ASSOCIATION OF CORPORATE COUNSEL

TITLE: **Copyright Issues for In-house Counsel**

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PRESENTED BY: **ACC's Intellectual Property Law Committee**

SPONSORED BY: **Kilpatrick Stockton, LLP**

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Operator: Welcome to this ACC Webcast.

Steve, please go ahead.

Steven Rosenthal: Thank you, Sandy.

Hello, everyone. This is Steven Rosenthal. Welcome to the ACC IP Committee's second Webcast of 2008. If you missed our April 23rd Webcast on updates in U.S. patent case law, you can listen to a recording of it on the ACC's virtual library at acc.com/vl.

I'd also like to take a quick moment to thank our sponsor, Kilpatrick Stockton and Judy Powell.

Today we have an expert panel highlighting some key copyright issues for in-house counsel. This is not intended to be an interview of copyright law. Rather, the discussion will have an emphasis on the use of copyrighted text materials and music for business purposes.

First, we're very fortunate to have Joseph Beck, a partner with Kilpatrick Stockton. Among numerous other credentials, Joe is an Adjunct Professor of Intellectual Property at Emory University and a former trustee of the Copyright Society of the U.S.A.

He has litigated numerous cases and has lectured extensively throughout the United States and internationally. He is a graduate of Emory College and Harvard Law School.

Joe will take us through the critical Legg Mason case.

Next, we have Frederic Haber, Vice President and General Counsel of Copyright Clearance Center, Inc. Prior to joining CCC, Fred handled intellectual property and international trade issues for Macy's department stores and was previously associated with Wild Gaucho.

Fred received his bachelor's, master's and law degrees from Harvard.

Fred will discuss reproduction rights organizations, with a focus on Copyright Clearance Center, including updates on their services.

Third, we have Sam Mosenkis, Vice President of Legal Affairs at ASCAP, the American Society of Composers, Authors and Publishers. Prior to joining ASCAP, Sam was associated with White & Case and clerked for the Honorable James Halpern of the U.S. Tax Court.

Sam has a B.A. magna cum laude from Yeshiva University and a J.D. magna cum laude from the Benjamin N. Cardozo School of Law.

Sam will discuss music licensing for businesses.

We will try to save a good amount of time for questions, so please do submit any questions that you have during the course of the speakers' presentations, and we'll try to respond to them at the end.

To submit a question, type your question in the box at the lower left corner of your screen, and clock on the Send button.

With that introduction, I now turn things over to Joe Beck.

Joe?

Joseph Beck: Thank you, Steve.

I'm going to talk about something that I'm afraid a great many of us have a problem with, and that is misuse of copyrighted materials that we receive online without always paying a lot of attention to the terms and conditions of that receipt.

Most companies today have some sort of copyright policy. Of course, the better policy is always the written one, but few companies would knowingly permit their colleagues and their employees, officers to infringe copyright. However, it does happen.

What I'm going to do is take you through a case that illustrates this as well as anything that I've seen. It's a bit scary, frankly. I've already begun defending two cases such as Legg Mason.

I was not in Legg Mason, but this is something that, if you wanted to go into plaintiff's law today, it would probably be the next best thing.

The Copyright Clearance Center – and you're going to hear more about them in a few minutes – they have taken a survey, and they believe, and I'm not surprised at all at the number, that about 91% of employees receive information on the Internet. After all, who doesn't?

A lot of the information that people receive is in the form of newsletters. Some of these are daily newsletters.

And often when employees look at those newsletters, they don't particularly pay any attention to the terms and conditions, and if it's something that they would like to pass on to a prospect or a colleague down the hall or merely to print and take home, they do so without regard to the possible liability.

I can tell you that some of the best business publishers today, people who publish these daily newsletters that we all rely on, use tracking software, and they can tell when this happens. And they can monitor you for a period of time and then let you know that what you've done is illegal.

The main point I want to make now is that the fact that you have the policy doesn't mean that you're protected. In the Lowry's Legg Mason case, the financial services company, Legg Mason, had a written policy. And it said do not infringe.

The court entered summary judgment of infringement, where copies were – these are not pirated copies, you understand; these are copies that people had subscriptions to.

So if you specialize in labor law, you're likely reading a daily, or certainly a weekly, newsletter to keep up, and you're getting it online. And if you violate the terms of that by sending it to a colleague down the law, that's an infringement. And each day you do that is a separate infringement.

Let me go over the holdings in brief. And by the way, Steve did not mention, but I think intended to, that if we have some time at the end, I will also talk a little about the Google book search cases that I'm defending in New York. But that's off topic – just something to put under the question time.

Vicarious liability of employer. To some it might be a surprise to know that the employer has pretty much per se liability for infringements by the employee. The court said the fact that the defendant's employee has infringed in violation of the policy only bears on the amount of damages the defendant's going to have to pay.

Here, the jury was not very impressed with the policy, even though it was written, because there was not adherence to it, and there was not sufficient monitoring and policing of it.

The equitable estoppel defense. The court said forget about it. Follow-ups and inaction could mislead, but that's not going to happen here. And in most copyright cases, it's frankly not.

As long as the company that is supplying the information – the newsletter – puts a copyright notice on his or her newsletter, they're going to probably be all right on the equitable estoppel defense.

