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Copyright

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INTRODUCTION

With a computer and modem, it is now possible to browse books, magazines, and musical compositions online and order selected items directly from the publishers of those works.[16] With electronic mail,[17] a message can be sent to a friend or client halfway around the world for the price of a local phone call. On an electronic bulletin board,[18] one can upload[19] comments concerning a myriad of issues for other subscribers to read and discuss in responsive postings. Volumes of publicly available government information[20] and classical Shakespeare[21] can be downloaded[22] and incorporated into briefs or papers with just a few keystrokes. These activities are just a few examples of how new digital technologies facilitate the authorized reproduction and dissemination of copyrighted works or information in the public domain by and to more people than ever before.[23]

Inevitably, these technologies lend themselves to unauthorized exploitation of copyrighted works as well. As recent legal disputes illustrate, it is possible, without permission, to upload (and download) copyrighted images from magazines,[24] copyrighted video games,[25] or

16. With respect to books and magazines, see Richard Wiggins, *The Word Electric*, Internet World, Sept. 1995, at 31, 31-32; Paul Ferguson, *On the Cyber Racks*, Internet World, Sept. 1995, at 37, 37-39; Calvin Reid, *Web Watch*, Publishers Weekly, Sept. 25, 1995, at 13, 13. Music compositions can be heard and downloaded through OnRamp, an online service created by former MTV disc jockey Adam Curry. Telephone Interview with Joseph DiMona, counsel for Broadcast Music, Inc. (June 19, 1995).

17. Electronic mail is "[t]he transmission, storage, and distribution of text material in electronic form over communications networks." James A. O'Brien, Management Information Systems: A Managerial End User Perspective 646 (1990).

18. An electronic bulletin board is an online service that enables users to enter information for others to read or copy. *See id.* at 646.

19. To upload is to copy a file from your computer to another computer. *See* G. Burgess Allison, A Lawyer's Guide to the Internet 332 (1995).

20. *See, e.g., id.* at 293-323 (listing "Government Sources of Business and Economic Information on the Internet").

21. *See* Robert Sanchez, *The Digital Press*, Internet World, Sept. 1995, at 58, 58. This article describes Project Gutenberg, the goal of which "is to provide a library of 10,000 of the most-used public-domain electronic texts . . . by the end of the year 2001." *Id.*

22. To download is to copy material from another computer to your computer. Allison, *supra* note 19, at 332.

23. Digital technology "also ensure[s] that copies will be perfect reproductions, without the degradation that normally occurs today when audio and videotapes are copied." 141 Cong. Rec. S14550, S14450 (daily ed. Sept. 28, 1995) (remarks of Senator Hatch in introducing the NII Copyright Protection Act of 1995, S. 1284, 104th Cong. 1st Sess. (1995)).

24. Playboy Enters. v. Frena, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

other proprietary materials,[26] or to create your own digital renditions of other people's graphic,[27] musical[28] or other[29] works, and to distribute these items to millions of people, for profit[30] or just for fun,[31] all under an assumed name.[32]

25. Sega Enters. v. MAPHIA, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (involving the uploading and downloading of copyrighted Sega video games). In Sega, the defendants actually were held liable for contributory infringement as opposed to direct infringement, because they themselves did not actually upload or download any of the copyrighted software. *Id.* at 686-87

26. Religious Technology Ctr. v. NETCOM On-line Communication Servs., Inc., No. C-95-20091 RMW, 1995 WL 86532, at *2 (N.D. Cal. Feb. 23, 1995) (involving the uploading and downloading of copyrighted works of the Church of Scientology).

27. *See, e.g.*, Tad Crawford, *Copyright and the Digital Revolution*, Comm. Arts, Jan./Feb. 1993, at 156, 156-58 (describing the ease with which components of photographs can be combined through digital technology); David Walker & Michele Herman, *Image Appropriation: On The Rise?*, Photo District News, May 1994, at 1, 1, 30-32 (discussing the recent increase in digital copyright infringement); *Multimedia Docket Sheet*, Multimedia Strategist, May 1995, at 7, 8 (reporting settlement of dispute between rock star David Bowie and photographer Donna Ann McAdams which arose out of Bowie's unauthorized creation of computer-generated print based on photograph by McAdams).

28. Complaint, Frank Music, Inc. v. CompuServe Inc., No. 93 Civ. 8153 (S.D.N.Y. Nov. 29, 1993) (alleging unauthorized transmission of copyrighted musical compositions over the CompuServe network).

29. A complaint filed recently by the National Football League charges the defendants with creating and distributing online derivative works of protected broadcasts of football games. Complaint at 11-13, National Football League v. Stats, Inc., 95 Civ. 8547 (S.D.N.Y. Oct. 10, 1995).

30. In *Sega Enters. v. MAPHIA*, there was evidence that the defendants "sometimes charge[d] a direct fee for downloading privileges, or barters for the privilege of downloading Sega's games." Sega Enters. v. MAPHIA, 857 F. Supp. 679, 683 (N.D. Cal. 1994).

31. United States v. LaMacchia, 871 F. Supp. 535, 536 (D. Mass. 1994) (describing how defendant created bulletin board allowing for unauthorized uploading and downloading of copyrighted software at no charge).

32. *See* Complaint, Macromedia, Inc. v. HRHacker, No. C-95-1261 (N.D. Cal. April 13, 1995) (alleging that 60 subscribers to American Online, who were identified only by their online names, had engaged in the unauthorized copying and distribution of Macromedia's software through America Online's e-mail system). The difficulty of user identification has caused problems for both plaintiffs seeking to hold individual users liable for certain conduct and for online services attempting to enforce subscriber indemnification agreements. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a case involving online defamation, the online account from which the allegedly defamatory message had been posted was found to have been closed long before the posting, making it virtually impossible to ascertain the identity of the real culprit. *See* Peter H. Lewis, *A New Twist in an On-Line Libel Case*, N.Y. Times, Dec. 19, 1994, at D10; Peter H. Lewis, *Libel Suit Against Prodigy Tests On-Line Speech Limits*, N.Y. Times, Nov. 16, 1994, at D1. Some commercial online services explicitly prohibit postings under assumed names. The operating policy of the AT&T Interchange Online Network (formerly owned by Ziff-Davis), for example, requires that members enroll under their own names and states, "Except where and when specifically permitted by a Network Service, [a member] may not upload any messages, data or programs anonymously or under a false name." *AT&T Interchange Online Network Operating Policies*, *in* Business and Legal Aspects of the Internet and Online Services 151, 153 (1995).

