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Mickey and the Mouse: The Motion Picture and Television Industry's Copyright Concerns on the Internet*

Mark S. Torpoco

I. INTRODUCTION

In early 1996, international chess champion Garry Kasparov played a six game match with an IBM computer, named Deep Blue, specifically designed to play chess and programmed with the knowledge of every known chess move, game, and strategy.¹ Kasparov's hard-won victory was hailed as a victory for human ingenuity over artificial intelligence,² but the match itself was important for another reason: it highlighted the potential commercial value of the Internet as an entertainment medium.

IBM, which sponsored the match, created an Internet site that allowed chess enthusiasts to follow the match move by move and to read on-the-scene expert commentary.³ IBM was expecting 200,000 people to drop by, but over 6 million people signed on to view the action as it transpired.⁴ These are Nielsen-size numbers larger than those of many TV shows, and if IBM could have charged admission to view its Inter-

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¹ Dave Anderson, *A Chess King Bails Out the Big Four*, N.Y. TIMES, Feb. 21, 1996, at B11.

² *Id.*

³ Steven Levy, *How to Cast a Wider Net*, TIME, Mar. 4, 1996, at 48.

⁴ Anderson, *supra* note 1.

net site through some form of digital cash, at least half of the tournament price of a half-million dollars would have been raised.⁵

It has been said that it is impossible for a content provider to make money on the Internet.⁶ But the Kasparov v. Deep Blue match showed that there is a market for Internet based entertainment, and with the continual development and refinement of Internet technologies and digital cash collection systems, the entertainment industry's ability to deliver product to consumers is sure to grow. In fact, the entertainment industry is already deeply involved in the Internet and has used the medium to advertise movies, television programs, and music releases for quite some time. As the suppliers of both advertising and entertainment product, the entertainment industry will have a large stake in protecting the intellectual property which it creates for the Internet.

This paper will examine the copyright concerns of the motion picture and television companies, studios, content developers, producers, etc. (collectively, the "Motion Picture and Television Industry") with respect to advertising and content they have developed for the Internet. It will illustrate that the Motion Picture and Television Industry has a growing financial interest in the Internet, and that this interest will continue to expand as the Industry shifts from being a mere Internet advertiser to a provider of content-for-sale. This growing interest will lead to the placing of tremendous amounts of intellectual property on the Internet, property which is inadequately protected given the ease of

⁵ Levy, *supra* note 3, at 48. The author notes, however, that the IBM site was successful because the "site's design was appropriate for the medium." *Id.* Television, for example, is a poor conduit for viewing the chess match due the time intervals between moves, but the Internet allowed for such things as viewer involvement, such as the ability to click a button and instantly receive pictures of the board layout at an earlier part of the match. *Id.*

⁶ David Clark, Lecture to the class Law, Internet, and Society at Harvard Law School (Feb. 5, 1996). Clark has argued that it is impossible for anyone to charge admission for access to an Internet site as: 1) without stronger intellectual property protections, a content provider seeking to charge for access will be instantly undercut by another provider putting up the same information for free, and 2) there is no viable mechanism by which to collect such admission charges—it is unlikely that anyone would be willing to pay as much as \$10 for access to an Internet site, but without a \$10 minimum charge, the expense of the transaction cannot justify the use of a credit card payment.

downloading material from and copying on the Internet and given the current ambiguities in copyright law. In order to adequately protect both the Industry's existing intellectual property assets and property created specifically for the Internet either now or in the future, this paper advocates an aggressive campaign of lobbying, targeted litigation, public education, and technology development. Central to this campaign are the ratification and implementation of the World Intellectual Property Organization ("WIPO") copyright treaties, approved in December 1996 by the WIPO Geneva conference, a program of copyright enforcement, and the development of copyright management protection systems.

II. THE INTERNET

In the mid-1960s, at the height of the cold war and in the wake of the Cuban Missile Crisis, the Department of Defense faced what then seemed to be a less-than-theoretical question: How could orders be issued to the armed forces if the U.S., as well as the major telephone, radio, and television hubs, were devastated by a nuclear assault?⁷ The answer was to develop a computer network that had no hub, no central operating authority, no central switching station, and that could continue to operate even if most of the phone lines were in tatters.⁸

In 1964, Paul Baran, a researcher at the Rand Corp., designed a computer-communications network that had no central or primary computer, which assumed that the links connecting any computer to any other computer were totally unreliable.⁹ The Department of Defense implemented Paul Baran's concept in 1969 when it linked four computers together in a network known as the ARPAnet.¹⁰ The AR-

⁷ Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62.

⁸ *Id.*

⁹ *Id.* "In Baran's scheme, each message was cut into tiny strips and stuffed into electronic envelopes, called packets, each marked with the address of the sender and the intended receiver. The packets were then released like so much confetti into the web of interconnected computers, where they were tossed back and forth over high-speed wires in the general direction of their destination and reassembled when they finally got there. If any packets were missing or mangled . . . it was no big deal; they were simply resent." *Id.*

¹⁰ JOHN LEVINE & CAROL BAROUNDI, INTERNET FOR DUMMIES 11-12 (3d ed. 1995). What made the ARPAnet workable was that the four computers used the same

PAnet itself continued to grow as other computers were added to the network. At the same time other networks, detached from ARPAnet, also began to appear.¹¹

In the mid-1980s, the National Science Foundation, which decided to build its own network (the NSFnet), “built the high-speed, long-distance data lines that form the Internet’s U.S. backbone.”¹² Eventually, “all publicly and private funded networks . . . joined the . . . NSFnet,” and the modern NSFnet, now termed the Internet, was born.¹³ Though the National Science Foundation created large parts of the Internet’s infrastructure, it in no way runs or controls the Internet.¹⁴ The Internet is thus “a network of networks”—a connection of computers throughout the world, all accessible to each other, by use of the same communication protocols.¹⁵

A variety of functions can be performed on the Internet. These include: Talk,¹⁶ Chat,¹⁷ File Transfer Protocol (FTP)¹⁸ and Telnet.¹⁹ By

set of protocols. A protocol is agreed-upon method of communication used by computers. The protocol handles such decisions as which computer should begin the communication, how replies are to be handled, how data will be represented, and how errors will be corrected. ARPAnet and the Internet use a collection of protocols called *Transmission Control Protocol/Internet Protocol* (TCP/IP). RICHARD J SMITH, MARK GIBBS & PAUL MCFEDRIES, *NAVIGATING THE INTERNET* 6 (1995).

¹¹ SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 7.

¹² Elmer-Dewitt, *supra* note 7.

¹³ SMITH, GIBBS & MCFEDRIES, *supra* note 10.

¹⁴ Elmer-Dewitt, *supra* note 8. The author notes that the NSF has cut back gradually on its funding and that all government support of the Internet is soon expected to be terminated. “The major costs of running the network are [now] shared in a cooperative arrangement by its primary users: universities, national labs, high-tech corporations and foreign governments.” *Id.*

¹⁵ Katie Hafner, *Making Sense of the Internet*, NEWSWEEK, Oct. 24, 1994, at 46.

¹⁶ A real-time typed dialogue between two individuals on the Internet. SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 12.

¹⁷ A real-time typed dialogue between a variety of people on the Internet akin to a party line. *Id.*

¹⁸ FTP allows the user to access another computer and download or upload a file. Through FTP, a user can access a variety of files, such as research papers, video games, Web browsers, and other software. *Id.* at 182.

¹⁹ Telnet allows a user to log into a remote machine. No downloading of programs or data onto the user’s machine occurs—the functions are run entirely on the remote

far the most widely used resource on the Internet, however, is electronic mail (e-mail).²⁰ E-mail most commonly involves the sending of typed messages by electronic transmission across the Internet from one user to the "mail box" of another user, from which that second user can later pull up and read the electronic letter.²¹

Another function, similar to e-mail, is Usenet, which contains many news groups. Usenet involves the posting by electronic transmission across the Internet of typed messages onto a public computerized bulletin board accessible (and thereby readable) by many Internet users, instead of a user's private mailbox.²²

Yet, one function has become the standard method for navigating the Internet: the World Wide Web.²³ The Web is essentially a collection of "sites" located on computers throughout the world.²⁴ One accesses a site on the Web by typing the site's alphabetic address.²⁵

computer. *Id.* at 12.

²⁰ Hafner, *supra* note 15. Millions of users are currently relying on the Internet for electronic mail. Louise Kehoe, *Trapped in the Web Traffic Jam*, THE FINANCIAL TIMES LTD., Oct. 16, 1996, at 22.

²¹ SMITH, GIBBS, & MCFEDRIES, *supra* note 19, at 13. E-mail is not limited to plain text-only transmissions but can also be used to transmit pictures, software, audio files or even video. *Id.*

²² *Id.* at 116. As with e-mail, Usenet can be used to transmit pictures, audio files, and video. *Id.*

²³ *Id.* at 264-267 (showing "in 1993, traffic on the World Wide Web increased by 443,931 percent"). In just a couple of years, volume on the World Wide Web has reached 38 million visits to sites per day. Judy Brown, *Could Fantastic Growth Strain the Internet?*, MILWAUKEE JOURNAL SENTINEL, Nov. 4, 1996, at 13. According to a study by International Data Corporation, the number of Web users will increase from 8.3 million users in 1996 to 1.2 billion by the year 1999. *Internet Access*, EDGE: WORK-GROUP COMPUTING REPORT, July 29, 1996.

²⁴ William F. Allman, *A Gentleman's Guide to the Internet*, FORBES, Sept. 25, 1995, at 133.

²⁵ A Web address is called a Uniform Resource Locator (URL). The URL for Web sites generally takes the form of the phrase "http:" (which stands for Hypertext Transport Protocol and is the protocol used by the Web to transfer Web documents) followed by the name of the host computer such as "www.harvard.edu" (also known as the domain name) followed by the directories and filename of the site sought. A full site name might thus read: "http://www.harvard.edu/courses/spanish.html." By typing in this site name, the user is transported to a web page containing the Spanish courses

This, in turn, will pull up a Web page located at the site. A Web page is often a collection of both text and graphics. The page will also have certain highlighted keywords within the text which are "hyperlinks" to other Web pages.²⁶ When the user clicks the mouse onto the highlighted word, the link takes effect and the other related Web page (a Web page sometimes on the same computer but sometimes at another computer anywhere in the world) is automatically displayed on the user's terminal.²⁷

This system of leaping from Web page to Web page (called hypertext) is what makes the Web such a powerful interactive tool.²⁸ Yet, the Web's interactivity is not solely limited to the ability to link pages. It also comes from the fact that sophisticated Web pages can allow the user to enter text, fill in forms, run computer programs, play sounds, or even launch other Internet functions like FTP or e-mail (essentially: actively participate on the page).²⁹ Because of this interactivity, the Web has become the linchpin of the Internet, and the primary vehicle through which entertainment products might flow.

The relative ease of use, the global nature of the network, and the variety of functions available have made the Internet a powerful communications tool. The power of this tool is further enhanced by the Web, and its ability to access information anywhere in the world through hypertext links initiated by simply clicking a computer mouse on a line of text.

III. THE MOTION PICTURE AND TELEVISION INDUSTRY'S UTILIZATION OF THE INTERNET

The Internet is a global network comprised of over 3.8 million host computers.³⁰ More than 5,000 computers are added to the Internet

available at Harvard University. This alphabetic address is translated by the computer into the actual address for the Web site, which is a number code. For a more thorough explanation, see SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 266

²⁶ George Gilder, *The Coming Software Shift*, FORBES, Aug. 28, 1995, at 147.

²⁷ *Id.*

²⁸ SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 264.

²⁹ *Id.* at 265.

³⁰ Mark Fritz, *Superhacker Saga Distracts from Real Computer Crime*, TORONTO

each day.³¹ One study estimates that about 5.8 million American adults are connected to the Internet, but the study “has been criticized as too conservative; some argue that there may be as many as 15 million Americans and 30 million users in total connected worldwide.”³² This is a vast market which the Motion Picture and Television Industry cannot afford to ignore because it will enable the Industry to advertise for products in other media, such as television programs or movies, and it will enable the Industry to provide specifically created entertainment content directly to the users over the Internet.

A. *The Internet as Advertising*

When the Internet first started to boom in the early 1990s, Hollywood was quick to recognize that the Internet was an ideal place to advertise to its core movie audience—young males. After all, throughout the 1980s, young men between the ages of 16 and 24 were the primary movie ticket purchasers.³³ This coincides with the majority of Internet users, who are predominantly young, affluent, educated and male.³⁴

STAR, Feb. 18, 1995, at C6.

³¹ SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 8.

³² Donald K. Ghostlaw, *Intellectual Property Law Meets the Internet*, THE CONNECTICUT LAW TRIBUNE, Oct. 16, 1995, at S4.

³³ Suzanna Andrews, *The Great Divide: The Sexes at the Box Office*, N.Y. TIMES, May 23, 1993, at Sec.2, 15.

³⁴ Claire M. Hinsberg, *Net Results: Ted Lang, CEO of an Internet-marketing Firm, Talks High Tech Business Trends and Promoting One's Company via the Net*, CORPORATE DETROIT MAGAZINE, Sept. 1995, Sec.1, 32; One executive, Larry Kasanoff, whose Threshold Entertainment produced the movie *Mortal Kombat* and a Web site to advertise the film, has commented that the young, educated and male-based demographics of the Internet make it a key medium for advertising motion pictures, especially those with any adventure of science-fiction component. He has stated: “You’re reaching 15- to 25-year-olds that generally don’t read newspapers, and they’re not as prone to watch entertainment shows on TV. If you can get them interested in an environment that they’re already curious about, it’s another way of advertising” Yardena Arar, *Movie Studios Are Staking Out Their Territory on the Internet*, L.A. DAILY NEWS, July 19, 1995, at L10. The studios like the demographics of the Internet because Internet users are young, educated, and have lots of disposable income. David Barboza, *The Frontier in Movie Promotion*, N.Y. TIMES, Aug. 22, 1995, at D6.

The primary vehicle for this advertising campaign was the World Wide Web. With its multimedia format, which allows for the posting of pages filled with interesting facts about the film, interviews with the cast, still pictures from the film, audio recordings, and even downloadable video trailers, the Web was uniquely suited for grabbing users' attention.³⁵ The studios have put up Web sites dedicated to such films as *Clueless*,³⁶ *Goldeneye*,³⁷ *Space Jam*,³⁸ *Batman & Robin*³⁹ and *Independence Day*.⁴⁰

The creation of a Web site typically accompanies the release of a particular movie and forms an integral part of the studio's advertising

³⁵ Steve Persall, *Cinema and Cyberspace*, ST. PETERSBURG TIMES, Aug. 9, 1996, at 1D.

³⁶ *Paramount's Clueless Page* (visited Mar. 1996) <<http://www.paramount.com/Clueless.html>>. This Web site offers a textual welcome by the main character in the film, pictures of the main characters, a dictionary of lingo from the movie, a "mall guide," and a list of interesting facts about the movie, cast, and film makers. The page is presented in a format that assumes the user is one of characters' friends stopping by to chat.

³⁷ *MGM/UA James Bond: Goldeneye* (visited Apr. 1997) <<http://www.mgm-ua.com/bond>>. The Web page is introduced with the graphic of a code book flashing the words "Top Secret" and "MI6 Branch" on the cover. In exploring the page, the user is assigned the role of one of MI6's agents investigating the whereabouts of James Bond. The site offers such things as a dossier on Bond, an audio clip of the theme song sung by Tina Turner, behind-the-scenes facts, a variety of pictures, and downloadable video clips for later replay.

³⁸ *Space Jam Home Page* (visited Apr. 1997) <<http://www.space-jam.com/jam.htm>>. This extensive Web site, produced by the Warner Brothers, the distributors of the film by the same name, allowed fans of the movie to view still photos from the film of both live and animated characters, to hear songs from the movie soundtrack, to download the movie trailer, and to create movie posters, screen savers and postcards. The site's advertising potential was enhanced by hyperlinks to the Warner Brother's Studio store, and through the use of interactive games and cartoons.

³⁹ *Batman & Robin Web Page* (visited Apr. 1997) <<http://www.batman-robin.com>>. Warner Brothers created this Web-site well in advance of the film's release in order to stir up added hype. The site features such items as storyboards, still advanced photos of movie posters, and video previews.

⁴⁰ *Independence Day Website* (visited Apr. 1997) <<http://www.id4.com>>. Twentieth Century Fox, the distributor for this film, has no official homepage as of yet, but established one for the release of this film. The site not only offered the standard press releases, still photographs, product information and video footage, but also offered an interactive comic book, a real-time online multimedia game and an MTV contest.

blitz to induce the public to watch the film.⁴¹ The addresses for the Web sites are posted after movie previews seen on television, in trailers released in theaters, and in newspaper advertisements for the film.⁴²

In addition to Web sites for particular films, the major studios have put up homepages dedicated to advertising the studios themselves and all the relevant products (from movies to toys) associated with that studio.⁴³ Some studios have even created departments for the creation of Web pages.⁴⁴ Additionally, the major theater chains have developed Web pages that enable visitors to purchase tickets to currently running movies and to preview major releases.⁴⁵

The television industry, though slower to respond to the growth in the Internet, has also responded by placing advertising on the Internet.

⁴¹ Barboza, *supra* note 34 (noting how Internet advertising compliments television and newspaper advertising campaigns).

