Mr. NEEL. Well, there were two treaties in the WIPO, Mr. Bono. One had to do with copyright, which is what we are discussing; the other had to do with phonograms and performers, which is more in the musical recording turf than it is in movies and television programs, and I presume computer software.

Mr. BONO. Mr. Chairman, what I am getting to is I think that very soon we are going to have to talk about performance as well; protecting copyright from a performance standpoint on the Internet as well. And I do not know if we are talking about that now.

Mr. COBLE. If the gentleman yield, ASCAB and BMI will appear today or tomorrow—today I think. So that perhaps we will get to focus on that then.

Mr. BONO. Okay, thank you.

Mr. COBLE. I thank the gentleman. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you and good morning, Mr. Chairman.

I have to pay special tribute to Jack Valenti. Of course he was in the mode today that cautions us, because he said no one knows where we are going. Jack, you know that has never stopped a single Congress from taking whatever action they thought was necessary, even though it might have been regretted later.

And I am glad to see you all, and see all of our ex-staffers who have been so ably provided for in the private sector. This is good for the economy. Our President praises you, and everybody else.

And I just got in, and I am looking at my Subcommittee chairman's coupling of both these bills, which strike me as—Well, I do not know how it strikes me, but a real light bulb goes on, Chairman Coble.

Please say to me that you are not coupling the treaty bill with the liability bill.

Mr. COBLE. Well, there are two separate bills.

Mr. CONYERS. Say what I need to know here.

Mr. COBLE. I say to you there are two separate bills, each freestanding.

Mr. CONYERS. Right. Oh, okay. So, they are two freestanding bills, but you have 57 bills in your committee. Was it accidental? You just reached into the basket and pulled out these two and coupled them?

One bill, we could almost go tomorrow, after we hear the witnesses, to markup. We are implementing a treaty that has been asked by 60 nations. The other bill, this liability bill, there are going to be some more hearings, unless I misjudged my reading of this hearing.

Now, I am for coupling, and the domino theory, and everything else, but it seems to me one of these can get out of the bind right away, and the other is going to need a little bit more work. So maybe we should all work on that. Because we could send one bill tomorrow on its way. We may need to talk with all of you—present witnesses and others—about where we are going.

Now, looking at the liability part, on-line service liability, is there anybody on a committee or a witness that knows some case law where something has gone wrong and we need to fix it? Has anybody heard of anything like that? There are not that many cases, but there are some.

So, what do you say, gang? I mean, why are we here? Yes, sir? Mr. Neel.

Mr. NEEL. Mr. Conyers, the fact is that current law is vague and grossly inadequate to deal with the transmission of copyright material over a digital network. It is not that there is something in the law specifically that creates a problem; it is the vagueness of the law and the likely activity of all kinds of folks who could sue third parties here.

And by the way, the two bills that you mentioned are—connected; they have to be.

Mr. CONYERS. Let me pause for a minute. Ahh. I just wanted that in the transcript.

Mr. NEEL. It is hard to answer that. That was not a question. In theory of course, you could move a treaty bill, but the practical political reality here is, there is only going to be one bite at this apple, and——

Mr. CONYERS. I got you. I see now. Let me do this.

Name me one case law—one court decision that ticks you off no end in this subject.

Mr. NEEL. It is not that it ticks us off, it fundamentally worries a thousand other telephone companies.

Mr. CONYERS. If it does not tick, it worries.

Mr. NEEL. Well, worry, tick, aggravate.

Mr. CONYERS. That is a degree of—that we tolerate here in the Judiciary Committee. No problem.

Mr. NEEL. All right. One thing that enrages us then, is the potential for massive lawsuits for copyright infringement liabilities that should not in any way be—on local telephone companies or carriers.

Mr. CONYERS. I am finding that in these cases—and have them tucked away in the staff director's office under lock and key. There are not any cases that did what it is that is enraging you and ticking you off. Not one.

Mr. NEEL. The sheer progress of new copyright treaty here will broaden the umbrella for liability alone. But the main thing is, that this network is unique. This is not the only time we are going to be able to address this issue.

Mr. CONYERS. So then what Valenti was really saying—and he had to direct his admonitions to the committee that called him—he was really talking to his partner sitting to his left—no one knows where we are going, but we do not need to perspectively legislate in advance.

Mr. VALENTI. Mr. Chairman, may I speak to that?

Mr. CONYERS. I would love to hear you.

Mr. VALENTI. The fact is that what Mr. Neel—formidable supporter of his cause—What he is saying is, that he is speculating about a future that is darkened and illuminated, and very fuzzily defined. It seems to me that it is not worthy of the Congress to deal in that kind of speculation, which has no basis and fact.

The Internet has been there for some time. As I said, 11 million pages, it is doubling 300,000 new pages every seven days.

