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Developments in Copyright Law in Cyberspace

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This roundtable will discuss (1) the Music Modernization Act, which made dramatic changes to the statutory treatment of digital music deliveries and pre-1972 sound recordings; (2) the outcome of the seventh triennial Section 1201 rulemaking; and (3) several recent court decisions with significant implications.
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I. Summary
   A. This title amends § 115 of the Copyright Act, the compulsory mechanical license provision, as it applies to musical works that are distributed through digital technologies. It sets up a new kind of license, called a blanket license, that grants music services the right to make and digitally distribute phonorecords of copyright-protected musical works. It creates a new entity, called the Mechanical Licensing Collective, to administer the blanket license.

II. Background
   A. Section 115 of the Copyright Act makes available a compulsory license allowing the licensee to make and distribute phonorecords of musical works. Obtaining the license as to a particular musical work requires payment of a license fee that is set by the Copyright Royalty Board.
B. The license allows use of the musical work in making a new recording (popularly called a cover version). It also allows use of the work in making and distributing phonorecords of an existing sound recording.

C. Traditionally, phonorecords were distributed in the form of physical objects: vinyl records, cassette tapes, compact disks. Digital technology now allows phonorecords to be distributed through transmission of bits alone, without shipping any atoms. That is what happens when one acquires a recording of a song by downloading it from a music service, such as iTunes or Spotify.

D. Under existing law, the compulsory license had to be acquired individually for each musical work. This creates high transaction costs for music services that make large numbers of sound recordings available for download. The amended provision allows a music service to obtain a blanket license that grants the right to make and distribute phonorecords embodying sound recordings of a multitude of copyright-protected musical works. This license only applies to digitally transmitted music, not to distribution of physical phonorecords.

III. Compulsory mechanical licenses for physical phonorecords

A. Existing rules allowing a person to make and distribute physical (i.e., not via digital phonorecord delivery) phonorecords of a new recording (aka a cover version) of a nondramatic musical work, upon payment of a compulsory license fee, remain unchanged (though the provision is rewritten).

B. Conditions for obtaining the compulsory license:
   (1) Phonorecords of the musical work have been distributed to the public under the authority of the copyright owner of the musical work. § 115(a)(1)(A)(i).
   (2) The licensee’s primary purpose is to distribute the phonorecords to the public for private use. § 115(a)(1)(A).
   (3) The musical arrangement doesn’t change “the basic melody or fundamental character” of the musical work. § 115(a)(2).
   (4) The licensee must timely notify the musical work copyright owner of intent to make the phonorecords. § 115(b)(1).

IV. Compulsory mechanical licenses for digital phonorecord deliveries

A. Transitional rule through December 31, 2020
   (1) Prior to this date, the licensee serves a notice of intention on the copyright owner. § 115(b)(2)(A).
   (2) After this date, the new procedure for obtaining a blanket license applies. § 115(b)(2)(B).

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1 A digital phonorecord delivery results from transmitting a sound recording to a recipient digitally, as opposed to manufacturing a physical object (such as a compact disk) containing the sound recording, and then shipping the object to the recipient. § 115(e)(10). There are three types of digital phonorecord deliveries: (1) a permanent download, which is one that doesn’t expire, § 115(e)(24); (2) a limited download, which is one that remains accessible for only a certain period of time or a certain number of times, § 115(e)(16); and (3) an interactive stream, which is delivered as a stream, § 115(e)(13).

2 This is the end of the period before the license availability date, which is defined as “January 1 following the expiration of the 2-year period beginning on the enactment date,” i.e., January 1, 2021. § 115(e)(15).

3 The term “notice of intention” is not defined in the statute, but Copyright Office regulations state its required form and content.

4 A blanket license is a new species of compulsory license, created by this amendment, which allows the licensee to make and distribute phonorecords of any musical work within the scope of coverage. § 115(e)(5).
(a) Note: Once the blanket license regime goes into effect, licenses can still be acquired on a work-by-work basis. § 115(b)(2)(B), (3).

B. Conditions for availability of a compulsory license

(1) The license is available once phonorecords of the musical work have been distributed to the public under the authority of the copyright owner of the musical work. § 115(a)(1)(A)(i).

(2) In addition, a digital music provider\(^5\) can get a compulsory license to make and distribute, via digital phonorecord delivery, phonorecords of a sound recording embodying the musical work, even if phonorecords of the work haven’t previously been distributed, if:
   (a) the musical work copyright owner authorized the first fixation of the sound recording;
   (b) the musical work copyright owner authorized the sound recording copyright owner to make and distribute digital phonorecord deliveries embodying the musical work; and
   (c) the sound recording copyright owner authorized the digital music provider to make and distribute digital phonorecord deliveries of the sound recording. § 115(a)(1)(A)(ii).

(d) Note: This means that the compulsory license is available even if the very recording for which the license is sought is the one through which the musical work is first distributed to the public.

C. Procedure for obtaining a blanket license

(1) A digital music provider may obtain a compulsory license to make digital phonorecord deliveries of a musical work by applying to the mechanical licensing collective for a blanket license. § 115(d)(1)(A).

(2) It does this by submitting a notice of license\(^6\) to the mechanical licensing collective, in a form to be prescribed by the Register of Copyrights. § 115(d)(2)(A).

(3) The mechanical licensing collective has 30 days in which to reject the request, else it is deemed granted. § 115(d)(2)(A)(ii).
   (a) The mechanical licensing collective can only reject a request if
      (i) the digital music provider or the notice does not meet the statutory requirements, or
      (ii) the digital music provider has, within the past three years, had its blanket license terminated, which can only happen if the digital music provider defaults in ways specified in § 115(d)(4)(E), as discussed below. § 115(d)(2)(A)(iii).
   (b) A rejection by the mechanical licensing collective is subject to judicial review. § 115(d)(2)(A)(v).

D. What a blanket license allows

(1) Engaging in covered activities\(^7\) with respect to all musical works available for compulsory licensing. § 115(d)(1)(B)(i).

