THE ASCAP LICENSING MODEL AND THE INTERNET: A POTENTIAL SOLUTION TO HIGH-TECH COPYRIGHT INFRINGEMENT

INTRODUCTION

Since its inception in the late 1960s, the Internet has reached the forefront of the communications world.[1] It has shown an unprecedented ability to make information available to the public with ease, efficiency and reliability.[2] As with the growth of any new communication medium, however, copyright holders are increasingly concerned over potential infringement of their rights.[3] Their fears are well founded. The Internet allows people to infringe on copyrights easily, while denying copyright holders any reasonable method of enforcing their copyrights.[4] Current technology is so simple to use that a child is capable of posting software, music and writings on the Internet for the purpose of worldwide public distribution.[5] Copyright holders, meanwhile, face new problems enforcing their copyrights across the Internet. A copyright holder may not even be able to locate infringing parties, given the Internet's international nature.[6] Those who can locate infringers often find that the infringers lack the financial resources to make legal action worthwhile.[7] As the Internet continues to grow, both technologically and in popularity, copyright infringement will only increase.[8]

There is, however, an existing solution to this problem. The way in which performance rights organizations regulate transmission of

---

[1] *See* Jonathan I. Edelstein, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 235 (1996).

[2] *See id.* at 235–36.

[3] *See* Jayashri Srikantiah, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology*, 71 N.Y.U. L. REV. 1634, 1647–48 (1996).

[4] *See id.*

[5] *See id.* at 1657.

[6] *See* Edelstein, *supra* note 1, at 236–38.

[7] *See id.* at 236; *see also* Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards a Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occurring Over the Internet*, 18 HASTINGS COMM. & ENT. L.J. 729, 735 (1996) (on-line infringers tend to be judgment-proof as a result of being too young or poor to satisfy a judgment award).

[8] *See* R. Carter Kirkwood, *When Should Computer Owners Be Liable For Copyright Infringement By Users?*, 64 U. CHI. L. REV. 709, 710 (1997).

music over the radio and television provides a model solution to Internet copyright infringement.[9] Similar organizations could license Internet Service Providers ("ISPs"), the companies that provide access to the Internet for individuals, to allow their users to transmit different types of digital information, such as music, documents, and computer programs over the Internet. Copyright holders could regulate the transmission of information through these licensing companies the same way music writers and publishers use performance rights organizations today.[10] Once the ISPs pass the rights contained in these licenses to Internet users, each individual user could legally place such copyrighted information on the Internet. Licensing companies would then focus their energies on surveying the Internet for the licensed information and calculate royalties according to the number of instances the copyrighted works appear on the Internet.[11] This would, in effect, transform the Internet into a type of "narrow-cast" transmission resource that would allow users to access information efficiently, effectively and legally without appropriating economic value from copyright holders.[12] Each party involved would improve his or her economic utility, while the legal system would remain true to the constitutional policy behind copyrights—an incentive to create works for society's betterment.

I. The Copyright, The Internet and Copyright Infringement

A. *The Origins and Nature of Copyright Protection*

1. Constitutional Copyright Protection

The right of copyright, as a conceptual type of "intellectual property," came into existence through English law and the Statute of Anne in 1710.[13] Here in the United States, in an effort to "promote the pro-

---

[9] *See* Andrew Hartman, *Don't Worry, Be Happy! Music Performance and Distribution on the Internet is Protected After the Digital Performance Rights in Sound Recordings Act of 1995*, 7 DePaul-LCA J. Art & Ent. L. 37, 67 (1996).

[10] *See infra* notes 140–59 and accompanying text.

[11] *See infra* notes 170–79 and accompanying text.

[12] *See* Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 262 (1996). "Narrow-casting" refers to the selective, *user defined* transmission of works that occurs on the Internet, rather than broad radio or television transmission (i.e. "broad-casting"). *See id.*

[13] *See* Srikantiah, *supra* note 3, at 1639 & 1639 n.27. The Statute of Anne was created in English law to enhance the public welfare by encouraging the dissemination of knowledge and encouraging "learned men to compose and write useful books." *Id.*

gress of Science and useful Arts," the founding fathers granted Congress the enumerated power to give exclusive copyrights to authors, inventors and creators.[14] The Constitution grants this power to Congress through Article I, Section 8, Clause 8, which is the basis of all copyright law.[15]

The ultimate purpose of this power was to encourage the dissemination of information. Ironically, despite this policy, copyright law allows a copyright holder to impede the spread of his or her works and thereby stem the dissemination of knowledge.[16] Thus, even where distributing copyrighted information would benefit society, a copyright holder may restrict society's access to the information.[17] Constitutional drafters saw this as a necessary consequence of encouraging people to create works—giving copyright holders the opportunity to benefit from their works both socially and financially.[18]

The evolution of the technology and media has magnified this conflict between the free flow of information and the protection of a creator's copyrights.[19] To keep copyright law viable in the face of developing technology, legislators and courts have extended the application of the law to address new technological norms.[20]

2. Statutory Rights of the Copyright Holder

To codify copyright law, Congress created the Copyright Code ("Code"), a set of statutory rules of copyright under Title 17 of the United States Code.[21] Title 17 defines the duration of copyrights, and creates causes of action for issues such as copyright infringement and remedies.[22] The Code also defines the subject matter and scope of copyright, including descriptions of limitations on exclusive rights.[23] Congress created exceptions to the monopolistic power of copyright—including fair use, reproduction by libraries and archives, and secon-

---

[14] U.S. CONST. art. I, § 8, cl. 8.

[15] *Id.*

[16] *See generally* L. Ray Patterson & Judge Stanley F. Birch, Jr., *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1 (1996).

[17] *See generally id.*

[18] *See* Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1396 (1996).

[19] *See id.* at 1398.

[20] *See id.*

[21] 17 U.S.C. §§ 101–121 (1994).

[22] 17 U.S.C. §§ 301–305 (1994), §§ 501–511 (1994).