I've tried to bring that defense in other cases. It's tough.

Fair use. Again, forget about it. Defendant did not even argue it, and the court said nor would such an argument prevail, and here's why.

Of the four fair use factors, the fourth is generally the most important – the effect of the copyright infringement on the market, or potential market, for the copyrighted work.

Here, for a newsletter organization or business, every time somebody infringes in violation of the terms and the license, that's a loss fail. And so the market effect is direct.

Moreover, there is language in the Copyright Act, that people my age at least think of as the new act, the 1978 Copyright Act, and in the House report there is language which was put in there by the newsletter publishers.

And it basically says these are small organizations, they have small subscriptions. It's vital in the public interest that they survive, and therefore, fair use is really going to be difficult to prove.

Bottom line; if you're using these kinds of materials, fair use is going to be very difficult.

I often here clients say, "Well, this is not a commercial use. This is training." It's not going to work.

Use by a corporation of copyrighted material to train its employees or to incur good will is going to be treated as a commercial use, so that even if you're using copyrighted materials as a corporation for a charitable cause, the argument is going to be that that use was to benefit the company's trademark to benefit its image in the community – in other words, a commercial use and not a fair use.

Implied license. The court said there's no way that a fact finder could conclude that the plaintiff and defendant mutually assented to the defendant's copying. And again, you can understand why, when you read the license and see the copyright warnings.

Disgorgement of profits. Before we get into that in detail, let me remind you there are three kinds of damages in copyright law.

I think Congress did that, because there's a great interest in protecting copyrightable work in the United States. And, of course, the people who own the content are very effective on Capitol Hill in getting that interest vindicated through award of damages.

First, you can get the actual damages suffered by the copyright owner. That would just be a license fee. Not too many people go for that. It's something that is there.

Let me read you the sentence that leads to disgorgement. "The copyright owner is entitled" – this is, for those who want to look it up, 17 USC Section 504B – "to recover the actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."

And establishing the infringer's profits, "the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

And I'm defending two cases now involving disgorgement. It's a tough area. The law is not very well developed, probably because more or often than not, cases settle, or they're decided on summary judgment, and the money is paid privately under a confidentiality clause.

So what I think this means is this. The plaintiffs can get your revenue, which they obviously can do in discovery with a document request and deposition.

They are supposed to get revenue attributable to the infringement, but the statute is vague on that. It talks about gross revenue, and it's a pretty low burden for the plaintiff. And that much is clear in the law. It's a low burden.

The defendant then has to prove his or her expenses and deductions. And the difficult thing about that is most of us don't want to show the world what our expenses are. We don't want to show our margins. So it's a very heavy hammer for a plaintiff to wield to try to limit that.

Here, the court flirted with the idea of disgorgement. Had the plaintiff's expert not caved on deposition and admitted, quote, "He could not say whether a causal link connected the infringement to defendant's profits," that might have been for a jury to decide. And Lord knows what they would have said.

The court said it seems that some of the defendant's profits should relate, but they recognized that when somebody buys or sells a financial instrument, there are lots of variable things that go into that other than, perhaps, that Legg Mason newsletter.

Nonetheless, a scary potential consequence is disgorgement.

Statutory damages are the third remedy. And statutory damages are useful in cases – for example, I represent BMI. They license music, and we're going to hear from ASCAP, and I'm sure Sam will have the same experience.

It would be very hard to prove how much a bartender or a bar owner made playing music. He's going to claim he made all his money selling beer and hamburgers.

Statutory damages are a nice, nifty way to deal with that – up to $150,000 per infringed work. Think about a daily newsletter. Each is a separate work. The statute of limitations is three years, and so you can in effect run into a multimillion dollar liability without even getting into disgorgement, much less a license fee, simply by going for a statutory damage fee.

The typical amount is from a minimum of $750 per work to $30,000. However, as you see on the screen, where willfulness can be shown, the court will be allowed to go as high as $150,000.

When I began practicing copyright law, statutory damages was considered an equitable remedy for a judge. Today, thanks to the Supreme Court, it is a jury issue, and so you will get the pleasure of a jury verdict, if you have that problem.

What to do about it? We'll deal with some of that, perhaps, in questions. I think a CCC license is a good beginning. It's not the end of the rope. You need to have a corporate policy, and it needs to be reinforced over and over.

It's a tough area, one that at some point Congress may step in and try to deal with in some sort of compulsory license from, but for now you've got big time exposure for doing this.

And I forget to mention, but should, the Copyright Act also provides for an award of attorneys' fees for the prevailing party. These cases are shooting fish in a barrel. They're easy to prove. It's just a matter of money. So attorneys' fees are a likely additional burden that you'll have.

All right. I think that covers my material, so I'll turn it over to Fred.

Frederic Haber: Thank you, Joe.

CCC – a lot of you who are on this call I know you know us, and we know you, although I may not have the pleasure of knowing you personally – we were designed to in fact address exactly the kinds of issues that Joe has been talking about.

Reproduction rights organizations is a name that was – I don't know who decided on that, but that's the name given to organizations like CCC, of which there are more than 50 around the world.

