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### The Internet: Is it Broadcasting?

Jonathan I. Ezor

*Touro Law Center*, [jezor@tourolaw.edu](mailto:jezor@tourolaw.edu)

Peter Brown

Peggy Miles

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## **The Internet: Is it Broadcasting?**

*Prof. GARY SHAW:*

The second panel deals with regulation of the Internet. The question becomes what is the appropriate metaphor for the Internet? Should we consider it broadcasting?

We have three distinguished speakers. The first speaker is Jonathan Ezor, who is an attorney with Davis & Gilbert in New York City practicing new media and computer law. His work includes advising clients on the establishment and maintenance of Internet resources, the creation of joint ventures and strategic relations in the new media field, multi-media and online promotion and marketing, and software and hardware licensing. He's advised clients such as Xerox, Burger King, Grey Interactive and Avon.<sup>1</sup>

Our second speaker will be Peter Brown, who is the managing partner of Brown, Raysman, Millstein, Felder & Steiner, LLP., which has offices in New York, Los Angeles, Hartford and Newark. He concentrates his practice on a variety of matters that relate to intellectual property, Internet, new media and computer law, and negotiating all types of Internet software and hardware agreements. He served as an Adjunct Professor of Computer Law at Dartmouth College from 1984 to 1988. He is the current Co-Chairman of the Computer Litigation Committee of the American Bar Association and the former Chairman of the Computer Law Committee of the Association of the Bar of the City of New York.

Our third and final speaker will be Peggy Miles, who is the President of Intervox Communications, an Internet consulting company in Washington, D.C. She is an internationally respected Internet expert and pioneer. She has spoken for

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<sup>1</sup> Subsequent to this presentation, Mr. Ezor left Davis & Gilbert and became the Director of Legal Affairs for Poppe Tyson, a global strategic interactive service company headquartered in New York City.

organizations including the National Association of Broadcasters, Canadian Association of Broadcasters and Radio Advertising Bureau. She's worked on consulting programs for CBS Radio Network, Gannett, U.S.A. Weekend, KCBS-FM Los Angeles, Liberty Broadcasting and many other online programs for leading entertainment corporations.

It's an absolute pleasure to welcome each of you here. Jonathan, the microphone is yours.

*Mr. JONATHON EZOR:*

Today, I would talk about the Internet as a broadcast medium. The Internet is different than what people think it is. People, of course, think about the Internet as a delivery medium, perhaps an interactive one. On the other hand broadcasting on the Internet is really a new model ready to grow as the bandwidth<sup>2</sup> and the technology permits it. But is the Internet ready for prime time? My argument is that it is. However, I want to make sure those utilizing the Internet are ready for what they are getting into.

When one begins to talk about Internet law, a lot of people will tell you that Internet law is akin to law in the wild, wild west; that there are no rules or no laws. It seems no one knows quite what to do, or what one's rights are or what one can and cannot accomplish on the Internet. Well, that is not the really the case. Although the Internet technology is new<sup>3</sup> and the potential of the Internet is new, the business issues and, for that matter, the legal issues arising out of them are not new.

The key to finding a legal framework for the Internet, including web broadcasting, is figuring out which combination of existing business and legal structures come together for this

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<sup>2</sup> Bandwidth "[is] the amount of data that can be sent through a given communications circuit." G. Malkin, *Internet Users' Glossary* (visited October 23, 1997) <<http://www.internic.net/rfc/rfc1983.txt>>. See also, PHILIP E. MARGOLIS, RANDOM HOUSE PERSONAL COMPUTER DICTIONARY 42 (2<sup>nd</sup> ed. 1996). Defining bandwidth as "[t]he amount of data that can be transmitted in a fixed amount of time .... [t]he bandwidth is usually expressed in bits or bites per second." *Id.*

<sup>3</sup> See HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE 2 (1994) (stating "[t]he roots of the Internet ...were developed in the 1970s....[b]y the United States Department of Defense."); see also, *State v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431, at \*1 (Minn. Dist. Ct., Ramsey County Dec. 11, 1996) *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997) (stating "[t]he Department of Defense developed the Internet 25 years ago as a means of linking the computer network of various universities, research centers, and government agencies . . . [n]ow, the Internet exists as a communication and advertising device used by millions of people around the world and millions of people in the United States.").

particular medium. Among the legal frameworks most often used are marketing<sup>4</sup> and advertising<sup>5</sup> law. Privacy issues are extremely important with regard to the Internet because the Internet allows one to reach people in their homes or place of business.<sup>6</sup> Additionally, privacy issues are particularly relevant if one is collecting information on the Internet about individuals or businesses. Intellectual property law<sup>7</sup> issues are also extremely important on the Internet because everything on the Internet is, by nature, intellectual property.

A legal framework is needed for the Internet because the Internet allows access to tangible materials coming through a TCP-IP connection. Primarily the underpinnings of an Internet resource include the software that is required on all ends of the communication, and software licensing, specifically software that is needed if one were downloading an Internet communication or an object as part of a web site. The subject of our discussion

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<sup>4</sup> See generally, Charles A. Maddock, *'Prosperity' Strategies: Common Catalyst -- Marketing*, 40-JUN RES GESTAE 18 (1997) (explaining that marketing is an area that concerns the aggregate of functions involved in the movement of goods and services from the producer or provider to the consumer).

<sup>5</sup> See generally, Roscoe B. Starek III & Lynda M. Rozell, *The Federal Trade Commissions Commitment to On-Line Consumer Protection*, 15 J. MARSHALL J. COMPUTER & INFO. L. 679 (1997) (stating that advertising law is a general area of federal and state laws regulating the practices of communications which offer goods, services and ideas for sale).

<sup>6</sup> See *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (asserting that "[t]he individuals right to be left alone plainly outweighs the First Amendment rights of the intruder.").

<sup>7</sup> See 18 C.J.S. *Copyrights and Intellectual Property* § § 4-16 (1990) (addressing the common-law right of property in intellectual productions). See also, 69 C.J.S. *Patents* § 6 (1951) (considers the property rights that exist in patents); 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 2-10 (1954) (considering the property rights that exist in trademarks and tradenames). See generally, *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp 1552 (M.D. Fla. 1993) (involving subscribers to a local bulletin board service who were uploading and downloading bootlegged photographs); *Sega Enterprises, Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) (involving subscribers to a local bulletin board service who were uploading and downloading video games).

today is webcasting.<sup>8</sup> Webcasting definitely fits this combination model. My approach to this subject is to focus on both the legal ramifications and business elements of being a webcaster.

The legal ramifications of Internet communications arise in a traditional way through broadcasting law<sup>9</sup> and regulations.<sup>10</sup> Although it is arguable whether the Federal Communications Commission [hereinafter "FCC"]<sup>11</sup> or an analogous international body<sup>12</sup> has jurisdiction over the Internet; Internet issues are currently being treated as if they were subject to broadcast law.<sup>13</sup> This is especially true with regard to production agreements made regarding creative material. Production agreements are normally

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<sup>8</sup> Webcasting is a generic term that describes the transmission of audio or video from a live or archived source onto the World Wide Web. Mark R. Johnson, *Webcasting, What It Is and What Should It Be?* (visited on October 23, 1997) <<http://www.mindspring.com/~city...on/papers/webcasting/index.html>>.

<sup>9</sup> A general area of law that applies to the dissemination of information by wire, radio and television intended to be received by the public. 86 C.J.S. *Telecommunications* § 1, 147 (1997).

<sup>10</sup> *Id.*

<sup>11</sup> The FCC is a governmental agency, empowered by Congress, to develop and implement policy regarding interstate and international communications by television, radio, satellite, wire, and cable. *Federal Communications Commission (FCC) Home Page* (visited October 9, 1997) <<http://www.fcc.gov/>>. See also Paul McClure, *Who's Who in the Federal Executive Branch*, CONG. Q. 100 (1996).

<sup>12</sup> European Conference of Postal and Telecommunications Administrations (CEPT) (publishes recommendations to harmonize and improve administration and operational services in the postal and telecommunications areas) AMY ZUCKERMAN, INTERNATIONAL STANDARDS DESK REFERENCE 164-5 (1997). European Telecommunications Standards Institute (ETSI) (an outgrowth of CEPT established to "deal with standards of public and private telecommunications systems and equipment, local area networks, and other electronics equipment for government and consumers." All the European nations are members. Australia and Israel are associate members). *Id.* See also Patrick G. Crago, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services within the European Union*, 20 HASTINGS INT'L & COMPARATIVE L. REV. 467, 471 (1997) ("The EU [European Union] is an evolving political and economic transnational organization of European countries.").

<sup>13</sup> See Cara E. Sheppard, *CyberPoliticking*, 4 COMMLAW CONSPECTUS 129 (1996) (discussing how the internet interacts with broadcasting law).

made in advance of production allowing for tailored provisions but when you have production happening on a real time basis, you need to have contracts containing fairly standardized provisions. These provisions are being drafted similar to that used by other production media.

There are significant legal ramifications with regard to sponsorship arrangements.<sup>14</sup> All those involved in the business area of the Internet hope to make some profit at it and one of the major ways to make a profit is through a sponsorship arrangement. Those contracts and those legal issues need to be addressed.

The legal ramifications of International law<sup>15</sup> cannot be over emphasized. International law is probably the most difficult area facing a webcaster or anyone doing business on the Internet. How much are you responsible for knowing what other countries, other regions, other states and cities will say about what you're doing? How liable are you to them? These questions certainly need to be addressed.

The Internet is a broadcasting medium and as such it is analogous perhaps to television or radio. Special note should be taken concerning the union and the guild contracts connected with television and radio, which have long since been collectively negotiated and are now becoming part of the Internet as well.<sup>16</sup>

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<sup>14</sup> An arrangement where a corporation or individual agrees to financially sponsor a group or organization in exchange for good will and potential tax benefits. David A. Brennen, *The Proposed Corporate Sponsorship Regulations: Is the Treasury Department "Sleeping with the Enemy?"*, 6 KAN. J.L. & PUB. POL'Y 49 (1996).

<sup>15</sup> See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 494 F. Supp. 1161, 1178 (D.C. Pa. 1980) (stating that "[e]ssentially, international law is a body of consensual principles which have evolved from the customs and practices civilized nations utilize in regulating their relationships"); See also 48 C.J.S. *International Law* § 2 (1981) (stating that "[i]nternational law...has been defined as that branch of positive law which governs the interrelations of sovereign states...which defines the rights and prescribes the duties of nations in their intercourse with each other.").

<sup>16</sup> See generally Carol T. Contes, *Performers Unions in the Interactive Media*, in PATENTS, COPYRIGHTS, TRADEMARKS, & LITERARY PROPERTY

These are not simple issues when it comes to webcasting because, unlike many of the other areas of Internet communication, the ideal environment for webcasting is real-time. Often there is little time to think about how something is formatted, or the rights needed to be obtained in advance when you are actually broadcasting or webcasting in real time.

