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NOTES

A PROPOSED REGIME FOR COPYRIGHT PROTECTION ON THE INTERNET

I. INTRODUCTION

The future of telecommunications has arrived, and it goes by many names. Call it "cyberspace,"¹ cyberia, the information superhighway, the Internet, the "Net," or any other name you think applicable,² but its recent explosive growth has sent a clear message. One computer consultant interviewed in 1994 said, "If you're not an active Internet citizen by the mid-1990's, you're likely to be out of business by the year 2000."³ While the number of users both nationally and internationally is skyrocketing, and the amount of available information increases daily, copyright infringement is rampant. Estimates have placed the amount of money lost each year to copyright infringement on the Internet in the range of tens of billions of dollars.⁴ Copyright experts around the world are debating, discussing, conferencing, writing, and publishing their views on the direction that copyright law must take to meet the challenges posed by this new mode of communication.⁵

1. Cyberspace is a term coined by science fiction writer William Gibson to describe the virtual space created by the interconnection of computers. WILLIAM GIBSON, *NEUROMANCER* 51 (1984).

2. Although technically incorrect, I will use the term "Internet" as a catchall to refer to the global network of computers that is revolutionizing the way in which people around the world communicate with each other.

3. Patricia B. Seybold, a computer consultant, is reported to have made this statement in *Computerworld*, an industry publication. See Peter H. Lewis, *Getting Down to Business on the Net*, N.Y. TIMES, June 19, 1994, §3, at 1, 1.

4. Marc S. Friedman et al., *Infojacking: Crimes on the Information Superhighway*, N.J. L.J., May 22, 1995, at S-2.

5. See *The Information Tidal Wave: Issues and Challenges*, 13 No. 1 ACCA Docket 10 (Jan.-Feb. 1995), available in Westlaw, ACCADKT Database [hereinafter *Information Tidal Wave*] (edited transcript of a closed roundtable discussion held

Governments around the world are scurrying to conduct studies and issue reports,⁶ yet no consensus has emerged.⁷ The only thing that can be agreed upon, at least by some copyright commentators, is that technology has once again outpaced the effectiveness of the world's current laws.⁸ The looming question is: How will the law respond to this challenge?⁹

This Note suggests an international regime for the copyright protection of digitized works which draws on models of regulation found in other industries that have been faced with similar problems. Part II addresses the nature of the dilemma facing legislators as they attempt to adapt copyright law to this new technology. Further, Part II explores the policies and conflicts surrounding copyright law generally, the reasons that the Internet specifically needs to be governed by a viable copyright regime, and the unique challenges that first must be overcome if a viable copyright regime is to be established. Part III examines how other industries have dealt with some of the same problems that are facing the Internet today. First, Part III focuses on compulsory licensing as a form of regulation generally. Second, Part III examines how compulsory licensing has been used in the United States to regulate copyright royalties in the cable and satellite television industries. Finally, the section observes how royalty remuneration functions in the music industry with regard to

in conjunction with the American Corporate Counsel Association's Tenth Annual Meeting in San Francisco in October 1994); see also John Markoff, *Unraveling Copyright Rules for Cyberspace*, N.Y. TIMES, Mar. 9, 1995, at D18.

6. For the report issued by the United States government, see BRUCE A. LEHMAN & RONALD H. BROWN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter NII REPORT].

7. See Michael D. McCoy & Needham J. Boddie, II, *Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway?*, 30 WAKE FOREST L. REV. 169, 172-73 (1995).

8. *Information Tidal Wave*, supra note 5, at *18, *24; Kenneth D. Salomon & Michael J. Pierce, *Copyright Law and the Information Highway*, 96 EDUC. L. REP. 315, 315 (1995); Robert L. Dunne, *Detering Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 JURIMETRICS J. 1, 15 (1994).

9. See Don E. Tomlinson, *Journalism and Entertainment as Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain*, 6 STAN. L. & POL'Y REV. 61, 62 (1994).

the licensing of public performing rights. Within this context, royalty collection societies in the United States and Europe and blanket licensing will be examined.

Part IV compares the cable and satellite television industries and the music industry to the Internet and determines that because of the Internet's similarity to these industries, certain aspects of the regulation used in each industry are feasible for the Internet. In Part V, a working copyright model combining aspects of both the cable and satellite television industries and the music industries is proposed. Finally, in Part VI, this Note argues that although the proposed regime will not put an end to copyright infringement of Internet-disseminated material, as long as certain definitional difficulties can be overcome, it is possible to strike a workable balance between providing for the economic rights of copyright holders, and decreasing the prohibitive transaction costs involved in forcing on-line networks to contact individually every copyright holder whose work they wanted to access.¹⁰ Many writers in the United States have explored the possibility of compulsory licensing for works disseminated on the Internet, but few have been in favor of the idea, and those that were in favor of it have only explored the possibility of instituting some type of compulsory licensing scheme in the United States.¹¹ Other writers have discussed the possibility of instituting a collection system similar to that of the music industry,¹² but again, only in

10. See generally Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

11. See, e.g., *Information Tidal Wave*, *supra* note 5, at *17 ("Perhaps something like compulsory licensing is on the horizon."). Indeed, another commentator noted, "I'm not sure how the information superhighway can be successfully implemented without it." *Id.* at *18. "[C]opyright should respond to instantaneous digital copying by . . . instituting for every work a system of compulsory licensing of limited duration." Ron Coleman, *Copycats on the Superhighway*, 81 A.B.A. J. 68, 70 (1995).

12. Henry H. Perritt, Jr., *President Clinton's National Information Infrastructure Initiative: Community Regained?* 69 CHI.-KENT L. REV. 991, 1004 (1994) (arguing that "[s]uch electronic intellectual property enforcement could be modeled on music industry institutions that enforce phonograph recording copyrights in bars and other places of public entertainment."); Ilene K. Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J.L. & TECH. 275, 319 (1995) (suggesting that "[p]erhaps a fee mechanism, such as BMI and ASCAP perform for musical recordings, could be designed to provide remuneration to copyright owners.");

terms of U.S. regulation. This Note explores the possibility of having a pseudo-compulsory licensing regime, along with royalty collection clearinghouses which are designed to transcend national boundaries, much like the medium that they would be regulating.

II. NATURE OF THE DILEMMA

A. Policies and Conflicts Surrounding Copyright Law

It has been widely recognized by copyright commentators that there are tensions between the "authors" who want to be compensated for the works they produce and the public's interest in unfettered access to these works.¹³ It is important for the public to have access to creative endeavors, but if these works are going to exist at all, authors need some type of incentive to produce.¹⁴ This tension has been embodied in a copyright regime around the world which attempts to reconcile these two competing interests by allowing the public to have access to copyrighted work, while simultaneously providing a system which affords limited protection to the creators.¹⁵ The premise behind this type of regime lies in the fact that without this protection, creators would not create and society as a

Information Tidal Wave, *supra* note 5, at *18 (where one member of the panel discussion noted: "I really am in favor of a royalty collection system similar to what happens with music licensing. I think that's probably the best way to give the owners of the intellectual property fair return and still not waste tremendous effort trying to police something that is virtually impossible to police anyway.").

13. McCoy & Boddie, *supra* note 7, at 175.

14. *Id.* at 175-76.

15. This international copyright regime is centered around two major copyright treaties. The first is the Berne Convention, initially adopted by nations in 1886. Convention for the Creation of an Intellectual Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol. T.S. 185. Since its inception, this convention has been subject to six revisions. Alan M. Fisch, *Compulsory Licensing of Blacked-Out Professional Team Sporting Event Telecasts (PTSETS): Using Copyright Law to Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403, 415 n.84 (1995). The most recent revision occurred in Paris in 1971. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 1 (1986), 828 U.N.T.S. 221 [hereinafter *Berne Convention*]. The United States resisted adopting the Berne Convention for many years, but finally became a member with the enactment of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

The second treaty is the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

whole would suffer because it would not have access to creative endeavors.¹⁶

The tension between public access to copyrighted works and a copyright holder's remuneration for those works has climaxed, and, for the most part, remains unresolved due to the recent explosive growth of the Internet. The Internet's purpose, dating from its inception in the 1960s,¹⁷ was the free flow of ideas and the purposeful creation of a pool of shared knowledge and information. This is the polar opposite of a copyright law whose purpose is to protect copyright holders' rights in the dissemination of their works and to prevent the works from "flowing freely."

B. Why The Internet Needs to be Governed by a Viable Copyright Regime

While the spirit in which the Internet was conceived should be realized, the medium cannot survive indefinitely without some type of copyright protection for authors. The existing copyright regime, however, originally created for works in print, will not be effective.¹⁸ New laws must be created that can control a medium which has been affectionately dubbed "The Wild West."¹⁹ The fact that developing and implementing a workable regime will be extremely difficult does not in any way lessen the urgency or the necessity of such a regime.²⁰ There is too much money in

16. Patrick Murphy, Note, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 COLUM.-VLA J.L. & ARTS 237, 256 (1994).

17. The Internet began as the Advanced Research Projects Agency Network (ARPAnet), an experimental computer network. ARPAnet was an integral portion of a larger plan to guarantee contact and communication between strategic sites in the event that the United States was involved in a nuclear war and other methods of communication were unavailable or unsafe. See generally Robert F. Goldman, Note, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1079-81 (1995); Richard Raysman & Peter Brown, *Liability on the Internet*, N.Y. L.J., Nov. 8, 1994, at 3.

