or process (i.e., by Internet download), and that under the statute, a public performance takes place even when, as in the downloading context, said members of the public receive the relevant transmission in separate places and at different times. So, the

⁴⁸ 17 U.S.C. §§ 106(4), (6) (2006).

⁴⁹ 17 U.S.C. § 101 (2006).

⁵⁰ *Id.*

argument goes, all Internet transmissions, including pure downloads, must qualify as “public performances” under the “transmit” clause—or, as ASCAP recently phrased it in a brief to Judge Conner, “the right of public performance exists in *every transmission* of copyrighted musical works to the public.”⁵¹

There is some legislative history apparently supporting this argument: the House Report on the Digital Performance Right in Sound Recordings Act of 1995 does state that “[u]nder existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work.”⁵² This language closely resembles the language in the “transmit” clause, suggesting that the House Report was referring to that clause when it mentioned “existing principles of copyright law.” Not surprisingly, ASCAP makes much of this bit of legislative history in its briefs.⁵³

However, while this language in the House Report *resembles* the language in the “transmit” clause, a crucial noun is missing: the “transmit” clause in fact begins by stating that to perform a work publicly is “to transmit or otherwise communicate *a performance . . . of the work . . . to the public . . .*”⁵⁴ Thus, the “transmit” clause, on its face, clearly states that a transmission or communication of *a performance of* a work, and not merely any transmission or other communication of *the work per se*, is necessary to constitute a public performance. Or, as the download providers vividly phrased it in their briefs, “it is the presence of a *performance* that breathes life into the transmit clause.”⁵⁵ As I will explain subsequently, a close textual analysis of the Copyright Act suggests that in the case of pure downloads, no “performance” of the work occurs. Therefore, since all that occurs is a mere transmission of *the work*—not a transmission of *a performance of the work*—a *public* performance of the work, *a fortiori*, does not take place.

The particular statement in the 1995 House Report relied upon by the PROs is quite likely a mere instance of careless drafting and should not be relied upon by a court to the extent it conflicts with the plain text of the statute. In any event, as a

⁵¹ ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 1 (emphasis added).

⁵² H.R. REP. NO. 104-274, at 22 (1995).

⁵³ ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 14; ASCAP’s Memorandum of Law in Opposition to Applicants’ Motion for Partial Summary Judgment, *supra* note 36, at 1, United States v. ASCAP, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)).

⁵⁴ 17 U.S.C. § 101 (emphasis added).

⁵⁵ Memorandum of Law in Support of Applicants’ Motion for Partial Summary Judgment at 11, United States v. ASCAP, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)) (citations omitted).

general rule, “subsequent legislative history ‘is a hazardous basis for inferring the intent of an earlier Congress.’”⁵⁶ Moreover, as the download providers pointed out in their briefs, the very next sentence of the House Report goes on to say that “[t]he digital transmission of a sound recording that *results in the reproduction* by or for the transmission recipient of a phonorecord of that sound recording implicates the exclusive rights *to reproduce and distribute* the sound recording and the musical work embodied therein.”⁵⁷ The download providers convincingly interpret these two sentences standing side by side as stating (if inelegantly) that on one hand, the transmission or other communication to the public of *a performance of a musical work* constitutes a public performance of that musical work, *and on the other hand*, the digital transmission of a sound recording that *results in a reproduction* implicates the exclusive rights to reproduce and distribute.⁵⁸

Thus, the answer as to whether a pure download entails a public performance is not to be found in the “transmit” clause. Rather, we must closely analyze the definition of “performance” itself, located in § 101 of the Act, to determine whether a pure download constitutes a “performance” at all. If it does, then under the “transmit” clause, it admittedly must qualify as a “*public performance*.” But, as I will now argue, it does not constitute a “performance” in the first place.

C. A Pure Download, Without Playback, Is Not a “Rendering” (And Therefore Not a Performance)

1. Plain Meaning Analysis

Under § 101 of the Copyright Act, “[t]o ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to

⁵⁶ *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 805 (N.D. Cal. 2005) (citing *Jones v. United States*, 526 U.S. 227, 238 (1999)).

Of course, some would question whether legislative history may be validly consulted in statutory interpretation at all. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Tanner Lecture on Human Values, Delivered at Princeton University (Mar. 8-9, 1995), at <http://www.tannerlectures.utah.edu/lectures/scalia97.pdf>, at 104-111. Since courts often do examine legislative history (justifiably or not), this article considers legislative history merely to bolster its argument from the plain-text reading of the Copyright Act. However, where (as here) the legislative history conflicts with the literal text of the statute, its use is especially suspect and the plain text should control.

⁵⁷ H.R. REP. NO. 104-274, at 22 (1995) (emphasis added).

⁵⁸ Memorandum of Law in Opposition to ASCAP’s Motion for Partial Summary Judgment and in Further Support of Applicants’ Motion for Partial Summary Judgment at 11, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)).

make the sounds accompanying it audible.”⁵⁹ Let us ignore, for the moment, the eventual playing or rendering that occurs when the customer subsequently plays back a downloaded music file—which may happen long after the download, if at all—as the PROs have claimed that a work is *already* fully “performed” at the time it is transmitted, irrespective of any audible rendering.⁶⁰

Clearly, a work is not “recited,” “played,” “danced,” or “acted” when a series of electromagnetic pulses encoding that work passes through wires or through the air to the downloader’s computer and is fixed on her hard drive in magnetic form. The only remaining verb in the definition of “perform” that might apply is “render”—and not surprisingly, PROs have hung their next line of argument on that verb, claiming that the mere transmission of data is *itself* a “rendering” of the work, and therefore a performance (and thus also a “public” performance under the “transmit” clause).⁶¹

This argument, however, is unavailing. Since the Copyright Act does not define “render,” we must impute to it its plain-language meaning, as “[w]hen words in a statute are not otherwise defined, it is fundamental that they will be interpreted as taking their ordinary, contemporary, common meaning.”⁶² The Oxford English Dictionary, perhaps the most comprehensive of English-language dictionaries, defines “render” in its only current, possibly relevant senses as:

- 4. To reproduce or represent, esp. by artistic means, to depict.
- 4b. To play or perform (music).
- 7. To hand over, deliver, commend, or commit, to another; to give, in various senses, to grant, concede.⁶³

Meanwhile, Merriam Webster’s Dictionary, relied upon by Judge Conner in *United States v. ASCAP*, defines “render” as “to reproduce or represent by artistic or verbal means[,] depict . . . to give a performance of . . . to produce a copy or version of (the documents are *rendered* in the original French) . . . to execute the

⁵⁹ 17 U.S.C. § 101.

⁶⁰ *DMCA Section 104 Report Hearing*, *supra* note 10, at 157 (testimony of Marvin Berenson).

⁶¹ *Id.* (“[T]ruly there is a public performance. It is rendered. You do not have to hear it. According to the law, you don’t have to hear it, you don’t have to see it. It is a transmission to the public. That is a public performance.”).

⁶² *United States v. ASCAP*, 485 F. Supp. 2d 438, 443 (S.D.N.Y. 2007) (citing *Morse v. Republican Party of Va.*, 517 U.S. 186, 254 (1996)). *See also* *Nixon v. United States*, 506 U.S. 224, 232 (1993) (stating that it is a “well-established rule [in statutory interpretation] that the plain language of the enacted text is the best indicator of intent”).

⁶³ OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), available at <http://dictionary.oed.com>.

motions of (*render* a salute).”⁶⁴

What to make of these various definitions? It is at this point that a significant lacuna arguably appears in Judge Conner’s opinion: he immediately concludes, after listing these definitions of “render,” as well as those of “recite” and “play,” that “[a]ll three terms require contemporaneous perceptibility.”⁶⁵ While I agree with this conclusion, I do not think it follows immediately from the list of definitions Conner provides; rather, some further justification is necessary. A closer examination, however, places Conner’s conclusion that a “performance” under the Copyright Act requires “contemporaneous perceptibility” on much firmer footing.

First of all, the ancient canon of statutory interpretation called *noscitur a sociis*, which dictates that “the meaning of an unclear word or phrase [in a list] should be determined by the words immediately surrounding it,”⁶⁶ strongly suggests that the word “render,” as used by Congress in the definition of “perform,” was intended by Congress in the OED’s sense 4b: “to play or perform (music).”^{67, 68} This would seem to most closely match the other verbs Congress listed in the definition of “perform”—“recite . . . play, dance, or act”—each of which entails making the work perceptible to the senses in a real-time fashion.

Moreover, consider the final part of the § 101 definition of “perform”: “in the case of a motion picture or other audiovisual work, to *show* [the work’s] images . . . or to make the sounds accompanying it *audible*.”⁶⁹ The necessity of the audiovisual work’s being made sensorily perceptible could hardly be more evident. If the same requirement for real-time sensory perceptibility did not apply to musical works and sound recordings, the pure download of a music file without playback would constitute a “performance,”

⁶⁴ United States v. ASCAP, 485 F. Supp. 2d at 443 (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2006), *available at* <http://m-w.com>).

⁶⁵ *Id.*

⁶⁶ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁶⁷ *Id.*

⁶⁸ OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), *available at* <http://dictionary.oed.com>. At first glance, there is something seemingly circular about defining a “performance” under the Act as, among other things, a “rendering,” and then choosing a dictionary definition of “render” that uses the word “perform.” But this problem is illusory. In selecting the appropriate dictionary definition of “render,” we reference the *plain meaning* of “perform,” as it would be understood by ordinary speakers—as opposed to the special *statutory* meaning of “perform” as it is defined in the Copyright Act. An ordinary speaker would understand “perform” in the phrase “to play or perform music” to entail a live act by which a human musician (or musicians) makes a work audible. So, it is not truly circular to suggest that Congress, in defining “perform” by, in part, using the verb “render,” intended the relatively narrow sense of “render” indicated in OED’s definition 4b that happens to include the word “perform.”

⁶⁹ 17 U.S.C. § 101(2006) (emphasis added).

while under the unmistakable language of the statute, the pure download of a video file without playback would not. Obviously, this would be absurd.⁷⁰

Another important indicator of Congressional intent is effectively presented by the Recording Industry Association of America in their *amicus* brief submitted to Judge Conner:

During the process leading to the general revision of the Copyright Act in 1976, the definition of perform was specifically modified to delete the term “represent,” which had been included in earlier drafts of the definition of perform. This deletion was made so that reproduction of copies within computer systems would not be considered performances. *See* Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6, at 22 (House Comm. Print 1965). Specifically, “[a] computer may well ‘perform’ a work by running off a motion picture or playing a sound recording as part of its output, but its internal operations do not appear to us to fall within this concept.” *Id.* (emphasis added). The intention of this change was clearly to limit the definition of perform to the commonsense meaning of rendering, playing or showing a work so as to make it audible – and to avoid counterintuitive results involving technical performances within computer systems. To the extent that ASCAP may take the position that a transmission of any representation of a work constitutes a performance, it is advocating a position rejected in the legislative process over 40 years ago.⁷¹

⁷⁰ The Recording Industry Association of America advanced this argument in its *amicus* brief. *See* Brief of *Amicus Curiae* Recording Industry Association of America, Inc. at 10-11, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)).

One could argue that the final part of the definition of “perform” (following the words “in the case of a motion picture or other audiovisual work”), which unmistakably implies sensory perceptibility, was not meant to be *exclusive* in the case of audiovisual works, preempting the rest of the definition of “perform.” Rather, one might argue that the *rest* of the definition of “perform” might provide another, not necessarily overlapping, method of “performing” an audiovisual work—namely, by means of a “rendering” of the work—which, as we have already seen, the PROs claim does *not* require sensory perceptibility. Thus, the argument concludes, since there is in fact no clear-cut requirement for sensory perceptibility in the case of audiovisual works after all, *a fortiori* there is no such requirement for other types of works.

The problem with this objection, however, is that it is not immediately clear why Congress would have added a superfluous final clause that pertains only to audiovisual works if the verb “render” was in fact as broad as the PROs claim it is—i.e., if it was already broad enough to encompass any “represent[ation]” of a work. Thus, this article’s reading of the definition of “perform”—under which the definition’s final clause is the exclusively operative clause in the case of an audiovisual work—is the more logical one.

⁷¹ *Id.* at 9; *see also* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §

In all, the most logical conclusion is that “render”—like “recite,” “play,” “dance,” “act,” “show,” or “make . . . audible”—requires that the work be made sensorily perceptible as a contemporaneous result of the act constituting the “rendering.” As a result, a pure download *per se*—without considering any subsequent playback by the user—cannot constitute a rendering, and therefore is not a public performance.

Al and Bob Kohn, authors of a leading treatise on music licensing, reach the opposite conclusion from Judge Conner. They point out that “[t]he requirement of a presence in a transmission of a ‘capability of simultaneous [sensorily perceptible] rendering or showing of the work’ is nowhere to be found in the legislative or case law history of the public performance right.”⁷² While it is true that there is no explicit statement to this effect in the legislative history, the Copyright Act itself and its legislative history abound with implicit suggestions that a performance requires the capability of a perceptible rendering contemporaneous with the transmission, as indicated above. Moreover, the lack of an explicit statement is easily explained: before the relatively recent advent of Internet downloading—and certainly at the time of the enactment of the Copyright Act of 1976—there simply *did not exist* any form of “transmission” that was inherently incapable of contemporaneous sensorily perceptible rendering. Every form of “transmission” then known (e.g., radio, television, telephonic) was at least *potentially* capable of simultaneous sensorily perceptible rendering. Thus, there was no reason for Congress to affirmatively state in the legislative history that for transmissions, the capability of contemporaneous rendering was a *sine qua non* of a “performance”—even if that was in fact what Congress implicitly assumed, as the preceding analysis suggests.