Where is the legal beef? The fact is that current law allows judges to make these decisions on a case by case basis. He cannot cite one—the two cases that I know about, where the on-line serv-

ice provider was so blatantly guilty that there was no question about it.

The fact is, we ought to deal with the issue at hand, Mr. Conyers, which is the implementation language that other 95 nations are waiting to see how we react. Everything else is irrelevant.

Now the issues that Mr. Neel raises are quite legitimate, but they ought to be taken up in another forum, not here. They do not belong here. We are dealing with this immensely crucially issue of how fast we can do this implementing language, and believe me, if we deal with that, we could deal with it in a week.

The other is going to take a lot of time to sit down and work out, but can be worked out.

Mr. CONYERS. Would you have any personal objection if I ask the Chairman for another round of questioning?

Mr. NEEL. Me?

Mr. CONYERS. A second round. Could you entertain such a consideration, Chairman Coble?

Mr. COBLE. Well, let us continue, and address the people who are here, John, and then if we are on-line. I want to try to finish here before we go into session, if we can. We have two more pancls remaining.

Let me go to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Valenti, how soon do you think it will before the motion picture industry is selling movies on the Internet?

Mr. VALENTI. I beg your pardon?

Mr. GOODLATTE. How soon will it be before the motion picture industry is selling movies on the Internet?

Mr. VALENTI. I do not know. The answer is, there is no question that there will be on a pay-per-view basis on the Internet—no question about it—but as of this moment it is not there, but it will be there.

Mr. GOODLATTE. What about downloading a copy that one can keep, like a copy that you can buy at Blockbuster or other places; you buy it as opposed to pay-per-view.

Mr. VALENTI. I think it is possible that somebody could take a copy from Blockbuster, and throw it up on the Internet——

Mr. GOODLATTE. I do not mean Blockbuster. I mean you. When is Sony, or Disney or any of the other companies in your industry going to be selling those in that fashion?

Mr. VALENTI. Well, right now in the sequence of marketing most companies go to theatrical, and then they go to home video, and then they go to pay TV, and then they go to premium pay channels, and then they go to free television. That is usually the sequence of marketing. But they might decide to insert in between one of those marketing sequences movies on the Internet, and you call it down for $1, $2, or whatever the charge would be.

Mr. GOODLATTE. Can you tell me the specific objections you have to the language that Mr. Coble has introduced in H.R. 2180?

Mr. VALENTI. I relied on my copyright attorneys to whom we pay obscene fees to come up with this information. And if I may, I do not like to read from notes—because I am now dealing in untrespassed territory let me just do this.

One, there are no threshold requirements. On the previous proposal service providers would have to meet minimum standards for fair, reasonable copyright practices and policies, before being able to claim immunity. This bill drops these, and therefore even the most irresponsible renegade service is eligible for special liability treatment, say my copyright lawyers.

Two, the awareness test. Even on-line service providers that reasonably should have known that their networks were used for piracy, are off the hook. As long as no one in the company can say they were aware of the problem. This seemingly subjective standard, say the copyright lawyers, rewards ignorance and discourages proactive efforts by service providers to prevent their networks for being used for piracy.

Those are the two principal objections that we proffer to you for your consideration.

Three, so you would say that the phone companies and other on-line service providers have some obligation to police their own network.

Mr. GOODLATTE. Is that what you are arguing there with that section objection?

Mr. VALENTI. I am saying that under current law if they are innocent, having the knowledge, they are not liable. That is what the current law has said, and there is a case where such a on-line service provider was so declared to be innocent; no liability.

Mr. GOODLATTE. Thank you.

Mr. Neel, do you want to respond now?

Mr. NEEL. Well, the problem here is that there are no proactive measures that could be invoked to police the Internet or the networks of copyright infringement. They are just not there. They are not there now, and they are not going to be there for the foreseeable future. And that is a very real problem; in fact that is a huge barrier to this kind of approach.

And secondly, in terms of whether or not anyone is going to be sued, what the case law is, our speculation is not a fantasy. The vice president of the Recording Industry Association says a matter of fact, "the fight about third party liability will be resolved in future litigation." So their intentions are clear. The software publishers or some of them have said, that unless the carriers meet our standards of behavior, they will be sued.

So it is not a speculation, it is not a fantasy that the networks are exposed here; it is a very real current situation.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman from California is recognized for five minutes.

Mr. BERMAN. Well, thank you, Mr. Chairman. I would like to talk a little bit before I ask a question—focus on Mr. Neel's testimony to give what might be viewed as a bias summary, but it is mine.

It seems like you are saying five things. One, we in the U.S. Telephone Association are both content owners and service providers, from which we should react. You are appropriate balancer of a different interest, and are in a sense——

Mr. NEEL. We would like to think so.