[23] 17 U.S.C. §§ 102–121.

dary transmissions—to balance the rights of the copyright holder with society's right to benefit from the copyrighted work.[24]

As media's technology evolves, the copyright law must also evolve to remain effective.[25] Each time a new method of relaying information to the public appears, new concerns arise over a copyright holder's rights to protect his or her works and society's right to benefit from them.[26] Existing exceptions to copyrights, designed to ensure that society benefits from the works, often conflict with new protections created to quell copyright holders' fears of emerging technology.[27] Extensions of copyright law to computer programs and digital information, such as categorizing the transmission of digital information as public works and display, have run up against existing exceptions to the copyright, including the doctrines of fair use and first sale.[28] Congress has emphasized the constitutional purpose of copyright law in each legislative alteration and amendment.[29] By changing copyright law to reflect modern technology, however, Congress may have impeded the Constitution's original policy underlying copyright law—to "promote the Progress of Science and useful Arts" for all.[30]

B. *The Origins and Nature of the Internet*

1. The Historical Internet and Modern Day Cyberspace

The Internet was originally created by the Department of Defense in 1969 as part of the Advanced Research Project Agency Network ("ARPAnet").[31] Its original purpose was to create a computer network system capable of maintaining complete functionality in the event that a portion of the system became disabled (through nuclear strike, electromagnetic pulse or a simple power interruption).[32] The Inter-

---

[24] *See* 17 U.S.C. § 108, § 111; Cate, *supra* note 18, at 1405–07.

[25] *See* Cate, *supra* note 18, at 1405–07 (noting past changes to copyright law in an attempt to adapt to changing technology such as cable TV, broadcasting, recording, etc.).

[26] *See* Srikantiah, *supra* note 3, at 1636–38.

[27] *See* Cate, *supra* note 18, at 1397–98.

[28] *See id.* "Fair use" refers to the copyright exception that allows copyrighted works to be used for the purpose of criticism, comment, teaching, scholarship and research. *See id.* at 1406. "First sale" refers to the doctrine that once the copyright holder has distributed copies of his or her work, subsequent possessors of these copies may redistribute them without permission or fear of reprisal. *See id.* at 1402.

[29] *See id.* at 1440–41.

[30] *See id.* at 1397–98.

[31] *See* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 488 (1997).

[32] *See id.*; *See also* Kenneth D. Suzan, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 792 (1995).

net's design assumes, therefore, that the network by which the information travels is unreliable.[33] If part of the network became disabled, the remainder of the network would route itself around the disabled areas and continue to function. Thus, there is no way to "turn off" the Internet so long as any systems that are part of the network are still functioning.[34] By 1981, the Internet was a network of 300 computers.[35]

Privatization of the Internet began in the 1980s when the National Science Foundation ("NSF") took over the ARPAnet project, implementing links with five regional supercomputers.[36] In 1987 the NSF contracted with a private company, Merit Network, Inc., to improve the network's capability.[37] In 1989, there were over 90,000 computers connected to the Internet.[38] By 1993, only eight years after it had begun, privatization was complete and the Internet as we know it today was up and running.[39]

As the Internet grew in popularity and the transmitted information diversified, government and private agencies began investigating ways of regulating it.[40] The chaotic nature of Internet usage, its inherent protection from users structurally disabling the network, and the exponential growth in the Internet's popularity, however, have made regulation difficult.[41] Several international organizations watch the Internet today to analyze growing issues of concern, such as copyright infringement. There are no international regulatory bodies that govern or police the Internet, however.[42] Cyberspace is, for the most part, self-regulated by the 9.4 million computers currently comprising the Internet.[43]

2. The Nature of Information Transmission Over the Internet

ARPAnet originally designed the method of transmitting digital information over the Internet to allow for efficient and dynamic communication that is not reliant on any single pathway for success.[44] Each

---

[33] *See* Gibbons, *supra* note 31, at 488.

[34] *See id.* at 488–89.

[35] *See id.* at 488.

[36] *See id.* at 490.

[37] *See id.*

[38] *See* Gibbons, *supra* note 31, at 488.

[39] *See id.* at 490.

[40] *See id.* at 488. Besides governmental efforts such as the Communications Decency Act, private organizations such as the World Intellectual Property Organization ("WIPO") and the Internet Society ("ISOC") have attempted to implement measures regulating behavior on the Internet with limited success. *See id.* at 492–93.

[41] *See id.* at 490.

[42] *See id.* at 492–93.

[43] *See* Gibbons, *supra* note 31, at 488, 492.

[44] *See id.* at 489.

system is required to turn digital information into accessible and understandable packages that can interface with any system on the network.[45] Under the current system, the information is divided into Internet Protocol ("IP") packets and sent through a network of communicating computers through a predetermined path. The computers define the path based on the speed at which they can transmit the packets.[46] The system sends the information from computer to computer. At each point, the information is received, copied and sent to its next location.[47] The system, rather than the sender, controls the information's path. Thus, the information may take what appears to be a geographically illogical route to its destination. The route, however, is the most efficient path based on the duration of the journey at the time of transmission. Thus, if the least busy and quickest route is from New York to Washington to Atlanta to Dallas to Los Angeles to Seattle to Chicago, the information will follow that route.[48]

The user also does not control how (or if) the information is divided into IP packets and, thus, has no knowledge as to which parts of the transmission are sent along different paths.[49] Thus, part of his or her transmission may take one geographic route while another part may take an entirely different route to reach the terminal destination. Finally, intermediate servers along the information's path do not control the receipt of the information and often do not know the information's source.[50] For this method of transmission to work properly, each intermediate terminal must copy the information to its own system and send the information onward to its next destination.[51] Consequently, copying is a necessary and uncontrollable element of the information's transmission.[52]

---

[45] *See id.* at 488–89.

[46] *See id.*

[47] *See* Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 432–33 (1993).

[48] See Gibbons, *supra* note 31, at 489.

[49] *See* Richard S. Vermut, *File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation*, 4 J. INTELL. PROP. L. 273, 280–81 (1997).

[50] *See* Gibbons, *supra* note 31, at 489.

[51] *See* Katsh, *supra* note 47, at 432–33.

[52] *See* Cate, *supra* note 18, at 1398. *See also* Playboy Enters., Inc. v. Chuckleberry Publ'g., Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (refusing to find computer owners who control Internet connected computers liable for infringing data that crosses their computers due to Internet traffic).