Some of these unauthorized activities appear clearly to constitute actionable copyright infringement.[33] But the legal status of other digital activities under the current copyright statute, the Copyright Act of 1976 ("Copyright Act"),[34] is not so clear. This section of the Report will discuss the copyright issues which have arisen from the development and spread of new technologies. Part I provides a brief summary of the basic tenets of copyright law, with an emphasis on those principles whose modification has been suggested. Part II considers the impact of the new technologies on the rights of copyright owners as well as the rights of users of copyrighted information. Part II also discusses the recommendations of the Clinton Administration's Working Group on Intellectual Property Rights ("Working Group") in its

33. For example, uploading and downloading digitized files clearly results in the creation of copies. White Paper, *supra* note 14, at 65-66. Even when you use your computer "as a 'dumb' terminal to access a file resident on another computer such as a [bulletin board] or [an] Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying, . . . no screen display would be possible." *Id.* at 66; *see also id.* at 65-56 (listing several other examples of electronic transactions that result in the creation of copies). Because there is no dispute that these activities result in the creation of copies, there does not appear to be any question that the unauthorized commission of such activities constitutes copyright infringement. For example, in *Sega*, the court found that the unauthorized uploading and downloading of copyrighted video games violated the plaintiff's copyright in the games. *Sega*, 857 F. Supp. at 686; *see also LaMacchia*, 871 F. Supp. at 536 (addressing criminal prosecution based on the unauthorized uploading and downloading of copyrighted software); Religious Technology Ctr. v. NETCOM On-line Communication Servs., Inc., No. C-95-20091 RMW, 1995 WL 86532, at *2 (N.D. Cal. Feb. 23, 1995) (issuing temporary restraining order prohibiting the uploading and downloading of confidential copyrighted works).

Digital technology also enables the creation of unauthorized derivative works. It is easy to take a graphic work, such as a photograph, and rearrange it or "transform" it into another medium. Indeed, "[i]n many cases, technology acts as a catalyst," in effect encouraging artists to manipulate the works of other artists just because they have the capacity to do so. Walker & Herman, *supra* note 27, at 30. Moreover, the same technology that enables digital appropriation facilitates the disguising of original images. *See id.* at 31. Recently, a photographer filed a claim against rock star David Bowie which alleged that Bowie had created a computer-generated print of one of her photographs and used it to illustrate an article on performance art. *See supra* note 27. Many artists do not understand that by engaging in the technological appropriation and manipulation of images, they may be violating the Copyright Act, believing instead that " '[i]f you take something and morph it, it's yours.' " Walker & Herman, *supra* note 27, at 31 (quoting Jonathan Gibson, owner of graphic design firm Form and Function). But there is no question from an informed legal standpoint that the works created by these methods, absent authorization or any other legal justification, are derivative works.

Finally, it seems clear that when one uploads copyrighted material onto a bulletin board or other electronic forum, as did subscribers to the defendant's bulletin board in *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993), the material is shown "by means of a . . . device," thereby implicating the display right. 17 U.S.C. § 101 (1994); *see infra* note 41 and accompanying text. The same result is reached when one "browses" material online; "a public display of at least a portion of the browsed work occurs." White Paper, *supra* note 14, at 72.

34. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101 (1994)).

preliminary draft report ("Green Paper")[35] and its final report ("White Paper").[36] Part III discusses the difficulties involved in enforcing copyright law on the information superhighway, including the thorny issue of online service provider liability. Finally, part III considers proposed solutions to some of these difficulties.

I. Basic Copyright Principles

Subject to certain statutory limitations, § 106 of the Copyright Act[37] gives a copyright holder the exclusive right to (1) reproduce the copyrighted work in copies or phonorecords,[38] (2) prepare derivative works based on the copyrighted work,[39] (3) distribute copies of the copyrighted work to the public, (4) perform the copyrighted work publicly,[40] and (5) display the copyrighted work publicly.[41] Anyone who engages in or authorizes any of these activities without the permission of the copyright holder may be held liable for copyright infringement.[42]

35. Working Group on Intellectual Property Rights, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure (1994) [hereinafter Green Paper]. The Working Group published the Green Paper following public hearings and the subsequent submission of written comments. *Id.* at 2. The Green Paper also briefly discusses the impact of the information superhighway on patent, trademark, and trade secret law.

36. White Paper, *supra* note 14. After the publication of the Green Paper, the Working Group received voluminous comments from a wide range of interested parties, conducted four days of hearings in different cities, held a special conference on fair use, and kicked off a "Copyright Awareness Campaign." *Id.* at 4-5. The Working Group issued the White Paper in September 1995.

37. 17 U.S.C. § 106 (1994).

38. "Copies" are defined as "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." 17 U.S.C. § 101 (1994). "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." *Id.*

39. A "derivative work" is defined as "a work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work can be recast, transformed, or adapted." *Id.*

40. "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." *Id.*

41. "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." *Id.*

42. 17 U.S.C. § 501(a) (1994). In order to establish a cause of action for copyright infringement, a plaintiff must prove (1) ownership of a valid copyright in the work and (2) copying of the work by the alleged infringer. Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 (2d Cir. 1977). A copyright registration certificate

One of the statutory limitations on a copyright owner's exclusive rights in his work is fair use, an affirmative defense that allows a defendant to avoid liability for activity which otherwise would constitute infringement.[43] Section 107 of the Copyright Act, which codified decades of judicial precedent, requires that in determining whether a certain use of a copyrighted work is fair, a court must consider four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the work used, and (4) the effect of the use on the market for the copyrighted work.[44]

The "first sale" doctrine limits the copyright owner's exclusive right of distribution. This doctrine, which is codified in § 109 of the Copyright Act, provides that if a copyright owner transfers ownership of a lawfully made copy of a work, the transferee "is entitled . . . to sell or otherwise dispose of . . . that copy."[45] Thus, if someone bought a book at a bookstore, she would not infringe the copyright in the book if she subsequently sold the book at a garage sale.[46]

Other limitations on copyright are found in § 108 of the Copyright Act, which allows library employees to make or distribute one copy of

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constitutes prima facie evidence of ownership of a valid copyright. 17 U.S.C. § 410(c) (1994); *Joan Fabrics*, 558 F.2d at 1092 & n.1. It is generally not possible to establish copying by direct evidence, because it is rare that the plaintiff has a witness who actually saw the defendant in the act of copying the plaintiff's work. 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[B], at 13-10 to 13-11 (1994); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). For this reason, a plaintiff may show copying by demonstrating that (1) the defendant had access to the copyrighted work and (2) the allegedly infringing work is substantially similar to the copyrighted work. *Id.* Access means that the defendant saw or heard, or had the opportunity to see or hear, the plaintiff's work. *See* Smith v. Little, Brown & Co., 245 F. Supp. 451, 458 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966). Substantially similarity means that the average person would recognize the alleged infringing work as having been based on or taken from the copyrighted work. Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966); *Roth*, 429 F.2d at 1110.