18. "[R]eliance on existing copyright law is dangerous, because it ignores the unique issues that arise when information is transmitted over computer networks." Denise Caruso, *Digital Commerce: Should an Extension of Current Copyright Law, Tweaked a Bit, Govern the Internet?*, N.Y. TIMES, July 15, 1996, at D7.

19. Michael Meyer & Anne Underwood, *Crimes of the 'Net'*, NEWSWEEK, Nov. 14, 1994, at 46, 46.

20. See Warren Caragata, *Crime in Cybercity*, MACLEAN'S, May 22, 1995, at 50, 50.

lost royalties at stake. Simply put, without better protection, creators will no longer create. The world will have a medium which theoretically promotes the free and unfettered flow of material and information, but there will be no material.²¹ Copyright holders will not allow their work to be reproduced and disseminated in digital form for fear that they will lose all control over further dissemination of their work.²² In addition, it might not be possible for copyright holders to prevent the unauthorized digitalization of their work. It is also quite possible that if unauthorized digitalization occurred, copyright holders might never be made aware of this fact, because policing of such a vast and interconnected network is so difficult. As a result, creators may no longer create at all.²³ This situation would be a net loss for both society and the original creator because copyright holders in printed works will lose access to the vast potential audiences that the Internet can provide, and "Net" subscribers will lose out on access to the works themselves, especially if creators decide not only to refuse to permit their works to be digitized, but also to refrain from producing anything at all.²⁴

Another important reason that a workable copyright regime is necessary stems from the fact that the potential exists for widespread distribution of, and unauthorized changes to, copyrighted works in a digital world.²⁵ The authenticity and reliability of copyrighted work is at risk, and if the work is altered in any material way, subsequent users who need to rely on the information would be harmed.²⁶

C. The Unique Problems Presented By the Internet

Legislators attempting to grapple with the need for effective copyright laws to govern the Internet will be faced with many difficult challenges. Perhaps the largest and most important problem facing the Internet is the fact that national boundaries are disregarded and easily transcended by this

21. See McCoy & Boddie, *supra* note 7, at 194.

22. In all probability, under the current "system," rights holders would lose all control over the dissemination of their work. See *id.* at 175.

23. *Id.*

24. *Id.*

25. Raysman & Brown, *supra* note 17, at 9.

26. *Id.*

"global" information superhighway.²⁷ As nations around the world begin to formulate national copyright laws to govern Internet use within their own borders, enforcers of these laws confront the enormous challenge of determining which country's laws apply in a given situation, and to whom they apply.²⁸ Even assuming that all nations around the world were to adopt stringent copyright laws,²⁹ a medium like the Internet cannot be governed on a nation-by-nation basis.³⁰ This choice-of-law issue is especially vexing in light of the fact that one can never be sure where the "offense" occurred.³¹ The possibilities seem endless. Some might argue that the law of the nation where the material originated should be used, assuming that such law can be ascertained. Others could argue that the law of the nation where the material originally was downloaded should govern, assuming that such law can be determined. Still others might argue that the law of the nation where the material eventually ends up should control. To exacerbate the problem, it is often difficult to determine who downloaded the information, uploaded the information, whether that person is a minor,³² or whether he or she is subject to the jurisdiction of the country whose law has been chosen to govern. Furthermore, the country where the "offense" occurred may not respect copyright laws and the "infringing" action may not be considered unlawful in that country.³³

As can be seen by the brief analysis of the choice-of-law

27. See Dunne, *supra* note 8, at 9-10.

28. See Caragata, *supra* note 20, at 52.

29. All nations have not adopted stringent copyright laws as of yet. The law has been extremely slow to catch up to the emerging technologies. Furthermore, existing laws passed to govern works in print cannot be effective in a digitized world. Salomon & Pierce, *supra* note 8, at 316 ("Laws that were designed to protect writers, composers, sculptors, visual artists and other authors may possibly be obsolete in the face of a technology that renders meaningless the distinction between originals and copies, displays and distribution, and even authors and their audiences.").

30. See Dunne, *supra* note 8, at 10; see also Motoko Rich, *Electronic Poser for Copyright Laws*, FIN. TIMES, Aug. 22, 1994, at 10 ("It would be difficult to say where the copyright infringement took place. Right now the laws are jurisdictional but the Internet is global.").

31. See Caragata, *supra* note 20, at 52.

32. Of course, the classification of the Internet user as a minor will be dependent upon the jurisdiction picked.

33. "[C]rimes in one country are not necessarily crimes in the next." Friedman et al., *supra* note 4, at S-3.

issues confronting regulation of the Internet, its very nature necessitates an international, rather than a national regime of copyright protection and regulation. "There is no single nation whose laws can viably control behavior in cyberspace . . . Short of a new international law and enforcement mechanisms, there is no viable way to impose existing . . . law on general behavior in cyberspace."³⁴ Even if each nation of the world were to enact the most stringent national copyright laws, the world would still be faced with a system of ineffective national laws trying to function separately within a completely international system. Meanwhile, no international law has been developed to satisfy this need.

Assuming, however, that it is possible to resolve the complex jurisdictional issues plaguing the Internet, the possible anonymity of the information uploaders and downloaders³⁵ would render this issue moot. It is virtually impossible to trace where information has originated, who is responsible for placing the material on the Internet, and who is downloading the information; users can connect through numerous computers in foreign nations and basically erase any trace of their identity.³⁶ Choosing a national law is useless if there is no one against whom it can be enforced.

The original concept of the Internet as a shared resource, encouraging the free flow of information and ideas, also poses a huge dilemma for legislators. The original users of the Internet were not in favor of restricting access to any of the materials made available on the Internet, whether copyrighted or not.³⁷ In addition, "shareware,"³⁸ which operates on an

34. Dunne, *supra* note 8, at 10.

35. "Downloading" constitutes obtaining a file from a bulletin board service and uploading constitutes placing the material on that bulletin board service. I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1002 (1994).

36. "Anonymous re-mailers" are the names given to computers which are used to divest the identity of someone who is sending a message. *Id.* at 1011 n.44.

37. The earliest Internet users were independent, laissez-faire types who tended to believe that computer access should be unlimited and that "all information should be free." Dunne, *supra* note 8, at 10 (citing Dorothy Denning, *Concerning Hackers Who Break Into Computer Systems* (paper presented at the 13th National Computer Security Conference, Washington D.C., Oct. 1-4, 1990)).

38. "Shareware" is a method of software publication and dissemination in which a software creator, wishing to distribute his creation without huge marketing and manufacturing costs, puts it on a computer bulletin board service. Anyone who would like to try the software simply downloads it from the bulletin

honor system, makes it extremely difficult to enforce copyright laws and to ensure that copyright holders are compensated for their work. The concept of shareware simply makes it too easy for users to download this copyrighted software and never pay for it, taking full advantage of the fact that shareware operates on such an honor system. Furthermore, the nature of shareware creates a belief among users that all information on the Internet should be shared and just as easily downloadable as shareware materials; this belief, in turn, leads to copyright infringement.

The ease, quickness, and quality of uploaded and downloaded material also poses a problem for legislators. Digitized copies³⁹ are perfect replicas and many can be made at once without any loss in resulting quality. The relatively low cost and wide availability of the equipment necessary to accomplish this replication embodies a drastic change from previous modes of copying.⁴⁰ It has become cheaper, easier, and more profitable to make and distribute copies digitally rather than by use of the old Xerox machine. In addition, it is often difficult to detect digital copies in the marketplace. It is a direct result of these technological improvements that copyright infringement along the Internet has become big business. Unless legislators can react quickly with new laws aimed directly at curbing infringement on the Internet, the problem will continue to spiral further out of control.

Legislators are also faced with the ease and widespread ability of potential infringers to convert already-published works, which employ older technologies, into digital form, without the permission or even the knowledge of the original copyright holder.⁴¹ Original copyright holders cannot bring

board. If the user wants to continue to use the software past a certain introductory period, he must pay a shareware fee to the programmer or creator. If he does not, he is in violation of copyright law. Steve Givens, *Sharing Shareware: Non-Traditional Marketing Relies on Honor System*, ST. LOUIS BUS. J., July 1-7, 1991, at 1B.

39. Digitizing information entails encoding the original material into a sequence of ones and zeroes. Once this is accomplished, the digitized information has the potential to be copied endlessly. Friedman et al., *supra* note 4, at S-2; Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1, 3 ("Nearly every type of copyrighted work can be transformed into digital form . . .").