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\(^5\) A digital music provider is a person whose business is to provide sound recordings of musical works to end users via digital transmission. § 115(e)(8). This would include a streaming service, like Spotify, or a seller of music downloads, like iTunes.

\(^6\) A notice of license is simply the notice required to obtain a blanket license. § 115(e)(22).
(2) Making all associated incidental reproductions. § 115(d)(1)(B)(ii).

E. Licenses other than the blanket license
(1) A record company\(^7\) may opt for an individual download license\(^9\) instead of a blanket license, by serving a notice of intention on the musical work copyright owner and paying royalties. § 115(b)(3).

(2) A musical work copyright owner may negotiate a voluntary license\(^10\) with users of the works. § 115(c)(2)(A).

F. Failure to comply with the requirements for a compulsory license
(1) A person who fails to serve a notice of intention to use a musical work for a physical phonorecord delivery loses the possibility of acquiring a compulsory license for use of that work. § 115(b)(4)(A).

(2) A person who fails to serve a notice of intention to use a musical work for a digital phonorecord delivery (under the regime applicable before the license availability date) loses the possibility of acquiring a compulsory license for use of that musical work. § 115(b)(4)(B)(i)(I).

(3) A record company that fails to serve a notice of intention to use a musical work for an individual download license loses the possibility of acquiring a compulsory license for use of that musical work. § 115(b)(4)(B)(i)(I).

(4) A person who fails to follow the procedure for obtaining a blanket license loses the possibility of acquiring a blanket license for three years. § 115(b)(4)(B)(i)(II).

(5) Failure to obtain a compulsory license means use of the musical work is infringing in the absence of a negotiated voluntary license. § 115(b)(4)(B)(ii).

G. Royalty rates
(1) Statutory rates
(a) Compulsory license rates are established through proceedings before the Copyright Royalty Judges. § 115(c)(1)(E).

(b) These rates should mirror what would have been negotiated in the marketplace between a willing buyer and a willing seller. § 115(c)(1)(F).

(i) Note: This represents a change from prior law, which called for rates to be based on factors such as maximizing the availability of creative works and providing the copyright owner a fair return.

(2) Negotiated rates
(a) Musical work copyright owners may negotiate consensual royalty rates with persons wanting to make and distribute phonorecords otherwise subject to a compulsory license. § 115(c)(1)(D).

(i) For physical phonorecord deliveries, these rates will apply in lieu of the rates set by the Copyright Royalty Judges. § 115(c)(2)(A)(i).

(ii) For digital phonorecord deliveries, the statutory rates will apply rather than any negotiated rates, except for some grandfathered negotiated rates. § 115(c)(2)(A)(i).

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\(^7\) A covered activity consists of making a digital phonorecord delivery of a musical work, if it is within the scope of the compulsory license. § 115(e)(7).

\(^8\) A record company is an entity that makes and sells sound recordings of musical works. § 115(e)(26).

\(^9\) An individual download license is one that allows a record company to make permanent downloads embodying a particular, specified musical work. § 115(e)(12). A permanent download is one that doesn’t expire. § 115(e)(24).

\(^10\) A voluntary license is one that is negotiated; not a compulsory license. § 115(e)(36)
H. Entitlement to receive royalties
   (1) To be entitled to receive royalties under a compulsory license, a musical work
       copyright owner “must be identified in the registration or other public records of the
       Copyright Office.” § 115(c)(1)(A).

I. Infringement
   (1) A digital phonorecord delivery of a sound recording is infringing, and subject to the
       usual copyright remedies, unless it is (i) authorized by the sound recording copyright
       owner, and (ii) authorized by the musical work copyright owner or by a compulsory
       license. § 115(c)(2)(C)(i).
   (2) A copyright owner of a sound recording who infringes with respect to the musical
       work embodied in that sound recording is liable under the usual copyright rules, but is
       not liable on account of a digital phonorecord delivery made by a third party if the
       sound recording copyright owner didn’t license that delivery. § 115(c)(2)(D).

J. Retention of statutory exemption for certain performances via digital audio
   transmission
   (1) These rules for licensing digital phonorecord deliveries leave in place the
       exemption of certain public performances from the public performance right in digital
       audio transmissions that appears in § 114(d)(1). § 115(c)(2)(G).
   (2) Note: The public performance right applies to sound recordings in only limited
       respects. Specifically, the public performance right only applies to digital audio
       transmissions, not to all performances. In addition, certain categories of digital audio
       transmissions are exempt from the public performance right, per § 114(d)(1). This
       provision preserves that exemption.

K. Lending right under a compulsory license
   (1) The compulsory license allowing one to make and distribute phonorecords includes
       the right to distribute by rental, lease, or lending, but only by distributing physical
       phonorecords. Rental of a digital phonorecord delivery is not permitted. The
       licensee must pay a proportional share of revenues received on account of such rental
       transactions. § 115(c)(2)(H).

L. Failure to pay royalties
   (1) A licensee must pay royalties monthly, and submit monthly and annual statements of
       account. § 115(c)(2)(I).
   (2) In the case of a person who obtains a compulsory license for a physical phonorecord
       delivery, a digital phonorecord delivery compulsory license before the license
       availability date, or a record company individual download license:
       (a) Upon failure of the licensee to make a monthly royalty payment, or a monthly or
           annual statement of account, the musical work copyright owner can send a notice
           giving the licensee 30 days to cure or the license will be terminated.
           § 115(c)(2)(J).
       (3) For a digital music provider who obtains a blanket license from the mechanical
           licensing collective:
           (a) Upon failure to make a monthly payment or submit a monthly report, the
               mechanical licensing collective provides written notice to the digital music
               provider, and allows 60 days to cure; if not cured, the license automatically
               terminates. § 115(c)(2)(J); § 115(d)(4)(E).

11 A digital audio transmission is a transmission of a sound recording by digital means; § 114(j)(5)
The digital music provider can seek judicial review of a termination of the blanket license. § 115(d)(4)(E)(iv).

