White Paper

Copyright Law for the Digital Music Education Library:
The Digital Performance Right in Sound Recordings

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By Sean Frazer
Graduate Student
Indiana University School of Law-Bloomington
and Kelley School of Business

Project Investigator:
Kenneth D. Crews
Professor
Indiana University School of Law-Indianapolis
and IU School of Library and Information Science
Associate Dean of the Faculties
Indiana University Purdue University Indianapolis

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Note: The research for this paper is current as of October 15, 2002. Since that date, Congress has revised Section 114 of the U.S. Copyright Act with passage of the Small Webcaster Settlement Act of 2002 (Public Law 107-321, 107th Cong., 116 STAT. 2780), which restructured the terms on which certain noncommercial webcasters of sound recordings of music must pay royalties to copyright owners.

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I. Executive Summary

The purpose of this paper is to determine the legal effects sections 106(6) and 114 of the Copyright Act will have upon the Variations2 (“V2”) project at Indiana University. V2 is a project endowed by the National Science Foundation that aims to investigate and build leading methods for leveraging digital technologies to further music education. These methods will inevitably include performing, reproducing, distributing, adapting and compiling musical compositions and sound recordings via various digital technologies. Section 106(6) of the Copyright Act establishes a right – held by the copyright owner of a sound recording – to perform that sound recording via “digital audio transmission.” Section 114 of the Copyright Act enumerates several limitations to the section 106(6) right. In general, the “digital transmissions” within V2 may be copyright infringements, but Section 114 holds some potential for permitting certain uses of sound recordings.

This paper begins by providing an overview of the V2 project and further detailing the operational aspects of the project that are relevant to sections 106(6) and 114. The paper then proceeds to provide an overview of the limitations on the right of performance via “digital audio transmission” provided in section 114. The goal of those limitations is to provide any entity that seeks to perform sound recordings via “digital audio transmission” the ability to do so under a statutorily mandated license. The entity seeking to perform sound recordings via “digital audio transmission” can qualify by navigating a four-step process set forth by the language of section 114. First, the entity must show that the intended uses of the sound recordings will actually constitute the statutory definition of “digital audio transmission.” Second, the entity must show that the “digital audio transmissions” are not part of an “interactive service.” Third, the entity can find exemption from infringement of the section 106(6) right and from payment of royalties if it can show that it can be categorized as one of three exempt statuses. Fourth, the entity can qualify for statutory licensing exculpating it from infringement of the section 106(6) right, but subjecting it to royalty payments to the copyright owner if the entity can show that it can be categorized as one of three licensable statuses.

The paper applies this four-step framework to the V2 operations. The result is that section 114 likely applies to V2; however, V2’s operations disqualify it for any exemptions from the statute and from qualifying for licensing under the statute. The performances of sound recordings that result from V2 operations do, in some instances, constitute “digital audio transmissions.” The “on-demand” nature of the way in which V2 delivers and performs the sound recordings precludes V2 from meeting the “non-interactivity” requirements for any of the exempt or licensable statuses.

The framework for analysis of section 114 demonstrates that the code provision likely offers little advantage for V2 in its use of musical compositions and sound recordings. This paper suggests the following courses of action:

- Inventory potential violations of copyright law resulting from the use of V2 and assess the application of fair use and other statutory limitations on owner rights and the probability of successful employment of such defenses.
• Obtain non-statutory licensing for use of musical compositions and sound recordings. A licensing strategy may emerge from recommendations of the Webcasting Copyright Arbitration Royalty Panel’s report of February 20, 2002.

II. Overview of Variations2: The Indiana University Digital Music Library Project

“The Variations2 project aims to establish a digital music library testbed system containing music in a variety of formats, involving research and development in the areas of system architecture, metadata standards, component-based application architecture, and network services. This system will be used as a foundation for digital library research in the areas of instruction, usability, human-computer interaction, and intellectual property rights.”

The music theory component of the project “will produce software tools and applications to support music teaching, learning, and research. Using these new tools, students will be able to experiment, try alternatives, and work collaboratively with colleagues who have access to the same resources. Faculty with modest computer skills will be able to create lessons efficiently and provide students with highly interactive learning experiences in music.”

The music instruction component of the project “will incorporate digital music library collections and applications in a 'music for the listener' course, designed for the non-major and offered as a general education credit. Assessments will compare the effectiveness of a lecture-based class supplemented with digital content with one fully online. Variations2 resources will be incorporated into these classes using Oncourse, an online teaching and learning environment developed at IU.”

The scope of this paper will be to determine to what extent, if any, Section 114 of the Copyright Act is relevant to the uses of sound recordings in connection with the V2 project. In making this determination, this paper will organize a detailed explanation of the operations of V2 into four scenarios relevant to Section 114: the library maintenance scenario; the instruction preparation scenario; the instructor-led performance scenario; and the on-demand performance scenario. The performance scenarios will then be scrutinized within the framework for analyzing section 114.