⁴² One of the most thorough Internet advertising campaigns in recent times was for the Disney movie *Toy Story*. See *Walt Disney's Toy Story* (visited Mar. 1996) <<http://www.disney.com/ToyStory/index.html?GL=H>>. The site not only provides the usual pictures and textual facts about the movie, but it also directs a user's attention to the products (such as toys) available from the film and where he can buy them by providing links to such things as the Disney Store Web pages. The site also offers a data base where a user can find the closest theater playing the film and an animated game called "Concentration". The site was advertised along with the film in theater trailers, newspapers, and television spots. See also Ty Burr, *Mouse Pad*, ENTERTAINMENT WEEKLY, Mar. 22, 1996, at 77 (noting that the site was produced out of house and was in place before Disney launched its own collection of Web pages).

⁴³ The Warner Brothers web site, <<http://www.warnerbros.com>>, for example, contains links not only to the sites for Warner Brothers' movies, television shows and cartoon characters, but also offers connections to the Warner Brothers store and Warner Brothers production units. Other studio sites include Paramount Pictures <www.paramount.com>, Sony/Columbia/TriStar <www.sony.com>, MCA/Universal <www.mca.com>, and MGM/UA <www.mgmua.com>.

⁴⁴ The Web site for the Disney Corporation is located at: <http://www.disney.com>. For more information on the site, see Burr, *supra* note 42. Burr notes that the Disney public relations department has established a division for the in-house production of Web pages dedicated to Disney products. "The massive [disney.com](http://www.disney.com) evokes a shiny, corporate awe that can make the hardest of [net] surfers feel puny—it's an online Magic Kingdom linking you to info on Disney's movies, music, books, theme parks, software, TV shows, and theatrical tours. There are sweepstakes and coloring-book pages, film clips and sound snippets . . ." *Id.* See also Stephen Lynch, *Disney's Web Gamble*, THE ORANGE COUNTY REGISTER, Mar. 24, 1996, at K07.

⁴⁵ See *Movielink* (visited Apr. 1997) <<http://www.movielink.com>>.

The major television networks all have Web pages,⁴⁶ as do the major cable networks.⁴⁷ Most hit shows, like *Friends*,⁴⁸ *ER*,⁴⁹ or *Star Trek: Deep Space 9*,⁵⁰ have Web pages of their own.

The Web's interactivity, market size, and demographics have thus made it an integral part of the Motion Picture and Television Industry's advertizing effort. Though it is unclear how successful these Internet advertizing campaigns have been,⁵¹ it is clear that the Web's ability to convey text, sounds, pictures, and video has made the Web a compelling, if not yet wholly effective, means of advertizing.⁵²

⁴⁶ See *NBC* (visited Apr. 1997) <<http://www.nbc.com>>; *ABC* (visited Apr. 1997) <<http://www.abc.com>>; and *CBS* (visited Apr. 1997) <<http://www.cbs.com>>. As of this writing, the Warner Brothers Network and United Paramount Network do not have their own independent sites. However, programming for these networks is available through the Warner Brothers and Paramount studio Web pages, respectively. NBC has taken to advertising the location of its Web site during network identification spots on television.

⁴⁷ For examples, see *CNN* (visited Apr. 1997) <<http://www.cnn.com>>; *MTV* (visited Apr. 1997) <<http://www.mtv.com>>; and *HBO* (visited Apr. 1997) <<http://www.hbo.com>>.

⁴⁸ *NBC's Friends Page* (visited Apr. 1997) <<http://www.nbc.com/entertainment/shows/friends/index.html>>.

⁴⁹ *NBC's ER Page* (visited Apr. 1997) <<http://www.nbc.com/entertainment/shows/er/index.html>>.

⁵⁰ *Star Trek: DS9* (visited Apr. 1997) <<http://www.paramount.com/DS9/Home.html>>.

⁵¹ It is unclear whether Web sites generate box-office success. Barboza, *supra* note 34. The studios can only measure interest in a home page, not potential ticket sales. *Id.* For an analysis of the success of Internet advertising campaigns, see Katie Hafner and Jennifer Tanaka, *This Web's For You*, NEWSWEEK, Apr. 1, 1996, at 74.

⁵² Alan Sutton, vice-president of national publicity for Universal Pictures, has stated Web sites are the Internet equivalent of a Sunset Strip billboard. "You're reaching a vast worldwide audience that is, from what we've found, very hungry for entertaining and useful coverage of motion pictures," said Sutton. Arar, *supra* note 34. George Brenner, vice president and chief information officer for MCA/Universal Information Services, has described the Internet as giving people "more of a taste of what a movie is like, something we can't do in print or television advertising." Joe Kilsheimer, *Lights! Camera! Interaction!*, THE ORLANDO SENTINEL, June 4, 1995, at F1. Arthur Cohen, president of worldwide marketing for Paramount Pictures, has described the Internet as "a huge tool for involving people in movies and encouraging them to go." Barboza, *supra* note 34. The added benefit of Internet advertising is that it is relatively cheap in comparison to newspaper advertising and television spots. *Id.*

B. *The Internet as Content for Sale*

To date, the Motion Picture and Television Industry has not managed to make a profit by selling content directly to users over the Internet. There are two primary reasons for this. First, consumers are not likely pay very much for access to a Web page. Second, the Industry has not developed a means by which to collect such a minimal fee. As such, the Web has been little more than “simply toys for the PR departments [of Industry corporations], a new way to hawk the wares.”⁵³

The assumption has been that no content provider could charge a fee for access to a Web page.⁵⁴ Many argue that no one would pay the same price for a Web page that they would for a movie ticket. Furthermore, the Web is still very unreliable and content providers will find it hard to justify a large fee in light of “the endless delays, disconnects, server errors and ‘host unavailable’ messages” which users still encounter on the Internet.⁵⁵

Nevertheless, these difficulties have not prevented the online service industries from making content available for sale.⁵⁶ Similarly,

Creating a Web home page costs \$25,000 to \$50,000, a fraction of the \$10 million marketing budgets accompanying major releases. *Id.*

⁵³ See Burr, *supra* note 42.

⁵⁴ See Clark, *supra* note 6.

⁵⁵ Daniel Burstein and David Kline, *In the Square-Off Between TV and Computer, the Smart Money Might be on the Boob Tube*, L.A. TIMES MAGAZINE, Oct. 29, 1995, at 24, 26.

⁵⁶ Online service providers include such companies as America Online (“AOL”), CompuServe, Prodigy and the Microsoft Network (“MSN”). SMITH, GIBBS & MCFEDRIES, *supra* note 10, at 23. These companies, in addition to providing their users with gateways onto the Internet, provide such other services as online shopping, online travel agencies, interactive games, and magazine data bases. Hafner, *supra* note 16. Online service providers thus greatly differ from Internet service providers, like Netcom and AT&T, whose only service entails providing access to the Internet. *Id.* Online service providers are content distributors who charge a blanket fee for access to their unique content. *Id.*

The content provided is developed either by the online service provider directly or by licensing arrangements with online content developers. For information regarding the various services available on AOL see Elaine Madison, HOW TO USE AMERICA

the Motion Picture and Television Industry currently develops content for distribution by the online services, receiving compensation through the licensing of content to the online services, as opposed to receiving compensation directly from consumers for access to the content.⁵⁷ These features tend to be very popular despite being geared largely to advertizing other products, such as movie releases.⁵⁸

Perhaps the current focus on providing content for online service providers is due to the fact that online service providers, unlike Web page creators, can charge a blanket fee for access to their content. However, the difficulty of collecting fees for Web page access has not deterred content creators from making entertainment available over the

ONLINE (1995); for information regarding one online content developer for AOL, see *CrossOver Technologies, Inc.* (visited Apr. 1997) <<http://www.crossover.com>>.

The online service industries have made a substantial investment in developing new and interesting content for sale to consumers. See *ABC's World News Tonight*, (ABC television broadcast, Apr. 2, 1996) (noting how Microsoft Chairman Bill Gates has begun acquiring licenses from the major museums of the world guaranteeing Gates (and through him MSN) the exclusive right to display the museums' work by electronic transmission). See *NBC's Nightly News* (NBC television broadcast, Mar. 4, 1996) (explaining the strategic alliance between MSNBC cable television network and MSN for the delivery of news and information).

⁵⁷ Paramount Television Group, for example, on Sept. 26, 1995, entered into an agreement with the MSN whereby Paramount would develop new online sites based on its hit TV series *Star Trek* and *Entertainment Tonight*. *Paramount Television Group and Microsoft Corp. Announce Exclusive Agreement for "Star Trek" and "Entertainment Tonight" on the Microsoft Network*, BUS. WIRE, Sept. 26, 1995 (noting that among the services to be provided by Paramount are real-time chat sessions on MSN, original multimedia content, a multimedia "Starfleet Academy," forums within which fans can interact, and advanced information on television shows and motion pictures). Warner Brothers Online recently renewed an arrangement that allows AOL to maintain exclusive sites based on such Warner Brothers products as "The Rosie O'Donnell Show" and "Kids' WB!" Scott Hettrick, *WB Online, AOL sign on again*, THE HOLLYWOOD REP., Apr. 21, 1997, at 7. MTV and ABC have similar arrangements with AOL. See GENE STEINBERG, *USING AMERICA ONLINE* (2d ed. 1996).

⁵⁸ For example, multimedia content created by Hollywood Online for the movie *THE MASK* had over 21,000 still images downloaded from it during the two month offering period. David Landis, *Catching Some Entertainment, in Bits and Pieces*, USA TODAY, Aug. 25, 1994, at 8D.

Internet. Examples of this include narrative soap operas,⁵⁹ Internet magazines,⁶⁰ games,⁶¹ virtual chat rooms⁶² and special events (such as the Kasparov v. Deep Blue match).⁶³ All of these are presently available on the Web. Motion picture and television companies have participated in the creation of this entertainment content,⁶⁴ and this participation is growing as these companies develop divisions and

⁵⁹ One such Internet soap opera is *The Spot*, a site where a soap opera story unfolds, in text and graphics, weekly. *The Spot* (visited Apr. 1997) <<http://www.thespot.com>>. These Internet soap operas sites not only tell a story, but also allow users to view the personal biographies, diaries, and communications of the individual characters.

⁶⁰ Many magazines are now available over the Web. See *Entertainment Weekly* (visited Apr. 1997) <<http://www.pathfinder.com/ew>>; *Wired* (visited Apr. 1997) <<http://www.wired.com>>; and *The Hollywood Reporter* (visited Apr. 1997) <<http://www.hollywoodreporter.com>>. There are also magazines which have been created specifically for the Web and are not available in hard print. See *JetPack* (visited Apr. 1997) <<http://www.jetpack.com>>.

⁶¹ A variety of games are available on the Web from role-playing games (*President '96* (visited Nov. 1996), <<http://www.pres96.com>> (where the user assumes the role of a presidential candidate)) to multi-user video games (*Outland* (visited Apr. 1997) <<http://www.outland.com>> (real-time Internet fantasy game)).

⁶² One popular virtual chat-room is "The Palace." *The Palace* (visited May 1997) <<http://www.thepalace.com>>.

⁶³ See also *On the Internet, It Was 'Mother of All Nights,' THE HOLLYWOOD REP.*, Nov. 6, 1996, at 6. (noting how CNN's special *All Politics* site for the 1996 elections was on track for 30 to 40 million hits. The pressures placed on the Internet from the various election Web sites and chat lines nearly overwhelmed the Net on election eve); but see *Showbiz Today, Kasparov v. Deep Blue Draws Snooze on the Net*, (CNN television broadcast, May 5, 1997) (noting that interest in the May, 1997 rematch between Kasparov and Deep Blue had dropped from hit levels registered on the Internet for the prior tournament).

⁶⁴ CNN and Time Warner, for instance, have created their respective news sites, updated every couple hours. *CNN* (visited Apr. 1997) <<http://www.cnn.com>>; *Pathfinder* (visited Apr. 1997) <<http://www.pathfinder.com>>. The most ambitious project launched to date by a Motion Picture and Television Industry company was made in connection with the 1996 Olympics. For the Olympics, NBC, in conjunction with Intel, used a program known as Intercast to integrate its television broadcast with a Web site supplying up-to-the-minute information about the program. JEANNIE NOVAK & PETE MARKIEWICZ, *CREATING INTERNET ENTERTAINMENT* 272 (1997). Intercast embeds the Web's HTML code in the TV signal and allows it to be displayed on a computer simultaneously with the TV show. *Id.*

subsidiaries for purposes of creating Web entertainment.⁶⁵ Industry representatives have indicated that their respective companies intend to become more involved in the creation of content for the Web.⁶⁶

Many commercial content developers are financing the creation of this content through the sale of advertising space on their Web sites.⁶⁷ Advertising is rapidly becoming the major source of revenue for the Web.⁶⁸ In this sense, the Web follows the broadcast model of finance for television and radio, whereby viewers and listeners are given free access to the content and the content developer makes his profit through the sale of commercials.⁶⁹

Other commercial content developers seek to make a profit based on a subscription model, whereby the user is charged a membership fee to access a Web site.⁷⁰ These sites, however, have encountered

⁶⁵ Paramount has created a division called Paramount Digital Entertainment, dedicated to creating "original programming" and "interactive shows" for the Internet. *Paramount Television Group and Microsoft Corp.*, *supra* note 56; NOVAK & MARKIEWICZ, *supra* note 64, at 63; *see also An Introduction to Paramount Digital Entertainment* (visited June 1996) <<http://www.paramount.com/pdehomepage>>. Disney's Web creation arm, Disney Online, is developing both its own sites, and has purchased existing Web entertainment. Scott Hettrick, *Disney Online takes over Family Planet*, THE HOLLYWOOD REP., Apr. 21, 1997, at 6.

⁶⁶ At a March, 1997 seminar of the American Film Market, representatives from Universal's, Paramount's, Disney's and Warner Brothers' online divisions declared the intention of their companies to become more involved in creating original Internet content. Carl DiOrio, *Studios find Net Worth in Promo and Production*, THE HOLLYWOOD REP., Mar. 5, 1997, at 14. One executive, Leonard Washington II, vice president and producer at Paramount Digital Entertainment, expressed the commitment of Paramount to the creation of new programming for the Internet. *Id.* at 67.

⁶⁷ The Web search engines, such as *Lycos* <<http://www.lycos.com>>, *Yahoo* <<http://www.yahoo.com>>, and *Altavista* <<http://www.altavista.com>> are financed through the advertisements placed on their Web sites. *CNN* and *Pathfinder* are also financed through advertising. *See supra* note 64.

⁶⁸ NOVAK & MARKIEWICZ, *supra* note 64, at 237. According to one study, by Jupiter Communications, Web advertising will rise from its 1995 levels of about \$50 million to \$2-5 billion by the year 2000. *Id.* The same report predicts that Web advertising revenues will rise higher than radio. *Id.*

⁶⁹ In 1995, the top five Web advertisers, in order of amount spent, were: 1) AT&T, 2) Netscape, 3) Internet Shopping Network, 4) NECX Direct, and 5) Mastercard. NOVAK & MARKIEWICZ, *supra* note 64, at 238.

⁷⁰ Access to the Web site is usually controlled by the use of a password, and the fee is generally collected in the form of a monthly credit card payment. ESPN has devel-

limited success due to the hesitancy of users to transmit their credit card numbers to the subscription site without more secure encryption technology.⁷¹ Moreover, because of the costs involved in credit card transactions, a minimum charge of roughly ten dollars is required if any profit is to be made through the use of a Web transaction.⁷² As a user is unlikely to pay ten dollars every time he wishes to access a Web page, a content provider cannot charge a user for a single access. Consequently the user must subscribe to the site or cannot use it at all.

The solution to this fee collection problem is the development of a system of micropayments through which users could be charged a couple of cents for access to a Web page—a system of digital cash. Digital cash is “the figurative money now being unrolled for use on the Internet . . . [n]o plastic, no bar code, no magnetic stripe—it exists only as bits.”⁷³ Digital cash works by having the user deposit a sum of money in an account from which payments (no matter how small) are automatically subtracted whenever a for-fee Web site is accessed.⁷⁴ A variety of companies have launched initiatives to develop digital cash payment mechanisms.⁷⁵

oped a Web site, *ESPN's SportsZone*, at <<http://espnet.sportzone.com>>, whereby a user is charged \$4.95 per month to access sports news, editorials, contest, opinion polls, and up-to-the-minute scores. *Id.* at 17. Playboy and the New York Times have similarly begun to create subscription based sites. *Playboy* (visited Apr. 1997) <<http://www.playboy.com>>; *The New York Times* (visited Apr. 1997) <<http://www.nytimes.com>>. Gaming sites (*Cyberpark*, <<http://www.inngames.com>>), dating services (*1st Site*, <<http://www.1st-site.com>>), and chat rooms (*The Palace*, <<http://www.thepalace.com>>) have also begun to follow the subscription model.

⁷¹ Credit card transactions over the Internet, however, are already fairly secure due to existing encryption technology. NOVAK & MARKIEWICZ, *supra* note 64, at 243-246. New improvements are underway which will make such transaction more secure. *Id.*

⁷² Keiron Henderson, *Cybermoney, No More Threatening than Credit Cards*, THE REUTER EUROPEAN BUS. REP., Mar. 11, 1996.

⁷³ Michael Finley, *E-Money: It's so Much More Refined than the Real Thing*, THE DENVER POST, Jan. 21, 1996, 2d Ed., at I-01.

⁷⁴ Russell B. Stevenson, Jr., *Internet Payment Systems and the Cybercash Approach*, in 17TH ANNUAL INST. ON COMPUTER LAW 449, 439-56 (Practicing Law Institute 1997).