40. Friedman et al., *supra* note 4, at S-2.

41. See Heinke & Rafter, *supra* note 39, at 3-4.

lawsuits for infringement because they do not know that their work has been made available on the Internet, or they find out after substantial damage has already been done.⁴² This has become a widespread problem and will continue to grow as the Internet expands, becoming more unwieldy, and even more difficult to monitor. Similarly, legislators are faced with the possibility that works might be altered from their original form,⁴³ that copyright notices could simply be deleted from the works,⁴⁴ or that there could be false attribution as to the origin of the work.⁴⁵ Absent policing, these things are temptingly easy to do. Even if bulletin board postings were monitored in some way, and even if downloaders have no intention of violating any copyright laws, they may be doing so inadvertently and can be found liable for copyright infringement under the current laws.⁴⁶

Another dilemma facing legislators is the sheer size and interconnectedness of the Internet. It is hard to say how many different bulletin boards currently exist on the Internet, let alone the exact content of any one bulletin board at a given time. To exacerbate this problem, the content of any one bulletin board or network service has the ability to constantly and instantly change without any notice.⁴⁷ Some estimates in 1994 put the number of bulletin board services (BBS's)⁴⁸ at over 100,000,⁴⁹ with at least 60,000 in the United States alone, and counting.⁵⁰ Furthermore, the majority of BBS's furnish little or no control over the nature or the content of the material carried over their service.⁵¹

42. See David Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 *COMPUTER/L.J.* 101, 145 (1993).

43. See *id.* at 144.

44. See *id.* at 145.

45. *Id.*

46. Copyright infringement is a strict liability crime subject to limitations in the United States that does not require intent or knowledge to find that a violation has occurred. *De Acosta v. Brown*, 146 F.2d 408, 410-412 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945).

47. "At best, one can take a snapshot of it [the Internet], but even this record is out of date before the information is tallied." Dunne, *supra* note 8, at 2.

48. A bulletin board service (BBS) is any computer service that is accessed through electronic communications technology. Hardy, *supra* note 35, at 1000.

49. Heinke & Rafter, *supra* note 39, at 2.

50. Hardy, *supra* note 35, at 1007 n.35 (citing Kathleen Doler, *INV. BUS. DAILY*, Feb. 17, 1994, *Computers and Automation Sec.*, at 4).

51. Heinke & Rafter, *supra* note 39, at 2.

Because there is no central overseer of the Internet or single one entity in charge of policing what is available on the Internet, regulation and legislation is extremely problematic. Individual BBS's are operated by system "Sysops,"⁵² which sometimes attempt to restrict or monitor objectionable or protected material, depending on the particular policies of the individual BBS, but the enormous volume of material, and the difficulty in identifying such material, usually makes detection impractical.⁵³

The potential of "beating" copy protection methods used by creators and manufacturers also poses a dilemma if these devices are even used. In the mid-1980s, many software creators began to use copy protection devices in their programs.⁵⁴ Although these methods were generally effective at thwarting unauthorized users, users nonetheless complained of the time and complexity involved in dealing with these devices, and they felt that the devices interfered with legitimate use of the software.⁵⁵ The industry responded, for the most part, by leaving these devices off their products.⁵⁶ Those manufacturers who have chosen to keep the copy protection devices are faced with the fact that for every technological breakthrough they make in the development of these devices, pirates can quickly develop another device that can beat them. This can become a never-ending cycle that can cost software manufacturers millions of dollars. Without these encryption devices, programs are much easier to reproduce in violation of existing copyright laws. The fact that manufacturers today are less likely to use copy protection devices on their programs makes the expeditious development of a workable copyright regime even more essential.

The very nature of the Internet poses another huge problem for legislators. Under existing copyright law, at least in the United States, when material is downloaded into the Random Access Memory (RAM) of any personal computer, a

52. "Each BBS is run by its own system operator, known as a 'Sysop.'" *Id.*

53. *Id.*

54. John C. Dvorak, *No Protection, Please*, CANADIAN DATASYSTEMS, Sept. 1992, at 70. An example of a copy protection device was the original "key disk." Each time a user wished to use the copy protected software, he had to insert the "original key disk" into the computer. *Id.*

55. *Id.*

56. *Id.*

"copy" of that material is made.⁵⁷ If the material is protected by a copyright, and the copyright holder has not granted permission for that "copy," downloading that material is considered copyright infringement.⁵⁸ The only problem with this type of definition for the word "copy," is that it would be impossible to "use" Internet material in any other way.⁵⁹ In order to view any of the files from a network or a BBS, one must download that material into the RAM of a computer, even if it is for just enough time to simply read the file in its entirety.⁶⁰ At least in the United States, it does not seem that Congress intended to reserve in copyright holders the exclusive "reading rights" to their copyrighted works.⁶¹ However, if the current definition of "copy" remains the same, that is exactly what copyright holders are getting in addition to the exclusive rights to also control "viewing" and "listening" to any of their works once they are in their digitized form.⁶² Copyright holders are being granted the exclusive right to prevent Internet users from reading their works because this cannot be done without making a "copy." Furthermore, the current interpretation of what constitutes a "copy" would seem to foreclose the possibility that copyright holders could ever license the "use" of their works over the Internet.⁶³ Under current definitions, it would seem that Internet material cannot be "used," because by trying to access copyrighted material by downloading it, the material is "copied." Consequently, the "user" would be deemed an infringer.

Furthermore, many cyberspace users are completely unfamiliar with any of the existing copyright laws and the

57. Litman, *supra* note 10, at 41 n.58 (citing NII REPORT, *supra* note 6).

58. *Id.*

59. *See id.* at 40.

60. *Id.*

61. *Id.* at 40-43. In enacting the 1976 Copyright Act, specifically 17 U.S.C. § 106 (1994), Congress granted certain exclusive rights to the copyright holder, including the exclusive right of reproduction. Nowhere in § 106 is it mentioned that the copyright holder also retains the exclusive right to read the material, nor is there any evidence in the legislative history of this section that this exclusive right was ever contemplated. However, recent interpretations of this statute have pronounced that one "reproduces" a work every time one downloads its information into the RAM of a computer. Litman, *supra* note 10, at 40.

62. Litman, *supra* note 10, at 31-32.

63. "Owning a copyright means no one can use it without receiving a license from you." Geraldine Fabrikant, *EMI Music Publishing Fills Chairman's Post*, N.Y. TIMES, Nov. 21, 1991, at D4.

implications that their Internet actions may have.⁶⁴ Most are completely unaware that downloading material into the RAM of their computers, even if they never actually print the material or share it with anyone else, technically constitutes a reproduction under current U.S. copyright law and thus makes them infringers, albeit unintentionally.⁶⁵ To aggravate the problem even further, although children currently account for only approximately two percent of total Internet users,⁶⁶ their numbers are expected to dramatically increase in the next decade.⁶⁷ Unless children can be taught the complexities of the current copyright statute early on, lessons that most of their adult counterparts have yet to learn, they too will join the ranks of copyright infringers.

The next problem facing legislators is the breed of computer "hackers" who seem to derive great pleasure from "cracking the system" and accessing protected and confidential material.⁶⁸ Hackers fully understand the implications of their actions,⁶⁹ but they act anyway, believing that material on the information superhighway should be free for all.⁷⁰ "[A]lthough an ethically undesirable pursuit, [hacking] is practised for a mixture of innocent and questionable reasons; the intellectual challenge, admiration of peers, the need to cause mayhem and destruction or illicitly gain software or data."⁷¹ Many hackers

64. "The current copyright statute has proved to be remarkably education-resistant." Litman, *supra* note 10, at 50.

65. "One part of the problem is that many people persist in believing that laws make sense. . . . Our current copyright statute has more than merely a provision or two or three or ten that don't make a lot of sense; it's chock-full of them." *Id.*; see also Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991) (discussing why copyright law is counterintuitive to the authorship process).

66. Peter H. Lewis, *On the Net*, N.Y. TIMES, May 29, 1995, at 39.

67. President Clinton stated in his most recent State of the Union Address that he wanted to see every classroom in America connected to the Internet by the year 2000, and added that by Spring 1996, 20% of the classrooms in California would be connected to the Internet. Leo Rennert, *President: Do More With Less*, SACRAMENTO BEE, Jan. 24, 1996, available in LEXIS, Nexis Library, Curnws File.

68. Noted one hacker: "It was just for the thrill of getting free software or logging onto pirate bulletin boards that normal people don't know about" Adam S. Bauman, *The Pirates of the Internet*, L.A. TIMES, Nov. 3, 1994, at A1, A18.

69. See Berni Dwan, *Internet Ethics*, COMPUTER FRAUD & SEC. BULL., Feb. 1995, available in LEXIS, Nexis Library, Curnws File.

