

Fair Use on the Internet: A Fine Line Between Fair and Foul*

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TO SAY THAT technology has pervaded nearly all facets of American society and culture is a truism.¹ As the Internet has grown and changed, so too have the various legal issues surrounding it.² The focus of this comment is an examination of just one of these issues—the relationship between the Internet and copyright law. More specifically, the focus will be on copyright infringement that occurs on the Internet, and how the “fair use” doctrine may provide a defense to infringement.³ While there is a general dearth of case law involving copyright infringement on the Internet, the biggest gap involves infringement by private users.⁴ Therefore, this comment explores the few cases that do exist and predicts how future cases involving infringement by private users on the Internet may be decided. Although

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1. See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 87 (1997) (stating that the claim that we are in the “information age” is such a cliché that it does not require footnote support).

2. For a historical perspective on the changes in the Internet, see Adam Druckman, *Back in the Digital Dawn* (visited Jan. 13, 1999) <<http://www.metrotimes.com/19/16/Columns/netropolis.html>>.

3. The issue of fair use has acquired a reputation as “the most troublesome in the whole law of copyright . . .” *Dellar v. Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939). As recently as 1984 at least one Justice called this reputation partially justified. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting).

4. For cases involving liability of Internet Service Providers, see *Marobie-FL, Inc. v. National Ass’n of Fire Equip. Dist.*, 983 F. Supp. 1167 (N.D. Ill. 1997); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). For cases involving liability of Bulletin Board Services, see *Sega Enters. LTD v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

the argument can be made that a copyright holder has little to no financial incentive to sue a judgment-proof individual, this comment takes the position that it is imperative for both savvy and novice users to have an understanding of the possible ramifications and legal consequences of their actions.

The most significant reason there is little case law dealing with infringement by private users is because private users are hard to track and find. However, there is little dispute that copyright infringement is pervasive on the Internet. It is likely that as privacy on the Internet diminishes, it will become easier to identify individuals that, for example, download pirated software or duplicate and distribute copyrighted images. New technologies, such as the Pentium III chip,⁵ will make it easier to track and identify copyright infringement. Additionally, as faster modems and better Internet connections decrease the time it takes to download a file, it is likely that the rate of infringement will increase.

Part I of this comment sets out the background structure of the Internet and examines why the Internet poses unique legal issues pertaining to copyright infringement. Part II provides a brief background of copyright law and sets out the fair use defense. Part III looks at different mediums, discusses how copyright protection applies to each medium when it is available on the Internet, and examines how fair use might apply. Part IV looks at governmental initiatives involving copyright law and the Internet and discusses issues that may be relevant in the future.

I. Structure of the Internet

The technical aspects of the Internet have been well documented and therefore will not be discussed in detail.⁶ The technical founda-

5. Intel's Pentium III chip was developed with an embedded 96 digit code that identifies the user. Intel claims the chip was developed in order to increase the security of online transactions. After public disapproval, the company agreed to produce a new chip with the code in a default "off" position. However, early reports indicate (to no surprise) that it is possible for a web site to activate the switch without the user's knowledge. See Charles Piller, *Security Flaw in Intel Chip, Magazine Says*, LOS ANGELES TIMES, Feb. 2, 1999, at C3; *Identification Inside*, COMPUTER SHOPPER FROM ZDWIRE, June 1, 1999, available in 1999 WL 12875453; see also Ephraim Schwartz & Dan Briody, *Intel's Pentium Security Woes Continue* (Mar. 10, 1999) <<http://www.infoworld.com/cgi-bin/displayStory.pl?990310.wcpsn.htm>>; *Protect Your PC's Privacy* (visited Sept. 28, 1999) <<http://www.bigbrotherinside.com/>>.

6. For the novice interested in learning more, Supreme Court and Circuit Court decisions involving the Internet provide relevant, clear, and succinct explanations of the technical issues. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849-861 (1997); *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109-11 (9th Cir. 1998).

tion of the Internet is not important for purposes of this comment; it is the way in which the Internet is used that is relevant.⁷ The capabilities of the Internet raise new issues involving copyright infringement because anything that can be digitized—such as text (including computer programs), images, movies, or music—can be placed on a web site and then copied from the site. Furthermore, copies of text, images, movies, or music downloaded from the Internet do not depreciate qualitatively.

There are generally two ways a copyrighted work is placed on the Internet. First, the author may upload data with the intention of disseminating it to a broad audience. This is a growing trend, for example, for independent or unsigned musicians without record contracts and without the ability to reach a broad audience.⁸ Second, a user may upload a copyrighted work to a web site in order to make it available free of charge.⁹

There is a great struggle involving freedom on the Internet. Because of the lack of regulation—and in spite of the attempts by some to regulate—the Internet encompasses a broad range of expression and conduct. Although some informal rules (sometimes called “netiquette”) exist,¹⁰ many users view the Internet as the last bastion of freedom. This freedom encompasses, for example, freedom of speech¹¹ and freedom of expression.¹² This freedom is relevant to

7. For an overview of the development of the Internet, see Robert H. Zakon, *Hobbes' Internet Timeline v4.1* (visited Aug. 12, 1999) <<http://info.isoc.org/guest/zakon/Internet/History/HIT.html>>.

8. See, e.g., *Online Bands* (visited Apr. 10, 1999) <<http://www.onlinebands.com/>>. Currently, some search engines cannot distinguish between legitimate sites and those that offer pirated recordings. See Andrea Orr, *Lycos to Offer Online Music Search*, (visited Aug. 17, 1999) <<http://www.cnn.co.uk/US/9902/01/BC-INTERNET-LYCOS.reut/>>.

9. With the lesson of Larry C. Matthews fresh in mind, this comment will not attempt to demonstrate any illegal Internet activities. Matthews, a broadcast journalist for over thirty years, was recently sentenced to one and a half years in federal prison for trading child pornography over the Internet. Matthews claimed he was conducting research for a story. See *U.S. v. Matthews*, 11 F. Supp. 2d 656, 658 (D. Md. 1998); Craig Whitlock, *Reporter Gets 1 1/2 Years for Child Pornography; Newsman Said He Was Working on Story*, WASH. POST, Mar. 9, 1999, at B4.

10. For example, sending unsolicited e-mail (also called “spam”) or typing in all CAPITAL letters (because it connotes shouting) are strongly discouraged and, in the case of spam, sometimes prohibited by Internet Service Providers and e-mail providers. See *Online Support* (visited Sept. 28, 1999) <<http://help.yahoo.com/help/us/mail/spam/>Spaminator™> (visited Sept. 28, 1999) <<http://www.mindspring.net/aact-mgmt/spam.html>>; *Hotmail Information*, (visited Sept. 28, 1999) <http://lc4.law5.hotmail.passport.com/cgi-bin/dasp/hminfo_shell.asp?_lang=&beta=&content=faq#q20>.

11. The campaign for free speech on the Internet is the Blue Ribbon Campaign. See *Blue Ribbon Free Speech Campaign* (visited Aug. 17, 1999) <<http://www.csd.uwo.ca/~jamie/blue-ribbon.html>>; see also *Cyberspace Independence Declaration* (visited Aug. 12, 1999) <<http://>

copyright in that some view content on the Internet as speech or expression and argue that content on the Internet cannot (or at least should not) be regulated.¹³ In other words, duplicating and sending files on the Internet implicates First Amendment protection and must be intensely guarded.

A. Novel Issues

Over time, copyright law has changed with technology. The first copyright laws were enacted in response to the technological breakthrough of the printing press. Since then, Congress has modified copyright laws several times, each time with the intent of furthering the underlying goal of copyright protection.¹⁴ Courts are generally deferential to Congress and have refused to unilaterally broaden protections in response to technological change.

It is fair to say the Internet is the most significant technological advance in relation to copyright law since the printing press. There are several reasons for this pronouncement. The first is the ease and convenience by which material on the Internet can be duplicated. While the camera, photocopier, and videocassette recorder have all impacted copyright law over the last hundred years, no other medium allows for duplication and distribution of nearly any kind of copyrighted material. This has prompted changes in the behavior of copyright holders. While some have gone to great lengths to protect

/www.ottoprint.com/cybdeclindep.htm>; cf. *The Green Ribbon Campaign for Responsibility in Free Speech* (visited Aug. 17, 1999) <<http://www.Zondervan.com/green.htm>>. The Green Ribbon site is sponsored by the self-proclaimed "world's leading Christian publisher," who believes that some use of the First Amendment is a "smoke screen to communicate in a vulgar, profane, violent, and insulting manner." The site's sponsors believe that "the true right of free speech is accurately carried out when self-restraint is responsibly exercised." *Id.*

12. See, e.g., *Online Freedom Federation* (visited Aug. 12, 1999) <<http://www.off-hq.org/>>. A recent episode involving 3Com Corporation is illustrative. 3Com ran ads featuring a naked woman holding its Palm V organizer so that it discretely covered her breasts. The tag line read "Simply Palm." A Web designer posted a spoof with a similar photo product, featuring a naked woman, and the tag line "Simply Porn." See J. McHugh., *Mirror, mirror!*, *FORBES*, May 3, 1999, at 54. The parody was originally posted at <<http://www.0sil8.com/>>. After a threat from 3Com's legal staff, the pictures were removed, but as is the nature of the Internet, the site now contains links to a multitude of other sites that have posted copies of the original spoof. See *Osils Thwarted by the Man* (visited Aug. 12, 1999) <<http://www.0sil8.com/episodes/99/03/29/index.html>>.

13. The most extreme of these movements essentially advocates what this comment calls the "fair game" defense, which believes that copyright currently does not apply to the Internet and anything that is found there may be used without limitation.