V. The mechanical licensing collective

A. What it is

(1) The mechanical licensing collective is a nonprofit entity to be created by copyright owners. § 115(d)(3)(A)(i).

(2) It must be supported by a large segment of musical work copyright owners. § 115(d)(3)(A)(ii).

(3) It is to be designated as such by the Register of Copyrights, by 270 days after the enactment date. § 115(d)(3)(B)(i).

(4) The entity designated as the mechanical licensing collective is to be reviewed every five years, via public input. § 115(d)(3)(B)(ii).

B. How it is governed

(1) The mechanical licensing collective is governed by a Board of Directors consisting of 14 voting members and 3 nonvoting members. § 115(d)(3)(D)(i).

(a) Ten voting members are representatives of music publishers.

(b) Four voting members are professional songwriters.

(c) The nonvoting members are (i) a representative of a trade association of music publishers, (ii) a representative of the digital licensee coordinator, and (iii) a representative of a trade association for songwriters.

(2) The Board of Directors is governed by bylaws that the mechanical licensing collective shall establish. § 115(d)(3)(D)(ii).

(3) The mechanical licensing collective posts online an annual report. § 115(d)(3)(D)(vii).

(4) Every five years, the mechanical licensing collective makes publicly available the results of an audit of its activities by a qualified auditor. § 115(d)(3)(D)(ix)(II).

C. Committees established by the collective

(1) The Board of Directors establishes an Advisory Committee, consisting of representatives of musical work copyright owners and representatives of digital music providers in equal numbers, that advises the Board of Directors. § 115(d)(3)(D)(iv).

(2) The Board of Directors establishes an Unclaimed Royalties Oversight Committee, composed of 5 musical work copyright owners and 5 professional songwriters. § 115(d)(3)(D)(v).

(3) The Board of Directors establishes a Dispute Resolution Committee, composed of representatives of musical work copyright owners and professional songwriters in equal numbers. § 115(d)(3)(D)(vi).

(a) The Dispute Resolution Committee must establish procedures allowing copyright owners to address disputes relating to ownership of musical works and distribution of royalties. § 115(d)(3)(K).

D. How it is funded

12 The enactment date is the date of the enactment of the Music Modernization Act, viz. October 11, 2018.

13 A songwriter is an author of a musical work. § 115(e)(32).

14 The digital licensee coordinator is an entity so designated by the Register of Copyrights. § 115(e)(9).

15 A qualified auditor is a certified public accountant with experience performing music royalty audits. § 115(e)(25).
(1) To cover its collective total costs,\textsuperscript{16} the mechanical licensing collective receives the administrative assessment\textsuperscript{17} that digital music providers and significant nonblanket licensees\textsuperscript{18} are required to pay. § 115(d)(7)(A).

(2) The amount of the administrative assessment is determined through proceedings before the Copyright Royalty Judges, and is to be adjusted periodically. § 115(d)(7)(D). Their determination is appealable to the D.C. Circuit. § 115(d)(7)(D)(vii).

(3) The mechanical licensing collective may also receive “voluntary contributions” from entities required to pay the administrative assessment, as determined through negotiations. § 115(d)(7)(B).

(a) Note: These voluntary contributions are designed to allow the mechanical licensing collective to begin operations quickly, without waiting for the Copyright Royalty Judges to determine the amount of the administrative assessment.

E. What it does. § 115(d)(3)(C)(i).

(1) Administers blanket licenses.

(2) Collects and distributes royalties.

(3) Makes efforts to identify the copyright owners of musical works embodied in sound recordings.

(4) Maintains the musical works database.\textsuperscript{19}

(5) Enables copyright owners to claim ownership of musical works.

(6) Distributes unclaimed royalties among musical copyright owners.

(7) Collects administrative assessments from licensees.

(8) Provides documentation for use by Copyright Royalty Judges.

(9) May, for a fee, administer voluntary licenses. § 115(d)(3)(C)(iii).

(10) Receives and makes publically available notices of license from digital music providers, notices of nonblanket activity\textsuperscript{20} from significant nonblanket licensees, and lists of blanket licensees and of significant nonblanket licensees. § 115(d)(3)(F).

(11) Distributes royalties to copyright owners based on the usage information contained in the usage reports it receives. § 115(d)(3)(G).

(12) Deposits royalties associated with unmatched musical works,\textsuperscript{21} and distributes them to the musical work copyright owners once they are matched.\textsuperscript{22} § 115(d)(3)(H), (I).

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\textsuperscript{16} The collective total costs are the mechanical licensing collective’s costs of administering the compulsory license system. § 115(e)(6).

\textsuperscript{17} The administrative assessment is the fee that the Copyright Royalty Judges set to cover the mechanical licensing collective’s collective total costs. § 115(e)(3).

\textsuperscript{18} A significant nonblanket licensee is an entity that makes large quantities of digital phonorecord deliveries to end users under a voluntary license or an individual download license (not under a blanket license). § 115(e)(31).

\textsuperscript{19} The musical works database is a database of musical works, their copyright owners, and the sound recordings in which the musical works are embodied. § 115(e)(20); § 115(d)(3)(E).

\textsuperscript{20} A notice of nonblanket activity is a monthly notice from a significant nonblanket licensee reporting on its covered activities. § 115(e)(23).

\textsuperscript{21} Unmatched musical works are ones for which the copyright owner cannot be identified or located. § 115(e)(35).

\textsuperscript{22} Matched musical works are ones for which the copyright owner has been identified and located. § 115(e)(17).
(13) After holding them for three years, distributes royalties attributable to unmatched works to known copyright owners pro rata based on their market share. § 115(d)(3)(J). The copyright owners must pay a share of those royalties to songwriters. § 115(d)(3)(J)(iv).

(14) May audit digital music providers operating under the blanket license, to determine the accuracy of royalty payments. The mechanical licensing collective pays for this, unless royalties were underpaid by at least 10 percent, in which case the digital music provider pays the costs. § 115(d)(4)(D).

