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Licensing Issues on the Internet

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Licensing Issues on the Internet

Mr. STEVEN MASUR:

Thank you very much for the introduction. I see myself mostly as a facilitator, trying to help my clients achieve their business objectives on the Internet. There are plenty of lawyers on the panel now, so I think I will start off by talking about what some entrepreneurs are doing on the Internet in order to set a business framework for our discussion of what legal issues affect business on the Internet.

We are in New York, and in New York the Internet is more of a media business than it is a technology business.¹ Most people in this market are using the Internet as a medium for creative expression and commerce.² At this point, I will tell you the two main points to remember from what I have to say. First, the best Internet ideas are those which can be done better on the Internet than on any other medium (i.e. TV, radio, magazines, etc.).³ Second, I think people will be drawn to the Internet primarily by content they cannot get any other way.⁴

¹ See Stephen P. Gallagher and Joseph D. Bermingham, *Technology and the Legal Profession: Conflict and Opportunity*, 68 N.Y. ST. B.J. 24, 26 (1996). The Internet is considered an important vehicle for agencies to use in disseminating information and collecting data. *Id.*

² *Id.* at 26-27. "Those familiar with the Internet believe that in the not-too-distant future, as security and similar issues are resolved, the Internet will be the primary way cities, counties and states transact business with citizens." *Id.*

³ See Bruce W. Sanford and Michael J. Lorenger, *Symposium: Legal Regulation of the Internet, Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1140 (1996). Commercial online services provide the quickest and cheapest way to access information. *Id.* at 1141. For a monthly fee, subscribers gain access to these systems which offer access to a variety of bulletin boards, electronic mail, news reports and reference materials. *Id.*

⁴ *Id.* at 1137. "The First Amendment and the Internet deserve each other." *Id.* "No technological advance in communications during the twentieth

There are a lot of examples of information and content that might not necessarily make it onto MTV⁵ or CBS,⁶ that you can only access on the Internet.⁷ I think this is one of the compelling things that will cause people to want to use the medium. At this point, can I ask how many people here, by a show of hands, use the Internet on a daily basis? Presumably the people listening online use it on a daily basis as well.⁸

The tools for production on the Internet are getting better and better.⁹ I could name some of those; but I do not think it is

century offers as much opportunity for robust, uninhibited self-expression as the free-wheeling Internet." *Id.*

⁵ MTV (Music Television) premiered in 1982 and is owned by Viacom International, Inc.

⁶ Columbia Broadcasting Systems is owned by Westinghouse. Rumor has it that Microsoft executives were considering buying CBS. "Consider . . . the option of combining broadcast TV shows with push technology incorporated directly into a PC operating system." Stuart J. Johnson, *Stupid Merger Trick?*, INFORMATION WEEK, July 7, 1997, available in Westlaw, 1997 WL 7602960.

⁷ See Excite, Inc., *WebCrawler* (visited Nov. 13, 1997) <<http://www.webcrawler.com/>> and *Yahoo!* (visited Nov. 13, 1997) <<http://www.yahoo.com/>>. Both websites are known as search engines. When these sites are accessed, a selection of topics appear at your fingertips. For example, both sites allow access to Arts & Books, Business & Entertainment, Travel, and News & Media. Users can read books and magazines online, get stock quotes and investment advice, make travel arrangements, and read the days news up to the minute.

⁸ See Ian C. Ballon, *Intellectual Property Protection and Related Third Party Liability*, (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4007, 1997). Millions of people read and contribute to Usenet on a daily basis. *Id.* at 567. See also, Sanford and Lorenger, *supra* note 3, at 1140. The amount of people who regularly use the Internet is anticipated to be one hundred million by the year 2000. *Id.* "The Internet will become as prevalent in our daily lives as the printing press, telephone, radio, and television." *Id.* at 1140-41.

⁹ See ITTA Discussion Paper, "Intellectual Property Protection in Cyberspace: Towards a New Consensus," 1997 WL 710185 (Dec. 12, 1996). A number of tools facilitate use of the Internet; these include: E-mail to facilitate creation, management, and exchange of information on the Internet; WAIS can search a database using key search terms; "Gopher" navigates the Gopher structure to locate exact information; "Archie, Veronica and Jughead [,] Archie is used for file transfer from FTP sites; Veronica provides

as important as simply to note that they are cheap, they are easy to use, they are getting much better, and they are accessible to anyone, whereas in other mediums this is not the case.¹⁰

One of the things that distinguish the Internet from other mediums is that amateurs can use these tools to broadcast for themselves.¹¹ Also, bandwidth issues are decreasing. There will always be a debate about which technology or group of technologies will take over distribution,¹² but it is more important for a media company simply to note that bandwidth issues are being solved. So you have both ease of production and access to bandwidth in the pretty near future, and that makes for pretty exciting marketplace.¹³

Now, I would like to talk about what some people are doing online. I think everyone online is more or less in competition for community, which basically means an audience. Whether you maintain a personal website or you are a business, you put up a website primarily to attract people. Only human imagination and human interaction limit the types of things you can do because increasingly you can interact on the Internet in nearly every way that you can interact in person.¹⁴ That makes for some interesting opportunities for performers as well as for business, and it means that there is a level playing field. I can

exhaustive Gopher site searching; and Jughead offers specified Gopher site searching." *Id.*

¹⁰ See Mike Hogan, *Farewell to Phones: Now All You Need Is a Computer To Take Your Calls. Or So One Entrepreneur Thought*, HOME OFFICE COMPUTING, Sept. 1995 at 61 (discussing new technology called CTI technology that integrates phone, answering machine, modem, contact manager/address book and communications software).

¹¹ See John Markoff, *Internet Growth Continues*, N.Y. TIMES, Sept. 15, 1997, at D 4-5.

¹² See Peter H. Lewis, *Netcom to Seek Profitable Niche: Internet Access Just for Business*, N.Y. TIMES, Dec. 19, 1996, at D 8.

¹³ *Id.*

¹⁴ See e.g. Blue Pearl Entertainment, *Techno-3* (visited Sept. 23, 1997) <<http://www.bluepearl.com/bluepearl>>. (online cybersoap opera) Seth Schiesel, *Taking in the Sites*, N.Y. TIMES, Sept. 8, 1997, at D 6 (professional football on the Web) Jane L. Levere, *The Media Business: Advertising: With Soap Operas on the Web, What's Next? J.R. Ewing Logging on to Lead Chat Groups*, N.Y. TIMES, Mar. 11, 1996, at D 9.

put my web site up right next to Time Warner's website.¹⁵ Almost like on the subway, you see an ad for a movie that probably cost thousands of dollars to produce, and there might be some graffiti right next to it that cost the amount of a can of paint. However, this is a double-edged sword, because you do not necessarily want to be on a level playing field with Time Warner, because you probably do not have the resources that Time Warner has.

I think the Internet business breaks up into three main categories, which include a number of hybrids. First, there are promotional resource and database sites, which can include everything from a site announcing the presence of a corporation and what they do, to a personal home page, to a band home page, to a list of bands like IUMA¹⁶ (Internet Underground Music Archive) or All Music Guide, which lists a number of bands, what those bands are doing and what their history is. Internet Movie Guide also fills a similar need for the movie industry.¹⁷

Another category of Internet businesses is entertainment content sites, which can include some of the larger companies -- the Time Warners, the Disneys, and the Microsoft Networks of the world -- who are putting up entertainment content. In this category, there are also some smaller players like some of the people I represent, who are either interested in producing something for a bigger site or just doing it on their own -- however they can get an audience. Those include people who have episodic shows on the Internet like "Televerse" and "At St. Mark's Place," or Sonic Net, or Pseudo Networks, or GRIT, which are producing content for the Internet.¹⁸

¹⁵ Time Warner (visited Nov. 3, 1997) <<http://www.pathfinder.com/>>.

¹⁶ *Internet Underground Music Archive* (visited Sept. 23, 1997) <<http://www.iurna.com>> (providing information on the music industry and latest musicians).

¹⁷ See, e.g., Martin Bohnet, *The Internet Guide to Movie Sites* (visited Sept. 23, 1997) <<http://www.internetdatabase.com/movie.htm>> (covering World Wide Web mailing lists, news groups, gopher sites, FTP sites, and Telnet).

¹⁸ "Televerse" and "At St. Mark's Place" are cyber drama cites which can be accessed at <<http://www.televerse.com>> and <<http://www.ecafe.org/freeside/cline/stmark>>.

The third category, of Internet businesses is retail, where people are selling things online. This category includes sites like See Me Now, amazon.com, and J Crew Online.¹⁹ There are also some hybrids of the categories I have mentioned. One such hybrid is a site called Platform.net, which mixes a retail business with a content business.²⁰ They have some notable magazines, including "Rap Pages" and "Teen Mom," which draw community to the site, but they also sell some interesting clothing labels off the site.²¹ Another example is the group of sites produced by N2K, which have information about different music genres and artists, and also sell CDs and music from those artists.

There are also hybrid retail and promotional sites like Soundwire,²² which sells independent music, and Outersound,²³ which is a resource for independent bands and musicians as well as a promotional, networking and sales platform for bands, music professionals and equipment. In addition, there is an interesting market in linked businesses, where a retail business will link with another business that does something different. There are mutual benefits for such a link. For example a retail site that sells music might link with a promotional or fan site which has information about bands.²⁴ The retail site would gain a point of sale for its merchandise, and the fan site would be able to offer its audience the music discussed on the site.

Again, there are a lot of new ideas in the marketplace right now. For example, there is an interesting thing happening

¹⁹ "See Me Now" is a compendium of on-line goods and services for sale and can be accessed at <<http://www.seemenow.com/>>. *Amazon.com* is a large on-line bookseller self-addressed as the "earth's biggest bookseller."

²⁰ *The Windward System Five* is a point of sale business management system and can be accessed at <<http://www.windward-software.com>>.

²¹ *Teen Mom* is a "satirical Web site of undiluted acerbity" and can be accessed at <<http://www.teenmom.com>>. *Rap Pages* is a website devoted to rap and hip-hop and can be accessed at <<http://www.platform.net/substance/raggages/raphomepage.htm/>>.