70. Dunne, *supra* note 8, at 10 (citing Denning, *supra* note 37).

71. Dwan, *supra* note 69.

believe that hacking is mentally challenging. They feel rewarded when they are able to bypass the security of a new computer system.⁷²

Finally, aside from hackers, the "profile" of other potential infringers also poses a problem. The problem arises from the fact that there really is no "profile" of the average Internet cruiser and hence, no "profile" of a potential infringer. Users are no longer just the computer nerds and geeks of yesteryear.⁷³ Anyone with a personal computer, a modem, and a telephone can now access vast amounts of copyrighted material at the touch of a button and become "infringers."⁷⁴ Furthermore, there exists the apparent widespread belief that it is not a crime to "copy" the latest computer software or to give a downloaded program to a friend.⁷⁵ As long as this type of attitude persists, infringement will be rampant on the Internet under the current regulation regime.

III. HOW OTHER INDUSTRIES HAVE DEALT WITH SIMILAR PROBLEMS

This is not the first time that copyright law has fallen behind technology, nor will it be the last.⁷⁶ The world has witnessed a virtual explosion of new technologies in the latter half of the twentieth century. Copyright law has gradually responded to them in a multitude of ways. This section will examine other industries that were faced with problems similar to those plaguing the Internet and will focus on legislative responses to these problems.

A. *Compulsory Licensing*

Under U.S. copyright law, copyright holders are granted certain exclusive rights in their copyrighted works,⁷⁷ subject

72. *Id.*

73. See Bauman, *supra* note 68, at A1.

74. As prices for computers and modems continue to drop, more and more people are going on-line.

75. See *Intellectual Property: The Property of the Mind*, ECONOMIST, July 27-Aug. 2, 1996, at 57, 57.

76. See Kim L. Milone, Comment, *Dithering Over Digitization: International Copyright and Licensing Agreements Between Museums, Artists, and New Media Publishers*, 5 IND. INT'L & COMP. L. REV. 393, 423 (1995).

77. These exclusive rights include the right to reproduce the copyrighted works in copies or phonorecords, the right to prepare derivative works, the right

to some exceptions.⁷⁸ The compulsory license is one of those exceptions. The compulsory license

resembles an unwritten contract which gives the user unlimited use of the work or product in return for the promise that he will pay a fee or royalty at some later date . . . [and] the holder of a copyright in a work *must* grant [it] to one who uses the work in any of the ways specified by the Copyright Law.⁷⁹

Once the licensee pays a royalty fee, the licensee has the right to use the work in its entirety, and the copyright holder has no right to refuse, restrict, or in any way interfere with the licensee's enjoyment of applicable statutory rights.⁸⁰ Compulsory licenses cut down on transaction costs between copyright holders and potential licensees, but they also limit the control that copyright holders have over their work.⁸¹ In the past, Congress has used the compulsory license to keep pace with new technologies,⁸² to help industries to grow by decreasing transaction costs,⁸³ and to prevent monopolies from forming.⁸⁴ These objectives are accomplished by setting a statutorily fixed royalty payment for copyright holders, which frees users from negotiating individually with each copyright holder to determine royalty payments.⁸⁵

to distribute copies or phonorecords, the right to perform works publicly, and the right to publicly display the copyrighted work. 17 U.S.C. § 106 (1994). These rights were granted under the Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (1976), which superseded the Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075, 1075-76 (1909).

78. 17 U.S.C. §§ 107-120 (1994).

79. Midge M. Hyman, Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT. L.J. 105, 107 (1985).

80. Darlene A. Cote, Note, *Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License*, 2 J. INTELL. PROP. L. 219, 226 (1994).

81. *Id.* at 221.

82. *Id.*

83. *Id.*

84. Aram Dobalian, *Copyright Protection for the Non-Literal Elements of Computer Programs: The Need for Compulsory Licensing*, 15 WHITTIER L. REV. 1019, 1067 (1994).

85. The cable industry is an example of this type of payment scheme. While recognizing that copyright holders should be compensated when their programs are retransmitted, Congress also sought to ensure that the cable television industry would continue to grow, develop, and serve the communication needs of the general public. Murphy, *supra* note 16, at 249. This congressional intent was clearly

Compulsory licensing was first introduced in the United States with passage of the 1909 Copyright Act.⁸⁶ It was aimed at preventing a monopoly in the player piano roll industry.⁸⁷ The 1909 Act prohibited the copyright owner from refusing to license a particular use, while in return the copyright holder was granted the right to receive a statutorily set royalty payment for any mechanical reproductions of the work, including the use of music in player piano rolls.⁸⁸

The 1909 Act was superseded by the 1976 Copyright Act. With enactment of this act, Congress modified the mechanical compulsory license established by the 1909 act and expanded the use of compulsory licenses to include public performance of music on jukeboxes, public broadcasting, and retransmission by cable systems of broadcast signals.⁸⁹ In 1988, Congress expanded compulsory licensing still further by establishing this type of protection for retransmission by satellite carriers of broadcast signals to private home viewers.⁹⁰

1. Cable Television and the Compulsory License

Compulsory licensing was introduced to cable television in the United States with the 1976 Copyright Act. "Congress recognized that excessive transaction costs in the cable television industry prevented bargaining between copyright owners and all potential users of the copyrighted material."⁹¹ The legislative history preceding the adoption of this scheme evidenced congressional intent at the time:

reflected in the fact that the royalty rate set by statute was clearly below the market value for cable retransmission. *Id.* Indeed, "[n]o one denies that the cable royalty rates under the Copyright Act of 1976 and the compulsory license were set artificially low. These rates have no connection with economic data or analysis or marketplace value. No one denies that." *Copyright Royalty Fees for Cable Systems: Hearings on H.R. 2802 and H.R. 3419 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 108 (1984) (testimony of Jack Valenti, President, Motion Picture Association of America); see Murphy, *supra* note 16, at 249 n.77.

86. Dobalian, *supra* note 84, at 1067.

87. *Id.*

88. *Id.*

89. *Id.* at 1068-69.

90. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, § 202, 102 Stat. 3949, 3949 (codified as amended at 17 U.S.C. § 119(a)(1) (1994)). For a discussion of the Satellite Home Viewer Act (SHVA), see *infra* notes 111-120 and accompanying text.

91. Dobalian, *supra* note 84, at 1068.

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.⁹²

The cable industry began as a means to improve the reception of local broadcasts in outlying areas.⁹³ Local broadcasters negotiated with copyright holders, and the cable station then picked up the signal and delivered it to the outlying areas. The cable companies did this at no cost to themselves.⁹⁴ As technology improved, cable stations began to pick up and deliver signals from distant "local" broadcasters, which encroached on the local broadcaster's exclusive right to the copyrighted material. As a result, some television stations refused to purchase copyrighted programs because these programs were already being broadcast on rival stations by cable companies who could pick up the signal from distant stations and never pay the copyright holder or seek his or her permission.⁹⁵ Cable companies were sued for copyright infringement, but the Supreme Court refused to find infringement.⁹⁶

The 1976 Copyright Act was Congress' attempt to strike a compromise between copyright holders and the cable companies.⁹⁷ This act recognized the rights of copyright holders by granting them a royalty for use of their material in broadcasts. At the same time, the act recognized the cable companies' interests by instituting a compulsory licensing scheme so that the companies did not have to negotiate with individual right holders.⁹⁸ The act set the statutory royalty fee well below its

92. *Id.* at 1068 n.279 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89 (1976)).

93. Cote, *supra* note 80, at 228.

94. *Id.*

95. *Id.* at 228-29.

96. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974).

97. Cote, *supra* note 80, at 230.

98. *Id.* at 230-31.

fair market value.⁹⁹ The compulsory license was enacted with the belief that this type of regulation would continue indefinitely and that the statutorily set fees would continue to function as an indispensable part of the regulatory framework.¹⁰⁰ The scheme guaranteed payment to copyright holders in the form of the statutorily set royalty fee, but it removed the ability of copyright holders to bargain for their fees.¹⁰¹ Furthermore, in addition to striking a compromise between copyright holders and cable companies, the act was promulgated to meet the needs of the viewing public and to ensure that there was a wide variety of programming available.¹⁰²

2. Satellite Television and the Compulsory License

The satellite television compulsory license also came about as a result of a technology improvement.¹⁰³ It began with superstations like WTBS and WOR-TV which were employing the new nationwide satellite distribution system rather than the more expensive microwave transmission that had previously prevented their growth.¹⁰⁴ As these stations flourished, so did satellite technology in general. This in turn lowered costs significantly and made satellite dishes affordable for viewers at home.¹⁰⁵

Satellite dishes for home viewers posed a major problem: individuals were able to receive signals directly from satellite carriers and avoid paying fees either directly to the copyright holder or indirectly in the form of a cable subscription.¹⁰⁶ Satellite carriers sought to prevent this direct reception by scrambling their signals.¹⁰⁷ Copyright holders claimed that the scrambling of the signals by satellite carriers constituted an altered secondary transmission, taking their transmission out of the category of "passive carrier," which had previously pro-

99. Murphy, *supra* note 16, at 249. Instead, the royalty rates designated by the statute are based on the number of signals that a carrier transmits as well as total revenue. *Id.*