C. *The Problems of Copyright Infringement Over the Internet*

1. Identifying an Infringing Party

Digital transmission across Cyberspace presents copyright problems for copyright law that amplify similar problems in other previous methods of communication.[53] One such problem has plagued copyright holders since copyright's creation—locating an infringing party.[54] As with finding an infringing public performer of copyrighted plays or music, identifying parties who place copyrighted photographs or documents on the Internet is extremely difficult.[55]

To enforce his or her copyright, the copyright holder must find the source of the infringing transmission of the protected works. A copyright holder's search typically leads to an Internet Service Provider ("ISP").[56] An ISP is a company or service that connects subscribing users to the Internet, usually in exchange for subscription fees or as part of a company or non-profit organization (e.g., educational institutions, government offices).[57] Each ISP contains a group of users who subscribe to its particular system. ISP managers may be unwilling to divulge the list of subscribers to assist in the copyright holder's investigation effort. Even if the ISP does cooperate, users are often identified only by pseudonyms (also known as "handles"), rather than by their true names and addresses.[58] Even where the copyright holder can identify the user, he or she will have difficulty finding clear evidence that the user actually transmitted the information. Often, a particular user's account is shared with family members, friends or colleagues. Anyone with access to the account could be the infringer. Unknown persons can also access accounts when a careless user forgets to log off of his or her connection to the Internet.[59]

This investigative process has frustrated numerous copyright holders. Accordingly, copyright lawyers have attempted to expand liability for copyright infringement by arguing that ISPs and Bulletin Board

---

[53] *See* Srikantiah, *supra* note 3, at 1636–38.

[54] *See* Edelstein, *supra* note 1, at 294.

[55] *See id.*

[56] *See Playboy*, 939 F. Supp. at 1039.

[57] *See* Haran Craig Rashes, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 57–59 (1997).

[58] *See* Edelstein, *supra* note 1, at 284.

[59] *See* Keith J. Epstein and Bill Tancer, *Enforcement of Use Limitations by Internet Service Providers: "How to Stop that Hacker, Cracker, Spammer, Spoofer, Flamer, Bomber,"* 19 HASTINGS COMM. & ENT. L.J. 661, 681 (1997).

System ("BBS") operators are liable for infringement caused by their users under a theory of vicarious infringement.[60] Under this theory, some argue that each computer owner should be responsible for information that flows through his or her machine.[61] The courts, however have found this reasoning flawed for practical reasons.[62]

In 1995, in *Religious Technology Center v. Netcomm On-Line Communication Services*, the United States District Court for the Northern District of California rejected the theory of vicarious infringement, finding that vicarious liability does not apply to ISPs because they reap little or no benefit from the information transmitted by their users.[63] In *Netcomm*, the plaintiff informed the defendant, an ISP, that one of its users was posting copyrighted material on the Internet through its computers.[64] The defendant refused to take any action to stop the infringing user, claiming that it did not have the resources to monitor every one of its users or every piece of information that crossed its computers.[65] The plaintiff then sued Netcomm for vicarious infringement.[66] The court reasoned that Netcomm did not directly benefit financially from the infringing activities of its users.[67] The court stated that general user fees were too indirect a benefit to impose vicarious liability on the ISP.[68] Thus, the court concluded that finding Netcomm vicariously liable for its users' infringements would not advance public policy goals.[69] Rather, such liability would damage the ability of ISPs to provide customers with inexpensive and effective Internet service, and would "have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet devised."[70]

2. Problems with International Infringement

The international nature of Cyberspace also causes significant problems for copyright holders.[71] Internet transmission has been global since the early 1990s.[72] Information travels across international

---

[60] *See* Kirkwood, *supra* note 8, at 729.

[61] *See id.* at 734–35.

[62] *See generally Playboy*, 939 F. Supp. at 1032; Religious Tech. Ctr. v. Netcomm On-Line Communication Servs., 907 F. Supp. 1361 (N.D. Cal. 1995).

[63] 907 F. Supp. at 1376–77.

[64] *See id.* at 1366.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 1377.

[68] *See Netcomm*, 907 F. Supp. at 1376–77.

[69] *See id.*

[70] *Id.* at 1377–78.

[71] *See* Edelstein, *supra* note 1, at 293.

[72] *See* Gibbons, *supra* note 31, at 490.

borders at fantastic speeds and volumes. U.S. copyrights generally do not extend beyond American jurisdiction, however, unless by international treaty.[73] Many infringing parties, therefore, exist outside of the jurisdictional control of U.S. copyright law.[74] Furthermore, domestic infringers may evade the law by operating internationally if the profitability is high enough.[75] Operating outside of American copyright jurisdiction to facilitate infringement has become less difficult as the market for infringement has grown more profitable.[76]

The World Intellectual Property Organization ("WIPO") and other international bodies have attempted to implement international treaties to deal with these issues.[77] Because none of these treaties encompass every country, however, their impact is limited. Further, different lobbying groups continue to pressure treaty organizations to create exceptions for their own markets. If adopted, such exceptions could render these treaties useless.[78]

Courts have attempted to deal with this type of copyright infringement by enjoining international web sites from accepting subscriptions from American patrons.[79]

In 1996, in *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, the United States District Court for the Southern District of New York enjoined an Italian magazine with an Internet service from allowing Americans to subscribe to the Italian web site.[80] The magazine, with the name "PLAYMEN," was already permanently enjoined from sale in the United States in a previous case as it violated the plaintiff's trademark.[81] In January 1996, the plaintiff discovered that the defendant had created a web page using the name "PLAYMEN" in Italy that was accessible by Internet users in the United States.[82] The court determined that the website was a violation of the permanent injunction despite the fact that such a web page was not considered when the injunction was created in 1981.[83] The court reasoned that the injunc-

---

[73] *See* Edelstein, *supra* note 1, at 293.

[74] *See id.* at 238, 293.

[75] *See id.* at 231–35.

[76] *See id.* at 235–36.

[77] *See* Gibbons, *supra* note 31, at 492–93.

[78] *See* Brian A. Carlson, *Balancing the Digital Scales of Copyright Law*, 50 SMU L. REV. 825, 864–66 (1997). The first WIPO treaty originally had clauses including direct and indirect reproductions of permanent or temporary works as part of the exclusive reproduction right, as well as a clause making illegal the use of protection-defeating devices, but both clauses were removed due to intense lobbying during the WIPO convention. *See id.*

[79] *See generally Playboy*, 939 F. Supp. at 1032.

[80] *Id.* at 1040.

[81] *See id.* at 1034–35.