(15) Provides monthly reports to the digital licensee coordinator naming any significant nonblanket licensees that have failed to submit monthly reports of their nonblanket activity. § 115(d)(6)(B).

(a) In that case, either the mechanical licensing collective or the digital licensee coordinator may file an action against the noncompliant significant nonblanket licensee for damages and injunctive relief. § 115(d)(6)(C).

F. Auditing of the mechanical licensing collective by copyright owners

(1) A musical copyright owner may, at its own cost, have a qualified auditor audit the mechanical licensing collective to ascertain whether the copyright owner is receiving the correct amount of royalty payments. § 115(d)(3)(L).

VI. The musical works database

A. The musical works database is established and maintained by the mechanical licensing collective. § 115(d)(3)(E)(i).

B. It consists of information about musical works, and the copyright owners of the musical works and the sound recordings embodying them. § 115(d)(3)(E)(i), (ii).

C. It includes both works that have been matched to a copyright owner, and works that are unmatched. § 115(d)(3)(E)(ii), (iii).

D. Musical work copyright owners must make best efforts to advise the mechanical licensing collective about all sound recordings embodying their works. § 115(d)(3)(E)(iv).

E. The database is to be made available and searchable, free of charge, to the public; and also available in machine-readable format to industry participants. § 115(d)(3)(E)(v).

VII. Obligations of digital music providers

A. Report and pay royalties under the blanket license monthly. § 115(d)(4)(A).

B. Report usage data for musical works used under the blanket license, and any usage in covered activities under voluntary licenses and individual download licenses. § 115(d)(4)(A)(ii).

(1) This includes information identifying copyright owners and other relevant information about the sound recording and musical work, and the number of digital phonorecord deliveries of the sound recording. § 115(d)(4)(A)(ii)(I), (II).

(2) The reports must be in a machine-readable format. § 115(d)(4)(A)(iii).

C. Make reasonable efforts to obtain, from the sound recording copyright owners, information about people who have rights to the sound recording and musical work. § 115(d)(4)(B).

D. Pay the administrative assessment. § 115(d)(4)(C).

VIII. Obligations of significant nonblanket licensees

A. Submit monthly reports of nonblanket activity to the mechanical licensing collective, including usage information. § 115(d)(6)(A)(i), (ii).
B. Pay any required administrative assessments. § 115(d)(6)(A)(ii).

IX. The digital licensee coordinator

A. How it is selected
(1) Must be a nonprofit entity created for this role. § 115(d)(5)(A)(i).
(2) Must be supported by a majority of digital music providers and significant nonblanket licensees. § 115(d)(5)(A)(ii).
(3) Must be so designated by the Register of Copyrights within 270 days after the enactment date. § 115(d)(5)(A)(iv). The Register reviews the designation every five years. § 115(d)(5)(B)(ii).

B. What it does
(1) Works with the mechanical licensing collective to enforce payment of the administrative assessment. § 115(d)(5)(C)(i)(II).
(2) Participates in proceedings before the Copyright Royalty Judges concerning establishing the administrative assessment. § 115(d)(5)(C)(i)(III)-(V).
(3) Assists the mechanical licensing collective in its efforts to identify copyright owners of unmatched musical works. § 115(d)(5)(C)(iii).

X. Repeal of § 114(i)

A. Background
(1) The public performance right applies to sound recordings in only limited respects. Specifically, the public performance right only applies to digital audio transmissions, not to all performances. § 106(6).
(2) The public performance right applying to digital audio transmissions of sound recordings applies differently to different categories of uses:
   (a) Certain types of digital audio transmissions, including those made by an ordinary radio broadcaster using digital technology, are exempt from the public performance right, per § 114(d)(1).
   (b) Other types of digital audio transmissions, including non-interactive webcasting and satellite radio, are subject to a compulsory license, per § 114(d)(2).
   (c) Digital audio transmissions that are not in either of these categories, including interactive services that allow the user to choose particular performances, are fully subject to the public performance right, and one who wishes to engage in such transmissions must negotiate a consensual license with the sound recording copyright owner.
(3) Section 114 directs the Copyright Royalty Judges to set the rates for digital audio transmissions of sound recordings subject to a compulsory license.
(4) The rates that ASCAP and BMI charge for public performance of musical works are subject to review by the U.S. District Court of the Southern District of New York, aka the rate court, under applicable consent decrees.

B. Section 114(i)
(1) Existing § 114(i) provided that the rates payable for public performance of sound recordings are not to be taken account of in any proceeding to determine the rates that performing rights organizations (e.g. ASCAP, BMI) charge for public performance of musical works.

C. The effect of the amendment
(1) The repeal of § 114(i) allows the rates payable for public performance of sound recordings to be taken account of in rate court proceedings to determine the rates that performing rights organizations charge for public performance of musical works.

(2) This is expected to lead to higher rates being paid to musical work copyright owners for public performance rights.
Title II: Classics Protection and Access Act

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I. Summary
A. The amendment creates a system of quasi-copyright for pre-1972 sound recordings. It does not grant copyright protection to these works, but treats them in most ways as the Copyright Act treats post-1972 sound recordings.¹ A person who makes unauthorized use of these works is subject to the same remedies that apply in the case of copyright infringement. Music services will henceforth have to pay a license fee for use of these sound recordings, just as they do currently for post-1972 sound recordings.

II. Background
A. Difference in treatment under the Copyright Act of pre- vs. post-1972 sound recordings
   (1) The Copyright Act does not protect sound recordings that were fixed before February 15, 1972, but generally does protect the musical works embodied in those sound recordings. Pre-1972 sound recordings are generally protected under state law, at least against unauthorized reproduction and distribution, but probably not against unauthorized public performances.
   (2) Therefore, the Copyright Act requires commercial users of pre-1972 music to pay royalties to the copyright owners of the musical works (the songwriter or music publisher), but not to the copyright owners of the sound recordings (the recording artist or record label).
   (3) This is perceived in some quarters to be unfair to aging recording artists, who do not earn royalties from sales of their record albums. To earn money on account of these pre-1972 recordings, the recording artist must go on tour and give concerts.