2. A False “Counterexample”: The Contemporaneously *Perceptible* Performance That Is Not Actually *Perceived*

As another counterargument to the claim that a performance requires a contemporaneous sensorily perceptible rendering, Kohn and Kohn point out the following: a radio broadcaster “publicly performs” under §106(4) (and *a fortiori* “performs” under § 106(1)) even if the recipient in question (whom we shall call “R₁”) is recording the broadcast to cassette, rather than

8.14[B][1], n.29 (release no. 66, 2005) (Congress removed “represent” to clarify that imperceptible “internal operations of a computer, such as the scanning of a work to determine whether it contains material the user is seeking,” was not a performance.).

⁷² KOHN & KOHN, *supra* note 26, at 1320.

listening live, and has her speakers turned off while the broadcast is recording, so that there is no contemporaneous sensorily perceptible rendering. This appears to contradict the argument made above that a work must be made sensorily perceptible to be “rendered” (and thus “performed”).⁷³ ASCAP picked up on this argument in one of its briefs, noting that “[a] radio or television broadcast is a public performance, after all, even if it has no listeners or viewers, and even if all the listeners or viewers record the program instead of . . . watching it when it is broadcast.”⁷⁴

However, the argument is specious. While the broadcaster in the Kohns’ scenario does not in fact cause the work to be contemporaneously *perceived* by R_1 , it certainly makes the work *capable of* being so perceived by her. To draw an analogy to the Kohns’ scenario using a “public place”-clause-type public performance, rather than a “transmit”-clause-type public performance: a pianist publicly performs when he plays Beethoven in a public concert hall, even if any given audience member is wearing earplugs, so that she does not actually perceive it—or, indeed, if this is true of the entire audience. This is because both the pianist and the Kohns’ broadcaster make their respective works *capable of* being contemporaneously perceived by their respective audiences, at least in theory. A *pure* download, on the other hand, is *by its very definition* not contemporaneously perceptible. The Kohns’ “counterexample,” then, does not refute the plain text interpretation that an act *inherently* incapable of being sensorily perceived (as is true of a pure download) is not a “rendering” and not a performance.

An alternative response to the Kohns’ counterargument is as follows: the Copyright Act tacitly assumes, due to the inherent nature of the broadcast media, that the broadcaster is reaching other users (R_2 , R_3 , etc.) who *are* watching or listening “live,” and that a contemporaneously perceptible rendering is thus occurring *to someone*, even if not to R_1 . Therefore, the broadcaster is constructively “rendering” (and thus “performing”) merely by sending out a signal—even if the performance is not perceived by any given recipient on whom we happen to focus. The actual “rendering” on which liability for performance is conceptually premised in the Kohns’ scenario has nothing to do with what happens when R_1 ’s stereo, with its speakers turned off, receives and tape-records the transmission. The Copyright Act merely treats the particular *non*-rendering in question here (i.e.,

⁷³ *Id.* at 1320-21.

⁷⁴ ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 19.

reception by R_1 's stereo) as a proxy for the actual rendering the Act justifiably assumes to be occurring when R_2 , R_3 , etc. perceive the same broadcast.

In fact, the legislative history of the Copyright Act of 1976 contains language that supports this latter theory: the House Report states that a broadcaster is liable for an infringing public performance "even if there is *no proof* that any of the potential recipients was operating his receiving apparatus at the time of the transmission."⁷⁵ This language ("no proof") suggests it is *not* the case, as the Kohns and ASCAP argue, that *potential* sensory perceptibility is wholly immaterial to whether there is a "performance." Rather, this language indicates that the Copyright Act tacitly presumes—"even if there is no proof"—that *someone* is always sensorily perceiving any given analog broadcast, due to the inherently public (and thus *potentially* sensorily perceptible) nature of the broadcast media, and that *this presumption* is the basis for performance liability in the Kohns' and ASCAP's aforementioned scenario.

The situation with regard to a pure download is very different from the broadcast scenario. While one can safely presume, in the broadcast media, that some hypothetical recipient always perceives a broadcast work contemporaneously with its transmission, one cannot presume that a particular pure download transmission, while not contemporaneously rendered to a given recipient, is nonetheless contemporaneously rendered at the time of its transmission to someone else. In fact, by definition, a party delivering pure downloads is not making the work perceptible to *anyone* at the time of transmission. Thus, the irrebuttable evidentiary presumption that gives rise to liability for a performance in the case of a *broadcast* that is not perceptibly rendered to a given recipient does not extend to the case of a *pure download* that is not perceptibly rendered to a given recipient.

3. Imperceptible Transmissions May Create Liability Only If They Are One Part of a *Process* Resulting in a Contemporaneously Perceptible Rendering

In the recent proceedings before Judge Conner, ASCAP made much of a line of cases typified by *David v. Showtime/The Movie Channel Inc.*⁷⁶ In *David*, the defendants had argued that because they did not *themselves* transmit copyrighted works directly to the viewing public, but rather, transmitted the works to local

⁷⁵ H.R. REP. NO. 94-1476, at 65 (1976) (emphasis added).

⁷⁶ 697 F. Supp. 752 (S.D.N.Y. 1988).

cable television operators for retransmission to the ultimate public, they could not be held liable for allegedly infringing “public performances” of those works.⁷⁷ The court disagreed, holding that “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.”⁷⁸ Other courts in analogous factual scenarios have similarly held that “the Copyright Act defines ‘perform or display . . . publicly’ broadly enough to encompass indirect transmission to the ultimate public,”⁷⁹ and that “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.”⁸⁰

ASCAP derives from *David* and its brethren the questionable conclusion that “a transmission involves the right of public performance even if it is neither directed to nor cognizable by members of the public.”⁸¹ After all, they reason, the transmissions that were being sent out by the defendants in *David* were not themselves contemporaneously perceptible to the public. Thus, ASCAP concludes, contemporaneous perceptibility (or “cognizab[ility]”) cannot be a requirement for a performance.

This conclusion contains a fallacy, however. As I have mentioned and as I will discuss further below, the Copyright Act states that a work can be “performed” “either directly or by means of any device or *process*.” Even though the defendants’ transmissions in *David* were not perceptible contemporaneously with their *initiation*, the rerouted transmissions were perceptible contemporaneously with their *retransmission*, a subsequent step in the continuous “process by which a protected work wends its way to its audience.” A contemporaneously perceptible rendering still occurred as part of the “process” set in motion by the defendants. Thus, *David* does not stand for what ASCAP claims—i.e., that *any* transmission is a performance, regardless of whether it ever results in the public’s perception of the work transmitted. In other words, as Judge Conner noted, because “[t]he *David* court addressed not the nature of the broadcast, but the fact that it was accomplished through an intermediary, . . . it is thus not instructive . . . [as to] whether downloading of a music file, i.e., the transmission of a signal *not capable of contemporaneous perception* . . .

⁷⁷ *Id.* at 758.

⁷⁸ *Id.* at 759.

⁷⁹ *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982).

⁸⁰ *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 593 F. Supp. 808, 813 (D. Minn. 1984).

⁸¹ ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 16.

constitutes a performance.”^{82, 83}

⁸² United States v. ASCAP, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) (emphasis added).

⁸³ In its briefs, ASCAP also cites *Nat'l Football League v. PrimeTime 24 Joint Venture*, in which the Second Circuit held that a party publicly performed a copyrighted work by transmitting that work from a satellite uplink located in the United States to a satellite in orbit, from which the work was then beamed down to satellite subscribers located solely in Canada. *Nat'l Football League v. PrimeTime 24 Joint Venture (NFL)*, 211 F.3d 10 (2d Cir. 2000). The defendant in *NFL* had argued that because the eventual perception of the transmission occurred outside the United States, beyond the reach of United States copyright law, and because this subscription-only transmission was not perceptible to members of the American public *even in theory*, there was no “public performance” cognizable under the Copyright Act. *Id.* at 11. In other words, the defendant claimed that at least as far as United States copyright law was concerned, nobody had ever perceived—or ever *could have perceived*—its transmissions, and that there was thus no public performance. The court disagreed, citing *David v. Showtime/The Movie Channel, Inc.* for the proposition that a public performance “encompass[es] each step in the process by which a protected work wends its way to its audience.” *Id.* (citing *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988)).

The flaw in the *NFL* court’s reasoning, of course, is that unlike the indirect transmission in *David*, which was part of a process that ultimately “wend[ed] its way” to the public, the satellite uplink transmission in *NFL* *never* reached the public—or at least the American public, which should mean the same thing, since it is a well-settled principle that U.S. copyright law generally does not apply extraterritorially. See, e.g., *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 634 (S.D.N.Y. 2000). Thus, when the *NFL* court held that “PrimeTime’s uplink transmission of signals captured in the United States [was] a step in the process by which [plaintiff] NFL’s protected work wends its way to a public audience,” it was simply incorrect, at least if the court meant “a public audience” that is of any consequence under the Copyright Act. *NFL*, 211 F.3d at 13. (Recall that because the retransmission was a *subscription* transmission to Canadian subscribers, it was not only *not contemporaneously perceived* by American viewers, but rather, like a pure download, was *incapable of being contemporaneously perceived* by American viewers, even in theory.) *David* is thus inapposite, and *NFL* may well have been wrongly decided; the Ninth Circuit, for example, came to the opposite conclusion from the one reached by the *NFL* court. See, e.g., *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995) (“defendants . . . initiated a potential infringement in the United States by broadcasting the Showtime signal . . . [T]he potential infringement was only completed in Canada once the signal was received and viewed. Accordingly, U.S. copyright law did not apply . . .”).

ASCAP wisely seized upon the questionable holding in *NFL* to argue that because “the non-visible, non-audible [satellite uplink] transmission at issue [in *NFL*] was a public performance . . . even though it would never reach an audience in the United States,” consequently, “inaudible, invisible transmissions . . . that are never in themselves capable of human perception, let alone simultaneous perception [such as pure download transmissions] . . . qualify as public performances.” ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 18; ASCAP’s Memorandum of Law in Opposition to Applicants’ Motion for Partial Summary Judgment, *supra* note 53, at 2. In other words, ASCAP claims that *NFL* establishes that any mere transmission is *ipso facto* a performance, even if it is inherently incapable of being perceived *at any point in the future*.

Judge Conner’s opinion did not mention *NFL* or attempt to distinguish it. However, the suspect holding in *NFL* should not outweigh the wealth of evidence to the contrary cited above. Moreover, the holding in *NFL* may already be *sui generis* due to the looming presence of the extraterritoriality issue in that case. While the extraterritorial application of the Copyright Act (or the lack thereof) is a subject of sufficient complexity to justify numerous articles unto itself, I will simply note in passing that the result in *NFL* may simply reflect the court’s unwillingness, for reasons of policy or equity, to willfully remain blind to *actual* contemporaneous perception occurring extraterritorially which is not technically cognizable under the Copyright Act, as long as *some* conduct in the United States provides a toehold for jurisdiction. Cf. *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67 (2d Cir. 1988) (holding that the defendant is liable for unauthorized reproduction of copyrighted image committed abroad because prior unauthorized

In conclusion, a “performance” requires a contemporaneously perceptible rendering—whether direct or by means of a “device or process.” This article’s discussion has so far ignored any effect of the possible playback of the downloaded file by the purchaser at a later time. Once again, this is because the PROs have maintained that considering the subsequent playback is unnecessary since a work is always fully “performed” whenever a transmission is sent out. As I have argued, this claim lacks merit. Whether subsequent playback does, in fact, have any further legal consequence (for example, whether the download provider is performing by means of a “process” like the defendants in *David*) is discussed immediately below.

D. *The Customer’s Eventual Playback Does Not Retroactively Turn the Transmission Into a Performance*

Since a pure download transmission *simpliciter* (i.e., the transmission of bits encoding a work across the Internet, without more) is not a performance, this article now considers whether the subsequent playback (i.e., rendering) of the work by the recipient makes a download provider’s transmission into a performance.

To repeat, under § 101 of the Copyright Act, “[t]o ‘perform’ a work means to recite, render, play, dance, or act it, *either directly or by means of any device or process . . .*”⁸⁴ The required playing or rendering thus must come within one of three categories: (1) direct; (2) effected by means of a device, or (3) effected by means of a process. The subsequent rendering of a downloaded file by the customer is clearly not a *direct* rendering on the part of the download provider. Therefore, we must determine whether the customer’s subsequent playback qualifies as a performance on the part of the download provider “by means of a device” or a “process.”

Because the Copyright Act does not define “device” or “process,” once again the plain language definitions should be imputed to these terms. The Oxford English Dictionary defines a “device” (in its only relevant sense) as “an invention, contrivance; *esp.* a mechanical contrivance (usually of a simple character) for some particular purpose.”⁸⁵ Meanwhile, the OED defines “process” in its “chief current sense” as “[a] continuous and

creation of the master copy which was taken abroad and used to create the subsequent copies was a “predicate act” of infringement committed in the United States). In summary, *NFL* should not be taken for the proposition that contemporaneous perceptibility is in fact *not* required for a “performance” to exist under the Copyright Act, especially where the dimension of extraterritoriality is not present.

⁸⁴ 17 U.S.C. § 101 (2006) (emphasis added).

⁸⁵ OXFORD ENGLISH DICTIONARY ONLINE, *supra* note 63.

regular action or succession of actions, taking place or carried on in a definite manner, and leading to the accomplishment of some result; a continuous operation or series of operations.”⁸⁶

1. “By Means of a Device”

Clearly, when the recipient of a download plays a music file, *that recipient* renders the work encoded therein in a contemporaneously perceptible fashion, and thus performs, “by means of a device” (the “device” being her computer, digital music player, etc.)—but this in-home performance, again, is not a “public” one and thus is not cognizable under the Copyright Act. By contrast, when a download provider transmits a music file to a recipient’s hard disk via pure download and the recipient later plays the file, *the download provider* has not in any coherent sense performed “by means of a device.” The issue of contemporaneousness aside, any alleged performance “by means of a device” on the part of the download provider would require construing the provider’s own server, the infrastructure of the Internet, the recipient’s computer, and the recipient herself (who makes the independent choice as to when, if ever, to play the file, and takes the causally intervening actions necessary to do so) as together constituting a “device.”