The Copyright Act provides several remedies for infringement, including (1) an injunction prohibiting the further violation of the copyright holder's rights, (2) the impoundment and destruction of all infringing works, (3) actual damages and profits or statutory damages, and (4) attorney's fees. 17 U.S.C. §§ 502-505 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433-34 (1984).

43. 17 U.S.C. § 107 (1994).

44. *Id.*; Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994). With respect to the first factor, the Supreme Court in *Acuff-Rose* expressly endorsed the proposition that a "transformative" use, in which the user "adds something new, with a further purpose or different character, altering the [original work] with new expression, meaning or message," is more likely to be held fair than verbatim copying. *Id.* at 1171.

45. 17 U.S.C. § 109(a) (1994); *see* Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc., 832 F. Supp. 1378, 1385 (C.D. Cal. 1993).

46. "It is important to understand, however, that the distribution of an *unlawfully* made (*i.e.*, infringing) copy will subject any distributor to liability for infringement." White Paper, *supra* note 14, at 67. Thus, if one downloads, without authorization, a copy of a book and prints the copy out, the sale of that print-out would violate the copyright owner's exclusive right to distribute his work.

a work under certain circumstances,[47] and § 110, which allows teachers to perform or display works in the course of teaching in non-profit educational settings[48] (in addition to being able to assert the fair use, first sale, and other general exemptions under appropriate circumstances).[49]

II. Copyright Meets Digital Technologies

Not surprisingly, many owners of copyrighted materials (commonly referred to as "content providers") are very concerned about the possibility that the Copyright Act in its current form may not provide sufficient legal recourse for infringement that takes place by means of online technology.[50] Much of the debate to date has centered on the Green Paper[51] and more recently the White Paper.[52] The recommen-

47. 17 U.S.C. § 108 (1994).

48. 17 U.S.C. § 110 (1994).

49. Other limitations on a copyright holder's rights include the following: (1) the reproduction of a computer program to use or archive the program, 17 U.S.C. § 117 (1994); (2) certain performances and displays, such as the performance of copyrighted works in religious services, 17 U.S.C. § 110(3) (1994); (3) the "ephemeral recordings" exemption in section 112, which allows a " 'transmitting organization' that has the right to transmit to the public a performance or display of a work" to make a single copy or phonorecord of a transmission program under certain conditions. White, *supra* note 14, at 98; 17 U.S.C. § 112 (1994); and (4) the compulsory licensing provisions of sections 111 and 119 for cable systems and satellite operators. 17 U.S.C. §§ 111, 119 (1994).

50. Among the organizations which filed comments on the Green Paper were the Association of American Publishers, the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), the Software Industry Coalition, and Magazine Publishers of America. *See* Comments Received on Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, "Intellectual Property and the National Information Infrastructure" 2, 4 (n.d.) (on file with author).

51. After the Working Group published the Green Paper in July 1994, "more than 1,500 pages of written comments on [it] and reply comments were filed . . . by more than 150 individuals and organizations—representing more than 425,000 members of the public—during the comment period." White Paper, *supra* note 14, at 4.

52. The debate tends to assume that some degree of copyright protection is essential in the world of digital technology. Even in the debate concerning the liability of online service providers for subscriber infringement, *see infra* part III.C, the issue is what standard of liability should attach, not whether there should be any liability at all. There are many people, however, who believe that the very nature of digital technology requires significant changes in, if not the outright abolition of, the copyright law.

For example, John Perry Barlow, a member of the Grateful Dead and a founder of the Electronic Frontier Foundation, states that, because electronic communication makes it "possible to convey ideas from one mind to another without ever making them physical," application of the Copyright Act to the information superhighway would allow authors "to own ideas themselves and not merely their expression." John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, Wired, Mar. 1994, at 84, 88. Barlow characterizes ideas in electronic form as "voltage conditions darting around the Net at the speed of light." *Id.* at 86. Moreover, he argues, "if we continue to assume that value is based on scarcity, as it is with regard to physical objects, we will create laws that are precisely

dations in those documents will serve as the framework for the discussion in this section of the Report.

A. *Rights of Copyright Owners*

It seems clear that the existing exclusive rights to reproduce, create derivative works based on, and publicly display copyrighted works afford in their current form sufficient recourse against digital infringement.[53] But there has been considerable debate concerning whether the right of distribution needs to be modified to ensure that it encompasses transmission, and concerning whether digital technology compels the expansion of the public performance right to owners of sound recordings. There also appears to be a need to modify the criminal copyright statute so as to provide a broader right against large scale digital infringement.

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contrary to the nature of information, which may, in many cases, increase in value with distribution." *Id.* at 86. Barlow illustrates his theory in part with the Grateful Dead's practice of letting people tape its concerts:

> [I]nstead of reducing the demand for our product, we are now the largest concert draw in America, a fact that is at least in part attributable to those tapes. True, I don't get any royalties on the millions of copies of my songs which have been extracted from concerts, but . . . [t]he fact is, no one but the Grateful Dead can perform a Grateful Dead song, so if you want the experience and not its thin projection, you have to buy a ticket from us. In other words, our intellectual property protection derives from our being the only real-time source of it.

Id. at 126. This model does not necessarily apply to non-aural works; it is hard to imagine how a book publisher could engage in large-scale free distribution of its works (in their entireties) and still retain demand for the originals. Perhaps the publisher might permit tapings of readings, but readings are not as integral a part of the book publishing business as live performances are a part of the music business.

Another advocate of an unrestricted right to use works in electronic form for the purpose of creative experimentation is John Oswald, a Canadian composer who creates musical works from existing electronic materials in a genre referred to as "plunderphonics." *See* David Gans, *The Man Who Stole Michael Jackson's Face*, Wired, Feb. 1995, at 137, 137. The name "plunderphonics" refers to the taking of entire musical pieces and transforming them electronically, for example, by playing them at different speeds or "build[ing] a jazz quartet from four separate and unrelated solo performances." *Id.* at 138. The Free Software Foundation, an organization which urges that there be no proprietary rights in software, is also against the application of copyright law to the information superhighway. *See* G. Pascal Zachary, *Computer Data Spur Copyright Proposal*, Wall St. J., July 7, 1994, at B5.

