Copyright and Podcasting:
The Impact of Regulation on New Communication Technologies

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Abstract

With the relative democratization of broadcast communication brought about by the new media technologies of podcasting and Internet broadcasting, new questions arise regarding appropriate legal standards for regulatory efforts. In particular, Internet broadcasters and podcasters collide with licensing agencies implementing U.S. and foreign copyright law. Media convergence has caused confusion among policymakers, industry professionals and the public with respect to the application of traditional copyright law to these new technologies.

This article explores how congressional legislation and federal court jurisprudence, combined with the efforts of private licensing agencies such as ASCAP, BMI and SoundExchange, impact the development of evolving technologies such as Internet broadcasting and podcasting. Lawmakers and jurists must assess whether the unique characteristics of new communication technologies such as Internet broadcasting and podcasting justify different legal treatment than that traditionally applicable to communication media in accordance with long-standing principles. Although holders of copyrights in popular music sound recordings contend that the threat of easy and widespread piracy justifies increasing the rights of copyright holders in the digital world, the new media of Internet broadcasting and podcasting raise new questions about whether copyright law is fulfilling its constitutional purpose of promoting progress of artistic expression.

This article first reviews the constitutional purpose of U.S. copyright law and the evolution of the Copyright Act. It then describes the current state of the Internet broadcasting and podcasting industries. Next, it discusses and analyzes the current collision between copyright law and the new podcasting technology. The article concludes with observations about the appropriateness and implications of differential legal treatment based on the unique characteristics of Internet broadcasting and podcasting.
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I. INTRODUCTION

In 1971 Congress, for the first time, granted creators of sound recordings the exclusive right to reproduce and distribute their recordings. Initially, there was some question whether merely assembling the equipment and people to make a sound recording of a copyrighted music composition met the Copyright Act’s requirement of an “original work of authorship.” However, a per curiam opinion from a three-judge panel of the U.S. District Court for the District of Columbia in 1972 observed that “[s]ound recording firms provide the equipment and organize the diverse talents of arrangers, performers and technicians” and concluded that “[t]hese activities satisfy the requirements of authorship found in the copyright clause” of the Constitution. As a result, record companies could prevent others from duplicating and distributing recorded music.

Congress declined, however, to grant sound recording copyright holders the right of public performance. Thus broadcast radio stations could play a musical sound recording as many times as they wished without compensating the record labels that produced those recordings; the radio stations did, however, have to compensate the holders of the copyrights in the underlying musical compositions – usually songwriters.

In 1995 Congress created a limited public performance right for digital audio recordings.

After this legislation, broadcast radio stations could continue to engage in traditional

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over-the-air broadcasting of copyrighted music recordings without paying record labels, but Internet radio broadcasting – sometimes called webcasting or streaming – became subject to a statutory licensing regime that compensated record companies each time a copyrighted music recording was played. Even traditional over-the-air broadcasters who engaged in Internet broadcasting were required to pay record companies for broadcasting over the Internet what they could broadcast without compensation over the airwaves.  

In 2004, individuals and entities around the globe began creating and distributing their own digital audio programs through the technology of podcasting. Podcasting allows virtually anyone to became a radio broadcaster without the need to apply for a license from a government regulatory agency such as, in the United States, the Federal Communications Commission. Podcasters, however, largely shy away from broadcasting music because they would be covered by the prohibitions against reproduction and distribution of sound recordings contained in the Sound Recording Act of 1971 as well as the prohibition against public performance of a digital audio recording contained in the Digital Performance Right in Sound Recordings Act of 1995. Record labels have yet to embrace podcasting or facilitate a system for podcasters to gain licenses to use copyrighted music.

In Part II, this article discusses the constitutional roots of copyright law. It then describes in Part III the recent phenomenon of podcasting before making observations

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6 See Bonneville Intern. Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003) (affirming a district court determination that traditional broadcasters were subject to the 1995 legislation requiring them to compensate sound recording copyright holders for digital transmissions).
7 See Byron Acohido, Radio to the MP3 degree: Podcasting, USA TODAY, Feb. 9, 2005, available at http://www.usatoday.com/money/media/2005-02-09-podcasting-usat-money-cover_x.htm (“Like the blogging phenomenon, podcasts have come out of nowhere to attract an enthusiastic grassroots following. They’re being generated by a wide cast of characters — from professional broadcasters to rank amateurs. Listeners can download shows to their computers, or, with a bit of know-how, automatically export shows to an Apple iPod — hence the term ‘podcast’ — or any MP3 player.”).
8 Michelle Kessler, Storm clouds gather over podcasting, USA TODAY, Aug. 4, 2005.
about the application of the Copyright Act to this new communication technology.

Finally, the manuscript draws on the application of copyright law to podcasting in Part IV in order to make conclusions about the effect of new communications technologies on application of law. Discussion of these concepts is important in light of the reality that the law and future advances in communications technologies will shape one another.

II. **U.S. COPYRIGHT LAW**

Among other powers delegated to the federal legislative branch, the U.S. Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Legislators, jurists and scholars have written thousands of pages interpreting that single sentence, and today, copyright law is less defined by the Framers’ vision for it than the subsequent gloss placed on the Copyright Clause by 215 years of interpretation. For example, one scholar noted:

> Unlike every other power-granting clause, this was the only power-granting clause that specified the means and purpose to which the power was devoted. Congress was not given the power simply to enact copyrights. Nor was it simply given the power to enact copyrights for limited times. Congress was given the power “to promote the Progress of Science” by granting, not to publishers, but to authors, “exclusive Right[s]” “for limited Times.”

In this regard, it has been argued that the current direction of copyright jurisprudence has moved away from the Framers’ vision of promoting artistic expression toward a materialistic concern with compensating corporations that produce and distribute authors’ works.