We're members of an organization of RROs, that we call the International Federation of RROs. There's their Web site up on the screen. And they exist in basically every developed capitalist country, Western countries. Some countries have more than one, like Canada and the U.K. and Japan. Most only have one.

And most of them are focused on licensing photocopying, mostly under statutory licenses, a statutory license meaning that the government has intervened in the situation that Joe is describing, which is a lot of rights holders on one side, and a lot of users on the other, having difficulty figuring out how to transfer rights between them.

And the license simply says all works are in license. You are required to pay a fee, and an RRO will stand by to collect the fee and distributed it to its participating rights holders.

That still focuses on photocopying pretty much throughout the world. Digital is just starting – intranet uses, email uses – and that's one way in which CCC is quite different from the rest.

While we, too, started with photocopying, and continue to license photocopying, we do now license – as many of you know, who have our licenses – both intranet use and email use, allowing your employees to share information as necessary in order to do the jobs that they need to do.

CCC, unlike these other organizations that rely on statutory licenses, have gone out and we today have thousands and thousands of contracts with rights holders that have authorized us to put their works into our services.

And we now license thousands of businesses – including many of you, I'm sure – as well as academic institutions and government agencies, under standardized terms that allow you to do widespread sharing of information within your organizations.

Our point – and I think Joe's discussion of the Legg Mason case – is an indication of what the mission needs to be, and that is to try to help you do the right thing.

We appreciate that you guys, as members of the IT section, are interested in not only protecting your company's own rights, but also you're willing to respect the rights of others in exchange. And CCC licenses are intended to help you do that.

We offer efficient systems. I'll discus some of them, many of which you probably know, some of which you may not know. We also offer copyright education, and we try to do distributions as equitably as we can among our participating rights holders.

What we've also done over the years, unlike a lot of our counterpart RROs in other countries, is that we've tried very hard to respond to the needs of users. As your needs have changed, our licenses have changed.

The license for which we're probably best known in the business environment are what we now call our annual copyright licenses. What they provide is unlimited internal use of content from any of the works in our database.

We have two basic licenses that look almost identical. They just cover different geographies. One is our traditional U.S. license, and one is what we call our multinational license.

They each cover photocopied internal email, Internal uses, and other kinds of internal sharing, and they allow your company worldwide to share information about employees.

Today, we license over 10,000 U.S. based companies, and on our count those companies employ more than 20 million people. And that many people are trying to comply with the copyright law as it applies to text.

And we believe that our repertoire covers most of the publications – not all of them. As Joe points out, we don't cover all of them, and the CCC license will not be your license to do everything you want with every piece of text in the world. But it covers most of what you want.

And as things come up that you're interested in that are not in our repertoire, we have a staff of people who go out and try to get it for you.

The other side of our business has been our traditional paper use license. That is, for the kinds of uses that our licenses don't cover – most prominently, the delivery of material outside your company – we have paper use licenses that are readily managed.

And I'll show you very quickly in one moment, or at least a screen shot of how that's done on our Web site. This is what are traditionally referred to as permissions. Your corporate communications department is probably familiar with it, your marketing department.

These are people who communicate with the outside world on behalf of your company, using third-party material. And they're fairly comfortable using our services, we believe.

In this case we act as the agent for the rights holders, and the individual rights holder sets all the specific terms and prices that apply to a particular use.

What's also true in fact is that many of our largest customers, who are users of materials, are also our rights holders. Not only publishers, but large tech companies, like IBM and General Electric and other companies like that, have traditionally put their materials into our services as well, to allow other people to use them.

It's about a year, and if anybody here has not been back to our Web site in the past year, you should come back and take a look. Our Web site has been updated to allow our traditional businesses to act much more efficiently in your behalf.

You can undertake individual transactions, bulk transactions, check titles. We don't even need to know who you are. You're welcome to use the system without registering with us until you want to actually conduct a transaction, at which point registration is free. And we handle transactions both by credit card and by invoice.

And we also have a fairly substantial set of educational services that are accessible. As you can see, on our Web site, down the left column, Business Licensing, Academic Licensing and Copyright Central. Copyright Central is where our educational materials are, all of which you're welcome to use to develop your own copyright policies within your companies.

The little black arrow on the right side points to our search facility that will allow you – especially if you already have a CCC license – to figure out whether the license covers the title that you have before you.

The system is very simple. You plug in the title or the ISSN – that's the standard number those of you are in publishing would know – and you'll get, in response to that search, a listing of all the rights that we have available to you for that title.

What we've done, though, is we've recognized that, especially in a company like yours, that you're not always going to be checking everything as you go by, and that sometimes you're going to need to purchase things individually.

Many of you have probably also come to use our rights link service, which is available at the Web site of individual publishers, like the Wall Street Journal and like the New York Times. These are places where you can get transactional licenses simply by – well, let me show you.

Here's a list of titles. I'm sorry. This is a sample list of the publishers who are involved – a lot of science publishers, a lot of newspaper publishers, and gradually we're building into things like newsletters as well.

What you do when you're on a Web site is you would see on the middle right-hand side here a little thing that says, "Request permission." You click that button, and without leaving the journal that you're using or the newspaper that you're using, up will pop what the techies tell me is called a daughter window, because the mother window, I guess is still open behind it.

