Loyola of Los Angeles Entertainment Law Review

Volume 27
Number 3 *Symposia—There is Something in the Air: The Legal Implications of Podcasting & User Generated Context and Legal & Business Issues in the Video Game Industry*

Article 1

3-1-2007

There Is Something in the Air: The Legal Implications of Podcasting and User Generated Context

Jeffrey Kravitz

James Nguyen

Dennis Loomis

Joseph M. Gabriel

THERE IS SOMETHING IN THE AIR: THE LEGAL IMPLICATIONS OF PODCASTING AND USER GENERATED CONTENT

LOYOLA LAW SCHOOL'S ENTERTAINMENT & SPORTS LAW SOCIETY & THE ASSOCIATION OF MEDIA AND ENTERTAINMENT COUNSEL SYMPOSIUM SERIES

TUESDAY, OCTOBER 3, 2006

Jeffrey Kravitz, Moderator[*]

James Nguyen, Panelist[**]

Dennis Loomis, Panelist[***]

Joseph M. Gabriel, Panelist[****]

Travis Kasper, Organizer[*****]

Alexander Kargher, Organizer[******]

MR. KASPER: Okay, guys, I think we're about ready to get started. My name's Travis Kasper. I'm the president of the Entertainment Sports Law Society. First, I want to introduce two of our esteemed panelists. First is Joseph Gabriel, down on the far end. He's a partner at Raskin Peter Rubin & Simon. He's practiced in the field of entertainment litigation for the past twenty years, representing clients including T-Mobile, Netflix, and

[*] Partner, Silver & Freedman
[**] Partner, Foley & Lardner, LLP
[***] Partner, Jenkins & Gilchrist
[****] Partner, Raskin, Peter, Rubin & Simon
[*****] Law Student, Loyola Law School
[******] Law Student, Loyola Law School

Federation Internationale de Football [FIFA]. Mr. Gabriel has argued cases at all levels of the California courts and all the leading arbitration tribunals, both domestically and internationally. He's named to Southern California's Super Lawyers in the area of entertainment litigation by *Los Angeles Lawyer* magazine, and is a graduate of the Loyola University of Chicago School of Law, where he was on the National Moot Court Team. Next, we have Mr. James Nguyen, who's a partner at Foley & Lardner, where he's a co-leader of the firm's entertainment and media industry and trademark and copyright litigation teams, and a member of the sports industry team. He's practiced in the entertainment field for over a decade, and currently is an Executive Committee Member of the State Bar of California Association IP section. Mr. Nguyen is a strong advocate for diversity in the legal profession and, among other positions, serves on the Steering Committee for the California Minority Council Program. Mr. Nguyen is a graduate of the USC Law Center, where he was both the chair and champion of the Hale Moot Court Honors Program, champion of the Jerome Prince National Evidence Moot Court Competition, and a member of the *Southern California Review of Law in Women's Studies.*

MR. KARGHER: My name is Alex Kargher. I'm the treasurer of the Entertainment Sports Law Society. Thank you all again for coming out tonight. Next to Mr. Gabriel we have C. Dennis Loomis, or Dennis. He is a partner at Jenkins & Gilchrist. He's been practicing for well over twenty-five years, and attained his JD at Hastings, where he was Order of the Coif and a Note and Order Editor of the [Hastings] Law Review. Mr. Loomis has practiced in the entertainment industry in Los Angeles for a significant period of time and is currently the Editor in Chief and contributor to the *Entertainment and Media Insights* magazine, a bi-monthly legal and business newsletter. He deals with high-tech concerns, different artists, entrepreneurs and others, both as a litigator and a transactional attorney. And then, also, our moderator this evening is Mr. Jeffrey Kravitz. He is a partner at Silver & Freedman. Prior to joining Silver & Freedman he was with Lord, Bissell & Brook for twenty-two years. He also served as Deputy Attorney General for the State of California. Mr. Kravitz's experience in intellectual property includes copyright, trademark, unfair competition, and trade secret law, and his clients include members of the entertainment and high technology industries. Mr. Kravitz is a graduate of Loyola Law School, where he was the Comment Editor and contributing author to the *Loyola Law Review*, and a member of the St. Thomas Moore Legal Honor Society. Please welcome our esteemed panelists.

[Applause.]

MR. KRAVITZ: Thank you, Alex. And, before we get started, I just

wanted to thank each of you. When I come back here it reminds me how all-consuming law school can be and how precious the time is, and we appreciate you taking out the time to come talk to us. We have several things that we're going to be speaking to, but, as we go along, if anybody has a question, or a comment, please just raise your hand, because we want this to be as interactive as possible. Coming here, again, is a reminder how quickly the world moves. If you would have said to me five years ago, "what is podcasting?", I probably would have answered that it was a reference to *Invasion of the Body Snatchers.*[1] Last year, podcasting was named the "word of the year"—I didn't even know there was such a thing— by the *Oxford English Dictionary.*[2] So, it's clearly entered our lexicon, and when I told people that I was going to be speaking and chatting with you folks here today, they said, "well, what is podcasting?" And I said, well think of it as "TV TiVo[3] for radio," but that's not as precise a definition as we might use. So I thought we might turn it over to our panelists, starting with Joe, just to get a sense from them what they think it is.

MR. GABRIEL: Well, from a legal standpoint, I think podcasting is really just a computer file, a digital file, that's available on the Internet for downloading, whether you have a subscription service that will push it out to your computer or you actually pull yourself, for most legal issues it doesn't really matter. So it's really just some form of a digital file that is a broadcast of, generally today it's of a sound file, but it could be a video file as well. That's what I think of when I think of podcasting.

MR. LOOMIS: Well, I would just append that what is generally considered podcasting has a variety, already, of offshoots and subsidiaries. Some of them I only learned of, actually, in doing some preparation for this program, such as "sound-seeing tours."[4] If you don't know what that is, we might talk about it a little bit later. There's also now "mobile casting,"

---

1. *See* Henry Steck, *Corporatization of the University: Seeking Conceptual Clarity*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (January 2003) ("a story of alien creatures who steal the soul and personality of individuals while retaining the identical and pleasant and amiable exterior.").

2. Michael N. Lang, *The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting*, 14 COMMLAW CONSPECTUS 463, 464 (2006).

3. *See, e.g.*, Ashley Kerns, *Modified to Fit Your Screen: DVD Playback Technology, Copyright Infringement or Fair Use?*, 24 LOY. L.A. ENT. L. REV. 483, 483 (2004) ("TiVo . . . enable[s] viewers to digitally record their television programs in order to watch them at a more convenient time, and also to skip commercials with a super-fast forward remote control feature.").