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9 U.S. CONST., art. I, § 8, cl. 8.  
might pose First Amendment concerns,\textsuperscript{12} the Act’s protections for copyright holders have consistently been strengthened by Congress. For example, the term of copyrights in 1790 was a mere 14 years; now the term of copyright protection extends for life of the author plus 70 years.\textsuperscript{13}

The U.S. Supreme Court has responded to the claim that copyright law poses the threat of stifling speech by saying First Amendment values are protected because only expression – not ideas and facts – are subject to copyright.\textsuperscript{14} The idea-expression dichotomy, or definitional balancing, was illustrated in the case of a book publisher who sued the owner of \textit{The Nation} magazine for publishing unauthorized excerpts from a forthcoming autobiography of President Gerald R. Ford.\textsuperscript{15} Although the magazine argued that the excerpts contained historical facts, the Court concluded that \textit{The Nation} had infringed the publisher’s copyright by reproducing President Ford’s original expression about those facts.\textsuperscript{16} Nevertheless, the Court reiterated that “First Amendment protections [were] embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas. . . .” \textsuperscript{17}

The Copyright Act itself protects expression “in original works of authorship fixed in any tangible medium of expression.”\textsuperscript{18} Originality does not require a high degree of creativity or exclusivity; originality merely means the author demonstrated some

\textsuperscript{13} Lessig, \textit{supra} note 10, at 1063.
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} at 569.
\textsuperscript{17} \textit{Id.} at 560.
\textsuperscript{18} 17 U.S.C. § 102.
modicum of creative expression and did not copy the work of another creator. The current version of the Copyright Act protects works of authorship in numerous categories: literary works; musical compositions, including words; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures; sound recordings; and architectural works. The Copyright Act also protects the rights of those who compile the aforementioned works into a new creation and those who would prepare derivative works. The Copyright Act grants certain exclusive rights to copyright holders, meaning only the works’ creators or their designees can engage in these activities with respect to the copyrighted works: reproduction, preparation of derivative works, distribution of copies, and public display.

There is also a public performance right, but the reach of that right depends on the technology involved in transmitting the public performance. If the work is literature, a musical composition or a motion picture, then the copyright holder has the exclusive right to publicly perform the work. If, however, the work is a sound recording, then the public performance right only extends to digital audio transmission; analog audio transmission, such as a radio broadcast, is not covered. That is why terrestrial broadcast radio stations can play songs as many times as they like without compensating the record companies that own the copyrights in the sound recordings. The record industry calls this lack of a broad public performance right for sound recordings “an historical accident”

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that is unique to the United States and resulted because “broadcasters were simply too strong on Capitol Hill.”\(^{25}\)

In reality, however, there is ample evidence that Congress made a reasoned and logical choice not to grant a public performance right for sound recordings. Despite heavy lobbying by the record industry that began as early as the 1920s, Congress concluded – after protracted deliberation – not to grant a public performance right to sound recording copyright holders because the threat of piracy would be mitigated by the other rights afforded sound recording copyright holders.\(^{26}\) Those rights included protection against unauthorized reproduction, distribution and preparation of derivative works.\(^{27}\) With respect to lack of a public performance right for analog sound recordings, Congress concluded that the system served broadcasters, composers and the record industry alike because radio stations provided, essentially, free advertising for copyrighted music that led to album purchases.\(^{28}\)

Perhaps another reason for not granting a broad public performance right for sound recording copyright holders is the lingering notion that copyright in sound recordings is “thin.”\(^{29}\) The Supreme Court explained that copyright is thin when it involves very little creative expression on the part of the creator.\(^{30}\) Thus, the creator of a telephone directory had only a thin copyright because the compilation of facts for a


\(^{27}\) Id.

\(^{28}\) Id. at 12. See also Raffi Zerounian, Bonneville International v. Peters, 17 BERKELEY TECH. L.J. 47, 69 (2002). The relationship has been called “symbiotic . . . between the record companies and the radio stations who 'promote these songs to 75 percent of Americans who listen to the radio each day.'” Id. (quoting Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 106th Cong. 140 (2000) (statement of Edward O. Fritts, President, National Association of Broadcasters)).


\(^{30}\) Id.
telephone directory involved little originality; telephone book white pages arranged alphabetically are not “remotely creative” because alphabetical arrangement is “an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.” This may be similar to sound recordings, in which the creative expression largely comes not from the record label that records the music but rather from the artists who write and perform it.

III. **Podcasting: The Rise of Personal Broadcasting**

Internet broadcasting, a term commonly used to refer to several different methods of digital content delivery via the Internet, has recently emerged as a low cost alternative to traditional broadcasting. Although there are many delivery methods, two specific methods have shown an exceptional ability to deliver high quality audio content to audiences both large and small: streaming and podcasting. Streaming emerged as a viable delivery method in the last decade. But podcasting seems on the surface to be the younger brother that will break all the records.

Streaming and podcasting share many common technological aspects, but they are also quite different. These similarities and differences raise questions as to their current and future treatment in copyright legislation. Further, it seems at this early stage that podcasting content is seriously inhibited by complicated and vague licensing processes and regulations; many podcasters that would serve up music format shows have been relegated to the waiting line, waiting for licensing that may never come. This section outlines the background and technical aspects of streaming and podcasting, with an emphasis on podcasting. First, we consider streaming, highlighting the legal challenges it

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31 *Id.* at 363.
32 *See supra* note 3 and accompanying text.
has faced. Then, we present podcasting with technical explanations to point out its similarities and differences with streaming. Finally, we consider the current trends in streaming and especially podcasting so as to assess its potential impact on copyright legislation, the recording industry, and traditional radio.

A. Streaming

Streaming (also known as webcasting, web radio, Internet broadcasting, and Internet radio) delivers real time digital audio content from a server to a listener across the Internet. A listener can use software to “tune in” to a specific Internet station and listen to what is currently being played at that moment, much like traditional radio. Those who broadcast internet stations can be described in essentially two basic categories: (1) AM/FM re-broadcasters – broadcasters of traditional terrestrial radio stations who concurrently channel (via live streams or archives) their broadcasting message via the web, and (2) webcasters (or Internet broadcasters) – individuals or groups who broadcast an audio message, exclusive to the Internet via streaming technology.