⁷⁵ *Id.* at 441-42 (noting how one such company is CyberCash, Inc., whose system is already undergoing testing). See also Chris Herringshaw, *E-Cash Gets to Work*,

As Internet technology evolves, and as Web pages become more than just text with pictures, the demand for such Internet-based entertainment can only increase. This heightened demand will increase the ability of content providers to earn a profit, through either advertising or fees charged for access. Already, for example, it is now possible for a user to download audio files from Web pages⁷⁶ and play them on an audio player on the user's computer.⁷⁷ The audio files can contain such things as the soundtrack from a film, the theme song from a television show, or a song recorded by the original artist or band.⁷⁸

The major drawback of downloading these digitized audio files, however, is that they are extremely large and can occupy a lot of memory on the user's hard drive.⁷⁹ The large size of the files also means that they take a tremendous amount of time to download.⁸⁰

INTERNET WORLD, May 1997, at 84 (describing other efforts to develop e-cash).

⁷⁶ Kenneth Suzan, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 798 (1995) ("As soon as full-length songs or . . . sound bites are placed in digital format and stored within a computer, the audio takes the shape of a computer file. By virtue of being placed in a computer file format, it can be copied effortlessly like any other computer file.").

⁷⁷ See, e.g., *Disney Records* (visited Apr. 1997) <<http://www.disney.com/DisneyRecords/downloads/Downloads.html>> (offering a wide variety of clips from Disney films for downloading).

⁷⁸ See also *The Ultimate Band List* (visited Apr. 1997) <<http://american.recordings.com>> (offering access for users to hundreds of band home pages where they can download sound clips from their latest releases); *Internet Underground Music Archive* (visited Apr. 1997) <http://www.iuma.com/IUMA/in-dex_graphic.html> (offering clips and full length recordings of works performed by various bands); *Pentagon CDs and Tapes* (visited Apr. 1997) <<http://www.pentagon.net>> (offering sound clips for download prior to a visitor's purchase of a mail-order CD); and Kenneth Suzan, *supra* note 77, at 801 (explaining that one Internet site, located in Finland, offered users worldwide the opportunity to download complete songs digitized from contemporary artists' recordings).

⁷⁹ Price Coleman, *Wired for Sound: Hard Rock is Rolling Down That Info Highway as Aerosmith Sends Out Digital Vibes for PC Users*, ROCKY MOUNTAIN NEWS, June 26, 1994, at 104A.

⁸⁰ Neil Strauss, *The Pop Life: Hit Makers Warily Explore the Computer Frontier*, N.Y. TIMES, July 6, 1994, at C9 (explaining that it takes a long time to download these digitized files because the quality of sound recording is high—equivalent sometimes to

When an Aerosmith song was released to CompuServe's online users in 1994, it took a user between sixty and ninety minutes to download the song using a modem set at a speed of 9,600 or 14,400 baud⁸¹ (the then average speed for PC modems).⁸² Despite the slow download rate, 7,000 members of CompuServe were not deterred from downloading the Aerosmith file onto their home computers during the eight day offering period.⁸³ The slow download time, however, remains an obstacle to the marketability of audio files.

The solution is to bypass downloading entirely by providing real-time audio over the Internet.⁸⁴ Audio on demand allows users to hear

CD quality—thereby requiring larger memory capacity).

⁸¹ See Landis, *supra* note 58 (describing how Geffen records offered a complete song, Aerosmith's *Head First*, exclusively on CompuServe before the song was released to stores. The less-than-CD quality version took over an hour to download).

⁸² Baud is a measure of how much bandwidth a transmission medium has and reflects the speed of a modem. SMITH, GIBBS, & MCFEDRIES, *supra* note 10, at 389. The baud rate can also be expressed in terms of bits per second (bps). *Id.* "Since it takes eight bits to describe a single character, a transmission medium with a bandwidth of 8 bps would send data at the pathetically slow rate of one character per second. Bandwidth is normally measured in kilobits per second (Kbps—thousands of bits per second). So, for example, a 14.4 Kbps modem can handle 14,400 bits per second." *Id.* A 28.8 Kbps modem is painfully slow in comparison to even an ancient single-spin CD-ROM drive that can transfer 150K of data each second. Jane Ozer, *Sound Blasts the Web*, PC MAGAZINE, Mar. 26, 1996, at 103. The 28.8 Kbps modem is approximately 1/40 the speed of an old CD-ROM. CD-quality audio requires about 176K of raw data per second, close to 50 times the capacity of a 28.8 Kbps modem. *Id.* 33.6 Kbps modems are currently in existence and new 56 Kbps are ready for release soon, but both are still too slow to deliver audio or video on demand and as the 56 Kbps modem uses the entire capacity of the copper wire phone lines, it is unlikely that future modems can be created that increase the bandwidth available to a PC. *Visual Bandwidth*, PC COMPUTING, May 1997, at 204.

⁸³ Coleman, *supra* note 79. Likewise, one Carl Malamud is using the Internet to distribute a weekly "radio" interview show called "Geek of the Week", despite the fact that it takes the average computer about an hour over a high-speed modem to capture 30 minutes of sound. Elmer-Dewitt, *supra* note 8, at 64. The question remains: why would anyone wait for an hour to listen to a half-hour show when they could receive the same information over the radio or even CD instantly? *Id.*

⁸⁴ Jan Ozer, *Sound Blasts The Web*, PC MAGAZINE, Mar. 26, 1996, at 103 (describing real-time audio as based on streaming technologies that start playback after a short buffering period and continue to play until the message is finished).

everything from top-of-the-hour news to audio track episodes from TV shows to contemporary pop hits just as the user would over the radio with only a slight delay.⁸⁵ There are a variety of computer programs already in existence that allow users to listen to music in real time.⁸⁶ The low-bandwidth problem, and hence the slow speed of transmission, is solved by compressing “the audio data stream drastically to match the throughput of [the] Internet connection, which may be as low as 9,600 bps.”⁸⁷ The problem with compression technology, however, is that the more the bitstream is compressed, the more the underlying audio work is distorted.⁸⁸ As a result, real-time audio broadcasts remain poor in quality—a problem that may not be resolved until conduit bandwidth is increased.⁸⁹

Another means by which demand for Internet entertainment is likely to be raised is through the offering of video over the Web. In fact, many sites currently offer video clips for downloading.⁹⁰ Again, the problem is that these files tend to be large, substantially larger than audio files, and as a result, even with current compression technology,

⁸⁵ Allman, *supra* note 24.

⁸⁶ “[T]he five important streaming audio products on today’s Web [are]: Internet Wave 1.0, from VocalTec; RealAudio 2.0, from Progressive Networks; StreamWorks, from Xing Technology Corp.; ToolVox for the Web, from Voxware; and TrueSpeech Internet from The DSP Group.” Ozer, *supra* note 84, at 103.

⁸⁷ *Id.* at 103-04 (explaining how compression works). In sum, an encoding program shrinks the audio bitstream to match the capacity of low-bandwidth connections used for Internet access, the bitstream is transmitted, and upon receipt, the player program on the user’s computer decompresses the bitstream. *Id.*

⁸⁸ *Id.* at 104 (explaining that this distortion arises because the original file which was compressed is not reproduced in its exact pre-decompression form during playback. “Rather, during compression, the codec discards the original data, replacing it with a more compact representation. During playback, the codec reassembles the information into a file that approximates the basic structure of the original but isn’t exactly the same.” A codec is compression/decompression program).

⁸⁹ *Id.*

⁹⁰ See, e.g., *Sony Pictures Entertainment* (visited Apr. 1997) <<http://www.spe.sony.com/Pictures/SonyMovies/index.html>> (offering a variety of video clips from Sony films ranging from 3.0MB to over 8.0MB); *CNN Interactive* (visited Oct. 1997) <<http://www.cnn.com>> (offering video clips from daily news stories).

transmission of more than a few seconds of video is impractical and requires tremendous download time.⁹¹

The solution, as with audio, is real-time video technology. As with audio, current programs exist making real-time video possible.⁹² Video, however, can only play at 1 or 2 frames per second in real-time with a 28.8-Kbps modem connection,⁹³ and unlike audio, video cannot effectively be compressed to play quickly without avoiding substantial distortions in the pictures delivered (either substantial degradation in speed or in resolution quality must be accepted).⁹⁴ At current modem connection speeds, therefore, "the technology is barely usable."⁹⁵

There is a new generation of modem connections on the horizon seeking to overcome the low bandwidth problem.⁹⁶ ISDN and ADSL connections, for example, greatly reduce downloading time.⁹⁷ However, it is the speed of cable modems, which use the coaxial TV cables which people have in their homes, which will likely make full-motion

⁹¹ Burstein and Kline, *supra* note 55.

⁹² Two major real-time video programs are currently on the market: StreamWorks, from Xing Technology Corp., and VDOLive, from VDOnet Corp. Jan Ozer, *Web TV Tunes In*, PC MAG., Mar. 26, 1996, at 129. New programs, such as VDOLive 2.0, VivoActive, and VXtreme Web Theater, with enhanced streaming technology, have made the delivery of real-time video more feasible. *Free Web Video Without the Wait*, PC COMPUTING, Apr. 1997, 115-16.

⁹³ *Id.*

⁹⁴ Compressing CD-quality audio to where it will work over a 14.4 Kbps connection requires an effective compression ratio of 97:1. By contrast, compressing television quality video, whose original bandwidth is about 27 megabytes per second, to a usable 28.8 Kbps requires a 7,500:1 compression ratio. *Id.*

⁹⁵ *Id.* The Internet's low bandwidth problem is a substantial problem across the entire Internet. It is estimated by some theorists that it would take only 100 full-motion video signals to swamp the entire information-carrying capacity of the Internet. Burstein and Kline, *supra* note 55.

⁹⁶ The common telephone modem speed, for example, is currently up to as fast as 56 Kbps. Bonny Georgia, *Visual Bandwidth*, PC COMPUTING, May 1997, 202-207.

⁹⁷ ISDN connections, now common among Internet users, have a speed of 64Kbps to 128 Kbps. *Id.* at 205. ADSL, the new asymmetric digital subscriber line, promises speeds as high as 8Mbps while still making use of the standard copper telephone lines. *Id.* at 206 (describing the new ADSL technology). Wireless technology offers another possible solution to the bandwidth problem. Rich Schwerin, *Internet Everywhere*, PC COMPUTING, Apr. 1997, 302.

video possible in the future.⁹⁸ In fact, the new cable modems will deliver the information at a rate of 10,000-Kbps (thousands of times faster than twisted copper phone wire), and while it takes a typical 28.8 Kbps phone modem 9.7 minutes to download a one-megabyte file, it will only take the cable modem eight tenths of a second.⁹⁹

Therefore, in a few years, it will be possible to deliver real-time video over the Internet to consumers upon demand.¹⁰⁰ This has led some experts, such as Andy Grove, CEO of Intel Corporation, to declare "some think the information superhighway will come through their TV . . . [but] the informational tool of the future is on your desk, not your living room . . . the personal computer is going to eat the TV."¹⁰¹ Eventually the advance of Internet technologies will make it possible for the Motion Picture and Television Industry to deliver exciting movies, multimedia, and special programming to users over the Web for a fee, provided a workable payment system can be created.¹⁰²

⁹⁸ Katie Hafner and N'Gai Croal, *Getting Up to Speed*, NEWSWEEK, Mar. 4, 1996, at 46 (noting that the new high-speed, high bandwidth modems will make it possible for entertainment providers to deliver such things as basketball games on the computer, complete with the Internet's interactive features which would allow a viewer to click a line and instantly watch a replay, another courtside angle, or browse through the players' statistics).

⁹⁹ *Id.* at 47. Both Time Warner and TCI have developed plans for the sale and distribution of cable modems. *Id.* TCI is the largest cable operator in the United States and has created a special subsidiary, @Home, to develop its current cable modem project. *Id.* It is interesting to note, however, that only about 17% of cable systems in the United States can handle two-way data transmissions. *Id.* Before interactive Internet service is offered, the other cable networks will have to be upgraded to allow more than just downstream only transmission into the home. This will enable users to send commands back up to the Internet through their cable networks. *Id.*

TCI has recently pulled back from immediate deployment of cable modems. Jeff Ubois, *Bright Horizon*, INTERNET WORLD, May 1997, at 58, 62 (interview with John Curran, Chief Technology Officer of BBN). Nevertheless, the technological power of cable modems is likely to bring them to dominance some time in the near future. *Id.*

¹⁰⁰ See generally Landis, *supra* note 58.

¹⁰¹ Burstein and Kline, *supra* note 55.

¹⁰² One company, NetChannel, for instance, has entered into deals with cable channels, such as A&E and Court TV, seeking to meld TV-based Internet access with new Internet programming. Katharine Statler, *NetChannel lines up Web alliances*, VARIETY, May 20, 1997, at 6.

With a system of payment in place, it will become possible for content providers to sell entertainment to consumers over the Internet, and the Web will thus become something more than just a toy for studio PR departments. The financial stake of the Motion Picture and Television Industry in the Internet will grow as the Industry shifts from providing the mere advertising that it currently puts out to creating entertainment exclusively for the Web.

IV. COPYRIGHT CONCERNS ON THE INTERNET

The effective use of the Internet by the Motion Picture and Television Industry for either advertising purposes or entertainment delivery will entail placing tremendous amounts of intellectual property on the Internet. To secure any profits to be made from the sale, lease, or use of such property, the Industry requires a legal framework under which such property can be protected from theft or unauthorized appropriation. Moreover, even if the Industry chooses not to place intellectual property on the Internet, existing intellectual property will have to be protected from unauthorized appropriation by those creating content for the Internet. Thus this type of use of the Internet will create numerous concerns regarding the creation and protection of copyrighted works.

A. *The Enhanced Danger of Infringement*

The current governing statute for federal copyright law is the Copyright Act of 1976.¹⁰³ The 1976 Act grants copyright protection to the owners of copyrights in “original works of authorship fixed in any tangible medium of expression.”¹⁰⁴ The owner of a copyright in a

¹⁰³ 17 U.S.C. §101 *et seq.*

¹⁰⁴ Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;

work has the exclusive rights to perform or authorize such things as the reproduction of the copyrighted work in copies or phonorecords, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work, or to perform or display the copyrighted work publicly.¹⁰⁵ Anyone who engages in or authorizes anyone to engage in any of the exclusive rights granted to a copyright owner without that owner's consent is an infringer and is subject to liability.¹⁰⁶ Copyright infringement has become a real and grave problem on the Internet.

One form of infringement occurs when an Internet user places a portion of a copyrighted work on the Internet without that copyright owner's permission. That copyrighted work exists in an independent, fixed form outside the Internet—such as a script, a photographic still from a television show, footage from a newly released videotape, or a recording.

This practice of taking portions of copyrighted entertainment works and placing them on the Internet (with or without the permis-

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- (6) motion pictures and other audiovisual works;
 - (7) sound recordings; and
 - (8) architectural works.

17 U.S.C. §102(a) (1994).

¹⁰⁵ Subject to sections 107 through 120 of Title 17, the owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106.

¹⁰⁶ "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A . . . is an infringer of the copyright or right of the author, as the case may be." 17 U.S.C. §501(a) (1994).

sion of the copyright owner) has become quite common. For instance the online Internet address directory known as Yahoo lists some 40 links to Web pages featuring dialogue, pictures, music and video clips taken from the show *Friends*.¹⁰⁷ Much of the use of this content has been unauthorized. Yahoo further lists 12 unofficial sites dedicated to the show *ER*¹⁰⁸ and well over a hundred unofficial sites dedicated to the various manifestations *Star Trek*.¹⁰⁹

A second form of infringement occurs when a piece of intellectual property is created specifically for the Internet (as opposed to having the copyright reside in a fixed, tangible work outside the Internet). The copyrighted work, often taken the form of a Web page or its content, is then appropriated by an Internet user who utilizes it either to create another work on the Internet or downloads it into a tangible form for sale. For example, a studio creates a cartoon video clip for distribution over the World Wide Web, places it on the Internet, and claims a copyright on the Web page. An Internet user then downloads the clip and either places it on a BBS for free distribution to others, or sells it on CD-ROM as part of a multimedia collection. This form of infringement has been relatively rare to date, but as Industry members become more involved on the Internet, the potential for this type of infringement will definitely increase.

The danger of infringement is enhanced by the fact that all information transferred over the Internet is “digital.”¹¹⁰ Unlike previous

¹⁰⁷ *Yahoo* (visited Apr. 1997) <<http://www.yahoo.com/Entertainment/Television/Shows/Comedies/Friends/>>. An examination of these pages reveals many are created by college students on university UNIX computers, mostly without the permission of Warner Brothers or NBC, the owners of the copyright to the show.

¹⁰⁸ *Id.* at <http://www.yahoo.com/News_and_Media/Television/Shows/Medical_Shows/ER/>.

¹⁰⁹ *See id.* at <http://www.yahoo.com/News_and_Media/Television/Genre/Science_Fiction_Fantasy_and_Horror/Star_Trek/>.

¹¹⁰ Suzan, *supra* note 58, at 796. At the heart of digitization is the translation of information into mathematical bits. N. Jansen Calamita, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age*, 74 B.U. L. REV. 505, 515 (1994). If a sound recording, for example, were to be transmitted over the Internet, the process would begin by having the sound uploaded from its tape onto the computer and converted into a series of 1s and 0s (known as bits). *Id.* These bits would then be sent over the Internet to another computer, where digital equipment then reassembles the code into sound “with virtually no loss in quality from

analog copying of recordings and reproductions, digital copies of works can be made with no generation loss—each digital copy is virtually an exact replica of the original work with no loss in quality no matter how many generations away the copy is from the original.¹¹¹ Both the first and the hundredth generation are virtually identical.¹¹² Additionally, digitization makes it possible to make an infinite number of replications after the initial sunk cost of downloading the first copy is made—there are no marginal costs in making additional copies.¹¹³ As infringement becomes easier and exact copies can be made at little cost with little or no quality loss, the incentive for people to infringe is greater, and the potential size potential of each infringement is enhanced. As a result, “just one unauthorized uploading of a work onto a bulletin board, for instance—unlike, perhaps, most single reproductions and distribution in the analog or print environment—could have devastating effects on the market for the work.”¹¹⁴

This ease of reproduction has led some critics to argue that copyright law simply does not apply to the Internet.¹¹⁵ So, “the riddle is

the original [sound] recording.” *Id.*

¹¹¹ David J. Loundy, *Revising Copyright Law for Electronic Publishing* (visited Apr. 1997) <<http://www.leefrog.com/E-Law/Revising-HyperT.html>>.