4. *See, e.g.*, Reid Goldsborough, PODCASTING IS THRUSTING A ONCE ALIEN TECHNOLOGY FIRMLY INTO THE AUDIO MAINSTREAM, COMMUNITY COLLEGE WEEK, Jan. 29, 2007, at 20. ("[S]ound seeing . . . is the extemporaneous audio recording of a person's experiences when traveling, or doing anything else.").

which is a subset of podcasting, specifically for delivery to mobile phones and other mobile devices. And podcasting is one form of "narrow-casting," which is to be distinguished from "broadcasting" in the sense that, it is, by its nature, targeted to a finite and generally niche audience. In the case of podcasting, that usually is an audience that is self-selecting. In other words, you choose to be a recipient, as opposed to the author or the publisher of the information choosing to send it to you, but it can work both ways.

MR. KRAVITZ: Jimmy, at this point, do you have any clients who have podcasting? And, what do they do?

MR. NGUYEN: I do. One of my clients is a major media conglomerate that owns, in particular, a number of radio stations across the country. Here in Los Angeles they own Power 106.[5] Anyone a Power 106 listener?

[Some hands raised.]

MR. NGUYEN: Begrudgingly so, I see. KZLA[6], too. Anyone listen to the Country Music station? Okay. I'll tell my client. They'll be very happy. Um, so, yes, they in fact, about a year and a half, two years ago, called me up and said, "Well what's the state of the law with respect to podcasting?" Because they, as radio station owners, wanted to be able to take the radio stations that you hear, every day, at 6:30-7:30, whatever, in the morning or in the afternoon, record them, digitize them, and make them available for people to download via the computer if you were unable to catch the radio show at the time that it's normally broadcast. So, yes, that is an example of one type of client who is very interested in podcasting.

MR. KRAVITZ: And we thought we might show you just a couple of examples, throughout our discussion. And, Alex, why don't we start out with the one that was your personal favorite.

MR. KARGHER: So, essentially, this is a clip from the movie *Little Miss Sunshine*. And it was an interview with two directors and some of the actresses, and is available on iTunes. So you can download clips with dialogue from the movie, as well as commentary from the directors, and actors and actresses, about what's going on in the film. If anybody is familiar with the movie, it's a story about a dysfunctional family. It's one example of how the mainstream is embracing iPods and podcasting technologies and making them available.

[Podcast played onscreen of *Little Miss Sunshine* . . . And The Whole

5. *See* http://www.power106.fm/index.aspx.

6. *See* http://www.kzla.com (until recently, KZLA was a country music station in Los Angeles).

Kitchen Sink.][7]

MR. KRAVITZ: Okay. And Joe, at the beginning they show what, at least those of us on the panel recognize as, a Volkswagen bus of a certain vintage. Any issues raised by the imagery that you see on the screen, with respect to that?

MR. GABRIEL: Well, a classic car like that can often give rise to a trademark claim, especially if it's something like a Volkswagen bus that became somewhat of an icon in the Sixties and has a well-established connection to the car-brand. So, if I were the attorney looking at this podcast, and asked if I see any issues, I would definitely flag that. But having said that, generally, in film production, the clearance attorney would have identified the Volkswagen bus as something that had to be cleared, and more likely than not there was a license, or at least a consent, to use the bus from Volkswagen. So that's probably, that consent would probably carry through to promotional pieces, like this. That's my view, at least.

MR. KRAVITZ: Jimmy, have you had experience with something like the Volkswagen that's pictured there, as to who's paying who, or whether anybody's paying anybody?

MR. NGUYEN: Sure. I mean, often product companies and large brand-owners pay for placement, if not in actual cash then with some other type of consideration to the producers and makers of a film, to get their particular product placed in there. So I've had a number of clients who have paid for placement of their products into certain entertainment projects. The legal issue that Joe raised that's critical is, yes, the clearance attorneys often will clear the use of a particular brand or product in a motion picture. But the new legal frontier is wondering whether or not that release or license that's been signed covers all new media and digital platforms, because the word "digital," for example, I tell clients, doesn't mean anything anymore, because everything's digital. And so, when you get clearance to use the Volkswagen in a motion picture, the lawyers and you, hopefully in the future when you get to negotiate these things, will have to be very careful to think about all the new platforms that you want to get clearance rights for.

MR. KRAVITZ: Just curious, how many people in the audience have seen the motion picture? Okay. And my understanding is that at a certain point the Volkswagen breaks down? Dennis, is there any kind of a problem there, with any kind of an implied libel that Volkswagen products aren't trustworthy?

---

7. Fox Searchlight Pictures, *Little Miss Sunshine . . . And The Whole Kitchen Sink*, available as a free subscription on iTunes.

MR. LOOMIS: Well, probably not in the real world, but it's an issue to spot. One of the broader implications of what we're talking about here is the idea that we live in a universe where there are new technologies and new means of distributing content that are emerging annually or even more frequently, such as podcasting. One of the issues that a clearance lawyer or a rights proprietor or other, or publishers, need to be thinking about is whether a use that was permitted in the first instance is also permitted in some future re-purposing use. Assume for argument that the movie producers satisfied themselves that they had every right to use the Volkswagen, does that mean that right extends to publishing that content in the form of a podcast? Or, if you have an interview show on the radio, and an interviewee agrees to appear on a radio show, does that impliedly authorize the publisher or owner of rights in that radio show to republish it? Or, take another example of one of the other sort of offshoots of podcasting called "peer-casting", which is really a technical way to distribute content without overusing bandwidth. If you take a program that was podcast to you, as an authorized receiver, say you are a subscriber, and now you've got it, legally, in your computer, does that mean that you impliedly have the right to publish it, or republish it to all of your favorite twenty friends? These are all issues that are not necessarily black and white. Even where there are fixed clear-cut answers, there are issues that you have to think about if you are in a position either, in your own activities, or as an advisor, a legal advisor, to a client that need to be addressed.

MR. NGUYEN: I have an example of that. I recently negotiated a product placement deal for a client of mine that is a gaming technology manufacturer. Essentially, one of the main products that they make is slot machines that you see in casinos in Las Vegas. And they negotiated a deal to have a number of their slot machines placed in a major motion picture from Warner Brothers, set in Las Vegas that's coming out next year. And one of the issues we faced was what particular media platform rights we were going to give to Warner Brothers to display these slot machines. They, of course, wanted every platform now known or hereinafter developed in the universe. But the bigger issue that Jeff was getting to was the possible libel issue. We, from our client's perspective, were very careful to build into the agreement protection so that we had approval of how the slot machines were going to be displayed, because we didn't want to have them in a scene in which, somehow, they might break down, for example, or seem to malfunction or hurt somebody. So that was a negotiating point, to make sure that our client was happy with how their machines and products were displayed and depicted in a motion picture.

MR. KRAVITZ: And, lest you think that people do not sue, there was a

movie that was akin to *Jackass*[8], where they had a Slip 'n Slide, and on the Slip 'n Slide they had people portrayed who, because there was a little something extra put on the Slip 'n Slide, slipped and slid into various objects, which seemed like it was an awful lot of fun, but not to the Slip 'n Slide company, which filed suit. And the initial defense was what I like to call "Aww, C'mon," like nobody ever believes that this happens in real life. But the argument from the Slip 'n Slide people was kind of interesting because, in a rather sophisticated way it was the first instance that there would be an assumption by the American public that if it appeared in the motion picture it would appear that it was endorsed if not paid for by Slip 'n Slide, and that they were maligning the company by virtue of having the Slip 'n Slide. And as I understand it, that case was very quietly settled. One of the issues that you face in this is whether there is anything more attached to this than the same issues that were faced a generation ago in the *Betamax*[9] case. In other words, are you simply just "time-shifting" from another medium? Jimmy, what are your thoughts?