²² Soundwire can be accessed at <<http://soundwire.com/>>.

²³ *See Welcome to Outer Sound - Independent Music Community* (visited Nov.3, 1997) <<http://www.outersound.com/>>.

²⁴ *See MusicBuzz* at <<http://www.v2k.com/gold.htm>>, a website for artists, bands, musicians, and songwriters.

where people are raising money for independent films on the Internet. It has traditionally been very difficult to raise money for an independent film project because it is such a risky endeavor. But now people have put up sites where they ask for a certain amount of money to produce their film project, and some have actually raised the money in this manner.

There are a lot of legal issues here, as I am sure everyone knows; securities law issues, the question of whether this is a public offering, how it should be prescribed, and whether you need to do a registration for it, etc. But, the point is that it is possible to do legally and cheaply, whereas previously it was more difficult. I am sure that the legal issues in all of these businesses will become clearer as the panel continues.

Again, the main things to remember are that the most interesting Internet businesses are the ones that are doing something that can only be done on the Internet. The thing that is most likely to draw people to the Internet is content they cannot get anywhere else.

Mr. NEAL FRIEDMAN

Not so long ago what we had on the Internet was just plain, black-and-white text. But, eventually we got to full color and graphics.²⁵ Now we have music online. This is relatively recent.²⁶ BMI's first online license was 1995, so we are only two years into this.²⁷ On the heels of that, we now have live

²⁵ See David Bailey, *Communications Assistant American Bankruptcy Institute, Beyond the Quill*, AM. BANKR. INST. J. 12 (Feb. 1996) (explaining that a graphical interface is the Web's claim to fame, and where services in the past only offered black and white text, users can now enjoy graphical colors).

²⁶ See Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97 (1996). Ease of availability means that copyrighted music is now readily available in cyberspace, often at no cost and with no authorization. *Id.* at 99-100.

²⁷ *BMI Media Licensing Web* (visited Sept. 23 1997) <<http://www.bmi.com/licensing/web.html>>. In April 1995, an agreement was reached

streaming audio.²⁸ This is a shameless plug for a client of mine, Olympia Networks, which uses the Telos system.²⁹ The nifty thing about this site is you can go on there and you can try out three of the leading audio systems at once: Telos Audio Active, Streamworks and Real Audio.³⁰ Make a choice, listen, and see which one you think provides the best quality audio.

The quality is getting better literally every day and we now have streaming stereo on several of the services.³¹ It's very

between BMI and OnRamp Inc., a commercial Internet provider, for a music performance license on the Internet. *Id.*

²⁸ See, e.g., *Progressive Networks, The Home of RealAudio & RealVideo* (visited Sept. 23, 1997) <<http://www.realaudio.com>>. A downloaded "realplayer" is utilized to hear live audio.

²⁹ Telos Corporation, an information technology company, provides life-cycle and network solutions to its customers worldwide. See *Audio Lounge* (visited Dec. 4, 1997). <<http://www.audiolounge.com>> AudioLounge is an international network of radio stations hosted by Olympia Broadcasting and supported by technology created at *Telos Systems*. The stations and programming available on AudioLounge carry a unique sound propelled by Audiocactive encoders and software. This is a relief for broadcasters who want to deliver high quality audio to their audience over the Internet and to listeners who only want to hear broadcasting without any interruption. *Id.*

³⁰ *About Telos* (visited Oct. 14, 1997) <http://www.audioactive.com/intro/intr_abt.html> (stating that systems made by this company are used by thousands of broadcast services worldwide and allows remote broadcasting over ISDN telephone lines with CD quality); *Xing-Streamworks NOW!* (visited Sept. 23, 1997) <http://www.streamworks.com/sw_now.html> (allowing viewing of real time audio and video by bringing them to one's desktop); *Progressive Networks* (visited Sept. 23, 1997) <<http://www.realaudio.com/corporate/index.html>> (allowing the web browser to receive live and on demand audio and video broadcasts over the net).

³¹ *CBC RADIO-Canada's National Public Radio Broadcaster* (visited Sept. 23, 1997) <<http://www.radio.cbc.ca>> (providing live public radio broadcast from Canada); *Direct Music* (visited Sept. 23, 1997) <http://www.2WayTV.com/music_direct.html> (providing live stereo broadcasts over the net); *Progressive Networks, The Home of RealAudio & RealVideo* (visited Sept. 23, 1997) <<http://www.realaudio.com/>> (providing live audio and video broadcasts over the Internet); *Welcome to A Dose of the Dead* (visited Sept. 23, 1997) <<http://www.morningdeal.com/dose.htm>> (providing vintage "Grateful Dead" concerts over the Internet); *KOFI's Programming Lineup* (visited Sept. 23, 1997) <<http://www.marsweb.com/kofi/fmlineup.htm>> (providing country music live over the Internet).

good. You don't even have to be a radio station. Another one of my clients, I-Rock, was one of the first people to have both an ASCAP and BMI license.³² He is not a radio broadcaster, but he looks to all the world like a radio broadcaster. In other words, he does not need a FCC license, even though, this is a radio station online. We now also have Streaming Video that Real Audio – now just Real – has announced just recently.³³ The quality, they are frank to admit, is not very good. You get this thumbnail-size picture, it's fuzzy, it's jerky, it's not great, but I think in another year or two—probably two years or so – it will be almost as good as what you see on the television set.

The big struggle right now between broadcasters and computer people is what the standard will be for digital broadcasting, which we will be seeing over the network owned and operated stations in New York City in about eighteen months. Is it going to be computers on your television set or television on your computer? The television broadcast industry wants its computers on your television set.³⁴ That is the technical standard they want. The computer industry would like it to be television on a PC.³⁵ We will see who wins the battle.

Gary Arlen, a consultant in new media, has been writing about this for about twenty years. He describes the present state

³² *iRock* (visited Nov. 3, 1997) <<http://www.irock.com/>>. The iRock website plays progressive rock, classic rock, hard rock, soft rock and occasionally polka tunes. *Id.*

³³ See Real, *Real Networks, Live and On-Demand Audio and Video for the Internet* (visited October 1, 1997) <<http://www.realaudio.com/>> also known as <<http://www.real.com/>> (“RealNetworks is the established market leader and pioneer in the delivery of real-time media over the Internet.”).

³⁴ See Howard Siegel, *Applying Fair Use Doctrine To Music on The Internet*, 3 NO. 7 MULTIMEDIA STRATEGIST 1, 5. See also, *Become an On TV Pioneer* (visited Sept. 30, 1997) <<http://www.ontv.com/bcast/index.htm>> (“The Television on Computer works with [a] remote control and is a real conversation piece. You [can] be one of a select few people with the World Wide Web broadcast to your television.”).

³⁵ Agumu Imanari, *Searching for the Fastest Runner* (visited Sept. 30, 1997) <<http://www.emerson.edu/acadepts/mc/chme/tool/modems/camodem.htm/>> (“What will the future of television look like? One perspective is that it will be a combination of the current television and computer networks such as the Internet.”).

of law as follows.³⁶ He says, first of all, we're in a state of "vujade," meaning we are in a place in time where we have never been before and, now that we are here, we have no idea of what we are supposed to do. That is accompanied by a longing for "prestalgia"; that is, a longing for the good old days that are not yet here but we all hope would come some time soon. I called Gary a couple of weeks ago and I said, "I've got another one for you, Gary. I want to be at the point of 'deja doo doo'." We have seen all this before.

Almost everything that we do in a legal context related to the Internet is brand new. Clients will say, "Well, have you ever done this before?" and I will say, "No, but I don't know of anyone else who has either." We are inventing the law, and adapting the law as we go along every single day.

I am going to talk a little bit about music. Rights of music easily comprise the most complex area of intellectual property because there are so many pieces of the pie.³⁷ You have, first of all, the mechanical right, which is the right to make and distribute a physical recording of the music as in a tape or a CD. Then you have the public performance, which is where ASCAP and BMI come in. This is typically the live and recorded performance of music. Next there is something called a master recording right which is a license that is needed for the right to use a particular performance of a specific artist of the underlying composition. Then, this is something that would come into play possibly on a web site, a synchronization right where you are going to synchronize audio and video together. What makes all of this so interesting and so maddening is that in order for people to try to

³⁶ Gary Arlen is the president of Arlen Communications Inc., a research company in Bethesda, Maryland, that specializes in interactive media.

³⁷ *Id.* at 119. "When a copyrighted song is recorded on a phonorecord, there are two separate copyrights: one on the musical composition and the other in the sound recording Thus the rights of an owner of a copyright in a sound recording do not extend to the song itself." *Id.*

get the rights, it is necessary to go to different places to get each one of these particular rights.³⁸

Finally, we have something brand new that just came into the law a year ago, it is called, "the digital performance right" for sound recordings.³⁹ I dare say there is not a living, breathing human being who fully understands this law. It was written by a committee and it is a camel with at least a dozen humps and it is

³⁸ Fara Daun, *The Content Shop: Toward an Economic Legal Structure for Clearing and Licensing Multimedia Content*, 30 LOY. L.A. L. REV. 215, 226 (1996). The multimedia producer often needs more than one type of right. *Id.*

What if the proposed content includes a piece of traditional Irish music in the program, and the developer wants to use the Chieftains' song "Boil the Breakfast Early"? The developer will need a master license in the composition as well as a license in the rendition. She must clear the right to the composition with CBS Records and the rights to the album rendition with Claddagh Records, Ltd. This project will require at least two licenses, one to synchronize the recording to the action in the program and a master license to record and distribute the song in the product and, if necessary, to convert the song to a digital format. The project will also require a public performance license through the band's performing rights society if the product is to be publicly demonstrated, for example, in a trade show. The Chieftains may also have trademarked their name or even the name of the song. Trademark adds another layer of requirements and licenses to the use. (citations omitted).

Id.