The advent of streaming technology came to center stage in 1995. That year RealNetworks introduced the RealAudio player, which allowed Internet users to “tune in” to web broadcasts. On the day of introduction, 100,000 users downloaded the player.\(^{33}\) Internet radio was soon in regular usage by millions of Americans.\(^{34}\) Now, in addition to the RealAudio player, users can tune in to Internet stream using a wide range of software tools. Like RealNetworks, companies like Apple and Microsoft also develop free

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software which allows users to simply connect to a unique Internet stream address (analogous to visiting a web site or tuning in to an FM station) and listen in.

When considering copyright principles, it is important to note two aspects of streaming. First, by necessity a stream uses file compression to reduce the amount of data needed to be transferred second by second. This in turn reduces the bandwidth costs and allows users to hear fairly high quality sound on a low bandwidth connection – even dialup modem speeds. The end result is audio of a reduced quality compared to the original recording.

Second, when using an Internet stream, the sound files are not downloaded. The streaming software is designed to receive packets of data in a sequence and then play them through the computer’s speaker in the designated order. Once the packets are played, they are discarded to make room for the other packets to follow. As explained by one reporter, “[s]reaming protocols make sure you get the notes of the song in the right order and at exactly the right time.”

At any given moment the station may be broadcasting a live event (such as a music concert) or may be playing pre-recorded material, such as a playlist of songs. In either case, the audio content is passed over to the listener as it happens (i.e. real time), without the need for a long download.

B. Podcasting

Podcasting is a way to distribute digital audio content over the Internet with the end goal that the content will be downloaded by a subscriber using subscription software, such as iTunes, then synced to the listener’s portable MP3 player for later listening. The

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35 Jim Heid, Streaming Audio – Lots of music, no wait. Find out how Internet radio gets from the Web to your PC without delay, PC WORLD, April 10, 2000, at http://www.pcworld.com/howto/article/0,aid,16060,pg,1,00.asp (last visited Oct. 6, 2005).

36 Id.
term podcasting gets part of its name from Apple’s ubiquitous iPod because of the notion that podcasts would likely be listened to on an iPod. However, an iPod is only one way of many to listen to the shows. Each individual podcast (episode) is a single MP3 file of audio content which is downloaded to the computer of the listener. Listeners can listen to the shows on their computers, directly from the web, or on a portable MP3 player.

One online encyclopedia describes podcasting this way:

Podcasting is a method of publishing audio broadcasts via the Internet, allowing users to subscribe to a feed of new files (usually MP3s). . . . Podcasting is distinct from other types of online media delivery because of its subscription model, which uses a feed (such as RSS or Atom) to deliver an enclosed file. Podcasting enables independent producers to create self-published, syndicated “radio shows,” and gives broadcast radio programs a new distribution method. Listeners may subscribe to feeds using “podcatching” software (a type of aggregator), which periodically checks for and downloads new content automatically.37

The most distinctive quality of podcasting is the ability to “time-shift” digital audio content.38 Time shifting is the result of downloading an audio program for later listening.

It is difficult to identify a logical starting point from which to describe the evolution of podcasting. Many macro factors could be included, such as the development of the Internet, the rise of file transfer software, or the emergence of the CD and its accompanying digital storage format. Streaming has enjoyed some success due to these and other factors. Yet, when considering the adoption of podcasting, there are three macro factors that have contributed notably: audio compression, bandwidth, and the iPod.

The MP3 format is now well established as an audio format39 that allows for relatively high quality audio to be compressed into roughly 1 MB per minute (about 10

38 Acohido, supra note 7.
percent of its full-quality size) with very little perceivable quality loss. In full-quality form a 30-minute recording could be over 300 MB, rendering it unusable for quick Internet exchange, whereas its compressed form could be 30 MB or less. Further, many software recorders allow the option of changing the bit rate (the quality of the recording) of audio files. Shorter podcasts may use a higher bit rate for the recording which will mean larger, but still manageable, files. Longer podcasts, especially talk shows, can use a low bit rate which can greatly reduce the final file size with very little quality loss.

The second important development contributing to the rise of podcasting is bandwidth improvement. The proliferation of high-speed Internet connections means that a podcast can be easily and quickly transferred to many listeners. A 30-minute podcast will be typically 15-30 MB (depending on the compression technique). At a common transfer rate, a 20 MB file may take less than two minutes to download.

In October 2001, Apple Computer introduced the iPod, a “breakthrough MP3 music player” designed to hold 1,000 songs in an ultra-portable device. Apple also developed accompanying software, iTunes, to ease the transfer of songs from the computer to the iPod. Although podcasts can be listened to on any device that will play a compressed audio file (iPods, other portable MP3 players, palm pilots, computers), the portability and ease of use of both the iPod and iTunes seem to be major contributors to

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40 Heid supra note 35.

In September 2002, Dave Winer of Userland Software (a maker of server blogging systems), released RSS version 2.0, which allowed for web syndication with attachments. The ability to attach audio files to a blog constituted the birth of podcasting. Winer was in part responding to requests from a user of Userland Software, former MTV jock Adam Curry, who began adding attachments and created a podcast called the Daily Source Code.\footnote{Wikipedia, \textit{supra} note 37.} Winer also began releasing his own content. At the Democratic National Convention in 2004, Winer collected audio recordings and published them as attachments on his blog. “There was starting to be enough content to catch people’s attention,” one reporter noted.\footnote{Andy J. Williams Affleck, \textit{Podcasting: The People’s Radio}, \textsc{TidBITS}, Feb. 14, 2005, at http://db.tidbits.com/getbits.acg?tbart=07986 (last visited Sept. 24, 2005).}

