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# Streaming Audio and Licensing: What Libraries Need to Know

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The number of ways streaming audio can be used in a library is limited only by the imagination of the individual librarian. Possible uses for streaming audio in libraries can be broken down into audio created by the library and audio created by other parties.

Library uses of audio created by other parties could include allowing patron access to individual streamed programs on a “check-out” basis, allowing patrons access to a continuing series of streamed programming in a sort of “streaming audio club,” providing streaming media to a group of patrons gathered in a meeting room or auditorium, using streaming media as background noise in the library itself, or retransmitting Internet radio streams. Streaming audio featuring programming created by the library can be used in all the above ways with the obvious exception that the library won’t “retransmit” self-created programming.

Before discussing the relationship between U.S. copyright law and the use of streaming media, a caveat and a definition are in order. First, there is virtually no case law in this area, which means that the legal landscape is not as well developed as it will be in the future.

Secondly, readers should recall the distinction between “downloading” and “streaming.” Downloading involves making a copy of a specific digital work into the recipient’s computer; it is more or less permanent, and cannot be listened to during the downloading process. Streaming, on the other hand, is more like a live performance in that it plays only once on the recipient’s computer, which is when it is streamed. No copy remains in the recipient’s hard-drive.<sup>2</sup>

As readers know from previous editions of *Against the Grain*, copyright law is mandated by the Constitution,<sup>3</sup> and the *Copyright Act* gives authors and artists certain exclusive rights, such as the rights to copy, perform, and distribute their works.<sup>4</sup> Initially, the types of work given protection rights included creations such as music, written works such as prose, poetry and plays, movies, and artwork.<sup>5</sup>

In 1971, **Congress** extended certain protections to the holders of the copyright in sound recordings of copyrighted works.<sup>6</sup> For the first time, not only did the creator (e.g., the songwriter or composer) of the substance of a recorded work have a copyright, but the entity which created the recording (e.g., a record company) also had a copyright in the recording itself. Thus, each recorded song actually has two copyrights: one in the artistic work, and one in the sound recording.

Because the *Sound Recording Act* was intended only to stop the illicit copying of commercially-produced recorded works,<sup>7</sup> the copyright protections granted to sound recordings were more limited than those granted to

holders of the copyright in the underlying material. This meant that the holder of the sound recording copyright could prevent the unauthorized *copying* of the sound recording, but was not given the right to prevent the unauthorized *public performance* of the sound recording.<sup>8</sup> Broadcast radio stations continued operating as before, without having to pay royalties to the sound recording copyright (they continued paying royalties to the holder of the copyright in the creative work, as they had done previously).

There followed almost 25 years of effort by the recording industry to achieve from **Congress** the “full bundle” of copyright protections — including the right of public performance — for sound recordings. Industry efforts, combined with technological developments enabling instantaneous, widespread and high-quality copying of digital material, led to the *Digital Performance Rights in Sound Recordings Act of 1995 (DPRSA)*.<sup>9</sup> The *DPRSA* gave the holders of the sound recording copyright (e.g., record companies) the ability to prevent the unauthorized performance in digital format of their materials.

The *DPRSA* made certain classifications of streaming audio which are pertinent to a discussion of the use of streaming audio in libraries; each type of classification is regulated differently under the *Act*. The classifications, and differing regulatory schemes, are based on whether audio streams are subscription or non-subscription, and whether they are interactive or not interactive.

At the time *DPRSA* was enacted, the record companies perceived the biggest threat to their financial health as coming from interactive subscription services which would allow customers to individually pick songs they would listen to, with payment going to the digital transmission service rather than the sound-recording copyright holder.<sup>10</sup> **Congress** responded to concerns about these types of “celestial jukebox” or “audio-on-demand” services by granting sound-recording copyright holders the “exclusive right”<sup>11</sup> to perform the work “publicly by means of a digital audio transmission.”<sup>12</sup> In other words, anyone other than the sound-recording copyright holders digitally transmitting (i.e., streaming) the work without permission of the copyright holder is liable for copyright infringement.