Although Judge Conner did not construe the phrase “by means of a device” (perhaps because he tacitly concluded that even under a generous construction of the word “device,” the contemporaneousness requirement was dispositive), it is nonetheless clear that future interpreters should not stretch the definition of “device”—i.e., “an invention, contrivance; *esp.* a mechanical contrivance”—this far. There seems to be no room under this definition to include another *human being* as part of a “device.”⁸⁷ Therefore, the *download provider* (unlike the recipient herself) does not perform “by means of a device” when its customers eventually play back their downloaded files.⁸⁸

⁸⁶ *Id.*

⁸⁷ Of the eight times the word “device” appears in section 101 of the Copyright Act (the “Definitions” section), four are in the conjunction “machine(s) or device(s)” (e.g., “machines, or devices such as projectors, viewers, or electronic equipment”). Applying *noscitur a sociis*, the canon of statutory construction discussed previously, it is thus most likely that a “device” was meant to signify something mechanical—or at the very least, something inanimate.

⁸⁸ Nor is the download provider liable for “authorizing” the *recipient’s* admitted performance by means of a device, 17 U.S.C. § 106 (2006), because the customer’s own in-home rendering of the work is private.

2. "By Means of a Process"

The remaining strategy on the part of the PROs is to characterize download providers as performing by means of an indirect, multi-step "process," like the "process" involved in *David*, encompassing the transmission of the data encoding the song over the Internet, the storage of the transmission on the customer's computer, and the customer's subsequent playback of the downloaded file.

But this would do violence to the plain meaning of the statute by distorting the word "process." Recall that a "process" is a "*continuous* and *regular* action or succession of actions, taking place or carried on in a *definite* manner[;] . . . a *continuous* operation or series of operations." In the case of a *pure* download, however, there is by definition no playing or rendering of the work, and therefore no performance, until some arbitrary time subsequent to the download—if ever. Any subsequent playing or rendering of the work by the customer is an event completely divorced, temporally and causally, from the transmission, and thus not part of any continuous and definite "process" initiated by the download provider. In other words, this sequence of events is neither continuous nor definite, and is thus not properly a "process."⁸⁹

Pure downloading is thus unlike the scenario involved in streaming, wherein the progression from transmission to rendering is continuous, definite, and bounded in time (e.g., the bits encoding the sounds heard three minutes into the song are transmitted three minutes into the transmission), and therefore part of a "process."⁹⁰ In the same way, pure downloading is unlike

⁸⁹ See *supra* note 84. Even if the customer plays the downloaded file back very quickly after receiving it, thus reducing the temporal disconnect between the transmission and the ultimate rendering, the *causal* chain has still been broken in the interim. Liability on the part of the download provider obviously should not be made to depend on how long a customer waits to play a purchased song.

⁹⁰ Given that this article and the download providers in *United States v. ASCAP* both concede that *streaming* entails a performance, one could attempt to rebut the claim that a performance requires a perceptible rendering as the result of a "continuous" and "definite" process by pointing to the fact that the Internet Protocol ("IP"), the fundamental set of rules and conventions used by computers and devices on the Internet to transfer data from a source to a destination—i.e., the "native language" of the Internet—is in a very technical sense *not* capable of "continuous" and "definite" transmissions:

IP provides a *connectionless, unreliable, best-effort* packet delivery service. Its service is called connectionless because it *resembles the Postal Service or Western Union* more than it does the telephone system. IP packets [of data], like telegrams or mail messages, are treated independently. Each packet is stamped with the addresses of the receiver and the sender. Routing decisions are made on a packet-by-packet basis. IP is quite different from connection-oriented and circuit switched phone systems that explicitly establish a connection between two users before any conversation (data exchange) takes place and maintain a connection for the entire length of exchange.

all recognized *non-Internet* forms of performance “by means of a process” (e.g., telephone music-on-hold, pay-per-view movies, or radio/television broadcasts). In those forms of performance, while members of the public may receive the rendering “at different times” *from one another*, each rendering is still part of the same continuous, definite, time-bounded process as each corresponding transmission. While these performances “by means of a process” may not be *instantaneous*, the processes involved are nonetheless bounded in time and proceed inexorably “in a definite manner . . . to the accomplishment of some result” (namely, a perceptible rendering) once the transmission is initiated. In pure downloading, on the other hand, this is not the case.

One might ask whether Congress intended a more expansive definition of “process” that would not require such strict notions of continuity or definiteness. Some guidance is found within the Copyright Act’s definition of the companion right of “display.”⁹¹ According to § 101, “[t]o ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any *other device or process*” (emphasis added).⁹² The basic canon of statutory construction called *ejusdem generis* (which states that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed”) suggests that “process” should not

A best-effort delivery service means that packets *might be discarded* during transmission . . . Erratic packet delivery is normally caused by the exhaustion of resources or a failure at the data link or physical layer In the geographically distributed and highly diverse Internet, which is *subject to many vagaries of operation*, IP delivery is insufficient and needs to be augmented by a higher-level protocol to provide satisfactory performance.

Shvetima Gulati, *The Internet Protocol: Part One: The Foundations*, CROSSROADS: THE ASSOCIATION FOR COMPUTING MACHINERY STUDENT MAGAZINE, July 2000 (citations omitted) (emphasis added), *available at* <http://www.acm.org/crossroads/columns/connector/july2000.html>.

However, this argument is unconvincing. First of all, even where individual data packets at the microscopic level behave unpredictably, everything about this behavior, nonetheless, happens *automatically* (i.e., without any human intervention) and in a *time-bounded* fashion (since each IP packet bears a “Time to Live” stamp serving as an expiration date). *Id.* More importantly, however, this focus on continuousness and definiteness at the level of *individual data packets*, rather than at the holistic level of the *work transmitted*, is surely too hyper-technical to have been what Congress intended in 1976 (and, moreover, subverts the plain meaning of “continuous” and “definite”). While IP may resemble the Postal Service on the level of individual packets, “higher-level protocols” layered above IP during streaming make these microscopic discontinuities immaterial at the macroscopic level of the *transmission*. Thus, streaming is still a rendering “by means of a process” in a way that a pure download transmission, which requires human intervention to produce a rendering, is not.

⁹¹ 17 U.S.C. § 101 (2006). The right of display is separate from the right of performance, but it is sensible to assume that a word (here, “process”) used at one place in the Act was not intended to have a strikingly different definition elsewhere in the same section of the Act.

⁹² *Id.*

be given an expansive definition.⁹³ It would be quite a leap to generalize from the definite, continuous, and temporally bounded “process[es]” mentioned in the statutory definition of “display”—namely, film projection, slide projection, and television projection—to something as discontinuous and indefinite as transmission over the Internet, creation of a permanent phonorecord, indefinite storage of that phonorecord on a third party’s computer, and possible subsequent rendering at that third party’s whim.

Furthermore, if Congress meant for “process” to be construed so as to encompass temporally discontinuous and indefinite chains of events (embracing even the volitional actions of other parties) as long as they *ultimately* result in a rendering, this would lead, as Judge Conner observed, to the absurd result that where “a retail purchaser of [traditional] musical records begins audibly playing each tape or disc as soon as he receives it[,] the *vendor* is engaging in a public performance.”⁹⁴ Or, as an admittedly fanciful but somewhat more precise analogy, let us again consider our keyboardist—this time, silently “playing” in front of a live audience on an electric synthesizer, the audio output of which is being routed to a mixing room backstage. The bewildered audience hears nothing, but as they watch and scratch their heads, a CD recording of the keyboardist’s live “performance” is being created for each audience member backstage. As the disgruntled audience members file out, each is given a copy. In this hypothetical scenario, the keyboardist’s inaudible on-stage motions clearly do not amount to a “public performance” of the works he is “playing.”⁹⁵ That the audience members *subsequently* perceive those works when they later play their souvenir CDs does not retroactively change this fact—even if they play their CDs *right then and there* using a portable Discman. Similarly, neither should the fact that the recipient of a contemporaneously imperceptible pure download transmission *subsequently* perceives the transmitted bits at the end of a causally (if not also temporally) discontinuous chain of events affect the transmission’s status under the Copyright Act—even if the downloaded work is played back *immediately* by the recipient.

⁹³ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁹⁴ *United States v. ASCAP*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) (emphasis in original).

⁹⁵ To preempt any quibbles that the pianist’s on-stage motions are in fact *visually* perceptible and thus constitute a “rendering”—as weak an objection as this would be—we can tighten the analogy by assuming that the keyboardist faces *away* from the live audience, or even sits inside a large black box on the stage. After all, the bits transmitted to one’s computer during a pure download are also invisible as well as inaudible.

Again, in its briefs before Judge Conner, ASCAP depended heavily on *David*, a case in which the court held that “the definitions of ‘public’ and ‘performance’ . . . encompass each step in the process by which a protected work wends its way to its audience.”⁹⁶ However, these cases simply establish that *if* a proper multi-step “process” exists, resulting in an ultimate “rendering,” each participant in the chain is liable for the performance that ultimately results, of which his actions—to use the language of basic tort law—are both a cause-in-fact (“but-for”) and a *proximate* cause. These cases do *not* establish that each participant in *any* causal chain ultimately resulting in a performance, no matter how discontinuous, irregular, or unpredictable that chain, is liable for the ultimate performance. In cases such as *David*, involving broadcast transmissions that are systematically picked up and retransmitted to the public by third parties, there is a proper “process” and liability clearly follows under the plain text of the Copyright Act. In the pure download scenario, by contrast, where a performance ultimately results only when the recipient independently decides when (if ever) to play her downloaded copy of the work, there is not a proper “process” in the first place, and the holding in *David* is inapposite.⁹⁷

⁹⁶ *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y.1988).

⁹⁷ As an aside, the courts in *David* and the other indirect transmission cases could instead have based their holdings on a theory of *contributory* copyright infringement. A party commits contributory infringement when “with knowledge [or reason to know] of the infringing activity, [he] induces, causes or materially contributes to the infringing conduct of another.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Of course, “there can be no contributory infringement by a defendant without direct infringement by another.” *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995). In *David*, the conduct of the *local cable companies*, who retransmitted the works in question *directly* to the viewing public in a contemporaneously perceptible fashion, indisputably constituted an infringing public performance (even though the local companies were not in fact defendants in the case). *David*, 697 F. Supp. 752. The defendant original transmitter, regardless of whether its initially imperceptible transmission constituted a public performance, clearly “induce[d], cause[d] or materially contribute[d] to the infringing [public performance]” of the local cable companies “with knowledge of the infringing activity.” *A&M Records*, 239 F.3d at 1019. Thus, the defendants in *David* and the other indirect transmission cases could have been held secondarily liable for the infringing public performance of the retransmitting parties without the *David* doctrine that a public performance “encompass[es] each step in the process by which a protected work wends its way to its audience.” *David*, 697 F. Supp. at 759.

By contrast, in the pure download scenario, the ultimate performance of the transmitted works by the customer/recipient is *private*, and thus there is no “direct infringement by another” and the required predicate for a finding of contributory infringement on the part of the download provider does not exist. *Religious Tech. Ctr.*, 907 F. Supp. at 1371.

I am not aware of the precise logistical arrangements behind the transmissions and retransmissions in *David* and the other retransmission cases. To the extent that any of these cases follow *David*’s “wending” doctrine even where the transmission-retransmission process is irregular or discontinuous and not systematic—and thus do not constitute a “process” as defined in this article—I maintain that those cases are better understood as

The most sensible interpretation, then, is to construe “process” fairly strictly, along the lines of the dictionary definition. Accordingly, a download provider, in transmitting the work as a pure download, does not bring about a playing or rendering of the work (1) directly, (2) by means of a device, or (3) by means of a process. Thus, a pure download cannot be called a “performance” at all, much less a “public” one.

E. *The “Initial Performance” in the Recording Studio Has No Bearing on Whether a Download Is a Performance*

Unexpectedly, in its reply brief submitted to Judge Conner, ASCAP adopted a novel statutory interpretation. Namely, ASCAP admitted that a predicate performance must exist in order for a “public performance” to occur, but claimed that when a work is publicly performed under the “transmit” clause, the predicate performance does not happen at the time of the *transmission*, but rather, already happened “when [the] recording artist[] [originally] perform[ed] and record[ed]” the track in the recording studio!⁹⁸ In other words, when the artist originally recorded the track that would later be downloaded, the *artist* clearly performed the work; ASCAP now argued that it is *this “initial performance”* whose “transmi[ssion] or . . . communicat[ion] . . . to the public” serves as the requisite performance under the “transmit” clause for each subsequent download.⁹⁹ According to this view, which I will term the “initial performance” argument, it is irrelevant whether a download transmission allows recipients to hear the work contemporaneously because the necessary predicate performance already occurred when the track downloaded by the user was first recorded.

Superficially, ASCAP’s “initial performance” argument seems promising. After all, the “transmit” clause merely states that a public performance occurs whenever a “performance” is transmitted or communicated to the public, and while I have argued above that a “performance,” as the term is used in the Copyright Act, requires contemporaneous perceptibility, the text of the “transmit” clause does *not* explicitly state that the relevant contemporaneously perceptible performance has to occur *in the*

having been tacitly decided under a theory of contributory infringement, and should not constitute grounds for abandoning the Copyright Act’s plain-text requirement that a “performance” requires perceptibility, either contemporaneous with the initial transmission or with the final step in a mechanistic, regular, and continuous “process” of which the defendant’s act forms an integral part.

⁹⁸ ASCAP’s Memorandum of Law in Opposition to Applicants’ Motion for Partial Summary Judgment at 1, 3, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (No. 41-1395).

⁹⁹ *Id.*

course of or as a result of the transmission.¹⁰⁰ The House Report on the Copyright Act of 1976 also stated that “any act by which the *initial performance* or display is transmitted, repeated, or made to recur would itself be a ‘performance’” of the work initially performed.¹⁰¹ Could it really be true that the *then*-contemporaneously perceptible performance of the recording artist in the studio—years, months, or decades ago—was what Congress had in mind when it used the word “performance” in the “transmit” clause (and “initial performance” in the legislative history)? At least one early commentator has noted that “[w]hile this argument is extremely counterintuitive, it does not appear on its face to be barred by the statute.”¹⁰² Meanwhile, Judge Conner effectively sidestepped the entire argument in his opinion.