14. These goals are, first, to benefit society and, second, to benefit the copyright owner. See *infra* notes 20–24 and accompanying text.

copyrighted materials from the Internet,¹⁵ others have realized the futility in controlling private use and have relinquished distribution control in hope that users will avoid commercial activity.¹⁶ A second unique aspect of copyright infringement on the Internet is the scope of liability. The Internet has the potential to implicate everyone who comes into contact with the copyrighted material. Under certain circumstances, liability for direct, contributory or vicarious infringement may be imposed upon the individual that posts the infringing material, the uploader and downloader of the infringing material, the administrator of the site, and the Internet Service Provider ("ISP"). This broad liability might arise because the user does not merely possess the downloaded or uploaded material, but also makes a copy of it. For example, an individual may purchase a bootlegged copy of a CD or movie on the street. By simply possessing the infringing material, it is unlikely the purchaser is liable for copyright infringement. However, when that same individual uploads or downloads the same CD or movie, a copy has been made, and therefore the person has satisfied at least one element of copyright infringement.¹⁷

B. Has a "Copy" Been Made?

When data is transmitted over the Internet it is broken into different pieces and reassembled at its destination. This routing technique insures that data will get from point A to point B because if one route is blocked or disabled, the piece attempting to use a blocked route will automatically be rerouted through a different path.¹⁸ At each step along the way, the computer makes a temporary copy of the piece of data. This has led to the argument that every copyrighted work sent

15. See Richard Morrison, *The Rights that Don't Smell Quite Right*, THE LONDON TIMES, Oct. 23, 1998, at 41 (suggesting that the recent extension of copyright protection in the United States for movies before they enter the public domain may have been motivated by what was to have been the expiration in 2003 of the cartoon Steamboat Willie, where Mickey Mouse made his first appearance). Disney's protection over Mickey Mouse is evident by the fact that the cartoon character appears in a limited and discrete manner on Disney's web site. This has not, however, stopped other sites from using the image. See, e.g., *Walt Disney His Life and Works* (visited Aug. 12, 1999) <<http://www.intergraffix.com/walt/options.htm>>.

16. See Associated Press, *Grateful Dead to Allow MP3 Trades* (visited May 13, 1999) <<http://www.washingtonpost.com/wp-srv/style/features/daily/dead0513.htm>>.

17. The elements of copyright infringement are (1) the owner holds a valid copyright to the work and (2) the defendant copied the work. See *Fiest Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citation omitted); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 9.2 (1989).

18. This function serves the Internet's original purpose, which was to serve as a means of communication after a nuclear war. See *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997).

over the Internet is copied and infringed along the way. Although recent legislation seems to have settled the question by granting exemptions for service providers for transitory communication,¹⁹ there has yet to be a case testing the scope of the exemptions, or an application of the conditions required for the provider to earn an exemption.

II. Copyright

A. Infringement

Congress's authority to establish copyright protection is found in the United States Constitution.²⁰ Since originally enacted, copyright law²¹ has been amended several times in order to adapt to changing technologies.²² Copyrights are intended to benefit both society and the creator of the copyrighted material. The rationale for granting copyright protection is that by giving the creator of a work a limited monopoly²³ over the rights of the work, individuals are encouraged to create, which leads to societal benefits.²⁴

As currently formulated, copyright law gives the copyright holder exclusive rights to reproduce, distribute, perform, prepare derivative works, and display the copyrighted work.²⁵ Copyright infringement

19. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. § 1201). See *infra* notes 253-273 and accompanying text.

20. "The Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. 1, § 8, cl. 8.

21. Copyright Act of 1976, 17 U.S.C. §§ 101-1101 (1994), originally Copyright Act of 1909, 35 Stat. 1705.

22. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984); Paul D. Amrozowicz, *When Law, Science and Technology Worlds Collide: Copyright Issues on the Internet*, 81 J. PAT. [& TRADEMARR] OFF. SOC'Y 81, 84 (1999).

23. A topic of much debate involves the tension between the purpose of copyright protection and the goals of antitrust law. See *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1215 (9th Cir. 1997); see also Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 4 (1998); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 187 (1998).

24. See *Sony*, 464 U.S. at 429.

25. Section 106 states:

Subject to sections 107 through 120, the owner of 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;

occurs when an individual uses, or authorizes the use of, the copyrighted material in a way that trespasses into any of the copyright holder's five exclusive rights.²⁶

The elements of copyright infringement are: (1) the owner holds a valid copyright to the work; and (2) the defendant copied the work.²⁷ Furthermore, given the strict liability nature of copyright infringement, an individual may violate the statute by downloading information even though she lacks knowledge that the material is protected.²⁸

B. Fair Use

Fair use is an affirmative defense to copyright infringement²⁹ and requires a court to weigh the four factors set forth in 17 U.S.C. section 107. These factors include the (1) purpose and character of the use; (2) nature of the work; (3) amount copied; and (4) market effects.³⁰

(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 (1994).

26. See 15 U.S.C. § 501(a) (1994); *Sony*, 464 U.S. at 433.

27. See *Fiest Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citation omitted); MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 9.2 (1989).

28. See David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 *TEX. INTELL. PROP. L.J.* 1, 17 (1998); David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 *U.S.F. L. REV.* 1, 6 (1998).

29. Section 107 states:

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 (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

30. See *id.*

Fair use is an "equitable rule of reason."³¹ While none of the four factors is determinative, the fourth factor, effect on the market place, is generally considered the most important.³² There are no "presumptive categories" of fair use.³³ Given the nature of the doctrine, "each case must be decided on its own facts."³⁴ Any bright-line rules are eschewed in favor of a case-by-case analysis.³⁵ "All factors are to be explored, and the results weighed together, in light of the purposes of copyright."³⁶

1. *Sony Corporation of America v. Universal City Studios, Inc.*³⁷

a. Facts and Decision

The Supreme Court's decision in *Sony* is the starting point of modern copyright and fair use case law. Universal brought suit against Sony for copyright violation,³⁸ claiming that Sony's manufacture and sale of video tape recorders ("VTRs") to the public—which could then be used to record broadcast television programs—constituted copyright infringement.³⁹ The district court concluded that "noncommercial home-use" of VTRs was a fair use and ruled for Sony on all claims.⁴⁰ The court of appeal reversed, finding no fair use defense because the use in question was not a "productive use."⁴¹ The Supreme Court found for Sony, holding that the sale of VTRs did not constitute contributory infringement because: (1) Sony showed that most copyright holders would not object to the show being recorded

31. *Sony*, 464 U.S. at 448 (quoting H.R. REP. NO. 94-1476, at 65-66 (1976)). Fair use has also been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERACY PROPERTY 260 (1944)).

32. See *Harper*, 471 U.S. at 566.

33. See *id.* at 561.

34. *Id.* at 560.

35. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

36. *Campbell*, 510 U.S. at 578 (citations omitted).

37. 464 U.S. 417 (1984) [hereinafter *Sony III*].

38. See *Sony III*, 464 U.S. at 420.

39. See *id.* Universal claimed that Sony was liable for infringement by the consumer because of Sony's marketing of the VTR's. See *id.*

40. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 469 (1979) [hereinafter *Sony I*].

41. The court of appeals stated that an example of "productive use" is "when copyrighted material is reproduced for its intrinsic use." *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981) [hereinafter *Sony II*]. Sony was thus liable for contributory infringement. See *Sony III*, 464 U.S. at 420.

and viewed at a later time;⁴² and (2) Universal failed to show that the potential market or value of the copyrighted work would be harmed in any significant way.⁴³

In its review of the district court's decision, the Supreme Court noted that VTRs were being used for "time-shifting"⁴⁴ and that there was no issue of a tape itself being used for prohibited purposes.⁴⁵ This finding was key to the Court's fair use analysis. The Court concluded that VTRs were being used for "noncommercial, nonprofit activity" and therefore did not conflict with the purpose and character of the use.⁴⁶ With regard to market effects, the Court stated that when copyrighted material was used for noncommercial reasons, in order to recover, the party bringing the evidence must demonstrate a likelihood of future harm to the copyrighted material's value.⁴⁷ There was no evidence of past harm to Universal and the evidence of potential future harm was "'speculative and, at best, minimal.'"⁴⁸ The Court briefly discussed the nature of the work and the amount copied, noting that since the nature of television viewing is to invite the viewer to watch the entire program for free, the fact that an entire program was taped did not weigh against a finding of fair use.⁴⁹

42. See *Sony III*, 464 U.S. at 443. The district court heard testimony from several major copyright holders who welcomed the use of time-shifting. The Supreme Court noted that in an action for direct infringement such testimony would be irrelevant, but under contributory infringement, "the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome." *Id.*

43. See *id.* at 456. The dissent argued that the taping in question was an unproductive use, and therefore not a fair use. Additionally, the dissent argued that while one person's infringing taping may seem inconsequential, the total infringement caused by countless tapings is a harm to the copyright holder that "must be prevented." *Id.* at 482 (Blackmun, J., dissenting). "When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so." *Id.* (Blackmun, J., dissenting).

44. Time-shifting occurs when an individual records a show to watch later. See *id.* at 421. The benefit of this practice to the television industry is that it "enlarges the television viewing audience." *Id.*

45. See *id.* at 425. Prohibited uses would have been "the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television . . ." *Id.*

46. *Id.* at 449.

47. See *id.* at 451.

48. *Id.* at 454 (quoting *Sony I*, 480 F. Supp. at 467).

49. See *id.* at 449-50.

b. Analysis

While *Sony* did not deal with the Internet, the case is significant from a technology standpoint for two reasons. First, the manner in which a VTR is used to record a television program, and the way that recording is then used, is analogous to downloading something from the Internet to a disk. The Court's analysis involving noncommercial, in-home use could easily be applied to a case of someone downloading a streamed signal from the Internet.⁵⁰ Second, *Sony* provides insight to the Court's approach to copyright issues involving "new" technology.⁵¹ The Court stated that "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials."⁵²

2. *Harper & Row, Publishers, Inc. v. Nation Enterprises*⁵³

a. Facts and Decision

The Court's next significant foray into fair use occurred the term following *Sony*. Harper & Row sued Nation Enterprises over its publication of excerpts from a book Harper & Row was about to publish.⁵⁴ The book at issue was former President Gerald Ford's memoirs.⁵⁵ One week before publication, excerpts from the book were set to appear in *Time Magazine*.⁵⁶ Nation Enterprises obtained an unauthorized copy of the manuscript and quickly published an article that quoted passages from the manuscript.⁵⁷ The district court ruled for Harper & Row, finding that Nation Enterprises' actions constituted copyright infringement and that the actions were not justified under the fair use doctrine.⁵⁸ The court of appeal reversed, finding Nation Enterprises'

50. See, e.g., *TV on the Web* (visited Aug. 12, 1999) <<http://www.tvontheweb.com/>>. Of course, adult entertainment is at the forefront of streaming technology. See generally *Dollbaby's* (visited Apr. 11, 1999) <<http://www.dollsbaby.com/>>; *Rah-Rahh!!* (visited Apr. 11, 1999) <<http://rahh-site.com/>>.