Subscription services that weren’t interactive were made eligible to receive compulsory licenses. Compulsory licenses (also known as statutory licenses or mandatory licenses) allow the use of copyrighted material without explicit permission of the copyright holder upon payment of a royalty.<sup>13</sup> Attaining a *DPRSA* compulsory license required several conditions be met, including an agreement to include any

copyright management information en-

coded in the work at the behest of the copyright holder;<sup>14</sup> licensees also had to adhere to the “sound recording performance complement,” which set limits on the number of selections from the same phonorecord that could be played in a certain time period.<sup>15</sup>

Certain types of digital transmissions were made exempt from the digital performance copyright, including any non-subscription, non-interactive service — in other words, Internet radio. This would be changed with enactment of the *Digital Millennium Copyright Act*, discussed below. Other exempt transmissions include any retransmission of broadcast transmissions<sup>16</sup> or authorized licensed transmissions,<sup>17</sup> and retransmissions by businesses in or around their business (“storecasting”).<sup>18</sup>

The landscape after the *1995 Act* was as follows: transmitters of all types of audio recordings, whether analog or digital, terrestrial or online, were subject to paying royalties for statutory licenses from the creators of copyrighted works (the composer of a musical work or author of a non-musical work). Additionally, transmitters of interactive programming (which allow the user to select which works she listens to) were subject to the copyright of the producers of the sound recording; the producers could individually license transmissions or ban entirely the digital transmission of the sound recording.

Transmitters of subscription programming were granted statutory licenses provided certain conditions were met. The conditions are primarily designed to prevent an end user from using the subscription transmission as a substitute for purchasing the physical sound recording (such as a CD). Transmitters of non-subscription, non-interactive programming were treated like traditional terrestrial analog broadcasters, and weren’t subject to the sound recordings producers’ copyrights. As a result, “hundreds” of Internet radio stations sprang up.<sup>19</sup>

Without going too far into the details, the **RIAA** wasn’t happy about this; threats of a lawsuit led to consultations between the **Association** and leading Webcasters, and the two sides agreed to an amendment to the already-introduced *Digital Millennium Copyright Act (DMCA)* to resolve the dispute.<sup>20</sup>

The major effect of the *DMCA* amendments to the digital performance copyright was to take non-interactive, non-subscription digital transmissions out of the regulatory realm re-

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served for terrestrial broadcasters, and regulate them in a way similar to the regulation imposed on subscription, non-interactive transmissions by the *DPRSA*. This meant that non-interactive, non-subscription programmers could obtain a statutory license to stream copyrighted content if they met certain conditions.

The conditions are “exceedingly detailed,”<sup>21</sup> but in general continue the effort to deter end users from using digital transmissions as a substitute for purchasing sound recordings. Thus, to use the statutory license, eligible streamers must not exceed the sound recording performance complement (as previously mentioned), or publish an advance program schedule or announce specific titles that will be played (there is an exception for an announcement made immediately before playing).<sup>22</sup>

If streaming an archived program, the program must be at least five hours in length, and can not be made available for more than two weeks.<sup>23</sup> As much as feasible, the streamer must cooperate in any effort to prevent end users from scanning various Internet audio streams to select particular sound records.<sup>24</sup> To whatever extent enabled by their technology, streamers must prevent end users from recording their transmissions,<sup>25</sup> and must not interfere with technological tools used by sound recording copyright holders to prevent copying.<sup>26</sup>

There is also a requirement that imbedded in the streams is information identifying the featured artist and composition, which will show up textually on the recipient’s computer screen.<sup>27</sup>

The implications of the foregoing on library audio streaming depend to some extent of how the library’s streaming program is structured. For example, the current library distribution model for physically embodied sound recordings (e.g., CDs) is that the library maintains a collection from which patrons may pick and choose.

Applying this to digital streaming audio, the analogy is that the library maintains a collection of streamable recordings on its servers and provides patrons with a menu of selections, allowing the patron to choose the selections she or he would like to hear. This is an interactive service, and as mentioned above the sound recording copyright holder retains the right to prohibit the use of its materials in this type of program, or to negotiate a license individually with the library or other entity streaming the recording.

A second potential library programming method would be for the library to stream non-interactive programs of sound recordings, in essence creating an Internet radio station. For example, a library could present an “Afternoon of Bluegrass” program consisting of a stream of different bluegrass songs. This could be either a subscription or non-subscription service, and has the advantage that if it’s structured in such a way to take advantage of the statutory license (for example, observing the sound recording performance component

and not publishing detailed program schedules) the sound recording copyright holder(s) would not be able to prohibit the library’s use of the material in this way.

As mentioned previously, a library is able to re-stream (retransmit) a licensed transmission if it does so simultaneously with the original transmission, and with the permission of the transmitter. If those two conditions aren’t met the library will need to acquire licenses as previously discussed.