However, a closer analysis shows that this reading of the statute cannot possibly be the one Congress intended. First of all, ASCAP’s argument may prove too much. If *any act* by which a recording artist’s “initial performance” is “transmit[ted] . . . or communicat[ed] . . . to the public” indeed constitutes a public performance in itself, then traditional brick-and-mortar record stores arguably “publicly perform” the compositions embedded on the compact discs they sell, just as download providers allegedly “publicly perform” the compositions embedded in the files they transmit. After all, a vendor who sells record albums appears to “communicate” the recording artist’s initial performance to its customers in a sense, just as a download provider “transmit[s] . . . or communicate[s]” that initial performance to its customers. ASCAP does not explain in its briefs why its argument, if adopted, would apply only to download providers and not to traditional record vendors. Since Congress clearly did not intend to make traditional record vendors into public performers, ASCAP’s argument must fail.

More importantly, however, ASCAP’s argument proves too little. While ASCAP’s argument may resonate when limiting the discussion to transmissions of *musical works* (i.e., lyrics and music in the abstract)—which, after all, were the only type of work at issue in *United States v. ASCAP*—the argument falls apart completely when considering the transmission of *sound recordings* (i.e., actual fixed renditions of musical works). To wit, if the predicate act that satisfies the “transmit” clause has nothing to do

¹⁰⁰ *Id.*

¹⁰¹ ASCAP’s Memorandum of Law in Opposition to Applicants’ Motion for Partial Summary Judgment, *supra* note 53, at 3 (emphasis added) (citing H.R. Rep. No. 94-1476, at 63 (1976)).

¹⁰² Kramarsky, *supra* note 40.

with what occurs in the course of the download transmission, but rather occurred in the recording studio, then it would be impossible to publicly perform a *sound recording* by means of a transmission. Unlike the underlying musical work, which is clearly “initially performed” in the studio when a recording artist lays down a track, the resultant *sound recording* is not “performed” in the studio because it does not even exist until after the artist’s “initial performance” of the musical work is complete. Thus, with respect to sound recordings, there is no predicate “initial performance” to transmit or communicate at all.¹⁰³ Because Congress in 1995 specifically established an exclusive right of public performance for sound recordings “by means of a digital audio transmission,” Congress must therefore have understood—with respect to sound recordings, musical works, or any other type of copyrighted work—that the requisite predicate performance mentioned in the “transmit” clause must occur in the course of or as a result of the transmission, not in the recording studio.¹⁰⁴ Otherwise, Congress’s actions would have been quite meaningless (and the record companies, which own the copyrights in those sound recordings, would be understandably surprised).¹⁰⁵

F. Congress’s Decision To Extend the Section 115 Compulsory Mechanical License to Downloads Means Congress Did Not Intend Pure Downloads To Entail Performances

In the immediately preceding subsections, this article has argued that a detailed textual analysis of §§ 101 and 106 of the Copyright Act indicates that a pure download does not entail a public performance. This conclusion is further strengthened by a provision in the current § 115 of the Copyright Act. Section 115 describes the “compulsory mechanical license” to reproduce and distribute phonorecords of a musical work that has already been

¹⁰³ The same thing is true of music files that are computer-synthesized from start to finish, such as MIDI (Musical Instrument Digital Interface) files: under ASCAP’s “initial performance” theory, a musical work embedded in a MIDI file could never be publicly performed via Internet transmission because there was likewise never any initial in-studio “performance” to transmit.

¹⁰⁴ 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. (2000)).

¹⁰⁵ In light of this result, perhaps it is less surprising than it may otherwise seem that the Recording Industry Association of America (RIAA), the trade group representing the major record companies, filed an *amicus* brief on behalf of AOL, RealNetworks, and Yahoo! and in *opposition* to ASCAP, a once (and presumably future) ally in copyright infringement litigation—although this result goes unmentioned in the RIAA’s brief. See, e.g., Brief of the American Society of Composers, Authors and Publishers et al. as *Amici Curiae* in Support of Petitioners, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (*amicus* brief filed by ASCAP in support of record companies).

distributed to the public.¹⁰⁶ In other words, under §115, if a party wishes to distribute phonorecords of an already-released sound recording to the public, and that party has already licensed the rights in the *sound recording*, the § 115 compulsory license allows that party to do so without the publishing company's permission to use the underlying musical work, provided he pays a royalty fixed by statute for use of that musical work.

As part of the Digital Performance Right in Sound Recordings Act of 1995, Congress extended the compulsory license to those wishing to distribute phonorecords of already-released songs *over the Internet* by means of "digital phonorecord deliveries" ("DPD").¹⁰⁷ A DPD is defined in § 115 as

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction . . . of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or . . . musical work embodied therein. A digital phonorecord delivery does not result from a . . . transmission of a sound recording where no reproduction of the sound recording or the musical work . . . is made . . .¹⁰⁸

Paraphrased, then, a DPD occurs when a seller makes a transmission over the Internet resulting in the presence of a *copy* of a music file on a customer's hard drive (or other device). Thus, DPDs occur in the course of pure download transmissions, as well as hybrid transmissions, but not during pure streaming transmissions (unless ephemeral RAM "copies" count as "specifically identifiable reproductions" for the purpose of this section).¹⁰⁹

The decision of Congress in 1995 to extend the § 115 compulsory license, then available to follow-on distributors of already-released songs on traditional physical media, to those parties wishing to distribute copies of already-released songs via DPD weighs heavily against the PROs' argument that a pure download entails a public performance. To see why this is so requires a brief history lesson. The original purpose of the § 115 compulsory license, instituted in the 1909 Copyright Act, was to

¹⁰⁶ 17 U.S.C. § 115 (2006).

¹⁰⁷ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 344 (1995).

¹⁰⁸ 17 U.S.C. § 115(d) (2006).

¹⁰⁹ As explained *supra* in note 15, if RAM copies *do* count as "specifically identifiable reproductions" here, the final sentence of the quoted text is surplusage, as *all* streaming transmissions require RAM buffering. This suggests that Congress did not intend pure streaming transmissions to qualify as DPDs.

circumvent monopolistic licensing behavior on the part of the owners of musical work copyrights.¹¹⁰ At the time, a single manufacturer dominated the piano roll market; due to its powerful position, it threatened to acquire the exclusive mechanical rights to nearly all popular musical works. This would enable it to charge inflated monopoly prices, put its competitors out of business, and assert a stranglehold on the nation's popular musical heritage. Intending to prevent this outcome, Congress declared that any party could obtain a compulsory mechanical license for a work already in commercial release, even without the copyright holder's consent, provided that such party pays the copyright holder a royalty rate capped by statute. Ever since, this fixed rate has served as a price ceiling on the mechanical license fees which musical work copyright holders could demand of follow-on distributors.¹¹¹

Given this rationale for the existence of the § 115 compulsory license, then if all DPDs (including pure downloads) in fact entail public performances, Congress's attempt to extend the compulsory license to the digital realm would be pointless. Under the updated § 115, the copyright-holding publishing companies can charge no more than the statutory royalty rate for the mechanical licenses needed to effect a DPD, just as under the pre-1995 § 115, they could charge no more than the statutory royalty rate for the mechanical licenses needed to distribute traditional-media phonorecords. But if *every* DPD is also a public performance, then the publishers can still charge a party hoping to make a DPD whatever they wish for the necessary *performance* license. The availability of a compulsory mechanical license for would-be providers of DPDs would be cold comfort indeed if publishers could circumvent the statutory fixed royalty rates by charging arbitrarily high rates for performance licenses—or by refusing to issue a performance license at all, thereby making a DPD impossible at any price.¹¹²

¹¹⁰ H. COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION: REPORT TO ACCOMPANY H.R. 2512, H.R. Doc. No. 90-83, at 66 (1st sess. 1967) (stating that “the 1909 [Copyright Act] adopted the compulsory license as a deliberate anti-monopoly condition on the grant of [mechanical] rights”). See also *Standard Music Roll Co. v. F. A. Mills, Inc.*, 241 F. 360, 363 (3d Cir. 1917) (holding that “object of [the compulsory license] seems to be the prevention of monopoly or favoritism in granting the right to reproduce a musical work mechanically”); Paul S. Rosenlund, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683, 687 (1979) (stating that Congress’s “basic goal [in enacting the compulsory license was] compensating composers for their efforts while preventing any one party from monopolizing or otherwise abusing mechanical rights in any particular composition”).

¹¹¹ See WILLIAM W. FISHER III, PROMISES TO KEEP 49 (2004) (summarizing the origins of the compulsory license).

¹¹² The RIAA advanced this argument in its *amicus* brief, noting that “Congress would have failed at its [anti-monopolistic] purpose if, contrary to the language of Section

Congress surely cannot have intended that this amendment to § 115 do nothing. Therefore, Congress cannot have believed that *every* DPD entails a public performance; there must be at least *some* DPDs that are not public performances in order for the compulsory license to apply meaningfully to them. And, if some DPDs are not public performances, then surely this class must include pure downloads.

This interpretation finds support in the legislative history of the 1995 amendment. One specifically stated goal in extending the compulsory license to DPDs was:

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 CDs. The intention is *not to substitute for or duplicate performance rights* in musical works, but rather to *maintain mechanical royalty income and performance rights income* for writers and music publishers.¹¹³

The choice of language supports the notion that a pure download of a phonorecord is not a performance. Under the “traditional” method of making and distributing phonorecords, publishers collected mechanical royalty income, but not performance rights income. If this is to be “maintain[ed]” and performance rights income is not to be “duplicate[d]” as digital downloading replaces sales of physical phonorecords, then the performance right cannot be implicated by mere distribution of phonorecords through this new method.¹¹⁴

115(d), every download was a public performance and could be blocked on that basis. Congress must have understood that DPDs that are also performances could exist, but would be the exception rather than the rule.” Brief for *Amicus Curiae* Recording Industry Association of America, Inc., *supra* note 70, at 15.

¹¹³ 141 CONG. REC. S11945, 11957 (1995) (daily ed. Aug. 8, 1995) (statements of Sen. Gorton) (emphasis added).

¹¹⁴ In 2006, the Section 115 Reform Act (“SIRA”) was introduced in the House of Representatives. This bill purported to further amend section 115 in light of the recent emergence of streaming and hybrid transmissions. H.R. 5553, 109th Cong. (2006). SIRA would have officially recognized “incidental reproductions” (including “cached, network, and RAM buffer reproductions”) as legally cognizable “phonorecords” under the Copyright Act, but would have provided for a royalty-free compulsory license for such incidental reproductions for purposes of *non-interactive* streaming (subject to a filing fee of up to \$30). *Id.* For purposes of *interactive* streaming, SIRA would also have provided a compulsory license for incidental reproductions at a royalty rate determined by Copyright Royalty Judges. *Id.*

Because SIRA’s drafters evidently considered incidental reproductions to constitute full-fledged phonorecords, they appear to have drafted the bill so as to redefine DPDs to include streaming transmissions. This was roundly criticized by the U.S. Copyright Office, which noted that “a DPD is generally understood—and should be understood—to be a distribution in and of itself[,]” and argued that “[a] stream, whether interactive or noninteractive, is predominantly a public performance . . . [and] does not . . . constitute a

G. *Applicability of Fair Use*

As this article has argued (and as Judge Conner held), a pure download is not a “public performance” under the literal language of the Copyright Act. Thus, inquiry into whether a hypothetical performance occurring in the course of a pure download is a “fair use” is unnecessary, and for that reason, Judge Conner did not attempt it.¹¹⁵ However, the United States Copyright Office has relied on the fair use doctrine (rather than a statutory construction of the term “public performance”) in opining that the PROs should receive no royalties from pure downloads.

In August 2001, pursuant to Congress’s request, the United States Copyright Office issued the *Digital Millennium Copyright Act Section 104 Report*, which noncommittally stated that the Copyright Office “do[es] not endorse the proposition that a digital download constitutes a public performance.”¹¹⁶ In testimony before Congress, the Register reaffirmed that “the Report does not take a position” either way as to whether or not a performance “technical[ly]” takes place.¹¹⁷ However, the § 104 Report goes on to say that even if a court were to find that a download constitutes a “technical” performance, no liability should result (and thus no performance license is needed) because the “technical” performance constitutes “fair use” under § 107 of the Copyright Act.¹¹⁸

Because of the Copyright Office’s position—and because, as I will describe in Part IV of this article, the question of fair use may

‘distribution,’ the object of which is to deliver a usable copy of the work to the recipient; the buffer and other intermediate copies . . . that may temporarily exist on a recipient’s computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify.” *Section 115 Reform Act (SIRA) of 2006: Hearing on H.R. 5553 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of the U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat051606.html>.

Even if SIRA had passed (or a similar bill passes in the future), it would not fully settle the controversy over what rights are involved in streaming and downloading. As the Copyright Office observed, SIRA would “resolve[] complaints by online music services about what they characterize as ‘double-dipping’ in one context, providing for a royalty-free license for intermediate copies in the context of noninteractive streaming, but [would] not resolve other situations involving arguably duplicative payments demanded by copyright holders’ representatives for both the performance as well as the reproduction and distribution rights.” *Id.*

¹¹⁵ The issue of fair use was not addressed in the briefs of any of the parties, but was mentioned in the *amicus* brief of Broadcast Music, Inc., a fellow PRO, submitted on behalf of ASCAP. See Memorandum of *Amicus Curiae* Broadcast Music, Inc. in Support of ASCAP’s Motion for Partial Summary Judgment at 23-25, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (Civ. Action No. 41-1395 (WCC)).

¹¹⁶ COPYRIGHT OFFICE REPORT ON §104 OF THE DMCA, *supra* note 8, at xxvii (emphasis added).