However, their job was not yet complete; the audio files could be listened through the web, but there was still no way to download the attachments and put them on a portable MP3 player. It was at that point that Curry created the first version of iPodder software, designed to specifically “catch” (i.e. download) the podcast file and then facilitate the transfer to the portable device.\footnote{S. Crofts, J. Killey, M. Fox, A. Retsema, \& B. Williams, \textit{Podcasting: A new technology in search of viable business models}, 10(9) \textsc{First Monday} (2005), at http://firstmonday.org/issues/issue10_9/crofts/index.html (last visited Sept. 27, 2005).} With the combination of the upload and download methods in place, podcasting was launched. The term “podcasting” was first used in September 2004. By December the term could be easily found in the press.\footnote{Affleck, \textit{supra} note 44.}
In June of 2005, podcasting was pushed into the mainstream with the release of iTunes 4.9, which added both a podcast receiver and a podcast listing service.\(^47\) iTunes software is used to both receive podcasts and sync the files to the iPod. This had a dramatic effect on listenership. Curry noted that this change would “introduce tens of millions of new listeners to the world of Podcasting.”\(^48\) Only three weeks later, Apple had already claimed over 5 million podcast subscriptions.\(^49\)

Podcasting owes its roots to blogging. Essentially, podcasting is an extension of weblog ("blog") technology, with one important difference: the addition of an attached file. The attached file is handled through the use of an RSS file. To understand how podcasting works, it is helpful to also discuss blogging, syndication, and the importance of the RSS file.

A blog (or “web-log”) can be used as an efficient way to add text content to a web site, similar to a daily journal. Bloggers add new entries through a simple web site interface which immediately publishes the entry to a web page. Many bloggers also choose to syndicate their content.

Syndication is simply a way to make periodic content available to many outlets from one publisher. Web syndication is a way to deliver standardized web content to other web sites or to software aggregators. An aggregator is a software program that receives the syndicated web content. An aggregator may either be a computer program (like iTunes) or a web site. Aggregators are also known as “news readers” and (in the

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\(^{49}\) Aline van Duyn, *Podcasters make easy listening*, FINANCIAL TIMES, August 29, 2005.
case of podcasting) “podcatchers.” Blogs can deliver their content through syndication using a programming format called RSS.

“Really Simple Syndication” is the backbone of syndicated blogging, which is the backbone of Podcasting. Essentially, RSS is nothing more than a standardized way of handling web content. An RSS file is written in XML code that simply sets out a format for the syndication feed information. In simpler terms, it is a formatting plan. When an aggregator requests the RSS “feed,” the web server gives the formatted content to the aggregator. In the case of a podcast, the content contains an attachment (the audio file).

When all of these aspects are orchestrated properly, an audio file can be easily uploaded to a public location, published through a web interface, then automatically downloaded by a listener. Once the file is downloaded, the listener can sync it to their iPod simply by plugging the iPod into the computer.

C. **Similarities and Differences Between Podcasting and Streaming**

Both streaming and podcasting use a form of compression to reduce the size of the audio file to make the delivery possible. Compression ratios are selected by the sender and the original full-quality audio (if it exists) cannot be extracted by the receiver. In other words, what is sent is exactly what is received.

Streaming and podcasting do differ in some significant ways, however. First, the content delivered through a stream can only be listened to once: at the time of delivery (analogous to an AM/FM broadcast). A podcast, on the other hand, must be downloaded and therefore can be time-shifted: listened to at will, paused and rewound (analogous to TiVo for television broadcasts).
Second, because of the necessity for embedded time-code information, synchronous transmission, such as the type used for streaming, uses more bandwidth than asynchronous, the delivery method for podcasts. When podcasts are downloaded (asynchronously), the downloads are delivered at the maximum speed of the server, varying over time.\textsuperscript{50} But since that speed can vary, the outcome is a much lower usage of server bandwidth. Less bandwidth equals less cost, allowing podcasters to broadcast to a large audience with relatively little overhead.

The following table identifies the similarities and differences:

<table>
<thead>
<tr>
<th>Streaming</th>
<th>Podcasting</th>
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<tbody>
<tr>
<td>High quality compressed digital audio content</td>
<td>High quality compressed digital audio content</td>
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<tr>
<td>Real time or live content</td>
<td>Time shifted content</td>
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<tr>
<td>Synchronous file transfer (streams have</td>
<td>Asynchronous file transfer (downloads spread</td>
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<tr>
<td>embedded time code and hence higher bandwidth usage)</td>
<td>over time, less bandwidth usage)</td>
</tr>
<tr>
<td>No file downloads</td>
<td>One downloaded MP3 file per podcast</td>
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**D. Podcasting and Copyright Law**

The music composition performance rights societies – ASCAP, BMI and SESAC – and the composition mechanical rights licensing agency, Harry Fox, have not given clear guidance to podcasters about whether and how to obtain licenses for podcasting copyrighted music recordings. The Harry Fox Agency, which licenses reproduction and distribution – but not public performance – of the musical compositions underlying sound

\textsuperscript{50} Tampa Bay Interactive web site, at http://telecom.tbi.net/sync-async.htm (last visited Sept. 24, 2005).
recordings, wrote in its *Soundcheck* newsletter in May 2005 that it planned to “continue to monitor the development of podcasting and associated licensing opportunities.” It’s debatable whether podcasts would have to obtain licensing agreements with Harry Fox Agency, but Harry Fox itself somewhat tentatively concluded that “[s]ince users download podcasts, it seems that music distributed through this platform – assuming it is not altered (e.g. fragmented or interspersed with other audio content), accompanied by visual content or used for commercial purposes – would appropriately be licensed as [digital phonorecord deliveries].”

A digital phonorecord delivery, or DPD, is defined by the Harry Fox Agency as a “full, permanent download.” In other words, it is “each individual delivery of a phonorecord by digital transmission of a sound recording (embodying a musical composition) resulting in a reproduction made by or for the recipient” and it “reside[s] on a recipient’s computer indefinitely.”

Harry Fox treats podcasts the same as physical phonorecords for the purposes of statutory licensing, meaning a podcaster would pay the same as a traditional broadcaster for the right to play a musical composition embodied in

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52 Id.