[82] *See id.*

[83] *See id.* at 1040.

tion's purpose was to prevent the defendants from disseminating their product in the United States.[84] A change in technological media did not alter the validity of that purpose.[85] Therefore, the court decided that the defendant needed to ensure that American Internet users could not access its homepage.[86]

There are very few cases where the courts have exercised this type of power, however, as the volume of problematic homepages exceeds judicial resources. International copyright infringement requires a global solution that will be difficult to enforce and long in the making. Treaties themselves are not an effective solution to this problem unless all involved countries are signatories and adequate enforcement resources exist in all such countries.[87] A more comprehensive solution is required.[88]

3. Judgment-Proof Defendants and Prosecutorial Ineffectiveness

Perhaps the most significant difficulty facing copyright holders is that individual infringers often do not have enough assets to make legal action worthwhile.[89] The Internet allows a single individual to make information available to millions of users. Consequently, a single person can catastrophically damage the marketability of a work, creating losses far beyond the value of that person's assets.[90] Moreover, most infringing parties are not large corporations, but rather individual copiers.[91] Consequently, a copyright holder is often left uncompensated for numerous infringements of his or her copyrights.[92]

Perhaps because legal options are limited, many are now turning to the Internet itself to promote awareness of the importance of preserving copyrights.[93] While improving technology is making infringement easier, it has also produced better investigative capabilities for copyright holders to locate infringing parties. Copyright holders are also supporting educational programs to teach proper and legal Internet use. Because the Internet is geared toward greater proliferation

---

[84] *See Playboy*, 939 F. Supp. at 1040.
[85] *See id.*
[86] *See id.*
[87] *See* Edelstein, *supra* note 1, at 290–94.
[88] *See id.*
[89] *See* Srikantiah, *supra* note 3, at 1652.
[90] *See id.*
[91] *See id.*
[92] *See id.*
[93] *See id.* at 1657.

of knowledge and technology, perhaps the best way to deal with a problem of the Internet is using Internet technology to solve it.[94]

In sum, the legal system is currently ill-equipped to deal with the growing problem of Internet copyright infringement. Imposing the American legal process on the global and generally unregulated Internet may prove to be unworkable and insufficient. If it is infeasible to enjoin users from placing copyrighted materials on the Internet, perhaps a solution can be found within analogous legal arenas. The music industry dealt with similar copyright problems with the advent of recording technology and radio. That industry's approach to resolving copyright issues provides a model for dealing with the problem of Internet copyright infringement.

II. THE MUSIC INDUSTRY, COPYRIGHT INFRINGEMENT, AND THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("ASCAP")

A. *Musicians and Copyright Infringement*

1. Statutory Rights as Applied to the Musician

Americans have traditionally viewed music as a valuable asset. Our culture encourages the composition and performance of music in various ways—through well-attended musical performances by devoted and vocal audiences, as well as through public and private funding. Copyright law has always been important to the music and entertainment industry due to the interest in public performances.[95] Because exhibition is often the purpose of composing or owning rights in music, copyright holders of musical works value the ability to control public performance of their works.[96] Currently, copyright holders have the legal right to control public performances, distribution and recordings of their work.[97] Normally, composers and songwriters want the public to hear their music to improve their prestige and to increase demand for their work. Thus, copyright law must balance the copyright holders' interests in having the music performed often, their interest in compensation for all such performances, their personal control over all performances and distribution of their music, and the public's

---

[94] *See* Srikantiah, *supra* note 3, at 1657.

[95] *See* Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 238 PLI/Pat 9, 38, 41 (1986).

[96] *See id.*

[97] *See* 17 U.S.C. §§ 114–115 (1994).

demand that their music be performed.[98] For artists and composers, maintaining copyright control over their music while simultaneously exposing it to the public is a difficult balancing act.[99]

2. Pre-ASCAP Copyright Control Over Music

Even before the rise of recording technology, maintaining control over a music copyright was problematic.[100] Copyright holders often found that public performances of their music were too numerous for the copyright holder to control personally.[101] The holder had to actually know of and have evidence of the performance.[102] Such proof often required too much investigation.[103]

The advent of the phonograph and other recording equipment exacerbated these copyright protection problems.[104] Controlling public performances of copyrighted music became nearly impossible.[105] Once an artist recorded a piece of music, courts could construe any performance of that recording as a public performance if it occurred outside of the confines of the family household.[106] On the other hand, recording technology provided much bigger audiences for copyright holders without the need for live performers.[107] Once recording technology had achieved widespread use, courts had to become more inventive—stretching common law interpretation of copyright law to cover the increasing loopholes.[108]

The appearance and growth of the radio and television posed further problems for the musical copyright holder.[109] While copyright holders might not have felt threatened by individual performances of recorded material, they could not ignore radio's widespread performance of their music.[110] Individually, they did not have the resources to enforce their copyrights against each radio and television station across the country.[111] Copyright holders thus needed a way to centralize their

---

[98] *See infra* note 110 and accompanying text.

[99] *See infra* note 110 and accompanying text.

[100] *See* Linda MacLeod, *735 H.R. 1195 Source Licensing: A Legislative Swan Song to the Blanket License*, 67 OR. L. REV. 735, 738–39 (1988).

[101] *See id.*

[102] *See id.*

[103] *See id.*

[104] *See* Korman & Koenigsberg, *supra* note 95, at 46–47.

[105] *See id.*

[106] *See id.* at 52.

[107] *See generally id.*

[108] *See id.*

[109] *See* Korman & Koenigsberg, *supra* note 95, at 41.

[110] *See id.*

[111] *Cf. infra* notes 110 and 114 and accompanying text.

resources, extend their ability to monitor the broadcast waves and enforce their copyrights on a national level.[112] This need, in turn, paved the way for the inception of performance rights organizations.[113]

B. *The Origins and History of ASCAP*

1. ASCAP/BMI Creation as a Response to Infringement

In 1913, a group of copyright holders in New York City began pooling their resources and copyrights to form a central organization that could collectively enforce and represent their individual interests.[114] These holders formally established the first performance rights society, the American Society of Composers, Authors & Publishers.[115] Collectively, these organizations issued blanket performance licenses granting the right to perform all of the music represented in each society.[116] The societies then monitored the public performance of their constituent works.[117] By tallying the number of times the works were performed, these organizations distributed royalties according to the public demand for each copyrighted piece of music within the license.[118]

Through this licensing system, a composer can include his or her music in a blanket license that is sold to radio stations and other places that wish to perform a recording of the copyrighted music.[119] The artist can then collect royalties for the licensed non-dramatic performance of the music without conducting any further investigation.[120] By centralizing investigative power through performance rights societies, copyright holders effectively protected their copyrights.[121]

2. The Current Prominence and Power of Performing Rights Societies

Although most major music copyright holders employ licensing societies to regulate public performances of their music, surprisingly the licensing society industry never developed into a fully competitive

---

[112] *See supra* notes 96–99 and accompanying text.