B. Difference in treatment under the Copyright Act of sound recordings vs. other types of works
   (1) The public performance right applies to sound recordings in only limited respects. Specifically, the public performance right only applies to digital audio transmissions,² not to all performances. § 106(6).
   (2) By contrast, the public performance right is fully applicable to musical works.
   (3) Therefore, ordinary radio stations that broadcast contemporary music must pay royalties to the copyright owners of the musical works (the songwriter or music publisher), but not to the copyright owners of the sound recordings (the recording artist or record label).

III. The new rules for pre-1972 sound recordings
A. Grant of protection to owners of rights to sound recordings

¹ The amendment is explicit about not granting copyright protection to pre-1972 sound recordings: “no sound recording fixed before February 15, 1972, shall be subject to copyright under this title.” § 301(c).
² A digital audio transmission is a transmission of a sound recording by digital means. § 114(j)(5).
(1) One who engages in a covered activity with respect to a sound recording, during the transition period when it is protectable, without the consent of the rights owner, is subject to remedies for infringement “to the same extent as an infringer of copyright.” § 1401(a)(1).

(2) Applicable remedial provisions:
   (a) § 502 (injunctions)
   (b) § 503 (impoundment)
   (c) § 504 (actual damages, infringer’s profits, statutory damages)
   (d) § 505 (costs and attorney’s fees)
   (e) § 1203 (anti-circumvention and copyright management information).

B. The transition period depends on when the sound recording was first published. § 1401(a)(2).
   (1) if first published pre-1923: ends Dec. 31, 2021
   (2) if first published 1923-46: ends 100 years after publication
      (a) e.g., a 1923 work is protected until 2023
   (3) if first published 1947-56: ends 110 years after publication
      (a) e.g., a 1947 work is protected until 2057
   (4) if first published starting 1957, but before February 15, 1972: ends on February 15, 2067
      (a) e.g., a 1957 work is protected until 2067, = 110 years after publication
      (b) e.g., a 1972 work is protected until 2067, = 95 years after publication
   (5) Note: a sound recording is published when phonorecords embodying it are distributed to the public. § 1401(f)(6)(B) (incorporating the definitions of terms in § 101, including that of “publication”).

C. Public performance via digital audio transmission of pre-1972 sound recordings is treated according to the three-tier structure set out in § 114:
   (1) If the transmission would be exempt under § 114(d)(1) if the sound recording had been fixed post-1972, there is no requirement to pay performance royalties. § 1401(b)(1).
   (2) If the transmission would be subject to a statutory license under § 114(d)(2) if the sound recording had been fixed post-1972, then the transmitting entity must pay the statutory royalty established for post-1972 works. § 1401(b)(2).

D. Sound recordings whose copyright owner is unknown
   (1) Noncommercial uses of pre-1972 sound recordings that are not being commercially exploited by the rights owner are permitted if certain conditions are met:
      (a) The noncommercial user makes good-faith efforts to determine whether the rights owner is making commercial use. § 1401(c)(1)(A).
      (b) The noncommercial user files a notice of its use in the Copyright Office. § 1401(c)(1)(B).

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3 A covered activity is anything that would infringe the copyright owner’s exclusive rights under § 106 or § 602, or would violate § 1201 or 1202, if the sound recording had been fixed on or after February 15, 1972. § 1401(f)(1).
4 The transition period is the term of the protection that § 1401 grants, which varies depending on when the sound recording was first published. § 1401(a)(2)(B).
5 A rights owner is a person who held a common law (i.e., under state law) reproduction right to a sound recording as of the date of enactment of § 1401, or a transferee of such a right. § 1401(f)(2). Stated otherwise, a rights owner is a person who is granted rights by this provision, and who would be called a copyright owner if the provision granted copyright rather than quasi-copyright protection.
(c) The rights owner has not opted out of the noncommercial use within 90 days after the notice of use becomes publicly available. § 1401(c)(1)(C).

(2) If the noncommercial user takes the steps to determine whether the work is being commercially exploited that the Register of Copyrights spells out by regulation, a “safe harbor” applies and the user has no liability for that use. § 1401(c)(4).

(3) There are civil penalties for users filing false notices of noncommercial use, or persons filing false opt-out notices. § 1401(c)(6).

E. Consensual licensing of public performances by digital audio transmission

(1) If the rights owner of a pre-1972 sound recording licenses a user to perform it via digital audio transmission, and the license agreement is entered on or after the enactment date of this amendment, the user must pay half of the royalties to SoundExchange. § 1401(d)(1), (2)(A).

(a) The payments to SoundExchange are credited towards the user’s royalty obligations under the license agreement. § 1401(d)(2)(A)(ii).

(2) If payments are due under an agreement that is entered between January 1, 2018 and the enactment date of this amendment, or under certain settlements entered starting January 1, 2015, then the rights owner pays half of the net royalties to SoundExchange. § 1401(d)(2)(B).

(a) The payments to SoundExchange are credited towards the user’s royalty obligations under the license or settlement agreement. § 1401(d)(2)(B)(ii).

(3) SoundExchange is to distribute the royalties it receives under the preceding provisions to the featured and nonfeatured musicians and vocalists appearing on the sound recording. § 1401(d)(3).

(a) Note: This results in distributing royalties to featured and nonfeatured musicians and vocalists in the same proportions as apply to statutory licenses that SoundExchange administers under § 114(g).

F. Preemption of state law claims

(1) Use of pre-1972 recordings occurring before the enactment date of the amendment

(a) The amendment preempts claims under state law based on public performance via digital audio transmission of pre-1972 sound recordings, or making incidental copies, if

(i) the transmission or copy is made before the enactment date of the amendment, and

(ii) the use would have been exempt or subject to a statutory license under § 114(d), or permissible under § 112, if it were a post-1972 sound recording, and

(iii) the transmitting entity pays any required royalties. § 1401(e).