³⁹ Digital Performance Right In Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). See Andrew Hartman, *Don't Worry, Be Happy! Music Performance and Distribution on the Internet is Protected after the Digital Performance Rights in Sound Recordings Act of 1995*, LCA J. ART & ENT. L. 37 (1996). "The Digital Performance Rights In Sound Recordings Act of 1995" was enacted to ensure that "performing artists, record companies and others whose livelihoods depend on effective copyrighted protection for sound recordings will be protected as new technologies affect the ways in which their creative works are used." *Id.* This is accomplished "by granting a limited right to copyright owners of sound recordings which are publicly performed by means of a digital transmission." *Id.* at 57- 58. The Act also grants a "digital transmission distribution right." (citations omitted). *Id.* at 58.

loaded with exceptions.⁴⁰ To parse it out takes a very long time. The good news is that you can work around the digital performance right, which is just as well because, when Congress wrote the law, they envisioned industry-wide negotiations similar to what you have in broadcasting with ASCAP and BMI and SESAC.⁴¹ Unfortunately, those negotiations have not yet taken place so if you would like to get a digital performance right, God knows where you go to get one. There is no place that I know of where you go to get the right so it is one of those areas that is very peculiar.

To give you some indication of how easily you can get into trouble on the Internet, this slide is from the University of North Carolina, a fine institution that should know better:

In October 1994 they decided to pay homage to "The King" in cyberspace and put up The Elvis Aaron Presley Home Page.⁴² The site was accompanied by an elaborate disclaimer that stated that the set of pages was not intended for financial gain of any sort. So what? The University requested that the readers "refer to the credit page for all borrowed material." However,

⁴⁰ See Joshua D. Levine, Note, *Dancing to A New Tune. A Digital One: The Digital Performance Right In Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624 (1996) (discussing the effects of the Digital Performance Right in Sound Recordings Act of 1995. Pub. L. No. 104-39, 109 Stat. 340, codified at various sections of 17 U.S.C., on record companies, copyright owners of musical compositions, effect on radio broadcasting and consumers).

⁴¹ *The American Society of Composers, Authors and Publishers*, (visited Oct. 7, 1997) <<http://www.ascap.com/about/about.htm>> ("ASCAP is the American Society of Composers, Authors and Publishers, a membership association of over 68,000 composers, songwriters, lyricists and music publishers. ASCAP's function is to protect the rights of its members by licensing and paying royalties for the public performances of their copyrighted works."). *BMI Media Licensing* (visited Oct. 7, 1997) <<http://www.bmi.com/toolbox/bmi101b.html>>. (BMI is a music performing rights organization. However, unlike ASCAP, BMI's members are only songwriters and music publishers. BMI "sign[s] writers and publishers to represent their music around the world" and BMI "sign[s] license agreements with businesses in the U.S. in order to pay the writers and publishers for the use of their music").

⁴² Andrea Helene Berman, *The (unofficial) Elvis Home Page* (visited Oct. 7, 1997) <<http://sunsite.unc.edu/elvis/frameright.html>>.

you do not borrow copyrighted material. You buy it or you license it; you cannot borrow it. Then they went on to say that Elvis, Elvis Presley, and Graceland are trademarks of Elvis Presley Enterprises. Again, so what? It is still infringing. Shortly thereafter the University heard from the ever-vigilant lawyers for the Presley Enterprises who required that they put up a note, which read, "The Elvis Home Page, as it once was, is unavailable due to legal problems." You bet. The representatives of Elvis Presley Enterprises let it be known that the distribution of images and sounds copyrighted by Elvis Presley Enterprises is illegal.⁴³ Absolutely. Then the note said, "The full text of the letter can be found here." There was a hypertext link to the letter, yet another copyright violation because they did not have the distribution right on the letter. However, the law firm got what they wanted so they let that go.⁴⁴ On the revised Elvis site, the really valuable stuff, the music, was removed and Elvis' lawyers were happy.

The two principal recording licensing societies in the United States, ASCAP, which stands for the American Society of Composers, Authors & Publishers, and BMI, which stands for the Broadcast Music, Incorporated,⁴⁵ perform essentially the same functions.⁴⁶ ASCAP and BMI both have terrific web sites. They have their entire repertoire in online databases. A user can

⁴³ *The Letter* (visited Oct. 1, 1997) <<http://sunsite.unc.edu/elvis/manatt.html>>. "We have noted the disclaimers in the Elvis Home Page, as well as your claim that you do not 'intend' the Graceland Tour to infringe EPE's rights. Please be advised that said disclaimers do not excuse the above-described infringements of EPE's rights."; Keith Schnegili-Roberts, *Elvis Has Left The Internet* (visited Oct. 1, 1997) <<http://www.tcp.ca/Jan95/elvis.html>> (discussing copyright law and Andrea Berman's encounter with lawyers from Elvis Presley Enterprises, Inc.).

⁴⁴ Keith Schnegili-Roberts, *Elvis Has Left the Internet* (visited Oct. 1, 1997) <<http://www.tcp.ca/Jan95/elvis.html>>.

⁴⁵ *The American Society of Composers, Authors and Publishers* (visited Oct. 7, 1997) <<http://www.ascap.com>>; *Welcome to BMI.com, Our Interface With Cyberspace* (visited Oct. 1, 1997) <<http://bmi.com/index.html>>.

⁴⁶ *BMI Media Licensing* (visited Oct. 7, 1997) <<http://www.bmi.com/toolbox/bmi101b.html>>.

search a title or composer and know whether ASCAP or BMI licenses that particular work.

There is a third organization called SESAC, which stands for the Society of European Singers, Composers, Authors & Publishers. SESAC historically has represented Latin artists and gospel singers. More recently, they have gotten some mainstream artists: Bob Dylan, Neil Diamond, and a few other big-name artists. SESAC, however, does not have any kind of online agreement. As I said, SESAC, is presently the only for-profit licensing society. They are still formulating their online strategy. Both ASCAP and BMI have online licenses available. I am going to talk about the ASCAP license and I will leave it to Judith to describe what BMI does.

ASCAP has what they describe as an experimental license.⁴⁷ There are, right now, three commercial templates depending upon how music intensive a site is.⁴⁸ There are some like GRIT, which primarily has talk and has little music.⁴⁹ Therefore, payment will be made at a higher rate based upon a smaller base so that it all works out.⁵⁰ The bookkeeping can be

⁴⁷ *ASCAP Experimental License Agreement* (visited Sept. 30, 1997) <<http://www.ascap.com/newmedia/license.html>>. ASCAP's experimental license agreement authorizes the performance of copyrighted musical works from ASCAP's repertory for use on a website or other on-line service. *Id.*

⁴⁸ *ASCAP Online License Agreement* (visited Sept. 30, 1997) <<http://www.ascap.com/newmedia/licensing.html>>. A licensee can choose any of three alternative commercial rate schedules that best suits their individual needs and gives them the most advantageous structure. There is a fourth rate schedule for non-commercial uses. *Id.* Accordingly, each licensee is active in determining the "economic value of music to its own computer service." *Id.* ASCAP believes that this arrangement results in reasonable license fees for all computer services and allows "a fair return to the copyright owners whose music is performed in this new medium." *Id.*

⁴⁹ *GRIT Info* (visited Sept. 30, 1997) <<http://www.grit.com/content-info.htm/#overview>>. Grit, a New York City based Internet radio broadcast site, offers 24 hour global coverage featuring live music, sports, politics, games and talk programming. *Id.* See also *GRIT CLIPS-MSNBC* (visited Sept. 30, 1997) <<http://www.grit.com/webweek.html/>>. GRIT, is headed by Robert Gould who began his Webcasting career with a religious broadcast. *Id.* Gould saw a need for an audio network and started GRIT in 1996. *Id.*

complex when you get into these other rate schedules. If gross revenues are not expected to be more than \$30,000, it makes a difference which fee schedule is selected or whether both are selected. Both ASCAP and BMI have a five hundred dollar minimum fee.⁵¹

With ASCAP, if there is no revenue attributable to the site - for example, a radio station may put up a site that is strictly for promotion - to pay the five hundred dollar minimum fee on the theory that their promotion of a radio station on the web will enhance the revenues and the station only has to collect larger royalties based on the increased revenues of the radio station.

I invite you to take a look at our web site,⁵² which we are very proud of. We were the second law firm in the United States to have a web site. You will find a number of useful articles there.

Prof. GARY SHAW

Thank you, Neal. Judith, do you want to speak with us?

⁵⁰ *ASCAP Experimental License Agreement* (visited Sept. 30, 1997) <<http://www.ascap.com/newmedia/license.html>>.

⁵¹ The minimum annual license fee under rate schedule "A", "B", "C" and "D" is \$500.00. See *ASCAP Rate Schedule "A"-Statement of Account* (visited Sept. 30, 1997) <<http://www.ascap.com/newmedia/schedule-a.html>>.

⁵² *Pepper & Corazzini, L.L.P., Washington, DC* (visited Nov. 11, 1997) <http://www.commlaw.com/>.

*Ms. JUDITH SAFFER:*⁵³

Thank you. I will speak today not only as the Assistant General Counsel of BMI⁵⁴, even though they are the ones who pay my salary, but as the President of the Copyright Society of the United States,⁵⁵ which I do for free. I think that I am the first to say that music, although certainly a very important part of all new technology products, is not the only part.⁵⁶

What we ought to really be thinking about is the role that content plays in new technology; in the Internet, in multi-media products, in all the other new inventions, much of which I am too old to understand or know how to work with very well. I do, however, recognize its value.

⁵³ Judith M. Saffer graduated from New York University School of Law in 1967 and was Phi Beta Kappa at Washington Square College at New York University. She is Assistant General Counsel for Broadcast Music, Inc (BMI). She is a participant in the Conference on Fair Use (CONFU) established by the Clinton Administration's National Information Infrastructure Task Force Working Group on Intellectual Property. Prior to joining BMI, Mrs. Saffer held a series of senior legal positions at ASCAP. *Cyber Symposium-Bio.-Judith M. Saffer* (visited Oct. 6, 1997) <<http://tourolaw.edu/symposia/Cyber97/Saffer.html>>.