One of the biggest issues to come up regarding webcast content concerns copyright rights.<sup>17</sup> Most, if not all, of the material going across the web in a webcast context is copyrightable but personal rights issues are raised as well. These personal rights issues concern the rights of speakers, composers, and personalities who are being discussed or being depicted on the Internet, and should be protected a way similar to that involving a television or a radio broadcast.<sup>18</sup>

Local liability for Internet content may be the single most difficult issue needed to be addressed by a potential Internet legal structure. It has ramifications concerning international law as well as the regional law. The state of Minnesota, for example, has said that any piece of content available to the citizens of

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1997, at 461 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4000, 1997).

<sup>17</sup> Copyright is defined as "[t]he right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a specific period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them." BLACK'S LAW DICTIONARY 336 (6th ed. 1990).

<sup>18</sup> 17 U.S.C. § 102 (1976) in pertinent part provides:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptured works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

*Id.*



Minnesota over the Internet brings the creator or transmitter of that content under the jurisdiction of the Attorney General of the State of Minnesota.<sup>19</sup> I don't know how many of you are familiar with the procedures and local laws of Minnesota. I certainly am not, and Minnesota's ability to enforce that view of its jurisdiction is a very arguable proposition. The potential for conflict with other local rules is clear. For example, Compuserve<sup>20</sup> has been transmitting and making news groups available in Germany where the local Munich authorities took the Minnesota position as to local liability for content.<sup>21</sup>

Webcasters are liable for both consumer protection<sup>22</sup> and for infringement<sup>23</sup> as well. In addition, moral objection is critical

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<sup>19</sup> State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at \*11 (Minn. Dist. Ct., Ramsey County Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997) (holding that an out of state gambling operation purposefully availing itself, via the Internet, of the citizens of Minnesota, for business purposes, are within the jurisdiction of the Attorney General of Minnesota).

<sup>20</sup> CompuServe Information Service (CompuServe). A commercial on-line service that provides an infrastructure in which subscribers can communicate with one another, either by exchanging e-mail messages or by participating in on-line conferences (forums). CompuServe also provides a variety of informational services including business news, investing advice, travel information, etc. JILL H. ELLSWORTH & MATTHEW V. ELLSWORTH, USING COMPUSERVE (1994).

<sup>21</sup> See Nathan Nash, *Holding Compuserve Responsible*, N.Y. TIMES Jan. 15, 1997, at D4.

<sup>22</sup> An area of federal and state law enacted to protect the consumer. Roscoe B. Starek III & Lynda M. Rozell, *The Federal Trade Commissions Commitment to On-Line Consumer Protection*, 15 J. MARSHALL J. COMPUTER & INFO. L. 679 (1997). A consumer is "...[a] member of a broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted." BLACK'S LAW DICTIONARY 316 (6th ed. 1990).

<sup>23</sup> 17 U.S.C. § 106, HISTORICAL & REVISION NOTES, H. REP. NO. 94-1476 at 909 (1994) (stating that "[a] copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.") *Id.* Infringement is described as "[a] breaking into; a trespass or encroachment upon; a violation of the law, regulation, contract, or right . . . [u]sed especially of invasions of the rights secured by

when dealing with webcast and the applicability of local law in general when you are dealing with business issues. One needs to remember that webcasting is a business -- or at least there are business components to it even if it is done for not-for-profit groups -- and there are a lot of different parties involved. The parties consist of the transmitter the hosting company, the bandwidth<sup>24</sup> provider, and the backbone<sup>25</sup> provider in addition to the software<sup>26</sup> providers. All of these parties have responsibilities and all of them will need to share the risks involved with doing business on the Internet.

It cannot emphasize enough that in webcasting context, as with other Internet legal issues, the medium -- that is, the Internet -- is not the message. The issue is not the Internet opposed to the rest of the world. When trying to discover what the relevant Internet law is, one needs to forget about the novelty of the Internet as a delivery medium. Although the delivery medium facet of the Internet makes it possible to do the things on-line at such a low cost and to such a wide distribution, but it is only a means; it is not the end itself. Focusing on the message transmitted on the Internet and not the medium itself requires one to inquire into who will have jurisdiction over the Internet and

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patents, copyrights, and trademarks." BLACK'S LAW DICTIONARY 780 (6th ed. 1990).

<sup>24</sup> Bandwidth "[is] the amount of data that can be sent through a given communications circuit." G. Malkin, *Internet Users' Glossary* (visited October 23, 1997) <<http://www.internic.net/rfc/rfc1983.txt>>. See also PHILIP E. MARGOLIS, RANDOM HOUSE PERSONAL COMPUTER DICTIONARY 42 (2<sup>nd</sup> ed. 1996). (defining bandwidth as "[t]he amount of data that can be transmitted in a fixed amount of time .... [t]he bandwidth is usually expressed in bits or bites per second.").

<sup>25</sup> Backbone is defined as "[t]hat portion of the network that manages the bulk of the traffic. The backbone may connect several different locations or buildings, and may also connect to other, smaller networks." PETER DYSON, THE PC USER'S ESSENTIAL ACCESSIBLE POCKET DICTIONARY 37 (1994).

<sup>26</sup> Software is defined as "[t]he generic term for any computer program or programs; instructions that cause hardware to do work." DONALD SPENCER, WEBSTER'S NEW WORLD DICTIONARY OF COMPUTER TERMS 534 (5th ed. 1994).

what agencies will be looking at the Internet from a regulatory point of view.

Even though I would argue that the FCC and similar bodies do not have jurisdiction over the Internet, the fact remains that the public policy issues have encouraged broadcasting regulation beyond spectrum limitations. As was held under electronic communications law, much of the justification for the government regulation of broadcasting is that the spectrum – that is, the number of frequencies available – is limited.<sup>27</sup> The broadcast spectrum is a public resource that should be shared and shared fairly. The Internet is not limited by a spectrum in the same way, but there other public policy concerns, such as free access,<sup>28</sup> fair voice to all sides,<sup>29</sup> making sure that information to the public is accurate and inexpensive,<sup>30</sup> that are still at issue and are going to encourage some sort of government regulation, even if it is not done by the FCC.

When using the Internet, one must constantly ask, “What is it that we want to do on-line?” and “How we are going to do it?” First, what are webcasters doing? Webcasters are doing a worldwide transmission of copyrighted or copyrightable materials. Worldwide transmission. This is like the Voice of America<sup>31</sup> in short-wave or CNN<sup>32</sup> on a satellite beaming all over

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<sup>27</sup> See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) (recognizing that the broadcast media utilizes a valuable and limited public resource and therefore regulation of this area is justified).

<sup>28</sup> *Id.* at 122. (asserting “[t]hat a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech...”).

<sup>29</sup> See *Am. Sec. Counsel Educ. Found. v. F.C.C.*, 607 F.2d 438, 443 (D.C. Cir. 1979) (asserting that there should be a reasonable opportunity for the presentation of conflicting views).

<sup>30</sup> *Id.* at 447.

<sup>31</sup> An arm of the government’s United States Information Agency which provides worldwide radio broadcasting of news, music, and editorials in English and 46 foreign languages. *United States Information Agency (USIA) Home Page* (visited October 8, 1997) <<http://www.usia.gov/>>. See also Paul McClure, *Who’s Who in the Federal Executive Branch*, CONG. Q. 128-9 (1996).

the world, even if it is happening out of an auditorium in a law school in Huntington, NY.<sup>32</sup> All of a sudden, it is as if we all have worldwide broadcast licenses, or at least a method available for worldwide transmission. Anyone who is involved in webcasting or any other Internet resource has to constantly keep that in mind. It is very easy to let that particular genie [access to worldwide transmission] out of the bottle, and get well beyond what you intended to do on the Internet.

Another factor to keep in mind is that Internet information is digital, or even if it is analoged at some level, it is digitally broadcast. Any time you deal with digital broadcasting, the copyright owners are very interested in how it is being done. You will get copyright owners attention because digital broadcasting allows information to be copied and distributed with very high quality. Therefore copyright owners feel their livelihood is much more at stake on the Internet than broadcasting information on media that is prone to static.

Who has been in this situation before? Well, no one because of the Internet's unique ability to allow such easy and worldwide transmission of information; although the people at CNN or the Voice of America have probably thought about these issues at some level. CNN's or at the Voice of America's worldwide nature, making sure they have the rights, making sure that their strategic partners are providing services they need to serve their customers would have caused them to address some of the issues now facing webcasters. Since CNN and Voice of America have dealt with these issues, they are good places to start if you are looking for business and legal precedent, at least on a theoretical basis.

Those are some of the issues I would like to address today. Additionally, I would like to examine what others are currently doing on the Internet and what kind of issues they may

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<sup>32</sup> Cable News Network (CNN). A privately owned national news network formed in 1980 to provide viewers with a 24-hour news service. HANK WHITEMORE, CNN THE INSIDE STORY (1990).

<sup>33</sup> Touro College, Jacob D. Fuchsberg Law Center. *Touro Law Center Web Server Home Page* (visited October 8, 1997) <<http://tourolaw.edu/>> .

be facing. Please take note that I do not work with any of the following parties. Let's take WCBS Radio<sup>34</sup> as an example. CBS-AM<sup>35</sup> is a news station in New York City. They have begun announcing, as part of their website -- [newsradio.com](http://newsradio.com) -- that they will be doing live retransmissions of their radio broadcast. Live retransmission is not a new concept to CBS. For a long time they have had a relationship with the Walt Disney World theme park to pipe New York news directly into their hotel rooms. However the retransmission of CBS-AM is now transmitted worldwide.

I wonder if CBS, or other radio stations in similar positions, have realized that they have just raised the stakes in their business. What about their ASCAP<sup>36</sup> and BMI<sup>37</sup> licenses? Now CBS is not a music station; but they probably have some sort of blanket license<sup>38</sup> in the event they transmit incidental music or transmit music covered by ASCAP or BMI. Have they

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<sup>34</sup> A radio news station, in New York City, located at 880 on the AM frequency. *WCBS NEWSRADIO 88* (visited October 8, 1997) <<http://newsradio88.com/>>.

<sup>35</sup> *Id.*

<sup>36</sup> American Society of Composers Authors and Publishers (ASCAP). "The ASCAP license provides businesses with the right to perform the millions of songs created or owned by more than 75,000 of Americas best composers, songwriters, lyricists, and publishers and many more tens of thousands of writers and publishers from all over the world. Through the ASCAP license, [in] one simple transaction and for one annual fee, businesses can take care of their legal obligation under the copyright law to obtain permission to use ASCAP members' copyrighted music" *The ASCAP License* (visited October 8, 1997) <<http://www.ascap.com/about/license.html>>.

<sup>37</sup> Broadcast Music, Inc., (BMI) "operates as a not-for-profit organization representing more than 200,000 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 work, and in the future, will distribute potential new royalties for their use of the works in cyberspace." *Welcome to bmi.com!* (visited October 8, 1997) <<http://bmi.com/licensing/genlic.html>>.