(2) Use of pre-1972 recordings occurring on or after the enactment date of the amendment

(a) The amendment makes the Copyright Act’s general preemption provision, § 301(a), applicable to state-law claims based on conduct occurring on or after the enactment date of the amendment. § 301(c).

6 October 11, 2018.

7 SoundExchange is the entity that, under existing law, is designated to collect statutory licensing fees due on account of public performances of sound recordings via digital audio transmission.
(b) The revised preemption provision takes no position on preemption of certain state-law claims arising from use of pre-1972 recordings by radio broadcasters. § 301(c).
(i) Note: This seems to apply only to public performances otherwise than via digital audio transmission.

G. Limitations on the rights granted to rights owners

(1) Certain existing limitations on the exclusive rights of a copyright owner are made applicable to claims that § 1401 authorizes with respect to pre-1972 sound recordings. § 1401(f)(1).
   (a) § 107 (fair use)
   (b) § 108 (library use)
   (c) § 109 (first-sale rule)
   (d) § 110 (specified limitations on public performance and display rights)
   (e) § 112(f) (ephemeral copies)
(2) Other provisions similarly made applicable; § 1401(f)(2)-(4)
   (a) § 507 (statute of limitations)
   (b) § 512 (safe harbor for online service providers)
   (c) principles of equity
(3) Special rules on availability of statutory damages or attorney’s fees
   (a) These are available only if
      (i) the rights owner has filed with the Copyright Office a schedule of information about the sound recording, and
      (ii) the unauthorized use occurs more than 90 days after the filing is made publicly available. § 1401(f)(5)(A).
      (iii) Note: This differs from the rule applying under the Copyright Act, requiring timely registration as a condition of entitlement for statutory damages or attorney’s fees. There is no registration of pre-1972 sound recordings.
   (b) In addition, a transitional rule eliminates statutory damages or attorney’s fees against one who performs a pre-1972 sound recording via digital audio transmission as of the enactment date, if the user files a notice of its contact information and transmission is stopped within 90 days after the user receives a notice from the rights owner saying to just knock it off. § 1401(f)(5)(B).
   (c) But: there’s no exclusion of statutory damages or attorney’s fees due to failure to timely register a work. § 1401(f)(5)(C).
(4) 47 U.S.C. § 230 (which eliminates liability for certain online intermediaries) does not apply. § 1401(g).

H. Transfer of rights

(1) The normal rules on divisibility of copyright apply. § 1401(h)(1)(A).
(2) The normal rules requiring a signed writing for transfer of copyright ownership apply. § 1401(h)(1)(A).

I. Registration not required

(1) There’s no need to register a work to bring an action with respect to it under § 1401. § 1401(h)(1)(B).

J. Various additional provisions are applicable:

(1) §§ 112(e)(2), 112(e)(7), 114(e), 114(h), § 112(g); § 1401(h)(2), (i)
Part II: Other Copyright Law Developments

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I. Completion of the seventh triennial Section 1201 rulemaking
   A. Background
      (1) Section 1201 contains three prohibitions relating to circumvention of technologies that control access to or use of copyrighted works:
         (a) a prohibition against circumventing a technological measure that controls access to a protected work, § 1201(a)(1)(A);
         (b) a prohibition against trafficking in a technology that circumvents a technological measure that controls access to a protected work, § 1201(a)(2); and
         (c) a prohibition against trafficking in a technology that circumvents a technological measure that controls use of a copyrighted work, § 1201(b)(1).
      (2) Congress set up a procedure whereby, every three years, the Register of Copyrights conducts a rulemaking to determine whether certain classes of works should be exempted from the first of these prohibitions for the succeeding three-year period, on the ground that the prohibition interferes with the ability of people to make noninfringing uses of those works. § 1201(a)(1)(B)-(E).
      (3) The seventh triennial rulemaking concluded in October 2018.
   B. Outcome of the rulemaking
      (1) A novel aspect of this rulemaking is that it implemented a streamlined procedure for considering whether to renew an exemption that was adopted during the prior (2015) rulemaking.
         (a) In previous triennial rulemakings, all exemption proposals were considered de novo.
         (b) Under the new procedure, a submitter may justify renewal of an exemption adopted in a prior rulemaking by showing that “due to a lack of legal, marketplace, or technological changes, the factors that led the Register to recommend adoption of the exemption in the prior rulemaking are expected to continue into the forthcoming triennial period.” 83 Fed. Reg. 54,010, 54,012 (Oct. 26, 2018).
(2) In the event, submitters sought renewal of all of the 2015 exemptions, and the Librarian of Congress (on the recommendation of the Register) determined that all of them met the criterion for renewal.

(3) The full listing of exempted classes of works is lengthy. It can be found at 37 CFR § 201.40. A summary of exempted uses:

(a) Capturing portions of movies from encrypted DVDs for critical and educational purposes.
(b) Making movies on DVD accessible to students with disabilities.
(c) Enabling read-aloud technology so that an ebook can be read by blind people.
(d) Extracting data from one’s own implanted medical devices.
(e) Unlocking a mobile phone or other mobile device so that it can be used on a different service provider’s network.
(f) Jailbreaking a smartphone or other mobile device so it can run unapproved apps.
(g) Jailbreaking smart televisions.
(h) Jailbreaking voice assistant devices (e.g., Amazon Echo, Google Home).
(i) Accessing data generated by your car so you can repair or tinker with it.
(j) Getting access to smartphones and Internet of Things devices for purposes of maintenance or repair.
(k) Security research on computer systems.
(l) Making use of videogames that are no longer supported.
(m) Preservation of computer programs by a library or archive.
(n) Enabling 3D printers to use unapproved feedstocks.

II. A challenge to the “server test”

A. Issue: When a website displays an image (or some other copyrighted work) but the file representing the image does not reside on a server within the control of the website operator, is the website operator deemed to be the entity making the display for purposes of assessing liability under the Copyright Act?