MR. NGUYEN: Sure. I'm going to assume most of you have not quite read or understood the *Sony Betamax*[10] decision. Some of you may have. I'll do a quick review of that, how it gets to the key issue, I think, in the copyright area that new media technologies raise, and that's fair use. Now, when I was a kid, my sister and I would always go to my parents and ask for something that we wanted at that time. It was about "me me me me me me me me," and I'm sure you've seen kids do that. It's always they want this, they want that. And that's what the new media universe is all about: consumers getting what they want, when they want it, and how they want it in terms of content. And part of the start of that was the VCR. The VCR was launched into the American market in the 1970s. There were two warring formats, VHS and Betamax. And when the VCR was launched—now it seems an antiquity—but at the time it was a major advancement. And the motion picture companies, as well as the television networks and other content owners were very unhappy with the VCR because they felt it allowed users on a mass scale to copy their motion pictures and television shows without permission and to record them and to play them back without a license. So they sued Sony, the maker of the Betamax VCR, claiming that Sony created a machine that facilitated massive copyright

8. *See* John Alan Cohan, *Broadcasting Industry Ethics: The First Amendment and Televised Violence*, 9 UCLA ENT. L. REV. 1, 17 (2001) ("MTV's show, "Jackass" featured young men performing stunts such as being shot with a stun gun or swimming around in sewage.").

9. *See generally* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

10. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

infringement.[11] The case went all the way up the U.S. Supreme Court, and it was decided on a variety of grounds.[12] But the one particular issue that I want to talk about today is the fair use ground and the concept of time-shifting. The Supreme Court, on a five-four split—so it was a very close decision—found that the Sony company was not liable for copyright infringement because what the users did by using the VCR was a fair-use.[13] And one of the fair uses was that you as the viewer would record a television show that you would want to watch. You couldn't watch it when you wanted to watch it, and so you would just shift the time when you wanted to watch it to a later time more convenient to you. So the Court found that was a fair-use in the concept of time-shifting when the content was viewed and enjoyed by the user and that did not impact the market value of the original work, which was one of the factors that goes into assessing whether use of a copyrighted work is fair.[14] How does this apply to the iPod context? Well, when you think about it, if you take copyrighted content, songs, audio recordings, audio recordings of texts, for example, if you read portions of a novel into audio digital files and you do that without the copyright owner's permission and you make it available via podcast, it raises a very similar issue, which is: Are you just taking something that is permissible at one time? Let's say a radio show that's on broadcast and you have permission to use the music that's on the radio show. You record it, you make it available for user via download onto your iPod or other MP3 device. Isn't that shifting not just the time that you enjoy that content, but also the space? You're not viewing it or hearing it in your car radio, or on your radio, but on your iPod or other device. And that's going to be one of the battlegrounds in the future. For the people and companies who deliver these types of content, they want to be able to do it necessarily without permission from the copyright owners. The copyright owners will resist, saying, "hey, you're infringing our work—you need a license to do that and you have to pay us some portion of your revenues." And there will be a battle over whether that is a fair use in the space-shifting sense as well as some concept of time-shifting. I'm not sure how it's going to turn out, but that will be one of the more fascinating new media copyright issues for the future. And, again, it's all about the users getting what they want, when they want it, because that's the market now, it's all about me me me and me.

MR. KRAVITZ: Dennis, is this *Betamax* 2, or is there something more

11. *Id.*
12. *Id.* at 417-18.
13. *Id.*
14. *Id.* at 417.

attached to it?

MR. LOOMIS: Well I don't know about that, but I think that the analogy to *Betamax* is pretty thin and, the significance of *Betamax*—not to get too deep into the *Betamax* case—but that was a great overview, but for those of you who are curious to know or who already know the *Grokster*[15] decision, which went against distributors of digital downloads, notwithstanding an argument, among others, that this was within the scope of what was permitted under *Betamax*, the vitality of *Betamax* going forward is now subject to at least a major asterisk. But, let me suggest that we show one more of the podcasts. I would like to, if we can, talk a little more about fair use. Let's spice it up with a little bit more podcasting. Then we can talk a bit about fair use.

[Podcast played onscreen, of *Borat Goes to Washington* comedy.][16]

MR. KRAVITZ: So, where does that take you in terms of fair use? Let's broaden it. Let's say you're the counsel at NBC, no, let's say you're the guy advising the counsel at NBC. Where does that take you?

MR. LOOMIS: First off, and we can have a little audience participation here. Does anybody think that anybody mentioned in this little news release might have a cause of action against him or the people he works for? Anybody think that? I see nobody. Definite no's. I think you're one hundred percent right.

MR. KRAVITZ: By the same token, did anybody think that the meat producers had a cause of action in [*Texas Beef Group*] *v. Oprah*[17], for maligning meat in this country?

MR. NGUYEN: No, because she's Oprah. She has "Oprah Immunity."

MR. LOOMIS: Going from that clip to just a thumbnail about the fair use doctrine is a little bit of a stretch, but not entirely discordant, because part of the fair use analysis is leavened with common sense. And not to get too hyper-academic about this, but there are four things that the copyright statute talks about a court looking at to weigh whether any particular use of copyrighted material is infringing or is in fair use, a permissible use: the nature of the work that's being copied, the nature of the copied work, the nature and quality and quantity of what's taken, and the effect on the marketplace of the authorized work.[18] So, when you put that all together, one thing that you get out of fair-use jurisprudence is virtually guaranteed

15. *See generally* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

16. MSNBC, *Borat Goes to Washington*, COUNTDOWN WITH KEITH OLBERMANN, available at http://www.youtube.com/watch?v=qtV5TK37Azk (last visited Mar. 19, 2007).