<sup>38</sup> Blanket licenses are defined as "licenses, [where] the licensee has access to the entire repertory of the collective, and the fee does not depend on the number of works that are used or how frequently they are performed." Stanley S. Besen, Sheila N. Kirby, and Steven C. Salop, *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383

revised and expanded those licenses to cover their new media use of this material? What about the network? Many times radio stations will get network news feeds or other national, third party information. Do the contracts entitle CBS to use that information or give CBS, or other radio stations, the right to use that information live on the Internet?

Beyond that, what else happens with that third-party content? For example, CBS Radio retransmits the audio portion of 60 Minutes<sup>39</sup> every Sunday night. Well, I am sure they have an arrangement with the CBS television network to do that. What happens if that broadcast of 60 Minutes violates local law in Japan because of the subject matter or because they use material which, while not under copyright in the United States, happens to be protected by copyright in Japan. Then suppose that CBS has some sort of business arrangements in Japan where they actually have the ability to be reached from a jurisdictional standpoint?

Who is responsible for that? Is it CBS Radio; is it CBS Television for having permitted CBS Radio to retransmit the broadcast or the producers of 60 Minutes? What happens now? Has the contract addressed this issue? If not, the parties are going to find themselves in a bit of a tricky situation when problems arise.

One other real world example, although not necessarily webcasting in the traditional sense, is that a lot of advertisers want to put their commercials on-line because they are fun. People enjoy seeing them when they want to, such as the Super Bowl commercials. Advertisers have a lot spent money to make these mini-movies and want to get additional marketing mileage out of them. Can they do that? Whether it is done as part of a streaming video<sup>40</sup> or as part of a download of a video, do

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<sup>39</sup> *60 Minutes* is a top rated television news program in its thirtieth season on the CBS Television Network. The program provides a "trademark blend of investigative reports, interviews and profiles." *CBS Primetime Sunday - 60 Minutes* (visited November 11, 1997) <<http://www.cbs.com/prime/60min/01.htm>>.

<sup>40</sup> "Streaming video enables the user to incorporate video and audio in web sites and efficiently delivers video over a variable bandwidth network without downloading the clip prior to viewing. For viewers this means not having to

advertisers have the right to put their commercials on the Internet? What kind of issues are they facing?

One major issue is talent. The talent issues are separate from copyrighting -- separate and in addition to copyrighting. This issue concerns the stars, the musicians, and all of those people who have signed certain rights over to the advertiser to put these spots on television, on radio or in print. Those rights may not have included digital retransmission on the Internet so advertisers need to be concerned about whether they have the rights to use those spots on the Internet.

There are also geographic and legal battles on the type of marketing advertisers may be able to do. Many times a company will license its trademarks only for a certain area, or a commercial allowed in the United States would not pass muster with foreign regulatory authorities. Germany, for example, prohibits comparative advertisement such as "My product is better than X's product." This is perfectly legal in the United States;<sup>41</sup> but if you take your comparative advertising in the United States, put it up on the web, the German version of the FCC might have something to say about it.

Advertising issues go hand in hand with consumer protection issues. Advertising seems to always run afoul of consumer protection regulations. Consumer protection regulations are different, not only in every country, but every region, every province, every state and sometimes even counties and cities have their own rules.<sup>42</sup> It is tough enough when you are simply trying to get national network permission. It is almost

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wait for content." *Streaming Video* (visited October 29, 1997) <<http://mangovideo.com/stream.html>>.

<sup>41</sup> Mark Sableman, *Business on the Internet, Part II: Library Issues*, 53 J. Mo. B. 223, 228 (1997).

<sup>42</sup> "Every state and the District of Columbia have laws prohibiting unfair and deceptive acts or practices ... [m]ost state statutes provide consumers, and some provide competitors, with a private right of action." Deborah K. Owen, *Internet Law Institute: Advertising Issues*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY 1997, at 756 (1997) (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4007, 1997).

impossible to think about what the scope of Internet permission would be down to the local level. When you have a multi-national advertiser, they are at particular risk for violating local consumer protection regulations because their assets overseas can be reached by foreign authorities.

What can you do to minimize the risks of webcasting? Other than educate yourself, the best thing to do for managing this kind of risk is contracting, contracting across the board. One should use contracts to ensure that your customers and your sponsors know both the advantages and the limitations on this medium and how you intend to use it. Additionally, make sure that the technical people with whom you work -- the hosting companies, the bandwidth providers, the software providers -- guarantee you what is necessary to fulfill your obligations to your customers along with making sure that the contract specifically describes what it is that you intend to do for the customer. This is necessary because there are very few terms of art concerning the Internet. In order to draft a good contract, the business people and the technical people need to talk to each other so they will have a better sense of what each is contracting to do. By focusing on the issues and drafting these agreements, you do get a much better understanding regarding webcasting. Hopefully, focusing on these issues will help prevent problems down the line.

My practice as a business lawyer generally involves helping clients with risk management. We strive to identify potential problems and avoid them or at least reduce the risk to some manageable level. Contracts are a major way of doing that; along with the use of disclaimers before and during a webcast.

Insurance is not very often discussed but it is very important if you are a business involved in Internet broadcasting. Does your business liability insurance cover this new technology? Does it cover this new area in terms of the size and the type of policy? Again, carefully evaluate your strategic and technical partners as to their capability, financial security, and insurance coverage. Above all, carefully evaluate what is actually being done on the Internet. Look at it very carefully; find out how it is



being done, what may happen down the road, where it is going, and what it is doing.

That is my overview presentation. Just as a quick plug, if I may, for my own experiment in netcasting and webcasting, actually e-mailcasting. I have begun an informal newsletter to discuss business and legal issues involving the Internet. It is free and I like to tell people about it. Feel free to drop me an e-mail message at netgains @ newmedialaw.com and join in on the conversation as we explore this very exciting issue. Thank you.

*Prof. SHAW:*

I want to thank Jonathan for his presentation. Jonathan has a bright future as a law professor because, as we like to do, he asks a series of questions for which there are no answers. Our next speaker is Peter Brown.

*Mr. PETER BROWN:*

Today I am going to focus in on two specific areas, that of copyright law<sup>43</sup> and trademark law.<sup>44</sup> I will focus on trademark law as it relates to domain names.<sup>45</sup> These areas will give you a feel for the issues we are talking about in cyber broadcasting.

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<sup>43</sup> Copyright "confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>44</sup> "[T]rademark' may be defined as a sign, device or mark by which the articles produced or dealt in by a particular person or organization are distinguished from those produced or dealt in by others. Under the Trade-Mark Act (Lanham Act), the term 'trademark' includes any word, name, symbol, or device, or any combination thereof, adopted and used to identify goods and distinguish them from others." 74 AM. JUR. 2D, *Trademarks and Tradenames* §1 (1974).

<sup>45</sup> "A domain name is the Internet equivalent of a telephone number or address." Ira S. Nathenson, Comment, *Showdown At The Domain Name Corral: Property Rights And Personal Jurisdiction over Squatters, Poachers And Other Parasites*, 58 U. PITT. L. REV. 911, 918 (1997). See also David J. Loundy, *A Primer on Trademark Law and Internet Addresses*, 15 J. MARSHALL L. REV. 465 (1997).

I want to take you back and I want to think of yourselves in an earlier time; perhaps a hundred, or a hundred and twenty-five years ago. Your clothing would be more formal. I doubt that there would be more than one or two women in the audience who would be attending law school. Everyone would be tearing their hair out because there was this new medium of transportation. It was a railroad and it ran very, very rapidly; many miles an hour on steel rails. When a train came barreling down the track and hit a cow, that was a serious issue because the people of the time never had anything move that fast and hit a cow so hard. What are the liability issues going to be? Additionally, the sides of this train could be used to advertise the name of your railroad company. Who was responsible for that advertising? These issues could be discussed forever and there we would be sitting, a hundred and twenty-five years ago, petrified about the impact of the railroad on the United States and how it's going to change our law.

Today we are here to talk about cyber broadcasting. Cyber broadcasting raises some of the issues that I have seen over the last seventeen years as a lawyer representing companies in computer-related contracts. Seventeen years ago we had main frame computers and mini-computers. Everyone was worried about the legal impact of those computers. The technology clearly has evolved since then. The technology available today is breathtaking compared to what was available seventeen years ago. Interestingly enough, when we get down to the basic issues, the issues and the questions remain the same. New technology, old issues. I am here to tell you, as a traditionalist, as someone on the side of the law professors, and as someone on the side of stability of the law, that the law is a very valuable instrument. The law has survived the railroads, it survived computer technology and, in my personal belief, it will survive the Internet.

That being said, let's look at the two critical areas that I want to cover for you; and that is, the copyright and trademark areas. Now, in terms of copyright the Internet provides you with many opportunities for infringing the work of other people. Just the sheer posting of a work, whether it is by a broadcast or printed on the Internet and its transmission worldwide creates

new liability issues. These opportunities for infringement arise because the Internet allows you to make exact duplicates of the work and this creates a number of practical problems, but not necessarily new legal problems.

The courts have begun to take a serious look at how they can protect the owners of copyrighted materials.<sup>46</sup> Since a good proportion of this audience is twenty-five or younger, I would call you the Net generation. If you are in the Net generation, you figure whatever is on the Net is free. You can use it, you can copy, you can just pull it off the Net; it is yours to do with whatever you want because it is there. The fools put it up there so you can take it, right? That is what everyone thinks; but, of course, the copyright law does not stop merely because the method of transmission is somehow different than some earlier form of transmission. No, you don't have the right to copy.<sup>47</sup>

I have a seventeen-year-old daughter and she sometimes creates mixes of sound recordings for her friends and those are

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<sup>46</sup> See generally *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 552 (M.D. Fla. 1993) (involving subscribers to a local bulletin board service who were uploading and downloading bootlegged photographs); *Sega Enterprises, Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) (involved subscribers to a local bulletin board service who were uploading and downloading video games).

<sup>47</sup> Copyright is defined as "[t]he right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a specific period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them." BLACK'S LAW DICTIONARY 336 (6th ed. 1990). See generally 17 U.S.C. § 102 (1976) which provides in relevant part:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptured works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

*Id.*

taken off of CDs or tapes that she has purchased. Later she has given or exchanges these mixes with her friends. Every teenage kid that I know does it; but it is illegal.<sup>48</sup> However no one is going to spend time or money to stop my daughter. Neither the owners of the copyright nor the federal government is going to come in here to stop my daughter from making those mixes. However, if I am a commercial pirate, and if I am involved in the commercial pirating of information, and I am profiting from those kinds of commercial mixes, you can bet that Sony or whomever will be coming after me for the misappropriation of intellectual property.<sup>49</sup>

Fair use<sup>50</sup> and the idea of fair use are critical issues and should be considered as the first step in your infringement analysis. First you should contrast between commercial, and non-profit or personal use. Fair use is a concept that has allowed personal use of misappropriated materials in a number of situations.<sup>51</sup>

The second issue concerning the concept of fair use is the substantiality; how much of the material are you misappropriating. The classic test of fair use is when someone does a movie or book review or review of poetry.<sup>52</sup> You're allowed, in terms of the concept of fair use, to take a small piece. You can quote a paragraph or two of the book or you can quote

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<sup>48</sup> *Id.*

<sup>49</sup> See generally, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) *Acuff-Rose Music, Inc.*, a copyright holder, filed suit against the rap music group 2 Live Crew and their record company for a song parody of Roy Orbison's song "Oh, Pretty Woman."