These views tend to be abhorrent to authors of copyrighted materials and, therefore, tend not to receive much attention or consideration from content providers and the attorneys who represent them. But in considering the impact of digital technology on copyright law, it is important to keep in mind that many people who use the Internet have similar beliefs. These beliefs are valuable because they force us to remember that the primary constitutional purpose of the copyright and other intellectual property laws is to "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. Arguably, the technological developments which have created the "information superhighway" and the absence of controls that currently characterizes its components are consistent with that goal.

53. *See supra* note 33 and accompanying text.

1. The Right to Distribute Copies

Many content providers believe that the unauthorized transmission of copyrighted material violates the copyright owner's exclusive right of distribution. To date, two courts have already endorsed this view. In *Playboy Enterprises v. Frena*, the court held that the unauthorized online transmission of copyrighted photographs constituted an infringement of Playboy's exclusive right under § 106(3) of the Copyright Act to distribute copies of its copyrighted images.[54] In *Sega Enterprises v. MAPHIA*, the court held that Sega was likely to succeed in proving that the defendants, who operated a bulletin board, had violated Sega's exclusive right of distribution.[55] But many believe that it is not clear under § 106(3) that the mere transmission of a copyrighted work violates the distribution right. The reason for this uncertainty is that "the right to distribute copies of a work has traditionally covered the right to convey a possessory interest in a tangible copy of the work."[56] But in most cases, when a document is transmitted electronically,[57] the sender does not relinquish possession of his copy. Instead, the sender keeps his original copy and a new copy is created in the receiving computer or computers.[58] Notwithstanding the holdings in *Playboy* and *Sega*, it is not clear that the transmission of a work results in the "distribution" of a "copy" in the traditional sense.[59] Ac-

54. Playboy Enters. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993).

55. Sega Enters. v. MAPHIA, 857 F. Supp. 679, 688 (N.D. Cal. 1994). The court also held that Sega had shown a likelihood of success on the merits of its claim that the defendants had infringed its right of reproduction of its games. *Id.*

56. White Paper, *supra* note 14, at 68-69.

57. The same would be true if the document were transmitted by cable or by any other media that comprises the information superhighway.

58. *See* White Paper, *supra* note 14, at 213 (stating that, in the case where one transmits a copy of a work from one computer to ten other computers, "[w]hen the transmission is complete, the original copy typically remains in the transmitting computer and a copy resides in the memory of, or in the storage devices associated with, each of the other computers").

59. *Id.* at 213. Arguably, it is superfluous to worry about whether every unauthorized transmission results in a distribution, because it clearly results in an unauthorized reproduction of the transmitted work. But this argument ignores the principle that, as the White Paper states:

> Each of the exclusive rights is distinct and separately alienable and different parties may be responsible for infringements or licensing of different rights—and different rights may be owned by different people. Because transmissions of copies may constitute both a reproduction and a distribution of a work, transmissions of copies should not constitute the exercise of just one of those rights. Indeed, those licensed only to reproduce a work should not be entitled to also distribute the work through transmission—thereby displacing the market for the copyright owner or his distribution licensee.

Id. at 214-15 (citation omitted). The Working Group turns this point on its head when it tries to rebut the argument that transmission is not covered by the distribution right and thus amending the Copyright Act to bring transmission within the distribution right would be equivalent to creating a new cause of action for copyright owners. *See id.* at 216. The White Paper's response to this argument is that "since transmissions of

cordingly, the Working Group has proposed that the language of § 106(3) be expanded to include distribution by "transmission."[60]

This recommendation raises a number of related definitional issues. The first of these issues is whether there needs to be any corresponding amendment to the existing definition of "transmit" in § 101 of the Copyright Act. Section 101 defines the verb "to transmit" in terms of "performances and displays."[61] The Working Group has taken the position that the transmission or a "performance or display" does not necessarily constitute the transmission of a *reproduction* of a work.[62] In the Working Group's view, as expressed in the Green Paper:

> When a copy of a work is transmitted over wires or satellite signals in digital form so that it may be captured in a user's computer, without being "rendered" or "shown," it has rather clearly not been performed. Thus, for example, a file comprising the digitized version of a motion picture might be transferred via the Internet without the public performance right being implicated.[63]

Accordingly, the Working Group recommends that Congress amend section 101 to add a separate definition of a "transmission of a reproduction."[64]

When the Working Group published the Green Paper, many owners of music copyrights and the organizations that enforce them, such as ASCAP and BMI, expressed strong opposition to this recommendation because it contradicted the prevailing view in the music industry that a song which is electronically transmitted to an end user is always "performed" to the public within the meaning of the current law, and thus results in performance royalties being due to the copyright owner, regardless of when the music is played audibly to the user.[65] While the Working Group omitted the above statement from

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copies already clearly implicate the reproduction right, it is misleading to suggest that the proposed amendment of the distribution right would expand the copyright owner's rights into an arena previously unprotected." *Id.*

60. *Id.* at 213; *see also id.* app. 1, at 2 (setting out Working Group's proposed amendments to the Copyright Act). The White Paper also proposes that section 602 of the Copyright Act be amended to provide that unauthorized copies can be imported into the United States by transmission: "Although we recognize that the U.S. Customs Service cannot, for all practical purposes, enforce a prohibition on importation by transmission, . . . it is important that copyright owners have the other remedies for infringements of this type available to them." *Id.* at 221.

61. 17 U.S.C. § 101 (1994) ("To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place to which they are sent.").

62. *See* White Paper, *supra* note 14, at 217.

63. Green Paper, *supra* note 35, at 43.

64. White Paper, *supra* note 14, at 217. The proposed amendment would add a provision stating that "[t]o 'transmit' a reproduction is to distribute it by any device whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent." *Id.* app. 1, at 2.

65. *See, e.g.*, Comments of the American Society of Composers, Authors and Publishers on the Preliminary Draft of the Report of the Working Group on Intellectual

the White Paper, and effectively reversed its view on the issue of whether a transmission that was not immediately audible constitutes a "performance",[66] it restated the distinction between different kinds of transmissions in the White Paper and affirmed the recommendation to amend the definition of transmit.[67]

A similar issue arises out of the definition of "publication" found in section 101 of the Copyright Act. Section 101 defines publication as "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[68] While the Copyright Act protects both published and unpublished works, a work's publication status affects whether and when certain rights and obligations attach to the work.[69] While a finding that a work has been

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Property Rights 7-12 (Sept. 7, 1994) (on file with author) [hereinafter ASCAP Comments] (including statement that the Working Group's view expressed in the Green Paper "is 'rather clearly' not true under [the] copyright law"). This premise underlies BMI's grant of a blanket license to the Internet service provider OnRamp last year, the first such license issued to an Internet service provider. A blanket license allows the user to make unlimited use of a licensor's repertoire for a single fee. OnRamp provides two services. First, it enables a person to listen to broadcast music by means of his or her computer in "real time," without having first to download the music. Telephone Interview with Joseph DiMona, counsel to BMI (June 19, 1995). Additionally, OnRamp allows Internet users to listen to snippets of music of musical works and download the works in their entireties for a fee. *Id.*