B. The reigning view has been that a website operator is not engaged in a display if the website makes the image available, but the image resides on a server maintained by some other party. This is typically the case when the image is shown using technologies like framing or inline linking. The leading case is the Ninth Circuit’s 2007 decision in Perfect 10, Inc. v. Amazon.com, Inc., which adopted what is known as the “server test.” The case held that Google’s Image Search was engaged in display of thumbnail images that it maintained on its own servers, but not of full-sized images that it showed in its search results but that it did not copy onto its own servers.

C. In Goldman v. Breitbart News Network, LLC, a district court rejected the server test, holding that the identity or ownership of the server that holds an image is irrelevant to determining which entity is engaging in a display of it. The case involved a photographic image included in a Twitter tweet, which the defendant websites made available to their users via embedded links. From the standpoint of the users, the image appeared as a part of the defendant’s website, even though the user’s browser was retrieving the image from a Twitter server rather than one operated by the defendants. The district court, referring to the plain language and legislative history of the Copyright Act, held that “the physical

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1 508 F.3d 1146 (9th Cir. 2007).
location or possession of an image” was not a relevant criterion. It was enough that the defendant websites had initiated a “process” that resulted in display of the image to users.

D. The significance of this holding is that it makes it very risky to engage in the widespread practice of embedding images in web pages. The ruling makes this practice prima facie infringing, and website operators can only rely on a fair use defense to avoid liability.

III. Two narrow applications of fair use

A. Overruling a jury determination of fair use

(1) In *Oracle America, Inc. v. Google LLC*, Oracle sued Google for copying some elements of Oracle’s Java Application Programming Interface (“API”) to include in its Android platform. Google did not copy any of the Java code, but it did copy the names of the API’s routines (called “methods”), and the grouping of the methods into “classes” and “packages.” A jury found that Google’s copying was non-infringing fair use. But the Federal Circuit (applying Ninth Circuit law) reversed, holding that the use was not fair as a matter of law. It found that three of the four statutory fair-use factors weighed against fair use, and the last factor was not entitled to much weight.

(2) The result is surprising because application of the fair-use factors is a highly factual inquiry, as to which a reviewing court typically defers to the finder of fact. The court explained that because fair use is a mixed question of law and fact, it would defer to the jury on its determinations of historical facts, but would engage in de novo review of the application of the legal standards and on the ultimate issue.

B. A database of television video recordings is not the same as a database of scanned books in a fair use analysis

(1) In *Fox News Network, LLC v. TVEyes, Inc.*, the Second Circuit held that a service that recorded the programming from over 1,400 television channels, and maintained the recordings in a searchable database that it made available for a price, was not engaged in fair use.

(2) The court distinguished its earlier decision in *Authors Guild v. Google, Inc.*, which held that Google’s book-scanning project, in which it created digital copies of books, placed them in a searchable database, and displayed snippets of text in its search results, constituted fair use. The most important difference was that the ten-minute video clips that the defendant’s service made available were far more substantial than the limited snippets of text that the Google Books search results displayed.

IV. The section 512 safe harbors

A. Background

(1) Online service providers are not subject to monetary relief for copyright infringement on account of the actions of third parties if they comply with the requirements of § 512.

(2) This typically arises in a situation where a website or other platform hosts copyrighted material uploaded by its users without authorization from the copyright owners.

B. Service provider’s use of moderators

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5 804 F.3d 202 (2d Cir. 2015).
In Mavrix Photographs, LLC v. LiveJournal, Inc., the Ninth Circuit made it harder for a platform that uses moderators to establish entitlement to the § 512(c) safe harbor. Defendant LiveJournal operated a social media platform that allowed users to post items such as celebrity photographs. Users could not post the items directly; they had to submit their postings to LiveJournal’s moderators (mostly unpaid volunteers), who would determine whether to post them.

The § 512(c) safe harbor protects a service provider against infringement liability based on the storage of material “at the direction of a user” on a system controlled by the service provider. The district court held on summary judgment that LiveJournal satisfied the requirements for the safe harbor. But the Ninth Circuit reversed, holding that there was a factual issue as to whether the moderators were agents of LiveJournal, and therefore whether the materials were stored “at the direction of a user.”

C. An informal repeat infringer policy suffices

(1) In Ventura Content, Ltd. v. Motherless, Inc., the Ninth Circuit held that a very informal repeat infringer policy could meet the requirements for safe harbor, if it was applied in good faith. The defendant operated a website that allowed users to upload photographs and videos; the site held over 12.6 million items, most of them pornographic.

(2) To be entitled to the safe harbor, a service provider must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers.” The website stated a policy of terminating the accounts of users who repeatedly post infringing material. However, there was no written statement of the details of how the policy would be implemented. The website was a one-man operation, and that man was solely responsible for deciding whether to terminate infringing users.

(3) The court held that this policy, vague and informal as it was, met the statutory requirements. The court was particularly impressed by the fact that the website operator had terminated “between 1,320 and 1,980 users for alleged copyright infringement and that only nine alleged repeat infringers had slipped through.” It concluded that this constituted a reasonable implementation of the policy.

D. A completely notional repeat infringer policy does not suffice

(1) In BMG Rights Management (US) LLC v. Cox Communications, Inc., the Fourth Circuit upheld the district court’s holding that the defendant’s repeat infringer termination policy was inadequate. Defendant Cox Communications is a provider of high-speed Internet access services. Plaintiff BMG, a record label, sought to hold Cox contributorily liable for infringement of BMG’s copyrights on the part of Cox’s subscribers.