17. *See generally* Texas Beef Group v. Oprah Winfrey, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

18. *See* 17 U.S.C. § 107.

unpredictability, because you can take that matrix and apply it to the same set of facts and convince one judge that it's clearly fair and some other judge is going to say it's clearly not fair, or a jury. So, it's an area where if you or your client are relying upon fair use to authorize them to do something that they otherwise would definitely need a license to do, be aware that it's almost impossible to give anybody solid guaranteed bullet-proof advice that "sure, that's fair, you can do it, go ahead." On the other hand, certain kinds of uses are almost certainly going to be considered fair, and this just brings to mind one such, which is parody. Part of the overall fair use analysis is the concept of a transformative use. So, you take a copyrighted work, and you use it in a way that either holds it up to scorn or makes it comic, in a way that wasn't intended to be, or otherwise transforms it from what it was originally to a different work. And since copyright exists, the doctrine exists to promote works of authorship. If you're clever enough, and funny enough, you're almost certainly going to be able to say that it's fair use because it's parody. Also, a parody will typically not have a terribly negative effect on the original work. Although there are some interesting exceptions in the case law, where the parody was so biting, and so caustic, that it really did significantly harm the work that was being copied, held it out and made it look ridiculous, and made the market for that work very unlikely, on a going-forth basis, but still was held to be a fair use because it was so completely a parody and so transformative. So, in any given case, if you mix these factors together, if the program, if the podcast, is newsworthy, say straight news, it's very difficult to establish that anything that's straight news is a copyright violation, particularly if you're not taking wholesale pieces of some copyrighted work. For example, broadcasting the whole first chapter of somebody's novel. That probably is going to be on the wrong side of the line, but if you're taking excerpts for commentary, or for criticism, that is almost certainly going to be on the right side of the line. I don't want to go on and on at length, but fair use is something I've litigated, and is a subject that is endlessly fascinating to me, when you get into the cases, because, as I say, they're almost purposely unpredictable in the outcome, but I'll stop, and we can pick up more of that as we go along.

MR. KRAVITZ: Joe, let me turn it to you. You're now the general counsel, and Dennis has just given you a clean bill of health on this thing. Is there anything that causes you to have a Maalox moment?

MR. GABRIEL: Well, I'd be concerned, because, you know, I guess, if I was told by clearance counsel, when it was Keith Olbermann's piece that was aired on TV, that it was fine and was all protected by the First Amendment or fair use doctrine, I'd be concerned that, now that I'm

podcasting this through my website, maybe this is a new use. Maybe there's a legal issue that my clearance attorney didn't consider. That is, I think, really kind of the broad issue that we're discussing today here: whether podcasting is a new use that requires new licenses, even though the original use of the work was properly licensed. So that's what I would lose sleep over—whether I'm now exposing my company to liability because I'm now broadcasting something in a different way that I'm not used to broadcasting, through podcasting.

MR. KRAVITZ: And is there any way to protect yourself from something like that before it goes out internationally?

MR. GABRIEL: Well, you hire a law firm with errors and omissions insurance.

MR. KRAVITZ: Okay.

MR. GABRIEL: No. What I think you have to do is . . . go back to the original. Determine what you had to license before, and go back to those particular entities who were giving licenses, and make sure that you have clearance from those entities for this particular use. Spell it out in the license agreement. And if you're absolutely—this may not be the greatest example for this—because this is the *Keith Olbermann Show*, and everyone knows that he picks the newsworthy items of the day, and it really is First Amendment type commentary, but once you start getting into more entertainment related things that are not clearly parody, not clearly news, then you want to be sure of going back to everybody whom you're getting licenses from. This really isn't the greatest example, because I think most of it is protected by fair-use.

MR. KRAVITZ: Well, it is an interesting question, because *The New York Times*, which hires the best counsel in the country, got caught on this, and got caught on a couple of published opinions. And the reason was the moment the Web started moving they took columns that had been published in the newspaper and they just wholesale put them up on the Web, thinking the releases that they had secured from the authors would protect them. And they found out that that, in fact, wasn't the case. That one follows up on a case involving a soap-opera that I shall not name which managed to clear all rights to music domestically, but never managed to clear them internationally, writing an internal memo which said "nobody will ever pick up on this." Well, one of the better antitrust lawyers in town did pick up on it, and they ended up with a fair amount of trouble over the thing. Jimmy, any thoughts in terms of what types of licenses you look for, for your clients, because I know you do transactional as well as litigation?

MR. NGUYEN: The bottom line is that you are the person or company

creating a clip like that and using it and making it available for podcasting on the Internet. The only surefire way to protect yourself is to get permission and a license from every single content owner, rights holder, talent involved in the content. That's the only surefire way. For the most part that is impractical for most clients, and so you have to do this cost-benefit analysis with your client, which is both a legal as well as a business balancing—and this is where you have to put on your business person's hat with your client. What's the value of putting that content out there versus the risk you take? So, some of the things I tell clients to look for and encourage you to look for are to assess the most important factor. In my mind, for fair-use it is the impact you're going to have on the original market value of the original work. So, if whoever owned the original work that you're using and repurposing for podcasting actually, for example, delivers that work through podcasting themselves—or the Internet or some other download service—I think you're taking a much bigger risk because they have a better argument that you're impinging upon their own revenue stream. So, that's the most important thing I look at. If that happens, then I usually advise clients to go approach the relevant content owner to get a license. The problem is, most clients just want to go and put stuff out there, and they don't want to do that. So, from that perspective, it makes things difficult. If they do get a license, what I encourage them to do is get as broad rights as possible, both geographically, you want worldwide rights if you can get it—in terms of platforms, to describe as many new media, and old media, platforms as possible, so that you're getting permission for them. Because today podcasting is very popular; tomorrow it may not be popular. There may be a new delivery platform so you want to get as broad of rights as possible, so you have the catchphrase which us lawyers use all the time, which is "any and all media now or hereafter known" is the ideal scenario. Just saying, for example, that I want it on all digital media or on the Internet doesn't necessarily mean as much these days, because there are different ways to deliver content digitally. And via the Internet, for example, if you get television rights, television can now be delivered through the Internet, through a technology called IPTV, Internet Protocol Television.[19] So the things I encourage: getting broad geographic rights, getting broad rights on as many platforms as possible, getting the catch-all "all media now known or hereafter known," if you can. Often you cannot do that, and people want to limit your rights, and then you have to parse out all of the different types of new media platforms that you currently know

19. *See* David S. Cohen, Phoneman Rings for H'wood, DAILY VARIETY, March 20, 2006, at A1 (Internet Protocol Television is a way to deliver television content over broadband lines and telephone lines).

about and that you want to get rights from. And in the final thing, if you are a company getting the license, you want a representation that warrants you from the content owner that they've got all the appropriate releases—for example from the talent that's in the clip, because the worst thing that could happen is that you get the permission from, let's say, NBC, or the copyright owner, but they don't have the relevant permission from everyone who's depicted in there, and those talent, or whoever's depicted in the clip, come in and want to sue your client because they didn't get the relevant permission. So, those are the things I look for.

MR. KRAVITZ: Okay. Jimmy, you go to Keith Olbermann and you give him that advice and he says, "You know, we checked it out with a few people, and they just don't want to give us licenses." What do I do?

MR. NGUYEN: At that point, I do that risk assessment. I tell them, well, I tell clients all the time, I cannot give you a blanket assurance that you're going to be protected. And they ask for it all the time. They say, "Well it's a fair use, come on, it's a fair use, tell me it's a fair use." And they want that from you as lawyers. You have both an ethical, as well as just a practical, responsibility to say, "The best I can tell you," and sometimes I'll quantify it for clients and say, "The best I can give you is fifty/fifty odds that it will be considered fair or not." And at that point you have to make the business decision whether it's worth the risk to do it, knowing that you might get a claim against you. And if you still think it is, then gosh darn it, go do it. Ultimately, that's not my decision to make as their lawyer. I advise them what the risks are. Sometimes I tell them flat-out that you shouldn't do something and clients do it anyways. But that's basically all you can do as the legal counsel is tell them what the risk is and tell them that there's no way you can give them blanket assurance that it's safe, and you can try to quantify, perhaps, the risk, but with fair use there's no way to give anything really higher than fifty, sixty, seventy percent odds, because it's just so unpredictable.