And through that you can conduct a rights link transaction, which in a little box inside the little box that is impossible to read, I imagine, on this screen, allows you to pick the kind of license that you want. And that will conduct the transaction with you very easily.

Let me show you. Here we go. Up will pop a license. Up will pop a price. Up will pop if you want a reprint. In the lower right-hand corner, we see reprint designed, in this case, by the Wall Street Journal, so that it looks like the classic reprints that you would want in order to distribute to customers or anybody else.

And this can be delivered to your office, basically overnight, from a printer near you. We have relationships with a lot of printers.

What we've also done recently is we've realized that you need, as a company interested in intellectual property, some way of managing all the rights that you've received – not just from CCC, but from other people.

And some of you may have seen this at last year's ACC annual meeting. And we've been showing this at other conferences.

It's a service that allows you to manage your own rights internally, using the CCC license and all the other licenses that you buy from other people, primarily for copyright now, but there's nothing in it that would not allow you to use it for patents or contract licenses or anything else, that allows you to manage your own right internally, and at this point allow your end users – the people, the scientists at their benches, the lawyers in their offices, and other staff – to find out what your company has in the way of a license, without needing to contact the legal department or contact the library.

And this is because the legal department and the library have downloaded their knowledge of their licenses right into the system.

And this also allows you, for example, as a lawyer, to get a sense of what your company is using, what the staff in your company is using, and whether you need to buy more rights, or maybe you have multiple subscriptions, or whatever it is you need in order to manage intellectual property within your company.

What we're also trying to do – and this again to reflect the circumstances that Joe was describing, which is that copyright rights holders are very concerned about the use of their materials with companies.

And we know that you, as intellectual property lawyers, have always been interested in trying to figure out how to minimize the risk inside your companies.

And so what we've been doing recently here at CCC – and I think we've been talking to some of you about it – is trying to design new licenses that serve your purposes.

We are just now in the middle of a pilot project to license several million images for use within a company, like our text license for use in presentations, for use in internal publications, for the intranet site and things like that, something that a lot of you have asked for a while.

We're continuing to work on video licensing, and very soon user generated content licensing – that is, blogs and other uses, which we have started to do in our traditional model, but will be doing to a greater extent sometime very soon.

I'm going to pass the – these are the end of my files – I'm going to pass the control here to Sam to talk about music.

Before we do that, I should mention, because I was asked to do that, that one of the other media that are not represented here, beside between Sam and me, is the motion picture industry.

And there is a licensing service, and you can get the URL, et cetera, in the last slides in the package here, where we've listed a bunch of resources for you.

And that's the Motion Picture Licensing Corporation based out in Los Angeles for use by your company to have movies during lunchtime and for other kinds of displays of commercial motion pictures.

Sam?

Sam Mosenkis: I am here.

Frederic Haber: There it goes.

Sam Mosenkis: Thank you, Fred, Joe, for the plug a little bit earlier.

I'm going to talk mostly about the licensing of music. I may touch upon the licensing of movies, which in the copyright world we refer to as audiovisual work.

I, as you can imagine, get calls from in-house, outside counsel every day about the use of sound recording or a piece of music on my Web site, at a meeting, at an exhibition, at this convention, at a holiday party.

And sometimes I would say that a little bit of knowledge is not necessarily a good thing, because in the music business it's a little convoluted, a little complex.

But hopefully I can give you a little bit of an overview, so that when you face a music or even an audio visual question, you have the basic fundamentals to sort of approach it and ask the right questions.

There's a list of a number of these licensing organizations – the ASCAP, the BMI, Harry Fox, Sound Exchange. People hear these words. They don't know exactly who they are, what they do, who they should approach.

Sometimes you don't need to approach more than one. Sometimes you need to approach a number of them. It depends upon what you're doing, and I'll go through that.

But essentially it's a good thing. They exist as collective licensing organizations, which makes your job a lot easier. ASCAP, as an example – BMI another – licenses the performing rights of each repertoire of many millions of works.

And if you're just simply performing music, say a concert for your employees, you just need to get one blanket license from ASCAP or BMI, and it should cover the entire use of the entire repertoire of millions of works.

I should mention that I have European societies down there. Copyright is territorial, so if you're multinational, and you have uses of music in foreign offices, you may have to deal with the European societies, the European copyright owners, which stand as sister societies to the U.S. organizations.

But let me go through the basics quickly.

The first step in approaching a question is know the rights involved. Music isn't just music. There are actually a number of copyrights involved in the usage of music.

First, you have the musical work, the song. Billy Joel writes the song, "Just the Way You Are." A copyright exists in that song. However, when Billy Joel and records that song, Billy Joel or the record company – we'll get into that – owns a separate copyright in that sound recording. So there are two different rights involved.

If Frank Sinatra goes and records – or did record – a cover version – you hear the word "cover version" – of "Just the Way You Are," that's a separate sound recording, and it's a separate copyright, and a separate copyright owner in that cover.

There's still only one musical work, one musical work copyright, but there may be multiple sound recording copyrights of that song.

In audiovisual work, which is defined by the copyright laws, it's a series of related images, which are intrinsically intended to incorporate one whole.