<sup>50</sup> "Fair use describes 'limited and useful forms of copying and distribution that are tolerated as exceptions to copyright protection.'" *Playboy Enterprises v. Frena*, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993).

<sup>51</sup> See generally *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Stewart v. Abend*, 495 U.S. 207 (1990); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Elsmere Music, Inc. v. National Broadcasting Co.* 482 F.Supp 741 (S.D.N.Y. 1980).

<sup>52</sup> For determining if the use of a copyrighted material is fair use the court must ask whether "the quantity and value of the material used are reasonable in relation to the purpose of the copying" *Campbell*, 570 U.S. at 586, (quoting *Folsom v. Marsh* 9 F.Cas. 342, 348 (C.C.D Mass.1841) (No. 4901.)

several lines of poetry. However you cannot go around quoting ten of the poems and claim that was fair use. Substantiality concerns how much of the work that you are using without permission from the author.

Some of you may be aware that there's a whole body of litigation around rappers and rap music specifically concerning the rappers' sampling sound recordings from other people's music.<sup>53</sup> Generally it does not take much for someone to be liable for misappropriating a sound recording.<sup>54</sup> That is in the world of music and I think analogous in the world of the Internet. Obviously, the most important issue is the effect on the market and how is the use of this copyrighted material going to affect the market for the copyrighted goods or information.

The first case which you have got to be aware of is *Religious Technology v. Lerma*,<sup>55</sup> a case out of the Eastern District of Virginia. The Religious Technology Center is part of the Church of Scientology.<sup>56</sup> The Church of Scientology has a very aggressive litigation strategy and they believe that the courts are there to protect their writings. The church not only asks you to pay to be a member, but at various levels makes you pay for

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<sup>53</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>54</sup> *Id.*

<sup>55</sup> *Religious Technology v. Lerma*, 1996 WL 633131, (E.D.Va. Oct. 4, 1996) [hereinafter *Lerma I*]. See also *Religious Technology v. Lerma*, 897 F. Supp. 260, (E.D.Va. Aug. 30, 1995), *Religious Technology v. Lerma*, 908 F. Supp. 1353, (E.D.Va. Nov. 28, 1995) [hereinafter *Lerma II*]; *Religious Technology v. Lerma*, 908 F. Supp. 1362, (E.D.Va. Nov. 29, 1995).

<sup>56</sup> *Religious Technology v. Lerma*, [Lerma I], 1996 WL 633131 at \*1, (E.D.Va. Oct. 4, 1996).

Founded by L. Ron Hubbard, the Scientology religion attempts to explain the origin of negative spiritual forces in the world and advances techniques for improving one's own spiritual well-being. Scientologists believe that most human problems can be traced to lingering spirits of an extraterrestrial people massacred by their ruler, Xenu, over 75 million years ago. These spirits attach themselves by 'clusters' to individuals in the contemporary world, causing spiritual harm and negatively influencing the lives of their hosts.

*Id.*

the next higher level of membership.<sup>57</sup> As you become more involved in the Church of Scientology, the church gives you access to various secret or restricted information.<sup>58</sup> They think that this is very important information and they only give it to a few people.<sup>59</sup>

Well, Mr. Lerma, who was a disenchanted scientologist, got a copy of some of this information and decided to broadcast this information on the Internet. The *Lerma I* case is a critical one because he lost the case. He took the scientology text and he put it on the Net. The Church of Scientology went into Federal District Court and they enjoined him. Not only did they enjoin him, but also he was fined five hundred dollars per infringing work.<sup>60</sup> I believe there were five works that were infringing.<sup>61</sup>

The problem with the *Lerma* cases is that bad facts make bad law. Mr. Lerma was an individual. Imagine if you had a nationwide, multi-million dollar, powerful organization coming down on your head individually. What if you had the whole Church of Scientology coming after you with a preliminary injunction in Federal Court just because you posted some information on the Net? The odds are that you would not have the resources to defend this action against a multi-million dollar copyright case. Here you have an individual up against the entire Church of Scientology. Guess what? He lost. It was bad facts. It may be even questionable law in this circumstance, but the Church of Scientology is going to continue to challenge those who use the Internet because the people who dislike the Church of Scientology have found that it is a great medium for distribution of information. These people hope to undercut the controls the church intends to put on the information.<sup>62</sup>

You cannot win on the area of direct infringement and, although *Lerma* is not the greatest fact case, there are numerous

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<sup>57</sup> Religious Technology v. Lerma, [Lerma II], 908 F. Supp. at 1356.

<sup>58</sup> Religious Technology v. Lerma, [Lerma I], 1996 WL 633131 at \*1-2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*15.

<sup>61</sup> *Id.* at \*14.

<sup>62</sup> *Id.* at \*11.

other cases in which individuals have been found liable for infringing.

However, there is another concept which is now arising and that's the concept of contributory infringement.<sup>63</sup> Here, you do not personally infringe, but you help somebody else infringe. Think of this is in the broadcast context where the broadcast begins -- we will use John's comment with CBS<sup>64</sup> News in New York. It gets broadcast through various servers throughout the world. Are you liable? Is someone else in the intermediary liable? The answer is perhaps.

There we go back to the Church of Scientology again with *Religious Technology v. Netcom*,<sup>65</sup> a case in which Netcom was an ISP, independent service provider and they provided the server and that's all. The Church of Scientology sent a notice to Netcom saying someone is using your service to distribute our copyrighted materials.<sup>66</sup> Netcom basically said that they did not know, and that they were not going to check this all out.<sup>67</sup> Additionally, they stated that any nut could send a notice like that and that they were not going to go bother with it.<sup>68</sup> The Court found that the Netcom, because they were a distributor, had a duty which resulted in their potential liability as a contributory infringer.<sup>69</sup>

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<sup>63</sup> See Alfred P. Ewert and Irah H. Donner, *Contributory Infringement: Software Architects Beware! What You Don't Know Just Might Hurt You (Part II)*, COMPUTER LAWYER, May 1994 at 11 (stating "The Supreme Court. . . has generally defined a contributory copyright infringer as one who 'was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.'").

<sup>64</sup> See *About CBS* (visited on Oct. 8, 1997) <<http://www.cbs.com/about/index.htm>> (stating that "the Columbia Broadcasting System Inc. was renamed CBS Inc. in April, 1974. On November 28, 1995, the network was acquired by the Westinghouse Electric Corporation . . . . In 1997, Westinghouse renamed its media business "CBS Corporation.").

<sup>65</sup> *Religious Technology Center v. Netcom On-Line Communication Services Inc.*, 907 F.Supp. 1361 (N.D.Cal. 1995).

<sup>66</sup> *Id.* at 1366.

<sup>67</sup> *Id.* at 1368.

<sup>68</sup> *Id.* at 1374-75.

<sup>69</sup> *Id.* at 1375.

The computer service -- not the guy who is creating it, but the people who are distributing it -- may bear some liability, particularly when they were put on notice. What does that mean? It means if you want to enforce your rights in an Internet environment you probably have to give notice of your copyright registration or of trademark registration.<sup>70</sup> One needs to give some notice of copyright violation of the underlying work, he needs to state where the violation is occurring, and have some other certification that he is the owner of this work. Additionally, one needs to give some opportunity for the respondent -- the party whose operating the service -- to respond so that they may, deal with this alleged infringement.

This methodology is something that future lawyers will have to repeatedly deal with as claims of infringement arise; and clients, who are in the chain of Internet transmission, may find that they bear liability as contributory infringers. A quick cite to *Sega Enterprises v. Maphia*,<sup>71</sup> in the Northern District of California. This was a case where a bulletin board received uploads of Sega games. The operator of the bulletin board service claimed that they didn't know what was going on, didn't monitor the bulletin board, it wasn't theirs, and it was just a bulletin board service.<sup>72</sup> In fact, people were getting bootleg Sega games off of the Maphia server.<sup>73</sup> Maphia was held to be

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<sup>70</sup> See "Network Solutions Announces Internet Domain Name Policy" (visited Oct. 8, 1997) <URL <ftp://rs.internic.net/policy/internic/internic-domain-2.txt>> (stating "N.S.I. serves as an INTERNIC domain name registrar under a cooperative agreement sponsored by the National Science Foundation. . . . Domain names will continue to be assigned on a first-come, first-serve basis, with N.S.I. checking to ensure that a requested domain name has not already been given to another user.").

<sup>71</sup> *Sega Enterprises Ltd. v. Maphia*, 857 F.Supp. 679 (N.D.Cal. 1994).

<sup>72</sup> See Kelly Tickle, *The Vicarious Liability Of Electronic Bulletin Board Operators For The Copyright Infringement Occurring On Their Bulletin Boards*, 80 IOWA L.REV. 391 (1995) (stating "An electronic bulletin board, a type of computer information service, provides subscribers with access to a variety of information and services. The services offered by a typical bulletin board include a public message area, e-mail service, conferencing area, and a file area with uploading and downloading capabilities.").

<sup>73</sup> *Id.* at 683.



contributory infringers.<sup>74</sup> They did nothing except provide a computer that took whatever messages were sent to it. This type of situation presents a particularly large risk. Whatever the content is, there will be a huge amount of risk.

We now have new ways of having copyright infringement on the Internet, new methodologies. First there are hyperlinks<sup>75</sup>, nothing more than connecting one web site to another by the click of a button, and then there is framing the links. Hyperlinks may give the impression that your software is part of someone else's or that the ownership of the software becomes muddled. In that case people may not be happy. For example, if Consumer Reports<sup>76</sup> finds out that it is being linked to, let's say, an ad for a highly rated car -- a Honda or Toyota -- Consumer Reports usually likes those cars and rates them fairly high. Imagine if Consumer Reports found out that, without their consent, that they were linked directly to an ad for Toyota or Honda cars. Conversely, if there's a real negative review, let's say, of a competitor -- let's say an old Ford Pinto type of car -- and the negative review gets linked so as to say "Our competitor stinks and Consumer Reports says so" and touch here and go directly to the Consumer Reports site. Consumer Reports is not likely to be happy about finding out that they are being linked to advertisements.

Another area of new infringement is that of framing.<sup>77</sup> Some of you may be aware of a case called *Washington Post Co.*

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<sup>74</sup> *Id.* at 689.

<sup>75</sup> See *Intermatic Incorporated v. Toepfen*, 947 F.Supp. 1227, 1231 (N.D. Ill. 1996) "A hyperlink is a link from one site on the Internet to a second site on the Internet. . . . Hyperlinks are commonly placed on existing web pages, thus allowing Internet users to move from web page to web page at the click of a button." *Id.*

<sup>76</sup> Consumer Reports "[f]eatures objective comparative evaluations of consumer items, ranging from small household appliances to automobiles." ULRICH'S INTERNATIONAL PERIODICALS DIRECTORY, 1714 (32<sup>nd</sup> ed.1994).