51. Although VTRs are certainly not "new" technology by today's standard, and will likely go the way of the 8-track player once DVD players become more reasonably priced, VTRs did constitute new technology at the time of this case.

52. *Sony III*, 464 U.S. at 431. The Court went on to say that "[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written." *Id.* at 456.

53. 471 U.S. 539 (1985) [hereinafter *Harper & Row III*].

54. See *Harper & Row III*, 471 U.S. at 542.

55. See *id.*

56. See *id.* at 543.

57. See *id.*

58. See 557 F. Supp. 1067, 1070-71 (S.D. N.Y. 1983) [hereinafter *Harper & Row I*].

publication of excerpts a valid form of fair use.⁵⁹ The Supreme Court subsequently found for Harper & Row, rejecting Nation Enterprises' fair use defense.⁶⁰

The Court applied each of the four factors to the facts of the case. In its determination that the purpose and character of the use did not warrant a finding of fair use, the Court focused on whether the actions of Nation Enterprises: (1) constituted newsreporting; and (2) were commercial.⁶¹ The Court noted that newsreporting generally constitutes fair use, but found that in this case Nation Enterprises went beyond reporting news because its scoop of a rival magazine was in fact the news event.⁶² Nation Enterprises argued that newsreporting is not strictly a commercial endeavor.⁶³ In response, the Court stated that the focus of the distinction between non-profit and commercial behavior is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."⁶⁴

The Court then looked at the second factor of section 107, the nature of the work, which in this case was an "unpublished historical narrative or autobiography."⁶⁵ Fair use is generally applicable to such works because of the societal interest in disseminating factual works.⁶⁶ However, in this case, the Court found that Nation Enterprises went beyond merely reporting the facts contained in the memoirs and instead captured "the author's individualized expression[s]."⁶⁷ Additionally, because the memoirs were previously unpublished, the copyright holder's right of first publication was violated.⁶⁸

59. See 723 F.2d 195, 208 (2d Cir. 1983) [hereinafter *Harper & Row II*].

60. See *Harper & Row III*, 471 U.S. at 569. *But see*, *Wright v. Warner Books, Inc.* 953 F.2d 731, 736-37 (2d Cir. 1991) (holding that author's minimal use of unpublished sources for biography was a fair use).

61. See *Harper & Row III*, 471 U.S. at 561-62. The Court also considered Nation Enterprises' conduct, pointing out that Nation Enterprises did not act in good faith in exploiting the manuscript it was not authorized to possess. See *id.* at 562. "Fair use distinguishes between a true scholar and a chiseler who infringes a work for personal profit." *Id.* at 563 (internal quotations omitted) (citation omitted).

62. See *id.* at 561.

63. See *id.* at 562. Commercial use of copyrighted material is presumptively a violation of the copyright holder's rights. See *Sony III*, 464 U.S. 417, 451 (1984).

64. *Harper & Row III*, 471 U.S. at 562 (citations omitted).

65. *Id.* at 563.

66. See *id.*

67. *Id.*

68. See *id.* at 564. "The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.* It is a concept that can underlie fair use analysis. See Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 66-67 (1999). The right of first publication is a common law doctrine that allows "authors

The Court also found that the third factor, the amount copied, weighed against a finding of fair use. The Court was not swayed by Nation Enterprises' relatively minimal use of copyrighted material in the article.⁶⁹ The Supreme Court agreed with the district court's conclusion that the parts of the manuscript quoted by Nation Enterprises were "essentially the heart of the book."⁷⁰

The Court's analysis of the fourth factor, market effects, also precluded a finding of fair use. In examining Nation Enterprises' actions for the effect on the market, the Court looked at the effect of these actions on the contract between Harper & Row and *Time Magazine*. Because the agreement specified that *Time* would have exclusive rights to prepublication, *Time* refused to pay Harper & Row.⁷¹ The Court concluded that Nation Enterprises "adversely affect[ed] the potential market for the copyrighted work."⁷²

b. Analysis

The Supreme Court has not ruled on a case that directly involves the fair use defense as it applies to the Internet, however, the Court's analysis in *Harper & Row* can be analogized to digital issues. In today's environment, scooping a rival probably entails being the first to release the information on a web site.⁷³ A court's analysis would likely mirror the analysis in *Harper & Row*. Furthermore, it would likely be difficult to prevail with a fair use defense because of the speed and scope of distribution over the Internet. Since materials can quickly be distributed worldwide, electronic access and distribution would quickly erase any future market potential.

of unpublished works to prevent unauthorized distribution of their works." Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 *FORDHAM L. REV.* 1025, 1042 n.59 (1998) (citation omitted).

69. See *Harper & Row III*, 471 U.S. at 565. Approximately 300 of the 2,500 words in The Nation's article were quotes of the author's original language. See *id.* at 548.

70. *Harper & Row III*, 471 U.S. at 565 (citation omitted).

71. See *id.* at 542-43.

72. *Id.* at 568 (quoting *Sony III*, 464 U.S. 417, 451(1984)) (emphasis omitted).

73. For example, after Newsweek magazine decided not to publish its scoop on the fact that Kenneth Starr was investigating the relationship between President Clinton and Monica Lewinsky, rival Matt Drudge broke the story on his web site. See Jonathan Karl, *How He Got that Story*, *WALL ST. J.*, Apr. 1, 1999, at A20; Dennis Persica, *Tripped Newsweek Reporter Michael Isikoff Replays Linda Tripp's Pivotal Role in Almost Bringing Down the President*, *THE NEW ORLEANS TIMES-PICAYUNE*, June 6, 1999, at D7.

3. *Campbell v. Acuff-Rose Music, Inc.*⁷⁴

a. Facts and Decision

Acuff-Rose Music sued 2 Live Crew, a musical group, for 2 Live Crew's song "Pretty Woman," a parody of "Oh, Pretty Woman," originally written and recorded by Roy Orbison.⁷⁵ Acuff-Rose claimed the recording constituted copyright infringement and 2 Live Crew asserted the fair use defense.⁷⁶ The district court granted summary judgment for 2 Live Crew,⁷⁷ but the Sixth Circuit reversed, holding that the commercial use of the song precluded its fair use.⁷⁸ The Supreme Court ruled for 2 Live Crew, stating that the Sixth Circuit's emphasis on the commercial nature of the parody was in error.⁷⁹

The crux of the issue before the Court was whether the commercial nature of the parody prevented a finding of fair use.⁸⁰ In its analysis of the purpose and character of the use, the Court focused on whether 2 Live Crew's version of the song was meant to supplant the original. In other words, was "Pretty Woman" transformative—did it add something new—or was it an attempt by the infringer to "avoid the drudgery in working up something fresh."⁸¹ The significance of this aspect of the analysis is that the more an allegedly infringing work differs from the original, the less significant other factors become—in this case, the commercial nature of 2 Live Crew's parody.⁸² The Court

74. 510 U.S. 569 (1994) [hereinafter *Campbell III*].

75. See *Campbell III*, 510 U.S. at 572. For a side by side comparison of the lyrics of each song and a brief sample of the recording, see *The Copyright Website* (visited Aug. 12, 1999) <<http://www.benedict.com/audio/crew/crew.htm>>.

76. See *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991) [hereinafter *Campbell I*].

77. See *id.*

78. See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) [hereinafter *Campbell II*].

79. See *Campbell III*, 510 U.S. at 594.

80. See *id.* at 571–72.

81. *Id.* at 580. The Court discussed the meaning and characteristics of parody, stating that a critical element is criticism of the original. See *id.* at 582. "[A] work with [a] slight parodic element and extensive copying will be more likely to merely 'supersede the objects' of the original." *Id.* at 582 n.16 (citations omitted). The Court stated that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived." *Id.* at 582. Once that threshold was met, the Court expressly declined to comment on the quality of the parody. See *id.*

82. See *id.* at 579. The Court found that 2 Live Crew's version could reasonably be considered as comment or criticism of the original. See *id.* at 583. The Court stated that: 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness

found that the Sixth Circuit erred by putting too great an emphasis on the commercial nature of the parody.⁸³ Section 107 gives examples⁸⁴ of some of the purposes where fair use applies,⁸⁵ and all of these uses are generally commercial.⁸⁶ The fact that 2 Live Crew's parody served a commercial purpose cannot be a presumption against fair use, just as a noncommercial use would not protect an infringer from liability.⁸⁷ The Court reiterated that no presumption could be drawn based on the commercial nature of the allegedly infringing work.⁸⁸ Instead, commerciality is only one factor to be weighed in conjunction with all other section 107 factors.⁸⁹

The second factor discussed by the Court was the nature of the copyrighted work.⁹⁰ Although Orbison's song was the type of expression intended to be protected by copyright, this factor was of little relevance to the case because parody, by definition, will almost always require copying from the original piece.⁹¹

The third factor considered by the Court was the amount copied and, specifically, the nature of parody.⁹² Parody requires a recognizable element from the original so that the audience is aware of the comparison the artist is attempting to draw.⁹³ The Sixth Circuit found that this factor weighed against 2 Live Crew because the opening words and music copied were the "heart" of the original song.⁹⁴ The Supreme Court disagreed on the ground that if 2 Live Crew had not used the most memorable feature of the original, it was questionable whether the parody would have been recognized.⁹⁵ Furthermore, after reproducing the words and music that open Orbison's version, 2

of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

Id. at 583.

83. *See id.* at 583-84.

84. *See id.* at 584. These examples are not intended to be considered an exhaustive list.

85. *See* 17 U.S.C. § 107 (1994).

86. *See Campbell III*, 510 U.S. at 583-84.

87. *See id.*

88. *See id.* at 585.

89. *See id.*

90. *See id.* at 586.

91. *See id.*

92. *See id.* at 588-89.

93. *See id.* at 588.

94. *See id.* at 587 (citing *Campbell II*, 972 F.2d 1429, 1438 (6th Cir. 1992)).

95. *See id.* at 586-89.