The uses of pictures – for instance, the music video – stands alone as a copyright. There's no separate sound recording. There may be a separate sound recording in the song, as we just mentioned, of "Just the Way You Are," but the video encompasses just music, and it incorporates a separate copyright work, which a separate copyright owner owns the rights to.

The music in the video – and this is a little complicated – stands on its own. So if you're performing a movie, for instance, or a music video, you may need clear licenses for the music in the video, as well as getting a license to show the video.

Now the owners – the way the music business has developed, songwriters don't own the copyrights to their songs. Years ago, people realized that songwriters don't have business sense. They don't have the time, the wherewithal to deal with licensing, so they created music publishers.

You may have heard of music publishes. They basically are business partners with the songwriter, and the deal is the songwriter assigns their copyrights to the publisher. The publisher exploits the work and splits the royalties with the songwriter. So if you need to license the musical work, you need to go to the musical publisher.

With a sound recording, you will hear about labels. The recording artists sounds an agreement with a record label, and the record label, by virtual of that agreement, owns the copyrights in the recording.

Similarly, with audiovisual work, the studio – MGM, Paramount – usually owns the copyright to the audiovisual work, if it's a movie. In the case of a music video, it's usually the record label. Those are the owners.

So the second step is to know who the owner is and who to approach to license the work.

Now, the last step of the question is know the uses involved. As many of you – hopefully all of you by now – know that there are a number of rights implicated in copyright.

There's a public performance, which is read during a performance. It could be live – you have a band coming into your holiday party. It could be music over speakers – you have music pumped to the factory floor or the break room.

There's display and derivative work rights that are implicated as well. And certainly, there are reproduction and distribution rights. You make a copy. You're making a multimedia work, and you need to copy a song into the Power Point display.

You're making marketing materials, and you want to distribute the marketing materials and create a CD. You may need to copy music onto it, so there are reproduction rights.

So those are the three questions. Know what the right is, what rights you're using, who to go to, and know what usage you need to clear. Now, I've given you a list of – this is just a list off the top of my head, as I get various questions from day to day.

You have multimedia presentations. That means you take a CD, and you want to copy it into, say, a Power Point type presentation that you want to use when doing a road show.

Now, you're taking those songs. Obviously, each recording has an underlying song, so you need to clear that song. Now, when you make a copy of that song, you're making a reproduction. You have to go to the publisher.

Now, sometimes the Harry Fox agency exists – you may have heard of that term – the Harry Fox agency is the agent for about 75 percent of the publishers, all the major publishers, but not all, so you may have to actually find out who the owner of the musical work is, who the publisher is, and go directly to that publisher to clear the reproduction and distribution of the musical work.

If you come to ASCAP's Web site, and if you go to the end of our presentation, there's a list of Web sites and sources. Many of these sources have database – ASCAP.com and BMI.com, for instance, have databases, which list many of the works in our repertoire with the proper owner.

It lists the publisher. You need the publisher, the copyright owner, and you can use that as a resource. That's the musical work side of it.

But when you're copying the recording onto your multimedia presentation, you're also making a copy of the sound recording rights. So in the case of Billy Joel's sound recording, you have to go to Billy Joe's record label – or if it's Frank Sinatra, to Frank Sinatra's record label – to make sure you have the right to reproduce that recording.

So it's one piece of music, but because there are two rights involved, you need the two licenses.

In an event or party where there's a live performance, you only need a performance license. Now, the way the law has developed, there's only a performance in the analog world. Let's split it between analog and digital. In the analog world, there's no performance rights for sound recordings.

So, for example, this is a major issue these days. A radio station that broadcasts in analog – they need a license to perform the musical works, but they do not need a license to perform the sound recording. That's just the way the law developed for various policy and business reasons.

So if you have a party, or an event where you're having live music, or you're pumping music over speakers in the break room or at the holiday party or at an event, you don't need to go to the record label. You do not need to clear that performance, because there's no performance for a sound recording.

You'll need to clear the performance of the musical work, which I'll get to in a minute. You can simply go to ASCAP or BMI or SECAC or all three, if you want to be sure you can use any music.

ASCAP and BMI represent about 99% of the music out there. SECAC is very small and represents a few major artists, but for the most part BMI and ASCAP licenses clear practically all new music.

You'll want a SECAC license as well, just to make sure they do have Bob Dylan and one or two other major artists. So an ASCAP, BMI, SECAC license collectively will give you the right to perform all the music that you can think of.

And because each of these societies are affiliated with foreign societies around the world – presently about 91 – we each have reciprocal agreements with those societies such that an ASCAP license will give you the right to use all the English or French or German music in the United States, and vice versa.

If you have offices in London, and you want to have an event in London, you can go to PRS, which is the British version of ASCAP, and they have a reciprocal agreement with ASCAP, which will allow the British party to use American music.

Now, I've given you various trade shows, meetings, marketing materials. All these utilize music in one way or another. And again, you have to utilize the three-step approach that I've given you to figure out which rights, who the owners are, and how I should go about licensing those.

Now, the ASCAP license I mentioned – for about 95 percent of what you're going to be doing, it's going to be a performance license that will pretty much cover what you're doing. Again, it's the events, the business events. It's the holiday parties. It's the music in the break room.