100. *Id.*

101. *See id.*

102. Cote, *supra* note 80, at 231.

103. *Id.* at 233.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 233-34.

tected them from copyright infringement under the 1976 Copyright Act.¹⁰⁸ Lawsuits ensued and the courts came to the rescue of the fledgling industry and found no infringement.¹⁰⁹ Congress eventually responded to the tension-riddled industry by enacting another compulsory licensing scheme employing the same rationale used to justify the compulsory license for the cable industry: "allowing a new technology to grow and supporting a new industry."¹¹⁰

In 1988 Congress enacted the Satellite Home Viewers Act (SHVA).¹¹¹ "The SHVA created a compulsory license for secondary transmissions by satellite carriers of primary transmissions of superstations and network transmissions for private viewing by owners of satellite dishes."¹¹² The SHVA attempts to balance the copyright holder's need for protection by allowing satellite carriers to continue scrambling signals while, at the same time, addressing the needs of the public and its access to programming.¹¹³

The SHVA licensing scheme however, differs from the cable licensing scheme in two important ways. First, unlike the cable compulsory license, the SHVA was passed with a sunset date of December 31, 1994.¹¹⁴ This is an important difference

108. *Id.* at 234. According to § 111 of the Copyright Act:

The secondary transmission of a primary transmission embodying a performance or display of a work is not infringement of copyright if . . . the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others

17 U.S.C. § 111(a)(3) (1994).

109. *See, e.g.,* Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc., 777 F.2d 393 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986) (holding that satellite carrier fell within exemption of § 111(a)(3)).

110. Cote, *supra* note 80, at 235.

111. Pub. L. No. 100-667, § 202, 102 Stat. 3949, 3949 (codified as amended at 17 U.S.C. § 119 (1994)).

112. Cote, *supra* note 80, at 235.

113. *Id.*

114. In late 1994, the compulsory license for satellite television was renewed for an additional five years. Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 4(a), 108 Stat. 3477, 3481 (codified at 42 U.S.C. § 119 note (1994) (Termination of Section)). Compulsory licensing of secondary transmissions by cable systems has also been enacted. Pub. L. No. 104-39, § 5(b), 109 Stat. 348 (codified at 17 U.S.C. § 111(c)(1) (1994)).

between the two licensing schemes because unlike the cable compulsory license, the legislators responsible for this licensing regime recognized that at some point in the future this industry would no longer need to be propped up by compulsory licensing and, accordingly, set a date for the scheme to end. Many opponents of the continuance of the cable compulsory license argue that one of the main purposes of the licensing scheme is to allow a new industry to grow and develop through close government supervision.¹¹⁵ "The industry, however, has reached a level of financial stability and public acceptance, and no longer needs this protective support."¹¹⁶ By setting a sunset date for the satellite television compulsory licensing scheme, the SHVA "avoids some of the complaints directed at the cable compulsory license"¹¹⁷

Second, unlike the cable compulsory license, the SHVA was promulgated in two phases. During the first phase, lasting from December of 1988 until December of 1992, royalty fees were set at predetermined rates.¹¹⁸ During the second phase, lasting from December of 1992 until December of 1994, fees were set either by negotiation or binding arbitration.¹¹⁹ By instituting a fee schedule that gradually phased out predetermined royalty fees, legislators responsible for the SHVA were attempting to move the satellite television industry towards greater dialogue between copyright holders and satellite signal carriers with less governmental control over prices and the resulting lower royalty fees associated with government price controls. Although this dialogue will increase transaction costs, it is believed that the groundwork that the parties laid during the first phase will minimize these costs significantly.¹²⁰

115. "The most compelling argument in support of the cable and satellite compulsory licenses has been the need to promote new technology and support infant industries." Cote, *supra* note 80, at 237.

116. *Id.* at 232 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[A], 8-197 (1994)).

117. *Id.* at 235.

118. During phase one, royalty fees were determined in much the same way that royalty fees are determined under the cable compulsory licensing scheme. Compare 17 U.S.C. § 119(b)(1)(B)(i)-(iii) (1988) with 17 U.S.C. § 111(d)(1)(A)-(D) (1994).

119. See 17 U.S.C. § 119(c) (1994).

120. Cote, *supra* note 80, at 237.

B. The Music Industry, Royalty Collection Societies, and Blanket Licensing

Before the advent of the phonograph and the broadcast medium, a musical composer's primary source of income was royalties from sheet music.¹²¹ Once phonographs and broadcasting came into wide use, however, public performance rights, exclusively reserved to the U.S. copyright holder beginning with the 1909 Copyright Act, became extremely important.¹²² As public performance rights became lucrative to the copyright holder, problems quickly emerged. Because public performances were fleeting in nature,¹²³ unauthorized performances were difficult for the copyright holder to discern, let alone prove.¹²⁴ Furthermore, it became difficult for potential licensees to seek out copyright holders individually in order to get their permission to perform their works.¹²⁵ In response to these two interrelated difficulties, a licensing society was formed to serve as a clearinghouse for the facilitation of the licensing, policing, and enforcement of copyright holders' public performance rights.¹²⁶

In the U.S. music industry today, the public performing rights to most copyrighted musical works are licensed to the major performing rights societies¹²⁷ like the American Society of Composers, Authors, and Publishers (ASCAP),¹²⁸ Broadcast Music, Inc. (BMI),¹²⁹ and SESAC, Inc.¹³⁰ These performing

121. Jay M. Fujitani, Comment, *Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation*, 72 CAL. L. REV. 103, 104 (1984).

122. *Id.*

123. A public performance is considered to be fleeting in nature because once it is over, unless recorded, there is no tangible proof that it ever occurred.

124. Fujitani, *supra* note 121, at 105.

125. *Id.*

126. *Id.*

127. *Id.* at 103. Television networks and most local stations have license agreements with all three of the major licensing societies, ASCAP, BMI, and SESAC, Inc. RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 513-14 (6th ed. 1995) (citing Herman Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, in SEVEN COPYRIGHT PROBLEMS ANALYZED 69, 76 (Fred B. Rothman & Co. 1966) (1953)).

128. ASCAP was established in 1914 and unlike the other licensing societies, it is comprised wholly of publishers, authors, and composers. *Id.* at 513 (citing Finkelstein, *supra* note 127, at 75).

129. *Id.* "BMI is a non-profit performing rights organization expressly recog-

rights societies either issue "blanket licenses" for use of the society's entire repertory,¹³¹ or "per-program" licenses.¹³² Once a license is issued, licensees can "perform" the work in any way that they choose.¹³³ Royalties are closely regulated by the federal government and must be "reasonable."¹³⁴ If the licensee believes that the established royalties are "unreasonable," the licensee may take the performing rights society to court for a judicially determined "reasonable royalty."¹³⁵ Po-

nized by the [U.S.] Copyright Act. Individual publishers grant to BMI a non-exclusive right to license public performance rights in their musical compositions." *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1484 (7th Cir. 1991) (citations omitted), *cert. denied*, 504 U.S. 911 (1992). BMI is a corporation owned by, and operated for, the radio broadcast industry. Finkelstein, *supra* note 127, at 75. It was established in response to an expanding radio industry in which its predecessor, ASCAP, was demanding larger and larger royalty payments based upon higher percentages of gross revenues. BROWN & DENICOLA, *supra* note 127, at 515. The radio broadcasting industry refused to deal with ASCAP and established a competing society, BMI, to secure copyrights and also to negotiate with foreign collection societies so that American radio stations could play foreign musical works. *Id.*

130. SESAC, Inc. was formerly known as the Society of European Stage Authors and Composers, but is today referred to by its acronym only. SESAC is a privately owned, profit-making company. BROWN & DENICOLA, *supra* note 127, at 513 (citing Finkelstein, *supra* note 127, at 75).

131. The number of works that a licensee uses is irrelevant with a blanket license. A licensee still pays for use of the entire repertory. Stations that have these blanket licenses "pay a percentage on all their receipts from the sale of 'time on the air.'" *Id.* at 514 (citing Finkelstein, *supra* note 127, at 76).

132. Stations that have per-program licenses pay only on those programs in which the Society's repertory is performed. *Id.* Per-program licensees may still use any work within the society's repertory. Fee percentages for per-program licenses are generally higher than those charged for blanket licenses. Fujitani, *supra* note 121, at 105-06.

133. BROWN & DENICOLA, *supra* note 127, at 514 (citing Finkelstein, *supra* note 127, at 77).

134. ASCAP is regulated to a large extent by a consent decree under the Sherman Antitrust Act. *Id.* at 515. The ASCAP consent decrees can be found in: 1940-43 Trade Cas. (CCH) ¶ 56,104; 1950-51 Trade Cas. (CCH) ¶ 62,595; 1960 Trade Cas. ¶ 69,612.