Equally disturbing to many of the organizations that protect music copyrights was the Green Paper's proposal that when a transmission "may constitute both a communication of a performance or display and a distribution of a reproduction, such transmission shall be considered a distribution of a reproduction if the primary purpose or effect of the transmission is to distribute a copy or phonorecord of the work." Green Paper, *supra* note 20, at 122. The Green Paper offered no explanation why it should be necessary to "pigeonhole" a given transmission into one category or the other or why it was appropriate to "allow the sender and receiver to enjoy several of the copyright owners' distinct exclusive rights for the price of one." ASCAP Comments, *supra*, at 18-19. The Working Group abandoned this proposal, concluding instead that the character of a given transmission "should rest upon the specific facts of the case" and that "the courts — rather than Congress — are in the better position to determine which, if any, exclusive rights are involved in a particular transmission." White Paper, *supra* note 14, at 218.

66. The White Paper states, "If a copy of a motion picture is transmitted to a computer's memory, for instance, and in the process, the sounds are capable of being heard and the images viewed as they are received in memory, then the performance right may well be implicated as well." White Paper, *supra* note 14, at 214, n.536. But it also maintains that recognizing a right of distribution by transmission will not diminish the public performance right. *See id.* at 217.

67. *Id.* at 217-18.

68. 17 U.S.C. § 101 (1994).

69. For example, every work published before March 1, 1989 must bear a copyright notice. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 401(a), 90 Stat. 2541, 2576 ("[A] notice of copyright *shall* be placed on all publicly distributed copies . . . .") (emphasis added) (amended by Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7(a)(2), 102 Stat. 2853, 2857). The publication of such a work without proper copyright notice may result in its entering the public domain, which would strip it of all copyright protection. Additionally, in a copyright infringement suit in which the defendant raises the defense of fair use, an unauthorized use of a published work is more likely to be considered a fair use than an unauthorized use of an unpub-

published often operates to the detriment of the copyright owner,[70] there may be some cases where a copyright owner wishes to publish her work first, or solely, by distributing it online. The legislative history of the Copyright Act demonstrates that publication was not intended to include "any form of dissemination in which a material object does not change hands."[71] Because, as noted above,[72] this transfer does not occur when a work is distributed by transmission, the White Paper recommends that Congress amend the definition of publication to provide "that a work may be published by distribution of copies . . . to the public by transmission."[73]

Another issue related to the recognition of "transmission" as a form of distribution reserved to the copyright owner is whether the right to distribute copies by transmission should be limited by the first sale doctrine,[74] which itself is a limitation on the copyright owner's exclusive distribution right.[75] Like the term "distribution," the first sale doctrine was intended and is drafted to apply "only to those situations where the owner of a particular copy disposes of physical possession of that particular copy."[76] Because transmission does not necessarily have this result, the Green Paper recommended amending § 109 to provide explicitly that the first sale doctrine does *not* apply to transmissions.[77] In the White Paper, the Working Group discarded this recommendation. But it did so on the ground that "[t]o apply the first

lished work. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

70. *See* White Paper, *supra* note 14, at 219-20.

71. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 138 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5754.

72. *See supra* notes 56-59 and accompanying text.

73. White Paper, *supra* note 14, at 219. This proposed amendment could, however, have the unfortunate result of making certain transmissions into unintended publications, thereby taking away the traditional right of a copyright owner to decide when a work shall be published. *See* Comments by The Association of American Publishers on the Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 7-8 (Sept. 7, 1994) (on file with author). In particular, this result might occur in a situation where a scientific or technical publisher transmits "to a few targeted users, specially compiled materials which are not, and will not be, 'published' in the traditional sense of the term . . . for the purpose of commentary or peer review." *Id.* at 7. Publishers would not want such transmission "ipso facto [to] constitute 'publication' under the proposed revision of the Act." *Id.*

74. For a discussion of the first sale doctrine, see *supra* notes 45-46 and accompanying text.

75. *See supra* note 45 and accompanying text.

76. White Paper, *supra* note 14, at 92.

77. Green Paper, *supra* note 35, at 124-25. This recommendation also provoked debate because it indicated that one would be prohibited, for example, from transmitting a well-liked novel to friend even though one is currently permitted by law to pass along one's actual copy of a novel without being liable for copyright infringement. The Green Paper's proposal illustrated the tension between trying to ensure maximum legal protection for copyrighted works in the context of the new technologies, and going so far as to give more protection to works in this context than is given to the same works in more traditional media.

sale doctrine in such a case would vitiate the *reproduction* right,"[78] because the person transmitting the work is creating a new, unauthorized copy in the recipient's computer. In other words, because the copy that the recipient receives is not a "lawfully made" copy, the first sale doctrine is irrelevant *ab initio*, because it applies only to the distribution of lawfully acquired copies. This conclusion can reasonably be interpreted as an extension of the view that the copyright owner should have an unlimited right to control the transmission of his or her works.[79]

2. Public Performance Right for Owners of Copyrights in Sound Recordings

A separate issue is whether the public performance right needs to be adapted to the digital world. Under the current Copyright Act, the holder of a copyright in a sound recording[80] does not enjoy protection from unauthorized public performances of the recording.[81] The Working Group notes in the White Paper that "[t]ransmissions of sound recordings will certainly supplement and may eventually replace the current forms of distribution of phonorecords,"[82] and that "many of these transmissions will clearly constitute exercise of the public performance right," whether or not they violate the distribution right.[83] Believing that under these circumstances it would be unfair to continue to deprive the owners of sound recordings of a public performance right,[84] the Working Group supports "a *full* public performance right" in sound recordings.[85]

3. Criminal Infringement

The apparent inadequacy of the criminal copyright statute is another subject of discussion and legislative initiative. Under the ex-

78. White Paper, *supra* note 14, at 94 (emphasis added).

79. *See infra* note 115.

80. "Sound recordings" are defined as "works that result from the fixation of a series of musical, spoken, or other sounds." 17 U.S.C. § 101 (1994).

81. Agee v. Paramount Communications, Inc., 59 F.3d 317, 321 (2d Cir. 1995) ("[A] performance right is explicitly not conferred."). Thus, if a restaurant owner wants to play a recording of a musical composition in the restaurant, he must obtain a performance license from the owner of the copyright in the underlying musical work and pay royalties accordingly, but he does not have to get permission from the record company that owns the copyright in the sound recording.

