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COMMENT: UNDERSTAND AND RESPECT THE COPYRIGHT LAW: KEEP THE INCENTIVE TO CREATE

Elissa D. Hecker[†]

I want to thank Professor Nard for his wonderful program and also the fact that I love doing business conferences with my father. It is a great way to get out of the office for the day and have an opportunity to travel. So, this has been a good opportunity because I am very happy to be in the same line of work as he is. First off, I want to say that the music publishing business and the music industry in general loves the Internet. This is the greatest thing since sliced bread. You could have dissemination of musical works like no way ever before. You could have a garage band in St. Louis, and you could have someone in Norway listening to your work and loving it. Obviously, there are a lot of laws that are involved and a lot of cross-cultural boundaries. But it is really and truly an amazing thing. And of course people are afraid. People are fearful of anything new. You want to put a new zoning right in, you want to put a new copyright law in, anything like that, anything new, and automatically, people are going to say, "Oh my God, no. How is that going to affect me?"

But once you take a step back, and it takes some time to evaluate what is going on, the fact that there will be a copyright law applicable, and there is the copyright law applicable to the Internet, everybody kind of breathes a little easier and says, "okay, what can we do now? What can we do to make this work? What can we do make most of the people happy, most of the time?" Because as David Carson said, there is a big difference between the First Amendment and the copyright law.¹

Music should not (except for of course, those works in the Public Domain) be free. The basis of the United States Copyright Act is economic. Europe is great. There are a lot of authors' rights issues and moral rights issues, but in the United States, it

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¹ David Carson, *How Tangled is the Web?*, 53 CASE W. RES. L. REV. 733 (2003).

really is all about the money. And to have the incentive to create original works and to disseminate and to share those works, you really need to compensate the creator, or the creators will not be able to afford to create; they will not be able to pay rent; they will not be able to pay their childrens' tuition; they will not be able to pay their electric bills. And that is a really important thing.

In addition, there will always be infringement because there always will be people who can get around the law. Just like there will always be people who are going to go carjacking or shoplifting. But one of the things we are trying to do in the music business with the Napster case, the Aimster case, the MusicCity case, and the MP3.com case is that we are targeting those responsible for large-scale infringements. And we have seen this be successful. Companies are now, for the first time ever, employing copyright law and licensing fees into their business models. No one had ever done so before because, as David Carson had mentioned, no one had ever thought to do it before, as they were never involved with the business.² Traditionally, you had the major record companies; you had the publishers; you had the independents, and they were always steeped in the music business, and they understood what a license was.

People coming in are used to sharing software and used to sharing ideas, and it was not second nature to them to have to think, "I have to get permission to use this." It is not a compliment of the highest form just to borrow and share and add on to it. You need to get permission to use it. So a lot of these things have had to be worked through.

I also really appreciated Professor Loren's article.³ It got my juices flowing because as a representative of 27 thousand American music publishers and The Harry Fox Agency, we do not want to do away with section 115. That is the basic thinking. The compulsory license, section 115, is the easiest possible license to get. And I think that that is a really big deal.

Interestingly enough, when we were at dinner last night, one of the interesting questions that came up was one that Maureen O'Rourke asked: "What does the music industry do that makes it so successful that the freelance writers and photographers do not do? Why does the music industry get it?" The biggest thing is, we have a compulsory license. And we have collecting rights societies. But the compulsory license is something that was discussed a

² *Id.*

³ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

lot this morning. "Why can't the freelance writers have it? Why can't the photographers have it?" The music publishers have it, and that means that an elementary school in Keokuk, Iowa, can pay the same rate and get the same music as Warner Music can to put out a major release. And that is a really cool thing. And I want to thank Mark Avsec, because he made my talk much easier because he covered just about every single thing I had on my list.

One of the things I wanted to add to what Mark Avsec had said is that one of the problems with Professor Loren's theory is that a songwriter will always lose out. Currently, it is to the sound recording entity – it is often a two-thirds/one-third split in the music business, with sound recording entities getting two-thirds of the ultimate royalties and the music publishers and songwriters tending to get one third. So, already the sound recording entities have more money. If there is only one license, you are not necessarily going to reduce the transaction cost. You are going to actually increase it because the owners will not change. You are still going to have the same number of owners; you are just going to have one place to pay the money to. So, if you are going to pay the licensing fees and get the permission from the sound recording owner, you are going to have to pay a fifty dollar charge rather than an eight cent charge because the owners will not change, just the licensing scheme will change. And, the songwriters may never see a cent. There will no longer be any groups like the Song Writer's Guild, or ASCAP, or BMI, or SESAC, or HFA. We will not be able to help the songwriters. The record companies have the most power. And I am not saying that is bad, and I am not saying that is good. That just the way it is right now.

Also, I do not necessarily agree that there are very high transaction costs now because the owners of the musical compositions are the owners of the mechanical, the sync and the performance rights. They are usually the same parties. So, if you need to get access to a work and want to put out a CD; you also want to make a commercial; you also want to do some broadcasting. You know the parties to go to. You can go to the same people for all three and for the sound recording you go to the record label. So, it is really not a million different parties out there that you have to get rights for. It is the copyright owners. There are usually – I think from what I have seen – there are not usually more than a few copyright owners per an underlying musical composition. Usually, there are only one to three owners, and it is very easy, particularly through The Harry Fox Agency or through some of the other public performance organizations, to get a license.