Mr. BERMAN. Because of your conflicting economic roles you have come to a fair conclusion.

The issue of your revenues from your carrier functions and your access functions versus your revenues from your content ownership functions would be instructive.

Mr. Valenti represents an association which has members which are content owners and also access providers. No one would suggest that in and of itself, Mr. Valenti's association members are necessarily arbiters of this any more than I believe you are. You have clear economic interests which tilt in an opposite direction from Mr. Valenti's.

You talk about being sued, and you raise the issue of the vice president of RIA, talking about this will be decided—third party liability will be decided in the courts.

That is not the real issue; the issue is whether it will be decided in the courts unfairly, and as of this date I still have yet to hear—of a case—which is decided third party liability, and contributory infringement cases unfairly.

Third. You talk about mere conduit. I would be that without regard to where the members of this committee or of this Congress are coming from—all of us agree on one thing; a mere conduit should not be liable for passing along infringing content in and of itself.

Your next point, you talk about actual knowledge on the other side. The question I would like to know is, where in a hint, in a dictum of any court decision, or any academic article is there a theory that makes a credible case that a near conduit under existing law has any serious potential liability? Perhaps someone will sue one of your 1,400 members for doing something that is a mere conduit, but that does not mean that they will win and that they will prevail on appeal.

The question to me is, why are you vulnerable when you are only operating as a mere conduit? I mean actual knowledge issue—I would like to liken this a little bit to an experience I had dealing with amendments to the Foreign Corrupt Practices Act.

The issue of red flags, reason to know a series of facts which would cause a judge and a jury to conclude that any reasonable person would have been aware that there was infringing material going on—that person's access. That provider was providing distribution of infringing material is very critically important.

Many corporations in this country resisted reason to know as a standard. They wanted the ability to pass out cash to foreign agents who might be bribing governments, and as along as that foreign agent never told them that that is what they were doing with the money it would be okay.

When you do that you incentivise the head in the sand approach towards this issue. Are there not some reasonable sense of obligations? Mr. Valenti talked about this a little bit in answer to Mr. Goodlatte's question. Are there not some obligations where you are in the uniquely best position to know that infringing material is passed on; that you should have some responsibility without the opponent having to prove that the infringer called you, told you he was going to stick some infringing material up there, and that conversation was tape recorded for the other side to be able to prove

actual knowledge, and that you let this thing go on and build up the damages to the party whose property had been stolen.

These are some of the issues that concern me. But the question I would like to ask is, in addition to the implementation legislation for these treaties, which is 2281—2281 is the implementing legislation? In addition to that how many other pieces of legislation around this place will the telephone companies be opposing until they get what they would like on-line service provider liability?

Mr. NEEL. The last question is the one you would like me to answer.

Mr. BERMAN. Yes.

Mr. NEEL. Because there is a lot of stuff embedded in that that is not so legitimate.

Mr. BERMAN. After you answer that, if the chairman is willing to let you, you can——

Mr. NEEL. The easiest answer to the last question is none. I am not aware of anything that the telephone industry is up here trying to hold hostage. The fact is the industry is held hostage. The Internet service providers are being held hostage, not by a speculative or a potential litigation; it is flat and it is stated.

There is at least one case—I do not have all the details provided to me—the Friendly case, in which Internet service providers were held liable for copyright infringement.

I would like to get you the details of this, but we will talk about it. It definitely puts the industry at risk.

The fundamental principle, it creates a flaw in your summary earlier. The nature of this network prevents the carriers and Internet service providers from monitoring all these transmissions, including the kind of obligation that you are suggesting. It is just not possible.

Mr. BERMAN. What if you are a bulletin board operator?

Mr. NEEL. Excuse me.

Mr. BERMAN. What if you are a bulletin board operator?

Mr. NEEL. A bulletin board operator?

Mr. BERMAN. Has no knowledge of what is being put on that bulletin board.

Mr. NEEL. Oh, I think you can come up with any number of analogies that could in fact be obvious infringements or obvious complicity. My point is, if you are moving billions of bits of data down these networks you have no way of knowing who owns the rights to any particular material, much less whether it has been——

Mr. BERMAN. Is that called a mere conduit?

Mr. NEEL. Excuse me?

Mr. BERMAN. Is that called a mere conduit?

Mr. NEEL. A conduit or even in the advertising, the existence of some kind of program or content; the storage and movement of this. There are any number of ways beyond conduit that——

Mr. BERMAN. Can I just interrupt there——

Mr. NEEL. Sure.

Mr. BERMAN. You stopped me.

Mr. NEEL. Well, I am sorry. It is okay with me.

Mr. BERMAN. How do you advertise something that you do not know whether the rights have been lawfully acquired?