135. The principle of the "reasonable" royalty was established to protect licensees from any exorbitant demands of ASCAP, especially in light of the fact that BMI and ASCAP held a virtual monopoly over the public performing rights in the music industry. BROWN & DENICOLA, *supra* note 127, at 516-17 (discussing *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948)). The collection society then has the burden of proving to the court that the rate is, in fact, "reasonable." *Id.* at 522 (citing *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968)). If the court agrees with the licensee that the rate is unreasonable, it has the authority to fix its own fee. *Id.*

tential licensees have the option of dealing individually with the copyright holder or collectively with the royalty collection society.¹³⁶ However, in the case of entities like radio stations and television networks, it is wholly impractical and nearly impossible for negotiations to occur individually between each copyright holder and the licensees.¹³⁷ The volume of works used by these licensees is enormous. Without these royalty collection societies, transaction costs would be prohibitive.¹³⁸

Most fees charged by these societies are based upon a percentage of revenues, although some licensees are charged a flat fee.¹³⁹ ASCAP fees become part of a common fund which is divided equally among publishers' and writers' member groups.¹⁴⁰ These groups then either distribute the fees based upon the number of performances of a member's works,¹⁴¹ or based upon a complex "spreading of payments" formula.¹⁴² BMI does not offer remuneration to its copyright holders on anything but a current basis.¹⁴³ The performing rights societies monitor their licensees in order to discern the number of total public performances so that they can accordingly remunerate their copyright holders. This is accomplished by taping broadcasts, examining station logs, and checking programs.¹⁴⁴ However, the societies cannot monitor all of their licensees' performances, thus forcing the societies to take a representative sampling in order to determine national levels. The societ-

136. *Id.* at 514 (citing Finkelstein, *supra* note 127, at 76).

137. *Id.*

138. "The need for bulk licensing of performing rights is nowhere more evident than in the radio and television field where program directors require the greatest latitude in building their shows while protecting the station, its sponsors and artists from claims in infringement." *Id.* (quoting Finkelstein, *supra* note 127, at 76).

139. *Id.*

140. *Id.*

141. The number of performances of a member's work is calculated on the basis of periodic objective surveys. *Id.* at 517-18. A 1950 judgment against ASCAP eliminated the previous subjective standards used to distribute royalties. *Id.* at 517.

142. *Id.* at 518-19. This payment spreading formula is a complex system of points, classes, and rules of administration which can protect the copyright holder from rather large fluctuations in income from year to year, and also serves as a way of possibly deferring income to leaner years by looking at factors other than current performances (i.e., "sustained performances"). *See id.*

143. *Id.* at 520.

144. Fujitani, *supra* note 121, at 106 n.18 (citing S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 163 (rev. ed. 1977)).

ies also police non-licensees within the industry in order to ensure that these non-licensees are not making unauthorized uses of their copyrighted material.¹⁴⁵

European nations also have their own copyright societies for the licensing of public performance rights. Copyright societies have evolved throughout Europe in different ways.¹⁴⁶ In some countries, many collection societies exist, but each society deals with its own limited copyright field.¹⁴⁷ In other countries, there are just a few societies that deal with numerous copyright fields.¹⁴⁸ Even in countries where many societies exist, however, because they each deal with a limited area, the individual societies "have a de facto monopoly in the fields looked after by them, so that to this extent competitive situations do not arise."¹⁴⁹ In France, the Societe des Auteurs, Compositeurs, et Editeurs de Musique (SACEM) is the clearinghouse for performing rights.¹⁵⁰ In Great Britain, blanket licenses authorizing public performances of copyrighted musical works are issued by the Performing Rights Society (PRS).¹⁵¹ In Germany, music performance rights are licensed by Gesellschaft für musikalische Aufführungs (GEMA).¹⁵² GEMA is required by German law to license its copyright holders' performance rights upon equitable terms to any potential licensee upon the licensee's request, to engage in blanket contracts on equitable terms with associations of users, and to establish scales of fees that allow for certain special interests.¹⁵³ While GEMA is permitted to issue blanket licenses of all of its members' works, the German government prohibits GEMA from preventing its members from licensing their works with other licensing societies (foreign or domestic). GEMA is also prohibited from requiring that its members license all categories of rights to GEMA.¹⁵⁴ The U.S. societies have reciprocal agreements with many of these licensing societies,

145. *Id.*

146. ADOLPH DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 213 (1978).

147. *Id.*

148. *Id.*

149. *Id.*

150. William Grimes, *Traveling from France to Harlem to Study Rap Culture at its Roots*, N.Y. TIMES, Nov. 18, 1991, at C11, C12; DIETZ, *supra* note 146, at 224.

151. Fujitani, *supra* note 121, at 129-30.

152. DIETZ, *supra* note 146, at 222.

153. *Id.* at 220.

154. *See* Fujitani, *supra* note 121, at 133.

including those in France, England, and Germany.¹⁵⁵

IV. THE INTERNET COMPARED TO CABLE TELEVISION, SATELLITE TELEVISION, AND THE MUSIC INDUSTRY

A. The Similarities and Differences Between the Cable and Satellite Television Industries and the Internet, and an Evaluation of the Feasibility of the Cable and Satellite Television Model for the Internet

There are many similarities among cable television, satellite television, and the Internet. Legislators contemplating regulation of the Internet should examine how these other two industries have effectively dealt with many of the same problems plaguing the Internet. The most important similarity between the cable and satellite television industries and the Internet is that all three media share potentially huge transaction costs that would cripple all three industries if they were required to negotiate agreements individually with single copyright holders. In this respect, a compulsory licensing scheme that eliminated the need for individual negotiations and had pre-set royalty fees would benefit the Internet's viability as a medium just as it has benefited the cable and satellite television industries.¹⁵⁶

The need for an Internet regulatory model that limits transaction costs as much as possible is heightened by the fact that the Internet carries a much more diverse array of material than either the cable or satellite television industries. The Internet can carry any type of copyrighted material including, but certainly not limited to, computer programs, books, music, movies, games, works of art, photographs, and newsletters. In contrast, cable and satellite systems carry much less varied information. For instance, it is both unlikely and impractical for the complete text of a book to be beamed by satellite technology or cable signals. The fact the Internet carries such a diverse array of copyrighted materials means that it faces even higher transaction costs than those media that are not so diverse, and further illustrates the need for a regulatory model

155. Thomas J. Cryan et al., *Radio for the 1990s: Legal Strategies in an Emerging Global Marketplace*, 22 U. MIAMI INTER-AM. L. REV. 377, 402 (1991).

156. For a more detailed description of this type of regulation, see discussion *supra* Part III.A.

that limits transaction costs as much as possible.

A further similarity among the three media is that anti-competitive problems, comparable to those faced in the player piano industry,¹⁵⁷ could plague the Internet BBS system if copyright holders could "hold out for the highest bidder" and demand outrageous royalty payments.¹⁵⁸ Not only would this increase transaction costs dramatically, it would ensure that only a few of the large commercial service providers like CompuServe, Prodigy, and America Online would be able to survive copyright bidding wars. These services could then effectively establish a monopoly on the industry and charge their subscribers exorbitant prices for access to the Internet, since there would be only a few service providers. If the number of Internet users continues to grow as expected,¹⁵⁹ almost unimaginable sums of money would be at stake. A monopoly could also serve as an incentive for renegade BBS's not to seek permission and just upload copyrighted material onto their

157. See *supra* notes 86-88 and accompanying text.

158. This scenario is similar to what has happened in other industries. For example, sports bar owners, although willing to pay for the right to broadcast copyrighted sports broadcasts from professional sports leagues such as Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA), could not afford the exorbitant royalty fees demanded by the leagues. Cote, *supra* note 80, at 219-20. These huge fees are due in large part to the sporting event's marketplace, which is comprised of television networks worth millions of dollars, and television superstations like ESPN, WTBS, and WGN that can out-maneuver and out-resource even the most lucrative of restaurant chains. See, e.g., Leonard Shapiro, *Owners Cash In, Carry NFL to New Home*, WASH. POST, Dec. 19, 1993, at D9 (describing NFL-Fox deal worth \$1.6 billion dollars); Mark Maske, *Numbers Translate to Losses: Each Day of Strike Costs Both Sides*, WASH. POST, Aug. 21, 1994, at D1 (reporting that because of a player strike, MLB lost \$140 million dollars in fees for broadcasting); *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 669 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992) (discussing the amount paid to the NBA for television coverage); Jerome Holtzman, *Vincent Tries Some Tenderness, Seeks Middle Ground in Superstation Dilemma*, CHI. TRIB., June 21, 1992, § 3, at 5 (reporting on Major League Baseball's multi-million dollar contracts with television superstations). Congress, in turn, proposed the compulsory license as a way of balancing the interests of copyright owners, sports bar owners, and viewers. See Right to View Professional Sports Act of 1993, H.R. 1988, 103d Cong., 1st Sess. (1993). This bill never made it out of Committee, however. A virtually identical bill was proposed in 1995, but this version never made it out of Committee either. See Right to View Professional Sports Act of 1995, H.R. 935, 104th Cong., 1st Sess. (1995).