Live Crew vastly changed them. Therefore, the Court concluded this factor weighed in favor of 2 Live Crew.⁹⁶

The Court found that the fourth factor, market effects, also weighed in favor of 2 Live Crew.⁹⁷ In determining the effect of the parody on the potential market for the copyrighted work, the Court pointed to the different market functions served by an original work and its parody.⁹⁸ However, the Court found fault in both parties for not addressing the possible effect the 2 Live Crew version could have on the potential market for derivative works.⁹⁹ In other words, did 2 Live Crew's rap parody destroy the potential for Acuff-Rose to record a non-parody rap version?

b. Analysis

The most significant aspect of the Court's ruling is the affirmation of the proposition that commercial use does not presumptively rule out fair use.¹⁰⁰ Setting aside for a moment the parody aspect of *Campbell*, the decision could be relevant to an individual who uses music obtained from the Internet to make a new work. For an individual with the ability and the equipment, the Internet provides a cornucopia of musical samples and pirated songs waiting to be copied and manipulated. If, for example, a pirated copy of Orbison's "Oh, Pretty Woman" was found on the Internet, it is technically possible to save it to a disk. Once digitized, it is then possible to isolate certain parts of the song—to only hear the guitar or to hear everything but the vocals. At this point, the user can manipulate the recording, add new music to it, and create a new work. While this process would certainly constitute copyright infringement, *Campbell* opens a door, albeit a small one, through which to escape a charge of infringement.

III. Different Mediums on the Internet

The Internet contains a wealth of copyrighted material. The digital nature of the Internet allows for easy copying, and thus easy copyright infringement. This section looks at four mediums that comprise a majority of copyrighted material on the Internet: text, images,

96. *See id.* at 589. The Court remanded the case for a determination of whether the copied portion of the bass guitar riff was excessive. *See id.*

97. *See id.* at 594.

98. *See id.* at 590–91.

99. *See id.* at 593–94.

100. *See id.* at 594.

software, and music. These mediums were selected because of their broad representation of Internet content.

A. Text

Copyrighted text is found on the Internet in the form of books, newspapers, magazines, or webzines—to name only a few. The Internet is a tremendous marketing tool for book authors because many sites, with permission from the author or publisher, will make the first chapter available on a web site as a way to promote the book and increase sales.¹⁰¹ Additionally, there are over 1,000 print newspapers that maintain Internet sites containing online versions of their newsstand editions.¹⁰² Magazines that up until now were sold by subscription or at newsstands are accessible online,¹⁰³ as are webzines that exist only in electronic form on the Internet.¹⁰⁴

Because of the ease with which text can be copied on the Internet, all of the above sources are ripe for duplication. While it is permissible to download text for personal, noncommercial use, text can easily be used in a way that violates a copyright holder's rights. For example, a user could simply download the first chapter from several books¹⁰⁵ and sell them as a compilation. Or the text could be copied and included in another commercial publication. Of course, such behavior was possible before the Internet, but at such significantly greater costs as to make it inefficient.

Along with copying text that is already available on the web, through the Internet a document can quickly and easily be distributed to a limitless number of readers. While this use is desirable when someone intends to disseminate information that unprotected by

101. See *Chapter One* (visited Aug. 17, 1999) <<http://www.washingtonpost.com/wp-srv/style/books/features/chapone.htm>>; *Today's Books* (visited Aug. 17, 1999) <http://www.msnbc.com/news/TODAYBOOKS_front.asp>.

102. See *US Newspaper Links* (visited Aug. 12, 1999) <<http://www.usnewspaperlinks.com/>>. A typical disclaimer states that all materials are copyrighted and that "[y]ou may not modify, copy, reproduce, republish, upload, post, transmit or distribute in any way any material from this site including code and software. You may download material from this site for your personal, non-commercial use only, provided you keep intact all copyright and other proprietary notices." *Tennessean.com* (visited Aug. 17, 1999) <<http://www.tennessean.com/terms/>>.

103. See *Modern Drummer Online* (visited Aug. 12, 1999) <<http://www.moderndrummer.com/>>; *Popular Mechanics* (visited Aug. 12, 1999) <<http://popularmechanics.com/>>.

104. See *Aphelion: The Webzine of Science Fiction and Fantasy* (visited Aug. 12, 1999) <<http://www.aphelion-webzine.com/index2.htm>>; *blast@explode.com* (visited Aug. 12, 1999) <<http://www.explode.com/>>.

105. See *supra* note 101.

copyright,¹⁰⁶ the speed and scope of the Internet make it difficult to stop the spread of information.

1. *Religious Technology Center v. Lerma*¹⁰⁷

a. Facts and Decision

Perhaps the most significant case involving the fair use defense by an individual user is *Religious Technology Center v. Lerma*, currently the only case to discuss the relevant issue here—copyright infringement by an individual user on the Internet. In *Lerma*, Religious Technology Center sued Lerma for copyright infringement after Lerma uploaded portions of text copyrighted by, and sacred to, the Church of Scientology.¹⁰⁸ Lerma admitted to copying and posting the materials on the Internet, but argued that his actions were a fair use of the materials.¹⁰⁹ The court ruled for Religious Technology Center on its motion for summary judgment.¹¹⁰

The court first addressed Lerma's argument that the unique nature of the Internet required the court to frame its evaluation considering the "special context of modern communication on the Internet."¹¹¹ The court stated:

While the Internet does present a truly revolutionary advance, neither Congress nor the courts have afforded it unique status under the fair use standard of § 107. The law of copyright has evolved with technological change, with each new technological

106. One of the first attempts to disseminate a document on a worldwide scale over the Internet had mixed results. In *Commonwealth v. Louise Woodward*, No. Crim. 97-0433, 1997 WL 694119 (Mass. Super. Nov. 10, 1998), Judge Hiller B. Zobel intended to release his decision reducing the second-degree murder conviction of a British *au pair* to involuntary manslaughter over the Internet at the same time he issued it in court. This high profile case sparked media attention from around the world. The judge's intentions were thwarted by a local power outage. Once the decision was posted on about 25 web sites, heavy traffic caused many of the sites to crash. See Pamela Ferdinand, *Judge Reduces Verdict, Frees Au Pair; Murder Conviction Cut to Manslaughter*, WASH. POST, Nov. 11, 1997, at A01; *Internet Press Service* (visited Aug. 12, 1999) <<http://www.ipsnews.com/nanny/>>. The next large-scale attempt at distribution came about 10 months later with the release of the Starr Report. This 453 page document was released on the Internet through many commercial and government sites, which helped spread out the traffic and keep glitches to a minimum. See Linton Weeks & Leslie Walker, *Required Reading: Millions Drawn Into the Web by Starr Report*, WASHINGTON POST, Sept. 12, 1998, at E01.

107. No. 95-1107-A, 1996 WL 633131 (E.D.Va. Oct. 4, 1996).

108. See *Lerma*, 1996 WL 633131, at *1. This case provides an excellent example of the difficulty a copyright holder has in protecting his rights. To view portions of these sacred texts, see *Scientology Secrets* (visited Aug. 12, 1999) <<http://www.b-org.demon.nl/scn/upper-levels/00-upper-levels-index.html>>.

109. See *Lerma*, 1996 WL 633131, at *4.

110. See *id.* at *1.

111. *Id.* at *4.

advancement creating complicated questions of copyright interpretation and application. Nevertheless, the new technologies—from television, to video cassette recorders, to digitized transmissions—have been made to fit within the overall scheme of copyright law and to serve the ends which copyright was intended to promote. The Internet is no exception, and postings on it must be judged in reference to the already flexible considerations which fair use affords.¹¹²

The court then proceeded to apply the four factors of section 107 to the facts of the case.

In relation to the purpose and character of the use, Lerma argued that his actions fell into several of the categories set out in the first paragraph of section 107.¹¹³ Specifically, he argued that since he obtained the information from an open court record, his actions constituted news reporting.¹¹⁴ The court rejected this argument because Lerma's motives were not neutral and his intentions were not to benefit the public.¹¹⁵ The court also rejected Lerma's argument that he was a scholar because scholarship does not permit "wholesale copying and republication of copyrighted material," and Lerma added very little quantitatively in the way of commentary or analysis to the postings.¹¹⁶ Lerma also argued that since his use was not commercial, it was fair.¹¹⁷ The court determined that while the commercialism of the use is significant, it is not controlling.¹¹⁸ Commercialism is only one factor to be considered and here it was outweighed by Lerma's motives.¹¹⁹ The court's analysis of the second factor, the nature of the copyrighted work, also fell against Lerma.¹²⁰

112. *Id.* (citation omitted).

113. *See id.* at *5. The categories in the statute are "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107 (1994). While there is no bright-line rule that a use that falls into one of these categories is a fair use, "[t]here is a strong presumption that factor one favors the defendant if an allegedly infringing work fits the description of uses described in section 107." *Lerma*, 1996 WL 633131, at *5 (quoting *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991)).

114. *See Lerma*, 1996 WL 633131, at *5.

115. *See id.*

116. *Id.*

117. *See id.* at *6.

118. *See id.* (quoting *Rogers v. Koons*, 960 F.2d 301, 109 (2d Cir. 1992)).

119. *See id.*

120. *See id.* at *8. The court's analysis, though interesting, is of little relevance to the Internet nature of the case. Briefly, the court discussed the difference in copyright protections in factual works versus expressive works and noted the difficulty in classifying these works. Although the factual nature of the work favored Lerma, the unpublished nature of the work and the Church of Scientology's repeated efforts to keep them unpublished, tipped the balance for Religious Technology Center. *See id.* at *6-8.

Regarding the third factor, the amount and substantiality of the copying, the court stated that although Lerma did not copy the entire text, the subparts that he did copy were considered "single works" protected by copyright.¹²¹ Lerma again argued for consideration of the postings in light of the nature of the Internet. He argued that because commentary and analysis by other users later accompanied the postings, the "single works" should be "considered within the context of the ongoing dialogue he has conducted on the newsgroup."¹²² The court rejected this argument in part because the commentary would not necessarily be seen in conjunction with the infringing postings.¹²³

Lastly, the court considered the effect on the potential market for the copyrighted work.¹²⁴ Because of the speculative nature of Religious Technology Center's evidence of harm, such as the inability of the Church of Scientology to gain new members, and its failure to show that Lerma was acting as a competitor, the court concluded that the fourth factor weighed in favor of Lerma.¹²⁵ However, this single factor, even though frequently cited as the most important factor in fair use analysis, was not enough for Lerma to prevail on a fair use defense.¹²⁶

b. Analysis

In light of *Lerma*, any user that uploads copyrighted material to a web site will have several obstacles to overcome in order to prevail on a fair use defense. The *Lerma* court, like courts before it, refused to change its fair use analysis because of new technology. Rather, the court deferred to Congress's legislative function to broaden, or narrow, the fair use defense.