¹¹⁷ DMCA Section 104 Report Hearing, *supra* note 10, at 150 (testimony of Marybeth Peters).

¹¹⁸ COPYRIGHT OFFICE REPORT ON §104 OF THE DMCA, *supra* note 8, at xxvii-xxviii.

in fact be dispositive in the case of *hybrid* transmissions (such as “progressive” downloads)—a brief fair use analysis is necessary at this point.

Section 107 specifies four main factors to be considered when evaluating whether a *prima facie* act of infringement should be excused as “fair use”:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁹

As for the first factor, the two most important questions that courts ask when evaluating the “purpose and character of the use” are whether the use is commercial and whether the use is “productive” and/or “transformative.”¹²⁰ The fact that this particular use is (usually) unquestionably commercial weighs against a finding of fair use, but does not decide the matter.¹²¹ The “productive” use inquiry asks whether “the secondary use adds value to the original – if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”¹²² It is fairly evident that these hypothetical performances are not “productive” or “transformative” in this sense, as the download providers add no new information or aesthetics to the works they transmit.¹²³ However, Judge Posner on the Seventh Circuit has

¹¹⁹ 17 U.S.C. § 107 (2006).

¹²⁰ NIMMER, *supra* note 71, at § 13.05[A][1][b].

¹²¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) (holding “that a parody’s commercial character is only one element to be weighed in a fair use enquiry”); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998) (“commerciality has only limited usefulness to a fair use inquiry”).

¹²² Castle Rock Entm’t v. Carol Publ’g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998) (alteration in original) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

¹²³ See, e.g., *Infinity*, 150 F.3d at 108 (defendant’s retransmissions of a broadcast are not “transformative” where they add neither “new expression, new meaning nor new message” (quoting *Infinity Broad. Corp. v. Kirkwood*, 965 F.Supp. 553, 557 (S.D.N.Y. 1997))). The download providers may add new “information” to the downloaded file in a purely trivial sense, in that they may append certain imperceptible metadata to a downloaded file (for example, identifying the title and artist, or setting restrictions on the file’s use). However, not only is this “information” too trivial to seriously consider “transformative,” it is, furthermore, not added to the *musical work* or *sound recording* itself, but rather, to the digital file (i.e., phonorecord) encapsulating it. One could no more easily argue that a vendor of pirated record albums is engaged in a “transformative” fair use because he uses a modified album cover.

reformulated the issue in economic terms, rather than “aesthetic” terms, defining a “transformative” use as a *complementary* rather than a *substitutional* use.¹²⁴ That is, uses of the original work that serve an independent function and do not substitute for the original work by “attract[ing] the audience *away* from the work” are more likely to be fair uses.¹²⁵ Since this effectively equates the question of transformativeness with the question of effect on the original work’s potential market (i.e., factor four), I will address it below. However, since I conclude below that the use at issue is not “substitutional,” the transformativeness question itself appears to depend on whether one adopts an “aesthetic” or “economic” view of transformativeness.¹²⁶

With respect to factor two—the nature of the original work—the more “creative” the nature of the plaintiff’s work, the less likely that a court will determine the defendant’s use is fair. That is to say, uses of “creative” works like movies, songs, and artworks are less prone to be found “fair” than uses of works that are factual, functional, or informational.¹²⁷ While this factor clearly weighs against a finding of fair use in the case of downloading musical works, this factor “typically recedes into insignificance in the greater fair use calculus,” and is seldom if ever decisive.¹²⁸ The Supreme Court, for instance, has found fair use in cases involving unauthorized use of “creative” musical works (even when the use was also “commercial” in nature).¹²⁹

The third factor—amount and substantiality of the portion used—is fairly straightforward: when the defendant has taken a substantial portion of the plaintiff’s work, a determination of fair use is less likely. This inquiry looks at the portion taken both quantitatively and qualitatively.¹³⁰ This factor clearly tilts against a finding of fair use, whether viewed quantitatively or qualitatively, as download providers typically transmit entire songs. Regardless, this factor, like the previous factor, is often of comparatively little importance to the overall fair use determination: the Supreme Court has found fair use even when entire original works (and even entire works of a “creative” nature) are copied.¹³¹

¹²⁴ Ty, Inc. v. Publ’ns Int’l, Ltd., 292 F.3d 512, 518 (7th Cir. 2002).

¹²⁵ *Id.* (emphasis in original).

¹²⁶ Perhaps the fact that Judge Posner’s view appears to render the transformativeness question under factor one superfluous itself counsels against adoption of his economic view of transformativeness.

¹²⁷ NIMMER, *supra* note 71, at § 13.05[A][2][a].

¹²⁸ *Id.*

¹²⁹ See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

¹³⁰ See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565-66 (1985).

¹³¹ See, e.g., Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that home users’ videotaping of entire copyrighted TV programs is nonetheless fair use).

The fourth factor is an inquiry into the adverse impact on the market for, or value of, the original work due to the defendant's siphoning off the demand for plaintiff's work.¹³² David Nimmer calls this "the most important, and indeed, central fair use factor," judging by what has actually proven dispositive in the bulk of fair use cases in recent years.¹³³ In this case, the fourth factor appears to weigh in favor of a finding of fair use. It is doubtful that any alleged "performance" (in the form of an imperceptible "rendering") occurring in the course of an *otherwise licensed* download (i.e., where the download provider has licensed the *mechanical* rights) attracts any paying audience away from the work.

First, by definition, such an allegedly infringing "performance" siphons off no demand for *phonorecords* of the work, because each alleged "performance" occurs incident to the properly licensed reproduction and distribution of a phonorecord of that very work. Second, the allegedly infringing technical "performance" is no substitute for other *public performances* that the customer would presumably pay for. When a DPD is effected, the value therein to the purchaser stems from the fact that he now owns a phonorecord of the downloaded work. Any technical "performance" that may occur in the course of the download—but does not occur when buying a CD at a store, or ordering one online from Amazon.com—is of no *independent* value to the purchaser, and cannot substitute for any actually perceptible performance. Of course, the fact that the customer now has a *phonorecord* of the work may make her less likely to pay for a future public performance of that work, but this is merely a function of the fact that the customer now possesses a properly licensed phonorecord; it is the *lawful* phonorecord that substitutes for future public performances, not the phantom "performance" that allegedly occurs in delivering it.¹³⁴ Thus, any alleged performance occurring in the course of a download cannot be said to "usurp[] . . . the demand"¹³⁵ for other public performances of the work.

In its *amicus* brief on ASCAP's behalf, BMI (a fellow PRO)

¹³² NIMMER, *supra* note 71, at § 13.05[A][4]. As noted *supra* note 126, the fourth factor bears a very close resemblance to Posner's economic reformulation of the *first* fair use factor.

¹³³ NIMMER, *supra* note 71, at § 13.05[A][4].

¹³⁴ In other words, as the Register of Copyrights testified before Congress, the activity of purchasing a song file via download is "the equivalent of going to a record store and buying a CD, [and therefore] the transmission has no separate economic significance, apart from the [already licensed] sale of [the] phonorecord. And, therefore, there should be no liability for [the] transmission." *DMCA Section 104 Report Hearing*, *supra* note 10, at 8.

¹³⁵ NIMMER, *supra* note 71, at § 13.05[A][4].

misguidedly argues that “*providing downloads* is not fair use” because “downloads compete with performances by traditional media (and, potentially, by streaming), thereby harming the value of public performances transmitted by both traditional and new media outlets for public performance of musical works.”¹³⁶ This is true but irrelevant—since all of the downloads at issue were performed with proper *mechanical* (i.e., reproduction and distribution) licenses, the relevant question is not whether “providing downloads” is fair use, but whether an incidental *public performance* allegedly occurring in the course of distributing a *licensed phonorecord* via download is fair use. It is obvious that “downloads compete with performances”—no one could reasonably contest this. However, as this article has argued, *incidental performances* that may occur in the course of otherwise licensed downloads do not.

In summary, while the predominant fourth factor points toward a finding of fair use, at least two of the other three factors clearly do not. Especially given the highly fact-specific nature of the fair use inquiry, “which always depends on consideration of the precise facts at hand,” it is thus not entirely clear that a court would make a finding of fair use in the case of any particular type of download or hybrid transmission—despite the Copyright Office’s stance.¹³⁷

IV. THOUGHTS ON A LEGISLATIVE AMENDMENT TO THE COPYRIGHT ACT

A. *Leaving the Issue to the Courts Is an Unsatisfactory Solution*

Even if Judge Conner’s decision in *United States v. ASCAP* is ultimately affirmed on appeal (or, improbably, if ASCAP forgoes an appeal), it hardly serves as a satisfactory solution to the broader issue of the rights implicated by streaming and downloading. First of all, the downloads at issue in that proceeding were all *pure* downloads, not hybrid transmissions such as “progressive downloads”—i.e., AOL, RealNetworks, and Yahoo! apparently prevented customers from listening to the works they purchased “live” as the data comprising the download was delivered.¹³⁸ It is

¹³⁶ Memorandum of *Amicus Curiae* Broadcast Music, Inc., *supra* note 115, at 24-25 (emphasis added).

¹³⁷ *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 916 (2d Cir. 1994).

¹³⁸ Memorandum of Law in Opposition to ASCAP’s Motion for Partial Summary Judgment and in Further Support of Applicants’ Motion for Partial Summary Judgment, at 18, *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (No. 41-1395) (“Applicants are not currently transmitting any content by means of progressive downloading Because [ASCAP’s expert’s declaration] addresses technology that is not currently at issue in this proceeding, the Court need not dwell on it.”).

not at all obvious, though, that Judge Conner's holding would apply equally to hybrid transmissions, such as progressive downloads, which resemble both downloads and streaming to some extent: in a possibly prophetic footnote, Conner noted, "[w]e do not mean to foreclose the possibility . . . that a transmission might, under certain circumstances, constitute both a stream *and* a download, each of which implicates a different right of the copyright holder."¹³⁹ (Understandably, Judge Conner did not elaborate on what these hypothetical circumstances might be.)

Similarly, all of the arguments in Part III of this article started with the assumption that the transmission at issue was a *pure* download, inherently incapable of contemporaneously perceptible rendering. In the case of progressive downloads and other hybrid transmissions, on the other hand, the PROs have a strong argument that, at least on a plain text reading of the Copyright Act, both the mechanical rights and the public performance rights are involved. After all, a progressive download *does* result in a contemporaneous, perceptible rendering of the transmitted data as it is being received, and it requires no further action by the recipient to effect the rendering that would interrupt the continuous "process" resulting in that rendering.

Thus, while Judge Conner may have adequately resolved the comparatively "easy" case—which, despite its relative "easiness," has necessitated all the foregoing pages of commentary and analysis—there remains outstanding the question of which rights are implicated by the wide array of hybrid transmissions and conditional downloads (i.e., the "spectrum . . . between permanent reproduction and instantaneous performance that incorporates many intermediate points").¹⁴⁰ Are *all* of these transmissions *both* full-fledged public performances *and* full-fledged reproductions? The variety of possible hybrid transmissions (e.g., progressive downloads, "rippable" or recordable streams, downloads that allow contemporaneous "previewing" of only a brief sample of the work as it is downloaded, streams with limited "instant replay" capability to revisit the last few seconds of the work, etc.) and the variety of possible conditional downloads (e.g., tethered downloads, expiration-dated downloads, downloads limited in number of playbacks, subscription-dependent downloads) is impressive, and all of the examples in this bestiary of transmissions resemble both

¹³⁹ United States v. ASCAP, 485 F. Supp. 2d 438, 446 n.5 (S.D.N.Y. 2007) (emphasis in original).

¹⁴⁰ Michael A. Einhorn & Lewis Kurlantzick, *Traffic Jam on the Music Highway: Is it a Reproduction or a Performance?*, 2 REV. OF NETWORK ECON. 10, 11 (2003).

archetypal “performances” and “reproductions” to varying degrees, depending on which characteristics (contemporaneous perceptibility? ephemerality versus permanence?) one chooses to emphasize. It is unlikely that the courts can (or should) settle this entire range of questions in one fell swoop.

While venturing into the thorny realm of fair use was unnecessary in the situation before Judge Conner, the fair use doctrine will almost certainly come into play with respect to hybrid transmissions and conditional downloads. While the PROs, as noted, have a strong argument that progressive downloads (for example) are *prima facie* public performances, the providers of progressive downloads will counter with the same fair use arguments presented above, which apply with similar force to many hybrid transmissions. Specifically, even where there is a contemporaneous rendering, and thus a *prima facie* public performance, so long as the recipient is left with a permanent and unrestricted copy of the work, the *prima facie* performance does not appear to “substitute” for other paid uses of the work, because the *function* or *primary effect* of the transmission is to provide a copy of the work which the purchaser can then perform at her pleasure.¹⁴¹ Should it be decisive, then, that the work is admittedly “performed” as part of the same process by which a copy is distributed, when the purchaser could simply turn around an instant later and privately perform the work *ad infinitum* with no consequences under the Copyright Act? In other words, shouldn’t the license to perform the “greater” act of distributing infinitely performable digital copies *in fairness* subsume the “lesser” act of allowing the recipient to perceive the distributed work a single time, albeit contemporaneously? Where is the “substitution” here? And how does this fairness calculus change if the distributed copy

¹⁴¹ See Memorandum of Law in Support of Applicants’ Motion for Partial Summary Judgment, *supra* note 19, at 6 (“The *function* of a download is not to enable the recipient to listen to or view the content during the download transmission. Its *purpose* is only to deliver a copy of the work.”) (italics added); see also Kramarsky, *supra* note 39:

[U]sing [contemporaneous perceptibility] as the basis for a legal distinction of this importance is a recipe for disaster. Instead, *the distinction should be based on the end user’s eventual bundle of rights*: If the user can retain the file for later use . . . then the file is a download; if not, then the file is a stream.

This essentially replicates the distinction that the ASCAP court most frequently returned to – listening to the radio versus buying a CD. . . .