(2) Cox invoked the § 512(a) safe harbor as a defense. Cox’s repeat infringer termination policy was laughable in both theory and practice. The court described it as a “thirteen-strike policy”:

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6 873 F.3d 1045 (9th Cir. 2017).
7 885 F.3d 597 (9th Cir. 2018).
9 881 F.3d 293 (4th Cir. 2018), pet. for reh’g & reh’g en banc denied (Feb. 27, 2018).
The first notice alleging a subscriber’s infringement produces no action from Cox. The second through seventh notices result in warning emails from Cox to the subscriber. After the eighth and ninth notices, Cox limits the subscriber’s Internet access to a single webpage that contains a warning, but the subscriber can reactivate complete service by clicking an acknowledgement. After the tenth and eleventh notices, Cox suspends services, requiring the subscriber to call a technician, who, after explaining the reason for suspension and advising removal of infringing content, reactivates service. After the twelfth notice, the subscriber is suspended and directed to a specialized technician, who, after another warning to cease infringing conduct, reactivates service. After the thirteenth notice, the subscriber is again suspended, and, for the first time, considered for termination. Cox never automatically terminates a subscriber.

(3) The Fourth Circuit thus agreed with the district court that Cox was not protected by the safe harbor. However, the appellate court remanded, holding that the district court had charged the jury with an erroneous legal standard on the issue of contributory liability. The district court explained to the jury that Cox would be contributorily liable if the jury found that “Cox knew or should have known of such infringing activity.” The Fourth Circuit noted that this stated a negligence standard, and held that contributory liability required a higher level of knowledge, at least at the level of willful blindness.

V. It is copyright misuse to deprive owners of their first-sale rights

A. In Disney Enterprises, Inc. v. Redbox Automated Retail, LLC,10 Disney attempted to use its movie copyrights to prevent Redbox from selling codes allowing movies to be downloaded separately from the DVDs containing those movies. Redbox purchased Disney’s “Combo Packs,” consisting of a movie on a DVD and a code allowing the purchaser to stream or download the same movie from a website. Disney’s terms of use provide that the download code may only be used by the owner of the physical DVD, and that “The redemption of a digital code sold or transferred separate from the original physical product is prohibited.” Redbox removed from the Combo Packs it purchased the piece of paper containing the download code, and offered the code for sale via its kiosks. Disney argued that Redbox’s conduct amounted to contributory infringement, since it encouraged end users to make unauthorized copies of the movies.

B. The court held that Redbox was likely to succeed in proving that Disney’s invocation of its copyrights under these circumstances amounted to copyright misuse, and was thus insupportable. Under the first-sale rule, owners of physical objects containing copyrighted works, such as the DVDs at issue here, have the right to resell them without any need for permission from the copyright owner, since the sale of the objects exhausts the copyright owner’s public distribution right as to those objects. The court held that Disney’s attempt to enforce its copyright effectively prevented the DVD owners from reselling them, thus depriving them of their statutory rights to do just that: “This improper leveraging of Disney’s copyright in the digital content to restrict secondary transfers of physical copies directly implicates and conflicts with public policy enshrined in the Copyright Act, and constitutes copyright misuse.”

C. In a subsequent decision in the same case, the court held that Disney had likely succeeded in working around the copyright misuse problem by adopting a new set of terms. The new terms, presented to the user in a clickwrap (or perhaps shrinkwrap) format, state that the purchaser is receiving only a license and place significant use restrictions on the download codes. The court held that this was likely sufficient to prevent the purchaser from acquiring unrestricted ownership rights, and therefore the purchaser did not gain the right to transfer ownership.

D. In both of these decisions, the court’s reasoning is suspect, because it seems to base its first-sale analysis on ownership of the digital content, rather than on ownership of a physical object (a copy or phonorecord) containing a copyrighted work.

VI. Copyright status of model codes enacted into law

A. In *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, the D.C. Circuit ducked the vexing issue of whether a set of standards created by a private organization loses its copyright protection once it is incorporated by reference into a law. The National Fire Protection Association created a technical standard called the National Electrical Code, which was incorporated by reference into a number of state and federal statutes and regulations. The defendant purchased copies of this and other standards and posted them on a website, allowing free access. Plaintiffs, copyright owners of the standards, sued for infringement.

B. Previous cases have yielded sharply divided views on whether a copyright-protected literary work loses its protection once it, in effect, becomes law. The defendant argued that allowing the plaintiffs to control access to the incorporated standards by invoking their copyrights would violate the public’s First Amendment and due process rights. Rather than address this argument, the court considered whether posting of the standards was fair use. Finding it likely that the defendant’s posting of at least some of the standards was fair use, the D.C. Circuit remanded the case and directed the district court to further develop the factual record as relevant to whether the defendant’s use of each particular standard was fair.

VII. What allegations are required to state an infringement claim against a subscriber of an Internet access service

A. The scenario: A person subscribes to an Internet access service. Multiple devices, used by multiple people, access the Internet via that service. A user of the account engages in copyright infringement. The copyright owner sues the subscriber, bringing claims for direct and contributory liability. Is this enough to state a claim?

B. In *Cobbler Nevada, LLC v. Gonzales* the Ninth Circuit held that the plaintiff had failed to state a claim. Gonzales operated an adult foster care home. He was the named subscriber of the Comcast account that provided Internet access at that location. Somebody, using that account, downloaded plaintiff’s copyrighted movie without authorization. There was nothing in the allegations of the complaint suggesting that

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12 896 F.3d 437 (D.C. Cir. 2018).
13 See, e.g., *Veeck v. Southern Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc) (dividing 8-6 in holding that “as law, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives. As model codes, however, the organization’s works retain their protected status.”).
14 901 F.3d 1142 (9th Cir. 2018).
Gonzales, rather than an resident of the home or visitor to it, had engaged in the infringement.

C. The Ninth Circuit held that these allegations were not sufficient to state a claim against Gonzales for direct infringement. “The direct infringement claim fails because Gonzales’s status as the registered subscriber of an infringing IP address, standing alone, does not create a reasonable inference that he is also the infringer. Because multiple devices and individuals may be able to connect via an IP address, simply identifying the IP subscriber solves only part of the puzzle.”

D. The court also held that the allegations did not state a claim for contributory infringement. “Nor can Cobbler Nevada succeed on a contributory infringement theory because, without allegations of intentional encouragement or inducement of infringement, an individual’s failure to take affirmative steps is internet connection is insufficient to state a claim.”