¹¹² Bruce A. Lehman, *The Report of the Working Group on Intellectual Property Rights 12* (hereinafter “White Paper”) (Sept. 1995). In February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to articulate and implement the Administration’s vision for the National Information Infrastructure (NII)—the name for the information superhighway of the future that is to include the Internet. White Paper, at 1. The IITF was chaired by the late Secretary of Commerce, Ronald H. Brown, and consisted of high-level representatives of the Federal agencies that play a role in advancing the development and application of information technologies. *Id.*

Under the rubric of the IITF, a Working Group on Intellectual Property, chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce A. Lehman, was established to examine the intellectual property implications of the NII and make recommendations on any appropriate changes to U.S. intellectual property law and policy. *Id.* at 2. In September, 1995, the Report of the Working Group on Intellectual Property (the “White Paper”) was issued. *Id.* at 4.

¹¹³ Loundy, *supra* note 111.

¹¹⁴ White Paper, at 15.

¹¹⁵ Barlow, *Selling Wine Without Bottles, Wired: The Economy of Mind on the Global Net* (visited Dec. 1996) <http://www.eff.org/pub/Intellectual_Property/idea_economy.article>.

this: if . . . property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it?"¹¹⁶ This belief, that copyright law can never be enforced on the Internet, has led critics to characterize copyright protections as "sailing into the future on a sinking ship" and efforts at reforming copyright law to address the problems of the Internet as trying "to keep the old boat floating" by "a frenzy of deck chair rearrangement."¹¹⁷ These critics suggest that the Internet should be regarded as a "public domain" where the rules of copyright infringement do not apply.¹¹⁸

Notwithstanding these arguments, several courts have sought to enforce copyright laws on the Internet. One case involving the music industry was *Frank Music Corp. v. CompuServe, Inc.*¹¹⁹ In this case, the Harry Fox Agency, Inc. filed a class action copyright infringement suit on behalf of a variety of music publishers alleging that CompuServe permitted users to upload and download previously recorded songs without the consent of class members holding the copyright.¹²⁰ Although the case settled before going to trial, it still set a precedent for recovering damages for these types of infringements.¹²¹

In another case, *Playboy Enterprises, Inc. v. Frena*, the plaintiff, owner of the copyright to "Playboy Magazine," brought suit against defendant Frena, the operator of a small computerized bulletin board

¹¹⁶ *Id.*

¹¹⁷ *Id.* The ease of reproduction on the Internet ensures that the public will violate any copyright limitations placed on Internet use. *Id.* Such regulations will thereby only serve to instill a disrespect and contempt among the public for the law in general. *Id.* Copyright law always meant to protect the physical expression of ideas, but now the Internet makes it possible to convey ideas from one mind to another without ever making them physical. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Frank Music Corp. v. CompuServe Inc.*, 93 Civ. 8153 (S.D.N.Y. 1993).

¹²⁰ For more information on the *Frank Music* case, see Richard Raysman and Peter Brown, *Liability on the Internet*, N.Y. LAW J., Nov. 8, 1994, at 3.

¹²¹ Suzan, *supra* note 58, at 820. "The two parties have agreed to a licensing arrangement whereby managers of CompuServe's interest areas will secure licenses from the Harry Fox Agency which 'permit the future uploading and downloading of recordings of the publishers' songs.'" *Id.* CompuServe further agreed to impose a moratorium on the uploading of songs onto its music BBS. *Id.*

system ("BBS").¹²² A subscriber to the defendant's BBS uploaded files containing digitized pictures copied from the plaintiff's copyrighted magazines. As a result these files were available for downloading by other BBS subscribers.¹²³ The plaintiff brought a suit for copyright infringement alleging that the defendant had violated the plaintiff's exclusive right to distribute copies to the public in violation of 17 U.S.C. §106(3) and that the defendant had violated plaintiff's exclusive right to display the photographs in violation of 17 U.S.C. §106(5).¹²⁴ The plaintiff brought a motion for summary judgment for the copyright violations which the court granted. The court held that liability existed under both sections of the Copyright Act, despite the defendant's insistence that he himself had never uploaded or downloaded any infringing material, and that he had only provided the mechanism by which others infringed.¹²⁵

Frena was found directly liable for infringing the distribution and display rights of the plaintiff Playboy. The Court determined that it did not matter the defendant claimed he did not make the copies himself. In addition, Frena conceivably could have been held indirectly liable for the copying of others under the principles of vicarious and contributory liability.¹²⁶

In *Sega Enterprises Ltd. v. MAPHIA*, the plaintiff, Sega Enterprises Ltd., a computer software producer, brought suit against defendant Chad Scherman and his BBS business known as MAPHIA, alleging that the defendants infringed plaintiff's copyright by allowing its users to upload and download copies of plaintiff's software without the plaintiff's permission.¹²⁷ The plaintiff moved for and was granted a preliminary injunction on the basis that Sega had "established a likelihood of success on the merits of showing a prima facie case of direct and contributory infringement by Defendants' operation of the MAPHIA bulletin board."¹²⁸

¹²² *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

¹²³ *Id.*

¹²⁴ *Id.* at 1556.

¹²⁵ *Id.* at 1556-57.

¹²⁶ See discussion, *infra* at IV.B.9, of vicarious and contributory liability.

¹²⁷ *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 683 (N.D. Cal. 1994).

¹²⁸ *Id.* at 687.

Religious Technology Center v. Netcom slowed the trend of holding BBS operators liable for copyright infringements by its subscribers.¹²⁹ The plaintiffs, Religious Technology Center (“RTC”) and Bridge Publications, Inc. held the copyrights in certain published and unpublished works by L. Ron Hubbard, the late founder of the Church of Scientology.¹³⁰ The plaintiffs brought suit against defendant Dennis Erlich, a former minister of the Church of Scientology who had become a vocal critic of the Church, for infringing plaintiffs’ copyright in the works.¹³¹ The plaintiffs alleged that Erlich violated plaintiffs’ the copyright by reproducing copies of the works on a BBS operated by defendant Klemesrud without permission. The BBS in turn was connected to the Internet through an arrangement with Internet access provider Netcom, also a defendant in the action, which enabled users/subscribers to download the material.¹³² The plaintiffs moved for and were granted a preliminary injunction against Erlich prohibiting further infringements on the grounds that they had demonstrated a likelihood of success in proving defendant Erlich’s direct liability.¹³³

Klemesrud and Netcom subsequently moved for both a judgment on the pleadings and a summary judgment.¹³⁴ The court found that these defendants were not directly liable for infringing the plaintiffs’ reproduction, distribution or display rights, holding that these defendants “did not take any affirmative action that directly resulted in copying plaintiffs’ works other than by installing and maintaining a system whereby software automatically forwards messages received by subscribers.”¹³⁵ This result is in direct contrast with the result in

¹²⁹ *Religious Tech. Ctr. v. Netcom (Netcom I)*, 923 F. Supp. 1231 (N.D. Cal. 1995) (granting in part and denying in part plaintiffs’ application for a preliminary injunction); *Religious Tech. Ctr. v. Netcom (Netcom II)*, 907 F. Supp. 1361 (N.D. Cal. 1995) (denying Defendant Netcom’s motion for summary judgment).

¹³⁰ *Netcom I*, 923 F. Supp. at 1238 (N.D. Cal. 1995).

¹³¹ *Id.* at 1239. This action was part of a series of actions brought by Religious Technology Center against critics of the church of Scientology. See *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995).

¹³² *Id.* at 1239.

¹³³ *Id.* at 1250.

¹³⁴ *Netcom II*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹³⁵ *Id.* As neither defendant incurred direct financial benefit from the infringing activities of its users, the court also granted summary judgment to the defendants on the issue of vicarious liability. *Id.* at 1376. However, the court declined to grant sum-

Playboy, where the court found violations of the copyright owner's §106(3) right to distribute copies and §106(5) right to publicly display the copyrighted work.¹³⁶

In a final and recent case, *Religious Technology Ctr. v. Lerma*, the RTC, as owner of the copyrights in the works of L. Ron Hubbard, sued Lerma, a former member of the Church of Scientology, for posting RTC documents on the Internet and sued his internet service provider for contributory infringement.¹³⁷ RTC moved for and was granted summary judgment on its claim against Lerma that he infringed the plaintiffs' copyrights by posting the works onto the Internet.¹³⁸ The court rejected Lerma's fair use, merger, and copyright misuse de-

mary judgment to the defendants on the issue of contributory liability noting that plaintiffs, however unlikely it may be, might prove that the two defendants had knowledge of the infringing activity and materially contributed to the infringing conduct through their services by not stopping it. *Id.* at 1373, *29. The court did not specify what conduct by Netcom may have materially contributed to the infringing conduct. *See id.* Defendants Netcom (August 1996) and Klemesrud (September 1996) subsequently settled with plaintiff RTC. June M Besek, *Recent Developments in Fair Use Under the Copyright Act*, 17TH ANNUAL INSTITUTE ON COMPUTER LAW 51 (Practicing Law Institute 1997).

¹³⁶ *See Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556.

¹³⁷ *Religious Tech. Ctr. v. Lerma* (Lerma I), 897 F. Supp. 260 (E.D. Va. 1995) (denying plaintiff's motion for a temporary restraining order and preliminary injunction against Defendant Washington Post); *Religious Tech. Ctr. v. Lerma* (Lerma II), 908 F. Supp. 1353 (E.D. Va. 1995) (denying plaintiff's motion for reconsideration and plaintiff's motion for a preliminary injunction against Defendants Lerma and Digital Gate Systems); *Religious Tech. Ctr. v. Lerma* (Lerma III), 908 F. Supp. 1362 (E.D. Va. 1995) (granting Defendants Washington Post, Marc Fisher and Richard Leiby's motion for summary judgment); *Religious Tech. Ctr. v. Lerma* (Lerma IV), 40 U.S.P.Q.2d 1569 (E.D. Va. 1996) (granting Plaintiff Religious Technology Center's motion for summary judgment against Defendant Lerma). *Lerma I* and *Lerma II* were decisions arising from a collateral action against the Washington Post for its reproduction of certain documents which were the subject of the law suit.

¹³⁸ *Lerma IV*, 40 U.S.P.Q.2d at 1571 (E.D. Va. 1996). *But see Religious Tech. Ctr. v. F.A.C.T.Net Inc.*, 901 F. Supp. 1519 (D. Colo. 1995) (In an action by RTC to enjoin defendant Lerma from copying RTC documents and posting the works to the Internet, the court denied the injunction stating that the limited, noncommercial postings were fair use).

fenses.¹³⁹ The court made no ruling with respect to the Internet service provider as RTC settled its claim with Digital Gateway Systems prior to the final disposition with respect to Lerma.¹⁴⁰

The courts have thus already confronted some initial copyright infringement concerns on the Internet, with somewhat conflicting results. As demonstrated in Part II, the use of the Internet as a medium for delivering product directly to consumers will grow in the near future, and to some extent this capacity is already here. Therefore, these types of cases will only become more common and plague courts around the country. Even if the Motion Picture and Television Industry chooses to totally ignore the potential of the Internet as a medium to provide entertainment products, it still has a major interest in ensuring that intellectual property piracy on the Internet does not undercut Industry products delivered through other mediums.

B. *Ambiguities in Copyright Law on the Internet*

The problem of the heightened potential for copyright infringement is compounded by the fact that the rise of new Internet technologies has led to concerns as to how copyright law is to be effectively applied to the new technology. As a result, new ambiguities in copyright law have developed, ambiguities that make the goal of defending intellectual property on the Internet more problematic.

1. The Existence of Copyright Law on the Internet

As noted above, several critics on this issue have questioned whether copyright law even applies to the new medium of the Internet.¹⁴¹ These critics, however, have no credible argument to support their position, and provide no reason why this should be the case.

As to infringements where the original copyrighted entertainment piece is located in a fixed, tangible form outside the Internet, it is clear that copyright protections ought to apply. Most entertainment works, such as motion pictures and television programs, are clearly listed as

¹³⁹ Lerma IV, 40 U.S.P.Q.2d 1569 (E.D. Va. 1996).

¹⁴⁰ *Id.* at 1574.

¹⁴¹ See discussion, *supra* at 24-25.

protected works of authorship under the 1976 Copyright Act.¹⁴² Any work, provided it is “original” and “fixed in any tangible medium of expression” is protected, whether it be a script, a film, a sound recording, or a pictorial graphic.¹⁴³ The mere fact that the Internet has enabled and encouraged the unauthorized duplication of these works does not change the legal reality that they are protected, or remove the works from the realm of copyrighted material.¹⁴⁴

As to infringements where the original copyrighted work is created specifically for and is first released to the public over the Internet itself, the issue becomes less clear. Unlike motion pictures, Internet works (i.e. Web pages or content designed exclusively for them) are not one of the eight works of authorship listed in §102(a).¹⁴⁵ However, as the list is only illustrative, Internet creations can still be protected as copyrighted works provided they are “original” and are “fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device.”¹⁴⁶

A “work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that

¹⁴² 17 U.S.C. §102(a)(6) (“Copyright protection subsists . . . in original works of authorship . . . Works of authorship include the following categories; . . . (6) motion pictures and other audiovisual works;”).

¹⁴³ 17 U.S.C. §102(a).

¹⁴⁴ Furthermore, the argument that by being placed on the Internet these works somehow enter the public domain ignores the possibility that many of these copyrighted materials are being placed on the Internet without the copyright owner’s permission. For further analysis, see Lance Rose, *Is Copyright Dead on the Net?* (visited Feb. 1997) <http://www.eff.org/pub.org/pub/Intellectual_Property/is_copyright/end.paper>. In order for a copyright work to enter the public domain, it must be expressly placed there by the copyright owner. *Id.* Additionally, the courts that have encountered this form of infringement using Internet or quasi-Internet conduits have repeatedly enforced copyright law. See *Sega Enters. v. MAPHIA*, *supra* note 127; *Netcom I*, *supra* note 129; *Lerma IV*, *supra* note 137.

¹⁴⁵ 17 U.S.C. §102(a).

¹⁴⁶ *Id.*

are being transmitted, is 'fixed' for purposes of this title if fixation of the work is being made simultaneously with its transmission."¹⁴⁷

As most Web pages are stored on hard disks or equivalent storage devices, Web pages will meet the fixation requirements of copyrightability.¹⁴⁸ But what about some e-mails or real-time transmissions which may never be downloaded onto disks and thereby reside only in Random-Access Memory ("RAM")?¹⁴⁹ In the case of software, the courts have consistently and uniformly held that loading the software into a computer's RAM sufficiently fixes the work so as to be copyrightable—just like a floppy disk, you can point to a RAM chip which is a tangible means of expression.¹⁵⁰ But a minority school of thought holds that RAM is too transitory to constitute fixation since fixation is maintained only by virtue of the application of constant power.¹⁵¹

As nearly all Internet-based works, whether a Web page or an e-mail, are fixed at some point onto a disk,¹⁵² the problem of fixation is likely to prove a strawman. However, without an express declaration in the law that the Internet is not a copyright-free zone where infringers are free to copy what they will, critics will likely continue to argue that copyright law is inapplicable to the new realities of the Internet.

2. The Classification of Internet Works

Assuming that copyright protection does extend to works existing on the Internet, the question arises as to how these works are to be

¹⁴⁷ 17 U.S.C. §101.

¹⁴⁸ The disk is clearly a material object constituting a fixation of the Web page in a form it can be perceived, reproduced, or otherwise communicated from the disk for a period of more than transitory duration. For a discussion, see Loundy, *supra* note 111.

¹⁴⁹ RAM memory is the temporary storage memory of a computer (i.e., data typed on a word processing program that has not been saved onto a disk or hard drive resides). Once the computer is turned off, the contents of RAM memory are erased unless saved. *Id.*

¹⁵⁰ See *MAI v. Peak*, 991 F.2d 511 (9th Cir. 1993).

¹⁵¹ See *Apple Computer, Inc. v. Formula Int'l, Inc.*, 594 F. Supp. 617 (C.D. Cal. 1984); see also Loundy, *supra* note 111 (noting that if software can be fixed by being downloaded into RAM memory, a written work can likewise be fixed by holding a book up to a mirror).

¹⁵² See Loundy, *supra* note 111.

classified.¹⁵³ The question is an important one because different rights attach to the different categories of works set forth in §102(a).¹⁵⁴ How should a multimedia Web page, complete with text, graphics, audio clips and video files be classified? Clearly, such a multimedia work covers a wide variety of categories, from literary works (the text), to sound recordings (the sound clip), to even audiovisual works (the video clip). Multiple classifications, however, are not generally accepted under copyright law.¹⁵⁵

The courts have recognized computer programs as protected literary works.¹⁵⁶ As the Web page resides as a computer file on a hard drive, the computer file itself, and the source and object codes responsible for their creation, may be classified as a literary work. One snag in this definition, however, is that a program containing a Web page may not qualify as a computer program under the Copyright Act. A computer program is defined in the 1976 Act as a “set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”¹⁵⁷ It may be disputed by some that such Web page files are in fact “to be used . . . to bring about a certain result.” The text, audio, and visual elements of these pages reside on read-only files, most of which do not execute any actions on the user’s computer and rely on other programs on the user’s computer to run the operation, such as the user’s Web browser program (Netscape, Mosaic,

¹⁵³ Copyrighted work are classified into a variety of categories, including literary works, audiovisual works, and sound recordings. See 17 U.S.C. §102(a) and *supra* note 104.