<sup>77</sup> See Steven Meyerowitz, *Intellectual Property: Where The Boom Is*, Pennsylvania Lawyer, Sept./Oct. 1997, 35 (1997) (stating "framing . . . happens when a Web site takes a third party's material, puts a border around it and surrounds that with advertising.").

v. *Total News Inc.*<sup>78</sup> Total News provides a service in which they frame information provided by other websites. Total News provides service where you can hit about twenty-five major news services. The user is provided options to go to the Washington Post, CNN, or the New York Times along one edge and at the bottom of the frame there is a continuing and moving set of ads which are not from the news providers; they are Total News ads. All of the revenue from those ads at the bottom of the frame, which stays at the bottom of the screen even while you're reading the content of CNN or the Washington Post, went to Total News. In that case you have a hijacking of content in a new and really unexpected way. The courts have just now looked at this issue and are likely to find it improper. I'm not sure of the specific legal theory by which the Washington Post will prevail, they sued under about five different theories, but the court is certainly are going to find that they are liable for infringement, whether it is a trademark violation or a copyright violation.

I am going to cover the issue of domain names and domain name<sup>79</sup> disputes. In order to get a domain name you file a

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<sup>78</sup> No. 97 Civ. 1190 (S.D.N.Y. Feb. 20, 1997). See David J. Haenel, *Legal Technicalities Can Trip Up Anyone Creating A Website*, THE IDAHO STATESMAN, July 28, 1997, at 1-2 (1997) (stating "In Washington Post Co. v. Total News Inc., . . . several large news agencies with websites filed suit against a small commercial website for trademark dilution, trademark and copyright infringement, unfair competition, misappropriation and 'tortious interference with a contract.'").

<sup>79</sup> See *Juno Online Services, L.P., v. Juno Lighting, Inc.*, 1997 WL 613021, at \*2 (N.D.Ill. Sept. 29, 1997)

Each computer that is linked to the Internet contains a numeric address called an Internet protocol address or I.P. address. The numeric I.P. address has four parts, each separated by a decimal point . . . . However, since it is easier to use, each computer is given an alphanumeric address, called a domain name, that corresponds to the I.P. address. When an Internet user types in the domain name, the user's computer reads the name as the numeric I.P. address and contacts the appropriate computer. An example of such a domain name is 'juno.com'.

*Id.*

registration with an organization called Internic<sup>80</sup> and they will assign you your name. My law firm is Brown, Raysman. We got "brownraysman.com", but I could have also filed one -- if someone else had not been there, for Cadillac, if I had been the first one. Now, Internic also asks you to certify that your name is not infringing upon a known trademark.<sup>81</sup>

However, there are a host of litigations involving domain names and trademark disputes around those domain names.<sup>82</sup> Just to give you an idea, my firm represented American Standard.<sup>83</sup> American Standard found out that someguy -- a fellow named Toeppen, a trademark or domain-name hijacker or pirate -- had

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<sup>80</sup>See Gayle Weiswasser, *Domain Names, The Internet, And Trademarks: Infringement In Cyberspace*, 13 SANTA CLARA COMPUTER & HIGH TECHNOLOGY L.J., 137, 147. Internic (Internet Network Information Center) assigns domain names under contract with the National Science Foundation, through Network Solutions, Inc. (NSI).

<sup>81</sup> See *Network Solutions Announces Internet Domain Name Policy* (visited Oct. 9, 1997) <ftp://rs.internic.net/policy/internic/internic>-domain-2.txt.

Domain names will continue to be assigned on a first-come, first-serve basis, with NSI checking to ensure that a requested domain name has not already been given to another user . . . . If the holder of a trademark provides evidence to NSI that a domain name already assigned to an Internet user is identical to that trademark, NSI will ask the Internet user to submit proof that the user also has a trademark for that name. . . . If the Internet user cannot provide such proof of trademark, the holder of the domain name will be allowed a reasonable period of time to transition to a different domain name.

*Id.*

<sup>82</sup> See *Intermatic Incorporated v. Toeppen*, 947 F.Supp. 1227 (N.D. Ill 1996) (plaintiff claimed defendant registered the company's trademark as an Internet domain name.); *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997) (plaintiff alleged trademark dilution, infringement and false designation under Lanham Act as well as state law claims against defendant for its use of domain names "zippo.com," "zippo.net," and "zipponews.com." on its computer news service.); *Cardservice International Inc. v. McGee*, 950 F.Supp. 737 (E.D. Va. 1997) (plaintiff alleged infringement of its "Cardservice" mark.) *Id.*

<sup>83</sup>*American Standard Inc. v. Toeppen*, No. 96-2147, 1996 U.S. Dist. Lexis 14451, at \*1 (C.D. Ill. 1996) Plaintiff was granted a preliminary injunction restraining defendant from using *americanstandard.com*.

taken their name.<sup>84</sup> They wrote him a letter that said "Mr. Toeppen, would you please give us back americanstandard.com" and he replied "Yes, for a large sum of money I will do that." Then they asked one of my partners, Randy Lipsitz, to please convince this guy to give American Standard the domain name. He sent him a really nasty lawyer's letter. The letter basically stated "Mr. Toeppen, if you don't give the domain name to American Standard, very bad things will happen to you in the courts of the United States." Mr. Toeppen, in an act of great bravado, returned the letter by fax within one hour having left only one word at the bottom. It was "Ha". That letter, in the next forty-five minutes, went from my partner's desk to the General Counsel of American Standard's desk and almost immediately to the desk of the President of American Standard, whose ego was engaged at that point. His response was that we no longer worry about the cost of litigation; we are litigating. Sure enough, my firm ended up in Champaign, Illinois getting a preliminary injunction against Mr. Toeppen, which he consented to very rapidly.<sup>85</sup>

There are a number of domain names disputes. I will tell you about just some of them. Toeppen got one called Panavision and Panavision sued him and won under the new trademark dilution statute.<sup>86</sup> That is a case that occurred in November of this year. Hasbro, the toy company, went after Candy Land and a site called candyland.com.<sup>87</sup> Unfortunately, this was not Chutes and Ladders; these were naked ladies and people doing bad

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Panavision International L.P., v. Toeppen*, 945 F.Supp. 1296, \*1304 (C.D. Cal. 1996). Plaintiff brought action for trademark dilution, trademark infringement and unfair competition against defendant for the use of the names *panavision.com* and *panaflex.com*. The court held that defendant's registration of these domain names violated Federal and California dilution acts). *Id.*

<sup>87</sup> *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, 1996 WL 84858 (W.D.Wash. 1996). Plaintiff alleged that defendant had violated a previously issued injunction for use of the name "candyland.com."

things. They won in that one as well. Toys-R-Us filed against a site called Adults-R-Us and, sure enough, Adults-R-Us lost.<sup>88</sup>

Finally, Roadrunner, a trademark owner on the computer hardware side, was involved in a suit involving Warner Brothers' Roadrunner.<sup>89</sup> Here you had a registered trademark owner fighting over the Roadrunner cartoon character. However the party that they ended up suing Roadrunner was Internick because Internick was threatening to suspend their use of word "Roadrunner," a perfectly legitimate trademark.<sup>90</sup> Interestingly enough, that case was settled. Roadrunner.com exists.<sup>91</sup> And it belongs to the computer company, not to Warner Brothers. It has been reported in the press that Warner Brothers has decided not to pursue its trademark case against roadrunner.com on the theory that the computer company did get the site and they do have a valid trademark.

There are many other issues. We could talk about this for hours. If you have any further questions and you want to reach me, you can reach me at my firm's web site, brownraysman.com.<sup>92</sup>

Thank you.

*Prof. SHAW:*

I would now like to introduce Ms. Peggy Miles.

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<sup>88</sup> Toys R Us Inc. v. Akkaoui, 1996 WL 772709 (N.D. Cal. 1996) Plaintiff, who owned many trademarks ending with the words "R Us," sought preliminary injunction against defendant for trademark dilution and infringement. Defendant, doing business as "Adults R Us," operated an Internet site for the sale of sexual devices and clothing using the name "adultsrus." The court enjoined and restrained the defendant from using this name during the pendency of the action.

<sup>89</sup> See Roadrunner Computer Systems v. Network Solutions Inc., No 96-Civ. 413-A (Court& 19XX), (involving litigation with Warner Brothers over the use of "roadrunner.com.").

<sup>90</sup> *Id.*

<sup>91</sup> See *Internet at Roadrunner* (visited Oct. 8, 1997) <<http://www.roadrunner.com>>

<sup>92</sup> See *Brown Raysman Millstein Felder & Steiner LLP* (visited Oct. 8, 1997) <<http://www.brownraysman.com>>

*Ms. PEGGY MILES:*

Thank you very much. My name is Peggy Miles.<sup>93</sup> I am delighted to be here. I would like to thank the Touro Law Center for the invitation, also GRIT and Robert Gould.<sup>94</sup>

I am on the other side of the fence; I work with broadcasters. I do not have a legal background. I would like to explain some of the trials and tribulations broadcasters are going through in order to get on the Internet and establish it as a business and a return investment.

Talking about local broadcasters, and with respect to the gentleman that was from the radio station, I received an e-mail message from a fourteen-year old that wanted to be a webcaster. It just goes to show that in the changing environment of the World Wide Web, everybody from a fourteen-year old all the way up to a major broadcasting corporation can have a presence and a voice on the Internet.

The Internet is changing the way information is moved throughout the world and it is a dramatic change for our community and our world. With this new technology comes a lot of legal challenges. We have always had these legal issues, but with the Internet these issues become more complex and we are on the leading edge trying to figure out what is next and what are the next steps. During my presentation, I would like to explain a vision of what we foresee as some of the challenges in our new technology age and maybe the panel can come up with some of the answers to the problems that we are experiencing as broadcasters.

What we are also noticing is that you can be a broadcaster to a mass medium of hundreds of thousands of people on the

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<sup>93</sup> Peggy Miles is President of Intervox Communications, an Internet Consulting Company, based in Washington, D.C. In addition, Ms. Miles has worked on consulting/programs for many organizations, including CBS Radio Network, Gannett-USA Weekend, KCBS-FM Los Angeles.

<sup>94</sup> GRIT, Gould Resources and Internet Telecommunications, is the world's first Internet audio web review station. On [grit.com](http://grit.com) one can hear and search for web sites on the Internet relating to entertainment, music, sports, games and politics. The site broadcasts 24 hours a day, 7 days a week, via Real Audio and Net Show.

Internet, but you can also be a broadcaster for a one-to-one environment. If I have enough information on a consumer and I have the product or the content, with the new technologies I can segment content, audio and video to produce a program entirely for this person. This concept is changing the way our society does business. The one thing that we all have in common as consumers, is that we all have a limited amount of time.