A. Library Maintenance Scenario

The “library maintenance” scenario details the processes by which V2 administrators propose to make copyrighted materials – including, but not limited to sound recordings and associated pictorial, graphical and other works – available to V2 users in a digital format, accessible through secured internet-based technologies. V2 administrators will create ephemeral copies of sound recordings, load those copies into databases, and make metadata associations amongst subsets of sound recordings. V2 administrators will also input graphical representations (digital “sheet music”) of musical compositions. The “library maintenance” scenario likely triggers copyright issues surrounding the making of ephemeral copies and infringement of the rights of reproduction and distribution.
B. Instruction Preparation Scenario

The “instruction preparation” scenario details the processes by which V2 instructors and researchers (both consisting of faculty and students) propose to create materials for presentation to other students and faculty. These “materials” might take the form of multimedia presentations that consist of sound recordings, digital sheet music, instructor or researcher annotations, and other items that will benefit an educational purpose in creating a presentation. Students and faculty will create these presentations by saving, copying, and arranging sound recordings and associated works. Creation of derivative works is not intended to be an activity within the scope of the “instruction preparation” scenario. The “instruction preparation” scenario likely triggers copyright issues surrounding the making of ephemeral copies and infringement of the rights of reproduction, and distribution.

C. Instructor-Led Performance Scenario

The “instructor-led performance” scenario details the situations in which V2 presentations created in the instruction preparation scenario are actually performed to audience members in a classroom or auditorium setting. The presentations may be used in classroom instruction or performed to a limited group of Indiana University students that are enrolled in a music-related course. Additionally, the presentations might be used in an auditorium setting, or they may be performed to a limited group of academic or industry individuals at an educational conference or research lecture series. The “instructor-led performance” scenario likely triggers copyright issues surrounding the rights of reproduction, distribution, public performance, and public performance by “digital audio transmission.”

D. On-Demand Performance Scenario

The “on-demand performance” scenario details the situations in which V2 presentations created in the “instruction preparation” scenario are actually performed to audience members in a non-controlled or non-limited setting. The presentations might be made available (published) to the public or a limited group of Indiana University students and faculty from the V2 website or from a class, student or faculty website. Anyone that has access to such presentations via a website might download the digital file(s) to his or her personal computer for performance from that computer immediately or at a later time. Alternatively, the same presentations might be made available on the website only to be performed directly from that website using digital audio “streaming” technology. The “on-demand performance” scenario likely triggers copyright issues surrounding the making of ephemeral copies and infringement of the rights of reproduction, distribution, public performance, and public performance by digital audio transmission.
III. Section 114 – Scope of Exclusive Rights in Sound Recordings

A. Overview of Section 114 – A Framework for Analysis

The Copyright Act, in section 106, enumerates rights that copyright owners possess in their creative works. Prior to 1995, these rights included: reproduction, adaptation, distribution, performance and display. The copyright owner, through these rights, was empowered to determine who she would allow, for instance, to reproduce her work, or to determine that she would not allow anyone to reproduce her work at all. In subsequent sections of the Copyright Act, sections 107 through 122, the rights of copyright owners are limited. For example, section 115 limits the rights of a copyright owner of a musical composition by requiring the copyright owner to license the musical composition to anyone who wishes to perform and record that musical composition in exchange for royalties paid to the copyright owner.5

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (“DPRSRA”). This act amended section 106 of the Copyright Act to add a sixth right to be held by the owner of the copyright in a sound recording: the right to perform a sound recording publicly by means of “digital audio transmission.” This right does not extend to the copyright owner of the underlying musical composition upon which the sound recording is based. The purpose of the act is “to ensure that performing artists, record companies, and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used.”6 The DPRSRA also created limitations to this new right. Those limitations are enumerated in section 114 of the Copyright Act. The implementation of these limitations, however, departed from the usual philosophy of copyright law. Section 114 did not establish general principles to be followed by the courts in interpreting the limitations to the sixth right, but rather created detailed anticipatory regulation, made up of a complex system of inclusions and exceptions.7 It is this right of performance by “digital audio transmission,” and its associated limitations, that is the subject of this paper.

A basic understanding of section 114 reveals that it creates a “statutory licensing” framework that permits interested parties to obtain licenses to perform sound recordings via “digital audio transmission.” Furthermore, the license requires those interested parties to pay royalties to the copyright owners of the sound recordings. Absent a statutorily mandated license, the copyright owner would be able to pick and choose to whom she licenses her sound recordings. The “statutory license,” also called a “compulsory license,” compels the copyright owner to license her sound recording to any entity that wishes to perform the sound recording via “digital audio transmission” so long as that entity meets the statutory requirements for the “compulsory license.”