[113] See Korman & Koenigsberg, *supra* note 95, at 57.

[114] *See id.* at 59.

[115] *See id.*

[116] *See* E. Scott Johnson, *Considering the Source-Licensing Threat to Performing Rights in Music Copyrights*, 6 U. MIAMI ENT. & SPORTS L. REV. 1, 10 (1989).

[117] *See id.* at 11.

[118] *See id.*

[119] *See id.* at 10.

[120] *See* Korman & Koenigsberg, *supra* note 95, at 72.

[121] *See id.* at 76.

market. Two licensing societies, ASCAP and Broadcast Music, Inc. ("BMI"), control the majority of performing licenses in the United States.[122] License purchasers prefer to purchase a license covering the broadest array of works possible to maximize value.[123] ASCAP and BMI have grown to the point where competition against them in the music licensing industry is minimal.[124] Nearly all radio stations use ASCAP and BMI licenses. Similarly, most filmmakers, retail stores and establishments that play music for the public use them.[125] Most parties involved in the process have found the effect of performance rights organizations on the music industry beneficial.[126] Radio stations are able to play a wide variety of music for their listeners, improving their audience and making themselves more attractive to advertisers.[127] Musicians, composers and music publishers are able to collect on the public performance of their works efficiently, while improving their fame and notoriety.[128]

Licensing societies have become the accepted method of regulating music performance rights.[129] They collect revenues well in excess of $350 million a year, which they spend on investigative efforts, legal representation, surveying techniques and royalties.[130] As a result, the performance industry has incorporated performance licensing as a standard that protects both the rights of the copyright holder and benefits a wide public audience.[131]

C. *The Performance Rights Society Model of Licensing*

1. The Copyright Holder and ASCAP

Nearly any songwriter or composer may become a member of ASCAP.[132] ASCAP enters into an agreement with each copyright holder,

---

[122] *See* Janet L. Avery, *The Struggle Over Performing Rights to Music: BMI and ASCAP vs. Cable Television*, 14 HASTINGS COMM. & ENT. L.J. 47, 51 (1992). Together, ASCAP and BMI own 95% of the market share for performance rights to musical compositions. *See id.* ASCAP alone represents 40,000 members and over 3 million compositions. *See id.*

[123] *See* Korman & Koenigsberg, *supra* note 95, at 57.

[124] *See* Avery, *supra* note 122, at 51.

[125] *See id.* at 51–52.

[126] *See* Hartman, *supra* note 9, at 66–67.

[127] *See* Jay L. Bergman, *Digital Technology has the Music Industry Singing the Blues: Creating a Performance Right for the Digital Transmissions of Sound Recordings*, 24 SW. U. L. REV. 351, 357–58 (1995).

[128] *See id.*

[129] *See* Avery, *supra* note 122, at 51.

[130] *See* Korman & Koenigsberg, *supra* note 95, at 60.

[131] *See* Bergman, *supra* note 127, at 357–58.

[132] *See* Korman & Koenigsberg, *supra* note 95, at 60–61. Minimal standards were set for

which allows ASCAP to act as the copyright holder's representative in enforcing and collecting on rights included in the individual's copyright.[133] As part of the agreement, the copyright holder grants ASCAP the non-exclusive right to license non-dramatic performances of the work.[134] Similarly, the contract grants ASCAP the power to bring suit in his or her name against infringing parties, appointing ASCAP attorney-in-fact in such instances.[135] Finally, the copyright holder must agree to accept ASCAP's royalty distribution system.[136]

After ASCAP's significant growth, some courts raised concerns about its monopolistic power to regulate the music industry and questioned its ability to do so under antitrust law.[137] In 1941, in *United States v. ASCAP*, the United States District Court for the Southern District of New York issued a consent decree in which the parties agreed, conditionally, that the defendant did not violate any law.[138] The consent decree stated that ASCAP licenses did not prohibit members from issuing their own licenses for their works, and that such licenses would not discriminate in price between licensees similarly situated.[139] Within this consent decree, the court determined that ASCAP would not be in violation of antitrust legislation.[140] This consent decree was further amended by the same court in 1950, allowing the court to adjudicate when the parties involved disagree as to what constitutes "reasonable fees."[141] After these key agreements, however, the courts determined that ASCAP's operation did not violate antitrust laws.[142]

In 1984, in *Buffalo Broadcasting Co. v. ASCAP*, the United States Court of Appeals for the Second Circuit held that it was not an unreasonable restraint on trade for ASCAP to offer blanket licenses to local

---

ASCAP membership. *See id.* For publishers, it includes anyone engaged in the financial risk normally involved in the publication of musical works. *See id.* at 61 n.94. For composers and lyricists, it includes anyone who regularly practices that profession of writing music and shall have not less than one work of his composition or writing regularly published. *See id.*

[133] *See id.* at 62.

[134] *See id.* Through this right ASCAP can include the member's music in its blanket licenses, but the member retains the right to license the performance of his music without consulting ASCAP. *See id.* Thus, the right is non-exclusive. *See id.* However, when the member does so he or she receives no royalties for such performances from ASCAP. *See id.* at 62 n.102.

[135] *See id.* Should a party infringe upon the member's copyright, ASCAP will take legal action against the infringer on behalf of the member. *See id.* Thus, ASCAP is the member's "attorney-in-fact" for issues related to copyright infringement of his or her music. *See id.*

[136] *See id.*

[137] *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 6 (1979); Buffalo Broad. Co., Inc. v. ASCAP, 744 F.2d 917, 920–22 (1984).

[138] United States v. ASCAP, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[139] *See id.*

[140] *See id.*

[141] *See* United States v. ASCAP, 1950–1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

[142] *See Broadcast Music*, 441 U.S. at 24–25; *Buffalo Broad.*, 744 F.2d at 933.