It's the music on hold. If you call a business, often when you're waiting on hold, there's music being played. That's a public performance under the copyright law, and you need a license for that.

An ASCAP blanket license will cover all of that.

Just to go through the basics of ASCAP – BMI's license is pretty much identical – it applies to business locations and business events, which is essentially business purposes, not events or conventions that are open to the general public, but either basically business uses that are used for business purposes only.

The rates are about $0.44, $0.45, for each of the first 10,000 employees, with a minimum fee of $223 annually. This is an annual rate.

And the rate descends from there for each additional employee, with a maximum fee of about $28,000 – a little under $29,000 per year for all the music in the ASCAP repertoire for all different types of performances that you want to use. This is a blanket license and will cover all of it.

Now, this is the analog world. I've been getting a lot of questions, as you can imagine, over the past few years about uses of music on the Web sites.

Now, additional questions need to be asked, because unlike the analog world, where I mentioned there's no performance rights for a sound recording, in the digital world on Web sites, big record labels, the owners of sound recordings, do have a right. So there's an extra step you may need to clear.

Now, when using on your Web site's music, you have to look at whether you're streaming the music, which is essentially being played as it's – you don't click to download onto your computer. It's being played sort of in real time.

The opposite of that is a download where – sort of the iTunes model – where you download music onto your computer, and there's a permanent copy made on your computer, or at least a temporary copy.

Various different issues surround, but a lot of these questions are still being litigated today. A recent decision actually was passed down. It's not final.

It was in the midst of a rate court proceeding that ASCAP's been involved with, whether a download – an iPod type thing where you download music onto your computer – whether that implicates the performance rights.

And the judge said at least with a permanent download, it sort of takes the place of going to Tower Records and buying it, so there's a reproduction. There's a copy and a distribution being

made, but there's no performance. So under the current decision, that decision, and that fact pattern, you may not need to go to ASCAP for a license.

But if you're streaming, there's certainly a performance, and you need to come to ASCAP to clear the musical rights. However, is there a reproduction, if you're streaming? And that's again the question.

Publishers will say, well, there's some sort of reproduction, because a copy is being put onto your server or onto your cache, and because there's a reproduction, you need a separate license from the music publisher.

So again, these are questions that are hot topics. There's no conclusive answer. Again, to be safe I would get a license from both ASCAP for the performance, as well as the music publisher – generally, Harry Fox as an agent for the music publisher in most instances – for the reproduction.

On the sound recording side, if you have downloads off of your Web site, certainly you need to go to the record label and get permission to do that, a license for that reproduction.

If there's streaming – for instance, you have a Web site that has a little music channel; I've seen some, General Mills, and they have this little General Mills radio – you need a license for that performance.

You need a license for that performance, but it depends whether it's sort of a radio stream or if it's an on demand and you can select a song – what they call interactive versus non-interactive.

If it's interactive, where you select a song to download, it's a stream. Then you need to go directly to the copyright owner, the record label, and get permission. They can deny it or not.

But if it meets certain conditions in the copyright law, there is a compulsory license for that type of streaming. And Sound Exchange – another organization that I put on the list of these resources that are listed in the index – controls the compulsory license and the payment for that type of usage.

ASCAP's Internet license, just as an example, is again a blanket license that allows you to stream – again, whether included downloads or not is subject to debate – but allows you to perform as much ASCAP music, millions of works, that you want.

And we have various different types of rates. Either you can use revenue based rates, revenue used off of the site; or a sessions based rate, the number of clicks, sessions; music based, which just looks at the clicks of music compared to clicks of overall clicks on the Web site.

There are different rates, and certainly if you have issues about your usage of music on the Web sites, we have licensing people who can go into depth and explain these licenses. The same thing – Sound Exchange, BMI, Harry Fox all have people who deal with these questions every day, day in, day out.

But hopefully you've been able to get some sort of understanding, or a basic approach, on how to deal with these music questions. If you have any specific factual questions that we can answer, I think we have about 15 minutes, so I pass it to you guys to put in questions that we can answer.

And I'm going to leave off with the display of the index. Here are just some licensing resources that you can print out and have for your use.

Steve Rosenthal: This is Steve. We can jump to a couple of questions now. A couple of questions came in for clarification, which may have been partially answered, but for clarity let's talk about statutory damages for a second. And I'll direct this toward Joe Beck.

Can you explain when my statutory damages will be applicable, what copyright registration requirements are there, et cetera?

Joseph Beck: Yes, good question. Basically, the statute says that in the case of a published work, so long as the copyright owner registers his or her copyrights within 90 days of first publication or prior to the infringement, they can recover, potentially, statutory damages and attorneys' fees.

For example, let's say you're a content owner and you fail to your register your. Somebody infringes it 40 days after publication. On the 50th day, you register. You're within the 90 days. You're all right. You can get statutory damages and attorneys' fees.

If someone infringes on the 91st day or the 100th day, let's say, and you register on the 105th day, you're too late. On the other hand, if you register on the 105th day, and they infringe on the 110th day, you're all right.

The only other complexity to add to this is in the case of an unpublished work, the registration has to occur prior to the infringement. An example of an unpublished work, a performance.