Of course, it may be difficult to ground this kind of distinction in existing statutory language

(emphasis added). Indeed, it is difficult (if not impossible) to ground the underlying distinction between a performance and a reproduction on the transmission’s “function” or “purpose,” or “the end user’s eventual bundle of rights”; the statutory language in § 106 simply will not bear such a result-driven definition. However, the fair use calculus, which considers, *inter alia*, the “*purpose* . . . of the use” and the “*effect* of the use upon the potential market . . .,” allows these concerns to figure into the ultimate determination of infringement.

is not infinitely performable (i.e., unrestricted), but rather, is subject to certain conditions—at what point does the substitutionary effect of the contemporaneous performance become significant enough to tip the scales away from fair use? Because of the notoriously unpredictable nature of fair use, the answer may well differ depending on the precise limiting conditions imposed and upon other highly case-specific factors—even the court’s subjective moral assessment of the parties’ conduct.¹⁴²

Thus, it is manifest that relying on the courts for the gradual elaboration of a jurisprudence of hybrid transmissions and conditional downloads (whether dependent on fair use or otherwise) is an inadequate option. Whatever the courts eventually decide, in the meantime, the chance (even if remote) that a court could find liability, multiplied by the massive retroactive damages that can result under the Copyright Act—i.e., statutory damages of up to \$30,000 *per work infringed* (\$150,000 if the infringement is “willful”), regardless of actual damages¹⁴³—yields a discounted penalty that is unacceptably high, especially for a cash-poor and risk-averse start-up business, as technological innovators often are. Consequently, would-be participants in this field, if acting strategically, will either refrain from entering it at all, or will take what David Nimmer calls “the prudent course” of paying for both mechanical and performance licenses.¹⁴⁴ But the resultant decrease in profit margin may keep small start-up operations unable to harness significant economies of scale out of the market. Thus, innovation could be significantly chilled. It would be one thing if this were the result of a considered policy judgment of Congress, but it is unacceptable that this situation should result from mere unintended ambiguity in the law. Therefore, Congress should amend the Copyright Act to make the rights involved in any variation of streaming, downloading, or hybrid transmission clear *ex ante*.

¹⁴² See NIMMER, *supra* note 71, at § 13.05[1][d] (noting that “fair use presupposes ‘good faith and fair dealing’” (quoting *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968))); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹⁴³ 17 U.S.C. §§ 504(c)(1)-(2) (2006). It appears unlikely, however, that “willful” infringement could be found, given the novelty of these issues.

¹⁴⁴ See NIMMER, *supra* note 71, at §8.24[B].

B. This Controversy Reflects the Fundamental Unsuitability of the Performance/Reproduction Dichotomy to Digital Transmissions

At root, the family of related controversies over streaming, downloading, and hybrid transmissions addressed in this article is merely symptomatic of a deeper underlying malady: namely, “digital technology produces a breakdown and conflation of legal categories that were meaningful in the analog era.”¹⁴⁵ As this article indicates, the traditionally intuitive and useful semantic distinction between “performance” and “distribution” does not translate readily, or particularly meaningfully, to the Internet context at all. On the Internet, even the most archetypally “performance-like” transmission—a pure stream—necessarily involves the work’s being “reproduced” ephemerally in RAM. Furthermore, even the most archetypally “reproduction/distribution-like” transmission—a pure download—is distinguishable from a performance based only on the *functionally* (as opposed to *statutorily*) negligible distinction of whether the transmission is audible contemporaneously or mere instants later with the additional click of a mouse.

Moreover, as one *amicus* noted in its brief in support of ASCAP, a further quandary arises from the fact that actions taken by the customer/recipient, largely outside the download provider’s control, can potentially blur or erase the distinction between pure transmissions and hybrid transmissions.¹⁴⁶ For example, whether progressive downloading is automatic, optional, or entirely unavailable depends in large part (if not exclusively) on the *software* the customer uses to perform the download. Some download providers (including Apple’s iTunes service, currently the market leader, accounting for 76% of digital music sales)¹⁴⁷ require the customer to use the provider’s proprietary software to effect a download. These providers, of course, can choose not to implement progressive download functionality in their proprietary software, thus maintaining the “purity” of the download. However, other download providers (such as those who provide downloads via the ubiquitous Web browsers) do not have their

¹⁴⁵ *Id.*

¹⁴⁶ See *Amicus Curiae* Brief of SESAC, Inc. in Support of ASCAP’s Motion for Partial Summary Judgment, at 3, United States v. ASCAP, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (No. 41-1395) (“Attempting to parse what is and what is not a public performance based upon whether the transmitted music is heard immediately or later—a choice that will be in the hands of the recipient—would create an unworkable and false distinction”) (emphasis added).

¹⁴⁷ Jeff Leeds, *Universal in Dispute with Apple over iTunes*, N.Y. TIMES, July 2, 2007, at C1, available at <http://www.nytimes.com/2007/07/02/business/media/02universal.html?ex=1341028800&en=64687402344443f8&ei=5090>.

own proprietary software, instead relying on commonly used third-party software, and thus lack control over the availability of a progressive download function.

As a consequence, whenever users have the *option* of employing software with progressive download functionality, does this in itself make all of the provider's download transmissions "capable" of being simultaneously rendered, and thus public performances, whether or not any particular user is *actually* using a software program with a progressive download function, let alone actually engaging that function (just as a radio broadcaster's transmissions are public performances whether or not anyone is listening live)? To avoid this potential pitfall, does the onus fall on every download provider to require use of secure proprietary software that prohibits previewing? What if the software is "hacked?" Does the download provider bear the affirmative responsibility to make its proprietary software "hack-proof" (relatively? completely?) in order to keep from inadvertently "publicly performing" when it meant only to reproduce and distribute?¹⁴⁸

Stepping back still further, it becomes evident that the underlying problem with the application of the current system in the Internet age is so fundamental as to approach the metaphysical. Imagine, for example, that I transmit to you a string of ones and zeroes that encodes this very article that you are reading now. If your computer is running software that saves that string to disk, I have effected a reproduction/distribution. Meanwhile, if your computer is instead running software that converts that string into patterns of dots on your screen, I have effected a display. Finally, if your computer happens to be

¹⁴⁸ For an instructive comparison, see 17 U.S.C. § 114(d)(2)(C)(vi) (2006), which conditions the availability of a statutory license of the section 106(6) digital performance right for sound recordings on the condition that

the transmitting entity take[] no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, *and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology.*

(emphasis added).

Last year, a bill (the "Perform Act of 2006") was introduced in the Senate that would have changed this language to the following:

the transmitting entity takes no affirmative steps to authorize, enable, cause or induce the making of a copy or phonorecord by or for the transmission recipient and uses technology that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies or phonorecords embodying the transmission

S. 2644, 109th Cong. § 2 (2006) (emphasis added). A change along these lines would place the burden on providers of streaming transmissions to use technologies that do not allow the recipient to subvert their intentions.

running software that “speaks” that same string using a text-to-speech synthesizer, I have effected a performance.

This is a far cry from the situation in the material, offline world, where the difference between reproductions, displays, and performances is fundamentally rooted in the concrete, physical nature of the actor’s act—that is, where creating a static arrangement of matter is a *reproduction*, creating a static projection via electromagnetic waves (i.e., visible light) is a *display*, and creating a dynamic sequence of waveform disturbances (either electromagnetic, sonic, or both) is a *performance*. Each action in the physical world is indisputably one of these three things, regardless of what the actor subjectively intended, and irrespective of what the recipient or observer does. On the Internet, by contrast, the status of a digital string is in the eye of the beholder—like Schrödinger’s hapless cat, a digital transmission remains in some indeterminate superposition of states until it is actually processed by the recipient in one way or another.

Thus, asking whether any given act of the *transmitting party* is “really a performance” or “really a reproduction” is not even a well-formed question—the answer (as suggested by the aforementioned progressive download example) is wholly dependent on the eventual acts of the *receiving party*. In other words, it is at root illusory to attempt to distinguish between various “types of uses” on the part of the *transmitting party*, where that party is doing the same exact thing—sending out the same string of zeroes and ones encoding the same work—in every instance. It is not just that the line-drawing is *difficult*; rather, it is inherently impossible.¹⁴⁹

True, the transmitting party can embed the string of zeroes and ones encoding the work in a cocoon of zeroes and ones encoding *protective measures*, thus allowing the recipient’s computer to make certain uses of the embedded string while prohibiting others. For example, as suggested above, a music file offered for download could be encrypted in a file format decodable only by the provider’s proprietary software, which prohibits progressive downloading. (This is the concept behind “digital rights management,” which will be discussed further below.) However, even with such protective measures implemented, it is still illogical to ask whether the transmitting party is “really performing the

¹⁴⁹ See ASCAP’s Memorandum of Law in Opposition to Applicants’ Motion for Partial Summary Judgment, *supra* note 53, at 11 (“A download, [AOL *et al.*] say, is only the ‘transmission of a copy,’ . . . whereas a stream is a transmission of a performance But that is misleading: in both downloads and streams the transmission is of electronic bits and bytes.”) (citation omitted).

work,” “really displaying it,” etc. The actual *act* in which the transmitting party engages in every instance is merely *transmission of a digital string*. It is the *content* of this string, i.e., the “metadata” encoding protective measures—not the particular “use” or “type of act” engaged in by the transmitting party—that determines what the recipient of the string can do with the embedded work. Thus, it makes more sense for the law to care about the *contents* of a particular digital string (e.g., by prohibiting end-users from tampering with protective metadata) than to care (quite anachronistically) about which Platonic “type of use” a transmitting party is engaging in.¹⁵⁰

For this reason, it is clear that salvaging the integrity of the system will require far more than an ad hoc judicial redrawing of borders. It will take a thoroughgoing evaluation of technological evidence and a balancing of competing policy issues, as well as significant alterations to the present structure of the Copyright Act—not just a narrowly focused “patch-up” dictating that a download is or is not a performance. These tasks, of course, are properly the province of Congress, not the judiciary.

C. *The WIPO Copyright Treaty’s “Communication” Right: A Model for Potential Legislative Reform?*

1. The Structure of the WIPO Copyright Treaty

A model for potential legislative reform of the Copyright Act to address the problem of convergence of rights in the digital context can be found in the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty,¹⁵¹ signed by the United States and sixty-one other nations.¹⁵² Among other provisions, the WIPO Copyright Treaty (WCT) specifies minimum protections that signatory nations must provide for works of authorship under their respective copyright regimes. The United States, as a signatory of the WCT, must provide those minimum protections in its copyright law, but it does not need to do so (and in fact, does

¹⁵⁰ In fact, the law has begun to migrate in precisely this direction, with the Digital Millennium Copyright Act prohibiting the “circumvention” of certain digital rights management measures that copyright holders implement to restrict the type of uses that an end user can make of an otherwise totipotent digital string. And, as I will argue below, as long as the law maintains the integrity of such measures against tampering or circumvention, attempting to differentiate “actual performances” from “actual displays” and “actual reproductions” is wholly unnecessary.

¹⁵¹ World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, 36 I.L.M. 65 (1996) [hereinafter WIPO Copyright Treaty].

¹⁵² World Intellectual Property Organization, *Treaties Database: Contracting Parties*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Sept. 10, 2007).

not do so) using the same *categories* of “exclusive rights,” provided that every *infringing act* reached by the WCT is also reached under some provision (or combination of provisions) of United States copyright law.¹⁵³ Nonetheless, two specific named categories of rights in the WCT are instructive for our purposes here.

First of all, the WCT’s Article 6 (“Right of Distribution”) requires that signatory nations grant authors “the exclusive right of authorizing the making available to the public of . . . copies of their works through sale or other transfer of ownership.”¹⁵⁴ This is almost identical to the United States Copyright Act’s § 106(3), which guarantees authors the exclusive right “to distribute [or authorize the distribution of] copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership.”¹⁵⁵

Meanwhile, Article 8 of the WCT (“Right of Communication to the Public”) requires that signatory nations grant authors the exclusive right of authorizing any *communication to the public* of their works, by wire or wireless means, *including* the making available to the public of their works in such a way that members of the public may access these works *from a place and at a time individually chosen by them*.¹⁵⁶

Note that Article 8 mentions a broad right of “communicat[ing]” a work to the public, and a sub-right of making a work available for individual members of the public to

¹⁵³ See DMCA Section 104 Report Hearing, *supra* note 10, at 154 (Responses of Mary Beth Peters, Register of Copyrights, to Follow-Up Questions of Rep. Chris Cannon) (“[W]hile the WCT requires that the conduct covered in Article 8 be covered by exclusive rights, it does not specify how those rights must be categorized under the laws of a contracting party.”); Memorandum of Law in Opposition to ASCAP’s Motion for Partial Summary Judgment and in Further Support of Applicants’ Motion for Partial Summary Judgment, *supra* note 53, at 14:

The drafters of the WCT understood that the treaty left ‘sufficient freedom . . . to national legislation’ as to which right would be implicated by a digital transmission and that, in many cases, the transmission would be covered by a ‘right *other than the right of communication to the public*,’ namely, the distribution right.

(emphasis in original) (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORLD INTELLECTUAL PROPERTY HANDBOOK ¶¶ 5.225-226 (2d ed. 2004), *available at* <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf>).

ASCAP nonetheless attempted to argue before Judge Conner that the United States’ accession to the WCT “reaffirmed the public performance right in downloads,” reasoning that because the WCT “communication” right would encompass all digital transmissions to the public, and because “Congress determined that the existing provisions in United States law governing the communication of works to others . . . were sufficient to satisfy” the requirements of the WCT, *one specific provision* of the U.S. Copyright Act (namely, the right of public performance) must therefore map exactly onto the WCT’s “communication” right. ASCAP’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 19, at 14-15. The statements quoted above demonstrate the ineffectiveness of this argument.

¹⁵⁴ WIPO Copyright Treaty, *supra* note 151, art. 6.