MR. GABRIEL: What Jimmy's talking about is really, for the litigator, the nightmare scenario, and that is when you've advised them, "Well, you should try to get a clearance," and then they go and try to get clearance, and everyone says "no" and they say, "Well isn't it fair use anyway, so we can use it anyway." And then the issue that will come up, of course, during discovery, during the litigation that ensues, is, "Why did you try to get clearance if you thought that it was fair use?" And it's second nature to attorneys to do this, where clearance is a business decision, it's not a legal thing. But, arguing that to a jury puts you in a very difficult position because you're asking for these rights, when you really didn't think you needed them supposedly.

MR. KRAVITZ: Or, frankly, to a judge. There's a case that goes back about a dozen years now, that involves Bette Midler,[20] where they approached—Ford approached Bette about doing an ad for them and she said no. And Ford says, "Well that's fine, we're just going to go get one of your background singers." So they got the background singers who sounded just like Bette Midler, and they put it out and Bette sued and, needless to say, she did very very well. It wasn't even a jury issue, it was the judge's taking a look at that situation and saying these are not just bad facts, these are probably aggravated facts because you knew you had to go out and get the license, and when she said no you went to her backup singers. So, it doesn't always work out the way you would have hoped for a business decision.

MR. LOOMIS: I'd like to add a couple things to that.

MR. KRAVITZ: Go ahead.

MR. LOOMIS: I wouldn't call it a lawyer's nightmare, as more a lawyer's full employment opportunity, as a litigator.

[General laughter.]

MR. KRAVITZ: And what's the bad thing?

[Laughter.]

MR. LOOMIS: And the other thing is—just so we're clear—the law is clear, notwithstanding the fact that you might have a problem with a bad impression on a jury or a judge if you've asked for clearance and don't get it then you go ahead and do it. There is clear law that says that asking for clearance does not create the need for clearance. You can ask for clearance simply as a matter of mitigating risk and to avoid, you know, you pay somebody a thousand dollars to get clearance, if they'll give it, to avoid having to spend a couple hundred thousand dollars defending a lawsuit, which you will win at the end of the day, but which you will spend a lot more than it cost you to get the clearance. So, just as a practical matter, if a client says, "Look, do we need clearance or not," and you say, "Well, maybe you do and maybe you don't," and they say, "Well, do we ask, because that's going to put us in a worse position." Well, generally speaking, if you know who the person is who can give you the clearance, I would ask for the clearance, because if you get it, you're golden, case closed. If you don't get it, and you don't need it, you can go ahead and do it and if you have a lawsuit, you have a lawsuit. Part of the dynamic when you're giving advice to clients is—and this is a dangerous area— how broadly do you expect to promote and circulate the work? What is your realistic expectation as to how successful it's going to be? Because, in a

20. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

fairly obvious way, if it's below the radar, it may be in violation, but who's going to care? Either they won't know it, the rights holders won't hear about it, or if they hear about it it's going to be too insignificant to do anything about. But, if you just happened to have hit a home run, and you're thinking, well, not to worry, because this is just a low-profile, it's a small-budget thing, it's never going to make any money, we just want to do it, and it's a big success, well, uh, you know, the phone's going to ring.

MR. KRAVITZ: Alex, let's take a look at another clip, and I'm thinking about the one with the cowbell.

[They run the clip.][21]

MR. KRAVITZ: Okay. We want to do a little bit of audience participation. Who can tell me what the background music was for that podcast? Hand in the back, can you tell?

MR. KRAVITZ: And, I guess my question is does anybody see any problems using that music?

AUDIENCE: [Inaudible.]

MR. KRAVITZ: Okay. Well, let's put it this way, let's see hands, how many of you thought, when you heard that, *Thus Spake Zarathustra*?[22] Okay, we've got one hand, probably a music major? No? Classical background. Alright. Okay. How many of you thought of *2001: A Space Odyssey*?[23]

[Hands rise.]

MR. KRAVITZ: Okay. Anybody see any issues? Why don't I turn it over to Dennis, because I know Dennis has a musical background. Any issues?

MR. LOOMIS: Well, there's clearly an issue, whether use of that music is or is not a copyright violation, absent the license. It's not the core of the subject, but just a quick thumbnail about music copyright. It's a very, very complicated subset of copyright law. And one thing that is unique to music, in the copyright environment, is that for any, okay, for that recording, there's at least two different, distinct copyrights and

---

21. *See* SWITCHFOOT, *The Cowbell*, Switchfoot Video Podcast, Episode 11, available as a free subscription on iTunes.

22. *See, e.g.*, *American Symphony Orchestra*, http://www.americansymphony.org/dialogues_extensions/99_2000season/2000_03_08/strauss.cfm (Richard Strauss composed *Thus Spake Zarathustra* in the late 19th century—later became famous when Stanley Kubrick chose the piece as the theme of his film *2001: A Space Odyssey*.) (last visited Mar. 22, 2007).

23. Stanley Kubrick's 1968 film, 2001: A SPACE ODYSSEY, won an Academy Award for visual effects (MGM 1968); *see also Internet Movie Database*, http://www.imdb.com/title/tt0062622/ (last visited Mar. 22, 2007).

probably two different, distinct copyright owners for the copyrighted work that you hear. One is the owner that owns the copyright in the recording itself, in other words that particular recorded performance of that piece, and the other would be the owner of the copyright in the music, which, in this case, that's got to be in the public domain. The composition has to be in the public domain, but the recording isn't. So, the fact that that's old music—I mean, you can have Mozart—but if it's been recorded, and you are not, you can perform your own performance and record your own performance of Mozart, and you don't need clearance from Mozart.

MR. NGUYEN: It's hard to get now.

[Laughter.]

MR. LOOMIS: But if you are going to copy somebody else's recording, of Mozart, and assuming it's still in copyright, which it probably will be, and by the way, as a sub- sub- sub- to this sub- subtopic, figuring out whether something is or is not still in copyright is absolutely mind-numbingly complicated, and I've been doing copyright law for twenty-five years and I can't even figure it out without drawing pictures and circles and without doing a flowchart. So, it's very difficult to assume that anything is not in the public domain, and even if it's ancient, but that's an aside. So, the question simply is: To do that, for them to do this podcast, are they technically infringing the copyright in the recording, and they very well might be. And would it be a fair use, that's the next question to ask. It's a minimal use. Probably has no impact on the market value of the work, as a practical matter . . .

MR. NGUYEN: Unless they license it for synchronization use.