Potential liability exists if a user scans copyrighted text into his computer and then uploads it to a web site or uses the materials for other purposes. For example, there is a vast amount of copyrighted text online in the form of newspapers, magazines, and creative works. A user that copies any of these materials to his own site may be liable, especially if he removes the copyright notice.¹²⁷

121. *See id.* at *10.

122. *Id.*

123. *See id.* The court stated that Lerma's argument would still allow for "blatant theft of a copyright." *Id.*

124. *See id.*

125. *See id.* at *10-*11.

126. *See id.* at *11.

127. *See Weiskopf, supra* note 28, at 30 n.133.

B. Images

Images can be found on the Internet in the form of computer-generated graphics, photographs, or video. Similar to text files, images on a web page can easily be copied.¹²⁸ While it has been possible since the photocopier to reproduce copyrighted pictures, the Internet allows for simple, virtually cost-free reproduction, with no decrease in quality. While there are sites that explicitly allow a user to copy and reuse images posted on the site,¹²⁹ many sites—especially those that are corporate or commercially driven—have pictures that are likely to be more attractive to a web site designer.¹³⁰

The ease with which a user can acquire copyrighted work points to the likelihood of potential copyright infringement claims against individual users that copy images to their site, either from images scanned into a computer or from images copied from another web site. The two cases that follow discuss private user infringement.¹³¹

1. *Playboy Enterprises, Inc. v. Frena*¹³² and *Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*¹³³

a. Facts and Decisions

(1) *Playboy Enterprises, Inc. v. Frena*

Playboy Enterprises, Inc. ("Playboy") sued Frena for copyright infringement after Playboy discovered a bulletin board service ("BBS") operated by Frena which contained copies of 170 photographs copyrighted by Playboy.¹³⁴ In granting Playboy's motion for summary judg-

128. While copyright notices are generally not imprinted on the photo, nearly all sites contain notices on the home page stating that all images and content are copyrighted. See, e.g., *Stock Boston* (visited Aug. 12, 1999) <<http://www.stockboston.com/>>. It is difficult to find a site more protective of its graphics than Kraft foods. The bottom of Kraft's site contains a link titled "A message from our lawyers." *Kraft Interactive Kitchen* (visited Aug. 12, 1999) <<http://www.kraft.com/index.cgi>>.

129. See *Media Link* (visited Aug. 12, 1999) <<http://www.erinet.com/cunning1/dales.html>>.

130. See, e.g., *Life* (visited Aug. 12, 1999) <<http://www.pathfinder.com/Life/>>; *Rolling Stone* (visited Aug. 12, 1999) <<http://rollingstone.tunes.com/sections/gallery/text/gallerycovers.asp?af1=>>>.

131. In the first case, *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993), the provider was the operator of the bulletin board service. In *Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*, 983 F. Supp. 1167, 1171 (N.D. Ill. 1997), the administrator was the person in charge of and responsible for the web site.

132. 839 F. Supp. 1552 (M.D. Fla. 1993).

133. 983 F. Supp. 1167 (N.D. Ill. 1997).

134. See *Frena*, 839 F. Supp. at 1554.

ment, the court stated that Frena violated Playboy's right to display its copyrighted works.¹³⁵

The court rejected Frena's fair use defense on several grounds. First, Frena's use was commercial because he charged a fee for access to the BBS.¹³⁶ Second, the nature of the work was entertainment, which led the court to find that fair use was not appropriate.¹³⁷ Third, in its analysis regarding the amount of the copyrighted material used, the court noted that the photographs were an "essential part of the copyrighted work."¹³⁸ The court found that this third factor weighed against Frena because he took a "very important part of [Playboy's] copyrighted publications."¹³⁹ Fourth, the court looked at the effect of Frena's actions.¹⁴⁰ The court quickly concluded it was obvious that Frena's conduct would harm the market for Playboy's product, thus depriving Playboy of "considerable revenue to which it is entitled for the service it provides."¹⁴¹ Frena argued this was fair use because the commercial use was insignificant.¹⁴² The court disagreed, stating that the detrimental market effects combined with the commercial use negated the fair use defense.¹⁴³ Therefore, the court ruled against Frena's fair use defense, even though he may have been unaware that Playboy had copyrights to the photographs.¹⁴⁴

(2) *Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors*

Marobie sued the National Association of Fire Equipment Distributors ("NAFED") for copyright infringement after NAFED uploaded copies of "clip art" created by Marobie onto NAFED's web site, thus making it available to everyone with access to the site.¹⁴⁵ Marobie had valid copyrights for the clip art and the court found that by placing the software on the web site, NAFED violated Marobie's right to reproduction and distribution.¹⁴⁶ The court rejected NAFED's fair use de-

135. *See id.* at 1556-57.

136. *See id.* at 1558.

137. *See id.*

138. *Id.* The court clarified that it did not intend to imply that people did not also read the articles. *See id.*

139. *Id.*

140. *See id.* at 1558.

141. *Id.* at 1559.

142. *See id.* at 1559.

143. *See id.*

144. *See id.*

145. *See Marobie-FL v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1172 (N.D. Ill. 1997).

146. *See id.*

fense and granted Marobie summary judgment on its infringement claim.¹⁴⁷

As to the first factor, the purpose and character of the use, the court stated that even though NAFED was a non-profit organization, this fact did not control the question of whether NAFED's conduct was commercial in nature.¹⁴⁸ "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹⁴⁹ Because the web page used by NAFED served a commercial purpose—promoting the association and advertising—its character was commercial.¹⁵⁰ Furthermore, the software was not uploaded for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research."¹⁵¹ The second factor, the nature of the work, also weighed in favor of Marobie since the software was creative in nature.¹⁵² NAFED's argument for the amount copied was that it had only copied three of the seven volumes of clip art—not a substantial amount.¹⁵³ The court rejected this argument, noting that each volume was copyrighted as an independent work.¹⁵⁴ Lastly, the court found that NAFED's uploads could be a "market substitute" for the copyrighted work and therefore could harm the market and value of the work.¹⁵⁵

b. Analysis

While neither *Frena* nor *Marobie* dealt with liability for a user that accessed the infringing materials, it is possible to extrapolate from these decisions the path a court might take should such a fact situation arise. Imagine the user that visits a site with pirated photographs

147. *See id.* at 1176.

148. *See id.* at 1175.

149. *Id.* (quoting *Harper & Row Publishers, Inc. v. National Enters.*, 471 U.S. 539, 562 (1985)).

150. *See id.*

151. *Id.* at 1175–76.

152. *See id.* at 1176. NAFED argued that because outside images and drawings were used in the creation of the clip art, it was factual rather than creative. The court disagreed, in part because the images were edited, colored, and organized. *See id.*

153. *See id.*

154. *See id.*; *see also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) ("[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate") (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)).

155. *See Marobie*, 983 F. Supp. at 1176.

from a magazine. Simply viewing¹⁵⁶ or downloading the images could constitute copyright infringement. Furthermore, the user could be liable for infringement regardless of whether he knows he is downloading copyrighted materials.¹⁵⁷

The ability of a private user to succeed with a fair use defense would depend on what the user did with the materials after downloading them. There are several likely scenarios as to how the images could be used in a digital environment. These include downloading for personal use, copying the images to a personal web site, e-mailing them to other users, or modifying them for a different use. The following examines how fair use might apply to these situations.

For example, if an image is saved for later viewing, although technically this could be copyright infringement, it is probable that fair use would apply.¹⁵⁸ Once the user begins to copy the images for any other purpose, however, a fair use defense becomes harder to establish. For example, if a user copied an image from one site to his own, several issues are raised. First, this use would not fall into the traditional categories where copying is justified.¹⁵⁹ Furthermore, in determining the character of the use, the court would have to perform its analysis within the context of the user's web site. For instance, copying an image of a Ford truck¹⁶⁰ to an individual's personal site in order to demonstrate the user's interest in automobiles satisfies both elements of copyright infringement.¹⁶¹ In determining whether the use was

156. Anytime an image is viewed on a web page a "copy" is made on the user's hard drive. Unless additional steps are taken to save the image, the copy will be stored temporarily in the computer's Random Access Memory, but will be erased when the computer is turned off. The courts and Congress have grappled with whether this process constitutes copying. See *MAI Sys. Corp. v. Peak Computer, Inc.* 991 F.2d 511 (9th Cir. 1993).

157. See *Lipton v. The Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) (citing *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986)) ("[I]ntent or knowledge is not an element of infringement."); *Pinkham v. Sara Lee Corp., Inc.*, 983 F.2d 824, 829 (8th Cir. 1992) ("The defendant's intent is simply not relevant: The defendant is liable even for 'innocent' or 'accidental' infringements."); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) ("Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable . . .").

158. It is not unusual for a site to state in its legal disclaimer that downloading is permitted only for personal use. See, e.g., *Victoria's Secret* (visited Aug. 12, 1999) <<http://www.victoriasscret.com/vsc/index.html>> (stating "You may download or copy text, photographs, images, video, and audio contained in this site for your personal use only").

159. These uses are "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . ." 17 U.S.C. § 107 (1994).

160. *Ford Motor Company* (visited Aug. 12, 1999) <<http://www2.ford.com/>> (warning that "[t]hese materials may not be copied for commercial use or distribution, nor may these materials be modified or reposted to other sites").

161. See *supra* Part II.A.

commercial, the court would need to consider whether the user's site hosted advertising of its own and whether the site sought to sell merchandise or recruit individuals. As seen in *Marobie*, a site hosted by a non-profit group can still be deemed to serve a commercial purpose.¹⁶² The type of image copied would also be relevant to a court's analysis. Generally, work classified as fiction or fantasy, as opposed to factual, will receive greater copyright protection. Therefore, a fair use defense is less likely to succeed.¹⁶³ Entertainment is classified as fiction or fantasy and thus falls into the category of works given greater copyright protection.¹⁶⁴ Similarly, creative works are given greater copyright—and thus less fair use—protection.¹⁶⁵ Therefore, a non-factual image copied to a commercial site will surely fail to satisfy the fair use defense.

C. Software

Given that the Internet is a computerized entity, built upon complex computer programs, and owing its function to dense codes, it is not surprising that software is one of the mediums frequently pirated on the Internet. As with any file, software is easily uploaded or downloaded to or from the Internet. Courts have dealt with several cases that involve copyright infringement caused by downloading software through the Internet. Because of the immense focus on technology in these cases, they are significant precedents.