54 Id. The Copyright Act similarly defines digital phonorecord delivery as each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

a recorded song.\textsuperscript{55} Thus, podcaster would pay Harry Fox “8.5 cents per download for songs under 5 minutes or 1.65 cents per minute for songs over five minutes.”\textsuperscript{56} Every three months, the podcaster would have to submit to Harry Fox a royalty payment along with a royalty layout (an Excel spreadsheet provided by Harry Fox and filled out by the podcaster).\textsuperscript{57} The podcaster must make the payments for each download regardless of whether the podcaster charges his or her users.\textsuperscript{58}

Additionally, at the outset of the relationship between the podcaster and Harry Fox, the podcaster is required to fill out a four-page application form.\textsuperscript{59} The form requires basic personal and corporate information as well as a business plan, estimate of annual gross receipts, a “security white paper” describing copyright protection measures, such as encryption, and credit references.\textsuperscript{60} Additionally, the form queries would-be podcaster about whether they have also obtained a master use license from the record companies in order to reproduce, distribute and perform the sound recordings.\textsuperscript{61}

Meanwhile, the public performance rights in musical compositions – but not sound recordings – are administered by ASCAP, BMI and SESAC. At the beginning of 2005 ASCAP announced two new “experimental” versions of its Internet music licensing agreement: Non-Interactive 5.0 and Interactive 2.0.\textsuperscript{62} Non-interactive 5.0 would be appropriate for podcasts that do not offer advance playlists or program guides, but most

\textsuperscript{55} See Harry Fox Agency, supra note 35.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{60} Id. at 2.
\textsuperscript{61} Id. at 3.
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podcasts would seem to fall under the description given for Interactive 2.0.\(^63\) The 14-page agreement constituting Non-Interactive 5.0 requires a minimum annual fee of $288, annual reports and quarterly payments.\(^64\) Meanwhile, the 14-page Interactive 2.0 agreement has a different rate calculation, with an annual minimum of $340.\(^65\)

On May 9, 2005, BMI attempted to respond to podcasting’s popularity by announcing a podcast series called “See It Hear First.”\(^66\) At the same time, BMI said that its “licensing website has been expanded to provide a clear path for podcasters to get more information on licensing music for their programs and to obtain BMI licenses 24 hours a day, 7 days a week.”\(^67\) BMI also said it already had been licensing podcasters for one year and that notable podcasters such as Coverville.com and Keener13.com had signed on to the BMI podcasting agreement.\(^68\) In reality, BMI’s “Website Music Performance Agreement” is used both for webcasting, or streaming, and podcasting.\(^69\)

Under the 12-page BMI Website Music Performance Agreement, podcasters and other webcasters pay licensing fees according to their revenues. If annual revenue is less than $15,000, podcasters will pay the annual minimum fee, which is $283.\(^70\) For podcasts with annual revenue over $15,000, the license fee would be calculated as 1.75

\(^{63}\) See id.
\(^{67}\) Id.
\(^{68}\) Id.
percent of gross revenues or as a factor of music revenues.\footnote{Id.} Podcasters with under $50,000 in annual revenues must account for royalties annually, while podcasters with more than $50,000 in revenues must account quarterly.\footnote{Id.} Perhaps reflecting recognition that its Website Music Performance Agreement did not address the specific situation of podcasters, BMI said in May 2005 that “BMI plans on rolling out additional licensing programs for [podcasting] as it grows.”\footnote{BMI, BMI Launches New Songwriter/Artist Podcast; Licenses Podcasters in Nationwide Initiative, May 9, 2005, at http://bmi.com/news/200505/20050509a.asp (last visited Oct. 8, 2005).}

The six-page “SESAC Internet License,” like the similar license agreements by BMI and ASCAP, does not specifically address podcasting.\footnote{SESAC, SESAC Internet License, at http://www.sesac.com/pdf/internet_2005.pdf (last visited Oct. 8, 2005).} The minimum annual fee is $168.\footnote{Id.} Given that BMI, ASCAP and SESAC all represent different composers, or songwriters, it would appear that any podcaster playing a variety of music recordings would need to comply with the licensing agreements of all three agencies. Doing so would give the podcaster permission to publicly perform the compositions. The podcaster also may need to comply with the Harry Fox licensing agreement in order to have permission to reproduce and distribute the compositions. In order to gain permission to publicly perform the sound recordings, however, the podcaster would have to go to the record labels that own the sound recording copyrights or their designees. This is where podcasters seem to hit a brick wall.

SoundExchange administers statutory licensing for sound recording copyright owners. SoundExchange members include major record labels such as Sony BMG and
Warner as well as more than 1,000 independent record companies. SoundExchange notes that there is no statutory license scheme for podcasters. Instead, the statutory license covers sound recording public performances by non-interactive webcasters; digital radio; and digital and cable television. SoundExchange thus suggests that since podcasts do not qualify for the statutory license because they are interactive in nature, podcasters would have to – in addition to complying with the licensing requirements of Harry Fox Agency and SESAC, BMI and ASCAP – obtain a master use license agreement from individual record companies. The prospect of having to negotiate a master use license for each individual sound recording is “a disaster, of course,” in the words of one blogger.

Assuming that podcasters qualified for a statutory license as eligible small webcasters, whose annual revenues must be less than $1,250, the annual minimum fee would be $500. But there is a significant debate about whether podcasts are “interactive” within the definition of the Copyright Act. If they are not interactive, they might qualify for the statutory license and SoundExchange would have to begin working with podcasters. If they are interactive, then SoundExchange is correct that podcasters would have to obtain master use licenses unless Congress modified the Copyright Act to include podcasters as those eligible for the statutory license.

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78 Id.
Section 114 of the Copyright Act specifies the services that are eligible for statutory licensing. Podcasting conceivably could come under the definition of a “subscription digital audio transmission” if the podcaster charges his or her users. Even though podcast listeners must “subscribe” to the podcast by indicating they want to receive the RSS feed, a subscription transmission is one “that is controlled and limited to particular recipients, and one for which consideration is required to be paid. . . .” More likely, a podcast could be “an eligible nonsubscription transmission.” However, in order to meet this definition, podcasts would have to meet multiple requirements. First, the podcast must be noninteractive. Interactive means that the content is “specially created for the recipient” or the recipient is able to request and select a particular sound recording. Podcasts, with content determined by creators rather than recipients, would seem to qualify as noninteractive.