One other thing that I thought was interesting involves people who never knew what the copyright law was; all of a sudden know what fair use is. I mean, that is the one thing you will see when you visit every website – fair use – this can only be used for educational purposes and you cannot copy and you cannot sell, etc., etc., and so forth. But I do not know what a copyright law is. Why is this not fair use? I love “Hello, Dolly” and I think it is the greatest show in the world, and I want to upload my music so that everybody else can enjoy it. What a lot of users do not realize or a lot of people do not realize who are putting up services is that there is a caveat in place, which I mentioned before. But this idea of fair use, and I totally agree with David Carson, this is one thing we are trying to do, and I know through the Copyright Society of the U.S.A. that there is an educational initiative called the FACE (Friends of Active Copyright Education), which is trying to start in the schools, in the elementary schools, in the middle schools, and in the high schools to teach students what copyright law is. It is very important to get out there because these kids are already on the computers; they are already creating things; they are playing their computer games. How amazingly important it is to make sure that this copyright law lasts. That it really is the incentive to create.

One other point: “Why are people disregarding the law wholesale?,” was a question that came out of Professor Loren’s initial speech.⁴ And the real reason is because it is free. It is so easy. One thing that we did as a publishing industry, we sat down with the members of the recording companies in the RIAA, which is the Recording Industry Association of America, and we negotiated an agreement between the publishers and record companies, and we have done similar deals with non-RIAA Internet companies. We have every company that is a member of RIAA and other Internet music subscription services, like Listen.com or FullAudio, that can obtain licenses to use music on the Internet for on-demand streaming and limited downloads.

As David Carson had mentioned, there is already a DPD rate established.⁵ That is out there. Currently, it is eight cents per use; it is the mechanical statutory rate. The RIAA Agreement covers server copies, on-demand streaming, and limited downloads made through Internet subscription services. What we did is that we got together and made it easier for licensees to come and get licenses to use music on online services – what they have to do track it.

⁴ Loren, *supra* note 3.

⁵ Carson, *supra* note 1.

We have to be able to examine it. It has got to be very parallel to what has been going on in the real physical phonorecord world. The only wrinkle in that is that there are no rates set yet for a lot of these uses. There is a straight DPD rate, but there is no rate yet for streaming or limited downloads. Ultimately, these rates may be decided in a CARP in Washington. But the really important thing about the agreement is that all the industry players sat down and said that we need to do this. This Internet is out there. We need to be able to have services so if we all get together and everybody has access to it, when a rate or rates are eventually determined from the CARP, the licensees will pay everything retroactively. We have this down on paper. All of the licensees should currently be conducting royalty examinations accounting for every use on a quarterly basis. We have the ability to audit, and when those rates are established, the money will be paid. And an advance has been paid.

So the parties involved in the music business are very concerned with what is going on and how many different pieces to the pie there are. The only thing is that they are entitled to that pie. It is the copyright pie, and you are entitled to have the sync use and the performance rights use, and the mechanical use and the sound recording use because that is what a copyright is. You can do whatever you want. It is a limited monopoly, except for fair use, public domain, whatever you contract out, but it is yours and it is yours to use. And I have a hard time saying, "No you're going to have to limit that because everybody else wants to use it." It will not help people create. It will not be inspiring to up and coming artists to say we are going to take your work, and we are going to do whatever we want and make millions of dollars, and you are just going to keep turning out, and you are not going to get paid anything. It is really hard to be taken seriously if you do that.

One of the things that Professor Loren brought up was record stores online.⁶ One thing that we all know is that there is no working model yet on the Internet. No one is making money for starters. There is nothing going on there. What a lot of the stores are doing – like Tower Records – they are selling you CDs. You click on it; you can listen to a streaming sample, you can do some downloads, which should be licensed. We are out there trying to make sure everyone is licensed. But you are actually clicking on something so that someone can either custom make a CD or have a CD shipped to you. It is the same business that Tower Records is

⁶ Loren, *supra* note 3.

in if you walk in on Broadway. This is not a business that has actually taken off in that, this is where the money is. It is going to take years to make money off the Internet. What we are trying to do now, among all the various legal and business players, is try to figure out the best way for the business model and the law to be married together to get the money to the creators, so that the creators will keep creating, so that, obviously, everybody will keep making money.

The final thing, I think, is that one of the things Professor Loren mentioned in her third theory that we did not really go into, which was an interesting one. But one thing she said was that owners "might be entitled to be paid,"⁷ and to me that cuts to the heart of the difference between what a lot of the new online services or the new potential licensees are out there saying, "we might want to pay you if it is good enough. We might want to pay you if we think it is reasonable. You might be entitled to be paid." And as a representative of the content creators, I would say, "I object." You might be entitled to use it if the copyright owners think you can. But I do not think there is ever a question of the fact that the copyright owner should not be entitled to be paid, because, this is the ultimate creator.

⁷ *Id.*