TV stations, where "source licensing" was also available.[143] In 1969, the plaintiff, along with many other broadcasting stations, purchased a specialized blanket license for broadcasting stations in exchange for a fee based on the station's revenue.[144] Plaintiff brought this action in 1978, claiming that the existing license unfairly restrained trade and thus violated antitrust laws.[145] The court reasoned that other licenses were available for the plaintiffs, including single-program licenses for the use of individual pieces of music, or source licenses from the copyright holders themselves.[146] Accordingly, the blanket license offered by ASCAP, although likely the least expensive of the available options, was not the only available option.[147] Therefore, the court held that the plaintiffs failed to prove adequately that ASCAP blanket licenses unfairly restrain trade in violation of the Sherman Antitrust Act.[148]

As a result of these consent decrees and other litigation, ASCAP changed its licensing system to avoid future antitrust litigation.[149] The licenses, for example, are now non-exclusive and the copyright holder retains the right to allow any public performances that he or she wishes without consulting ASCAP.[150] Also, ASCAP licenses do not discriminate in license rates, terms or conditions between similarly-situated users.[151] Royalties attached to an ASCAP agreement are determined on a completely objective basis according to a survey designed to locate public performances of the members' works.[152] Through these alterations, ASCAP has, so far, successfully avoided antitrust liability.[153]

2. The ASCAP License

Each ASCAP license is tailored to an individual industry—radio, television and elevator music, to name a few.[154] Although ASCAP is not

---

[143] 744 F.2d at 933.

[144] *See id.* at 923.

[145] *See id.* at 924.

[146] *See id.* at 927.

[147] *See id.*

[148] *See Buffalo Broad.*, 744 F.2d at 933.

[149] *See* Korman & Koenigsberg, *supra* note 95, at 64–65.

[150] *See id.* at 64.

[151] *See id.* BMI does not act under such a restriction and thus there is no requirement that all writers and publishers be treated alike. *See id.* at 65.

[152] *See id.*

[153] *See id.* Although ASCAP has been successful in combating antitrust issues through its consent decrees, such decrees have not stopped litigants from trying their cases. *See, e.g.*, BMI v. CBS, 441 U.S. 1 (1979); BMI v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1981).

[154] *See* Korman & Koenigsberg, *supra* note 95, at 67–68.

allowed to discriminate in license rates or terms between similar users, it may legally set different rates for different types of users.[155] Fees are primarily assigned based on the value of performance music to the individual industry.[156] Thus, radio stations may pay more than television stations.[157] The rates are also set according to the total size of the audience.[158] For example, radio and television stations pay a licensing fee based on a percentage of net revenues, while a bar or restaurant pays based on objective factors such as seating capacity or whether the establishment uses live or recorded music.[159] Common provisions, however, include the right to perform all current and future works in the ASCAP repertory for the term of the license.[160] The license is limited to non-dramatic public performances.[161] Often, ASCAP has the right to audit the establishment to ensure compliance.[162] ASCAP may also terminate the license in cases of breach or non-payment of fees.[163]

Because each license grants similar rights, some industries have accused ASCAP of price-fixing when it charged different fee structures to different industries.[164] In 1979, in *Columbia Broadcasting System, Inc. v. ASCAP*, the United States Supreme Court held that this pricing system for blanket licenses did not constitute illegal price-fixing.[165] The plaintiff purchased blanket licenses from ASCAP for the use of music on its television station.[166] The plaintiff later claimed that the license unfairly bundled rights to desired music with rights to undesired music, and thus was a form of illegal price fixing and a violation of the Sherman Antitrust Act.[167] The Court, however, determined that such pricing did not violate antitrust legislation.[168] Instead, the Court reasoned that the system was a function of the industry's market structure.[169] Thus, the Court reasoned, given the availability of source licenses, the artists did not fix prices, but rather allowed the blanket

---

[155] *See id.* at 64.

[156] *See id.* at 67.

[157] *See id.* at 67–68.

[158] *See id.*

[159] *See* Korman & Koenigsberg, *supra* note 95, at 67.

[160] *See id.* at 68.

[161] *See id.*

[162] *See id.* This right is used when the license fee is dependent on information solely in the user's possession, such as a hotel's expenditures for live entertainment. *See id.*

[163] *See id.*

[164] *See Broadcast Music*, 441 U.S. at 6.

[165] *Id.* at 24–25.

[166] *See id.* at 6.

[167] *See id.*

[168] *See id.* at 23–24.

[169] *See Broadcast Music*, 441 U.S. at 23–24.

license as an alternative purchase option. In other words, artists were not agreeing to withhold a license to their copyrights at a cheaper price, as would typify a price-fixing arrangement.[170]

Notwithstanding the decision of the courts in *Columbia Broadcasting System* and *Buffalo Broadcasting*, many licensees still criticize the legality and fairness of the ASCAP licensing system.[171] In certain instances, dissatisfaction with the ASCAP licensing system has led some to seek licenses from the copyright holders themselves, known as "source licensing."[172] It could be argued that if source licensing becomes more popular, it will create a broader and more competitive market for licensing.[173] Others argue, however, that source licensing is a questionable venture in the face of cooperative licensing societies.[174] It appears that the difficulty in obtaining the number of individual licenses that are already included in an ASCAP license has kept source licensing from affecting ASCAP's monopoly.[175] For those seeking licenses to only a few pieces of music, source licensing may be more economical.[176] For most others, however, ASCAP and BMI licenses continue to be the common source of performance licensing in the music industry.[177]

3. ASCAP's Monitoring System

ASCAP is proactive in protecting its members' copyrights.[178] It identifies establishments such as nightclubs through local advertisements and other sources where copyright infringements may be taking place and provides them with opportunities to purchase licenses.[179] ASCAP informs those establishments that decline licenses of the possibility of copyright infringement liability.[180]

ASCAP sends field representatives to visit establishments within assigned territories, locating establishments that frequently play music publicly.[181] The field representatives find these locales primarily through newspaper ads, information from competitors and word of

---

[170] *See id.*
[171] *See* McLeod, *supra* note 100, at 756–57.
[172] *See id.* at 768.
[173] *See generally id.*
[174] *See id.* at 768–69.
[175] *See generally id.*
[176] *See* McLeod, *supra* note 100, at 768–69.
[177] *See supra* note 122 and accompanying text.
[178] *See* Korman & Koeniggsberg, *supra* note 95, at 69.
[179] *See id.* at 70–71.
[180] *See id.*
[181] *See id.* at 69.