82. *See* White Paper, *supra* note 14, at 221.

83. *Id.* at 222.

84. *See id.*

85. *Id.* at 223. Such a right would transcend the "very limited performance right" that two pieces of pending legislation would create. *See id.*; H.R. 1506, 104th Cong., 1st Sess. (1995); S. 227, 104th Cong., 1st Sess. (1995). These pending bills trouble some members of the music industry who fear that granting such a broad right to the owners of sound recordings might "derogate the rights of the creators and copyright owners of the musical compositions which are recorded." *See* ASCAP Comments, *supra* note 65, at 5-6.

isting Copyright Act, a copyright infringer can be subjected to criminal sanctions if the infringement was willful and committed for purposes of commercial advantage or private financial gain.[86] Until recently, this law was considered adequate to deal with or deter large scale infringement. But as the dismissal of the complaint in *United States v. LaMacchia*[87] demonstrates, "the current law is insufficient to prevent flagrant violations in the [digital] context"[88] by people who undertake or faciliate, with no profit motive, large scale infringement that causes substantial harm to copyright owners. Accordingly, the Working Group supports legislation introduced in the 104th Congress that would make it a criminal offense to infringe a copyright willfully by making or distributing copies whose retail value is $5000 or more.[89]

4. Alternatives to Distribution to Compensate for Difficulties in Enforcement

Even as the debate over the optimal forms of enforcement continues, it would not be unreasonable to conclude that in practice it will be very difficult to enforce the copyright law against the mass replication of digitized intellectual property. Therefore, content providers should be concentrating on ways other than distribution in which they might continue to profit from the exploitation of their works. Esther Dyson, a vice chair of the Electronic Frontier Foundation, proposes, for example, that content providers "add value" by offering services which are, or can be perceived as, indispensable to the use of the content itself, such as "selecting, classifying, rating, interpreting, and customizing content for specific customer needs."[90]

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86. *See* 17 U.S.C. § 506(a) (1994).

87. 871 F. Supp. 535 (D. Mass 1994). The indictment in this case charged Mr. LaMacchia with carrying out a fraudulent scheme involving the illegal copying and distribution of copyrighted software. *Id.* at 536. Mr. LaMacchia succeeded in having the complaint dismissed on the ground that the government's attempt to use the wire fraud statute as a means of enforcing copyrights contravened the decision in *Dowling v. United States*, 473 U.S. 207 (1985), and that to prosecute copyright infringers, the government must rely on copyright, not criminal, law. *Id.* at 544-45.

88. White Paper, *supra* note 14, at 127.

89. *Id.* at 229. The Working Group notes, "By setting a monetary threshold and requiring willfulness, the bill ensures that merely casual or careless conduct resulting in distribution of only a few copies will not be subject to criminal prosecution and that criminal charges will not be brought unless there is a significant level of harm to the copyright owner's rights." *Id.*

90. Esther Dyson, *Intellectual Value*, Wired, July 1995, at 136, 183; *see also* Richard Seltzer, *Personal Touch*, Internet World, Nov. 1995, at 89, 90 ("The gravitational pull of the Internet is toward the center, toward users interacting with one another, and to the rich resources of free information. To capture the interests of Internet users and make them brand loyal, publishers will want to build on this environment rather than simply mimicking their old business models.... For example, an online bookstore or book publisher could include virtual rooms and events, where customers could talk about the books they have read, and for-a-fee forums, where they could interact with authors, editors, reviewers, and other experts and celebrities.").

B. *Rights of Users of Copyrighted Materials*

Although it is fair to say that the concerns of the content providers are the driving force behind the push for change in the Copyright Act,[91] one group of users of copyrighted materials, namely libraries and educational institutions, has asserted forcefully its concerns about its right to take advantage of digital technology. As noted above,[92] § 108 of the Copyright Act sets out certain conditions under which is is not infringement for a library or an archive to make or distribute one copy of a copyrighted work (including a phonorecord), even though such conditions typically would not warrant a claim of fair use.[93] Section 108 also sets out guidelines which govern, among other things, the right of such institutions to "borrow" works from one another.[94] But those guidelines were developed when "there were no readily available systems for the supply of single copies of, or for the licensing of reproduction of multiple copies of copyrighted works,"[95] and they applied specifically and exclusively to print copies of works.[96] To bring the library and educational use exemptions into line with the capacities of digital technology, the White Paper proposes that the ex-

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91. The introduction to the White Paper states forcefully:

> Creators and other owners of intellectual property rights will not be willing to put their interests at risk if appropriate systems — both in the U.S. and internationally — are not in place to permit them to set and enforce the terms and conditions under which their works are made available in the NII environment. . . . All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is no *content.* What will drive the NII is the content moving through it.

White Paper, *supra* note 14, at 10-11. The White Paper does discuss the interests of users, for example, when it mentions the "[n]ew job opportunities [that] can be created in the processing, organizing, packaging and dissemination of the information and entertainment products flowing through the NII," *id.* at 10, and when it advocates "[e]nsuring consumer access to and enjoyment of both copyrighted works and new technologies." *Id.* at 11. But it seems somewhat circular to say that the benefits to users of restrictions on the use of informationin digital media will be balanced or even outweighed by the very availability of the information.

92. *See supra* note 47 and accompanying text.

93. The types of copies that a library or similar institution might make under section 108 include archival copies, copies to replace damaged, lost or stolen copies, articles and short excerpts for users (as long as the copy becomes the property of the user and the library has no notice that the copy will be used for any purpose other than scholarship or private study), copies of out-of-print works (if the library cannot obtain a copy of such a work from another source at a fair price), limited copies of audiovisual news programs, and limited copies for interlibrary loans. *See* 17 U.S.C. § 108 (1994).

94. These guidelines are known as the CONTU guidelines. White Paper, *supra* note 14, at 88.

95. *Id.*

96. *Id.* at 89.

emptions in § 108 be expressly expanded to permit digital copying by libraries and archives in some circumstances.[97]

III. Enforcement on the Information Superhighway

Apart from the questions that have been raised concerning the extent and adequacy of the exclusive rights which comprise copyright in the digital context and the limitations on those rights, content providers are very concerned about their ability to enforce those rights against digital infringers. The White Paper considers some specific enforcement issues and proposes adding a new chapter to the Copyright Act entitled "Copyright Protection and Management Systems."[98] Other possible solutions are being developed independently.