Section 114 establishes a four-step process by which one determines how a particular use of a sound recording is treated regarding the section 106(6) right and its limitations (See Figure 1 below for an overview of this process). First, the entity seeking digital use of sound recordings must determine if the intended use of a sound recording will actually constitute the statutory definition of a “digital audio transmission.” If a “digital audio transmission” does not in fact
occur as a result of the use, section 114 is not applicable, and hence, statutory licensing is not available. If, on the other hand, a “digital audio transmission” does in fact occur as a result of the use, section 114 is applicable.

Second, the entity seeking digital use of sound recordings must ensure that its use of the sound recording does not enable the target listener to exert certain influences on the selection process by which the sound recording is chosen for performance. If the entity does enable such “interactivity,” it is disqualified from obtaining exemption from the statute and from obtaining licensing under the statute. Otherwise, the entity is constrained – by the rules proscribing “interactivity” – in the way in which it uses the sound recording.

Third, the entity seeking digital use of sound recordings should determine if its “non-interactive” use is exempted from infringement and royalty liability. If the use of the sound recording can be categorized as one of three broad groups, that use is exempt and licensing is not required. Those exemptions include: 1) transmissions that are part of a nonsubscription, broadcast service; 2) transmissions that are part of a business establishment service; and 3) transmissions that are either “simultaneous” or “incidental” to an otherwise exempt transmission. The result of determining qualification for one of these three exempt categories is that the entity could perform the sound recording via “digital audio transmission” without subjecting itself to royalty liability or to copyright infringement liability. Otherwise, the entity must obtain licensing either through private agreement or the statute.

Fourth, the entity seeking digital use of sound recordings – not within one of the preceding three exempt categories – must determine if the use can be categorized as one of three statutorily licensable services: 1) a subscription service; 2) an eligible nonsubscription service; or 3) a preexisting satellite digital audio radio service. If so categorized, the entity qualifies for the statutory license. In order to obtain the license the entity must file notice with the Copyright Office and begin to pay royalties as set forth by the Librarian of Congress. Upon obtaining the statutory license and paying royalties, the entity is exculpated from liability for infringement of the sixth right of the copyright owner – the performance of a sound recording by “digital audio transmission.”

The nature of the performances resulting from the V2 operational scenarios arguably falls within the realm of section 114. Therefore, in order to determine the applicability of section 114 to the V2 project, the remainder of this paper will apply the four-step framework to the relevant V2 operational scenarios.
B. Applying the Framework to V2

Section 114(d) sets forth limitations on the exclusive rights in sound recordings of section 106. Those limitations are contained in three categories: Exempt transmissions and retransmissions,8 statutory licensing of certain nonexempt transmissions,9 and licenses for transmissions by interactive services.10 Depending on which, if any, of these categories the V2 operational scenarios can be classified as, section 114 could affect V2 in a wide range of ways:
1) V2 could be exempt from all royalty and infringement liability; 2) V2 could be subject to royalty liability via statutory licensing; or 3) V2 could be subject to requirements surrounding negotiation of private agreements for interactive services. The remainder of this section will step through each of these categories of limitations, making determinations of the likelihood of application of each to the V2 project. But first, one must address the issue of exactly what is a “digital audio transmission.”

1. “Digital Audio Transmission”

The first step in the framework for analysis of the applicability of section 114 to the V2 project is to ask whether the performances of sound recordings resulting from the V2 operational scenarios constitute “digital audio transmissions.” The definition of “digital audio transmission” is integral to understanding the scope of section 114. The right of public performance of sound recordings via “digital audio transmission” created by the DPRSRA “is wholly inapplicable outside the realm of transmissions.” Therefore, any performance by V2 that is not considered to be a “digital audio transmission” would likely be outside the scope of this performance right, and furthermore, would not likely create any liability for royalties relating to performances via “digital audio transmissions.” Conversely stated, any performance by V2 that is not considered to be a “digital audio transmission” would require scrutiny to determine if that “non-digital audio transmission” performance triggers issues related to the other five rights of copyright owners.