¹⁵⁴ Sound recordings, for example, do not carry with them an exclusive right to perform the copyrighted work publicly. 17 U.S.C. §114(a). It was only very recently that sound recording received a right to perform the copyrighted work publicly by means of a digital audio transmission. See The Digital Performance Right in Sound Recordings Act of 1995, H.R. Rep. No. 104-274, at 12 (1995); 17 U.S.C. §106(6) (“[T]he owner of the copyright under this title has the exclusive right . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”) Nondramatic musical works are subject to a compulsory license for the purpose of making and distributing phonorecords. 17 U.S.C. §115.

¹⁵⁵ A music video, for example, is not both a sound recording and an audiovisual work. For a discussion, see White Paper, *supra* note 113, at 37.

¹⁵⁶ See *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983).

¹⁵⁷ 17 U.S.C. §101.

etc.). In this sense, they are similar to the document files one views with a word processing program. One could argue that the certain result they bring about is that without them, the user could not view the text; but in actuality these files remain purely passive, are merely acted upon by other programs, and do not themselves independently bring about a particular result.¹⁵⁸

Moreover, protecting the source and object codes which constitute the computer program behind the Web page does not necessarily mean that the images, sounds, and text produced by that program are protected as computer programs themselves.¹⁵⁹ These, perhaps, could be accorded separate protection under the single category of audiovisual works.¹⁶⁰ Not all Internet works, however, will meet the definition of a protected audiovisual work.¹⁶¹

¹⁵⁸ See generally Loundy, *supra* note 122.

¹⁵⁹ In the case of video games, for example, the courts have drawn a distinction between the codes constituting the computer program, which are protectable as literary works, from the graphics and sound display which the video game player sees, which is protectable as an audiovisual work. See *Stern Elecs. v. Kaufman*, 523 F. Supp. 635 (E.D.N.Y. 1981) (Defendants accused of infringing plaintiff's copyright in a video game argued that the only original work of authorship lay in the computer program, which had not been registered, and not in the video game display, which they argued was unprotectable as an audiovisual work. The court noted that: "While the audiovisual display emanates from the computer program, it is senseless to say that therefore the display is not original." The court concluded the video display could be copyrighted as an audiovisual work even if the underlying computer program was not copyrighted.); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981) (rejecting defendants argument that a video game display cannot be copyrighted as an audiovisual work. In response to defendants argument that the audiovisual display could not be fixed but for the computer program, the court found the display could be copyrighted as an audiovisual work by drawing a distinction between the work itself and the medium in which it is fixed); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (1982) (noting that plaintiff's video game display was primarily an unprotectible game, but certain aspects of the audiovisual work, such as the characters, were protectable).

¹⁶⁰ Audiovisual works are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objections, such as films or tapes, in which the works are embodied." 17 U.S.C. §101. An audiovisual work thus consists of three elements: 1) images, 2) which are related and presented in a series, and 3) being capable of being shown by a machine or device. 1 NIMMER ON COPYRIGHT §2.09[A]

As such, it seems that a court analyzing an Internet work will have to determine, on an individual basis, in which category the work should be placed.¹⁶² This however, creates a problem of uncertainty in that no creator of an Internet work will be sure of his rights upon creation. For example: is a Web page introduced by text with a video available by clicking on a line of text two separate works (literary and audiovisual) or merely an audiovisual work?¹⁶³ If a Web page contains both sound and video, is it an audiovisual work, or a separate audiovisual work and a separate sound recording?¹⁶⁴

The elimination of categories or harmonization of rights among the various entities would help to ameliorate the problem of classifying multimedia Web works, but such a resolution is not likely to appear in the near future.¹⁶⁵

(1997). Some courts have taken an expansive view of what can constitute an audiovisual work. *See* *Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.*, 653 F. Supp. 135 (N.D. Ohio 1986); *Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc.* 658 F. Supp. 351, 355 (N.D. Tex. 1986) (concluding an animated doll known as Teddy Ruxpin “is properly classified as an audiovisual work”).

¹⁶¹ An e-mail, for example, lacks the “series of related images” component required under the definition of audiovisual works. *See* 17 U.S.C. §101.

¹⁶² The White Paper suggests that the vast majority of works currently on the Internet, such as articles, essays, and other reference materials, are literary works. White Paper, *supra* note 112, at 36. The White Paper also suggests that a significant number of the works on the Internet are pictorial and graphic. White Paper, at 38.

¹⁶³ The definition of a literary work begins with the phrase “works other than audiovisual works” 17 U.S.C. §101. The definition however, merely illustrates that literary works and audiovisual works are distinct and exclusive. It does not address, however, whether the sound and text constituting a Web page are so related so as to be considered one work, or separate works classified into separate categories.

¹⁶⁴ The definition of “sound recordings” explicitly excludes from the category of sound recordings music, spoken or other sounds “accompanying a motion picture or other audiovisual work” 17 U.S.C. § 101. The definition, again, however, does not address at what point the visual and audio elements of a Web page are sufficiently related so as to constitute one work.

¹⁶⁵ The White Paper declined to make such a recommendation. *See* White Paper, *supra* note 112, at 45.

3. Fair Use

Many of those who are appropriating intellectual property currently on the Internet are justifying their actions with the fair use defense.¹⁶⁶ Internet users have been widely known to plunder works existing both in fixed form outside the Internet and works existing solely on Internet itself, declaring their actions justified under fair use.¹⁶⁷

Fair use is an affirmative defense to infringement.¹⁶⁸ The 1976 Act instructs courts to consider four factors to determine whether a use is fair use.¹⁶⁹ However, the courts that have applied this four factor test in the context of fair use on the Internet have not left users with much guidance on exactly what behavior constitutes fair use.

The courts which have dealt with the issue of fair use and computer BBS systems have uniformly rejected the defense with respect to the contributory and vicarious liability of the BBS operators, whom plaintiffs attempted to hold responsible for the conduct of subscribers.¹⁷⁰ However, only a few courts have addressed the fair use claim of

¹⁶⁶ One *Friends* Web page (visited Oct. 30, 1997) <http://www.students.uiuc.edu/~jrbenst/friends.html>, for example, justifies its taking of intellectual property from the show with a fair use disclaimer which reads: "The fine print: any images shown on any of my pages are not meant to infringe on the copywrite [sic] protection of NBC, Warner Brothers, People, Rolling Stone, Entertainment Weekly or the photographers of these images. All images are intended to be used under the 'fair use' clause of copywrite [sic] protection. This page is a SkyNet subsidiary. SkyNet, and the token human operator, Jason Rubenstein, take no responsibility for the content of this, or any pages linked here."

¹⁶⁷ For illustrations, see Rose, *supra* note 144.

¹⁶⁸ 17 U.S.C. §107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.")

¹⁶⁹ "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

¹⁷⁰ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1557-1559 ("Defendant Frena's use was clearly commercial One who distributes copyrighted material for profit is

a user uploading copyrighted works. In *Religious Technology Center v. Netcom*, defendant Erlich justified his infringement of plaintiffs' copyright on the fair use basis that his purpose in using the work was to criticize Scientology teachings.¹⁷¹ The court declined to find fair use in that case.¹⁷²

In cases to date, the courts have apparently disfavored the defense of fair use when dealing with mass copying over the Internet, largely focusing on such factors as the commercial nature of the copying, the amount of work taken, and the effect on the potential market of copyrighted works. But what happens with fair use when the use is not commercial and there is little or no market effect on a plaintiff's product, as is true about those Web pages in which portions of television shows and motion pictures are appropriated by students who impose no access fees? The courts have yet to answer. The only guidance to date is that the courts will apply the same test as in cases outside of the Internet context.¹⁷³

engaged in a commercial use even if the customers supplied with such material themselves use it for personal use . . . the fourth factor, the effect of the use upon the potential market is undoubtedly the single most important element of fair use . . . Obviously if this type of conduct became widespread, it would adversely affect the potential market for the copyrighted work.”); *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. at 687 (The purpose to help users to avoid having to buy Sega video game cartridges, the commercial purpose of the infringement, the entertainment nature of the infringed work, the copying of the entire program, and most importantly, the effect on Sega's potential market militated against a finding of fair use); *Netcom II*, 907 F. Supp. at 1378-1381 (The commercial purpose of the use, the copying of substantial amounts of intellectual property, and the possibility that the postings hurt the market for plaintiff's work raised a genuine issue of fact as to whether there was a valid fair use defense).

¹⁷¹ *Netcom I*, 923 F. Supp. at 1243.

¹⁷² *Id.* at 1249. The court declared that “[i]n balancing the various factors, the court finds that the percentage of plaintiffs' works copied combined with the minimal added criticism or commentary negates a finding of fair use.” *Id.* The court went on to state that although the criticism is a favored use, where that criticism consists of copying large portions of plaintiffs' works, the fair use defense is inappropriate. *Id.*

¹⁷³ *Jerma IV*, 40 U.S.P.Q.2d at 1574 (“ . . . the new technologies . . . have been made to fit within the overall scheme of copyright law and to serve the ends which copyright was intended to promote. [citation omitted]. The Internet is no exception, and postings on it must be judged in reference to the already flexible considerations which fair use affords.”)

4. The Right to Reproduce Copyrighted Works

The 1976 Act grants the owner of a copyright the exclusive right “to reproduce the copyrighted work in copies or phonorecords.”¹⁷⁴ Under this rule, unauthorized copying and placing onto the Internet of works existing in a fixed form other than the Internet would be prohibited, because when a printed, audio, or audiovisual work existing outside the Internet is scanned and uploaded onto a digital file on the network, a reproduction is made and the exclusive right to reproduce has thereby been violated.¹⁷⁵ Also under this rule, the unauthorized copying of a work existing on the Internet would also be prohibited because when the digital file comprising a Web page or other Internet resource is copied off the Internet and then downloaded onto print, a CD, or hard drive, a reproduction is made and the exclusive right to reproduce is again violated.¹⁷⁶

The analysis seems straightforward, but in reality it is much more problematic. The problem exists primarily because of the fact that on the Internet, “copying is everywhere.”¹⁷⁷ When a user visits a Web site in order to view the page, an actual copy of the digital file containing the page’s contents is taken from the host computer’s hard drive and is downloaded onto the RAM memory or hard drive of the user’s home computer.¹⁷⁸ Without such copying into RAM, no screen display would be possible on the user’s computer.¹⁷⁹ Thus, even if somehow a user does not download the Web page onto a hard drive, and even if the user is only viewing an official Web page containing no infringing material and to which the copyright owner has granted

¹⁷⁴ 17 U.S.C. §106(1).

¹⁷⁵ See White Paper, *supra* note 112, at 65.

¹⁷⁶ See *id.*

¹⁷⁷ James A. Powers, *Intellectual Property in Cyberspace: The Next Frontier*, THE CONNECTICUT LAW TRIBUNE, Oct. 16, 1995, at S9.

¹⁷⁸ *Id.* Similarly when you forward an e-mail to a colleague, “you are copying the message and replicating the original author’s work, which is technically in violation of the author’s copyright. The Internet actually requires copying to operate effectively; there are simply too many users demanding access to the same information to allow them to line up and wait to gain access.” *Id.*

¹⁷⁹ See White Paper, *supra* note 112 at 65.

access, to utilize the Web page that user must still create a “reproduction” which would violate the technical language of the 1976 Act.¹⁸⁰

The issue is made much more problematic in light of the fact that if copying into RAM memory is considered fixation, then the viewing of a single Internet work will require reproduction on a wide variety of computers. An e-mail being sent over the Internet, for example, is reproduced on the RAM and hard drives of a whole host of computers. It first resides in the RAM of the sender's PC, is then transferred to the RAM of the internet access provider computer, and then is traded from computer to computer all the way down the Internet (sometimes being copied onto hard drives or equivalent devices) until it reaches the RAM of the receiver's PC.¹⁸¹

Thus, without a clarification of what actions constitute copying in violation of a copyright owner's exclusive right to reproduce, it is conceivable that a variety of Internet users will technically be construed as violating the copyright owner's right. This will be true even if the Internet use is doing no more than viewing a copyrighted Web page to which access has been granted by the copyright owner,

Perhaps what could be determined is that the copyright owner, by placing a work on the Internet, grants an implied license to an Internet user to view the work, including the right to make whatever multiple reproductions are necessary for viewing. Such an implied license, however, has no statutory basis, nor has it been created by case law. The scope of the implied license is therefore ambiguous: does the copyright owner grant the Internet user a right to view, to download a copy onto the hard drive for a specified period of time, to post onto the Internet or forward by e-mail, or even to make printed copies? The issue of hyperlinks, which make the Internet what it is today, further

¹⁸⁰ In order to be a violation of the exclusive right, however, the reproduction must be made in “copies” or “phonorecords”. 17 U.S.C. §106(1). Copies and phonorecords, in turn, are defined as “material objects in which a work is fixed”. 17 U.S.C. §101. As explained above, however, a work is fixed only when “its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable.” 17 U.S.C. § 101. As it is explained above, it is unclear under current law whether downloading a copy of a Web page file onto RAM can be sufficiently permanent or stable to constitute fixation. If there is no fixation, there is no copy, and if no copy is made, the exclusive right to reproduce is not violated.

¹⁸¹ See Elmer-Dewitt, *supra* note 8.

complicates the issue. By posting a work on the Internet, does the copyright proprietor consent to another Web page owner hyperlinking to his page?

5. . The Right to Distribute Copies Or Phonorecords

The 1976 Act grants a copyright owner the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.”¹⁸²

With respect to the right to reproduce, it is unclear whether the fixation of works on the Internet is too temporary to constitute a “copy.”¹⁸³ In *Playboy Enterprises Inc. v. Frena*, for example, where the BBS operator was found to have violated the plaintiff’s exclusive right to distribute copies, the only objects the BBS operator distributed were the electronic images of the Playboy photographs which may or may not have been downloaded onto users’ hard drives or floppy disks for more than a temporary time period.¹⁸⁴ To be a “copy,” however, a work must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁸⁵

The issue is complicated by the definition of “copies” in the 1976 Act. The Act defines “copies” as “material objects.”¹⁸⁶ Over the Internet, however, there is no distribution of any material object, only the transmission of digital images. In *Playboy Enterprises, Frena* re-

¹⁸² 17 U.S.C. §106(3).

¹⁸³ See discussion regarding the requirements of fixation, *supra* at 30-31.

¹⁸⁴ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556.

¹⁸⁵ 17 U.S.C. §101 (definition and requirement of fixation).

¹⁸⁶ “‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.” 17 U.S.C. § 101. Additionally, phonorecords are defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.” *Id.*

tained and did not distribute the material manifestation of the infringement—the hard drive on which these images were located.¹⁸⁷

The exclusive right to distribution seems to be limited to distribution of physical objects occurring “by sale or other transfer of ownership, or by rental, lease or lending.” These terms may not cover situations in which only the digitized images are transmitted. Moreover, as most Internet works currently available are being given away for free, such files are not being sold, rented, leased, or lent, and there is no transfer of ownership occurring as a BBS owner like Frena would retain the original fixation—the hard drive on which the digitized files are located.

When section 106(3) was originally drafted, only the distribution of physical copies was contemplated.¹⁸⁸ Despite the fact that at least one court has recognized that the distribution right applies to files transferred over the Internet,¹⁸⁹ “it is not clear under the current law that a transmission can constitute a distribution of copies or phonorecords of a work.”¹⁹⁰

Finally, the scope of the application of the distribution right is unclear. In *Playboy Enterprises, Inc. v. Frena*, for example, BBS operator Frena was found to have violated plaintiff’s exclusive right to distribute copies despite the fact that no evidence existed that Frena himself had engaged in the unauthorized uploading or downloading of copyrighted files.¹⁹¹ In contrast, the court in *Religious Technology Center v. Netcom II* declined to hold the BBS operator and Internet access provider liable for violating the right to distribute. Rather the court found that the defendants could only be held contributorily liable for assisting Erlich’s violation of the exclusive right to reproduce.¹⁹²

¹⁸⁷ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556. For further discussion, see Loundy, *supra* note 111.

¹⁸⁸ *Id.*

¹⁸⁹ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556 (Plaintiff’s right “under 17 U.S.C. §106(3) to distribute copies to the public has been implicated by Defendant Frena . . . There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself.”).

¹⁹⁰ See White Paper, *supra* note 112, at 213.

¹⁹¹ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556.

¹⁹² *Netcom II*, 907 F. Supp. at 1368.

Under what circumstances will the exclusive right to distribute copies be found to have been violated?

6. The Right to Perform or Display a Work Publicly

The 1976 Copyright Act grants to the owner of a copyrighted work, other than a sound recording, the exclusive right “to perform the copyrighted work publicly,”¹⁹³ or in the alternative, “to display the copyrighted work publicly.”¹⁹⁴

The primary problem with the right to public performance and display is that the exact scope of the right is ambiguous: should any or all Internet transactions be characterized as performances or displays?¹⁹⁵ For works existing in a fixed form outside the Internet, the question becomes whether the Internet user who uploads the copyrighted work, and the BBS operator, Internet access provider, or host computer provider, violate the display rights of the copyright owner by giving the public unauthorized access to the work over the Internet? For works existing in a fixed form exclusively on the Internet (as no original hard copy outside of the Internet exists), the question is whether the Internet user who copies a copyrighted Web site ‘displays’ or ‘performs’ the copyrighted work when he either downloads the work onto another medium (e.g., by printing the web page and reproducing it in a newsletter) or uses it in creating his own Web site?