mouth.[182] Once located, the representatives offer it a blanket ASCAP license for permission to play songs from the ASCAP repertory.[183] Where an establishment capitalizes on copyrighted music within the ASCAP repertory, a field representative notifies the establishment that it has infringed a member's rights.[184] The representative then offers the establishment a choice between purchasing a blanket license or a lawsuit from ASCAP.[185] For the most part, these efforts have successfully protected ASCAP members' rights.[186] As a result of its investigations, ASCAP has proceeded with thousands of lawsuits.[187] Today, most establishments that offer performed music as a regular part of their operation have performance licenses from ASCAP and/or BMI.[188]

4. ASCAP and the Copyright Holder

Presumably, the most important aspect of ASCAP's operation (at least to its members) is its process of allocating royalties. To allocate the appropriate royalties to each copyright holder effectively, ASCAP surveys performances and bases its distribution on the appearance of each piece of music.[189] ASCAP studies representative samples from every local radio and television station in the country and pays members based on the number of times their work appeared during the survey period.[190] Other establishments, such as network television stations, airlines and educational licenses provide complete logs of the music they play to ASCAP.[191] A complete piece of music is given stronger credit for royalty assessment purposes than use of a piece of music as part of a theme, background or "jingle."[192] Once ASCAP deducts its operating expenses from revenues, it divides the remainder equally between writers and producers, paying royalties according to the survey results.[193] ASCAP applies the rules uniformly so that no artist or producer is given any extra benefit because of his or her prestige

---

[182] *See id.*

[183] *See* Korman & Koenigsberg, *supra* note 95, at 70–71.

[184] *See id.* at 71.

[185] *See id.*

[186] *See id.*

[187] *See id.* at 72. Nearly all of these lawsuits are settled. *See id.* Less than 1% actually go to trial. *See id.*

[188] *See* Johnson, *supra* note 116, at 3; *see also supra* note 122 and accompanying text.

[189] *See* Korman & Koenigsberg, *supra* note 95, at 72–73.

[190] *See id.*

[191] *See id.*

[192] *See id.* at 74.

[193] *See id.*

or seniority within the society.[194] Thus, the licensing organization treats all members equally for purposes of allocating revenues.[195]

ASCAP has, in sum, produced an efficient and effective method of protecting its members against copyright infringement in music performance.[196] It remains the industry standard in protecting the copyrighted works of its members.[197] The success of ASCAP's method has enabled copyright holders to protect themselves significantly beyond what would be possible by their own individual means.[198] These licensing societies have overcome the significant problems of enforcing music industry copyrights.[199]

D. *The ASCAP Model Applied To Copyright Infringement Over the Internet*

1. The Copyright Holder and the Licensing Company

The successful ASCAP model provides a solution to Internet copyright infringement.[200] Such a model, when applied to the Internet, would create a self-sustaining licensing system similar to licensing performance music through ASCAP.[201]

Currently, copyright holders are having a difficult time enforcing their individual copyrights over the Internet, echoing the problems that musical composers endured before the appearance of ASCAP and BMI.[202] Presumably then, there is a demand for collective enforcement among copyright holders in the Internet context. If so, these copyright holders could form licensing companies similar to ASCAP to create licensing systems covering Internet transmission of types of information such as music, films, literature or computer programs.[203] Just as music composers and producers of music came together to form licensing societies, the composers and producers of information are searching today for a way to enforce their rights and increase the revenues their works generate.[204] By forming licensing companies simi-

---

[194] *See* Korman & Koenigsberg, *supra* note 95, at 74.
[195] *See id.*
[196] *See* Bergman, *supra* note 127, at 357–58.
[197] *See supra* note 122 and accompanying text.
[198] *See* Korman & Koenigsberg, *supra* note 95, at 57.
[199] *See id.* at 56, 72.
[200] *See supra* notes 1–12 and accompanying text.
[201] *See generally* Korman & Koenigsberg, *supra* note 95.
[202] *See* Srikantiah, *supra* note 3, at 1647–48; McCleod, *supra* note 100, at 738–39.
[203] *See generally* Korman & Koeniggsberg, *supra* note 95.
[204] *See id.*

lar to ASCAP, copyright holders could use these companies for collective representation just as music composers use ASCAP.[205] As with ASCAP members, representation by such an entity would grant authority to license the use of different kinds of information, provide better investigative ability, and establish a royalty system for its members without impeding the flow of information on the Internet.[206]

2. The Licensing Company and the ISP

Under this ASCAP-type system, these organizations would allow Internet users to transmit any material in their repertory. It would be impractical, however, to sell these licenses to individual users legally.[207] The number of Internet users is growing exponentially.[208] Consequently, any attempt to control and keep records of each individual homepage on the Internet would be futile.[209] Users, however, can be grouped together under each of their respective ISPs.[210] Each ISP provides service for hundreds or thousands of users, all of whom use the ISPs' computers to post homepages and to transmit and receive email messages.[211] Thus, instead of selling licenses to individual users, it would be more logical to sell the license to an ISP that can represent all of its users as a group.[212]

The ISP also has incentives to represent its users. Although courts, such as that in *Religious Technology Center v. Netcomm*, have recently been unwilling to find ISPs liable for the copyright infringements of its users, the ISP is not without liability exposure.[213] Logically, each ISP has an interest in avoiding litigation. An ISP could see these licenses, then, as an opportunity to reduce the possibility of an adverse judgment for contributory or vicarious liability in an action for copyright infringement. Furthermore, the market for ISPs is currently a competitive one.[214] Presenting these licenses as part of an ISP's service would motivate users to join one ISP over another. Today, many Internet users ignore legal consequences associated with copyright infringement and

---

[205] *See id.*

[206] *See generally id.*

[207] *Cf.* Macleod, *supra* note 100, at 767–768 (discussing problems with source licensing).

[208] *See* Gibbons, *supra* note 31, at 492.

[209] *See id.*

[210] *See* Rashes, *supra* note 57, at 57.

[211] *See id.* at 57–59.

[212] *See supra* notes 185–88 and accompanying text.

[213] *See* Religious Tech. Ctr. v. Netcomm On-Line Communication Servs., 907 F. Supp. 1361, 1380 (N.D. Cal. 1995).

[214] *See* Epstein, *supra* note 59, at 680.

continue to violate copyright laws on the Internet with impunity.[215] As technology improves, however, this impunity may cease to exist. As copyright holders come together to pursue their legal rights, they would find it much easier to identify and take action against infringers.[216] While individual copyright holders may not find it economically feasible to bring legal action against an individual, a larger collective body would have the necessary resources and may be more willing to take such action.[217] As a result, individual users will want to avoid infringement suits. ISPs that have licensed the information that they wish to post and transmit would likely become more marketable. Finally, as with ASCAP, as these licensing organizations cover more information, the value of these licenses will increase.[218] In turn, more users would seek ISPs carrying such licenses. Accordingly, the ISP, rather than any individual user, would be a good place to direct the sale of licenses.