Second, the eligible nonsubscription transmission must provide audio programming primarily for entertainment purposes rather than primarily “to sell, advertise, or promote particular products or services other than sound recordings. . . .” Podcasts consisting of music and talk apparently would meet this requirement. Third, in order to be an eligible nonsubscription transmission, the podcast must not exceed the “sound recording performance complement,” meaning that a podcast could not, within a three-hour period of time, transmit more than three songs from a single album or four

82 Id. § 114(j)(14).
83 Id. § 114(d)(2).
84 Id. at § 114(j)(6).
85 Id. § 114(j)(7).
86 Id. § 114(j)(6).
87 Id. § 114(d)(2)(C)(i).
songs from a given artist.\textsuperscript{88} Fourth, the podcast could not advertise in advance its playlist or program of scheduled songs.\textsuperscript{89}

Fifth, in order to qualify for the statutory license as an eligible nonsubscription transmission, the podcast must not be an archived program of less than five hours long.\textsuperscript{90} In other words, if podcasters are going to archive their programs, the archived programs would have to be more than five hours long. This requirement may reflect a concern with users being able to identify and extract particular sound recordings from shorter archived programs.\textsuperscript{91} But, sixth, even if the archived program is longer than five hours, the archive may not be made available for longer than two weeks.\textsuperscript{92} Seventh, if the program is played in a continuous loop, then it must be longer than three hours.\textsuperscript{93}

Perhaps the biggest obstacle for podcasts to overcome, however, would be the requirement that they not “take\ldots affirmative steps to cause or induce the making of a phonorecord by the transmission recipient.\ldots”\textsuperscript{94} Because podcasts do seem to induce recipients to make copies of the programs by downloading them, it would seem this requirement could make most podcasts of music sound recordings ineligible for the statutory license through SoundExchange. One blogger commented on this non-inducement rule: “Since the whole purpose of podcasting is to induce a large audience to

\begin{itemize}
\item[]\textsuperscript{88} \textit{Id.} § 114(j)(13).
\item[]\textsuperscript{89} \textit{Id.} § 114(d)(2)(C)(ii).
\item[]\textsuperscript{90} \textit{Id.} § 114(d)(2)(C)(iii)(I).
\item[]\textsuperscript{92} 17 U.S.C. § 114(d)(2)(C)(iii)(II).
\item[]\textsuperscript{93} \textit{Id.} § 114(d)(2)(C)(iii)(III).
\item[]\textsuperscript{94} \textit{Id.} § 114(d)(2)(C)(vi).
\end{itemize}
make a phonorecord (i.e. make a downloadable copy) of a digital transmission, it looks like this clause would disqualify a podcast from receiving the [statutory] license.”

While some podcasts apparently have negotiated the licensing process through ASCAP, BMI and SESAC, it is not clear that any podcast at this point has convinced SoundExchange that the podcast is entitled to the statutory license as an eligible nonsubscription transmission. Keener13.com, which is operated by fans of the 1960s Detroit radio station WKNR, advertises that it is “copyright legal” because it has obtained licensing agreements with ASCAP, BMI and SESAC. Keener13.com says nothing about mechanical rights licensing through Harry Fox Agency, however. With respect to licensing for public performance of sound recordings through SoundExchange, Keener13.com says “we’re watching our friends at Coverville closely as they continue their conversations with SoundExchange” and that Keener13.com will “follow their lead.” The Seattle Post-Intelligencer wrote that 35-year-old Brian Ibbott, who podcasts on Coverville.com three times a week from his home in Arvada, Colorado, was working through licensing issues with the RIAA in an attempt to get podcast licenses for sound recording public performances.

IV. EFFECT OF REGULATION ON TECHNOLOGICAL DEVELOPMENT

It appears by the current state of the Internet broadcasting industry that record labels still don’t know what to do with podcasting. For example, FM broadcaster KCRW in Los Angeles currently offers a web stream of their well known music-format show

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97 Id.
Morning Becomes Eclectic. Listeners outside of Los Angeles can tune in to the KCRW web stream, or subscribe to a podcast of their talk shows. But Morning Becomes Eclectic is not offered as a podcast since no license arrangement is currently available.\footnote{Kessler, supra note 8.} Apparently record companies are concerned that granting licenses to podcasters will exacerbate the piracy problems.\footnote{Id.} Similarly, podcasting around the nation is largely talk-oriented rather than music-oriented because of concerns with copyright implications. Podcasters who do broadcast music seek artists who are not represented by the licensing agencies in order to gain permission without a raft of contractual and payment issues.

\textit{A. Podcasting Goes Talk or Podsafe}

A scan in October 2005 of some popular listing sites for Internet broadcasts showed quite a consistent yet polarized view of formats between streaming and podcasting, demonstrating a strong bias toward music formats with streaming stations, and a strong bias for talk-based format in podcasts. Shoutcast,\footnote{http://www.shoutcast.com.} a leader among Internet streaming technologies, lists hundreds of Internet streaming stations that use Shoutcast servers. The top 20 streaming stations (rated by number of current listeners) were all music format streams, ranging in genre from “Classical Easy Symphonic” to “Trance Techno Dance.” Another popular streaming audio location is Yahoo’s radio service, LAUNCHcast Radio,\footnote{http://music.yahoo.com/launchcast.} which offers access to over 120 commercial-free Internet radio stations. Many stations are free of service charge, and many higher sound quality stations can also be accessed for a nominal annual fee. All of the listed stations were music format.
On the podcasting front, however, the scene is much different. Odeo, one popular podcast directory, lists its top 20 podcasts by subscription numbers. Of the top 20, only two were music format programs. These were (#10) Free Radio Sub Pop, which plays music from the Sub Pop music label, and (#15) Tracks up the Tree, which “only play[s] music from artists’ websites who make their tracks available online.”