159. Major growth in users is expected both internationally as well as nationally. In 1994, it was estimated that the Internet had approximately 25 million users in 135 countries, and that this number was growing at a rate of 10% to 15% a month. Lewis, *supra* note 3, § 3, at 6.

services because they could not afford the royalties demanded. If the goal is to stop, or at least curb, copyright infringement along the Internet, a regulatory scheme which allowed bidding wars would not be effective. On the other hand, a system like the compulsory licensing system used in the cable and satellite television industries would prevent bidding wars, would keep prices from rising past their fair market value, and would ensure that the public was continually able to access creative materials.

Another similarity among the three media is that all three present the potential for widespread and unauthorized reception. In fact, unauthorized reception is considered to be one of the largest problems facing both the satellite and cable television industries today. Despite identification of the problem, however, neither legislators nor industry leaders have been able to deal effectively with the problem. Notwithstanding national laws designed to prevent piracy and industry attempts at signal scrambling and coding, unlawful reception of cable signals continues to persist. A British article reported in 1988 that "[p]iracy of satellite television programmes is blatant and could reach epidemic proportions . . . [,] costing film studios vast sums of money in lost royalties and depriving broadcasters of subscription revenue."¹⁶⁰ The continued prevalence of this problem stems from the fact that despite the laws, enforcement is difficult because it is hard to detect unauthorized signal reception at the receiving end.¹⁶¹ In addition, every time signal providers find a new way to encode or scramble their signals, new devices are developed that can decode and descramble the industry's efforts.¹⁶²

On the issue of unauthorized reception, regulating the Internet like the cable or satellite television industries would be even more ineffective than it has proven to be in either of the two other industries; it is even harder to detect unauthorized reception of copyrighted material along the Internet than it is to detect unauthorized signal reception in either the cable or satellite television industries. While people who illegally intercept cable signals do not put a sign on the top of their

160. UK: *BSB Criticises Satellite Pirates in Report*, MARKETING WK., Sept. 8, 1988, at 15, available in LEXIS, Nexis Library, Arcnws File.

161. *Id.*

162. *Id.*

house that tells the world they are infringing, satellite dishes and cable wires can be visible outside of the home, and without powerful and often extremely expensive equipment,¹⁶³ people cannot steal cable signals from halfway across the world as they can relatively inexpensively tap into unauthorized databases containing copyrighted material that are physically located even further away. Furthermore, encryption devices and coding methods are no longer widely used on computer software.¹⁶⁴ A regulatory scheme attempting to draw on the experiences of both the cable and satellite television industries must consider their lack of success in dealing with this unauthorized reception problem, and also must consider the added dilemmas presented by the Internet's "covert" transmission.¹⁶⁵

Another similarity shared by cable television, satellite television, and the Internet is the fact that all three media are able to transcend national boundaries. Just as Internet messages can be sent from Finland to France and on to England in a matter of seconds, so too can broadcast signals. Both cable television and satellite television are governed nationally by a central authority in each respective country, while the Internet today has no central overseer whatsoever. While this Note argues that a central authority is necessary to regulate the Internet, national regulation is not the answer. National regulation creates a basis for additional transaction costs¹⁶⁶ and would be ineffectual for the Internet because it is often impossible to trace the route of Internet-disseminated materials, thus making choice-of-law issues virtually impossible to determine.¹⁶⁷ This Note argues that the Internet should be governed by an international, rather than a national, regulatory scheme.

163. Although the equipment is still not accessible to the average person, the costs are decreasing.

164. For the reasons behind the lack of encryption devices on computer software, see *supra* notes 54-56 and accompanying text.

165. For a proposal that attempts to grapple with the cable and satellite television industries' lack of success in dealing with this issue, see *infra* Part V.

166. National regulation adds transaction costs because the signal carrier has to ensure that he has permission to broadcast the signals into every country where his signal will be received. See *generally Competition: UK-Irish Broadcasting Agreements Set to be Cleared*, EUR. REPORT, Apr. 21, 1993, available in Westlaw, Allnewsplus Database.

167. For a full discussion of choice-of-law issues plaguing the Internet, see *supra* notes 27-36 and accompanying text.

An important difference, which could prove to be prohibitive if nations are unwilling to formulate copyright laws whose definitions truly reflect the realities of the Internet, is that cable television programs can be "used" under current copyright definitions while Internet materials cannot. This means that cable programs can be licensed and Internet materials would not be eligible for licensing unless the definition of "use" can be changed.¹⁶⁸ Although there still exists a risk that users may become copiers by videotaping a program for more than a transitory period of time,¹⁶⁹ this is not an issue with which the cable television or satellite systems or their royalty remuneration schemes must concern themselves.

B. The Similarities and Differences Between the Music Industry and the Internet and an Evaluation of the Feasibility of the Music Industry Model of Regulation for the Internet

In addition to examining the cable television and satellite television industries as examples of copyright regulation models, legislators should also examine the similarities between the music industry and the Internet. One important similarity between the music industry model and the Internet is the problem created by prohibitive transaction costs in both media.¹⁷⁰ In the music industry, copyright collection societies formed early in the twentieth century to make it easier for potential licensees to deal with copyright holders. Instead of negotiating individually with each right holder, a licensee merely had to contact one of two copyright collection societies and pay the royalty. The Internet would benefit significantly from the idea of the royalty collection system because it would eliminate the need for BBS's to deal with individual copyright holders.

In order for the music industry to be used as a model for Internet regulation, however, a few important operational differences between the music industry and the Internet must

168. For a full discussion of the term "use," see *supra* notes 59-63 and accompanying text.

169. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that mere time-shifting does not constitute copyright infringement as it is considered only transitory).

170. This similarity is also shared by the cable and satellite television industries. See discussion *supra* Part III.A.1-2.

be acknowledged. The Internet has the potential to carry any type of copyrighted material in its digitized form. On the other hand, the music industry only has to regulate the non-dramatic performing rights in musical compositions, yet the system is still racked by serious collection problems. Furthermore, individual performing rights societies exist in every nation in the music industry. This aspect of the music industry model would not be feasible for the Internet. There would be too many societies with which potential licensees would have to deal in the various countries. The royalty collection society system in the music industry has enough difficulty handling national performing rights¹⁷¹ and foreign reciprocal collection agreements. These problems would be magnified at least tenfold in a system where each nation had its own collection society for every possible type of copyrightable medium.¹⁷² Transaction costs, although significantly less than they would be if it were necessary to negotiate individually with copyright holders, would still be prohibitive. Collection would be both inefficient and ineffective system-wide. In order for a royalty collection society system to work effectively for the global Internet, there must be fewer societies and they must be global in nature.

Another feature of the music industry model that could prove beneficial to the Internet model is the fact that royalty fees in the music industry are not statutorily set and are not paid into a royalty tribunal. The fees are set by the collecting societies at "reasonable rates," subject to judicial review by the courts, and the collecting societies actually collect the money from the licensees. This type of system could work well with a private, for-profit international regulatory regime that is not run by a governmental organization.

A significant difference between the music industry and the Internet must be noted. In the music industry, when a

171. Compliance by establishments open to the public with the licensing system in the United States for performing rights in music has been described as "grudging at best." Litman, *supra* note 10, at 49.

172. For example, "[e]ach year, an unspecified amount of foreign royalties attributable to American songs are routinely detained for months or years in foreign coffers due to improper crediting, nonreciprocal laws, negligence, and incompetence." William I. Hochberg, *Fishing in the Black Box: Developments in International Music Royalty Collecting*, 26 BEVERLY HILLS B. ASS'N J. 114 (1992). Indeed, "a surprising amount of royalty income never makes it stateside, due not only to insidious piracy but also to insidious bureaucracy." *Id.*

licensed song is played with permission of the copyright holder, the song is performed "in public." This means that the performance is out in the open and capable of being heard by more people than just the permission holder. Performing Rights Societies in the music industry can attempt to monitor "public performances" of copyrighted material through random sampling and then estimate national levels so that they can remunerate their copyright holders accordingly.¹⁷³ However, it would be close to impossible to try and monitor actual or even approximate "use" of copyrighted material on the Internet. It is thus not feasible for Internet monitors to attempt to judge uploading and downloading of copyrighted material based upon the music industry's random sampling or any other such mechanism. Instead, unlike the music industry model, a method of remuneration that is not contingent upon actual "use" must be established for the Internet.

V. THE PROPOSED REGIME

This section proposes how a hybrid¹⁷⁴ system could work in light of the analysis of the similarities and differences among cable television, satellite television, and the Internet. On-line networks will negotiate with international copyright collection societies for the right to "use" copyrighted work as part of a licensing agreement. This negotiation will reduce the transaction costs of national collection societies acting as agents for foreign societies abroad, collecting royalties for those societies, and then ensuring that the foreign society gets paid the correct amount in a timely fashion. The BBS's will pay royalties to these international copyright societies based upon the number of subscribers that they have on their on-line system, and not based upon the number who actually download the material.¹⁷⁵ Network subscribers can *transitorily* place

173. For a discussion of performing rights societies, see *supra* Part III.B.

174. This model is considered "hybrid" because it combines elements from both the compulsory licensing cable and satellite television models and the music industry model.