⁵⁴ Broadcast Music, Inc. BMI operates as a not-for-profit organization representing more than 180,000 songwriters, composers, and music publishers with a repertoire of more than 3,000,000 works in all areas of music. BMI distributes royalties to its songwriters, composers, and publishers, for the public performance and digital home copying of their works, and in the future, will distribute potential new royalties for the use of their works in cyberspace. *Welcome to bmi.com!* (visited Oct. 6, 1997) <<http://bmi.com/index.html>>.

⁵⁵ The Copyright Society of the U.S.A. is a nonprofit corporation that was organized in 1953 to foster interest in and advance the study of copyright laws and the rights in literature, music, art, the theater, motion pictures, and other forms of intellectual property. *Copyright Society Home Page* (visited Oct. 19, 1997) <<http://www.csusa.org/>>.

⁵⁶ *Trying to Fill a Hole in Cyberspace: U.N. Summit Tackles Problem of Copyright Violation on the Internet*, L.A. TIMES, Dec. 9, 1996, at B4. The article states that Internet users worldwide can receive feature length movies and books on the Internet. *Id.*

I think if we are really honest with ourselves, we will all admit that all the inventions, hardware, and technology are really meaningless if you do not have content to put on the new technology.

Everybody mistakenly seems to take that for granted, as if the content just appears from out of somewhere. It is obviously the work product of very creative people who have invested a tremendous amount of their time and energy and who expect to be compensated; and that is where the copyright law comes into play.⁵⁷

There are many people who feel that, as a result of all the new technological innovations, the laws that exist are not adequate to protect creators and the people who, like music publishers or book publishers, own the copyrights in a lot of the creative material.⁵⁸ Some of us disagree.

I think that, by and large, our current statutes do provide adequate protection. The real problem is whether or not those statutes are going to be enforced.⁵⁹ It is a question of public

See *Liebowitz v. Paramount Pictures Corp.*, 948 F.Supp.1214,1218 (S.D.N.Y. 1996) In *Liebowitz*, the court stated

[t]he purpose of copyright law is set forth in the United States Constitution, Art. I, § 8, cl.8 '[t]o promote the Progress of Science and useful Arts...'. Lawmakers and judges generally adhered to the view that optimal means to encourage the production of creative works was to secure to their creators the exclusive and entitlement to resulting financial awards.

Id.

⁵⁸ *Trying to Fill a Hole in Cyberspace: U.N. Summit Tackles Problem of Copyright Violation on the Internet*, L.A. TIMES, Dec. 9, 1996, at B4. The article states that "[a]rtists accustomed to raking in royalties when their work is used in any medium are now finding themselves virtually uncompensated and unprotected in this new global marketplace." *Id.*

⁵⁹ Jayashri Srikantiah, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology*, 71 N.Y.U. L. REV. 1634, 1646 (1996). The article states that

[c]opyright owners will only assert their rights when it is economically advantageous for them to do so. Copyright enforcement, therefore, is bounded on one side by the economics of enforcement and on the other by the problems of underenforcement.

awareness, public education, and public recognition of the value of content in this new environment.

When we heard the introduction today, we were referred to and said that this is a wonderful new tool for distance learning. Whenever I hear that, I become schizophrenic.

I am a parent and my children have completed school. I am all in favor of education and I am a big supporter of my various alumni associations and the like; but people seem to equate education in a vacuum as if, because education is good, anything you do in the name of education is, therefore, also good.⁶⁰ Unfortunately, that is not necessarily true.

I have spent a lot of time in the past two years down in Washington where I have been involved in a project trying to draft guidelines for what can be used without obtaining prior authorization.⁶¹ Copyrighted material, in other words, can or cannot be used in an educational context without having to get a license or having to pay for it.⁶²

Realistically, given the private, market-driven nature of copyright enforcement, the copyright laws will never be fully enforced.

Id.

⁶⁰ See *When Copying is OK: The 'Fair Use' Rule* (visited Oct. 15, 1997) <<http://www.nolo.com/nn75.html>>. A court will invoke the "fair use" doctrine, to insulate the user from liability when the court views the use of the copyright as a socially desirable. *Id.*

⁶¹ See Normandy Helmer *Domestic "Fair Use" Deliberations: The Conference on Fair Use (CONFU)* <<http://darkwing.uoregon.edu/~nhelmer/531/confu.html>>. The Conference on Fair Use (CONFU) began in September 1994 and is attempting to create a widely accepted interpretation of fair use that will apply to copyrighted material in the digital age.

See "Classroom Guidelines" H.R.REP. NO 94-1476 at 69 (1976). This report provides:

The Guidelines allow multiple copies for classroom use provided that (1) the copying meets the test of brevity (1000 words, in the present context); (2) the copying meets the test of spontaneity, under which "[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness [must be] so close in time that it would be unreasonable to expect a timely reply to a request for permission;" (3) no more than nine instances of multiple copying take place during a term, and only a limited number of copies are made from the works of any one author or from any one collective work; (4) each copy contains a notice of

We have fortunately -- in a very narrow area -- come up with a solution, which, like most compromises, makes nobody happy.⁶³

The education community feels that it is too restrictive, that they are only allowed to use a little bit.⁶⁴ Many people in the copyright community feel that it is too broad, that there is no reason why just because something is labeled educational, people should be allowed to use their product for free.⁶⁵

copyright; (5) the copying does not substitute for the purchase of "books, publishers, reprints or periodicals;" and (6) the student is not charged anymore than the actual cost of copying. The Classroom Guidelines also make clear that unauthorized copying to create "anthologies, compilations or collective works" is prohibited.

Id.

⁶³ *Id.* See also Statement of Support for Conference on Fair Use, Assoc. of American Publishers (June 1997) "The Conference on Fair Use did not answer all the questions surrounding fair use in the digital age; however, given the uncertainties about the evolving digital environment that both users and copyright holders face, it would have been surprising if it had."; *Association of American Research Libraries* (modified May 12, 1997) <<http://www.arl.org/info/frn/copy/fowler.html>>. The Association of Research Libraries participated in the conference and concluded that it could endorse many of the proposals due to the lack of wide and deep consensus among CONFU participants that were introduced at the conference.

⁶⁴ See Mary R. Barry, *Multiple Photocopying by Educators and the Fair Use Doctrine: The Court's Role in Reducing Transaction Costs*, 1994 U. ILL. L. REV. 387. The article states that the reproduction of copyrighted material is a heated debate between the publishing industry, the academic community, and scholars of copyright law. *Id.* See also Jessica D. Litman *Copyright, Compromise, and Legislative History*, 72 CORN. L. REV. 857 (1987). "Copyright owners had long claimed that much of what educational users were doing and wanted to continue doing, including most educational photocopying, was not within the fair use exception." (citing 1973 *Senate Hearings*, at 844) (prepared statement of Don White, National Audiovisual Association); *Id.* at 1053-54 (testimony of Horace Manges, American Book Publishers Council); 1975 *House Hearings* at 311 (prepared statement of Bella Linden, Association of American Publishers).

⁶⁵ See *supra* note 11 and accompanying text. See also *Basic Books, Inc. v. Kinko's Graphics Corp.* 758 F.Supp. 1522, 1533 (S.D.N.Y. 1991) (stating that permission fees may be the only income for authors and copyright owners); See also *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996). In *Princeton University Press*, Michigan

It is a compromise and it is something that many large educational institutions have signed off on and many copyright representative groups have endorsed.⁶⁶ In my mind, what it does is send a message finally to the world, when it gets publicized sufficiently, that these tools are excellent; but they can only be used if at the same time people understand that when they are using other people's property, they have to get permission.

Now, getting permission may mean you get permission for free. It may be a gratuitous license if the use is something that the copyright proprietor wishes to endorse fully.⁶⁷ On the other hand, you may have to pay something.

Those of us who represent copyright proprietors are constantly hearing that the problem is too difficult, too hard, and that there are too many people you have to reach. I am not going to minimize it; I am not going to say it is simple. The fact that something can be difficult does not necessarily mean that it gives you the right to do it for free. People also hear others saying that it is too expensive.

I am reminded of a colleague of mine, an elderly woman lawyer who I have a tremendous amount of respect for, who tells

Document Services, Inc. a commercial copyshop that produced course packets and sold them to university students without obtaining permission from the copyright owners did not constitute fair use. In *Princeton University Press*, the court posed two questions: "(1) if publishers cannot look forward to receiving permission fees, why should they continue publishing marginally profitable books at all? (2) And how will artistic creativity be stimulated if the diminution of economic incentives for publishers to publish academic works means that fewer academic works will be published?" *Id.* at 1391.

⁶⁶ See *supra* note 11 and accompanying text. See also *Brief Amicus Curie of Eleven Copyright Law Professors in Princeton University Press v. Michigan Document Services, Inc.*, 2 JOURNAL OF INTELLECTUAL PROPERTY LAW 183 (1994).

⁶⁷ See Jill Sarnoff Riola, *Getting a Grip: A Practical Approach to Protection of Multimedia*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY 1994, at 395 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 394, 1994). The article states that acquiring permission depends on the desires of the parties; it often depends on the proposed use of the copyrighted material. A copyright owner may sign a permission letter or a release form that may include the terms of the permitted use. *Id.*

a story of giving a lecture at a university and talking about why it was not okay to photocopy books, which was the big problem copyright proprietors faced before the Internet.

The educators were saying "but the books are too expensive." Then, the elderly woman stood up and said, "well, you know, the other day I was walking by Tiffany's and I saw these magnificent, diamond earrings in the window and I had to go to the Grammys that night, and I thought, oh, how good these are going to look with my dress. I could not afford them, but I really needed them because they would look so great with my dress; therefore, I just went in and took them because I needed them." It is a silly story, but it makes the point.

I think that one of the things that people will learn is that, in our country, which operates primarily in a free-enterprise environment, if a copyright proprietor is too greedy and expects too much money, you will go to somebody else.

You cannot insist on an unreasonable price because there is too much competition. To make an analogy once again to the stores, if one store is too expensive you do not shop there; you go to the other one down the street.