MR. LOOMIS: Right.

MR. NGUYEN: Which they probably do.

MR. LOOMIS: Let us put it this way. This would be a good example where, if you had a client and they actually had something to lose, you would probably say, "Get a license." And, by the way, getting sync licenses is pretty straightforward because there are rights agencies where you just deal with them and it's a plug-in member and it's usually not all that much, depending on what you want to do with it, so you can always—not always—but you can find the owner of copyright in most recordings and obtain a license without a lot of hassle, so better safe than sorry. If you were taking that piece and using it as some sort of a musical counterpoint for a comic effect, you don't even need a license, possibly. You know, it's a musical parity.

MR. NGUYEN: Where this becomes a real issue is in this new me-generation, particularly of user-generated content, like on services like YouTube, people in the public are now the authors of their own motion

picture, home videos, sorts of things like this podcast. And so, people at home are frequently using not just music but video clips and other types of copyrighted content without permission, making their own home-created, home-auteur pieces of content, putting it up for podcast, on YouTube, you know, putting it up on their own website, and this is where it becomes more prevalent. And from that perspective, you as the content owner, it doesn't really serve you much to go after all these individual little users of your copyrighted content. Now, if it were a major company, now, releasing that, that would create a bigger issue. And, in fact, some companies, such as one of the music companies, has announced that it may make a claim against YouTube, that is actually facilitating a lot of this type of content posting. So that becomes the bigger issue. This didn't use to be such a big issue in the days where content was controlled by certain key players, the motion picture studios, the television networks, because they were all sophisticated and careful. But in this generation, with new media technology, when all of you can go home and create one of these podcasts or clips, *that* becomes the challenge for the content owner, because they can't have the resources to pursue each and every one of you that use their music or video content without permission.

MR. KRAVITZ: Question in the back. Why don't you stand up if you could.

AUDIENCE: [inaudible]

MR. KRAVITZ: The short answer: I think it makes a profound difference. One of the keystones on a fair use analysis is whether it's used for educational purposes, is it short, what's the length, what's the brevity, and those are the sorts of criteria that the court takes a look at. Let me shift the emphasis on the clip a little bit, and turn to Joe on this one. Joe, as a litigator, I'll play the client, and say I'm the rights holder in *2001: A Space Odyssey* and I come to you and I'm mad as hell. And I want you to do something about it. I want you to shut these people down because, you know, maybe it's *Thus Spake Zarathustra*, but goddamn it, when I made the movie I went out and got every license that I needed, and I'm looking at this, I've now done a survey, as I'm required to do under trademark law, and I know that nine out of ten people out there who are my target audience are looking at this thing and are not thinking *Thus Spake Zarathustra*, but are thinking *2001: A Space Odyssey*, and they're holding my movie up to ridicule. What's your advice to me—other than to pay the bill?

MR. GABRIEL: Or to pay the retainer? I would first try to figure out what claims you have out there—and I know that you're most upset about the new association of this music piece with this particular piece instead of your film, but I would be looking at, looking to see what rights that *you*

had—you're the owner of the rights in the film—what rights *you* had in the music in the film, if any. And, generally speaking, you probably *don't* have any rights in the film, so you don't have any rights in the music, per se. *Your* concern is strictly the association, is that correct?

MR. KRAVITZ: My movie has secondary meanings with ninety percent of the American public, regardless of imprint [last word unclear].

MR. GABRIEL: I would say that you have this close association, your film has this close association with this particular music, it doesn't rise to the level of a trademark or some sort of a protectable right that you have in associating your film with this music. Music is separately copyrightable. This is a work that existed long before *2001: A Space Odyssey*. As long as whoever's using this obtains the right licenses, you as the owner of the copyright in the film made this song popular, I don't think that you can interpose your rights as against this particular producer.

MR. KRAVITZ: Are you telling me that it's because my rights aren't strong enough?

MR. GABRIEL: No, I'm saying that you don't have any rights.

[Laughter.]

MR. GABRIEL: I mean, in this particular song your problem is the association, and that music is now associated with your film that somehow you're able to control how that music is used in other films.

MR. NGUYEN: I would just be more practical about it. I would say to the client, "Well, you know, is this person really worth going after? Are they really denigrating or tarnishing your image, or the reputation of your film?" Because, if they're really not, do you really want to spend money suing this person, or every other person, that might use it? There may be a specific reason to do it, 'cause maybe it's on a porn website, and you don't want to be associated with that. And that's a very good reason. But short of that, I would just say, "Is it really worth the money to pay me as a litigator—well, I would love to get paid—you know, it's really not worth the money." Usually just sending them a cease and desist letter will do the trick, but you also have to forewarn clients, since you don't want to send cease and desist letters and then not follow up with a lawsuit. So I would, just to the practical question: "Is it damaging enough to your company, your reputation, or your revenue stream to spend the money to sue?"

MR. KRAVITZ: Sir, you had a question.

AUDIENCE: [inaudible]

MR. KRAVITZ: Well you're absolutely right. There are all sorts of conclusions that you can draw from that. One is, "If I really own the rights in *2001*, I really want to shut these people down." It's a little bit like

Disney. They go after people, they go after elementary schools, that put Mickey Mouse on the side of a wall. That's literally happened. It happened down in Florida.[24] So I guess that would be part of my answer to the angry client is that I want to make gosh darn sure that this does not achieve secondary meaning, that my meaning is the one that's going to stay in play.

MR. LOOMIS: Just to pick on Jeff a little bit, I'll take Joe's theme. There's a fundamental question whether there's any trademark rights owned at all by the owners of copyright in the movie, because owning copyright in a movie or in a television show or work does not automatically and necessarily create a trademark. It only creates a trademark if you've used the title of that work to promote other products and services other than the movie, which often is the case. I'm not so sure that, in the real world, if they ever promoted *2001* in that sense. For example, *The Simpsons*. I spent a lot of years representing and enforcing Fox's *The Simpsons*. For example, the title of that show was not a trademark, but it surely became a trademark when they started selling t-shirts, coffee mugs, you know, caps and everything else under the sun. So, the fundamental starting point of the hypothetical Jeff poses is: Is there a trademark issue at all? But now, if there is a trademark, and going to your point, the argument, if you had trademark rights, would be that that concern is a precise basis to argue infringement, but necessarily a trademark infringement but a grounds of dilution. Because your argument would be: Well, look, I have this well-known association between this music and my movie, and I have a trademark in the whole sort of public impression associated with the movie, if I let other people use the same music for entirely different works, over time, that's going to break down the association between my work, and my mark, and this element of my mark. So, that would be an argument for the trademark owner to advance, to show that this is, in fact, in violation of the trademark rights, even though they're not potentially using this to sell any other product. Whatever merchandise they're spinning off from *2001*, they're probably not cutting into that market, but they may be cutting into the public perception of a direct association between the music and the movie and the commercial byproducts of that.