The phrase “digital audio transmission” is not completely defined in any one place in the Copyright Act. Under the law, a “digital transmission” is a transmission in whole or in part in a digital or other non-analog format. Nimmer, the leading copyright treatise, asserts that this “broad definition, by itself, is not limited to the audio subspecies to which the new sound recording public performance right applies. The statute therefore goes on to specify as follows: “A ‘digital audio transmission’ is a digital transmission . . . that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.” This begs the question: What then, constitutes a “transmission,” or better yet, what does “transmit” mean? The Copyright Act specifies that to “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent. This presents two sub-issues for V2. First, are all performances of sound recordings in the V2 operational scenarios being performed via a “digital, non-analog mechanism?” Second, to what extent is geographical dispersion allowed between the places from which a digital performance is sent and received for that digital performance to fall within the meaning of “transmit?”
In answering the question posed by the first sub-issue regarding whether all performances of sound recordings in the V2 operational scenarios are performed via a digital, non-analog mechanism, one must look to the mission of the V2 project. The core mission of the V2 project “aims to establish a digital music library testbed system . . . [to] be used as a foundation for digital library research in the areas of instruction, usability, human-computer interaction, and intellectual property rights.” Based on this mission, one can assume for the purposes of this paper that all delivery methods will be via digital, non-analog mechanisms.
In answering the question posed by the second sub-issue regarding to what extent geographical dispersion is allowed between the places from which the digital performance is sent and received for that digital performance to fall within the meaning of “transmit,” one must take part in an exercise that attempts to delineate the many possible lines that could be drawn in the “sending-location-versus-receiving-location sand.” Taking for instance the V2 instructor-led performance scenario, a performance might be “sent” from a presentation that is resident on a laptop computer located within the same classroom as the student audience that is to “receive” the digital performance. The implication of this instance of the “instructor-led performance” scenario is that likely no “digital audio transmission” occurs because the performance is not to be received “beyond the place from which” the transmission will be sent – the classroom. Another possible instance of the “instructor-led performance” scenario occurs when the transmission is sent from a webserver located in a different room in the same building as the classroom where the transmission is received by the student audience. Here the implication might be that a “digital audio transmission” occurs because the transmission is to be received beyond the room from which the webserver will send the transmission. An alternative implication could be given, however, by making the argument that because the sending webserver and the receiving classroom were in the same building, the transmission will not be received beyond the place (the building) from which it will be sent by the webserver. Furthermore, the same two alternative implications can be given and arguments presented in the case where the sending webserver is located on the university campus but in a different building. The delineation of sending-receiving scenarios could be the subject of an entire paper equal in weight to the scope of this paper. The same analysis holds true for the “on-demand performance” scenario.

The issue regarding proximity of sending and receiving location could very likely drive the determination of whether or not the V2 operational scenarios facilitate “digital audio transmissions,” but the law does not offer a settled resolution at this time. For purposes of exploring related issues, this paper will conservatively assume that a “digital audio transmission” does indeed occur when performances are rendered through the “instructor-led performance” scenario and the “on-demand performance” scenario. Under this assumption the paper will now move on to the second step in the framework for analysis of section 114.

2. Interactive Services and Licensing

a. Non-Interactivity Requirements for Exemptions and Statutory Licensing

The second step in the framework for analysis of the applicability of section 114 to the V2 project is to ask whether the performances of sound recordings resulting from the V2 operational scenarios constitute an “interactive service.” Section 114(d)(2) requires that any qualifying transmission (exempt or licensable) must not be part of an interactive service. An “interactive service” is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception . . . by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service
does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.\textsuperscript{20}

In order to determine whether or not the V2 performance scenarios would be deemed interactive, one must dissect the definition of an “interactive service” into its component parts.

\textbf{Figure 3: Step}

\emph{Digital Audio Transmission?}

\begin{itemize}
  \item Digital, non-analog format
  \item Beyond the place from which it is sent
\end{itemize}
The “instructor-led performance” scenario does not likely include presentations that were specially created for a specific member of the public, but rather includes presentations created for a group of students or faculty. Furthermore, these presentations were likely selected for performance by the faculty member teaching the class, not by or on behalf of an individual student. Therefore, the “instructor-led performance” scenario likely does not cross the threshold of becoming interactive. However, the same fact pattern can be approached from a different perspective: the request for the presentation was made by the instructor to meet the instructor’s demands and needs – not the students’. Viewed from this perspective, an argument could be made that the “instructor-led performance” scenario likely does cross the threshold of becoming interactive.

Similarly, the “on-demand performance” scenario empowers a student or faculty member to search for and perform a particular presentation to himself or herself. Even though the presentation that was searched for and performed was not specially created for any one particular student it was selected for performance by the recipient. Therefore, the “on-demand performance” scenario likely does cross the threshold of being an “interactive service.” So V2 is left to sort out how section 114 will treat a V2 composed of one “non-interactive” performance scenario (instructor-led) and one “interactive” performance scenario (on-demand).