Copyright proprietors may not like to admit it, but the truth of the matter is that most copyrighted material is probably fungible.⁶⁸ You put together some program that needs music in the background and that has to be a '50s rock song or a '60s rock song, so you decide that you want to use the Beatles' music,⁶⁹ but they will not give you permission.

⁶⁸ *Truth and Fiction, Director Quentin Tarantino Talks about Movies, Music, and the Making of Pulp Fiction*. PULP FICTION SOUNDTRACK (MCA Records 1994). Quentin Tarantino stated "I want this song, but I could use this other song, and if this song is too much, then forget it. Here are five choices that I could work with and we can find out which one's the best one." He also pointed out that there are instances where he will not make the film if he cannot use a particular song. *Id.*

¹⁸ See MIKE CLIFFORD, *THE HARMONY ILLUSTRATED ENCYCLOPEDIA OF ROCK* 14 (1988). The Beatles consisted of John Lennon, Paul McCartney, George Harrison and Ringo Starr. The Beatles enjoyed enormous worldwide success in the mid-1960s, and their success opened the floodgates for the "British Invasion." The Beatles also starred in a pair of ground breaking rock films, "A Hard Day's Night" and "Help". John Lennon and Paul McCartney are

You probably do not really need to use something from the Beatles. There is probably another rock group whose music will give the same flavor. You can go to somebody else and you can get some other piece of music at a price that you really think you can afford.

I think the question about it being too expensive is fallacious. I have seen tremendous changes in the amounts charged for copyrighted material in other kinds of situations that pre-date new technology⁷⁰, and it has all worked out. Television stations and film companies who put music in as background to a show managed somehow to negotiate prices they can live with. I think the same thing will happen on the Net.

Second, the difficulty that Neal alluded to regarding the tremendous need for permission from various sources – is one that is a legitimate one, but not one that is insurmountable.⁷¹ This

considered the most important songwriting partnership in the Rock 'n' Roll era.
Id.

⁷⁰ See Ariel B. Taitz, *Removing Road Blocks Along the Information Superhighway: Facilitating the Dissemination of New Technology by Changing the Law of Contributory Copyright Infringement*, 64 GEO. WASH. L. REV. 133, 143 (1995). The article states that "technology could provide the public, with greater, quicker and easier access to more information, including music and art ... at lower prices. *Id.* But see Mary L. Mills, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT L. REV. 307, 335 (1989). The article states that

[t]he availability of a new technology can be a source of market flaws. The market poses a greater risk to intellectual property owners when a new technology is involved because often the transaction costs are high and, especially where the product is accessible by individual home users, the expected profits are low.

Id.

⁷¹ See Kenneth D. Crews, *Copyright at a Turning Point: Corporate Responses to the Changing Environment* 3 J. INTELL. PROP. L. 277 (1996). The article states that

In anticipation of the widespread need for copyright permission following the passage of the 1976 Copyright Act, publishers, corporate users, and other interested parties established the Copyright Clearance Center ("CCC") to serve as a licensing intermediary between users and copyright owners. A fundamental objective of the CCC is to simplify the permissions process...[and]

brings me back to the people who pay my salary. I work for an organization called BMI.

BMI and ASCAP are two organizations that represent people who write and publish music. We license music to people who use music commercially: radio stations, television stations, background music services, and now Internet providers.

I will not go into the details of the license agreements because I do not think they are particularly relevant for this kind of a discussion. Generally, the point is that what ASCAP and BMI have offered in another era, is single-shop licensing⁷² for a great amount of product. BMI licenses about three million compositions. ASCAP has comparable figures.

Before coming to BMI, I was a lawyer at ASCAP and, again, for purposes of this discussion I am going to lump the two of them together. They are in the same business and they primarily do the same thing. One of the things that is very interesting is that, in today's world other groups of copyright owners are now beginning to understand that the way that ASCAP and BMI have done business for fifty, sixty, seventy years makes sense for their products as well.⁷³

[u]sers are spared the need to locate copyright owners and negotiate fees.

Id.

⁷² See *ASCAP News Media: Introduction to the ASCAP Online License Agreement* (visited Nov. 13, 1997) <<http://www.ascap.com/newsmedia/licensing.html>>. A single-shop license is a new form of license agreement that offers licensees the opportunity to elect, from among four rate schedules, the schedule that best meets its needs. *Id.* This will enable the licensor to accommodate, in a single form of license agreement, the wide variety of business models and music use patterns in the online marketplace. *Id.* There are three advantages to a single-shop license. *Id.* First, "[i]t provides a context in which each licensee participates in determining the economic value of music to its own service." *Id.* Second, "[i]t results in reasonable license fees for all services." *Id.* Third, "[i]t provides a fair return to the copyright owners whose music is performed in this medium." *Id.*

⁷³ See *U.S. Copyright Office Home Page* (visited Nov. 1, 1997) <<http://lcwb.loc.gov/copyright/resces.html>>. Other copyright licensing organizations and publication rights clearinghouses include The Author's Registry, Christian Copyright Licensing International, Copyright Clearance

There is, for example, the Association of American Publishers to which all of the large publishing companies – book publishers and magazine publishers – belong.⁷⁴

If you want to use some particular print material, – not a multi-media product or on the Internet – you can get a license or permission from them. You do not have to seek out the individual publisher. The photographers got together and formed a similar organization.⁷⁵

There is something called the Copyright Clearance Center, which represents periodicals and newspapers.⁷⁶ If you think you are going to use a lot of print from various newspapers, not just the New York Times, and you want to have access to a whole bunch of papers around the country, then you can go to them. I think that those things are going to evolve more and more, which is going to simplify the process of obtaining permissions. Also, new technology itself is going to simplify the process because there are going to be more ways of keeping track of what is used and of finding ways to compensate copyright

Center, Harry Fox Agency, Motion Picture Licensing Corporation, and National Writers Union Publications Rights Clearinghouse. *Id.*

⁷⁴ The Association of American Publishers (AAP), with some 200 members located throughout the United States, is the principal trade association of the book publishing industry. *Association Of American Publishers* (visited Oct. 15, 1997) <<http://www.publishers.org/>> .

⁷⁵ Publishers Depot is a virtual warehouse that was created by Picture Network International, Ltd. The warehouse offers everything one might need for electronic or print publication. One can find, buy or download professional digital media including photography, illustrations, maps and more. (visited Oct. 29, 1997) *About Publishers Depot* <<http://www.publishersdepot.com/pubdepot/guest/act/about>> .

⁷⁶ The Copyright Clearance Center (CCC) was established by authors, publishers and users as the not-for-profit Reproduction Rights Organization (RRO) for the United States. CCC operates collective licensing systems that facilitate compliance with the copyright law and promote the Constitutional purposes of copyright, namely progress and creativity in the arts and sciences. CCC acts as an agent for domestic/foreign authors and publishers by providing them with the efficiencies of collective services through equitable collection and distribution of royalties for photocopying and electronic uses of their copyrighted printed works. *Mission Statement* (visited Oct. 29, 1997) <<http://www.copyright.com/aboutccc/mission.html>> .

owners through tools that new technology provides, such as superior recordkeeping abilities.

The most important thing to remember when we are having these kinds of discussions, is that for this technology to be meaningful, and in order for all of us, our children -- and our grandchildren -- to enjoy it, there has to be good, reliable content available. If people are not compensated, they will not create; this is a fact of life. I will end with my usual sermon when I get into debates with people over why they should have to pay for content when the goal is such an admirable one; to disseminate information to people around the world. I have a simple answer to that question.

If you do not have to pay for the machines, and you do not have to pay for the teachers, and if you do not have to pay the electric company for the electricity, then you should not have to pay the people who provide the intellectual property. But if you find money to pay everybody else, then you should pay the creator as well.⁷⁷

Prof. SHAW:

I would like to thank all three of the panelists. What I would like to do first is to ask if any of the panelists would like to respond to the other panelists' comments, and then, after that, we will take whatever questions you might have. Steve, you look like you wanted to respond first.

Mr. MASUR:

I guess I just wanted to raise a couple of issues with what was just said. What usually happens with my clients is they want

⁷⁷ See *supra* note 6 and accompanying text. See also Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines*, Cases and Materials on the Law of Intellectual Property, at 8 (4th ed. 1997) (citing Macaulay, *Prose and Poetry* 731, 733-37 (G. Young ed. 1967)). The speech remarks that "[M]en must be remunerated for their . . . labour [a]nd there are only two ways in which that can be [,] patronage and copyright". *Id.*

to, for example, sell music online or put a video stream online.⁷⁸ Maybe it is a filmmaker who wants to use a piece of music, but he or she is usually surprised by how much red tape he or she has to go through in order to do what he or she wants to do.

In many cases, the questions are: am I helping the artist, am I trying to promote what the artist is doing, am I going to put one single online and are they going to sell more records because I put the one single online? They are paying me to do that, so that they make a name for themselves, and they can continue to create and support themselves by creating.

Now I have to pay ASCAP and BMI because I do not understand the money stream⁷⁹ and I am usually in the role of explaining why a blanket license⁸⁰ is necessary. The artists who are creating have been using material from other people's music. I think it is important that there be a balance because creating intellectual property is not exactly like being an electrician. Instead, I think that, culturally, things build up to a level where

⁷⁸ Steven Vedro, *TV and Radio Meet The Internet* (visited Oct. 13, 1997) <<http://www.cpb.org/library/infopackets/packet28.html>>. Video streams are video clips on demand over the internet or available on websites. *Id.* The video clips include everything from infomercials to rock concerts and political opinions to music sound selections. *Id.*

⁷⁹ See *Reilly v. United States*, 665 F. Supp. 976, 992 (D. R.I. 1987). In *Reilly*, the court noted that calculating the present value of future damages required "estimating the future stream of money; and discounting the future stream to present value." (citing *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537-38 (1983)). Additionally, the Supreme Court in *Jones & Laughlin* stated that:

[I]f in estimating the relevant future stream, inflation is factored into the calculation, then the chosen discount rate must also include an inflationary factor. On the other hand, if in estimating the relevant future stream, inflation is not factored into the calculation, then the discount rate must likewise be inflation free.