MR. GABRIEL: I think there have been cases where copyright owners in films have advocated, have argued that they have trademark rights out of things that are in the film, but it's generally a situation where there's a

24. In 1989, Disney threatened to sue three Florida preschools that had painted murals of popular Disney characters on its walls. Peter Johnson, *Disney Gets Grumpy With Preschool*, USA TODAY, Arp. 26, 1989, at O1D.

character, definitive well-laid-out character.

MR. KRAVITZ: Oftentimes, you think Rambo or Batman or . . .

MR. GABRIEL: James Bond . . .

MR. NGUYEN: Pink Panther . . .

MR. GABRIEL: And also animated films, 'cause those are fleshed out as clearly as they can be. Those are characters that are in films that become part of merchandising, and then become trademarks. But generally, my only comment would be that the producers of those kind, copyright owners of films are successful when they've argued that they have visual cues. And this is simply an auditory cue, a song associated with something being panned, an image being panned, I don't think that that rises to the level of a trademark.

MR. NGUYEN: But, for example, if you took the James Bond theme, and used it in one of these, you know, home-grown music-generated video clips, that's pretty recognizable, and those people associate that very instantly with James Bond, and if I were MGM Studios I might have a concern about it. So, I think it's right that most audio clips don't rise to the level of trademark protection, identifying the source of the product, but there are some very unique things that do.

MR. KRAVITZ: Why don't we show another clip. Let's take a look at the newscast we talked about.

[Clip viewed: CBS News item with Katie Couric and Ken Hall.][25]

MR. KRAVITZ: I would warrant that unless you've been inside Saddam Hussein's hole, you're probably going to know who that is if you're an American citizen. And Joey, that being on a podcast, is that anything more than a public performance? How does that whole area of the law come into play?

MR. GABRIEL: Well the first issue is not exactly directed to your question, but the first issue I would wonder is whether the release obtained from Ken Hall covered podcasting. When reporters go out in the field and they interview subjects, they get them to sign a release and it's usually pretty broad, but I would want to make sure that I want to take a look at that release, that he signed, to make sure that we can use it in the podcast. Yes I figured that we got the right language for use in the television broadcast itself, but the podcast I'd be wondering about.

MR. NGUYEN: I have a question. Where did you get the podcast from?

MR. KARGHER: I think out of iTunes?

---

25. CBS News, Eye to Eye: Ken Hall, available at http://www.imdb.com/title/tt0062622/.

MR. NGUYEN: Out of iTunes? And did you pay for it?

MR. KRAVITZ: It was a free subscription. Let's just for a moment, Joe, assume that it's not off from iTunes. You go home at night, and you think that this story on the all-time rushing leader in high school football isn't going to see it, so you put it up on your own personal website. Are there any issues involved? Are you going to hear from CBS?

MR. LOOMIS: I'd expect to receive a letter from CBS. It just happened recently. It was slightly different, it was YouTube, but a bunch of people put on the Chris Wallace interview with Clinton on YouTube[26] and Fox went after not just YouTube but those who posted it on YouTube, and then realized that that was a public relations disaster, because they made it look like there was something wrong with the interview, and pulled it back. Now you can see that interview. But, I would fully expect that if I did that I would actually receive a letter from CBS because I think that, that is, that's pretty clear that I'm taking copyrighted work, work that's owned by CBS, and putting it, rebroadcasting it, copying it, and rebroadcasting it as if it was mine.

MR. KRAVITZ: Dennis, the trial lawyers at your places say that maybe not so. Give us your commentary.

MR. LOOMIS: No no. What was, I don't know whether, what my face was showing, but what I was thinking, frankly, and this is just an offering to those who might practice in the IP area, is the beauty of being an IP lawyer is you never have to give a straight answer to anything because no matter what the issue is, well maybe it's this, but maybe it's that, and we can argue this and we can argue that, and its fifty/fifty or maybe it's sixty/forty. I would say that, just as a technical analytical standpoint, that if you take a podcast that you've lawfully obtained, as you did, and then you republish it in a large way that, unless there's terms of use that say that you can do that, I would start from the proposition that you probably can't do that. Because, as you may know, if you may know the basics of copyright, one of the exclusive rights owned by the owner of copyright is to distribute the copyrighted work. So, the fact that you obtained it lawfully does not by any stretch of the imagination mean that you have an implied right to redistribute it or to rebroadcast it or to republish it for your own purposes, and even if those purposes are non-commercial and just because you think it's a great contribution to society.

---

26. YouTube.com, at http://www.youtube.com/watch?v=xvUIwa1rkNU (last visited Mar. 22, 2007); *see also* Lorne Manly, *Democrats Come Out Swinging Against Fox Letter from America*, INT'L HERALD TRIBUNE, Oct. 2, 2006, at 2, available at http://www.iht.com/articles/2006/10/01/news/letter.php (describing how Democratic officials used the YouTube link in an email fundraising appeal) (last visited Mar. 22, 2007).

MR. NGUYEN: Most websites and webservices like an iTunes, there are terms and conditions which you clicked on to agree to. Sometimes they're just posts on there that say that you only can use and view the content for your personal use and cannot redistribute, reproduce it, without permission.

MR. GABRIEL: Yeah, this is an evolving area, and this could very well be the place where we get, actually, some law on podcasting. And the issue is whether podcasting is a public performance of the work. The argument that could be made, that it is public performance, is that—and I'm just looking at the definition of what public performance is, under the Copyright Act—it's to perform a work is to play it either directly or by means of any device or process. Because it has such simple language, you could argue that because it went through this whole digitized format and was played on computer, that it was played through a device or process, much like a song is converted into a radio wave and then played through a radio. So you can, that is the view of many. There are others who say, "Well, just because you make it available and someone can download it and then listen to it later, in the privacy of their own home kind of thing, why do you call that a public performance?" It's being available for download, but not immediately performed. I think under the Copyright Law they would consider streaming that kind of material, that's public performance, because it's immediately available. The difference with podcasting is that you're downloading the file and then later on, at your convenience, listening to it on your iPod or your computer, what have you. So, there's arguments out there as to whether this is actually public performance in the first place. There's no law on this yet. We're not aware of any cases that raise this issue.

MR. KRAVITZ: And each of us checked.

MR. GABRIEL: Right.

MR. KRAVITZ: And we checked in multiple sources. And if any of you would see anything we would appreciate it if you would take it to us. 'Cause, panel aside, we asked some pretty fair company lawyers across the country if any of them are dealing with this, even at the trial level, and so far we're coming back with nothing.

MR. GABRIEL: If you're looking for a copyright, for an issue to write about in your law review article, this would be a good one.