It should be noted that many of the talk-format top 20 podcasts, such as Adam Curry’s Daily Source Code, play an occasional “podsafe” song during the show, meaning the sound recording copyright owners are not represented by the major performing rights agencies.

Podcast Alley, a podcast listing service, lists the most popular podcasts ranked by votes cast from listeners. Of the top 20, only #20, MusicNerve, is a music-format podcast. This podcast “is an eclectic mix of just about every type of music. . . . If people call it music and it has a purpose other than filling the pockets of the major labels we hope to share it with you.”

iTunes Podcast Directory also maintains a list of top subscribed podcasts. Of the top 20 on October 3, 2005, only one was in the “Music” category (#3, iTunes New Music Tuesday – selected free songs from the iTunes music store), and one other with a music theme (#17, NPR Music – a music review excerpt). All other programs were non-music based.

Podcastalley listed 7,539 podcasts with 1,742 listed in the Music category.

iTunes podcast listing database, which claims to list over 15,000 podcasts, showed 759

podcasts in the music category. However, even in spite of the low percentage of music-format shows, many, if not most of these podcasts are playing “podsafe” music or are operating without licenses from the requisite agencies.

One notable exception to the trend away from music format in podcasting is the show Coverville, created by Brian Ibbott. Coverville touts itself as a “30 minute music podcast featuring rare, unusual and great cover songs, usually produced three times a week. Licensed with ASCAP and BMI.” Coverville has received much media attention since its birth and has just celebrated its one year anniversary (having produced 135 biweekly shows). Ibbott, however, still waits for a licensing agreement from the record labels.

Podcasters, fed up with record labels’ restrictive copyright enforcement and perhaps not fully comprehending the complicated aspects of copyright licensing, are doing their best to go around licensing agencies. The Rock’n’ Roll Geek Show, a well-known podcast from San Francisco, plays music from independent and unsigned bands, widely known to podcasters as “podsafe” music. Michael Butler told the San Francisco Chronicle that in January 2005 he had 156,000 downloads of his show. “It’s blowing up,” he said. “It’s one of the most exciting things that has happened since the beginning of the Internet.”

Adam Curry and his colleagues have orchestrated the PodSafe music network, an online meeting place for podcasters and musicians, with the stated intention to “give

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112 Personal correspondence, Feb. 21, 2005.
podcasters access to music, other content and tools to create royalty-free podcasts.”

The basic attraction of podsafe music for podcasters is the absence of record label control, which allows podcasters to play the podsafe music they like, whenever they choose. For unsigned and independent musicians, the PodSafe music network gives them the opportunity to be heard by a large audience. Ron Bloom, CEO of the parent company PodShow, said, “By empowering artists and podcasters, we have created the framework for an entirely new form of music promotion and discovery to emerge.” In August 2005 Bloom and Curry collected $8.85 million in venture capital funding.

**B. Appropriateness of Regulation Based on Communication Medium**

For as long as communication has evolved, governments have sought to regulate each new medium of expression because of a belief that technology afforded mediated communication some special influence that needed to be kept in check. Contemporary with the advent of printing in England in the late 15th century, for example, first the English Church and later the King asserted the prerogative to approve printed materials before publication. Throughout the 16th and 17th centuries, English publishers chafed under a variety of licensing regimes, including several licensing decrees by the infamous Star Chamber. In 1644, John Milton published *Areopagitica*, a powerful argument against a parliamentary licensing scheme.

In the American colonies, governments continued the English tradition of licensing. The first American newspaper, Benjamin Harris’ *Publick Occurrences Both*

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115 *Id.*


117 *Id.* at 298-306.
Forreign and Domestick, was shut down by the Massachusetts governor and legislature after just one issue in 1690 because it lacked a license. After the adoption of the First Amendment as part of the Bill of Rights in 1791, 140 years passed before the Supreme Court clearly established that government could not engage in such prior restraint of the printed word. But even the First Amendment and subsequent Supreme Court jurisprudence did little to defeat the notion that government could regulate speech on new forms of communication with different constitutional standards.

For example, the Supreme Court did not recognize the right to be free from a motion picture censorship statute, as asserted by an early 20th century Ohio film distributor. Although this case, Mutual Film Corporation v. Industrial Commission of Ohio, took place before the Supreme Court even held the First Amendment applicable to the states under the doctrine of incorporation, its treatment of the protections afforded – or not afforded – to new media are illuminating. Having recognized that the rights to freedom of opinion and expression were “too certain to need discussion,” the Court nevertheless concluded that motion pictures – along with “the theater, the circus, and all other shows and spectacles” – did not deserve the same protections accorded to the press. The Court regarded the new communications medium of motion pictures as non-expressive conduct, which was “amenable to the law,” rather than opinion, which was free:

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other

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118 Id. at 314-15.
119 See Near v. Minnesota, 283 U.S. 697 (1931) (“Any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.”).
120 See Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230 (1915).
121 See Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (asserting that the Fourteenth Amendment’s due process guarantee made the First Amendment applicable to the states).
122 Mutual Film Corp., 236 U.S. at 243.
spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.\(^\text{123}\)

Later, the Supreme Court encountered another new medium of communication: sound amplifiers. When a New Jersey man was convicted of violating an ordinance that prohibited operation of a sound truck emitting “loud and raucous noises” on a public street, the Supreme Court did not act to protect speech interests but rather held that the regulation was an appropriate exercise of the state’s police power.\(^\text{124}\) The Court made a distinction between the noisy and raucous sound truck, which it acknowledged might reach more listeners than unmediated speech, and the by-then more traditional forms of communication such as newspapers.\(^\text{125}\)