In *Playboy Enterprises, Inc. v. Frena*, the court held the defendant BBS system operator liable for publicly displaying Playboy’s pictures, despite the fact that it was the users on his system that had uploaded and downloaded the Playboy pictures.¹⁹⁶ Some critics, however, have called the case one of “questionable accuracy,” arguing that the transmissions should be defined merely as copies of digitalized files, rather than actual displays or performances (as television signals would be defined). Thus these critics claim that this is a violation of the right to distribute copies by the user who uploaded the work origi-

¹⁹³ 17 U.S.C. §106(4).

¹⁹⁴ 17 U.S.C. §106(5).

¹⁹⁵ See White Paper, *supra* note 112 at 70.

¹⁹⁶ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1557. (“The display right precludes unauthorized transmission of the display from one place to another, for example, by a computer system.”)

nally, not the BBS system.¹⁹⁷ Citing this rationale, the court in *Religious Technology Center v. Netcom II* refused to find a violation of the right to display by the Internet access provider or BBS operator.¹⁹⁸

The courts are far from uniform as to when exactly the display and performance rights are violated. This has led to the confusing result in which some defendants have been found to have violated the right for the very same conduct for which other defendants have been absolved of liability.

Perhaps at the heart of this confusion is the unresolved issue of what exactly is occurring over the Internet in these situations—are copies of digitized computer files being distributed to other users or are the digitized files merely a means of accomplishing a transmission of a performance or display (as is the case with television).¹⁹⁹ The fundamental problem remains that the distinction of rights provided for in section 106 was meant to apply to physical copies of works, and did not foresee the new mechanisms of distribution presented by the Internet. It remains to be seen whether the old distinctions prove flexible enough to adapt to new realities, or whether a new means of analyzing what is being transmitted over the Internet is needed.

7. The Definition of Publication

With the expansion of federal copyright protection to unpublished works in the 1976 Act, the distinction between published and unpublished works has lost its “all-embracing importance.”²⁰⁰ However, publication is still an important concept because publication: (1) sets the duration of copyright protection for works for hire and anonymous works,²⁰¹ (2) triggers a deposit requirement with the Library of Con-

¹⁹⁷ See Loundy, *supra* note 111.

¹⁹⁸ *Netcom II*, 907 F. Supp. at 1371. The court argued *Playboy* was “factually distinguishable” and that “[n]o purposes would be served by holding liable those who have no ability to control the information to which their subscribers have access” *Id.*

¹⁹⁹ See Loundy, *supra* note 111.

²⁰⁰ White Paper, at 29. Under the 1909 Copyright Act, federal copyright protection was available only to published works. Copyright Act of 1909, ch. 320, § 9, 61 Stat. 652 (current version at 17 U.S.C. § 101). Unpublished works were protected by state common law copyright. *Id.* at §2.

²⁰¹ 17 U.S.C. § 302(c).

gress,²⁰² (3) narrows the scope of the fair use defense,²⁰³ and (4) allows certain limitations on the exclusive rights of a copyright owner.²⁰⁴

Currently, though, the Act only contemplates publication in terms of sale, rental, lease or lending.²⁰⁵ The language may or may not cover transmissions occurring over the Internet. As the original program and the images it produces continue to reside on the copyright owner's server, nothing physical is being exchanged—there is not a sale, rental, lease or lending of any object. The question thus becomes: Does the definition of publication cover this new method of digitized transmission, especially where many such transmissions are made free, without charge or cost to the user?

8. Importation

The 1976 Act prohibits the importation of certain infringing copies or phonorecords of a copyrighted work.²⁰⁶ However, it is unclear whether, given the emphasis on copies or phonorecords (defined as “material objects” in §101) in section 602(a), a work can be imported into the United States by transmission.²⁰⁷ Nothing “material” is being brought into the country over the Internet, as the original hard drive and programs remain on the sender's computer. There is room for argument, therefore, that section 602(a) does not apply to digital transmissions received in the United States over the Internet from abroad.

²⁰² 17 U.S.C. § 407.

²⁰³ The fact that a work is unpublished weighs against a finding of fair use. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

²⁰⁴ *See, e.g.*, 17 U.S.C. § 118 (compulsory license is available for the use of certain published works in connection with noncommercial broadcasting).

²⁰⁵ “‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer or ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of person for purposes of further distribution, public performance, or public display, constitutes publication.” 17 U.S.C. § 101.

²⁰⁶ “Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.” 17 U.S.C. § 602(a).

²⁰⁷ *See White Paper, supra* note 112, at 107. “Copies” and “phonorecords” are defined as “material objects” by the 1976 Act. 17 U.S.C. § 101.

This ambiguity in the law might lead to the strange result that the importation of certain CDs would be prohibited, but the importation of the same digitized recording over the Internet from which CDs could be manufactured domestically might not be precluded.

9. Contributory and Vicarious Liability

Another ambiguity in current copyright law is the extent to which BBS operators, Internet access providers, online service providers, and host servers will be held liable for the actions of users uploading and downloading information over the Internet. Can a university, for example, be held liable for the actions of a student who infringes a copyright by placing unauthorized photographs on a Web page located on the university's UNIX computer? Or can America Online be held liable for the infringing e-mail of a subscriber? The case law which does exist seems to be split on this issue.

In *Playboy Enterprises, Inc. v. Frena*, BBS operator Frena was found liable for violating the exclusive rights of Playboy to distribute copies and to display the underlying copyrighted works.²⁰⁸ In *Sega Enterprise Ltd. v. MAPHIA*, a preliminary injunction was granted against BBS operator Scherman and the BBS itself on the basis that the plaintiff had established "a likelihood of success on the merits of showing a prima facie case of direct and contributory infringement by Defendants' operation of the MAPHIA bulletin board," but the court declined to elaborate the exclusive rights which were directly violated.²⁰⁹

In *Religious Technology Center v. Netcom II*, however, the court declined to find the Internet access provider and BBS operator directly liable for violating the exclusive rights of the copyright owner on the basis that "although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."²¹⁰ The court rejected the holding in *Playboy* arguing that "the storage on a defendant's system of infringing copies and retransmission to other

²⁰⁸ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. at 1556.

²⁰⁹ *Sega Enters., Ltd. v. MAPHIA*, 853 F. Supp. at 686.

²¹⁰ *Netcom II*, 907 F. Supp. at 1370.

servers is not a direct infringement.”²¹¹ The court distinguished the *Sega* case on the basis that the finding of direct infringement was entirely conclusory and that the *Sega* court’s reference to the knowledge of the defendant indicates that the *Sega* court was focusing on contributory infringement, as knowledge is not an element of direct infringement.²¹² The court even expressed reservation as to whether either defendant could be held liable for contributory infringement, but declined to grant summary judgment on the basis that this was a question of fact for a jury to decide.²¹³

Thus, the law remains unclear both as to whether Internet access providers will be held responsible for the actions of their subscribers, and, if they should be found so liable, under what theory of liability a court will base its ruling. The liability of Internet access providers is but one of a whole host of ambiguities which exist with respect to copyright law and the Internet. Without clarification of these ambiguities, it will be difficult for the owners of intellectual property and other copyrighted material on the Internet to know when their rights are being violated and when they should bring suit for the enforcement of those rights.

10. Jurisdictional Issues

The fact that the Internet is vast and without boundaries has raised the possibility that Internet content providers may be subject to legal liability in the various jurisdictions from which their web sites may be accessed.²¹⁴

²¹¹ *Id.*

²¹² *Id.* at 1371.

²¹³ *Id.* at 1374.

²¹⁴ Peter Brown, *New Issues in Internet Litigation*, 17TH ANNUAL INSTITUTE ON COMPUTER LAW 151, 177 (PLI ed., 1997). The power of a court to render a valid personal judgement over a non-resident defendant is limited by both state law and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 178. The traditional test for determining jurisdiction under the Due Process Clause focuses on whether a defendant has sufficient minimum contacts with the state of jurisdiction to satisfy the requirements of the Fourteenth Amendment. *Internat’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Three prongs exist to the minimum contacts test: 1) defendant must have purposefully availed itself of the privilege of doing business in the forum state, thus invoking the benefits and protections of the state’s laws, 2) the cause

The United States courts which have examined this issue to date have held that mere electronic contacts with the forum state can be sufficient to establish the necessary minimum contacts to create jurisdiction within a given state or court.²¹⁵ The extent to which electronic contacts are required to trigger jurisdiction, however, remains unclear.²¹⁶ Due to the lack of a clear signal from the courts as to when electronic contacts will be sufficient, Web page operators have little guidance as to what conduct may subject them to infringement litigation in any of the 50 states.

The problem is further compounded by the fact that the Internet is international in scope, having no borders or boundaries. Not only do American content providers face the risk that their content can be infringed by Internet sites in far-off nations, but they themselves may be subject to infringement suits in countries that favor their own nationals or that have different copyright standards, merely by placing a work on the Internet.

of action must arise from the defendant's activities with respect to the forum state, and 3) the exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice. *Id.*

²¹⁵ See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (finding that a Texas Internet user's contract with Ohio's CompuServe to distribute his software over the Internet constituted a sufficient basis for an Ohio federal court to exercise jurisdiction in a suit by CompuServe against the user); *Panavision Internat'l v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996) (holding that, in a trademark infringement suit in California, nonresident defendant who registered a domain name for purpose of extracting money from California plaintiff was subject to personal jurisdiction); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D. Conn. 1996) (holding that, in a trademark infringement suit, sufficient minimum contacts existed where defendant's sole contact with forum was the use of the "Inset.com" domain name and the use of a toll free number containing the disputed trademark "Inset").

²¹⁶ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (finding insufficient minimum contacts with the forum where defendant's sole contact with that forum was the existence of a site on the Web. Plaintiff, the owner of the New York club "Blue Note," maintained the defendant's use of the name "Blue Note" for defendant's Missouri club infringed the trademark in that name. The court stated that creation of a site on the Web, despite knowledge that New York residents might view it, "without more . . . is not an act purposefully directed toward the forum state" and hence insufficient to establish jurisdiction.)

11. The International Scope of the Internet

The problem of international jurisdiction is again compounded by the fact that the copyright laws of the various nation states are not standardized.²¹⁷ The United States and other common law countries emphasize promoting the creation of new works for the public benefit by protecting the author's economic rights.²¹⁸ This philosophy has led to the creation of such copyright concepts as a corporation being able to hold a copyright and the work-for-hire doctrine. Countries that follow the civil law tradition regard an author's rights (*droit d'auteur*) as natural human rights, or part of one's right of personality.²¹⁹ With such divergent theoretical bases, the two systems often come into conflict, providing different levels of protection for differing works.²²⁰ As

²¹⁷ Developing countries, for example, traditionally have had inadequate or nonexistent copyright protection measures for the creative original works of foreign authors. Benjamin R. Kuhn, *A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow*, 10 TEMP. INT'L & COMP. L.J. 171, 197 (Spring, 1996).

²¹⁸ See White Paper, *supra* Note 112, at 133.

²¹⁹ *Id.*, at 133-134.

²²⁰ The *droit d'auteur* tradition, for example, protects an author's moral rights, including the right of the author to be named as the author of a work he created and the right to object to uses of the work which could bring dishonor or discredit on the author's reputation, a concept largely rejected by the American system. *Id.* From these divergent theoretical bases also arises the concept of neighboring rights. *Id.* at 134. Neighboring rights are those rights applied to the producers of phonograms, producers of motion pictures, performers, and broadcasters. *Id.* Under the United States copyright system, these entities are considered authors holding those rights extended to other authors under federal copyright law. *Id.* A sound recording is thus protected under the federal copyright system. *Id.* Under the *droit d'auteur* tradition, however, such producers' and performers' rights would be protected as neighboring rights. *Id.* Neighboring rights, while similar in character to author's rights, may be protected at a lower level than authors' rights and are entirely separate and distinct from the higher-level rights granted to authors. *Id.*

The problems presented by a motion picture to the *droit d'auteur* tradition are severe. A motion picture is created by a whole host of producers, directors, writers, cinematographers, actors, and engineers. While the United States resolves the problem through the work for hire doctrine (copyright rests with the corporation that commissioned the work), the logic of the *droit d'auteur* holds that rights should rest with all these creators and the rights thus become problematic to implement. For further discussion, see Stephen Fraser, *The Copyright Battle: Emerging International Rules and*

the Internet is now a global phenomenon, use of the Internet might result in the unknowing infringement of the copyright laws of various nations.²²¹

Attempts have been made, however, to standardize international copyright law. The 1886 Berne Convention (the most current text being the Paris Act of July 24, 1971) is the premier and most universal attempt at standardization.²²² The Berne Convention is rooted in two related principles—"national treatment" and "minimum standards."²²³ National treatment means that authors should enjoy in other countries the same protection for their works as those countries accord their own authors.²²⁴ Minimum standards are those protections which member states must accord to authors in other Berne countries.²²⁵

Sound recordings are currently protected by two multilateral conventions: The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva 1971), to which the United States has belonged since March 10, 1974, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome

Roadblocks on the Global Information Infrastructure, 15 J. MARSHALL J. COMPUTER & INFO. L.J. 759, 770 (Summer 1997).

²²¹ *Id.* at 765.

²²² 4 NIMMER ON COPYRIGHT § 17.01[B] (1997). Due to the Berne Convention's rejection of copyright protections based on formalities, The United States, unwilling to discard the idea of copyright notice that set it apart among all the world's principal nations, refused to join Berne until the close of the 1980's. *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* The Berne Convention grants the authors of "literary and artistic works" the exclusive right of authorizing the reproductions of such works, in any manner or form. Berne Convention, Paris Text of July 24, 1971, art. 9. The Berne Convention defines "literary and artistic works" to include virtually all categories of works listed in 17 U.S.C. § 102, including cinematographic works, but excepting, notably, sound recordings. *Id.* at art. 2. The Berne Convention provides for additional protections such as a minimum copyright term (Article 7), the right to make translations (Article 8), a right to broadcast (Article 11 *bis*), a right of recitation for literary works (Article 11 *ter*), a right of public performance for dramatic and musical works (Article 11), a right to cinematographic adaptation (Article 14) and a right of seizure of infringing copies (Article 16).

1961), to which the United States does not adhere.²²⁶ Additional protections for all types of works are found in regional treaties²²⁷ and through the World Trade Organization's TRIPs Agreement.²²⁸

Despite these attempts at harmonization, however, conflicts remain among the various national systems.²²⁹ These conflicts are made more severe by ambiguities presented to copyright law by the Internet.

V. A PLAN OF ACTION FOR THE PROTECTION OF ENTERTAINMENT WORKS

The twin problems of the likelihood of infringement and ambiguities in copyright law presented by the Internet dictate that if entertainment works are to be sufficiently protected, a radical plan of action is needed by the Motion Picture and Television Industry. The ideal plan of action would encompass legislative reform, enforcement through litigation, contractual protections, and technological development. The focus of the plan of action would center on public education and awareness—educating the public that intellectual property protections are applicable to the medium of the Internet.

A. *The Need for Public Education*

When the software industry began, “it was a whole new industry, making a product so different from anything ever seen before that the old rules did not seem to apply.”²³⁰ The early software ethic “was a sort of freemasonry, and copying of software was approved by most people.”²³¹ The software industry did not move to enforce its intellectual property rights, and in doing so lost the opportunity to educate the public as to the protections accorded computer programs under

²²⁶ 4 NIMMER ON COPYRIGHT § 17.01[B][3] (1997).

²²⁷ *Id.*

²²⁸ See discussion in Fraser, *supra* note 220, at 766.

²²⁹ See White Paper, *supra* note 112, at 132.

²³⁰ Speech by William S. Strong presented at the Annual Meeting of The Association of American University Presses (June 17, 1994), in COPYRIGHT IN THE NEW WORLD OF ELECTRONIC PUBLISHING.

²³¹ *Id.*

copyright law.²³² Today, software piracy is a major problem both domestically and globally.

A similar problem exists today with the Internet as existed with the software industry when it first burgeoned. For one thing, as one author has put it, “[it] is fair to say that the great majority of Americans are entirely ignorant of how copyright works, where it came from or why we have it. That is correctable.”²³³ For another, a large part of the Internet community basically regards everything placed on the Internet as being fair game for copying and within the public domain.²³⁴ The pre-commercial users of the Internet seem to feel that the Internet was their territory prior to the entry of commercial forces such as the Industry onto the network, and thus they firmly believe that the new entrants must play by their rules if they wish to gain access to the Internet.²³⁵

B. *The NII Legislation*

In February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to articulate and implement the Administration’s vision for the National Information Infrastructure (NII)—the information superhighway of the future that will include the Internet.²³⁶ The IITF was chaired by the late Secretary of Commerce Ronald H. Brown, and it consisted of high-level representatives of the Federal agencies that play a role in advancing the development and application of information technologies.²³⁷ Under the rubric of the IITF, a Working Group on Intellectual Property, chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce A. Lehman, was established to examine the intellectual property implications posed by the formation of the NII, and to make recom-

²³² *Id.*

²³³ *Id.*

²³⁴ Barlow, *supra* note 115.

²³⁵ Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50.

²³⁶ See White Paper, *supra* note 112, at 1.