Id. at 547-48.

⁸⁰ A blanket license gives "the right to perform any and all of the compositions owned by members of the organizations as often as the licensees desire for a stated term." ASCAP and BMI then collect the licensing fees and give them as royalties to their members, this is after deducting operating costs. *Copyrights: 'Conflict Preemption' Bars Enforcement of State Law Curbs on ASCAP and BMI*, BNA-PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Apr. 23, 1996, at 2.

there has to be a certain amount of fair use so that artists can use what has gone before and build on it.

Everything is not completely locked up because that makes it difficult for other types of artists to build on what they are trying to make.⁸¹

Ms. SAFFER:

I will respond to that with two comments. First, the copyright law provides for a limited term of protection; it is not indefinite.⁸² Somebody creates a product, eventually, the product goes into the public domain, at which point the public is free to use it for as long as they want after the copyright term has ended.⁸³ Second, the United States Copyright Law does have within it a Fair Use provision.⁸⁴ It is a compromise because we do believe in this country that the public good is something that

⁸¹ 17 U.S.C.A. § 107 (1995). The Fair Use provision lists four factors for determining fair use. *Id.* Section one examines "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." *Id.* Section two looks at "the nature of the copyrighted work." *Id.* Section three focuses on "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Id.* Section four concerns "the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

⁸² 17 U.S.C.A. § 302(a) (1995). The Copyright Act of 1976 states in pertinent part: "Copyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death." *Id.*

⁸³ *Id.* See also 17 U.S.C.A. §104(A)(h)(6)(B) and subsection (C) (1995). Section 104 in pertinent part explains how restored copyrighted material can become part of the public domain. *Id.* These include: failure of renewal, lack of notice, a failure to comply with any manufacturing requirements, lack of subject matter protection in the case of sound recordings fixed before Feb. 15, 1972, and a lack of national eligibility. *Id.*

⁸⁴ 17 U.S.C.A. §107 (1995). The Fair Use provision states in pertinent part: [T]he fair use of a copyrighted work, including such use by reproduction in the copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id.

has to be taken into consideration, and, because copyright is a constitutionally and legislatively acknowledged monopoly, it has certain limitations.⁸⁵

Important questions and arguments have arisen as to where to draw the line. For example, there is an ongoing dispute right now. The copyright law provides that there is an exemption for using music as part of a religious service.⁸⁶ If I write music and it is used as part of a service in a church or a synagogue somewhere, I am not entitled to demand compensation.

Presently, a group of broadcasters, who are referred to as religious broadcasters because they have religious format programming, claim that they too should be entitled to an exemption.⁸⁷ The copyright community says no, wait a minute. You are in business to collect money, whether it is from people who send it in to you or not. You drive in very fancy limousines and you live in great big fancy houses. The copyright proprietors, therefore, are entitled to be paid.

So, it is a monopoly; but it is not an absolute monopoly and there are exceptions to that monopoly.⁸⁸ It is where you draw the line.

⁸⁵ The Copyright Act of 1976 provisions under 17 U.S.C.A. allow use of copyrighted material for those exemptions listed under sections 107, 302(a), and 110(1-10). *Id.*

⁸⁶ 17 U.S.C.A. §110(3) (1995). Section 110(3) provides in pertinent part: "[T]he following are not infringements of copyright: (3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." *Id.*

⁸⁷ *Interest Groups Seek Exemptions From Performing Rights in the United States*, (FIN.TIMES LTD.), Apr. 29, 1994, at 11. The article states that "religious broadcasters seem to believe that they are entitled to the use of the property of music creators for free because of the content of their broadcasts." *Id.*

⁸⁸ 17 U.S.C.A. § 103 permits copyright of compilations, which as defined under § 101, are a collection of preexisting materials that are put together in such a way as to create an original piece of authorship. *Id.* See *supra* note 33. The Fair Use Provision allows use of copyrighted material in limited circumstances such as for use as criticism, in news reporting, teaching, and research purposes. *Id.* See generally 17 U.S.C.A. § 110. The limitations on exclusive rights: Exemption of certain performances and displays provision,

The copyright community would say in response to Steven's client that if I want to get publicity for my song and I think that what your client has been doing is going to help my song, I will tell you to use it for free; but that is my choice. If I think that what your client is going to do to my song is going to hurt my song because of overexposure or because your client can not sing or whatever the reason may be, that is also my choice and not yours.

Mr. MASUR:

I think that is an excellent point. When you were telling the story about the woman going by the window in Tiffany's, I was thinking: maybe they will let her use it for the night. I think it should be easier, and you did address how things are getting easier. Previously, a client might have to contact thirteen different agencies or hire someone to take on that job.

I am not saying that my clients want to rip anyone off because they certainly do not want to do that; but, the more harmonization there is, the better: the easier it is for the client. The client will have to contact fewer agencies.

Mr. FRIEDMAN:

One of the issues we have, and I will come down the middle on this, is that I think there is a certain level of greed here. No group is more zealous in protecting their intellectual property right than the people in the music industry.⁸⁹ You can

lists other ways to use copyrighted material without infringing that copyright, such as using copyrighted material for religious purposes. *Id.* See generally 17 U.S.C.A. § 302. For works that have been created on or after January 1, 1978, the copyright lasts for the life of the author plus fifty years, upon that date, the copyright turns to the public domain. *Id.*

⁸⁹ See generally *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 572 (1994). Luther Campbell, of the rap group 2 Live Crew, released a song parody of Roy Orbison's "Pretty Woman" and the copyright owners of "Pretty Woman" sued for copyright infringement. *Id.*; *Cream Records, Inc. v. Jos. Schlitz Brewing Co.* 754 F.2d 826, 225 U.S.P.Q. 896 (1985). Cream Records

look at that as either a credit or a curse depending on your point of view.

The royalty levels in the United States are relatively low as compared to some countries around the world.⁹⁰ Online performances are on a sliding scale.⁹¹ For broadcasting, you are talking about a little more than five percent.⁹² The SESAC makes about six or seven percent of the gross revenues.⁹³

There are a lot of radio stations that question why they have to pay seven percent of gross revenues. On the other hand, you can say look, other than that, royalties are your only cost. If you are a deejay, that is your only cost for the program. The problem comes in on the Internet, which we do not have an answer for.

What about the global rates? BMI and their license implies an indemnification against foreign right societies; but if I have a web site in the United States and I get my ASCAP and BMI licenses, is that truly going to protect me against any of the fifty or sixty foreign right societies that may come in for a piece

sued Schlitz Brewing Co. on copyright infringement of "The Theme from [the movie] Shaft" which Cream owned the rights to and which Schlitz used in their beer commercial without permission. *Id.*; *Selle v. Gibb*, 741 F.2d 896, 223 U.S.P.Q. 195. *Selle* sued the music group "The Bee Gees" for copyright infringement, claiming they took his song "Let It End" and copied portions of it to write their song "How Deep Is Your Love". *Id.*

⁹⁰ See generally *ASCAP Home Webpage* (visited on Nov 23, 1997) <<http://ascap.com/about/collecting.html>> (discussing performance rights both here and abroad. *Id.*

⁹¹ RICHARD RAYSMAN, ET AL., *MULTIMEDIA LAW: FORMS AND ANALYSIS* § 2.03, at 25 (1996). Sliding scale is a percentage of sales that either rises or falls as the gross amount of such sales rises or falls. *Id.*

⁹² *Harry Fox Agency Website* (visited Oct. 29, 1997) <<http://www.nmpa.org/hfa/services.html>>. The Harry Fox Agency's commission rates are 5 percent of the royalties "distributed with a maximum of \$2,200 per composition." *Id.*

⁹³ *Who is SESAC?* (visited Oct. 30, 1997) <<http://www.sesac.com/whois.htm>>. Songwriters and publishers are paid royalties based on how often their songs are played. *Id.* Compensation is based on "many factors, including music trade publication chart activity, broadcast logs, computer database information, and monitoring." *Id.*

of the action? Is it going to protect me against Harry Fox⁹⁴, who has mechanical rights⁹⁵, and says this is not only a performance, but it is also a reproduction, and you owe us some money. The recording industry has been late to the game, but it is beginning to wake up and is making noises; it could become a fairly expensive proposition.

If it does, then that is what would kill it because the Internet provides a tremendous resource for the music industry. The more people get greedy and increase rates, the less it becomes economically viable.

Ms. SAFFER:

I would respond by saying that I take everything that Neal said as a compliment. I think it just shows that we have been doing our job well. As a reminder, everybody focuses on the Michael Jacksons⁹⁶ and Michael Boltons⁹⁷ of the world. They are very few and far between. Ninety percent of the people who belong to ASCAP and BMI can not make a living at their

⁹⁴ *Harry Fox Agency Website* (visited Oct. 25, 1997) < <http://www.nmpa.org/hfa.html> >. The Harry Fox Agency was established in 1927 by the National Music Publishers' Association, Inc. "to provide an information source, clearinghouse and monitoring service for licensing musical copyrights." *Id.*

⁹⁵ *Harry Fox Agency Website* (visited Oct. 25, 1997) < <http://www.nmpa.org/hfa/services.html> >. Mechanical rights are rights "for the licensing of copyrighted musical compositions for use on commercial records, tapes, CDs and computer chips to be distributed to the public for private use." *Id.*

⁹⁶ *Michael Jackson Biography* (visited Oct. 30, 1997) < <http://www.fred.net/mjj/bio.html> >. Labeled the King of Pop, Michael Jackson earns an estimated \$30 million dollars per year through a music-publishing catalog he began in 1985 but his net worth is estimated to reach 1 billion dollars. *Id.* His album "Thriller" has sold over 46 million copies since its release over a decade ago. *Id.*

⁹⁷ *Michael Bolton Fan Club* (visited Oct. 30, 1997) < <http://www.michaelbolton-fanclub.com/bio.htm> >. Michael Bolton is a classic rock and pop artist who has sold over 35 million records and has won two Grammy Awards and six American Music Awards. *Id.*

songwriting.⁹⁸ Their royalties are a trickle. They earn a couple hundred dollars a year for something they may have written that gets some performances somewhere; they drive cabs or they wash dishes. It is a mistake to focus on the superstars. However, that is not to say they do not exist; they certainly do.