Even if the “on-demand performance” scenario is interactive, the definition of an “interactive service” in section 114(j)(7) provides for an exception of sorts. “The ability of individuals to request that particular sound recordings be performed for reception . . . by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within one hour of the request or at a time designated by either the transmitting entity or the individual making such request.” V2 could pursue software limitations that require a “waiting period” of at least one hour from the time that a student requests a presentation to be performed until the time that the presentation is actually performed. This suggestion, however, should be discouraged for two reasons. First, the likely intent of the “one-hour” exception was to complicate the process by which a recipient could digitally record a requested sound recording. The idea was that if a request was made and that requested sound recording was not performed immediately, the recipient would be thwarted in any efforts to make such a recording because the requested sound recording would be preceded by other sound recordings. If V2 were to require a one-hour waiting period, students could request presentations to be performed one hour prior to the student’s intended listening time, effectively undermining the purpose of the statutory exception in the first place. The second reason why implementing a one-hour “waiting period” should be discouraged is that it simply is not consistent with the mission of the V2 project. V2 aims to provide advances in music instruction in the classroom. To effectively accomplish this goal, V2 must allow its instructors to access classroom presentations consisting of sound recordings in a timely, sometimes dynamic, fashion. For these two reasons, it is likely that V2 will not benefit by an attempt to exploit this definitional exception found in section 114(j)(7).

As V2’s two performance scenarios elucidate, it is likely that V2 will facilitate a variety of “interactive” and “non-interactive” transmissions. “If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.” The implication of this statement is that V2 could license its “non-interactive” transmissions under sections 114(d)(2) and (f), but could not license its “interactive” transmissions.
Finally, section 114(d)(2) imposes a list of performance requirements aimed to thwart "interactivity." In short, V2 would have to make broad changes to the two performance scenarios to comply with these requirements for a “non-interactive” system. Again, compliance would defeat the overriding on-demand educational purpose of V2. To not comply, clearly takes V2 inside the realm of “interactivity” and therefore, precludes its ability to gain exemption from or licensing under section 114. The list of performance requirements for the “non-interactive” exemption is as follows:

- The transmission must not exceed the “sound recording performance complement” except if a retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station;  
  
- The transmission must not publish an advance program schedule that details the titles of specific sound recordings that will be transmitted, except that some information about upcoming artists may be published and if the transmission is a retransmission of a broadcast station and the transmitting entity does not have the right or ability to control the programming of the retransmission, prior oral announcement by the broadcast station may be transmitted;  
  
- The transmission is not part of:
  - An archived program of less than five hours duration;  
  - An archived program of five hours or greater in duration that is made available for a period exceeding two weeks;  
  - A continuous program which is of less than three hours duration;  
  - An identifiable program that is less than one hour in duration in which performances of sound recordings are rendered in a predetermined order that is transmitted more than three times in any two-week period that have been publicly announced in advance; or  
  - An identifiable program that is of more than one hour in duration in which performances of sound recordings are rendered in a predetermined order that is transmitted more than four times in any two-week period that have been publicly announced in advance;  
  
- The transmission does not knowingly perform a sound recording as part of a service that associates visual images contemporaneously with the sound recording, in a promotional or advertorial (advertisement delivered in an editorial fashion) way;  
  
- The transmitting entity must cooperate to prevent transmission recipients from scanning the transmission in order to select a particular sound recording for transmission to the recipient;  
  
- The transmitting entity must not cause or induce the recipient to make a copy of the sound recording, and if the transmitting entity has the technological capability to prevent such copying, it must enable that capability;  


• Transmissions must be made from a copy of the sound recording legally obtained under the authority of the copyright owner, and copies distributed to the public via the transmission are made under the same;33
• The transmitting entity must accommodate and not interfere with technical measures used by sound recording copyright owners to protect their works;34
• The transmitting entity must display the following information to the transmission recipient during, but not before, the transmission, except in the case of some broadcast retransmissions:35
  o Title of the sound recording;
  o Title of the phonorecord embodying the sound recording;
  o Featured recording artist.
• Except as provided in section 1002(e)36, information encoded in the sound recording must accompany the sound recording transmission: identification of the title of the sound recording; the featured artist who performs on the sound recording; and related information concerning the underlying musical work and its writer.37

b. Licensing for Interactive Services

Since the result of the second step in the framework for analysis of the applicability of section 114 to the V2 project is that V2’s performances of sound recordings most likely constitute an “interactive service,” V2 will not likely qualify for an exception. V2 must therefore look to section 114(d)(3) for general guidelines regarding private licensing agreements between copyright owners (or their representatives) and interactive services. Section 114(d)(3) first states that the interactive service is restrained from publicly performing a sound recording “unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording,” provided that the license can be obtained by the interactive service through either a performing rights society38 or the copyright owner.39 This subsection is important to V2 in that it spells out the most likely effect section 114 has on V2—an interactive service obtains no statutory license under section 114 and must obtain a private license through one of the copyright owner designees or through the copyright owners directly. More important, this section implies that until such private licensing is obtained, any interactive service operation could be an infringement of the performance rights held by the copyright owner of the composition, as well as an infringement of the performance rights—by means of the digital audio transmission—with respect to the sound recording.40