¹⁵⁵ 17 U.S.C. § 106(3) (2006).

¹⁵⁶ WIPO Copyright Treaty, *supra* note 151, art. 8 (emphasis added).

access *from the place and at the time of their choice* (i.e., of communicating the work *interactively*, and/or “making [the work] available” for such interactive communication). This interactive/non-interactive distinction is crucial, and I will return to it again below.

2. The “Right of Communication” Is Independently Sufficient To Cover All Online Methods of Content Delivery

Importantly, the WCT’s Article 8 “right of communication” would be implicated in all the modes of Internet content delivery—download-based, streaming-based, and hybrid. In other words, all commercial content delivery over the Internet that implicates one or more of the “legacy” rights of reproduction, distribution, or public performance—or public display, for that matter—would also implicate this broad right of digital communication to the public.

Note that one consequence of this is that the Article 8 “right of communication” makes the WCT’s Article 6 “right of distribution” completely superfluous in the Internet context (although Article 6 may serve an independent function in *non-digital* contexts such as traditional distribution of hard-copy phonorecords such as CDs, to the extent that this is not considered a form of “communication to the public of [the embedded] works . . . by . . . wireless means”).¹⁵⁷ Note also that American copyright law’s troublesome legacy terms—i.e., “reproduction,” “distribution,” “performance,” and “display”—which, as we have seen, require extensive judicial and statutory elaborations to embrace Internet content delivery models in the first place—appear nowhere within Article 8, and are thus not conceptually necessary to describe or legally regulate any of the modes of Internet delivery of copyrighted works.

For comparison’s sake, note that unlike the simple language in the WCT’s Article 8 “Right of Communication to the Public,” the United States Copyright Act requires four separate rights to cover all the modes of Internet media content delivery. To quote the United States Register of Copyrights,

[u]nder the WCT, on-demand downloads, such as certain digital phonorecord deliveries, would fall [solely] under the communication to the public right [By contrast,] [u]nder U.S. copyright law, on-demand downloads entail an exercise of, at a minimum, the distribution right and the reproduction right [if not the public performance

¹⁵⁷ See Part III.E *supra* (querying whether the distribution of hard-copy phonorecords constitutes “communicat[ion]” to the public of the works embedded therein).

right as well].¹⁵⁸

Meanwhile, “[s]treaming, which would also fall [solely] under the WCT’s communication right, entails exercise of the public performance and (because of the buffer copy) reproduction rights under U.S. law.”¹⁵⁹ As the WCT’s “communication” right shows us, the United States Copyright Act’s historically accumulated jumble of terms and conditions, which the phenomenon of digital convergence has shown to be problematic in practice and analytically suspect in theory, is completely unnecessary to protect works of authorship in the Internet context.

D. A Proposed Amendment

A relatively simple legislative solution can simultaneously moot the download-as-performance controversy (and the analogous streaming-as-reproduction and hybrid transmission questions), address the more fundamental unsuitability of the performance/distribution distinction to Internet transmissions, and bring the structure of United States copyright law into greater harmony with prevailing international norms as reflected in the structure of rights in the WCT.

1. Offline/Online Uses: A Bifurcated Copyright Regime

This article’s proposal is to establish two parallel, mutually coexisting copyright regimes: one for “offline” uses of a copyrighted work (i.e., uses that do not involve a wired or wireless digital transmission), and another for “online” (digitally transmitted) uses of a work. On the offline side of the divide, I advocate leaving intact the Copyright Act’s pre-1995 “bundle” of uses, rights, compulsory licenses, etc., simply because they have served adequately for decades in this very context. Meanwhile, for *online* uses of a work (i.e., those uses involving wired or wireless digital transmissions), rather than attempting to shoehorn digital technology into the Copyright Act’s legacy categories, I advocate abolishing the separate rights of reproduction, distribution, display, and performance outright and replacing them with a WCT-style right of *digital communication*, reflecting the convergence of all of these concepts in the digital context.¹⁶⁰ (In

¹⁵⁸ *DMCA Section 104 Report Hearing*, *supra* note 10, at 154 (Responses of Mary Beth Peters, Register of Copyrights, to Follow-Up Questions of Rep. Chris Cannon).

¹⁵⁹ *Id.*

¹⁶⁰ I place the right of adaptation (i.e., creation of a derivative work) found in section 106(2) neither in the “offline” or “online” regime. Adaptation is a unique right, in that it cannot be infringed *on its own*; an infringement of the adaptation right must generally piggyback on an infringement of one of the other rights in section 106. This is because the mere act of inventing a derivative work *simpliciter* is purely mental, and thus an

fact, United States copyright law has something of an inchoate dual-regime system already—the addition in 1995 of the *sui generis* § 106(6) right of public performance “by means of a digital audio transmission” suggests that Congress has realized to some extent that online uses of works implicate different considerations from offline uses and are best treated separately. The system proposed herein, in a sense, is merely a development or continuation of this theme.)

Importantly, however, the particular dual regime proposed herein would differ from the WCT’s two-part regime, in that this article’s system would draw a border not between “copies” on one hand and “wired or wireless communications” on the other—as the WCT does—but rather, between “hard copies and *analog* communications” (i.e., “offline” uses) on one hand, and “*digital* transmissions” (“online” uses) on the other. This proposed dividing line, unlike that drawn by the WCT, would keep conventional analog wired and wireless transmissions, such as analog radio/television broadcasting, analog cable, telephone music-on-hold, etc., under the same regime as conventional hard copies such as CDs—even though analog transmissions, as a form of “wire or wireless” communications, would be grouped together with *digital* transmissions under the WCT’s Article 8 “Right of Communication.”

This article’s online/offline line of demarcation is superior to the WCT’s copies/communications divide for the purposes of American law, primarily for historical reasons. Specifically, maintaining the traditional categories and terminology for analog (“offline”) transmissions such as analog radio and television will avoid disrupting deeply entrenched business models in the broadcast industries which have grown up in the shadow of, function well with, and may be inextricably entangled with, the present “bundle of rights” in § 106 and the concomitant exceptions, compulsory licenses, and the like. By contrast, this article has shown that the old system simply does not work properly for online uses—and there is (at least at this point) drastically less inertia preventing an ambitious restructuring of copyright law in the online domain, which has existed only for a comparatively brief period of time and in which the roles of the various industry actors are less crystallized.

adaptation does not become actionable until the adaptation is either fixed, distributed, performed, displayed, or communicated online. H. REP. NO. 94-1476, at 62 (1976). Therefore, the right of adaptation is “free floating” and belongs to neither the online regime or the offline regime, or alternatively, belongs to whichever regime the action on which it piggybacks belongs to.

2. The Interactive/Non-Interactive Distinction

I would divide this new “right of (digital) communication” applicable to wired and wireless digital transmissions into two mutually exclusive sub-rights: a right of *interactive* communication and a right of *non-interactive* communication. As mentioned above, the importance of the interactive/non-interactive distinction is signaled in the WCT by the explicit specification of a “making available” sub-right. Indeed, American copyright law has also already taken halting steps toward recognizing the importance of the interactive/non-interactive distinction in the context of Internet transmissions: § 114 of the Copyright Act, added in 1995 at the same time as the new § 106(6) right of public performance “by means of a digital audio transmission,”¹⁶¹ implements a complex system of exemptions and compulsory licenses for certain *non-interactive* digital public performances of sound recordings under the § 106(6) right. This section defines an “interactive service” as “one that enables a member of the public to receive a transmission of a program *specially created for the recipient*, or *on request*, a transmission of a particular sound recording . . . which is *selected by or on behalf of the recipient*.”¹⁶² However, under current American law, the “interactive/non-interactive” distinction is not legally recognized outside this relatively narrow context. It does not play a role in the legal treatment of the digital public performance of musical works, which is regulated by the traditional § 106(4) right of public performance, or in reproductions, distributions, or public displays of *any* type of work effected over the Internet.¹⁶³

However, despite the minor part it currently appears to play in American copyright law, the interactive/non-interactive distinction is actually of fundamental conceptual importance to *all* online communications of works. The *interactive* streaming of works is (or, with foreseeable advances in technology, will soon become) mutually substitutable with downloading of works, because members of the public will be able to experience any work of their choice at any time and in any place via interactive streaming—just as they can currently do by downloading (or purchasing traditional copies/phonorecords of) those works and maintaining a “library.” The difference between possessing and

¹⁶¹ 17 U.S.C. § 106(6) (2006).

¹⁶² 17 U.S.C. § 114(j) (7) (2006) (emphasis added).

¹⁶³ The proposed Section 115 Reform Act of 2006 (SIRA), *supra* note 114, would also have made the availability of a royalty-free compulsory license for the streaming of *musical works* dependent on the *non-interactivity* of the transmission. See *supra* note 114. Interactive streaming of musical works would also have been compulsorily licensed, but subject to royalty rates set by Copyright Royalty Judges.

accessing a downloaded copy and receiving an interactive, on-demand stream, from the user's perspective, will be utterly negligible.¹⁶⁴ It makes perfect sense, then, to adopt a system that treats all interactive transmissions or communications of works—downloads as well as interactive streams, and any hybrids thereof—similarly.

On the other hand, the *non*-interactive streaming of works is *not* mutually substitutable with downloading (or purchasing traditional copies/phonorecords of) those works. Unlike downloads or interactive streaming, *non*-interactive streaming simply allows the recipient to experience whichever works the communicating party happens to be transmitting at the moment.¹⁶⁵ Thus, it makes sense to treat such *non*-interactive streaming separately from interactive streaming, to which it bears no economic equivalence. Meanwhile, today's current performance/reproduction-and-distribution schema, which focuses on qualities such as contemporaneity (the *sine qua non* of a "performance") and permanence (the *sine qua non* of a "copy")—qualities which are difficult to define in the digital world to begin with—illogically results in interactive and *non*-interactive streaming being grouped together, and downloading being treated separately, even though this does not reflect the underlying economic reality of the situation.¹⁶⁶

¹⁶⁴ See Declaration of Andrew Lippman in Support of ASCAP's Motion for Partial Summary Judgment, at 8 ("[A]s network speeds increase and as technology improves, most if not all technical and perceptible distinctions between streaming and downloading will disappear. A faster network will allow a download to begin playing virtually immediately A program will 'feel' streamed no matter how it is delivered.").

¹⁶⁵ Like conventional analog radio broadcasts, which Congress thought *advertised* for sales of records rather than supplanting them, see FISHER, *supra* note 111, at 54, passive streaming very likely functions as an advertisement for the works streamed, leading consumers to pay for downloads or interactive streaming of those works at a subsequent time. While Congress responded to the "advertisement-like" function of analog radio by exempting public performances of sound recordings from the Copyright Act altogether, *id.*, I advocate that Congress recognize *both* interactive and *non*-interactive digital communications of works under the amended Copyright Act, but under separate "sub-rights"—thus allowing different regimes of exemptions and compulsory licenses to be crafted for each one as Congress sees fit.

¹⁶⁶ There is an important complication that must be addressed here: a natural division of all transmissions into "interactive" and "non-interactive" categories is not, in fact, possible. Because of the functionally unlimited number of Internet "radio stations" that can co-exist online, it is conceivable that highly specialized Internet radio stations might spring up that broadcast a range of songs so narrow that, simply by selecting the station, a listener would have a very good chance of hearing any given work of her choice—even if no "particular sound recording . . . is [technically] selected by or on behalf of the recipient." For example, imagine an Internet radio station that broadcasts a particular album (or brief playlist of songs) over and over, *ad infinitum*. Any such station may not technically be engaging in "interactive" transmissions, but with enough narrowly-specialized stations to choose from, a listener could *effectively* hear the work of her choice *more or less* at the time of her choice merely by tuning in to the right station. Thus, in actuality, "interactivity" is a continuum.

Section 114 of the Copyright Act (which, again, creates exemptions and compulsory

Incorporating the interactive/non-interactive distinction in lieu of the “legacy” categories, the dual-regime system I propose would look like this:¹⁶⁷

Offline Uses		Online Uses	
§ 106(1)	reproduction	interactive communication	non-interactive communication
§ 106(3)	distribution		
§ 106(4)	public performance		
§ 106(5)	public display		
§ 106(2)	adaptation		

A final note about the interactive/non-interactive distinction: this article has hopefully made clear that in the Internet age, the critical distinction that copyright law should track is the distinction

licenses for certain “non-interactive” digital audio transmissions of sound recordings) recognizes this fact by establishing what it calls the “sound recording performance complement,” a set of limitations by which a transmitting entity must abide in order to qualify for the exemption or compulsory license. The “sound recording performance complement” establishes a bright line (although admittedly a somewhat arbitrary one) bisecting the interactivity continuum:

The “sound recording performance complement” is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

17 U.S.C. § 114(j) (13) (2006).

There is nothing sacred about this *particular* dividing line. However, *some* bright line test resembling the “sound recording performance complement” would be necessary in the “interactive/non-interactive” schema envisioned in this article. While this article’s proposal would thus place much greater importance on the necessarily somewhat arbitrary dividing line between interactive and non-interactive currently buried in § 114, this dependence on arbitrary line-drawing would be a small price to pay for obviating the controversies discussed in this article and making copyright law’s “bundle of rights” conceptually and economically coherent.

¹⁶⁷ Obviously, under this dual-regime system, section 106(6)’s right of public performance “by means of a digital audio transmission” would be completely subsumed within the new “digital communication” rights.

between *interactive* and *non-interactive* communications of works—not the distinction between “performances” of works and the “distribution” of “copies.” As I have argued, aside from being ill-defined in the Internet context, the performance/distribution distinction is also economically irrelevant in the fast-approaching age of ubiquitous wireless broadband access: as mentioned above, whether a copy is made or distributed is of no practical concern to the customer, as long as she can *access* the work (by whatever method) at the time of her choice.¹⁶⁸ If the distinction is immaterial to the customer, it is irrelevant economically, and should therefore be irrelevant to the categorization scheme of copyright law, which should obviously treat functionally and economically equivalent uses of a work alike.