A. *Copyright Management Information*

The prerequisite to enforcement on the information superhighway is the ability to discover incidents of electronic infringement and identify the person(s) responsible.[99] One step in this direction is the development of methods for the authentication and identification of copyrighted works transmitted over the information superhighway. One such method is the imprinting of digital signatures on electronic works which will preserve, and enable later verification of, the works' "copyright management information."[100] Various private entities are working to develop systems for this purpose.[101] The United States Copyright Office is also developing an electronic copyright registra-

97. The Working Group specifically recommends modifying the exemptions to permit "the preparation of three copies of works in digital form, with no more than one copy in use at any time (while the others are archived)," and "the making of digital copies for purposes of preservation." *Id.* at 227. The White Paper also proposes modifying the exemptions "to recognize that the use of a copyright notice on a published work is no longer mandatory." *Id.*

Another specific group of users of copyrighted materials whose needs are addressed by the White Paper is the visually impaired. To enable visually impaired people to enjoy the advantages afforded by digital technology, such as "large-text" format on CD-ROM, *see id.*, and to bring the United States into line with many other countries, the Working Group has proposed amending the Copyright Act to enact certain exemptions to liability for the unauthorized manufacture or distribution of "Braille . . . or other edititions of previously published literary works" designed for the visually impaired. *Id.* at 228.

98. *Id.* at 230-36; *id.* app. 2, at 3-7.

99. The difficulty in identifying those responsible for on-line infringement is illustrated in *Macromedia, Inc. v. HRHacker*. *See supra* note 32 and accompanying text.

100. Copyright management information includes the name of, and other information identifying, the copyright owner, the terms and conditions for the use of the work, and identification codes. *See* White Paper, *supra* note 14, at 235.

101. The Association of American Publishers has commissioned research into such a system. *See AAP Seeks Copyright Control System*, Publishers Weekly, Jan. 9, 1995, at 18, 18. Additionally, the Copyright Clearance Center ("CCC") and EPR Electronic Commerce Technologies are joining forces to develop a method to generate an electronic "envelope" for each electronically transmitted work that will provide information about the work and register any copying. *Multimedia Developments of Note*,

tion, recordation, and deposit system ("CORDS"). CORDS would, among other things, enable copyright owners to (1) "prepare their copyright applications and deposit materials in machine readable formats," (2) "sign their submissions digitally using public key/private key encryption technology," and (3) "send [digital] applications, deposits, and [copyright] documents for recordation to the Copyright Office [over] the Internet, using Privacy Enhanced Mail."[102]

The use of copyright identification information will be to no avail, however, if sophisticated infringers simply alter or destroy this information. Recognizing this problem, the Working Group recommends, as part of its proposal to add a new chapter 12 to the Copyright Act, a provision that would prohibit and impose criminal penalties for the fraudulent use, removal, or alteration of copyright management information.[103]

B. *Anti-Copying Systems*

One currently available means of protecting against unauthorized copying is the use of equipment which limits the making of multiple copies of copyrighted works.[104] To encourage the circumvention of such systems, the White Paper recommends adding a § 512 to the Copyright Act which would prohibit the importation, manufacture, and distribution of devices and the provision of services whose "primary purpose or effect" is to bypass anti-copying systems.[105]

In this context, like in the context of double purpose transmissions, it is unclear just what criteria would be used to determine the "primary purpose or effect" of such a device or service. Arguably this test would more readily impose liability on manufacturers than the test set out by the Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*[106] Moreover, the proposed test may preclude the lawful owner of a copy of a copyrighted work from making additional copies of the work even under circumstances which would not constitute infringement, such as the making of an interim copy of a software program for the purpose of reverse engineering, which has been held

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Multimedia Strategist, June 1995, at 9, 9. The envelope will provide information about rights and pricing, and will register any "pass-along copying" with the CCC. *Id.*

102. United States Copyright Office, Copyright Office Electronic Registration, Recordation & Deposit System 3 (n.d.) (on file with author).

103. White Paper, *supra* note 14, at 235; *id.*, Appendix 2, at 5-12.

104. *See id.* at 230-33. An example of such a system is the Serial Copy management System, which prevents the multiple copying of audiotapes. *See* 17 U.S.C. §§ 1001-1010 (1994). This chapter of the Copyright Act, which is entitled "Digital Audio Recording Devices and Media," was enacted as the Audio Home Recording Act of 1992. Pub. L. No. 102-563, 106 Stat. 4237.

105. *See* White Paper, *supra* note 14, at 230-34.

106. 464 U.S. 417 (1984). The Court held that Sony was not liable for contributory infringement just because its Betamax videocassette recorders might be used to make unauthorized copies of movies, because the videocassette recorders were "capable of substantial non-infringing uses." *Id.* at 418.

to be fair use.[107] Also, the proposed test also could preclude someone from making of a copy of a work which had already entered the public domain if that work was first distributed with an anti-copying device.

C. *Liability of Online Service Providers*

Even to the extent that it is technologically possible to detect infringement,[108] it is necessary to consider who is, or should be, responsible for tracking infringing or potentially infringing activity in the different contexts created by the information superhighway. In particular, the question has arisen whether online service providers such as CompuServe, Prodigy, and America Online, or private bulletin board operators, should be held directly liable as infringers for the infringing activities of their subscribers,[109] as has been charged in two lawsuits

107. *See* Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1520 (9th Cir. 1992). For a discussion of these issues, see American Committee for Interoperable Systems on "Intellectual Property and the National Information Infrastructure" (Sept. 7, 1994) (on file with author). The ACIS's comments point out, among other things, that the proposed provision is really not analogous to the law which prohibits the importation, manufacture, or distribution of devices which contain a Serial Copy Management System ("SCMS"), because "[i]n digital audio recording systems that employ a SCMS, the scheme allows the end-user to make at least one digital-to-digital copy of a copyrighted digital original and unlimited copies of a digital source if made through the digital-to-analog converters of the recording device. Thus, the SCMS provides an adequate accommodation to the rights to make fair uses of copyrighted works and to make copies for other legal purposes," while, by contrast, the proposed section 512 allows a copyright holder to "implement a scheme whereby *no* copies of the work, lawful or unlawful, may be made." *Id.* at 6. Arguably, a better approach is that of the 14 May 1991 Council Directive of the European Union, which, while prohibiting the circulation of devices whose sole purpose is to circumvent an anti-copying system, (1) permits "the making of a back-up copy," (2) allows "the legal holder of a copy of a program to study the functioning of a program to determine its underlying ideas and principles," and (3) "provides for the right to decompile a program to make interoperable programs." *Id.* at 8.

108. *See supra* notes 99-107 and accompanying text.