Twenty years later, the Supreme Court justified its differential treatment of broadcast media not because broadcast communication did not constitute speech but rather because of the unique characteristics of broadcast media. The Court synthesized in *Red Lion Broadcasting Co. v. Radio Television News Directors Association* the principle that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”\(^\text{126}\) The Court did not, however – in *Red Lion* nor any subsequent case – expound a standard for gauging the appropriateness of the

\(^\text{123}\) Id. at 244-45.
\(^\text{125}\) Id. at 89.
differential First Amendment treatment with the unique characteristics of a given new medium. Rather, the Court in Red Lion asserted only that the scarcity of broadcast frequencies allowed the government to enforce the fairness doctrine by requiring broadcasters to allow individuals and groups to respond to personal attacks made in the presentation of views on issues of public importance and by requiring broadcasters to allow a political candidate to respond to an editorial. In later opinions, the Court seemed increasingly focused on broadcast media’s pervasiveness and accessibility to children rather than scarcity as the unique characteristic justifying medium-based regulation.\(^\text{127}\)

During subsequent years, the Court perpetuated its failure in Red Lion to articulate any standard for measuring the appropriateness of medium-based regulation, or differential treatment of new media based on unique characteristics. With respect to cable television, for example, the Court again recognized differences in the characteristics of the medium when compared to other media. The Court stated in 1994 that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation.”\(^\text{128}\) This was so because “cable television does not suffer from the inherent limitations that characterize the broadcast medium.”\(^\text{129}\) But the Court again failed to expound a test for measuring the extent to which unique medium characteristics justified different constitutional treatment, and the Court held only that the must-carry provisions at issue in Turner Broadcasting System v. FCC were not content-based and should therefore be reviewed under an intermediate scrutiny standard rather than under strict scrutiny.

\(^\text{128}\) Turner, 512 U.S. at 637.
\(^\text{129}\) Id. at 639.
Three years later, the Court concluded that the must-carry provisions were constitutional in that the government had satisfied its burden under intermediate scrutiny to show that it had an important interest in preserving over-the-air local programming and that its interest was narrowly tailored by requiring cable operators to carry the over-the-air programming.\(^{130}\) But the Court here noticed another unique characteristic that it suggested justified different constitutional standards for cable television: concentrated ownership. The economic characteristics of cable supported Congress’s finding that cable television systems would be likely to drop local over-the-air programming, the Court said.\(^{131}\)

The most recent major new communications medium to come to the Court’s attention was the Internet.\(^{132}\) In 1997 in \textit{Reno v. ACLU}, the Court took great pains to describe the Internet as it existed then.\(^{133}\) Yet despite its efforts to define the unique

\(^{130}\) Turner Broadcasting System v. FCC, 520 U.S. 180 (1997).
\(^{132}\) Reno v. ACLU, 521 U.S. 844, 850 (1997) (“The Internet is a unique and wholly new medium of worldwide human communication.”) (citation omitted).
\(^{133}\) The Supreme Court described the Internet of 1997:

The Internet is an international network of interconnected computers. . . . [Early government-sponsored innovations] provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. . . .

The number of “host” computers – those that store information and relay communications – increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999. . . .

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services (“mail exploders,” sometimes referred to as “listservs”), “newsgroups,” “chat rooms,” and the “World Wide Web.” All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. . . .

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the
characteristics of the Internet when compared with other communications media, the Court once again did not articulate a standard for measuring the extent to which those unique characteristics justified different constitutional treatment. Rather, the Court stated only that the Internet did not suffer from medium scarcity and was not as invasive as radio or television and therefore was entitled to greater speech freedom than broadcast media.134

Given the Copyright Act’s current differential treatment of podcasting when compared with broadcast radio, or even streaming, Congress should re-assess the situation to ensure that the unique characteristics of podcasting justify this treatment. If there is not a sufficient government interest in failing to grant podcasters sound recording public performance licenses under the statutory scheme, then Congress should remedy the situation. Due to podcasting’s potential for serving the constitutional purpose of copyright law by promoting progress of artistic expression, the development of this new technology should not be unduly stifled by regulation.

Copyrights in recorded music pose a particular risk to stifle the ability of future creators to build on previous works of authorship. For works of literature, the idea-expression dichotomy protects the ability of future authors to use and build on the ideas

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Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web “pages,” are also prevalent. . . . Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. . . .

Id. at 849-53.

134 521 U.S. 844.
of others. But for recorded music, both the idea – in the form of the copyrighted musical composition – and the expression of the idea – in the form of the sound recording – are protected by the current iteration of the Copyright Act.\textsuperscript{135} In some sense, then, this provides particularly strong copyright protection for recorded music that is not present in other formats. In light of that reality, copyright law should be especially vigilant about the additional protections it provides in the digital format that are not present in the analog context. Granting too tight control to authors and creators may pose the risk of undermining the ability of future authors and creators to serve copyright’s constitutional purpose by advancing the progress of society through creating their own new works.

V. CONCLUSION

Currently, podcasters largely gravitate toward talk-oriented programs rather than music-oriented programs. This appears due in large part to the copyright licensing agencies’ complicated processes and unwillingness to concede that podcasters might be entitled to the statutory license under the Copyright Act. Meanwhile, some podcasters have circumvented the record labels and their licensing agencies by locating and broadcasting “podsafe” music. This phenomenon demonstrates that the complicated and costly licensing regimes administered by the performance rights agencies may be less about providing an incentive for progress in creative expression and more about compensating the large corporations that hold sound recording copyrights.

The issue of whether medium-based regulation is appropriate will continue to be important as technology evolves. Podcasting’s unique characteristics – high quality compressed digital audio, interactivity, time shifting, asynchronous delivery and ease of reproduction and distribution – may well justify different copyright law treatment than,

\textsuperscript{135} See supra notes 14-17 and accompanying text.
for example, streaming. But Congress and the courts must not allow that to be so simply as a default. Rather, the differential treatment must be justified. Currently, the courts have no mechanism to determine whether differential treatment based on technology is justified. In the future, advances in technology will demand that such a test be devised and put to use, or continuing pressures by copyright holders will take the Copyright Act even further from its constitutional roots.