1. *Sega Enterprises Ltd. v. MAPHIA*¹⁶⁶

a. Facts and Decision

Sega sued Chad Sherman, among others, for copyright infringement.¹⁶⁷ Sherman was the system operator for MAPHIA, an electronic BBS.¹⁶⁸ MAPHIA contained copies of video games produced by Sega.¹⁶⁹ Users paid a fee to access the BBS and also had to purchase a

162. See *supra* notes 148–150 and accompanying text.

163. See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993); see also Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 833 (1998) (“Under copyright law, although potentially an open forum use, all Internet postings are shrouded under copyright *property* protection given to the person creating the message, image or the like”).

164. See *Frena*, 839 F. Supp. at 1558.

165. See *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1175–76 (N.D. Ill. 1997).

166. 948 F. Supp. 923 (N.D. Cal. 1996).

167. See *MAPHIA*, 948 F. Supp. at 927.

168. See *id.*

169. See *id.*

“copier” that allowed the pirated game to be played after it was downloaded.¹⁷⁰ The court did not hold Sherman liable for direct infringement because Sega did not show he copied files himself or directly caused any files to be copied.¹⁷¹ However, the court found Sherman liable for contributory infringement.¹⁷² The court rejected Sherman’s fair use defense and granted Sega summary judgment on its infringement claim.¹⁷³

The court found that all four fair use factors weighed against Sherman.¹⁷⁴ First, Sherman’s use was commercial. He encouraged downloads so that customers would have to purchase one of his copiers.¹⁷⁵ The creative nature of the games and the fact that the entire game was copied also weighed against Sherman.¹⁷⁶ Third, the court found that even if the use of Sherman’s copiers was small, “unrestricted and widespread conduct of this sort would result in a substantial adverse impact on the market for the Sega games.”¹⁷⁷

b. Analysis

Although *MAPHIA* dealt with infringement by a BBS and not an individual user, the court’s analysis serves as a guide to whether an individual user could have been found liable for downloading games from *MAPHIA*. Sherman argued that he could not be liable for contributory infringement unless the users were liable for direct infringement.¹⁷⁸ He argued that since the games were used only for in-home entertainment and were not distributed further, the conduct of the users was fair.¹⁷⁹ The court stated that “[i]f the users’ actions consti-

170. *See id.* at 929.

171. *See id.* at 932. Therefore, Sega failed to prove copying, the second element of copyright infringement. The court pointed to *Religious Technology Center v. Netcomm On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), where the defendant Internet Service Provider was found not liable for direct infringement because the system was used to make a copy—defendant did not make the copies himself. *See Netcomm*, 907 F. Supp. at 1371.

172. *See MAPHIA*, 948 F. Supp. at 936. The court stated that liability for other than direct infringement would be proper if Sega showed that the BBS users directly infringed Sega’s copyright and that with knowledge of the infringing activity, Sherman “induced, caused, or materially contributed to their infringing activity.” *Id.* at 932.

173. *See id.* at 936.

174. *See id.* at 934–36.

175. *See id.* at 934. The copiers sold for \$350 and download fees ran from \$35 a month to \$500 for unlimited use. *See id.* at 929, 935. Individual games from Sega cost between \$30 to \$70. *See id.* at 935.

176. *See id.* at 934–35.

177. *Id.* at 935.

178. *See id.* at 934.

179. *See id.* at 933.

tute fair use, they will not be considered direct infringers. Then, Sherman cannot be contributorily liable because contributory infringement requires direct infringement by someone."¹⁸⁰ The court evaluated the conduct of the users in conjunction with Sherman's defense.¹⁸¹ Although there was no evidence that the games were downloaded for commercial purposes, downloading eliminated the need to purchase the game from Sega.¹⁸² This purpose, according to the court, weighed against fair use.¹⁸³ Another factor weighing against the user's fair use was that each download contained essentially the entire copyrighted work.¹⁸⁴ Finally, after downloading the file, the user could make additional copies, which could then potentially be distributed.¹⁸⁵ The entire range of conduct erased the need for a user to purchase the game from Sega, thereby reducing Sega's market.¹⁸⁶

The factors that led the court to conclude MAPHIA's users were liable for direct infringement, and consequently that Sherman was liable for contributory infringement, would be identical in nearly any case where software was improperly posted on the Internet. There are, however, two significant exceptions where fair use has been successfully used in cases involving copyright infringement of software.¹⁸⁷ Although these cases did not involve software downloaded from the Internet, they are discussed below for two primary reasons. First, both cases involve video games which are representative of the kinds of software likely to be pirated and downloaded from the Internet.¹⁸⁸ Second, their analyses and holdings can be analogized to conduct often found on the Internet.

180. *Id.* at 934 (citation omitted).

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* at 935.

185. *See id.*

186. *See id.*

187. *See Sega Enters. Ltd., v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

188. Video games are manufactured for personal use, specifically entertainment, and are more likely to be pirated, than, for example, an accounting program, which would be purchased by a business and is therefore less likely to be pirated.

2. *Lewis Galoob Toys, Inc. v. Nintendo of America*¹⁸⁹ and *Sega Enterprises Ltd. v. Accolade, Inc.*¹⁹⁰

a. Facts and Decisions

(1) *Lewis Galoob Toys, Inc. v. Nintendo of America*

Plaintiff Nintendo produced video game cartridges that worked in conjunction with a video game console, also produced by plaintiff.¹⁹¹ Defendant Galoob manufactured a device called the Game Genie.¹⁹² When this device was used in conjunction with plaintiff's game and console it could alter features of the game by blocking and replacing data exchanged between the cartridge and the console.¹⁹³ The changes made by the Game Genie were not saved once the console was turned off and the changes were not stored in the cartridge.¹⁹⁴ Nintendo sued, claiming the Game Genie violated Nintendo's copyright by creating a derivative work.¹⁹⁵ The district court held, and the Ninth Circuit Court affirmed, that the Game Genie did not create a derivative work and that even if it did, the work produced by the Game Genie was protected as a fair use.¹⁹⁶ The court based its conclusion on two things: (1) the fact that users of the Game Genie were engaged in noncommercial activity; and (2) the published nature of the games.¹⁹⁷ Furthermore, the circuit court analogized the Game Genie to the video tape recorders at issue in *Sony Corporation of America v. Universal City Studios, Inc.*¹⁹⁸ Just as the recorders were used by consumers to watch shows at a more convenient, and thus more enjoyable time, the Game Genie allowed users to have a more entertaining experience.¹⁹⁹ Nintendo failed to show that the Game Genie would harm

189. 964 F.2d 965 (9th Cir. 1992).

190. 977 F.2d 1510 (9th Cir. 1992).

191. *See Galoob*, 964 F.2d at 967. The game console was called the Nintendo Entertainment System. *See id.*

192. *See id.*

193. *See id.* By inputting specific codes a player could, for example, increase the amount of lives or the speed the character possessed. *See id.*

194. *See id.*

195. *See id.*

196. *See id.* at 969. The circuit court compared the Game Genie to a spell-checking program. *See id.* At the time of the case spell-checkers were developed and sold by a company different from the word-processor manufacturer and were integrated into the existing word processing software. *See id.*

197. *See id.* at 970-71.

198. *See id.* at 971.

199. *See id.*

the market for future derivative works, despite Nintendo's claim that it could "re-release altered versions of its game cartridges . . ." ²⁰⁰

(2) *Sega Enterprises Ltd. v. Accolade, Inc.*

Defendant Accolade developed and manufactured video games that could be played on a video game console marketed by plaintiff Sega.²⁰¹ Sega developed games for the console and sold licenses to other software companies allowing development and production of games that were compatible with Sega's console.²⁰² Without obtaining a license, Accolade produced games that were compatible with Sega's console.²⁰³ Accolade's development process required it to reverse engineer several Sega games to discover what was required to make its games compatible with the Sega console.²⁰⁴ The games were analyzed for their common features and these features were described in a manual.²⁰⁵ The manual only described the requirements to make the games compatible with the Sega console; it did not list the actual code.²⁰⁶

The circuit court reversed the district court's issuance of a preliminary injunction and held that Accolade's reverse engineering of Sega's games was a fair use.²⁰⁷ Regarding the purpose and character of the use, the circuit court noted that Accolade's use was commercial, but that the general presumption against a commercial use being a fair use "can be rebutted by the characteristics of a particular commer-

200. *Id.* at 972. The district court and the circuit court were both skeptical of this assertion. Both courts noted the fast pace which the industry moves and the lack of evidence by Nintendo that any such releases were being considered. "While board games may never die, good video games are mortal." *Id.* (quoting *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.* 780 F. Supp. 1283, 1295 (N.D. Cal. 1991)).

201. *See* *Sega Enters. Ltd., v. Accolade, Inc.*, 977 F.2d 1510, 1514 (9th Cir. 1992). The game console was called Genesis. *See id.*

202. *See id.* The license included rights to Sega's copyrighted computer game code and the SEGA trademark. *See id.*

203. *See id.*

204. *See id.* Reverse engineering entails accessing the program's object code, which is the machine-readable binary language and converting it to source code, the programming language written by programmers and readable by humans. *See id.*

205. *See id.* at 1515.

206. *See id.*

207. *See id.* at 1514. Fair use was only one of four arguments raised by Accolade. The circuit court rejected Accolade's remaining three arguments that copying was permissible: (1) as intermediate copying; (2) because computer code is not protected by copyright; or (3) under 17 U.S.C. § 117(1). *See id.* at 1517-20. Section 117(1) allows the owner to make a copy if the "new copy or adaptation" is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner . . ." *Id.* at 1520 (quoting 17 U.S.C. § 117(1)).

cial use.”²⁰⁸ In this case, the court considered that the copying done by Accolade was conducted to understand how to make games compatible with the system and not to copy any of Sega’s games.²⁰⁹ Also, under this factor the court stated that “we are free to consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially.”²¹⁰ The court found the increase in independent games created for the Sega console and the creative effort required for those products were consistent with the intended effect of copyright law.²¹¹ For the nature of the work, the court discussed the difficulty in classifying computer programs as either an idea, which is not granted copyright protection, or an expression, meaning the expression of the idea, which is granted copyright protection.²¹² The court concluded that denying fair use applications of object code would essentially give the creator a “monopoly over the functional aspects of [the] work—aspects that were expressly denied copyright protection by Congress.”²¹³ Therefore, this factor also weighed in favor of Accolade.²¹⁴ The amount copied weighed in favor of Sega because Accolade copied the entire program.²¹⁵ However, this factor was given little weight, in light of the fact that Accolade’s end product made little use of the copied materials.²¹⁶ The *Sega* court next considered the effect Accolade’s copying had on Sega’s product market. The court stated that Accolade’s games were different from Sega’s and, given the nature of the video game market, it would not be unreasonable for a consumer to purchase, for example, a football game produced by each company.²¹⁷ The court recognized that Sega may suffer an economic loss from the competition, but characterized the loss as “minor.”²¹⁸ Moreover, by furthering creative expression, Accolade’s use was consistent with the intent of copyright law.²¹⁹

208. *Id.* at 1522. The court stated that the commercial aspect of Accolade’s use was of “minimal significance.” *Id.* at 1523.