109. Direct copyright infringement is a strict liability offense—neither knowledge nor intent is required. Intent *is* relevant to the issue of whether an infringement was "willful," but this issue arises only in the context of statutory damages. Statutory damages are damages that the court is permitted to impose, within specific statutory standards, if the plaintiff cannot prove that it suffered any actual damages or that the defendant made actual profits, or if the plaintiff wishes to forego proven damages and profits in the hope of obtaining a higher award from the court. *See* 17 U.S.C. § 504(c) (1994). Liability for contributory copyright infringement, on the other hand, requires that the alleged infringer have had knowledge of the direct infringement, and that he "induce[d], cause[d] or materially contribute[d] to the infringing conduct." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (citation omitted). In *Sega Enterprises v. MAPHIA*, the court held that the defendants, owners and operators of a commercial bulletin board, were contributorily liable for the unauthorized uploading and downloading of copyrighted video games onto and off of the bulletin board. Sega Enters. v. MAPHIA, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994). The *Sega* court stated that, even though the defendants were unaware of the uploading and downloading, "their role in the copying, including provision of facilities, direction, knowledge and encouragement, amount[ed] to contributory copyright infringement." *Id.* at 687.

brought by owners of musical compositions and a group of freelance writers, respectively.[110] The major online services have urged that "providers and bulletin board operators should be held to a standard of liability based on contributory infringement, not one grounded on the strict standard of liability for direct infringement."[111] They argue that it is virtually impossible for them to monitor the "trillions of bits of data—representing millions of individual messages" that cross their systems each day without sacrificing the speed that is the touchstone of online communication; and that even if they could, the cost of such tracking activities, which would be substantial, would have to be passed on to consumers, threatening the prospect of "universal access" to the information superhighway.[112]

The White Paper rejects this argument. It lists several specific reasons why the Working Group believes that there should not be any changes in the application of a strict liability standard to online service providers.[113] Claiming that it is "premature to reduce the liability of any type of service provider in the NII environment,"[114] the Working

110. *See* Complaint, Frank Music, Inc. v. CompuServe Inc., 93 Civ. 8153 (S.D.N.Y. Nov. 29, 1993); Amended Complaint, Tasini v. New York Times Co., 93 Civ. 8678 (S.D.N.Y. Feb. 24, 1994). In *Frank Music*, the plaintiffs charged CompuServe with both direct and contributory infringement by virtue of its alleged involvement in the uploading, storage, and downloading of musical compositions in its MIDI forum. *See* Complaint, *Frank Music*, 93 Civ. 8153. This case recently settled, with CompuServe agreeing to "pay an undisclosed sum" and "promote an electronic licensing mechanism that will permit [its] subscribers to legally download audio recordings." *CompuServe Music Settlement*, Publishers Weekly, Nov. 13, 1995, at 18, 18. In *Tasini*, the plaintiffs charged Mead Data Central and various publishers with direct infringement for the electronic distribution of copyrighted works on Mead Data's systems. *See* Amended Complaint, *Tasini*, 93 Civ. 8678.

111. Comments of Online Service Providers on a Preliminary Draft of the Report of the Working Group on Intellectual Property Rights 16 (Sept. 7, 1994) (on file with author) [hereinafter Online Service Provider Comments]. The online services also invoke the *Sony* case to support their position in that their systems and services are "capable of commercially significant noninfringing uses." Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 442 (1984); *see* Online Service Provider Comments, *supra*, at 17.

112. Online Service Provider Comments, *supra* note 111, at 12.

113. These reasons include the following: (1) online service providers are not the only ones who are in a position of being strictly liable without having the ability to screen the material that they handle. (e.g., neither can film developers) and who nevertheless have to pay this cost of doing business; (2) online service providers at least can take action when they are informed that infringement (allegedly) has occurred on their networks; (3) online service providers are the only ones who are in a position to know the identity of the subscriber who committed the infringement; (4) online service providers are making money from infringement when it occurs; (5) to incorporate an intent requirement into copyright law would make it much more difficult to prove infringement and therefore would undermine copyright protection as a whole; and (6) as between the copyright owner and the service provider, both relatively innocent parties, the preferable policy is to hold the service provider liable. White Paper, *supra* note 14, at 114-24.

114. *Id.* at 122. The Working Group takes the position that there are so many different players in different circumstances (compare a big commercial online service to an individual person operating a not-for-profit bulletin board out of his home) that "it

Group recommends "discussion and negotiation among the service providers, the content owners and the government" to identify specific "circumstances . . . [in] which service providers should have reduced liability."[115]

D. *International Implications*

The foregoing discussion has concentrated on the implications of the "national" information insfrastructure. But the development of digital technology and networks transcends national boundaries. As the White Paper points out, "under the present level of development, a user in France can access a database in the United States and have a copy downloaded to a computer in Sweden."[116] How can protection be ensured for the myriad of works that move through international channels and through the national information insfrastructures of countries around the world? What makes the answer to this question complicated is, among other things, the fact that there is no uniform international law of copyright.[117] In common law countries such as the United States, copyright is a form of economic protection for authors.[118] In countries with civil law systems, copyright is considered an extension of an author's natural rights to personality, imbued with moral rights.[119] The different perceptions of copyright have created divergent approaches to protecting copyright in different countries. The White Paper recommends the international adoption of rules that would protect the rights of copyright owners.[120]

CONCLUSION

Modern technologies offer new opportunities and challenges to copyright owners who wish to exploit their works on the information superhighway. The proposed changes to the Copyright Act would

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is not feasible to identify *a priori* those whose circumstances or situations under which service providers should have reduced liability." *Id.* at 123.

115. *Id.* at 123. What makes this debate more complex and interesting is the fact that many companies function both as content providers and online service providers. Rupert Murdoch's News America Publishing Incorporated, for example, is a publisher and the operator of the Delphi online service. Time Inc. is both a publisher and the operator of its own "Pathfinder" online service as well as its own bulletin boards for *Time* subscribers.

116. *Id.* at 131.

117. There do exist, however, international copyright treaties such as the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221, to which the United States is a signatory. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

118. *See* Eric M. Brooks, Comment, *"Titled" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 Cal. L. Rev. 1431, 1443 (1989).

119. *See* Laura Lee Van Velzen, Note, *Injecting a Dose of Duty Into the Doctrine of* Droit Moral, 74 Iowa L. Rev. 629, 631 (1989).

120. *See* White Paper, *supra* note 14, at 147-55.

greatly increase the protection available to content providers against digital infringement and thereby increase the amount of material that the copyright owners are willing to make available. But the needs of users need to be taken into account as well. Moreover, given the practical difficulties of enforcement, copyright owners should be searching for ways to exploit their content other than mere distribution.