However, while it is not at all obvious on the surface, I maintain that the economic irrelevance of the performance/distribution distinction is not, in fact, a new phenomenon caused by the “digital moment.” If one looks closely, the performance/distribution distinction *per se* was not actually the fundamentally relevant dichotomy in the pre-Internet era, either—what was economically relevant at that time, just like today, was whether, as a result of a given act, members of the public were empowered to experience a work in an *interactive* fashion (i.e., the work of their choice at the time of their choice), or only in a *non-interactive* fashion. It just so happened that before the Internet, owning a copy was the only way (short of maintaining a private stable of musicians) to have at-will access to a work. Performances, whether perceived via broadcast transmission or in person, were virtually always non-interactive, in that they could not provide at-will access to the work at a time and place of one’s choice. Thus, the performance/distribution distinction, which played such a seemingly meaningful role in the pre-Internet age, was all along really just a proxy for the actual distinction that was (and still is) economically and conceptually central to copyright

¹⁶⁸ Jane Ginsburg points out that the existence of a “personal copy” will not be *completely* irrelevant because at least some people derive additional economic value from *possessing* works (e.g., the tactile pleasure of holding them, the self-definition value of “owning” them, etc.) that is impossible to derive from mere at-will *access* to works. See Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y 113 (2003), available at <http://ssrn.com/abstract=222493>. However, this additional value would presumably be derived primarily from possessing *tangible, conventional* copies/phonorecords of works, rather than invisible, intangible copies/phonorecords stored on a hard drive. Thus, the dual-regime system I propose in this article can allow successful price discrimination between dissemination of tangible, conventional copies (which would implicate the traditional rights of reproduction and distribution) on one hand, and streaming or download transmissions of works (which would both implicate the new communication right), on the other.

law—the distinction between *interactive* and *non-interactive* communication of works, or in other words, between access at will and the mere passive, happenstance experiencing of works.

Unsurprisingly, nobody thought to articulate the dichotomy in this way so long as the less abstract and more immediately intuitive “performance/distribution” distinction was conceptually sound and served as a virtually perfect proxy for the more fundamental passive/interactive distinction. However, as we have seen, the advance of technology upset both of these conditions: the performance/distribution distinction is not conceptually sound in the Internet context, and because of the advent of interactive streaming, it is no longer true that acts that the Copyright Act currently regards as “public performances” are unable to provide interactive access to works. The performance/distribution distinction therefore no longer maps onto the true economic distinction that copyright law has actually (but unknowingly) cared about all along—that between interactive and passive experiencing of works.

American copyright law has already begun to grope tentatively toward this realization, having conditioned the availability of the § 114 compulsory license for digital transmissions of sound recordings on the *non-interactivity* of the transmission. Recent draft bills that would have amended the Copyright Act have made reference to the interactive/non-interactive distinction, albeit only in limited domains.¹⁶⁹ We should continue down this path, abandoning our increasingly baroque legislative and judicial attempts to readjust the meaning of the words “performance,” “distribution,” “copy,” and the like in order to reestablish the historical proxy relationship, and instead, at least in the online context, fully and openly embrace the underlying distinction between interactivity and passivity that has been covertly guiding copyright law all along. Meanwhile, once we place all online uses in a separate “communication” regime, the former proxy relationship in the offline regime between performances/distributions and passive/interactive uses will be restored.

3. Digital Rights Management

Under this contemplated regime, the further issue of which specific *types* of digital communications a transmitting party is entitled to make,¹⁷⁰ beyond the basic interactive/non-interactive

¹⁶⁹ See Section 115 Reform Act of 2006 (SIRA), *supra* note 114.

¹⁷⁰ Indeed, as I noted previously, it is not truly accurate to speak of the different “*types* of digital communications” a *transmitting party* might make, since in all cases, the

choice—i.e., whether a licensee may make transmissions that are “performance-like,” “display-like,” “distribution-like,” or any hybrid of these—would not be the concern of copyright law *per se*. Rather, the issue of which particular restrictions the transmitting party must place on the recipient’s use of the transmitted work would be settled privately between the copyright holder (i.e., the licensor of the digital communication right) and the transmitting party (i.e., the licensee of that right) as a matter of contract law. The transmitter-licensee would then implement the contractually agreed-upon restrictions by embedding the appropriate digital rights management (“DRM”) technology¹⁷¹ in its digital transmissions of the work, thus ensuring that downstream recipients of the transmission experience or perceive the digital transmissions only in the manner agreed upon by the transmitting party and the copyright holder.

Likewise, traditional “copyright law” *per se* would play no role in policing these technologically-implemented restrictions on the end-user; rather, they would be enforced by the embedded computer code itself, backed up with the legal force of the Digital Millennium Copyright Act (“DMCA”), which already makes it unlawful to “circumvent a technological measure that effectively controls access to a [copyrighted] work.”¹⁷²

This appears to be a superior arrangement to the present one, because DRM—unlike the Platonic five-category taxonomy of uses in the “legacy” bundle of rights—permits an infinitely flexible and arbitrarily fine-tuned categorization of authorized and unauthorized uses, and hence more accurate control by artists and authors of the use of their works, as well as more fine-toothed

transmitting party is merely sending an identical digital string encoding the work, perhaps with metadata dictating the uses the recipient might make of the string once received. It would thus be more accurate, though also more unwieldy, to speak of the specific *uses* a transmitting party is entitled to *empower a receiving party to make* of the work.

¹⁷¹ DRM can be defined as “secure packaging and delivery software designed to prevent purchasers and third parties from making unauthorized uses of digital works.” Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 48 (2001).

¹⁷² 17 U.S.C. § 1201(a)(1)(A) (2006); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2876 (1998).

Professor Peter Jaszi has termed the anti-circumvention provision of the DMCA “paracopyright” law, since it is superimposed on traditional copyright law and is meant to reinforce it, but is in fact a regime unto itself, providing for new rights, new restrictions, and new exceptions. See *Fair Use: Its Effects on Consumers and Industry: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Trade and Consumer Protection*, 109th Cong. 12-13 (2005) (testimony of Peter Jaszi), available at <http://energycommerce.house.gov/reparchives/108/Hearings/11162005hearing1716/Jaszi.pdf>.

See also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 183-84 (2001); Michael J. Remington, *The Ever-Whirling Cycle of Change: Copyright and Cyberspace*, 3 N.C.J.L. & TECH. 213, 238-241 (2002).

price discrimination by content providers and thus less deadweight loss.¹⁷³ It is also a *necessary* arrangement, because as detailed above, the convergence of categories caused by the digital transformation no longer permits the Copyright Act itself to make meaningful, bright-line definitional distinctions between broad categories of online uses as a matter of public law.¹⁷⁴

On the other hand, an obvious potential downside of this arrangement is that the pervasive and unchecked implementation of DRM may have a chilling effect on fair use or interfere with notions of personal autonomy (e.g., our intuition that *private* uses of a copyrighted work should be outside the ambit of the law). However, as part of the far-reaching legislative overhaul of the Copyright Act suggested herein, a broader “fair use exception” to the DMCA’s anti-circumvention provisions could be introduced to ameliorate this problem.¹⁷⁵ Furthermore, by and large, free-market forces will likely be a natural check on overambitious use of DRM, as customers would presumably be unwilling to pay very much to receive oppressively crippled digital transmissions and would presumably be willing to pay a bit more to receive relatively or completely unrestricted transmissions. (In fact, earlier this year, Apple began providing DRM-free versions of many tracks via

¹⁷³ For example, under traditional copyright law, a party wishing to hear a work performed (say) ten times would either have to pay for ten separate performances of the work at the individual rate or purchase a copy outright, either of which could easily be prohibitively expensive. Meanwhile, under a flexible DRM system, that party could purchase a quasi-permanent “conditional download,” specifically programmed to allow any desired number of playbacks (e.g., ten), at a price cheaper than either a full, unrestricted copy (which the party does not need in any event) or ten individual performances purchased separately. This way, the copyright holder maximizes his income and the purchaser maximizes his satisfaction. This type of customization does not require the assistance of copyright law *per se* to regulate—merely the computer code to implement the desired DRM protections and the anti-circumvention provision of the DMCA to back up the coded restrictions with legal force.

¹⁷⁴ See Declaration of Andrew Lippman in Support of ASCAP’s Motion for Partial Summary Judgment, *supra* note 164, at 7-8:

From the perspective of an Internet user, a streaming server and a downloading server both provide for the delivery of the digital information that represents a musical performance. Both can provide for permanent, semi-permanent or transient storage of the file at the client computer, and both can provide audition of the music during the transfer as well as deferred listening Indeed, it is the client program and other arrangements between the sender and the recipient that determine these features In the limit, *the manner by which the data representing the musical performance may be used will be determined by other mechanisms, such as digital rights management, rather than by any technical distinctions between the delivery means.*

(emphasis added).

¹⁷⁵ Indeed, earlier this year, a bill designed to accomplish something along these lines, entitled the Freedom and Innovation Revitalizing U.S. Entrepreneurship (FAIR USE) Act of 2007, was introduced in the House of Representatives. If passed, this act would implement an exception to the DMCA’s anti-circumvention provisions where the circumvention was done for various specified “fair use” purposes. See H.R. 1201, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1201:>

its iTunes Store for \$1.29 apiece, alongside its traditional DRM-limited downloads, for which it continues to charge 99 cents.)¹⁷⁶

Since DRM (properly regulated) allows a finer and more flexible segmentation of the universe of all possible uses of a digitally transmitted work than the traditional (and, in the Internet context, hopelessly flawed) bundle of rights under § 106, and since the DMCA backs up DRM protections with the requisite legal muscle, there is no real reason for copyright law *per se* to continue to distinguish among digital transmissions of works at all, beyond the interactive/non-interactive distinction described previously. The interactive/non-interactive distinction still does independent economic work from DRM technology, because DRM technology merely restricts what *uses can be made* of a particular digital string encoding a work once it has been transmitted and received. The interactive/non-interactive distinction, on the other hand, which copyright law would still police, goes to the logistical terms on which transmissions of that digital string may be “made available” in the first place. Thus, it is a distinction of an entirely different sort—one that is independently meaningful, and indeed, as described above, centrally important.

With the new digital copyright regime (i.e., the right of “digital communication to the public”) regulating the terms on which a transmission may be made available, and with DRM (backed up by the DMCA) regulating what uses may be made of that transmission once it is received, copyright holders can fully protect their works in the digital environment—with more flexibility and robustness than is possible under the current Copyright Act alone, and without relying on its ill-fitting legacy categories.¹⁷⁷

¹⁷⁶ See *Apple Launches iTunes Plus*, APPLE.COM, May 30, 2007, <http://www.apple.com/pr/library/2007/05/30itunesplus.html>.

¹⁷⁷ Interestingly, earlier this year, technological visionary and Apple, Inc. CEO Steve Jobs came out publicly (to much fanfare) against DRM (at least in theory—Apple continues to sell some DRM-restricted tracks in its iTunes store. See *id.*). Jobs noted that because of hackers, “any company trying to protect content using [] DRM must frequently update it with new and harder to discover [encryption keys],” in a type of wasteful “cat-and-mouse game.” Instead, Jobs imagined “a world where every online store sells DRM-free music encoded in open licensable formats,” where “any [music] player can play music purchased from any store, and any store can sell music which is playable on all players.” Steve Jobs, *Thoughts on Music*, Feb. 6, 2007, <http://www.apple.com/hotnews/thoughtsonmusic/>.

Of course, in such a world, as noted above, there is no way to prevent the end user from doing whatever he wishes with the “open” strings of zeroes and ones transmitted by such stores. Without DRM, the most copyright law could hope to meaningfully regulate is the interactive vs. non-interactive nature of the initial transmission itself. Of course, since (as this article argues) this is the fundamental distinction that copyright law *should* care about, such a regime is not entirely unimaginable.

V. CONCLUSION

To summarize, the digital moment has plunged American copyright law into a crisis. A major aspect of this crisis is that the formerly meaningful categories of “public performance” and “reproduction-and-distribution” (and, for that matter, “public display”) are no longer mutually exclusive, or even genuinely meaningful, in the Internet context. Or, stated otherwise, the formerly tight correspondence between the proxy categories of “reproduction-and-distribution” and “performance/display” relied upon by the Copyright Act, on one hand, and the unspoken yet fundamental economic distinction between the right to experience a work on demand and the mere privilege of experiencing a work chosen by another, on the other hand, has fallen apart. Therefore, while under current law a pure download should not be considered a performance, as Judge Conner recently held in *United States v. ASCAP*, a complete, enduring and satisfying solution to the digital copyright crisis requires much more than a mere declaration to that effect by a court.

Rather, a meaningful and lasting solution to the digital crisis requires abandoning the old categories developed for the analog world—at least in the Internet context—and embracing the interactive/non-interactive distinction, rather than the performance/distribution distinction, as the central operative dichotomy in copyright law’s “bundle” of exclusive rights. A “right of communication to the public,” supplemented by DRM technology and the already-existent protections of the DMCA, would obviate the confusing and controversial questions addressed in this article as to precisely which exclusive rights are involved in pure streaming, pure downloading, and every type of transmission in between. Meanwhile, starting afresh in the digital context with the conceptually superior rights of “interactive/non-interactive communication to the public” would be minimally disruptive to existing business practices, because institutions and business models in the Internet media arena have yet to stabilize and are thus still malleable, unlike the established institutions and ossified business models in the traditional media industry.

On the other hand, waiting much longer to make these amendments will allow entrenchment of the present unsatisfactory and obsolete rights framework in the digital world. The present moment—at which the content-distribution paradigm has only just begun to shift to the online model, but yet at which is nonetheless obvious that the entire industry will soon have to take the plunge—is a singular, historic opportunity to implement these much-needed reforms in American copyright law, liberating it

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from its current limitations and complexities imposed by accident of history, and bringing it fully, at last, from the age of the Wurlitzer jukebox into the age of the celestial one.