209. *See id.* at 1522.

210. *Id.* at 1523 (citations omitted).

211. *See id.*

212. *See id.* at 1524.

213. *Id.* at 1526; *see also* 17 U.S.C. § 102(b) (1995).

214. *See Sega*, 977 F.2d at 1526.

215. *See id.*

216. *See id.* at 1526–27.

217. *See id.* at 1523.

218. *See id.* at 1524.

219. *See id.*

b. Analysis

Galoob and *Accolade* are examples of successful assertions of the fair use defense. Although the software was not obtained over the Internet, the courts' rationales are applicable given the ease with which pirated software can be found on the Internet. If an individual user downloads pirated software, even for personal use, success on a fair use defense is unlikely. The user may succeed on the first factor considered by the court, the purpose and character of the use. However, the nature of the work, the amount copied, and the market effects will likely weigh against fair use. While there is some debate about the strength of copyright protection for object code, the program as a whole will be protected by copyright. Additionally, it is most likely that the entire program will be downloaded, thus tipping factor three, the amount copied, against the user. Finally, the downloading of pirated software effects the market for the product. Even if the user does not distribute the software to anyone else, this practice shrinks the consumer base. A fair use defense will have a stronger chance of succeeding if the software is used for purposes other than supplanting the need to purchase the product from the original manufacturer.

D. Music

Of the different electronic mediums discussed in this comment, music has the least precedent in the area of fair use. The result is that music is perhaps the medium where the largest amount of infringement occurs.²²⁰ This is because consumers have long been accustomed to recording songs from the radio or copying songs from one source to another, such as from compact disk to cassette tape. However, it is important to note the legal and technological differences between radio and the Internet. A radio station purchases the licensing rights to a recording, enabling the station to broadcast the music legally and compensate the artist.²²¹ Currently, there are no universal license agreements that apply to the Internet.²²² This means that online music providers must either negotiate individually with recording artists or their labels, or simply neglect to secure these licenses at all.

220. See Rick Hepp, *Cybermusic's Future May Not Be as Smooth as It Sounds*, CHI. TRIB., July 25, 1999, at 5.

221. See *Buffalo Broad. Corp. v. American Soc'y of Composers, Authors and Publishers*, 546 F. Supp. 274, 277 (S.D. N.Y. 1982).

222. See Jim Kirk, *Performing Online: Music Licensing Debate Takes Center Stage*, CHI. SUN-TIMES, Oct. 12, 1995, at 51.

This may result in the violation of the copyright holder's performance and distribution rights.

It is unclear whether an individual user that downloads music, at least from a legitimate site, is liable for copyright infringement. Assuming that the site has negotiated a licensing agreement with the copyright holder, infringement would not be an issue. However, if no such license exists, the user—and certainly the provider—could face potential liability. Furthermore, it is unclear whether the Audio Home Recording Act of 1992²²³ ("AHRA"), which was intended in part to allow in-home noncommercial recording of copyrighted works without possible liability, acts as a defense to downloading music from the Internet.

1. *Frank Music Corp. v. CompuServe, Inc.*²²⁴ and *Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc.*²²⁵

a. Facts and Decisions

(1) *Frank Music Corp. v. CompuServe, Inc.*

Frank Music involved a BBS administered by the ISP CompuServe, through which users could upload and download copyrighted and pirated recordings.²²⁶ Although the case settled before the court could rule on CompuServe's liability, the case is often cited as an example of the potential liability for copyright infringement involving music over the Internet.²²⁷ Under the court-approved settlement, CompuServe agreed to pay \$568,000 in damages and put in place a licensing agreement that provided royalties to artists for any future use.²²⁸ Although under The Copyright Act and The Digital Millennium Copyright Act CompuServe would likely have been liable only for contributory infringement, the suit is significant because CompuServe raised the AHRA as an affirmative defense to the plaintiff's copyright infringement claim.²²⁹

223. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–1010 (1994).

224. No. 93 Civ. 8153 (S.D. N.Y. filed Nov. 29, 1993; court approved settlement Dec. 19, 1995).

225. 29 F. Supp. 2d 624 (C.D. Cal. 1998).

226. See Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y 179, 193 (1997).

227. As of May 2, 1999, a Westlaw search showed that 99 law review articles cited this suit as a leading precedent in this area.

228. See Bloom, *supra* note 226, at 193.

229. See *id.*

(2) *Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc.*²³⁰

The AHRA was discussed more recently when plaintiff Recording Industry Association of America ("RIAA") sought an injunction against defendant Diamond Multimedia Systems ("Diamond") for the upcoming distribution of the Rio PMP 300 ("Rio").²³¹ The Rio is a small, handheld device that can receive copies of audio files from a computer's hard drive and store approximately sixty minutes of music internally.²³² A removable memory card can also be purchased which effectively doubles the playback capability of the Rio.²³³ Although the Rio does not have output capability, meaning it cannot copy music to another source, the memory card can be used with any other Rio.²³⁴ The issue before the court was whether the Rio would be considered a Digital Audio Recording Device ("recording device") under the AHRA.²³⁵ Plaintiff argued that as a recording device, the Rio was subject to AHRA, requiring the manufacturer to pay royalties to plaintiff, and that the Rio must incorporate Serial Copy Management System ("SCMS") technology in its design.²³⁶ Plaintiff did not assert a potential copyright claim, because section 1008 of the AHRA exempts recording devices from copyright violations.²³⁷ However, the court stated that if the Rio was not considered a recording device,

230. The court of appeals affirmed the district court's decision, concluding that the Rio was not a digital audio recording device and therefore not subject to the AHRA. See *Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999). In reaching its decision, the court thoroughly discussed how MP3 technology functions and the existence of music piracy on the Internet. See *Diamond*, 180 F.3d at 1073-74. Less than two months after the decision, the parties announced they had reached an agreement to end the litigation. See *The Cutting Edge Over Rio Portable MP3 Player Ends*, LOS ANGELES TIMES, August 5, 1999, at C6. Future versions of the Rio will incorporate SDMI, a cooperatively developed security system to prevent piracy or mass copying. See James Lardner, *The Record Industry Gives Peace a Chance*, U.S. NEWS & WORLD REPORT, September 20, 1999, at 48.

231. See *Diamond*, 29 F. Supp. 2d at 625.

232. See *id.*

233. See *id.*

234. See *id.* Assuming the cost of a memory card is less than the cost of a compact disk, it would be efficient and inexpensive for a user to download music and build a collection of memory cards.

235. See *id.* at 628.

236. See *id.* at 631-32. SCMS is intended to prevent a recording device from copying "unauthorized, multigenerational copies of copyrighted digital audio recordings." John F. Delaney et al., *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 545 PRACTISING L. INST. 61, 112 (1999).

237. See *Diamond*, 29 F. Supp. 2d at 627.

"[d]efendant has a potential 'fair use' defense that might defeat any *prima facie* showing of infringement."²³⁸ The court went on to say that:

Although the Rio will inevitably be used to record both legitimate music (e.g., commercially available CDs) and illegitimate music (e.g., copyrighted music illegally posted on the Internet), the absence of the SCMS information does not *cause* the illegitimate uses. Even if the Rio *did* incorporate SCMS, a Rio user could *still* use the device to record unauthorized MP3 files posted to the Internet. Moreover, to the extent Plaintiffs are injured through an illicit use of the Rio, this is precisely the type of injury for which the royalty provisions were adopted.²³⁹

In denying the injunction, the court stressed that the Rio was "capable of recording legitimate digital music" and that the Rio had "significant beneficial uses."²⁴⁰

b. Analysis

The problem with copyright infringement of musical works is evident to Congress and the Judiciary. Given the nature of the music industry and the sums of money involved, it is safe to say that the industry will do what it can to protect its interests. These efforts have commenced on both technological and legal fronts.

Technologically, the development of devices that block unauthorized reproductions are a first step toward stopping the seemingly unstoppable practice of bootlegging. The problem faced by the industry, however, is that for every obstacle it puts in front of infringers, a counter technology is soon developed to bypass the hurdle. Anticipating this conundrum, the industry put its support behind the Digital Millennium Copyright Act,²⁴¹ which, in part, prohibits the circumvention of technological matters used to protect copyrighted materials.

How these matters will impact fair use defenses by individuals downloading copyrighted music from the Internet remains to be seen. Based on dicta from *Diamond*, it seems that courts are at least aware of the problem. Additionally, the built-in royalty mechanisms for the devices most likely to be used for legitimate and illegitimate copying provides a remedy for the copyright holder.

The oftentimes ephemeral nature of web sites provides the biggest obstacle for copyright holders.²⁴² In at least three cases filed in

238. *Id.*

239. *Id.* at 633.

240. *Id.*

241. See discussion *infra* Part IV.A.1.

242. See John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 926 (1999).

the last two years,²⁴³ a record company has initiated legal action against web sites and bulletin boards based on the uploading and downloading of copyrighted materials.²⁴⁴ Each time, however, the defendant's site disappeared from the Internet before plaintiff could positively identify the site administrator.²⁴⁵

While the music industry and Internet bootleggers will likely be in a perpetual cat-and-mouse chase, the increasing ability to locate and track infringers means that eventually a court will hear a case involving an entrepreneur who performed one too many downloads. There are several scenarios that are likely to exist, and given the case-by-case application of fair use, the success of the defense will hinge on the particular facts of the case.

The most likely scenario will involve downloads from a site that is not licensed to distribute the music. While the site itself may be directly liable for at least violating reproduction and distribution rights, the user of the site may too face liability. As stated before, if the user does nothing more than listen to the songs for personal use, liability will likely not attach. However, if the user transfers the files to another medium, such as a cassette or compact disk, the user may have a hard time overcoming any of the four fair use factors. Copying an entire creative piece for commercial purposes, with the finished product serving as a substitute for the original, is a tremendous burden to overcome. Even if the user is not selling the downloaded music, but is merely trading or sending it to others, fair use is not likely to prevent liability.