Even the Michael Jacksons of the world probably do not make the same kind of money that Michael Jordan⁹⁹ makes by endorsing a sneaker company. We can say that is out of line as well, but that is just a reflection, perhaps, on our economy.

When we discuss these topics, we have to think in terms of the vast majority of artists. They do not make a lot of money. We also have to look at what it is that the user is being asked to pay and how that fee will impact on the user.¹⁰⁰ Much of this is in transition. The reason why ASCAP calls their license an experimental license is because it does not know where it is going and is very concerned about being locked into a particular format of licensing arrangement.¹⁰¹

I know that a lot of music publishers, when they enter into deals with people who are making multi-media products, agree not to take any money up-front. They agree that if the product is successful, they will get a percentage of the profits. Copyright

⁹⁸ See *supra* note 43. Songwriters and publishers are paid by how many times their song is played, if the song is not played very often the royalty that will be paid will be low. *Id.* If the song is played often or the artist has many songs, then the royalty rates will generally be higher. *Id.*

⁹⁹ *Michael Jordan Fan Page* (visited Oct. 30, 1997) < <http://www.cardsinc.com/players/jordan/jordan1.html> >. Michael Jordan is a guard for the NBA's Chicago Bulls. *Id.* Jordan has won three NBA MVP titles (1987-88; 1990-91; 1991-92). *Id.* Jordan was also rookie of the year in 1984-85. *Id.*

¹⁰⁰ See *supra* note 16 and accompanying text.

¹⁰¹ See *ASCAP Experimental Licensing Agreement* (visited Sept. 25, 1997) < <http://ascap.com/newmedia/license.html> >. An Experimental License grants "a license to publicly perform, or cause to be publicly performed, by means of transmissions, non-dramatic renditions of the separate musical compositions in the ASCAP catalog." *Id.* The catalog consists of "all copyrighted musical compositions written or published by ASCAP members or by the members of affiliated foreign performing rights societies, including compositions written or published during the term of the agreement." *Id.*

proprietors are not dumb. They do not want to force an infant industry out of business. They want to participate in it.

Again, using the example I made; I feel very badly about bad-mouthing the Beatles, since they are BMI clients; but I just use them because in many instances they have been very particular about the use of their music. Since it is their music; they can afford that luxury.

If somebody is asking for something that is unrealistic, you should move on to somebody else. There are other people out there who will give you a product that is perfectly acceptable at what you consider to be a reasonable price. At this point it is a difficult process, but that is because there has not been sufficient experience in negotiating contracts and in making deals for people to know where they are going. I think that if we were to have this discussion in ten years, we would have a totally different blueprint to work with.

Prof. SHAW:

On that note then, let me officially invite you back in ten years from now to discuss this. At the same time I would like to invite members of the audience to please step up to the microphone with any questions that you might have.

AUDIENCE MEMBER:

I am the General Manager of a non-profit educational radio station. We are kind of unique because we do big band jazz primarily in a high school. We would like to be worldwide and we would like to find out whether there are experimental licenses for non-commercial organizations.

Mr. FRIEDMAN:

ASCAP does have a non-commercial template.¹⁰²

¹⁰² A non-commercial template is an experimental license granted to non-profit organizations for permission to broadcast on a radio frequency *ASCAP*

AUDIENCE MEMBER:

There are an enormous number of people illegally operating radio stations in the United States. They are called pirates, and they do not collect money from anyone.¹⁰³ The pirates would probably like to pay money to be on the air, but they can not do it with the FCC. The process is very difficult and expensive, but this Internet process is not.¹⁰⁴ It is reasonable

Experimental Licensing Agreement. (visited Sept. 25, 1997) <<http://ascap.com/newmedia/license.html>>. See also *ASCAP Signs Web Music Licensing Deal with net.radio.* (visited Sept. 25, 1997) <<http://ascap.com/press/nmts-112195.html>>. ASCAP agreed to a licensing deal with net.radio and AudioNet, to bring radio broadcasts onto the World Wide Web. *Id.* This one-year agreement is experimental, and viewed as a work in progress. *Id.* Net.radio president Scott Bourne first initiated the negotiations, aiming towards setting a "a favorable precedent for music royalties on the Web." Bourne stated that "Maybe we didn't need to license it, and if they passed [a license requirement] we'd have to pay from that day. But we felt there was a fairness issue."; Barry Schrader, *Electronic Studio Art and the Internet*, 75 OR. L. REV. 339, 343-44 (1996). Non-profit organizations, including schools, can obtain ASCAP or BMI licenses by paying a small annual fee to cover the performance fees for all copyrighted works. *Id.*

¹⁰³ *Free Radio Stations* (visited Nov. 9, 1997) <<http://www.access.digex.net/~cps/pirate.html>>. "Free Radio stations are unlicensed broadcasters. They operate in defiance of FCC rules, which often seem to be more concerned with protecting the big broadcasting interests." *Id.* See also *Glen's Pirate Radio Site* (visited Nov. 9, 1997) <<http://www.speedline.ca/~glen/>>. "When most people think of unlicensed broadcasting the first word that pops into mind is 'Pirates.' More than 500 North American short-wave pirates and about 300 low power FM pirates have taken to the airwaves during the 1990 . . . Almost all are doing something which is either unavailable or prohibited in normal, legal broadcasting." *Id.*

¹⁰⁴ *Radio Licenses Awaiting Review* (visited Sept. 25, 1997) <<http://www.fcc.gov/mmb/asd/status/license.html>>. "[I]t can take up to 30 days from the date of filing before this public notice is released, depending on the number of applications received for all categories of applications before the license application filing date (emphasis omitted)." *Id.* "[L]icense applications with deficiencies will be sent a letter informing the permittee of the nature of the

to infer that as many as ten percent of the broadcast licenses are pirates.¹⁰⁵ Also, there is an enormous number of public schools and educational facilities who do not have the wherewithal to get the fifty or sixty thousand dollars it takes to get on the air with the FCC, but they do have money to get into this.

Mr. FRIEDMAN:

That is if you could even find a frequency. In New York City there is nothing available.¹⁰⁶

AUDIENCE MEMBER:

There is also nothing available on Long Island at this present time.¹⁰⁷ There are at least two schools actively looking right now, and they can not find anything. Even if they did, they would not be able to afford the fees. I have been talking with them and they are very interested in getting on the Internet as a radio station, and I can not imagine that there would be an enormous amount of revenue coming in for this. I hope that you could come up with something for people like this.

Mr. FRIEDMAN:

deficiency. In some cases, a license application grant may be held up for other reasons. . . ." *Id.*

¹⁰⁵ *FCC Wins Court Action Against Unlicensed Radio Operator* (visited Sept. 25, 1997) <http://www.fcc.gov/Bureaus/Comp...News_Releases/1997/nrci7012.txt>. See *United States v. Any And All Radio Transmission Equipment*, No. 3-96-951, 1997 WL 591127 (D. Minn. 1997). The FCC was granted a judgment on the pleadings against Alan Fried for broadcasting a radio station out of his apartment without a license. *Id.*

¹⁰⁶ *Metro Area: NYC* (visited Sept. 28, 1997) <<http://206.114.196.37/cgi-bin/amdb.cgi>>. This site lists all the licensed AM radio stations in the New York City metropolitan area, which occupy every frequency. There is virtually no space available. See also *Metro Area: NYC* (visited Sept. 28, 1997) <<http://206.114.196.37/cgi-bin/FMdb.cgi>>. This site has a similar list for all the FM stations in the New York City region.

¹⁰⁷ *Id.*

It is a very simple matter. One of the beauties of putting your station online is you do not have to deal with the FCC.

It is not a bad deal for me either; I get tired of it sometimes, but it is very easy. You just go out, get your website design, get your licenses from ASCAP and BMI, and you are in business around the world. You do not have to worry.

If you can find a frequency on Long Island, for example, it probably would be relatively low power and would not have much reach. On the Internet, however, it could reach the whole world.

AUDIENCE MEMBER:

Thank you.

Prof. SHAW:

Are there any other questions? If not, I have one. You have pretty much addressed those countries that will abide by copyright laws. There is an entire world out there where piracy is simply rampant and there are sites out there that are not amenable to the United States' jurisdiction. How do you deal with them?

Ms. SAFFER:

Carefully. There are a lot of questions that we do not have answers to, and problems that we do not understand. A lot of the difficulties are going to be caused in the future by questions of jurisdiction and choice of law.¹⁰⁸ I think that the whole intellectual property community has become more tuned in to that and understands those difficulties.

¹⁰⁸ See *Frequently Asked Questions About Copyright, Part 4 International Aspects* (visited Sept. 28, 1997) <<ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/faq/part4>>. Under the Berne Convention, "an author's rights are respected in another country as though the author were a citizen of that country (Art. 5(1). *Id.*

Currently, the United States Government and the Clinton Administration are supportive of intellectual property issues because it brings a tremendous amount of revenue into the United States.¹⁰⁹ The United States has participated in a lot of international discussions and has signed treaties with many other countries.¹¹⁰

The big problem that we are beginning to see is not even whether other countries have adequate copyright laws; it is the question of whether or not they will enforce them. As a country, what we have been able to do, at least to some extent, is to use trade sanctions as a threat to get countries to abide by copyright laws.¹¹¹ Recently, it has worked a little in China.¹¹²

I went to Taiwan on a wonderful trip paid for by the Taiwanese government. It was an attempt by the Taiwanese to convince leaders in the United States copyright industry that, in fact, they were abiding by the copyright laws so that they would not lose their preferential trade status. I just came back from Africa as a representative of the State Department to West Africa, where a number of countries have recently enacted copyright laws.¹¹³ A lot of these countries barely have enough money to eat, but are concerned because of the repercussions from the United States in the form of trade sanctions. They want to foster their emerging music industry. They want the United States music industry people to invest in their industries. They know that if they do not have any copyright laws, United States'

¹⁰⁹ *GATT Brings Intellectual Property Into Worldwide Trade*, 52 CONG. Q.WKLY. REP., Dec. 31, 1994, at 50. The agreement brought key industries, such as intellectual property, under worldwide trade disciplines. *Id.* The Clinton administration said this new agreement would bring about billions of dollars in economic growth and thousands of new jobs in our country. *Id.*

¹¹⁰ CNN Interactive, *U.S. sets deadline for possible China trade sanctions* (visited Sept. 28, 1997) <<http://www.cnn.com/US/9605/09/us.china/index.html>>. The United States suggested an agreement with China that would avoid sanctioning \$3 million of Chinese imports. *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See John & Kernick (visited Oct. 13, 1997) <<http://www.icon.co.za/~jkernick/>>. John & Kernick is a law firm practicing patent and trademark law in Johannesburg, South Africa. *Id.*

companies will not invest; and even if they are not so concerned about Michael Jackson being “ripped off”, they are concerned about their own creators being “ripped off”.