Using the streamed audio of digital sound recordings as background music in a library is seemingly authorized by 17 USC 114(d)(1)(C)(ii), which exempts transmissions “within a business establishment” from the scope of sound recording copyright protection. The **Senate Judiciary Committee** specifically addressed this kind of “storecasting” when considering the bill which became the *DPRSA*,<sup>28</sup> and even though a library is not normally considered a “business establishment,” the Congressional intent to authorize transmission of digital sound recordings when used as background music is clear.

Less clear is the consideration that would be given to a library’s use of streaming audio of copyrighted material in connection with a formal program given in a library’s auditorium or meeting room. Linguistically, this activity would fit the exemption just mentioned (assuming that a library would be considered a “business establishment”); however, it wouldn’t be “storecasting,” the activity specifically cited by the **Committee** as one that should be exempt. Since there have been no published cases discussing this issue, and since there was no specific mention of it made in either the *DPRSA* or *DMCA*, the treatment of this kind of library activity is still an open question. At this point in time record companies are using digital royalties to make up for the disappearing revenue from CD sales,<sup>29</sup> which dictates a certain amount of caution for any librarian streaming the audio of digital sound recordings.

The **Copyright Royalty Board** proceeding which recently caused controversy also included a provision setting royalty rates for non-commercial audio streamers of non-interactive programming. The newly-added Part 380 of Title 37 of the Code of Federal Regulations provides that a non-commercial Webcaster streaming 159,140 average tuning hours (ATH) per month or less shall pay an annual royalty of \$500 per channel. Once the ATH threshold is reached, the non-commercial streamer will pay a royalty of \$.00008 per “performance.”<sup>30</sup> A “performance” is defined as “each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission.”<sup>31</sup>

This provision has two implications for resource-challenged libraries: First, the ATH number solves to 218 users listening continuously to a 24-hour per day audio stream; libraries will be called upon to monitor the number of hours materials are streamed each month. The ATH stays the same regardless of the number of simultaneous streams being transmitted, so the

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## Endnotes

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2. *United States of America v. American Society of Composers, Authors and Publishers, et al.*, 2007 U.S. Dist LEXIS 31910, 6-8 (S.D. N.Y. 2007).
3. U.S. Const. art. I, sec. 8.
4. 17 U.S.C. 106.
5. 17 U.S.C. 102.
6. *An Act of Oct. 15, 1971*, Public Law 92-140, *U. S. Statutes at Large* 92 (1971): 140 (hereinafter referred to as the Sound Recording Act).
7. Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, 104th Congress, 1st Sess. 1995. S. Rep. 104-128, 10.
8. *Id.*
9. *Digital Performance Right in Sound Recordings Act of 1995*, Public Law 104-39, *U.S. Statutes at Large* 109 (1995): 336 (hereinafter referred to as *DPRSA*).
10. (U.S. Senate Committee 1995, 14-15)
11. *Id.*
12. 17 U.S.C. 106(6).
13. *Black’s Law Dictionary*, 8th ed., ed. **Bryan A. Garner**, (St. Paul, Minn.: West Group, 1999), 938.
14. 17 U.S.C. 114 (d)(2)(C)(viii).
15. 17 U.S.C. 114 (d)(2)(B)(i). The “sound recording performance complement” is defined at U.S.C. 114 (j)(13).
16. 17 U.S.C. 114(d)(1)(B).
17. 17 U.S.C. 114(d)(1)(C)(iii).
18. 17 U.S.C. 114(d)(1)(C)(ii).
19. **Al Kohn** and **Bob Kohn**, *Cohn on Music Licensing* 1300 (3d ed., Aspen Publishers, 2002).
20. *Id.* at 1300-1301.
21. **Jane C. Ginsburg**, *Copyright Legislation for the “Digital Millennium,”* 23 *Colum.-VLA J. L. & Arts*, 137, 169 (1999).
22. 17 U.S.C. 114 (d)(2)(C)(ii).
23. 17 U.S.C. 114 (d)(2)(C)(iii)
24. 17 U.S.C. 114 (d)(2)(C)(v)
25. 17 U.S.C. 114 (d)(2)(C)(vi)
26. 17 U.S.C. 114 (d)(2)(C)(viii)
27. 17 U.S.C. 114 (d)(2)(C)(ix)
28. (U.S. Senate Committee 1995, 22).
29. **Mike Musgrove**, “Web Radio Stations Hope Silence Speaks Volumes About Fee Hike,” *Washington Post*, June 26, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501801\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501801_pf.html) (accessed June 26, 2007).
30. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24111, (May 1, 2007)(to be codified at 37 C.F.R. 380.3(a)(2)).
31. *Id.* (to be codified at 37 C.F.R. 380.2(i)).