Second, one of the few specifics about licensing relates to exclusivity, which is not likely to be relevant to V2. The license granted to the interactive service may not be exclusive for a period in excess of 12 months for a licensor that holds copyright to 1,000 or more sound recordings, and may not be exclusive for a period in excess of 24 months for a licensor that holds copyright to 1,000 or fewer sound recordings.42 However, two exceptions to this second guideline are relevant: 1) the bar on exclusive agreements does not apply if a licensor grants at least five different interactive services licenses, each such license being for at least ten percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, or for 50 sound recordings, whichever is greater;43 2) the bar on exclusive agreements
does not apply if an exclusive license is to be granted for the sole purpose of promoting the sound recording and the license is granted for no more than forty-five seconds of the play-time of the sound recording.44

Even though V2 will likely have to obtain private licensing because of the “interactive” nature of its operations, it will be useful for this paper to continue to step through the framework for analysis of section 114 in order to provide a complete picture of the statute to V2 project team members and to other interested parties. Therefore, the paper continues with step three of the framework.

3. Exempt Transmissions and Retransmissions

The third step in the framework for analysis of the applicability of section 114 to the V2 project, assuming the system is not “interactive,” is to ask whether the performances of sound recordings resulting from the V2 operational scenarios can be categorized as one of three exempt services. A performance by “digital audio transmission” is exempt if the performance is part of:

- A “nonsubscription broadcast transmission”45 or a retransmission of a “nonsubscription broadcast transmission;”46
- A transmission within a business establishment, confined to its premises or immediately surrounding vicinity47 or a transmission to a business establishment for use in the ordinary course of its business;48 or
- A “simultaneous” retransmission of a transmission by a transmitter licensed to publicly perform and authorized to retransmit the sound recording49 or a prior or simultaneous transmission “incidental” to an exempt transmission.50

If the transmissions to be made by V2 were to fall within one of these exempt categories, V2 would be relieved of liability for infringement of section 106(6) and would also be relieved from the duty to pay royalties for performance of sound recordings by “digital audio transmission.” Unfortunately, V2 likely does not fall within any one of these exempt categories. Analysis of each exemption follows.
a. Broadcast Transmissions

A “nonsubscription broadcast transmission” and a “retransmission of a nonsubscription broadcast transmission” are those transmissions made by a terrestrial broadcast radio station licensed by the Federal Communications Commission and transmitted in such a way that they are not “controlled and limited to particular recipients, and for which consideration is not required to...
be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." Because V2 is not licensed by the FCC as a terrestrial broadcast radio station, V2 likely will not qualify for the nonsubscription broadcast transmissions or retransmissions exemption.

b. Business Establishment Services

A transmission within a business establishment, confined to its premises or immediately surrounding vicinity as well as a transmission to a business establishment for use in the ordinary course of its business are exempt from section 114 royalties because these services are licensed under separate, pre-existing licensing schemes. V2 likely does not qualify as a “business establishment service” because its operational purpose is creation and delivery of academic programming, not background music for a business establishment.

c. Simultaneous and Incidental Transmissions

A “simultaneous” retransmission of a transmission by a transmitter licensed to publicly perform and authorized to retransmit the sound recording is an exemption that provides those entities already licensed to transmit and retransmit sound recordings, under private agreement for example, the ability to do exactly that without section 114 nullifying previously existing license agreements. Unless V2 has secured previous license agreements to transmit or retransmit sound recordings, this exemption is not relevant.

A prior or “simultaneous” transmission “incidental” to an exempt transmission is an exemption that allows a transmitting entity to make additional transmissions – such as for signal boosting – necessary to facilitate transmissions that are exempt under other parts of section 114(d)(1). As the paragraphs preceding this one indicate, V2 does not likely qualify for any other exemptions under section 114(d)(1), and since the “simultaneous incidental” transmission exemption is dependent upon qualification for another section 114(d)(1) exemption, it likely does not apply to V2.

V2 likely does not qualify under any section 114(d)(1) exemption. Therefore, V2 must address the fourth step in the framework for analysis of section 114.

4. Statutory Licensing of Certain Nonexempt Transmissions

The fourth step in the framework for analysis of the applicability of section 114 to the V2 project is to ask whether the performances of sound recordings resulting from the V2 operational scenarios can be categorized as one of three services that qualify for compulsory licensing under section 114:

- A “subscription digital audio transmission” not exempt under section 114(d)(1);
- An “eligible nonsubscription transmission;” or
- Transmissions not exempt under section 114(d)(1) that is made by a “preexisting satellite digital audio radio service.”

On the surface it could be in the financial best interests of the V2 project to qualify for statutory licensing as one of these three classifications because the Librarian of Congress set copyright
royalties to be paid under the section 114 statutory licenses at rates that may be acceptable to V2. These rates are fixed to be a certain dollar amount per sound recording performed by “digital audio transmission.” If V2’s expected volume of sound recordings performed via “digital audio transmission” is low or modest, given the acceptable per-performance royalty rates, the total royalty liability to be incurred by V2 under a section 114 license would be minimal.