The equipment for CDs is too expensive, so they only use tapes. When they make a tape and they find pirated copies of their own material for sale on the street corner, then they begin to take it seriously. I do not really have an answer for you, but it is a serious problem and it is one that everybody’s aware of and that we are beginning to try to address.

Mr. MASUR:

There is a certain amount of self-help available as well. You can put choice-of-law and choice-of-forum clauses in your contracts. Some companies have actually had their sort of private police force that went abroad and engaged in pirate-busting activities.¹¹⁴ However, I do not know how advisable that is, because you are subject to the other country’s jurisdiction then, and they may object to your activities in that realm.

Since you did bring up Africa, I just wanted to mention an interesting business opportunity in Africa. There is a guy who invented a wind-up radio. Batteries are very expensive in Africa. Now these wind-up radios are for sale pretty cheap, but there are not many radio stations in Africa. It seems to me there is quite a business opportunity there, and I think that could be a very interesting market.

¹¹⁴ *Anti-Piracy: How the Anti-Piracy Unit Guards the U.S. Marketplace From Illegal Profiteers*. (visited Oct. 7, 1997) <<http://www.riaa.com/antipir/antipir.htm>>. The Recording Industry Association of America (RIAA) has helped to coordinate raids with the authorities at the U.S.-Mexican border, to stop pirates who ducked from one side to the other to avoid prosecution. *Id.* RIAA has also worked alongside U.S. Customs agents to seize bootleg recordings, and has obtained its first federal indictment against an alleged bootlegger, after a seizure of over 50,000 allegedly bootlegged CDs. *Id.*

Mr. FRIEDMAN:

I would say that the biggest problem is a lack of harmonization around the world. For example, the United States is one of the few countries, that does not have a performer's right.¹¹⁵ When Tony Bennett sings "I Left My Heart in San Francisco,"¹¹⁶ which I am pretty sure he did not write himself, he does not receive anything.

In any event, in the United States, the composer gets a royalty but the performer does not. In Europe and in other parts of the world, the performers get a royalty.¹¹⁷

The broadcast industry has waged a very successful battle over the years to maintain that status quo because it reduces their cost of operation.¹¹⁸ Eventually we are going to have to address this over the Internet because the European artists are going to want it. There are other aspects where the moral rights, the rights of change and copyright material exist in Europe.¹¹⁹ It is practically nonexistent in the United States. Therefore, there is no harmonization of laws that leads to these violations.

On behalf of one client, we chose to locate a server in a particular country just because the rates were lower. We

¹¹⁵ *Current Copyright Issues With an International Aspect: Public Performance Rights for Performers*. (visited Oct. 7, 1997) <<http://edie.cprost.sfu.ca/cjc/amb/per-right.html>>. Performer's Right is the right to receive money for the appropriation or reproduction of copyrighted material. *Id.*

¹¹⁶ *See Tony Bennett on Holiday* (visited Nov. 13, 1997) <www.music.sony.com/music/ArtistInfo/TonyBennett/bio.html>. "I left My Heart in San Francisco" was a double Grammy Award winning song that was released by Tony Bennett in 1962. *Id.*

¹¹⁷ *See About APRA* (visited Sept. 28, 1997) <<http://www.apra.com.au/htm/about/index.htm>>. APRA is the Australasian Performers' Rights Association (covering Australia and Southern and Eastern Asia). It collectively pools licensing fees, and pays them out to performers as royalties.

¹¹⁸ *Performance Licenses* (visited Oct. 13, 1997) <http://www.belmont.edu/pages/f&s/Rolston.Clyde/survey.ppt/performance_lic_ppt.html>.

¹¹⁹ *In Search of a Normative Infrastructure for the European Information Society* (visited 10/13/97) <<http://www.gmd.de/People/Herbert.Burkert/Florence.html>>.

investigated it, and we were convinced that it is legal because we said the performance takes place here where the server is located, and not in some other place where you might have to pay a higher rate. You can do a little forum shopping. These are issues that are going to have to be worked out.

Ms. SAFFER:

I am not sure that your client has necessarily solved his problems, because there is a question of where the performance occurs. I am not going to litigate it at this moment, obviously, but there are just a lot of open questions.

Mr. FRIEDMAN:

Well, if it makes you feel better, we have decided to locate it in the U.S. because the price was lower.

Ms. SAFFER:

No, it does not make me feel better at all. It means if you do not pay, I can sue, so I guess it is better than nothing. There is a tremendous gamut of copyright protection. If I were having this talk in Europe, instead of trying to explain to people why it is necessary to protect copyright interests, I would be on the defensive because, compared to a lot of European countries, our levels of protection are very low.¹²⁰ The concept of fair use that we talked about before, includes, for example, using music in a religious service or other exemptions under United States law.¹²¹

¹²⁰ *What is Copyright Infringement?* (visited Oct. 13, 1997) <<http://geom.unm.edu/event/courses/1996/imwh/Copyright/infringe.html>>.

¹²¹ 17 U.S.C.A. § 107 provides in pertinent part, "[t]he fair use of a copyrighted work, including such use by reproduction in copies . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

You can, in an educational context, use copyrighted materials like music or film clips in a classroom for free.¹²² You can not use it in the auditorium or over the television at this point, but you can in the classroom.¹²³ Now, Europeans do not allow that. In their mind-set they are much more protective of creative people. Nothing is allowable for free. These gradations reflect how societies view these issues, and the United States falls somewhere in the middle.

Mr. SHAW:

Which is a perfect segue into a question that just came in over the IRC. This particular listener wants to know what is being done to facilitate piracy in the United States and what is being done to prevent it. In other words, what kind of piracy is taking place and what are you doing to prevent it?

Ms. SAFFER:

Well, there have been a few lawsuits that have been filed in the United States for uses on the Internet.¹²⁴ The biggest lawsuit involving music was brought against Compuserve, and unfortunately, it was settled.¹²⁵ The only reason I say "unfortunately" is because it might have been good to have a decision so that people had some legal authority to point to.

This is typical of most settlements. The copyright proprietors insist that they won because Compuserve paid a substantial amount of money and agreed to take licenses. Compuserve, and others, however, insist that the copyright community lost, because there are disclaimers that say they have

¹²² *Id.* See also *When Copying is OK: The Fair Use Rule* (visited Oct. 7, 1997) <<http://www.nolo.com/nn75.html>>.

¹²³ *Id.*

¹²⁴ *Music Publishers Sue Web Site That Offers Digital Recordings: MCA Records Inc. v. Internet Site Known As FTP://Parsoft.com/MP3s/*, 1997 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 24328.

¹²⁵ *Models v. Compuserve* (visited Oct. 7, 1997) <<http://www.worldwide-web-design.com/models.html>>.

done everything they could to try to prohibit infringement. They claim that they were not actively involved in it, so they will not be responsible. They said that they won.

The scope of the Copyright law as it relates to the Internet is very much an open question. There has been a huge debate in Congress as a result of proposed legislation with the copyright community on the one side and the online service providers, on the other side, as to who should be responsible for infringement which occurs and to what extent liability should be imposed.¹²⁶ It is very much an open issue.

Mr. FRIEDMAN:

One of the real problems for people who own intellectual property is that it is so easy to steal it off on the Internet. All you need to do is click on your mouse and you can grab somebody's graphic just that quickly. Copying text is also no problem at all. Everyday, I see an article online taken out of a major newspaper, in which the copyright notice is placed very carefully at the bottom of the page.¹²⁷ This would still be an infringement.¹²⁸

With music it is more difficult not only because the music files are so large, but there are a number of stations that play music every day that do not have ASCAP or BMI licenses. I am

¹²⁶ *Special Report: The Information Arena: The Marketforce. Competition – Four Experts Debate When & How.* 52 CONG. Q. WKLY. REP. May 14, 1994 at 30. Daniel J. Weitzner, staff counsel for the Electronic Frontier Foundation, a consumer's protection organization, stated that those who have personal property online need the technical means to protect it. *Id.* However, Steve Effros, president of the Cable Telecommunications Association, argued that government standards might deter businesses from using the internet. *Id.*

¹²⁷ *Publishers Settle Dispute Over Framing With Web Site Owner: Washington Post Co. v. Total News Inc.* 1997 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 24327. A Website owner agreed to cease "framing" the displays of news websites that were linked to his site. *Id.* The frame he used prevented web users from seeing the advertisements that the Washington Post, CNN, and others had placed on their websites. *Id.*

¹²⁸ *Filmvideo Recording Corp. v. Hastings*, 426 F. Supp. 690 (S.D.N.Y. 1976). If material is copyrighted in one medium, it may be infringed by material provided in another medium. *Id.*

aware of one very prominent service that is putting certain audio online that represents in its contracts that it has ASCAP and BMI licenses and I know for a fact that it does not. So, you have to be very careful in this area of who you are dealing with.

Mr. MASUR:

You are not going to tell us who they are?

Ms. SAFFER:

Not with me sitting here.

Mr. SHAW:

I would like to thank the panel. I would like to thank our three panelists for what I found to be an absolutely scintillating, thrilling discussion. I thank you on behalf of Touro Law Center and GRIT. Thank you.