MR. NGUYEN: Yes this is the key legal issue with regard to podcasting, particularly when it comes to music, because the public performance right that's built into the Copyright Act really was intended for things such as playing music at your gym or at your restaurant, and music copyright owners wanted to be able to get money, essentially, for the

public performance of that. And it started even earlier than that, with people playing piano in restaurants, you know, back decades ago. So many people think that that was what the public performance right is really designed to cover. It would not be designed to cover, in some people's mind, if in the old days you took an audio cassette or a CD and put it into your Walkman, and played your music in your Walkman. That would not be considered a public performance, for which you had to pay a public performance license. But now, content owners are saying that now are distributing our content on either music or video, via the Internet, and then making it available to be downloaded and podcast, then that is a public performance. So, some people think that there's an inconsistency there and I think there'll be a struggle in the law about whether that is a public performance because it's made available via the Internet, which is a public medium, but it's actually enjoyed and used in a way that is more private. And there is not a clear answer to that. And that is a question that clients are struggling with. I have the client of mine that's a media conglomerate ask me that very question: "What's the state of the law on whether or not podcasting is a public performance?" And frankly, I told him there's no answer to that question. And so they make a risk-analysis about whether or not they want to go ahead with providing some of their content via podcasting, when they might get a claim for public performance royalties.

MR. KRAVITZ: Any final thought before we throw it open to the audience for questioning?

MR. LOOMIS: No, I've said enough.

MR. KRAVITZ: Well, let me just close briefly with an item from PCmagazine.com.[27] I don't know if any of you read it, but it's awfully good, and it kind of approaches things from a non-law school aspect. And the title of the article is "The Death of Radio Is the End of Last Month," and it said: "Over the weekend a story appeared about shortwave radio towers along the Spanish Coast of Brava being blown up. Obviously, they were no longer needed or wanted. Even YouTube has a clip showing the Voice of America towers near Munich, Germany being destroyed." Then it goes on to talk about shortwave, and it closes out by saying: "Podcasting is a much bigger threat to radio than it is to shortwave. In fact, radio is being assailed from every angle you can imagine." And then it ends up by saying: "Perhaps I should get to the point here: Commercial radio sucks." Well, that may or may not be true, but maybe that's for a different discussion, but it's very clear that the ability to change time is going to

27. John C. Dvorak, *The Death of the Radio*, PC MAGAZINE.COM, Sept. 25, 2006, http://www.pcmag.com/print_article2/0,1217,a=189468,00.asp.

revolutionize radio just as TiVo has revolutionized TV. Anyway, with that, I think we'll close from our end, but I did want to open it up with discussion from the audience. Yes, sir.

AUDIENCE: It seems like, as far as podcasting goes, with the majors, these things at CBS, MSNBC have the most traditional sources of sophisticated artists. To me obviously the issue is whether the scope of the rights that they have include a bypass. When you talk about the user-generation issue from a copyright holder's standpoint, is the best they can hope for is to prevent a future occurrence of use? I'm thinking about, in the city, there's this thirteen-year-old kid, who does this video to a popular song, and it gets distributed all over the Net, and they're e-mailing each other, and it's out there. And so they try to tell him to desist, and they tell him to stop, and he's going to stop, eventually, but that one clip is still going to be continuing to go around.

MR. KRAVITZ: Right.

AUDIENCE: And you really don't know, there's nothing really you can do to go after him, and even if they did go after him it's kind of a PR mechanism, so, taking this little kid to the limit, so is the best they can do to hope he doesn't do it again?

MR. KRAVITZ: Realistically? Probably. One story that I heard that I love is the latest iteration of Grokster is on the West Bank of Israel or Palestine, depending on your political bent, and some reporter went out there to interview the guy who was doing it, who was eighteen years old. And he was asked the question: "Aren't you concerned that somebody's going to shut you down?" And he said: "Look around here. We don't get a lot of visitors around here." And, realistically, who the hell's going to go to the West Bank and start dealing with that sort of situation and shut somebody down? It's just not going to happen.

MR. NGUYEN: What the content owners do is make a claim and a demand in to the Internet service providers that carry it. So if it's a website, and if it were me and I represent a content owner I would just send a notice under the Digital Millennium Copyright Act and a notice and take-down letter saying, "This content's on there and it infringes my copyright and, in order for you to keep your immunity under the DMCA, you have to take it down within a very reasonable time." And most Internet service providers and servers *will* do it, in order to preserve their immunity. YouTube, for example, which is sort of in the cultural *Zeitgeist* right now, is very cooperative with content owners right now; they get a notice, they take it down right away. We represent ISPs; they get a notice about infringing, they take it down. So, that's the practical remedy that content owners face. They don't really go after the person that created and posted

it originally; they just send a notice to the Internet service provider.

MR. LOOMIS: The thing is, once it's achieved a certain level of notoriety, you can write DMCA notices to anybody you want to, but it's still going to be available on the Internet. Like the Clinton interview, it got taken down by YouTube, but people were talking on the radio about other sites where you can get it that day, and now I guess they've put it back up. But the point you make about the publicity, that angle is really important when you're representing a really high-profile copyright holder. If I may impose on you a small war story. When I was doing the Fox *Simpsons* work, the client wanted us to send a cease and desist letter to this organization which you may have heard of called Jews for Jesus, because they had taken *The Simpsons* style of strip, and they had these flyers that they were handing around on Hollywood Boulevard and everywhere, with a sort of *Simpsons* motif, but it was basically a promotional, evangelical thing for Jews for Jesus. And they said, "Well, we got to make them stop!" And, as soon as we sent the letter, like, on the front page of the Calendar section of the *L.A. Times* and *The New York Times* and everyplace else was this letter from some kid, some twelve-year-old, who says he was the guy who did the design, and why was a company like Fox picking on a little kid, and what's wrong with us, and didn't we—and it was a nightmare.[28] It was kind of fun for me, 'cause I had to unwind the mess that they had walked into. That's a big factor, that companies have to beware, and companies also, believe it or not, big companies do watch the budgets on what they spend money for, and they don't basically, it's all, it's even hard-sell to get a DMCA letter sent out, if it's pretty secondary.

MR. KRAVITZ: Why don't we take one other question, then we'll answer all other questions after-hours.

AUDIENCE: What about the fundamental question of the term podcasting, which has become common parlance, and now Apple's starting to get very grumpy about people using it.

MR. KRAVITZ: Mr. Loomis researched this.

MR. LOOMIS: Do you happen to know where the term podcasting came from?

AUDIENCE: No.

MR. LOOMIS: Ah. Did you think it came from iPod?

AUDIENCE: No.

MR. LOOMIS: I did. But I was wrong. You didn't know, so you couldn't be wrong. It actually began as an acronym for "portable on

28. *See* Karen Nikos, *Fox Lawyers Warn 4th Grader: Hey, Dude, You Can't Use Bart*, DAILY NEWS OF L.A., Nov. 22, 1990, at N1.

demand." I think that there was something called podcasting before there was something called an iPod. I'm fascinated to see how that spins out. As you may know, Apple is trying to trademark "pod" and it's going to be very interesting to watch how far that gets. I don't know all the ins and outs of it, but my guestimate is that they're going to have a tough time claiming exclusive rights in "pod," in any kind of a broad way, because it's become too generic. Certainly in terms of "podcasting," they're never going to be able to reel that one back in.

MR. KRAVITZ: Anyway, I want to thank each of you for coming. This has been an awful lot of fun.