²³⁷ *Id.*

mendations on any appropriate changes to U.S. intellectual property law and policy.²³⁸

In September, 1995, the Report of the Working Group on Intellectual Property, now known as the “White Paper” was issued.²³⁹ The White Paper made numerous legislative recommendations. Many of these recommendations were incorporated into House Resolution 2441: The NII Copyright Protection Act, introduced in Congress on September 29, 1995, by Representative Carlos Moorhead (R-CA).

Some of the amendments to the 1976 Copyright Act proposed by H.R. 2441 included:

—Amending the right of distribution to make clear the concept that copies can be distributed by transmission.²⁴⁰

—Amending the definition of publication to make it clear that a work can be published by transmission.²⁴¹

—Amending the definition of “to transmit” to recognize that both copies of works and performances can be transmitted.²⁴²

—Amending the prohibitions on the importation of certain works in order to recognize that works can be imported by transmission.²⁴³

—Prohibiting the manufacture and importation of devices designed to circumvent copyright protection systems.²⁴⁴

²³⁸ *Id.* at 2.

²³⁹ *Id.*

²⁴⁰ “§106(3) of Title 17, United States Code, has been amended by striking ‘or by rental, lease, or lending’ and inserting ‘by rental, lease, or lending, or by transmission.’” H.R. REP. NO. 2441, 104th Cong., 1st Sess. §2(a).

²⁴¹ “§101 of Title 17, United States Code, is amended in the definition of ‘publication’, by striking ‘or by rental, lease, or lending’ in the first sentence and inserting ‘by rental, lease, or lending, or by transmission.’” H.R. REP. NO. 2441, at §2(b)(1).

²⁴² “To ‘transmit’ a reproduction is to distribute it by any device or process whereby a copy of [sic] phonorecord of the work is fixed beyond the place from which it was sent.” H.R. REP. NO. 2441, at §2(b)(2).

²⁴³ “Importation— Section 602 of Title 17, United States Code, is amended by inserting ‘whether by carriage of tangible goods or by transmission’, after ‘importation into the United States.’” H.R. REP. NO. 2441, at §2(c).

²⁴⁴ Adds new §1201 to Title 17 reading “No person shall import, manufacture, or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copy-

—Prohibiting the removal of copyright management information.²⁴⁵

—Providing for civil and criminal penalties for the manufacture and importation of devices designed to circumvent copyright protection systems and for the removal of copyright management information.²⁴⁶

The bill was filed in both the United States House of Representatives and in the Senate.²⁴⁷ The bill had the full support of the Motion Picture and Television Industry, which regarded it as a positive step forward towards protecting intellectual property rights on the Internet.²⁴⁸ The bill, however, never came to a vote in the last Congress, due largely from pressure from a coalition of computer industry entrepreneurs, fair use advocates, privacy groups, librarians and educa-

right owner or the law, any process, treatment, mechanism, or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106." H.R. REP. NO. 2441, at §4.

²⁴⁵ Adds new §1202(b) to Title 17 reading "Removal or alteration of copyright management information— No person shall, without authority of the copyright owner or the law (I) knowingly remove or alter any copyright management information, (II) knowingly distribute or import for distribution copyright management information that has been altered without authority of the copyright owner of the law, or (III) knowingly distribute or import for distribution copies or phonorecords from which copyright management information has been removed without authority of the copyright owner or the law." Also adds new §1202(c) reading "Definition— As used in this chapter, 'copyright management information' means the name and other identifying information of the author of the work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such information as the Register of Copyrights may prescribe by regulation." H.R. REP. NO. 2441, at §4.

²⁴⁶ Adding §1203 to Title 17 of the United States Code outlining civil remedies and adding §1204 to Title 17 of the United States Code outlining criminal penalties. H.R. REP. NO. 2441, at §4.

²⁴⁷ House Resolution 2441 and Senate Bill 1284, respectively.

²⁴⁸ Jack Valenti, Chairman and CEO of the Motion Picture Association of America, stated while testifying before Congress on H.R. 2441: "I think that the bill is just fine the way it is . . . You shouldn't be monkeying too much with current law and that's why I think this bill has a clarity about it that I find admirable, and my recommendation is that it should go forward" *Hearing of the Court and Intellectual Subcommittee of the House Judiciary Committee*, FEDERAL NEWS SERVICE, 104th Cong., 2d Sess. (Feb. 7, 1996) (statement of Jack Valenti, Chairman and CEO of Motion Picture Association of America, Inc.)

tors.²⁴⁹ This coalition was joined by some telecommunications companies and Internet providers which feared exposure to liability for the actions of their customers and, ultimately, the responsibility for policing the Internet.²⁵⁰

The effort to amend the 1976 Copyright Act represented a positive step at resolving the ambiguities in American copyright law. House Resolution 2441 ensured that the right to distribute copies would have applied fully to Internet-based works. House Resolution 2441 clarified the definition of “publication” to encompass electronic publication, and clarified the definition of “transmit” to make it clear that a reproduction can be transmitted. House Resolution 2441 strengthened importation protections, encouraged technological protection for intellectual property, and protected copyright management information.

Nevertheless, House Resolution 2441 was not without its shortcomings. It left a whole host of copyright issues without clarification, including:

—House Resolution 2441 never made clear whether copyright protection would extend to works created and fixed in tangible form for the first time on the Internet;

—House Resolution 2441 never made clear how such Internet based works will be classified—as multimedia forms of expression or as computer programs;

—House Resolution 2441 did not specify whether downloading a computer program into RAM constituted fixation of a work;

—House Resolution 2441 did not resolve the contradiction between the *Playboy* and *Netcom* cases as to exactly which §106 exclusive rights are violated when an infringing work is transmitted across the Internet. Is such an action a violation of the right to reproduce, the right to distribute copies, or the right to display or perform a work publicly?

—House Resolution 2441 did not address the issue of the reproduction right. As demonstrated in Part III, the Internet exists on copying. An authorized user viewing a copyrighted Web page with permission

²⁴⁹ Ana Radelat, *Devil or Angel?*, CALIFORNIA LAWYER, at 27 (June 1997).

²⁵⁰ *Id.* at 28.

may nevertheless violate the reproduction right of the copyright owner since his PC must necessarily make a copy to view the document.

—House Resolution 2441 did nothing to clarify the confusion behind what types of Internet uses will be considered fair use and which will be considered infringements.

—House Resolution 2441 did not resolve the conflicting holdings of the *Playboy* and *Netcom* courts as to the extent to which online service and Internet access providers will be held liable for the copyright violations of its users.

Bruce Lehman has responded to criticism of the Working Group's failure to address these issues by claiming that the omissions are not major concerns. He has stated, "The marketplace will respond to some of these issues."²⁵¹ As to the assertion that a user's viewing of a Web page will infringe the reproduction right of the copyright owner, for instance, Lehman has stated that the market will lead to the creation of licensing rights to allow such viewing.²⁵² The argument presupposes that if Internet content providers are to establish a market, they will be forced to work out a legal arrangement whereby users will be licensed the right to download a document into RAM to view it and whereby users might even be granted "browsing rights" under which they can preview documents before deciding whether to purchase and reproduce the document in total.²⁵³ Should such an arrangement fail to materialize, Lehman argues that the courts will likely step in and declare such usage fair use, or in the alternative the issue can be clarified through subsequent legislation.²⁵⁴ Lehman maintains, however, that despite the omissions, H.R. 2441 was a good initial first step.²⁵⁵

House Resolution 2441 was important, however, not for the ambiguities in copyright law, but for its educational value. House Resolution 2441 would have served to heighten the public awareness of copyright law and encouraged a dialogue with Internet users as to their rights and

²⁵¹ *Interview with Bruce Lehman: Lehman Hears His Critics But Doesn't Buy it All*, INFO L. ALERT: A VOORHEES REP. (Dec. 9, 1994).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *See White Paper, supra* note 112, at 29.

²⁵⁵ *Id.*

obligations. House Resolution 2441, however, was most important for the signal it would have sent to the Internet community that the federal government does consider copyright law to exist on the Internet, and that it intends for intellectual property rights to be enforced and respected on the NII.

C. *The WIPO Copyright Treaties*

In December 1996, the World Intellectual Property Organization (WIPO) held a three week conference to discuss proposals for modifying international copyright law.²⁵⁶ Three draft treaties were considered: 1) the Copyright Treaty supplementing the Berne Convention, 2) the Performances and Phonograms Treaty supplementing the Rome Convention and 3) the Database Protection Treaty seeking to extend copyright protection to computer databases.²⁵⁷ On December 20, 1996, the conference approved the first two of these treaties.²⁵⁸

Bruce Lehman, at the conference announcing adoption of the treaties, stated: "These treaties we've been working on will be the cornerstone of international economic law for the information and technological age of the 21st century."²⁵⁹ Stymied in Congress, Lehman, as he has put it, was given "a second bite of the apple," accomplishing through international treaties what could not be done in the House of Representatives.²⁶⁰

The Copyright Treaty preserves those rights granted authors of literary and artistic works under the Berne convention.²⁶¹ In addition to

²⁵⁶ Amy Harmon, *Meeting Takes Copyright Law to Digital Age*, L.A. TIMES, Dec. 2, 1996, at A1.

²⁵⁷ *WIPO Delegates Agree on International Copyright Protections*, TR DAILY (BRP Publications, Inc.), Dec. 20, 1996, available in 1996 WL 15885989.

²⁵⁸ *Id.* The Database Treaty was deemed too controversial, and in light of the difficulties encountered with the other two treaties, was dropped from the agenda by its primary supporter, the U.S. government. *Revolt over Copyright Treaty Prompts U.S. Withdrawal from Database Treaty*, EDUC. TECH. NEWS, Dec. 17, 1996, at 17.

²⁵⁹ *WIPO Approves Copyright Treaty*, NEWBYTES, Dec. 23, 1996, at 8.

²⁶⁰ Radelat, *supra* note 249, at 28.

²⁶¹ WIPO Copyright Treaty, December 20, 1996, art. 1(4), in *Int'l Legal Materials* (Am. Soc'y. of Int'l. Law, Jan. 1997) ("Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention"). Rather than amend the Berne Convention (which would have required unanimous support among the Contracting

protecting the works itemized in Berne, the Copyright Treaty adds one new item, computer programs, to the list of protected items.²⁶² Article 6 of the treaty grants authors of literary and artistic works a right of distribution.²⁶³ Article 7 of the treaty grants the authors of computer programs, cinematographic works, and certain phonograms a right of rental.²⁶⁴ Article 8 provides for a right of communication to the public and makes clear that the right applies to transmissions, such as through the Internet.²⁶⁵ Articles 11 and 12 protect against the circumvention of technological measures meant to protect copyrighted works.²⁶⁶

Parties), WIPO chose to construct the Copyright Treaty as a supplement to the Berne Convention. *See id.* at art. 1(1) (“This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.”)

²⁶² “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.” *Id.* at art. 4.

²⁶³ “Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.” *Id.* at art. 6(1).

²⁶⁴ “Authors of (i) computer programs; (ii) cinematographic works; and (iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.” *Id.* at art. 7(1). Article 7(1) does not apply “(i) in the case of computer programs, where the program itself is not the essential object of rental; and (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.” *Id.* at art. 7(2).

²⁶⁵ “. . . authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” *Id.* at art. 8.

²⁶⁶ “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” *Id.* at art. 11. “Contracting Parties shall

The Performances and Phonograms Treaty preserves those rights granted to the performers and producers of phonograms under the Rome Convention.²⁶⁷ Article 4 of the treaty provides for national treatment of said performers and producers.²⁶⁸ The treaty grants performers moral rights in their works,²⁶⁹ economic rights in unfixed performances,²⁷⁰ a right of reproduction of their performances in phonograms,²⁷¹ a right of distribution of their performances fixed in phonograms,²⁷² a right of rental,²⁷³ and a right to make available fixed performances to the public.²⁷⁴ Producers of phonograms are similarly granted a right of reproduction,²⁷⁵ a right of distribution,²⁷⁶ a right of rental,²⁷⁷ and a right to

provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." *Id.* at art. 12(1).

²⁶⁷ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, art. (1) ("Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

²⁶⁸ "Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty." *Id.* at art. 4(1).

²⁶⁹ *Id.* at art. 5.

²⁷⁰ *Id.* at art. 6.

²⁷¹ *Id.* at art. 7.

²⁷² *Id.* at art. 8.

²⁷³ *Id.* at art. 9.

²⁷⁴ *Id.* at art. 10. ("Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.") Such performances would seemingly include performances made over the Internet.

²⁷⁵ *Id.* at art. 11.

²⁷⁶ *Id.* at art. 12.

²⁷⁷ *Id.* at art. 13.

make available phonograms to the public.²⁷⁸ The treaty also provides for a right of remuneration to producers and performers for broadcast and communication of phonograms to the public.²⁷⁹ The treaty also contains provisions containing technological protections and copyright management information.²⁸⁰

The two critical elements of these treaties, as they pertain to the Internet are first, that the Copyright Treaty extends intellectual property protection to computer programs.²⁸¹ Second, the agreed statements concerning the treaties, though not having the binding authority of international law, and while not being adopted unanimously by the WIPO membership like the treaties, make clear that copyright protection extends to the digital environment. The Agreed Statement Concerning the WIPO Copyright Treaty, Article 1(4) states:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic

²⁷⁸ *Id.* at art. 14.

²⁷⁹ “Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.” *Id.* at art. 15(1). “Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.” *Id.* at art. 15(2). “For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered if they had been published for commercial purposes.” *Id.* at art. 15(4). The term “communication to the public”, defined in Article 2, would seemingly encompass transmissions over the Internet. *Id.* at art. 2(g) (“‘communication to the public’ of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram”)

²⁸⁰ *Id.* at arts. 18-19.

²⁸¹ Article 10 of the TRIPS Agreement also confirmed computer programs were protectible under international copyright law as literary works. *See* White Paper, *supra* note 112, at 136. Several key states, however, are not members of the World Trade Organization which governs the TRIPS Agreement.

medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

The Performances and Phonograms treaty contains similar but weaker language with respect to phonograms on the Internet.²⁸² The agreed statements outline exactly how the treaties are to be interpreted by the contracting party-states.

Originally, Article 7 of the original draft treaty made clear that the right to reproduction in Berne extended to all mediums and included temporary reproductions, such as downloading memory into RAM for viewing a Web page.²⁸³ The Notes accompanying Draft Article 7 further stated that the right of reproduction “clearly includes the storage of a work in any electronic medium [and] such acts as uploading and downloading a work to or from the memory of a computer.”²⁸⁴ Draft Article 7 ensured that any reproduction occurring over the Internet, no matter how temporary, would constitute an infringement, and left it to the individual states to draft exceptions which would exempt activities, such as browsing rights, from legal liability.²⁸⁵

²⁸² “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment” Agreed Statement Concerning the WIPO Performances and Phonograms Treaty, Concerning Article 10.

²⁸³ “Article 7: Scope of the Right of Reproduction.

(1) The exclusive right accorded to authors of literary and artistic works in article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of that work that is authorized by the author or permitted by law.”

Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, December 2, 1996, in 43 J. COPYRIGHT SOC'Y U.S.A. 399, 416 (1996).

²⁸⁴ Wendy L. Addis and Ronald S. Katz, *WIPO Treaties: Euphoria Should Wait*, 14 COMPUTER LAW 1, 2 (1997).

²⁸⁵ *Id.* The Performances and Phonograms Treaty contained parallel provisions to

Draft Article 7, however, drew loud protests from Internet service providers, such as AT&T and U.S. Telephone Association, which feared they could be made liable for these unauthorized reproductions.²⁸⁶ On one side of the debate were the film and recording industries, publishing companies, and software manufacturers, on the other were consumer advocates, library and academic groups, and telecommunication companies.²⁸⁷ As a result of this pressure, several countries concluded that Draft Article 7 was too controversial and that the subject matter was already protected under existing law, and therefore they withdrew their support and demanded that the article be withdrawn.²⁸⁸ The United States reluctantly agreed to delete the draft article, but insisted that language be inserted into the agreed statements to make clear that the treaties' protections extended to the digital environment.²⁸⁹

The current U.S. administration believes the treaties, in their current form, resolve the debate over whether copyright protections apply to the Internet.²⁹⁰ The Treaties do, however, leave a number of ambiguities in

Draft Article 7. *Id.*

²⁸⁶ John Parry, *Loud Protest Song Over Draft of Copyright Treaty*, THE HOLLYWOOD REP., Dec. 20-22, 1996, at 3.

²⁸⁷ John Parry, *Slow Copyright Dance in Geneva*, THE HOLLYWOOD REP., Dec. 10, 1996, at 7.

²⁸⁸ *Controversial Section in Copyright Treaties Deleted, But Carriers Want More* COMM. DAILY (Warren Publishing, Inc.), Dec. 23, 1996, available at 1996 WL 12301580.

²⁸⁹ *Online Community Claims Victory in World Copyright Conference*, COMM. DAILY (Warren Publishing, Inc.), Dec. 26, 1996, available at 1996 WL 12306658.