Figure 5: Step 4 of the Framework

**Digital Audio Transmission?**
- Digital, non-analog format
- Beyond the place from which it is sent
V2 could pursue a statutory license under section 114. While affordable economically, this strategy would have two crippling effects on the V2 project: 1) the operational flexibility of the services offered by V2 would be severely constrained as a result of the “non-interactivity” requirements discussed in step two of the framework for analysis; and 2) to obtain a statutory license under such guise would force V2 to assert that it is a commercial service, which might hinder its efforts to assert defenses, such as fair use, to copyright infringement claims spawning from non-section 114 issues.

It is not the scope of this paper to make decisions regarding legal strategy so the details of section 114 licensing must be further investigated. The hurdles to qualifying for such licensing, however, would be steep for V2 and would jeopardize some elements of the V2 proposal. Regardless, the remaining paragraphs of section (III)(B)(4) of this paper will complete the fourth and final step of the framework for analysis of section 114 by determining whether the performances of sound recordings resulting from V2’s operational scenarios constitute one of the three categories that qualify for statutory licensing.

a. Subscription Digital Audio Service Transmissions

A “subscription digital audio service” transmission is the first classification under which an entity may qualify for a section 114 statutory license. A “subscription digital audio transmission” not exempt under section 114(d)(1) is a “transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.” This simple definition packs within it three distinct legal issues: 1) whether a “digital audio transmission” occurred; 2) if a transmission did occur, whether it was controlled and limited; and 3) whether consideration was required to be paid by the recipient.

The first legal issue to be tackled in making the determination as to whether a transmission qualifies as a “subscription digital audio service transmission” is to determine which actions within the V2 operational scenarios are considered “digital audio transmissions.” As discussed in step one of the framework for analysis of section 114, for purposes of this paper assume that the typical performances facilitated by the “instructor-led performance” scenario and the “on-demand performance” scenario do likely constitute “digital audio transmissions.”

The second legal issue to be tackled in making the determination as to whether a transmission qualifies as a “subscription digital audio service transmission” is to determine if the transmissions performed in the V2 operational scenarios are controlled and limited to particular recipients. In the case of the “instructor-led performance” scenario accessibility is limited to students actually enrolled in course work or to audience members attending a faculty-researcher’s lecture series. For each performance, the receiving audience is limited to those physically present, and therefore, the “instructor-led performance” scenario likely qualifies as being controlled and limited. On the other hand, if the “on-demand performance” scenario does not limit accessibility to some arbitrary group of recipients, such as enrolled university students and faculty, the argument could be made that the transmissions are not controlled and are not limited to particular recipients. Even in the case where the “on-demand performance” scenario limits accessibility to enrolled university students and faculty, the argument could be made that the “on-demand” nature of the scenario precludes qualification as being “controlled.” Due to the flexible nature of the V2 operational scenarios and the ambiguity surrounding the
terms “controlled” and “limited,” the “instructor-led performance” scenario and the “on-demand performance” scenario will most likely not meet the standards of the second threshold issue faced in determining whether the V2 project will qualify as a subscription digital audio service.

The third legal issue to be tackled in making the determination as to whether a transmission qualifies as a “subscription digital audio service transmission” is to determine if the particular participants are required to pay consideration (or consideration is otherwise paid on their behalf) for access to the transmissions. In both performance scenarios the university could charge an itemized subscription fee to each enrolled student who is provided access to classroom performances or to each audience member who is provided access to a faculty-researcher’s lecture series performances. This would provide direct evidence of a quid pro quo – money for access to performances. On the other hand, the university might not charge a direct subscription fee to enrolled students or audience members, but assert that the V2 subscription fee is included in course fees or lecture-series fees. This alternative would provide less evidence of a direct quid pro quo, and therefore, might hinder establishing that V2 is a subscription service. Either way, it is likely that the university could establish that consideration is paid by the particular recipients for access to the transmissions resulting from both performance scenarios. Since both V2 performance scenarios present evidence of a quid pro quo, it is likely that each will meet the standards of the third issue faced in determining whether the V2 project will qualify as a subscription digital audio service.