For example, I represented the estate of Martin Luther King, Jr. We successfully proved that when he gave that speech, he did not publish it, even though there were 200,000 people there and an audience on TV and radio, because it was a performance, not a distribution of copies.

So if you're wanting to protect a performance, you will need to register that very quickly.

Steve didn't ask about this, but the courts use, and the juries now use, the typical latitude in measuring how much to award. And I referred in my presentation to the fact that if you have a strong written policy that says don't infringe, that can at least reduce your statutory damages.

For Legg Mason it ran around $20,000 – no, it's more than that – per work. And the problem is, of course, because these are daily works, so every five days you've got five times $20,000, $30,000, whatever the court awards.

Steve Rosenthal: Thank you, Joe.

We have another good question that's come in, which we can direct toward perhaps Sam or Joe.

Can you address the implications of a copyrighted work being used as the basis for a new work in a song parody or an image being altered to fit a corporate event or program? So it sounds like this is corporations have parodies in various shows, and can you address that issue?

Joseph Beck: Well, Sam and I may differ on this. I have represented a parodist in the Gone with the Wind and the Wind Done Gone case. And we were able to successfully show that what our client did in really attacking Gone with the Wind was a fair use parody.

Now, for a corporation to take a popular song and use it in a so-called parody is probably going to be less far less sympathetic than our client, an African American woman attacking Gone with the Wind for what she perceives as the racism in the book.

So I suspect Sam would agree. However, I should add that the court has made clear several times now that the fact that a use is commercial does not prevent it from being a fair use parody. That was clear in the SunTrust case that I had. It was in the Campbell v. Acuff-Rose case involving the song "Pretty Woman."

One other point I just want to mention, and I think this will be something Sam will certain agree with. Ask permission.

The Supreme Court in the opinion by Justice Souter in the Campbell v. Acuff-Rose case said it's not a bad thing to ask for permission. And if you don't get it, go ahead and try to make it fair use.

If you think what you're doing is a fair use, you ask permission and you're turned down, some people feel like if I go ahead and do it now, I'm really going to get nailed.

Well, you in fact may get sued, but the fact that you asked permission and went ahead and tried to exercise your fair use right will not be held against you, according to Campbell v. Acuff-Rose.

Sam Mosenkis: Yes, just quickly, I agree with everything Joe just said. Essentially, parodies are very – it's a question of law. It's a factual question. But generally, you have Weird Al Yankovic songs. All these are copyrighted, and generally licenses are obtained.

If a company is having a review where there are going to be songs sung, including parodies, the best is again to just get a blanket license, and for the performance, certainly, that would be covered.

But again, just asking is the simplest, as far as I know, and I've been doing this for a number of years. We're very quick to say yes. Copyright owners want a license that works in these situations.

So certainly ask. It's pretty quick and usually for a minimal amount of money.

Steve Rosenthal: Sam, another question has come in. It sounds like sometimes people have trouble getting a quick response on a license...

Sam Mosenkis: Right.

Steve Rosenthal: ... from either Harry Fox or other individual publishers. The person is filling out the correct forms, trying to do the right thing, following up, contacting everyone, not getting a substantive answer, not getting a license other than it's still pending.

Do you have any suggestions on how the license process can be expedited?

Sam Mosenkis: There's a bigger question, because it's really a policy question. We get this a lot.

If you're not getting response, it's mostly because they believe the use that you're making is so negligible and minimal. They only have a limited resource of licensing personnel, so it's probably put on the bottom of their task list, and they just don't get it.

I would continue to call. Be polite about it. Maybe I guess at the last instance you'd say, "I'm going to use this. If I don't hear from you, I'm taking it as implied license."

Again, that necessarily won't hold water in every instance, but I guess just keep on calling. But if you make a pest of yourself in a good way, you'll probably get things done.

I know here, again, there's a lot of work. We get a lot of requests when you're dealing with a repertoire of millions of works, publishers with individual repertoires of thousands and thousands of works. We get just hundreds of requests a day, and there's just not enough people to reply.

But if you can be persistent, but polite, then you should get an answer at some point, because they do want to give a license. They do. Even if it's a small amount of money that they make, they certainly would like to issue that license. So that's my best suggestion again. I understand.

There are separate issues, of course, of orphaned work, which basically you can't find the publisher. You want to do the right thing. You just can't, because you don't know who the owner is. You've searched ASCAP's databases. You've contacted Harry Fox, BMI. You just don't know who the owner is.

There are actually a couple of bills out that both the House and the Senate have introduced last week regarding orphaned works, which would give users the right to use an orphaned work, if they've done a diligent search, without any statutory damages if the owner actually comes forward.

So that problem may actually be addressed by Congress within the next year.

Steve Rosenthal: OK. Thanks, Sam.

I have another question, and then we'll have Joe provide an update on a hot issue.

This question I would direct to Fred.

For those who are less familiar – we've been talking a bit about music, so let's go to the less familiar with the Copyright Clearance Center – can you just help distinguish the RROs from the other music organizations that Sam was talking about?

Why would somebody need to go to CCC, as opposed to these other organizations?

Frederic Haber: OK. Music, as Sam has done very well, covers the kinds of things that you identify as music – uses in an organization for internal uses or showing customers.