Time is a person's most important commodity. Almost as important as time is the way we do business and how we do business. Growing up in the generation born after World War II, we have become accustomed to the concept of instant gratification. I want something now. I want this computer to work, I want everything to be here instantly and immediately. The Internet is showing us a glimpse of being able to get the right information -- whether or not it is text, audio or video -- on demand.<sup>95</sup> What we're also finding out, is that the Internet gets personalized; it can be catered to one's individual needs. Now, a few years ago if you were reading the media trade publications, you saw that there was something called interactive television that was supposed to be herald as the new mass medium.<sup>96</sup> Today we are finding out that the Internet is now becoming interactive television and interactive radio. It is the five-hundred-channel universe. It is interactive television.<sup>97</sup>

Just last week, in a major industry conference called the National Association of Broadcasters,<sup>98</sup> Microsoft announced a

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<sup>95</sup> See Langston Hughes, *The Poetry of Langston Hughes* (visited October 14, 1997) <[http://www.novia.net/u\\_aaronk/ls/hughes.htm](http://www.novia.net/u_aaronk/ls/hughes.htm)> (an example of text on the Internet); *Music Boulevard: Forest For the Trees* (visited October 14, 1997) <<http://mbl.musicblvd.com/cgi-bin...441011> S&FP=MTV. LIST #samples> (an example of audio on the Internet.); Kelly Freas, *2d to 3d* (visited October 14, 1997) <[http://www.concentric.net/3dstero/2d to 3d. html](http://www.concentric.net/3dstero/2d%20to%203d.html)> (an example of a visual display on the Internet).

<sup>96</sup> See *Intel Smart TV-Homepage* (visited October 14, 1997) <<http://www.hig.com>>. Interactive television uses your television to access and interact on the internet, instead of your computer.

<sup>97</sup> *Id.*

<sup>98</sup> *Welcome to the NAB* (visited November 9, 1997) <<http://www.nab.org/President/Welcome.htm>>. The National Association of Broadcasters fosters discussion of the problems of the broadcast industry.

purchase of another company called Web TV.<sup>99</sup> Web TV allows you to use a remote control and as you view your television set you can look at your cable channels or your regular local programming or you can use the remote control to get to any web site on the Internet.<sup>100</sup> These web sites are sometimes called channels.<sup>101</sup> These channels have both audio and video capability. Also Microsoft has announced that a number of new technologies and Netscape will be imbedded in the browser, which is the means that one uses to actually log on to the World Wide Web, and these methods are called push technologies.<sup>102</sup> Push technology allows you not to have to go search for a subject, but rather the subject comes to you.<sup>103</sup> Now, some people might think that this is intrusive.

I might register for sports information or for airline fares or for my favorite radio program or television program. I may register to be alerted instantly about the lowest fare on American Airlines that is going from Washington, D.C., my hometown, to New York. The computer will alert me instantly when such a fare exists and allow me to purchase the ticket immediately online.<sup>104</sup>

I have a client called American Singles & Cupids Net<sup>105</sup> that asks people to register their traits - what they would like in the mate of their choice, whether or not it's nonsmoking, whether or not they live within five miles of each other and we push this

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<sup>99</sup> See *About Web TV* (visited October 14, 1997) <<http://webtv.net/corp/HTML/home.about.html>> (WebTV's purpose is to make the internet as accessible to consumers as broadcast television.).

<sup>100</sup> *Id.*

<sup>101</sup> See *Cheerleaders* (visited October 14, 1997) <<http://www.kvii.com/cheer.html>>.

<sup>102</sup> See *Push Publishing Technologies* (visited October 14, 1997) <<http://www.strom.com/imc/t4a.html>>. Push technology is the ability to target specific users with specific content..

<sup>103</sup> See Lawrence Aragon, *When Shove Comes to Push PC Week*, February 10, 1997. <<http://www.zdnet.com/pcweek/business/0210/10push.html>>.

<sup>104</sup> *Id.*

<sup>105</sup> See *Cupid's Network* (visited October 14, 1997) <<http://www.cupidnet.com/matchsits.html>>.



information to the desktop.<sup>106</sup> Now, what does this have to do with Internet broadcasting? What is this one-web world? Well, what we are seeing is that data information, which is content about individuals is valuable to individuals, and to business. This provides us with challenges for the privacy of the individuals, for active privacy. What do I do when I have to share this data with other companies, what kind of data base share agreements do I have and what kind of contractual obligations do I have? Do I really want to give advertisers this information and is it fair to the consumers to give out this information?

These are all challenges that broadcasters and the advertising industry are trying to figure out. Our standpoint is that we are here to develop a brand relationship with the consumer. If I am going to market to you and develop a long-time relationship, I am going to make sure that I give you the right information and take the right information to match your needs. I do not want to abuse your trust. That is our theory, that the next evolution of marketing will be one to one and database marketing with the consumer in mind.

Now, the other thing that we are noticing besides push/pull is that in this changing environment content can be produced for an individual or for thousands.

A lot of us asked then, is this really a medium? Yes, it is. The bandwidth will be there or the hybrid delivery channels.<sup>107</sup> What we mean by hybrid delivery channels is the Internet or Web or that particular environment of the e-mail has been standardized as a platform that all of the companies are building infrastructure around.<sup>108</sup> The satellite companies are now building interfaces on the Internet, the television companies -- Web TV, currently Microsoft -- is building on the Internet, the broadcasters are building web sites so they're kind of using this as an environment.<sup>109</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> See *Abel Associates, Inc.* (visited October 14, 1997) <<http://www.abelpr.com/>>.

<sup>108</sup> *Id.*

<sup>109</sup> See *About Web TV* (visited October 14, 1997) <<http://www.webtv.net/corp/HTML/home.about.html>>.

We are now realizing that the Internet is almost what they call a standard, in that everybody understands it in some way. In September of 1995 I had the pleasure of working with a technology that was right on the brink of changing a lot of things.<sup>110</sup> This technology was Zing Technology, which is right before Real Audio, and we put the first major market station broadcasting live in Seattle.<sup>111</sup> It had a terrible sound. We were stringing wires up on the 32nd floor of the Weston Tower and we didn't know what the heck we were doing. But we knew that if something is going to happen in the marketplace. Things are going to change and things are going to enhance the educational environment with audio, video and enhanced multi-media.<sup>112</sup> We had a vision of this new technology and we realized that if we can do it, we would have another marketplace and another way to communicate one to another.

Now, the big question for a lot of us is whether they are making money. For the most part, they are not. A few of them are. The ones that train their sales forces, the ones that treat this as a business, make money.<sup>113</sup> Just like anything in life, you can't just put a business out there without a marketing plan. Currently, there are so many web sites it is really hard to find somebody so you have to put a marketing strategy together.<sup>114</sup> It is just like a retail store: Location, location, location. You have to tell people how to get to your web site and, the content has to be compelling. A large percent of the web sites out there are nothing more than a business card, so until that changes those companies will not make money. Grit.com is one of those in the category of "Internet Only Webcasters" which is a new breed of people that don't need

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<sup>110</sup> *Id.*

<sup>111</sup> See *SI: Zing Technology* (visited October 14, 1997) <<http://www.techstocks.com/nwsapi?investor/Subject-5273>>

<sup>112</sup> See *Syracuse University* (visited October 14, 1997) <<http://www.web.syr.edu/cazinger/music.html>>.

<sup>113</sup> See *Miglautsch Marketing* (visited October 23, 1997), <<http://www.migmar.com/>>

<sup>114</sup> See *Tritech* (visited October 23, 1997) <<http://www.tritech.net.com/index-ya.htm>>.

a radio tower, that don't need FCC licensing and can program anything they want on the Internet.<sup>115</sup>

What is the status of video webcasting?<sup>116</sup> At this conference today, Cheetah Broadcasting<sup>117</sup> is conducting real-time transcription of this actual program exactly as I am speaking.<sup>118</sup> It is very exciting. At this conference, they are doing IRC, which allows the consumers that are on the Internet anywhere in the world to communicate back with us and ask questions.<sup>119</sup> This is just an inkling of enhanced interactive content. If you look at this, as children grow up, we have the ability to do this quicker and the visuals become so exciting. It becomes a new educational and communicative experience, real time translation. I am having issues because I have been asked to translate a web site in different languages. I'm having issues because I have database sharing questions. I am having issues because I have different licensing content.<sup>120</sup> I am having issues because I want to put graphics up at the same time a record is playing on a radio station.<sup>121</sup> All of these issues are causing me to pull back and delay some of my programs with broadcasters.

In-synch broadcasting is something that I work with which is going to be beneficial to broadcasters. In-synch broadcasting is radio television, which means that at the same

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<sup>115</sup> See *Grit Internet Broadcasting* (visited October 23, 1997) <<http://www.grit.net/>>.

<sup>116</sup> See *Cybersymposium* (visited October 23, 1997) <<http://touro.law.edu/symposia/cyber97/video1.html>>.

<sup>117</sup> See *Cheetah Broadcasting Information* (visited November 9, 1997) <<http://www.cheetahcast.com/noframes/info/>> Cheetah Broadcasting provides real time transcriptions of programming on the internet. Cheetah Broadcasting is a division of Cheetah Systems, Inc.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *BMI licensing Toolbox* (visited October 7, 1997) <<http://www.bmi.com/licensing/>>.

<sup>121</sup> See *CyberSim Company Background* (visited October 7, 1997) <<http://www.cybersim.com/cyberism/csinfo/>>

time something is going on in the air it provides the listener with reference materials.<sup>122</sup>

Normally you would have to call up the TV station for a transcript for that particular program to find out more information or you had to jot down the telephone number. Now one can get this information instantly. People are using the Internet or the Web as a reference tool to enhance the information or news content delivery at a radio or TV station.

What is the next generation of the Web? In less than two and a half years we've gone from a flat, gray background text only, to many audio sites, and to tons of multi-media animated graphics.<sup>123</sup> The next major change will be information catered directly to the user rather than having to go through data base searches and wander around. Businesses are going to be looking at the traits, the psychographics and the demographics and trying to predict as best as possible some of your interests.

The other way business will cater to a user needs is to ask you questions. We would like to better serve your needs. If you would like information on golfing, we can tell you -- that is a combination of the push technology and broadcasting. What kind of radio or television programming would you like? Would you like to design your own radio or television station? If I'm designing my own radio station, that means I'm actually putting together CD's of my favorite songs and the quality is starting to get fairly close that I could record this on a digital or hard drive. Because of this eventuality the music industry is looking at all the legal ramifications of how to encrypt or watermark those particular song segments. A lot of people are spending money trying to figure out these particular issues. Right now I can get anything on demand. I don't need to pay twelve dollars and forty-nine cents for a CD. What if I want to pay for something by the number of times I listen to it? A lot of companies are being

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<sup>122</sup> See *Unique Communications* (visited October 7, 1997) <<http://www.geocities.com/heartland/2234/>>

<sup>123</sup> See *Web Tools and Tips Article* (visited October 7, 1997) <<http://www.pimall.com/nais/n.web.tips.html>> (stating that "there are tons of free public animated graphics you can get from various places on the web...").

built and actually getting a lot of venture money to establish this next generation on the Net, and to answer these issues.