Because only two of three threshold legal issues plausibly favor V2, one must conclude that V2 does not qualify as a “subscription digital audio service,” and therefore, does not qualify for a statutory license under section 114.

b. Eligible Nonsubscription Service Transmissions

An “eligible nonsubscription service” is the second classification under which an entity may qualify for a section 114 statutory license. An “eligible nonsubscription transmission” is “a noninteractive nonsubscription digital audio transmission . . . that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings . . . if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.” An “eligible nonsubscription transmission” differs from a “subscription digital audio transmission” in that it is offered to the general public (not limited to particular recipients) and recipients are not charged a subscription fee for the performances. For example, a webcaster that provides music programming to its listeners qualifies as an “eligible nonsubscription service” even if that webcaster sells music on the website or advertises products for third-party sellers.55 Consider in contrast a website that promotes a specific product or group of products, such as a bookseller. In this case, the bookseller that performs sound recordings from its website in order to provide a more enjoyable shopping experience for its customer likely does not qualify as an “eligible nonsubscription service.”56 However, the bookseller that performs sound recordings from its website that also sells music likely does qualify as an “eligible nonsubscription service” so far as the bookseller can distinguish those sound recordings performed from the area of the website that sells music versus those sound recordings performed from the area of the website that sells books.57
c. Preexisting Satellite Digital Audio Radio Service Transmissions

A “preexisting satellite digital audio radio service” is the third classification under which an entity may qualify for a section 114 statutory license. A “preexisting satellite digital audio radio service” is “a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission . . . .” V2 does not possess the FCC license required to be classified as a satellite digital audio radio service, and therefore, this classification is irrelevant to V2.

C. Recommendations

In summary, V2 does not likely qualify for exemption from infringement liability—or for payment of statutory royalties—resulting from performances of sound recordings via “digital audio transmission.” Nor does V2 qualify for statutory licensing of the same. V2 does likely facilitate “digital audio transmissions,” bringing its operations within the scope of section 114. However, V2 operations do not conform to the “non-interactivity” requirements set forth in section 114. Thus, V2 must consider alternatives to statutory exemption from and compulsory licensing of sound recordings under section 114.

The framework for analysis of section 114 demonstrates that the code provision likely offers little advantage for V2 in its use of musical compositions and sound recordings. This paper accordingly suggests the following courses of action:

- Inventory potential violations of copyright law resulting from the use of V2 and assess the application of fair use and other statutory limitations on owner rights and the probability of successful employment of such defenses.
- Obtain non-statutory licensing for use of musical compositions and sound recordings. A licensing strategy may emerge from recommendations of the Webcasting Copyright Arbitration Royalty Panel’s report of February 20, 2002.

1 Variations2 website at http://dml.indiana.edu/.
5 Before this limitation takes affect, the copyright owner of the musical composition must first license the composition for performance voluntarily. Once the musical composition has been performed and released the first time, anyone else may obtain a “mechanical license” to do the same. See 17 U.S.C.A. § 115 (West 2002).
7 DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21(A) (BENDER 2002).
9 17 U.S.C.A. § 114(d)(2) (West 2002). Nonexempt transmissions are those that do not fall within the scope of section 114(d)(1).
One additional note regarding what is and what is not a digital audio transmission should be discussed. One might incorrectly consider the actions of the instruction preparation scenario or library maintenance scenario to be considered digital audio transmissions. These individuals might engage in downloading, saving, and manipulating of the sound recording during the course of instruction preparation or during the course of loading sound recordings to the library; these activities likely create copies of sound recordings or adapt sound recordings in some way. These activities, therefore, are more likely to trigger issues regarding infringement of the rights of reproduction, distribution and adaptation, rather than the right of performance via digital audio transmission.

Section 1002 pertains to copying controls for digital audio recording devices and media. Section 1002(e) states, “[a]ny person who transmits or otherwise communicates to the public any sound recording in digital format is not required under this chapter to transmit or otherwise communicate the information relating to the copyright status of.
the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.” 17 U.S.C.A. § 1002(e) (West 2002).


38 “[A] ‘performing rights society’ is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.” 17 U.S.C.A. § 114(d)(3)(E)(ii) (West 2002).


40 This statement would, of course, be subject to the activity being within fair use or another exception to the rights of copyright owners.

41 “[A] ‘licensor’ shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings.” 17 U.S.C.A. § 114(d)(3)(E)(i) (West 2002).


45 17 U.S.C.A. § 114(d)(1)(A) (West 2002). “A ‘broadcast transmission’ is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.” 17. U.S.C.A. § 114(j)(3) (West 2002). “A ‘nonsubscription’ transmission is any transmission that is not a subscription transmission.” 17. U.S.C.A. § 114(j)(9) (West 2002). “A ‘subscription’ transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.” 17. U.S.C.A. § 114(j)(14) (West 2002).


52 For a more detailed discussion of the distinction and legal treatment of a “retransmission of a nonsubscription broadcast transmission” see DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22(B)(2) (BENDER 2002).


54 Classroom-based activities such as the ones described here likely trigger issues surrounding distance education. See 17 U.S.C.A. § 110 (West 2002).

55 DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22(D)(1)(d) (BENDER 2002).

56 DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22(D)(1)(d) (BENDER 2002).

57 DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22(D)(1)(d) (BENDER 2002).