CCC was set up by text based rights holders, mostly publishers, also authors and other people who own rights in text, meaning newspapers, books, scientific journals, magazines, newsletters, the kinds of materials that a company would use on an everyday basis for research, for current awareness, for things like that.

You have subscriptions for that material that entitles you to take the material that you receive from the copyright holder, pursuant to your subscription. But it doesn't allow you to make further uses of it – copyright sensitive uses of it – including in particular, reproduction.

And this is the Legg Mason that Joe was describing to us earlier in the presentation. What Legg Mason was doing was it had a handful of subscriptions to a newsletter published by a company called Lowry's Reports, which specialized in banking issues.

And from its five or 10 subscriptions, Legg Mason would circulate to basically the entire company. By the entire company, I don't mean hundreds of tellers. What I mean is basically all the professionals in the organization, to keep them apprised of the financial issues that Lowry's Reports covered.

And that kind of reproduction of Lowry's Reports materials is a copyright infringement. You're buying X number of copies. You want Y number of copies, which is greater than X. You need the right to do that.

An occasional offhand copy may be protected by fair use, but the regular use of materials for the commercial purposes of your organization, in order to keep everybody as smart as they need to be, in order to be competitive in your market – that kind of thing needs licensing.

That's what RROs was created for, and that was CCC was created for in the United States. Does that help?

Steve Rosenthal: Yes, great. Thanks for that answer.

We have just a couple more minutes, so we'll use this time to cover a hot issue, the Google case. And I'll turn it over to Joe Beck.

Joseph Beck: Google decided several years ago to try to make information more available by scanning books and putting the books up in various views online.

That has resulted in two major lawsuits, a class action – purported class action – by authors of books in American libraries, or copyright holders, I should say, and a second suit filed a few months later – or actually a few weeks later – by five big New York publishers.

I'm lead counsel for Google in defending those cases. I'll tell you briefly what Google is doing, since there's some confusion.

By scanning a book, they make an electronic copy. Therefore, that is markedly a copyright infringement. The book comes from libraries at Michigan, Harvard, Stanford, Oxford University, New York Public Library. Those are the initial partners. Today there are probably additional libraries that are providing books.

There are three ways to look at a book that Google scans. If the book is in the public domain, and we're very conservative about that, you can read the entire book and download it. So let's say it was a very old book.

Secondly, some of the people who are suing us have licensed some of the uses that we are making. So let's say a particular publisher wants to promote its book. You can read a chapter, a prologue. If you remember when there were record stores, it's a little bit like that.

On that view, you can again read what the copyright holder licenses, and there is advertising that is split with the publisher or a copyright order. There's also a hot link that you can go directly to the publisher and buy the book. So what's not to like about that?

The third one is the one that, of course, has resulted in litigation. If we don't obtain permission, we go ahead and scan the book. However, all you can read is what we call a snippet, which is based on a pixel count that's usually something like three to six lines.

All the smart 12-year-old boys from Denmark are already working for Google, so you're not going to be able to scroll through and download the book. It's not going to happen.

What you can do is by looking at the snippet – sort of like a quick, slight review on Lexus, if you've done that – you'll find your search term and the place where it appears, and you'll get a pretty good inkling. Is this book relevant, or is this just a happenstance overlap of the search term?

If it is relevant, and you want the book, you cannot read it online. You cannot download it online. But what you can do, because we provide that, is the name of the library where we got it, the name of the publisher where you can buy it, as well as the author, and there's no advertising on that.

If you don't like this, instead of suing us, all you've got to do is send Google an email and say, "Take my book off your server," and we will.

Nevertheless, we've been sued in these two lower suits in New York, pending in the Southern District of New York. The suits are in discovery. There's much that I can tell you about at this point, other than to tell you that the dean of the Stanford Law School was quoted in the New York Times as saying these suits will not end in our lifetime.

I think that's probably an extreme reaction, but they are large pieces of litigation, and they will have a lot to say about what is and is not fair use.

We strongly believe that the uses that Google is making are fair. We permit people to find books, which ought to be in the interest of the publisher and the author. It will sell books. There's really no question it will sell books.

And the use is what is called a transformative use, and if I had another 10 minutes, I could explain that.

But if you're interested in it, you could send me an email; jbeck@kilpatrickstockton.com or read the Arriba Soft case in the Ninth Circuit or the Bill Graham case in the Second Circuit. They talk a lot about transformative use and how it has expanded from its original use in the Campbell v. Acuff-Rose and SunTrust, Gone with the Wind case.

So, it's 1:01.

Steve Rosenthal: Thanks, Joe. Sounds like that could be the subject of ...

Frederic Haber: And I'm running to the airport, as you know, Steve. It's been a pleasure. Take care.

Steve Rosenthal: Thank you, Joe. We're out of time. At the top of the hour, I'd like to thank all of our speakers – Joe Beck, Fred Haber and Sam Mosenkis – and our sponsor, Kilpatrick Stockton.

Thanks to everyone who signed for the Webcast today. If you have a few comments, please fill out the evaluation from so we can have your feedback.

This concludes the ACC IP committee's copyright Webcast. Have a great day.

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