After the licensing organization grants a license to the ISP for a type of digital information, the licensing organization must then allocate appropriate royalties to its members. To do so, the licensing company would survey the Internet in ways similar to how ASCAP surveys radio stations, i.e., by obtaining and reviewing representative samples of Internet space, analyzing these samples and paying royalties based on the appearance of the licensed information.[219] This system would require each organization to create and present a payment system that would allow the organization to keep the licenses marketable while providing adequate compensation for constituent members.

3. The ISP and the Subscriber

Once the ISP purchases a license from a licensing organization, the license would cover all users who subscribe to the ISP's service and they would have the right to post and transmit the licensed information. For example, an ASCAP-type license would allow all ISP members to post and transmit musical recordings on their homepages.[220] Having the music data on the homepage would allow for wide exposure of the

---

[215] *See* Suzanne M. Fay, *Cyberspace: Stretching the Fabric of Copyright Law*, 23 OHIO N.U. L. REV. 973, 988 (1997).

[216] In doing so they would be following in the footsteps of the original members of ASCAP. *See* MacLeod, *supra* note 100, at 738–39.

[217] *See id.*

[218] *See* Korman & Koenigsberg, *supra* note 95, at 57.

[219] *See id.* at 72–73.

[220] A homepage, also known as an Internet site, is a graphical interface stored on a computer connected to the Internet. *See* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F.Supp. 1032,

music, as other users could find the displayed piece of music through a network browser. The artists and producers would benefit through the greater notoriety of their work, while receiving royalties from the licensing company for its appearance on the Internet. In exchange for granting users licensing rights, the ISPs will pass along licensing fees to users through rate increases. Internet users, through this system, engage in a type of "narrow-casting," permitting individuals who wish to receive specific information to receive it.[221] This is a more efficient and effective method of finding desired information than receiving television or radio broadcasts, as a user can locate the specific information that he or she desires.[222] Under this system, the ISP and its users are similar to a "narrow-casting" radio station, transmitting licensed information across the Internet legally and for the greater benefit of informing society. Concomitantly, the fame and notoriety of the information would heighten through "public performance" of the music, films, and other works that users post. In short, this approach furthers the purpose of the Internet—to transmit information efficiently and effectively.[223]

E. *Privatized Market for Licensing—a Model for "Narrow-Cast" Transmission*

1. "Narrow-Casting" versus Broadcasting

The Internet is a communication medium. It does not generate information, nor does it alter the display or performance of that information.[224] It is simply the space and memory of numerous computers linked together to function as one huge memory landscape, with each piece of memory space controlled by an individual machine.[225] Although one system or another may experience difficulty at any given time, it is nearly impossible for the entire network to fail.[226] There is no central control, and each individual's ability to receive information is based on the operation of their local system.[227]

1035, n.3 (S.D.N.Y. 1996). It is accessed with proper software through a computer connected to the Internet, and is located through an Internet address, also known as a Uniform Resource Locator ("URL"). *See id.* If the Internet user knows the proper address, they can access the homepage and download the contents to the screen of his or her personal computer. *See id.*

[221] *See* Gibbons, *supra* note 31, at 479.

[222] *See id.*

[223] *See supra* notes 44–48 and accompanying text.

[224] *See supra* notes 31–43 and accompanying text.

[225] *See* Gibbons, *supra* note 31, at 492.

[226] *See id.* at 488–89.

[227] *See id.*

As a form of communication, the Internet is much more efficient and advanced than the radio, transmitting information directly to the users who desire it, rather than broadly across public airwaves.[228] But the actual effect of transmissions between sender and recipient, (i.e., "narrow-casting") is no different from any radio or television broadcast. The difference lies in the fact that the Internet user has the advantage of accessing the information upon demand, rather than by a fixed schedule, thereby allowing the user to have constant access to the information at convenient times.[229] Nonetheless, the law should regulate the Internet the way it regulates a broadcast system.

Public performance or display of any copyrighted work, be it music, documents, literature or computer programs, is difficult to control.[230] Licensing societies have produced an effective and efficient system of regulating the public performance of copyrighted music through radio, television, film and other media.[231] There is no reason why a similar system would not apply to the Internet.[232]

2. A Potential Market for Private Licensers

This system of ASCAP-style licensing brings value to every party involved.[233] Copyright holders will receive financial benefit for the public performance of their works. At the same time, licensing companies would profit from the creation and sale of licenses to ISPs. Given the ever-increasing demand for Internet access, this market is only likely to become larger and more profitable in the future. ISPs would better control their liability exposure and become more marketable by offering these licenses to their users. Finally, the users themselves would benefit from the ability to post and transmit copyrighted information over the Internet legally. As all parties benefit, this system will likely be self-sustaining.

New licensing societies could group together new types of information based on demand. Because each society would be responsible for its own surveying of the Internet, economic incentives would create efficient licensing companies with strong surveying abilities and fair royalties policies for its members. The growth of the licensing industry will improve the policing power of the copyright holders, making these

---

[228] *See id.* at 479.

[229] *See id.*

[230] *See* Srikantiah, *supra* note 3, at 1647–48.

[231] *See* Korman & Koenigsberg, *supra* note 95, at 74.

[232] *See id.*

[233] *See* Hartman, *supra* note 9, at 66–67.

licenses more attractive to users in the face of undesirable litigation. The result of this demand will spur ISPs to seek out these types of licenses for their users. In the end, the Internet will reach its potential as a powerful tool to transmit works directly upon demand while protecting the rights of copyright holders.

CONCLUSION

Performance rights societies such as ASCAP and BMI provide a model for licensing organizations geared toward all types of works. Such a licensing system would empower disenfranchised copyright holders, as well as accommodate the demands of Internet users. By improving the economic utility to all parties, this model of performance licensing would improve the current situation, which has paralyzed copyright holders and produced inconclusive litigation on issues of copyright infringement over the Internet. Not only would all parties benefit, but this system would preserve the purpose of the copyright—to promote creation and invention—by rewarding originators of works with the monetary rewards, the fame and the recognition that they deserve for their contributions.

MICHAEL B. RUTNER