The other thing we are seeing is a change in distribution channel for e-commerce because. For instance, normally I would call my travel agent. But if it is two o'clock in the morning and I just got back in from a flight and I can go to a Microsoft site called [expedient.com](http://expedient.com),<sup>124</sup> I may buy my ticket right there on the Internet, so it is changing some of the e-commerce applications.<sup>125</sup> If you see on your PC or TV, a particular product, you I might purchase that instantly. Now the challenges for a lot of the broadcasters is getting to the next level, the equipment and the software necessary to do that.

The other thing we noticed -- and this happened -- a good friend of mine is Ted Kelly from CBS Radio, an Internet visionary.<sup>126</sup> He did the first major market broadcast with [audionet.com](http://audionet.com) of an All Stars game last summer.<sup>127</sup> He did not have the rights to the commercials to broadcast them internationally so he literally had to cover the commercials.<sup>128</sup> Broadcasters have to rewrite their contracts with their advertisers to give them the digital rights necessary to do that.

A lot of time when you buy advertising or you buy talent for a spot, you buy for a region.<sup>129</sup> This radio and television commercial or print can only air in the Los Angeles region. Once I am on the Internet, this talent can be heard from Brazil to Los Angeles. Every contract in the radio station is being totally

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<sup>124</sup> See *Expedient Services, Inc.* <<http://www.expedia.com/home/frmain.htm>>

<sup>125</sup> See *CommerceToday* (visited October 7, 1997) <<http://www.homepage.usr.com/v/networks/>> (stating that "E. Commerce Today is the most comprehensive news source of the Internet-based electronic commerce.").

<sup>126</sup> National Marketing & Promotion Director of CBS Radio. See *CBS Radio Meeting the Internet Challenge* (visited October 7, 1997) <<http://www.intervox.com/cbs.htm>>.

<sup>127</sup> See *MLB-All Star Game LIVE on AudioNet!* (visited October 7, 1997) <<http://www.Audionet.com/mlb/allstar/>>.

<sup>128</sup> *Id.*

<sup>129</sup> See *Per Inquiry Advertising* (visited October 8, 1997) <<http://www.selvtv.com/pi.htm/>> (stating "what it will cost to sell your product on a P.I. basis").

rewritten by broadcasters that know there is a market for this.<sup>130</sup> This is really an enormous task.

There are real ramifications because in one particular place there is an ability to not just do what newspapers did, which was print ads, not just do what radio did, which was audio ads, but also direct response data base marketing, direct mail and e-mail. Each one of these industries has different rules and regulations. There is a whole arena of cybercasting live, talking with bands and contracting with the different talents.<sup>131</sup>

There are some other revenue models. We mentioned a couple of these. Something that is new on the horizon is what to do with content redistribution and the content redistribution rights. For example, I may have specific news content, and I want to syndicate it to other broadcast stations either in an audio or a text-based format and I am really not sure how to do that around the nation or globally on the Internet. Do I need to rewrite all my contracts? Can I do this in the normal syndication models of broadcasters? All of this has to go back to the attorneys before it can go out on the streets because we are really not sure of the issues. It is really holding us back from actually putting some of the programs into place on quick notice. This new technology allows personalized content and redistribution for a specific person or content that might go to one person or to thousands of people.

The other thing we are noticing is that the community can contribute content for the first time easily. You can ask people to send a video tape straight to your web site or they can create a paragraph of content. Who owns the rights to this content? Is it now the broadcaster or the advertiser because somebody contributes information to them on a web site?

What happens when there is a video that is produced? These are all new questions for broadcasters because it is

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<sup>130</sup> See *ABAP-RIO LINK* (visited October 8, 1997) <[www.abap-rio.com.br/indexing.htm](http://www.abap-rio.com.br/indexing.htm). Brazil Links.

<sup>131</sup> See Esme Neely, *Rapid Advance Push Cybercasts Near Reality*, 14 *BALTIMORE BUSINESS JOURNAL* (Apr. 25, 1997) page 1. (stating that "the company is cybercasting events such as government committee hearings and a live audio and video interviews with rock band U2.").

community-derived-distributed content. One of the other questions is linking to audio files. We run a webcasting list serve with about six hundred webcasters.<sup>132</sup> There has been an on going dilemma, whether or not any other companies, can link straight to audio files.<sup>133</sup> Some of the people that are handling the bandwidth transmission pipes are saying you cannot link directly to the audio files because I am actually paying for the bandwidth.<sup>134</sup> These are issues that have been debated for a number of months on the Internet.

Another thing that we are looking at is that we need a proactive privacy policy for our clients. We also need a database and data share agreements with all our sponsors determining exactly what is fair use and where we can use the information. We need to tell our consumers about where this data is going so that we are fair to them. We have customer community-generated sites and what kind of legal issues will affect us and then electronic mail transmission list services.

A broadcaster in Washington, D.C., WHFS, had a number of bootleg sites.<sup>135</sup> They looked better than the actual radio station's site. Then they had a list serve, which is a number of people e-mailing each other on a list service and talking about all this talent and putting information out there.<sup>136</sup> It was a concern for a number of people- whether or not the PR is good, and how to moderate this information because it grows into this big community. It is a fascinating thing to see how the communities are developed.

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<sup>132</sup> See *IWA* (visited October 15, 1997) <<http://www.intervox.com/webcast.htm>> windows for board/executives, companies, mission, membership, news, contact, logos, members.

<sup>133</sup> See *Deck II* (visited October 26, 1997) <<http://www.sitenoise.com/deckusers/>>.

<sup>134</sup> See *Bandwidth and Transmission* (visited October 26, 1997) <<http://www.carmen.artsci.washington.edu/cmu/courses/300/nettek/sld010.htm>>.

<sup>135</sup> See *Banana pages online* (visited October 26, 1997) <<http://www.bananapages.com/bpol...le/commguide/radiostations.html>>.

<sup>136</sup> *Id.*

The most important thing that we are seeing is that information is going to make the difference in this competitive environment. We are finally getting out of the manufacturing age to the information age where, if you are looking for something that is going to allow you to win, it is to be able to respond to consumers very quickly with the information they desire. Thank you very much.

*Prof. SHAW:*

How do you deal with issues of software piracy?<sup>137</sup>

*Mr. EZOR:*

It is a real issue, in part, because people do not realize perhaps that they may be pirating software and, in part, because software piracy can go hand in hand with other intellectual property piracy.<sup>138</sup>

I think all of this has to do with education. Business people educating their employees as to what is appropriate, software companies educating their customers as to why it is that they actually charge for software and the value that people can receive from it and also education of lawyers to figure out exactly what is going on.

Unfortunately, of course, you may have whole countries where the software piracy issue is entirely out of control and sometimes the argument is made that it is there because people cannot afford the real software.<sup>139</sup> There is something to be said for that. On the other hand, the software companies can adjust that more easily than they can deal with this problem.

Ultimately what we advise clients whenever they are asking questions about software or their copyrighted material generally is really a multi-part answer.

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<sup>137</sup> See *Software Piracy* (visited October 26, 1997) <<http://www.wheatonma.edu/academ...Writing/155f95/Willis/home.html>>.

<sup>138</sup> See *Intellectual Property in the Global Village* (visited October 26, 1997) <<http://www.usak.cal/library/gic/v1n4/chartrand/chartrand.html>>.

<sup>139</sup> *Notes From Around The Globe*, COMPUTERWORLD, October 6, 1997, at 1.



One is not to put anything online or in free distribution whose copying would bankrupt your business. Do not put the keys to the kingdom, if you can help it, online so that you can control some of that distribution. The other side of it is when you do come up with egregious offenders, go after them and go after them strongly.

You have the right to protect your work.<sup>140</sup> Economically and legally if you do not do it, if you do not go after the egregious offenders, you may lose the ability, either because of law or simply because you cannot catch up to get the next people down the line.

*Mr. BROWN:*

One of the cases that I mentioned during my presentation was the Sega litigation.<sup>141</sup> If you go on to Lexis or Nexis or Westlaw and hit Sega and see how many lawsuits Sega has started, you will see that, in fact, they are quite vigorous in protecting their property.<sup>142</sup>

The game distributors have generally been very vigorous in doing that because the game industry is so enormous and the amounts at issue are so great. People who have an interest in protecting their intellectual property, in this case games and latest software, are in fact, doing it and have to do it in order to protect themselves with expensive games.

The second thing that I think will also come along over time is technology. Although the works that are now being digitized can allow you to make perfect copies, I think that

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<sup>140</sup> See 17 USC 101 (1997)

<sup>141</sup> See *Sega Enterprises Ltd. v. Maphia*, 948 F. Supp 923 (N.D.Cal 1996) (holding that the defendant infringed on Sega's copyright and trademark rights); *Sega Enterprises Ltd. V. Accolade, Inc.* 787 F.Supp. 1392 (N.D.Cal 1992) (holding that manufacturer may preliminarily enjoin a competitor from engaging in compatible manufacturing of its games.); *Sega Enterprises Ltd. V. Sabella* 1996 WL 780560 (N.D.Cal.) (holding grant in favor of Sega for request for injunction which prohibits any further copying of its games)

<sup>142</sup> *Id.*

watermarking and various encryption techniques and other tracing techniques will ultimately be used. There are practical ways, not for preventing the sophisticated pirate from knocking off some software or defeating some encryption technology, but to defeat the average Joe trying to pull something off the Net.<sup>143</sup> It will somehow either disable, become dysfunctional, or not perform correctly because of new and evolving encryption technologies.

*Prof. SHAW:*

We have a question. Are there any proposed laws or rules of professional conduct regarding attorneys use of the Internet for advertising purposes?

*Mr. BROWN:*

As most of you know who have been on the Net, there are lots of attorney web sites and so far the state Bars have allowed this. The interesting problem of course occurs, for example, where different jurisdictions have different standards.

For example, New York does not allow you to hold yourself out as a specialist, for example, a specialist in civil litigation or a specialist in matrimonial law, because there is no certification methodology.<sup>144</sup> In some states, in fact, there are certified specialists.

I think problems will begin to arise when multi-state law firms or firms that are soliciting across interstate boundaries stumble upon a state where they are making claims which are ethically incorrect in the jurisdiction.

You have to remember, and this is my favorite explanation, the law lagging indicator. We are today on the second day of the Internet for practical purposes. We are probably talking about Internet broadcasting the first day.

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<sup>143</sup> See *Data Encryption Techniques* (visited October 15, 1997) <<http://www.catalog.com/sft/encrpt.html>>.

<sup>144</sup> See *MODEL RULES OF PROFESSIONAL CONDUCT RULE 7.4 ; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(2)*.

These issues and ethical issues will undoubtedly percolate over the next few years as someone commits either egregious acts or crosses somebody in the state regulatory area.

*Mr. EZOR:*

As attorneys, the related issues that we have to worry about have to do with the attorney-client privilege, which is often discussed particularly in the context of e-mail.<sup>145</sup> When you e-mail something to your client or your client, in return, sends you something, is that a privileged communication?