175. This scheme would work well because we no longer have to try and monitor who is downloading what and how many times a work has been downloaded from a network. Since every person who accesses the Internet does so through some type of network, all users could theoretically be accounted for under this type of regime. Of course, this scheme would not prevent tiny, unknown networks from escaping detection and not paying royalties based upon the number of sub-

the material in the RAM of their computers,¹⁷⁶ but in the absence of a separate agreement, they would not be able to print, distribute, lend, or transfer the material without violating the holder's copyright. Since everyone must access the Internet through some type of bulletin board subscription agreement, theoretically, no Internet user would be unaccounted for in this scheme and there would be a marked shift in focus from the information receivers to the information providers.¹⁷⁷ Every BBS would be responsible for paying royalty fees to copyright collection societies based upon its number of subscribers and the type of licensing agreement that they established with the collection societies.¹⁷⁸ "Blanket licenses" would be given based upon a percentage of gross receipts and per-work licenses would be granted at a predetermined fair market value, depending upon public demand. These collection societies would also play the role of policemen.¹⁷⁹ They would employ people

scribers that they have, nor does it ensure that every network pays for every copyrighted work that it has on its system, but these are operational problems that should not stop the development of the regime. Besides, if the industry were to make it profitable for people to be "Internet Policers" and make their living logging on to the Internet, and to ensure that all works disseminated on a network were properly licensed and paid for (like the watchdogs at BMI and ASCAP), these types of operational problems would not pose great threats to the system.

176. This licensing model does not deal with the ability of an end-user to print out and/or distribute the material that is accessed through the Internet.

177. This scheme would theoretically eliminate the problem of unauthorized reception of copyrighted material at the receiving end that plagues both the cable and satellite television industries. See *supra* text accompanying notes 95-96, 106-10. The problem would theoretically be eliminated in regard to the receivers (downloaders) because the only copyrighted material available to them would be material that had been licensed to the BBS. This scheme would not prevent Internet users from uploading copyrighted material that had not been previously licensed to their BBS, but the "Internet Policers," see *supra* note 175, would monitor this type of activity, and the BBS itself would take steps to prevent this from happening because it would face stiff fines if it were found to be in violation of the regulations.

178. This includes corporate networks, even though corporate employees do not pay a subscriber's fee to the corporation. For corporate networks, corporations would pay some predetermined percentage of gross profits.

179. This policing could work as it does with the Software Publishers Association (SPA). The SPA is a group founded by numerous publishers of software whose intent is to fight software piracy. The SPA polices BBS's to see if copyrighted software is being distributed. SPA officials also warn SYSOPS that they will be monitoring their BBS's, and give them the chance to remove any and all software that they have not been given permission to distribute. Violators are required to remove all illegal software and pay a fine equal to the purchase price of that software. If the violators comply with the SPA requirements, they are spared the

to explore the numerous BBS's and seek out instances of infringement. This will be expensive and time-consuming work, but will be especially worthwhile given the large sums of money at stake and the fact that the collection societies are profiting from this venture. The monitoring would differ from BMI or ASCAP's monitoring because the Internet monitors would not care how many subscribers were downloading particular copyrighted works. The actual number of downloads is irrelevant according to this model. The monitors would be searching only for instances in which a BBS had not paid a licensing fee, yet had uploaded copyrighted works or was allowing its subscribers to upload copyrighted materials. Although this type of endeavor would not be completely effective because of the vastness of the Internet and the numerous other difficulties associated with the medium,¹⁸⁰ it would reduce substantially the amount of infringement that occurs today.

Collection societies would work, in theory, on the basis of a pseudo-compulsory license,¹⁸¹ but the license would not be a government-instituted compulsory license,¹⁸² nor would it have statutorily set royalty fees that were below market value like the cable television industry. This model envisions private,

inconvenience of a lawsuit. If not, violators can expect swift legal action against them. Janet Mason, *Crackdown on Software Pirates: Industry Watchdog Renew Efforts to Curb Illegal Copying*, COMPUTERWORLD, Feb. 5, 1990, at 107, 111, 113, 115. It has been suggested that the software industry employ "bounty hunters" recruited from the ranks of former pirates to seek out and turn in their former cohorts, and receive remuneration based upon the number of convictions of software pirating groups and/or individuals or the damages recovered. See Bauman, *supra* note 68, at A18.

180. "No one is naive enough to believe that copyright infringement can be eradicated from the Internet." Rich, *supra* note 30, at 10 (quoting Ed Morin, head of Novell's anti-piracy team).

181. I say "in theory" because it would only be a compulsory license in that neither the societies nor the copyright holders would have the right to refuse to grant a license to a potential licensee.

182. The compulsory licenses cannot be statutorily fixed by governments because according to the Berne Convention:

It shall be a matter for legislation in the countries of the Union to determine the conditions under which [exclusive] rights may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Berne Convention, *supra* note 15, art. 11bis(2), S. TREATY DOC. NO. 27, at 8, 828 U.N.T.S. at 243.

for-profit corporations operating these international collection societies. Copyright holders in all media around the world would turn their works over to these private international copyright collection societies. This model contemplates only a few societies in each medium to keep transaction costs as low as possible.¹⁸³ The collection societies would then "license" the "use" of these materials on the Internet to networks and BBS's. For networks and BBS's, the system would be "convenient, affordable, and democratic."¹⁸⁴ From the right holder's perspective, the system of compensation would be efficient, include some veto power, and permit the maximum revenue flow.¹⁸⁵

The best way to effectuate this system would be for nations around the world to execute an international Internet copyright treaty¹⁸⁶ that would provide the foundation for the international licensing regime and garner the consent and compliance of the participating nations.¹⁸⁷ Under the auspices of this treaty, a multi-function administrative agency¹⁸⁸ must be organized to preside over the operation. The regime overseer would be comprised of market insiders and experts from around the world, who would conduct extensive research in order to determine the correct "fair market values"¹⁸⁹ for the predetermined royalty rates. Disputes between licensees and collection societies or copyright holders and licensees would be brought before the regime overseer for resolution. A royalty

183. One society in each medium, although it certainly would cut down on transaction costs, would give rise to cries of monopolies and antitrust violations. Competition among a few collection societies will drive down licensing fees, even when collectives issue blanket licenses. See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 383 (1992).

184. Raymond L. Ocampo, Jr. & David R. Schellhase, *The Multimedia Marketplace: A Proposal for Handling Rights in the Digital Age*, 14 CAL. LAW. 70, 72 (1994).

185. *Id.*

186. Instead of trying to institute this regime through an already-existing treaty (i.e., the Berne Convention or the Universal Copyright Convention), it is necessary that a new treaty be used. A treaty originally designed to govern works in print will not be effective for this new technology. For the reason behind this, see *supra* notes 18-19 and accompanying text.

187. Garnering the consent and compliance of the participating nations is essential if this model is to succeed.

188. This administrative agency (or "regime overseer") would also serve as a review/disciplinary board.

189. A portion of the "fair market value" is the fee that royalty collection societies are entitled to charge under this regime.

collection society operating in violation of the treaty provisions¹⁹⁰ would be subject to disciplinary measures.¹⁹¹ These disciplinary measures would be determined by the regime overseer. Copyright infringers¹⁹² would also be subject to disciplinary proceedings promulgated under the authority of the regime overseer if they were caught violating the copyright regime.

VI. CONCLUSION

Although this model of regulation, combining individual aspects of the cable television, the satellite television, and the music industry models of regulation will not put an end to copyright infringement on the Internet, it will at least provide a viable model and a workable balance between providing for the economic rights of copyright holders and decreasing the prohibitive transaction costs that would be involved if on-line networks were forced to negotiate individually with copyright owners. This type of regulation may prevent some individual copyright holders from negotiating large royalty contracts with potential licensees, but at least the system will ensure that copyright holders receive some compensation for their works. As the Internet operates today, those same individual copyright holders may get nothing while their works are widely disseminated along the Internet. This system will substantially reduce the amount of copyright infringement occurring under the current regime, and it will also uphold one of the main purposes of copyright law, which is to ensure that society as a whole continues to have access to a wide variety of creative endeavors at a relatively low cost.¹⁹³

Barbara Cohen

190. A collection society could violate the regime by refusing to deal with a potential licensee, charging rates above the pre-set "fair market value rates," etc.

191. Examples of disciplinary measures that could be imposed would be fines, injunctions, or a loss of permission to operate within the regime.

192. Under this model, copyright infringers are those BBS's who either upload copyrighted works onto their networks without first obtaining a license from one of the international licensing societies, or BBS's who allow any of their subscribers to upload such material.

193. See *supra* notes 13-16 and accompanying text.