²⁹⁰ Peter Fowler, the Executive Secretary to the U.S. delegation to the WIPO Diplomatic Conference, has stated that the treaties resolve the issue of the application of copyright law to the Internet. Peter N. Fowler, Address to the Los Angeles County Bar Association (May 1, 1997). Additionally, the Administration's Framework for Global Electronic Commerce describes the WIPO Treaties: "The two treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—will greatly facilitate the commercial applications of online digital communications over the GII." A Framework for Global Electronic Commerce, July 1997, available at <<http://www.whitehouse.gov/WH/New/Commerce/read.html>>. As to the reproduction right, the Framework states: "Both treaties also contain provisions that permit nations to provide for exceptions to rights in certain cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author (e.g., 'fair use'). These provisions permit members to carry forward and ap-

international copyright law. Primarily, the agreed statements only clarify that the right to reproduction extends into the digital environment, but they say nothing regarding the new rights to distribution or communication. Room is left for argument as to whether these rights extend to the Internet, and when a Web page is accessed, whether the reproduction, distribution, or communication rights are triggered. The primary function of the treaties, however, is to serve as a statement to the public and critics of copyright protection that intellectual property does exist on the Internet.

The motion picture, television, recording, and software industries have whole-heartily supported ratification of and lobbied for the treaties.²⁹¹ In response, President Clinton has submitted the treaties for ratification to the U.S. Senate,²⁹² though Bruce Lehman and other administration officials believe little else in the way of supplementing legislation is required.²⁹³ House Resolution 2281, the limited supplementing legislation was introduced on July 29, 1997 to implement the treaties.²⁹⁴ For the most part, the legislation consists of technical amendments to bring definitions in line with the WIPO language.²⁹⁵ The bill also includes provisions prohibiting the circumvention of copyright protection systems.²⁹⁶ The bill attempts to preserve the integrity of

appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. These provisions permit members to devise new exceptions and limitations that are appropriate in the digital network environment, but neither reduce nor extend the scope of applicability of the limitations and exceptions permitted by the Berne Convention." *Id.*

²⁹¹ Jack Valenti, chief executive officer of the Motion Picture Association, has stated: "These treaties are in the best interests [sic] of the United States." Brooks Boliek, *Clinton Goes Forward on WIPO Treaty Legislation*, THE HOLLYWOOD REP., July 30, 1997, at 8.

²⁹² *Id.*

²⁹³ *Clinton Administration to Push for Ratification of WIPO Treaties*, 9 J. PROPRIETARY RTS. 16 (Mar. 1997).

²⁹⁴ H.R. 2281, 105th Cong., 1st. Sess., reprinted in BNA'S PAT., TRADEMARK & COPYRIGHT J. (July 31, 1997).

²⁹⁵ *Id.* at Sec. 2.

²⁹⁶ "(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES—

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- (1) No person shall circumvent a technological protection measure that effectively controls access to a work protected under this title.
- (2) No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof that—
- (A) is primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a work protected under this title;
 - (B) has only limited commercially significant purpose or use other than to circumvent a technological protection measure that effectively controls access to a work protected under this title; or
 - (C) is marketed by that person or another acting in concert with that person for use in circumventing a technological protection measure that effectively controls access to a work protected under this title.
- (3) As used in this subsection—
- (A) to ‘circumvent a technological protection’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate or impair a technological protection measure, without the authority of the copyright owner; and
 - (B) a technological protection measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) ADDITIONAL VIOLATIONS—

- (1) No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof that—
- (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological protection measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;
 - (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological protection measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or
 - (C) is marketed by that person or another acting in concert with that person for use in circumventing protection afforded by a technological protection measure that effectively protects a right of a copyright owner under this title in a work or portion thereof.
- (2) As used in this subsection—
- (A) the term ‘circumvent protection afforded by a technological protection measure’ means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological protection measure; and
 - (B) a technological protection measure ‘effectively protects a right of a copyright owner’ under this title if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

copyright management information²⁹⁷ and the bill provides for civil remedies²⁹⁸ and criminal penalties²⁹⁹ for circumvention of these protec-

(c) IMPORTATION— The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee of any technology, product, service, device, component, or part thereof as described in subsection (a) or (b) shall be actionable under section 337 of the Tariff Act of 1930 (19 U.S.C. §1337)”

Id. at sec.3, §1201.

²⁹⁷ (a) FALSE COPYRIGHT MANAGEMENT INFORMATION—No person shall knowingly—

- (1) provide copyright management information that is false, or
- (2) distribute or import for public distribution copyright management information that is false, with the intent to induce, enable, facilitate, or conceal infringement.

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION— No person shall, without the authority of the copyright owner or the law—

- (1) intentionally remove or alter any copyright management information,
- (2) distribute or import for distribution copyright management information knowing that the Copyright Management Information has been removed or altered without authority of the copyright owner of the law, or
- (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) DEFINITION— As used in this chapter, the term ‘copyright management information’ means the following information conveyed in connection with copies or phonorecords or a work or performances or displays of a work, including in digital form:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of the work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including information set forth in a notice of copyright.
- (4) Terms and conditions for use of the work.
- (5) Identifying number or symbols referring to such information or links to such information.

tions. This bill differs little from House Resolution 2241, except on the margins. The extent of the difference is unclear at this point due to the numerous amendments expected.

Passage of the treaty and implementing language, however, is likely to be held up by the very same telecommunication and online service companies that removed Draft Article 7 from the Copyright Treaty. These interest groups feel passage of the treaties will create an enhanced danger of contributory and vicarious liability. To protect these interests, Rep. Howard Coble (R-NC), the sponsor of House Resolution 2281, has introduced a bill, House Resolution 2180, which will exempt qualifying Internet and on-line service providers from direct or vicarious copyright liability for transmissions by third parties.³⁰⁰ A Senate version of the bill has also been introduced.³⁰¹

(6) Such other information as the Register of Copyrights may prescribe by regulation, except the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work ”

Id. at sec.3, §1202.

²⁹⁸ *Id.* at sec.3, §1203(a) (“ Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.”) The bill provides for injunctive relief, an impoundment remedy, damages, and attorney’s fees. *Id.* at sec. 3, §1203(b). Damages can either be actual or statutory, with trebled damages for repeat violators. *Id.* at sec.3, §1203(c).

²⁹⁹ *Id.* at sec.3, §1204. The bill provides for a fine of no more than \$500,000 and imprisonment of not more than five years or both for the first offense, \$1,000,000 and ten years or both for subsequent offenses. *Id.*

³⁰⁰ H.R. 2180, 105th Cong., 1st. Sess., *reprinted in* BNA’S PAT., TRADEMARK & COPYRIGHT J. (July 24, 1997). A provider will not be liable for direct infringement or the infringing acts of another, based solely on transmitting or providing access to material on-line if “the person— (A) does not initially place the material on-line; (B) does not generate, select, or alter the content of the material; (C) does not determine the recipients of the material; (D) does not receive a financial benefit directly attributable to a particular act of infringement; (E) does not sponsor, endorse, or advertise the material; and (F) (i) does not know and is not aware by notice or other information indicating that the material is infringing, or (ii) is prohibited by law from accessing the material.” *Id.* at sec.2, §512(a). Injunctive relief is available still for contributory infringement. *Id.* The service provider is also shielded from liability for blocking on-line access to infringing material. *Id.* at §512(b). Finally, any person who knowingly materially misrepresents that material is infringing is subjected to damages incurred by

The WIPO Treaties, for all their imperfections, and despite the compromise of House Resolution 2281, serve the critical function of communicating that copyright protections do apply on the Internet in the global marketplace.³⁰²

any person who relies upon such misrepresentation in blocking access. *Id.* at §512(d). Subsection (d) raises the specter of lawsuit by individuals claiming their allegedly infringing materials were fair use and the copyright owner knew this and initiated blocking access for harassment purposes.

³⁰¹ Sen. John Ashcroft (R-MO) on September 3, 1997 introduced the Senate counterpart to the House bill (HR 2180) limiting on-line service provider liability to third parties. *Liability Bill for On-Line Service Providers Focuses on 'Notice and Take-Down'*, BNA'S PAT., TRADEMARK & COPYRIGHT J., Sept. 11, 1997, at 384-385.

Sen. Ashcroft's bill (S1146) takes a different approach to on-line service provider liability than the pending house bill. *See* S. 1146, 105th Cong., 1st Sess., *reprinted in* BNA'S PAT., TRADEMARK & COPYRIGHT J., Sept. 11, 1997.

As with the House Bill, Title I of S 1146 adds a new Section 512 to the Copyright Act, exempting on-line services from liability for infringing transmissions of copyrighted material on their networks, but also includes explicit exemptions for voice messaging, e-mail service providers, real-time communication providers, and browsers. *Id.* This sets up a notice and take-down structure, whereby service providers escape liability only provided they remove or block infringing material upon receiving notice of its existence from the copyright proprietor. *Id.*

Title II of S 1146 expands the concept of fair use to make clear fair use may be made of a copyrighted work by "analog or digital transmission." *Id.* Title II also contains added exemptions for libraries, archives, and education. *Id.*

Finally, Title III of S 1146 incorporates the WIPO implementation provisions of other bills into the on-line service bill. Like HR 2281, S 1146 prohibits the circumvention of technological measures used to control access to copyrighted works, however, whereas the House bill outlaws the "manufacture, import, offer to the public" or other "trafficking" in devices used to circumvent, only the circumvention itself is illegal under S 1146. *Id.* S 1146 also differs from HR 2281 in its definition of "copyright management information," S1146 limited the definition to information in electronic form. *Id.* The bills also provide for different civil remedies, and S 1146 contains no criminal penalties.

³⁰² Additionally, the No Electronic Theft Act (H.R. 2265, 105th Cong., 1st Sess.) has recently been approved by the House Subcommittee on Intellectual Property. The No Electronic Theft Act makes it a crime for a person to post stolen electronic property on the Internet even if the person makes no money from the material. The NET Act makes it a felony to willfully infringe a copyright by reproducing 100 or more copyrighted works, with a value of at least \$5,000, within a 180 day period,

D. *An Enforcement Campaign*

In addition to raising public awareness of copyright concerns on the Internet through treaties and legislation, the same goal can be achieved through targeted litigation. Major infringements of intellectual property demand a rapid response through litigation that seeks an end to such infringement through remedies such as injunctions and the deterrent threat of imposing the maximum damages allowed under the law.

The entertainment industries have begun to respond to infringements on the Internet when they are discovered by sending e-mail messages ordering infringers to cease and desist or face litigation. In May 1997, for example, the rock band Oasis e-mailed hundreds of sites warning the site operators to remove copyrighted photos, video clips, lyrics and sound samples.³⁰³ Several studios have followed suit for their motion picture and television releases.³⁰⁴

The targets of these threats, however, must be carefully selected to avoid public relations disasters. Suing a college student putting up a Web page dedicated to her favorite television show will do nothing to endear the public to that show, nor to heighten public respect for the intellectual property rights of copyright owners. In fact, several studios who have threatened fans with litigation have discovered the strategy backfired.³⁰⁵

regardless of whether the infringer realized any financial gain. Brooks Bolick, *Panel OK's Copyright Package*, THE HOLLYWOOD REP., Oct. 1, 1997, at 23.

³⁰³ *The Hollywood Minute*, (CNN television broadcast, May 20, 1997). The band's management company, Ignition, said the move was a preventative measure prompted by discovery last year that tracks from U2's latest album, "Pop," were illegally available on the Internet prior to the record's release, and by concerns that the same would happen with the Oasis release "Be Here Now." Erich Boehm, *Oasis Targets Internet Piracy*, DAILY VARIETY, May 19, 1997, at 9.

³⁰⁴ The film studios Fox and Viacom have taken an aggressive policy against infringing Web sites. See David Pescovitz, *Hollywood War on the Fans*, THE WEB MAGAZINE, May 1997, at 24-28.

³⁰⁵ In October, 1996, for example, Fox ordered fan Gil Trevizo to remove bootlegged excerpts and script excerpts from the yet-to-be-released show *Millennium*. *Id.* at 26. Trevizo responded by organizing an e-mail protest wherein fans overwhelmed Fox servers with e-mail messages. *Id.* at 27. Fox, in turn, allegedly caused Trevizo's university to freeze his internet account. *Id.* Lucasfilms encountered similar problems

Instead, lawsuits should be targeted against: 1) sites infringing copyrighted works set up for commercial purposes and 2) sites involving the mass copying of sensitive information, including video excerpts, audio recordings, and private material, such as unreleased screen plays. In addition these sites are more likely to not be protected by fair use due to their commercial impact on motion picture and television properties.³⁰⁶ Test lawsuits against individual infringers should be launched immediately to avoid the argument made before the courts that this form of conduct has occurred for a long time, and hence poses no threat to the industry.

The primary function of this litigation would be to deter potential infringers and to create a heightened sense of public awareness as to the existence of copyright law on the Internet. By raising such public awareness, the Industry might avoid the fate suffered by the software industry in which many consumers regard the unauthorized copying of computer programs as acceptable because of the lack of awareness and deterrence. In fact there are few PC owners who do not have a piece of unauthorized software on their hard drives.

E. *Notices and Contracts*

Another means of raising public awareness of the rights granted under copyright law is to provide notices of copyright, complete with a brief explanation of what the user is licensed to do with the Web pages or other documents, and an explanation of the penalties which will be incurred by violating the provisions of copyright law. These notices could be phrased in contractual terms, thus providing an additional claim of breach of contract against would be infringers, in addition to the basic copyright claims.

Many Industry members are, in fact, already doing this. Disney's Web pages, for example, demonstrate "some of the scariest legal boilerplate the Web has yet seen."³⁰⁷ A disclaimer on the bottom of the introductory page informs users that access to this Web site is subject to the

with its campaign against infringing Star Wars sites. *Id.*

³⁰⁶ See discussion on fair use, *supra*.

³⁰⁷ See Burr, *supra* note 42.

terms and conditions set forth by Disney.³⁰⁸ Clicking on the disclaimer takes a user to a page listing the terms and conditions of use.

Such adhesion contracts may or may not be enforceable, but their main function is to put the public on notice of the existence of copyright privileges and the owner's willingness to enforce such rights.³⁰⁹

F. *Technological Protections*

House Resolution 2281 envisions two forms of copyright protection. The first are technological protections that control access to a work.³¹⁰ Such protections would include passwords, payment systems, encryption technology, and protection protocols. The second form of protection comes in the form of copyright managerial information. Pursuant to section 1201 of the bill, it is prohibited to manufacture, import, offer to the public, provide or traffic in technology designed to circumvent such technological protections.³¹¹

Only technology which is "primarily designed or produced" to circumvent technological protections is prohibited.³¹² Moreover, the technology must have "limited commercially significant purpose or use other than" circumvention of protection measures.³¹³ Finally, the technology must be marketed for the purpose of circumventing a technological protection measure.³¹⁴ In other words, the scope of protection under

³⁰⁸ "Restrictions on Use of Materials— No material from Disney.com, or any Web site owned, operated, licensed, or controlled by Disney Online, the Walt Disney Company, or any of its related, affiliated or subsidiary companies (collectively, 'Disney') may be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way, without prior written permission of Disney, except that you may download one copy of the material on any single computer for your personal, non-commercial home use only, provided you keep in tact all copyright proprietary notices" <<http://www.disney.com>>.

³⁰⁹ Software companies have long taken to issuing printed limitations with the software they sell. Though the courts have been divided over the enforceability of such licenses, the trend seems to follow a recent Seventh Circuit case, upholding the enforceability of such shrinkwrap licenses under the U.C.C. *CD Pro, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

³¹⁰ House Resolution 2281, *supra* note 296, at sec.2, §2201(a).

³¹¹ *Id.* at sec.2, §1201(a)(2).

³¹² *Id.* at §1201(a)(2)(A).

³¹³ *Id.* at sec.2, §1201(a)(2)(B).

³¹⁴ *Id.* at sec.2, §1201(a)(2)(C).

section 1201 is limited, and subject to interpretation by the courts as to when technology is “primarily designed” or “marketed” for such a purpose.

Copyright management information includes such information as copyright notices, the name of the copyright owner, terms and conditions for use of the work, and a number of identifying symbols.³¹⁵ House Resolution section 1202 prohibits the intentional altering of such information or the knowing distribution of a work with altered information.³¹⁶

Though not contemplated by the bill, technological protections can go beyond those envisioned in the statute, such as enhanced encryption technology, or copyright management information that can trace who is accessing the work and where that work is transferred after the initial user.³¹⁷ Technological protections represent a viable means by which copyrighted works can be protected from potential infringers, and users can be educated as to the rights of the copyright proprietor.

VI. CONCLUSION

As has been illustrated, the Motion Picture and Television Industry has a growing stake in the creation of content on the Internet, both in the form of advertising and in the form of entertainment content. With the passage of time and the development of technology, its role is certain to grow. The ease of infringement on the Internet, however, poses a severe problem to the creators of content, a danger enhanced by unresolved ambiguities under copyright law.

To counteract these difficulties, the Motion Picture and Television Industry must play a more active role in policing the Internet. First and foremost, the Industry should support the ratification of the WIPO copyright treaties, and the accompanying legislation, House Resolution 2281. The legislation would act as a statement that copyright protection does, in fact, apply to the Internet on a global level. The legislation, however, is not enough and a broader campaign of enforcement, education, and technology protection is needed. Only in this way can a firm statement

³¹⁵ *Id.* at sec.2, §1202(c).

³¹⁶ *Id.* at sec.2, §1202(b).

³¹⁷ Protection of such copyright management information is specifically exempted from the proposed statute. *Id.* at sec.2, §1202(c)(6).

be made that copyright protections must be respected in the digital environment.

The Motion Picture and Television Industry has been on the cutting edge of entertainment delivery for the last 40 years. With the growing importance of the Internet as a medium for the delivery of entertainment, the Industry cannot afford to neglect the network and thereby risk falling behind and losing its place as an entertainment leader. But a leadership role in the face of changing technology requires foresight and imagination—the foresight to face and overcome the copyright dangers which will arise in cyberspace and the imagination to build a world where infinite information is available with the single click of a mouse.