Without going into great detail, privilege has to do with, at least in the United States, a subjective expectation of privacy.<sup>146</sup> Is it reasonable for you to assume that a particular kind of communication is private? A postcard would not be a private communication. A sealed envelope would probably be considered a private communication even if someone steamed it open, so a sealed envelope would be considered a privileged communication.

What I have seen as the general consensus is that if you are concerned about it, encrypt it. It does not have to be 128 bit encryption, but just something to say to someone to put people on notice we have put a lock on it. We have sealed the envelope, you cannot casually intercept this.

The other issue briefly has to do with providing legal advice online.<sup>147</sup> By the way, none of the things that you are reading now constitutes legal advice. You should consult your local attorney. In truth, it is an issue. We do not have relationships with the people with whom we communicate online necessarily.

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<sup>145</sup> See Johnathan Rose, *E-Mail Security Risks: Taking Hacks at the Attorney-Client Privilege*, 23 RUTGERS COMPUTER AND TECHNOLOGY LAW JOURNAL.

<sup>146</sup> See *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (holding that under New York State Law a person has a reasonable expectation of privacy).

<sup>147</sup> See Brad Hunt, *Lawyers in Cyberspace: Legal Malpractice on Computer Bulletin Boards* 1996 U. CHI LEGAL F. 553 (1996).

I have seen some lawyers' web sites which go beyond the kind of mass market articles that we might do and go into some great detail about the "do's and don'ts" of a particular kind of law or a particular kind of business from a legal perspective.<sup>148</sup>

I would be concerned about that and I think my malpractice insurance company would also be concerned about that. Just as you cannot necessarily verify that anyone else knows what he or she is talking about online, keep in mind always that the lawyers you meet online may not know what they are talking about either so you should not rely upon them.

As lawyers we should remember we should not put something up there that someone might rely upon to their detriment, and ultimately, to our detriment.

*Mr. FRIEDMAN:*

I am going to comment on two points here.

First, with regard to lawyer advertising on web sites, fortunately only two states have taken a real position on this. Texas and Florida, under the guise of regulating and protecting the public, censored advertising, everything from the ambulance-chaser ads in the Yellow Pages to very sophisticated web sites.<sup>149</sup>

The problem is you have to submit your web site to the state Bar and get it approved. In Texas and Florida, you have to pay a fifty-dollar fee.

Secondly, with regard to e-mail, this is a big issue. My clients working with the Internet want to communicate with me by e-mail. There is no law or ethical standard in the District of Columbia to cover this so what we did was we made up our own waiver, crossed our fingers, hoped for the best.

Before we initiate any e-mail contact with the client, we send them a form that says we are careful about this; however,

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<sup>148</sup> See Rosalind Resnick, *A Shingle in Cyber Space*, NATIONAL LAW JOURNAL, Sept. 27, 1993 AT 1.

<sup>149</sup> See Texas Disciplinary R. Prof. Conduct Rule 7.04 (1994) (stating the disciplinary rules of professional conduct about advertising in the public media); FLA. STAT. Bar rule 4-7.2(A)(1994) (stating the rules of professional conduct regarding information about legal services, including advertising).

you should know this is not necessarily a privileged communication.

It could be intercepted, although with great difficulty, you who are technically savvy, know how hard it is, so you are on notice that this communication may not be privileged and either one of us can use some other means if we think it is appropriate.

I have routinely exchanged drafts of contracts with clients and lawyers on the other side. It is very convenient. We need some help from the court because it is a lot easier to go to the mailbox in the lobby of my building, rip it open, get every piece of mail that we are sending out. Our Fed Ex sits out in front of the door until 7 o'clock every night. It is much easier to rip that stuff off, than trying to intercept e-mail; but all that is mailed and is privileged while e-mail is not.<sup>150</sup>

*Prof. SHAW:*

Thank you. We have a question on the Internet from the U.K. There has been a lot of talk about corporate organizations protecting themselves, but issues arise with directed advertising becoming more popular.

This particular person wants to know if there are any cases where gross invasions of privacy have taken place and, in this person's words, what protection is a financially unprotected web server offered?

*Mr. BROWN:*

It is not unusual that we got this question from the U.K.. Europeans view their privacy in a way that Americans do not.<sup>151</sup> There is a much greater body of law in Europe. It varies from country to country, as to the nature of your personal privacy.

We routinely give out everything from our driver's license numbers to our Social Security numbers to access virtually all of our credit card transactions and with very little justification.

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<sup>150</sup> See Todd H. Flaming, *Internet E-Mail and the Attorney Client Privilege*, 85 ILL.B.J.183, (1997).

<sup>151</sup> See Jennifer L. Kraus, *On the Regulation of Personal Data Flows in Europe and the United States*, 1993 COLUMB. BUS. L. REV 59 (1993).

A large body of people, and in some instances, even snoopers can look in and find out what you purchased on your American Express card, what kind of videos are you looking at the video store, where you are traveling, what is your medical history. Much of that can be obtained either through credit card companies or some of that is available on the Internet.

Europeans are much more concerned about privacy and have established a higher barrier so that companies cannot routinely trade databases and cannot get involved in the wholesale invasion of personal privacy.

The flip side to individually personalized broadcasting is that someone's got to give out your information. I know that many of the large credit card companies are creating data base profiles.

Your privacy is going to be compromised and I think that eventually the United States will catch up. For our European colleagues, I think that there is a reasonable body of privacy statutes already in place. I do not believe, simply because of the lack of penetration of the Internet, that it is being enforced in the U.K. or in other European countries but undoubtedly will be.

*Mr. EZOR:*

Just a few points to add. One is that this is by no means an Internet-specific problem. Computer technology generally has made the sharing and combining and mining of this information much more convenient and inexpensive, but the fact remains, our personal information has been collected by hand for a very long time so I am not a believer in the Internet as a privacy demon.

One other thing to keep in mind is that many of the more egregious violations of privacy that have been reported in the press did not happen. They were either hoaxes or misreporting.

Probably the most well-known was the Lexis P Track database on the Lexis service which made available not only people's Social Security numbers but their mother's maiden

names as well.<sup>152</sup> That data is often used to verify credit card information.

What I understand to be the case, when the P Track was first launched in, I believe, June of 1996, there were no mother's maiden names.<sup>153</sup> There were, however, Social Security numbers available. Within two weeks, because of public protest, that information was removed.

In October, when this crisis hit the press, I believe that neither the Social Security numbers nor the mother's maiden names were then available on P Track. However, that did not stop people from calling Lexis in such volumes that their customer service numbers were basically shut down to attorneys looking for real help.<sup>154</sup>

There are currently at least two bills before the House of Representatives in Washington which state much the same thing; namely, that before an online resource may reveal identifiable information about a person, a user, to any third party, that online resource must have prior written, signed, informed consent.<sup>155</sup>

Now, what does this mean? It means that if I am an online retailer and you want to buy something from me using Federal Express to deliver that package to you, I cannot give Federal Express your home address until you mail me something with your signature entitling me to give it to Federal Express. No other medium would be subject to this kind of regulation.

I do not believe these bills will pass. I do agree that there will be enhanced privacy restrictions, both in terms of self and governmental regulation. But I would caution that before people go ahead and fight for enhanced privacy, they need to be aware

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<sup>152</sup> See Carolyn Thompson, *New Lexis-Nexis Service to Stop Revealing Social Security Numbers*, BOSTON GLOBE, June 14, 1996, at 39; Tom Abate, *Rumor Net Spreads Half Truths*, ARIZONA REPUBLIC/PHOENIX GAZETTE, Oct. 28, 1996, at E 1; See also Bruce Haring, *Internet Users Say Data Firm Violates Privacy*, USA TODAY, Sept. 20, 1996, at A3.

<sup>153</sup> See THE WALL STREET JOURNAL, Sept. 24, 1996 at B 7.

<sup>154</sup> See Elizabeth Carcoran & John Schwartz, *On-Line Databases Draw Privacy Protests; Unfounded Lexis-Nexis Report Reflects Worry Over Growing Files*, WASHINGTON POST, September 20, 1996, at A 1.

<sup>155</sup> H.R. 98, 105<sup>th</sup> Cong. (1997); H.R. 1287, 105<sup>th</sup> Cong. (1997).

of the facts as well as the potential dangers in privacy on the Internet.

*Prof. SHAW:*

I want to thank the members of the panel. I think we'll all agree that this has been most informative and helpful. Thank you.





## Issues on Internet Pornography

*Prof. GARY SHAW:*

I guess it is fair to say, pun intended, that we have arrived at the sexiest panel of the three, dealing with issues of cyberporn on the Internet. We have two distinguished speakers to speak on the topic this afternoon. Our first speaker is Paul McGeady. Paul is general counsel for Morality In Media, Incorporated, which is the leading anti-pornography organization in the United States, as well as, Director of the Organization's National Obscenity Law Center. He has appeared as Amicus in a brief presented to the Supreme Court of the United States, on behalf of Morality In Media, in the case of *F.C.C. v. Pacifica Foundation*.<sup>1</sup> It is better known as the "Seven Dirty Words" case.<sup>2</sup> He has also participated, as Amicus counsel, in *Action For Children's Television v. F.C.C.*,<sup>3</sup> a Circuit Court case for the District of Columbia.

The other speaker this afternoon is Mike Godwin. Mike is staff counsel for the Electronic Frontier Foundation.<sup>4</sup> He advises users of electronic networks about their legal rights and responsibilities. He also instructs criminal lawyers and law enforcement personnel about computer civil liberties issues. In addition, he conducts seminars about civil liberties in electronics communication for a wide range of groups. He is a prolific author and has written about social and legal issues on the electronic frontier. The issues have appeared in the *Whole Earth Review*,<sup>5</sup> *Internet World*<sup>6</sup>

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<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> *Id.* at 770, 776 (Brennan, J., dissenting).

<sup>3</sup> 821 F.2d 741 (D.C. Cir. 1987).

<sup>4</sup> Josh Daniel, *Combating Censorship in Cyberspace*; Mike Godwin, *TEX. MONTHLY*, Sept. 1996, at 120.

<sup>5</sup> See, e.g., Mike Godwin, *The Electronic Frontier Foundation and Virtual Communities*, *WHOLE EARTH REVIEW*, June 22, 1991, at 40.

and Wired.<sup>7</sup> His first book is also coming out soon. It was supposed to be out this month. Mike informs us that it will be out later in the year. I can only say I will be getting a copy and I strongly recommend it to you. It is entitled "Cyber Rights: Defending Free Speech in the Digital Age."<sup>8</sup>

Paul, it is our pleasure and our honor to welcome you.

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<sup>6</sup> See, e.g., Mike Godwin, *Church and Statutes*, INTERNET WORLD, Apr. 1996, at 89.

<sup>7</sup> See, e.g., Mike Godwin, *Libel Law: Let it Die*, WIRED, Mar. 1996, at 116.

<sup>8</sup> Mike Godwin, *Cyberights: Defending Free Speech in the Digital Age* (forthcoming 1997).