Another issue involving music downloaded from the Internet involves sampling. This occurs when part of a song is used verbatim in another song. This practice became widespread in the 1980's and is now commonplace. Although some artists that use sampling obtain licenses and permission to do so, others do not, thus creating infringement issues.²⁴⁶ The Internet gives anyone with the necessary software the ability to splice part of one work into his own. Once a piece of

243. See *A&M Records, Inc. v. Internet Site Known as Fresh Kutz*, No. 97-CV-1099 H (JFS) (S.D. Cal. filed June 10, 1997); *MCA Records Inc. v. Internet Site Known as ftp://parsoft.com/MP3s/*, No. 97-CV-1360-T (N.D. Tex. filed June 9, 1997); *Sony Music Entertainment Inc. v. Internet Site Known as ftp://208.197.0.28*, No. 97 Civ. 4245 (S.D. N.Y. filed June 9, 1997).

244. See Delaney, *supra* note 236, at 87-89.

245. See *id.* at 89.

246. See James P. Allen, Jr., *Look What They've Done to My Song Ma — Digital Sampling in the 90's: A Legal Challenge for the Music Industry*, 9 U. MIAMI ENT. & SPORTS L. REV. 179 (1992).

music is downloaded, sampled, and put into another work, differentiation in a court's analysis as to whether infringement exists, regardless of the source of the music, is unlikely.

Initially, most artists did not believe it was necessary to seek permission or authorization to sample from a copyrighted work.²⁴⁷ After the case of *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*,²⁴⁸ record companies and artists have generally acknowledged the necessity of acquiring the rights to a work before sampling it. In *Grand Upright*, a musician released a song containing three sampled words along with the underlying music after the copyright holder denied his request to use the piece.²⁴⁹ The court held that the sample constituted infringement and chastised the defendant for using the sample with knowledge that a license was required.²⁵⁰ Similarly, in *Jarvis v. A & M Records*,²⁵¹ where defendant was accused of sampling words and music from the plaintiff's copyrighted work, the court denied defendant's motion for summary judgment and equated sampling with stealing.²⁵²

IV. Governmental Initiatives

A. United States

Drafting legislation responding to the proliferation of copyright infringement on the Internet is problematic for several reasons. First, the legislative process is not designed to respond quickly. Legislation intended to respond to a cutting edge problem may be outdated by the time it is enacted. Second, given the perceived lack of technological knowledge within Congress, legislation in this area is even more likely than most to be broad, ambiguous or both. Despite the inherent

247. See Don E. Tomlinson & Timothy Nielander, *Unchained Melody: Music Licensing in the Digital Age*, 6 TEX. INTEL. PROP. L.J. 277, 310 (1998).

248. 780 F. Supp. 182 (S.D. N.Y. 1991).

249. See *id.* at 184. The court did not seem to be open to the artistic side of sampling, or any argument that sampling would not constitute infringement. The court stated:

'Thou shalt not steal' has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

Id. at 183.

250. See *id.* at 185.

251. 827 F. Supp. 282, 295 (D. N.J. 1993).

252. See *id.* ("[T]here can be no more brazen stealing of music than digital sampling . . .").

obstacles in its way, Congress passed legislation intended to address the issue. Whether the effect will foster the openness that has allowed the Internet to thrive or begin to regulate the flow of ideas and creativity remains to be seen. The following provides an overview of significant governmental initiatives that involve copyright infringement and the Internet.

1. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act ("DMCA") is the most recent legislation intended to modify copyright law in the face of new technologies.²⁵³ The DMCA has two relevant titles.²⁵⁴ Title I implements two treaties from the World Intellectual Property Organization ("WIPO").²⁵⁵ The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty require signatory countries to give foreign copyrighted materials at least the same protections as domestic copyrighted materials. Title I of the DMCA states, in part, that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."²⁵⁶ This provision is intended to prohibit users from disabling the mechanisms created to block illegal access or copying. For example, music companies are developing digital watermarks which can be placed on digital recordings, to prevent second generation copies from being made.²⁵⁷ This device, in theory, could prevent a user from downloading unlicensed

253. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. § 1201); see also *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary* (visited May 12, 1999) <<http://lcweb.loc.gov/copyright/legislation/dmca.pdf>>.

254. Title III involves copying software in conjunction with computer maintenance and Title IV contains various miscellaneous provisions. Title V is the "Vessel Hull Design Protection Act." See *id.* Title V is a response to *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), where the Supreme Court affirmed a decision by the Florida Supreme Court striking down a statute that prohibited "the direct molding process to duplicate unpatented boat hulls." *Bonito Boats*, 489 U.S. at 144. Respondent essentially made a mold of Petitioner's boat hull in order to make a competing product. See *id.* at 145. Petitioner had not filed for a patent to protect the utility or design of the hull or the manufacturing process. See *id.* at 144. The Court held that the Florida statute would have given "patent-like" protection to the Petitioner and that "state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws." *Id.* at 152.

255. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. § 1201).

256. 17 U.S.C. § 1201(a) (Supp. 1999). This section does not become effective for two years, while administrative rules are being written. See *id.*

257. See Barak D. Jolish, *Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet*, 17 ENT. & SPORTS LAW, 9, 11 (1999).

songs from a web site²⁵⁸ and provide some tracking capabilities.²⁵⁹ Title I also contains three prohibitions of products or technologies relating to circumvention.²⁶⁰ If the primary design or commercial significance is for circumvention, or marketed for circumvention, it is prohibited by the DMCA.²⁶¹ Once this provision takes effect, and after the copyrighted protection technologies are in place, access will be significantly impaired. Instead of relying on a fair use defense, the alleged infringer will have to defend himself for violating the DMCA. Although the Act states that it is not intended to affect fair use,²⁶² by cutting off access it seems that the anti-circumvention provisions are in conflict with fair use.

Title II limits online service provider ("OSP") liability for the following activities.²⁶³ First, an OSP is not liable for "[t]ransitory digital network communications." In other words, when infringing material is routed through an OSP's network, the OSP is not liable for the copy that the network automatically makes of the material.²⁶⁴ Second, the Act removes potential liability for systems caching.²⁶⁵ This seems to settle the debate as to whether the ubiquitous function of caching violates the copyrighted holder's rights. Third, an OSP is not liable for storage of the user's infringing materials, provided that the OSP meets certain statutory requirements. To avoid liability, the OSP: (1) may not have knowledge of the infringing material; (2) may not receive financial benefit directly from the infringing material; and (3) must expeditiously remove the infringing material, or prohibit access to it.²⁶⁶ Fourth, under Title II, an OSP is not liable for having links to infringing material, with similar knowledge, financial, and removal re-

258. *See id.*

259. *See* J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract With Public Good Uses of Information*, 147 U. PA. L. REV. 875, 897 & n.86 (1999).

260. Circumvention is defined as "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner . . ." 17 U.S.C. § 1201(a)(3)(A).

261. *See* 17 U.S.C. § 1201(a)(2)(A)-(C). Exceptions exist for libraries and colleges, reverse engineering, protection of minors, personal privacy, and security testing. *See* 17 U.S.C. § 1201(d), (f)-(j).

262. "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." 17 U.S.C. § 1201(c)(1).

263. *See* 17 U.S.C. § 512 (Supp. 1999).

264. The statute specifies that to avoid liability the OSP: cannot have initiated the transmission; may not have selected the specific work for copying; did not select the recipients of the material; may not have made a permanent copy of the material; and did not modify the content. 17 U.S.C. § 512(a)(1)-(5).

265. *See* 17 U.S.C. § 512(b).

266. *See* 17 U.S.C. § 512(c)(1)(A)-(C).

quirements in place.²⁶⁷ The statute specifies that if the OSP is liable under any of the previous categories, all defenses, including fair use, are available.²⁶⁸

2. The Working Group on Intellectual Property Rights

The Information Infrastructure Task Force Working Group on Intellectual Property Rights, a group composed of experts within the Executive Branch, published the final version of its report in 1995.²⁶⁹ The report, referred to as the White Paper, has been criticized by some as endorsing a narrow view of fair use in relation to the Internet.²⁷⁰ Others have stated the White Paper intended to "eliminate fair-use rights whenever a use might be licensed."²⁷¹ Taking the report at face value, it seems to advocate preserving the status quo, stating:

Preserving the framework [of copyright protection] does not require, however, a dramatic increase in author's rights, such as more limited or no further applicability of the fair use doctrine in the NII [National Information Infrastructure] environment. . . . The Working Group believes that weakening copyright owners' rights in the NII is not in the public interest; nor would a dramatic increase in their rights be justified.²⁷²

However, at least one member of the Working Group has publicly stated that the White Paper did not go far enough in supporting fair use for noncommercial uses.²⁷³

B. European Union

The European Union ("E.U.") has made strides towards implementing new laws governing the Internet and intellectual property.²⁷⁴ Recent proposals focus on audio and visual materials and how to protect them from illegal distribution over the Internet.²⁷⁵ However, it is

267. See 17 U.S.C. § 512(d).

268. See 17 U.S.C. § 512(l).

269. See U.S. Dep't of Commerce, Information Infrastructure Task Force, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY (1995) [hereinafter WHITE PAPER].

270. See James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 HARV. J.L. & TECH. 47, 52 (1996).

271. Weiskopf, *supra* note 28, at 42 n.220.

272. WHITE PAPER, *supra* note 269, at 17.

273. See Barry D. Weiss, *Barbed Wires and Branding in Cyberspace: The Future of Copyright Protection*, 450 PRACTISING L. INST. 397, 408 (1996) (citing Bruce A. Lehman, Remarks at Conference on "The On Line Services Industry: Today and Tomorrow" (May 6, 1996)).

274. See E.U. Parliament Will Soon Release Draft Copyright Law Revisions, 9 NO. 12 J. PROPRIETARY RTS. 26, 26 (Dec. 1997).

275. See *id.* One area where the E.U. is breaking ground involves rights of privacy on the Internet. See Jonathan D. Hart et al., *Cyberspace Liability*, 523 PRACTISING L. INST. 123,

clear that similar debates—such as striking the appropriate balance between protection and access to protected works—exist in the European realm as well.²⁷⁶ A recent draft directive seeks to prevent illegal duplication of copyrighted materials through digital means and to compensate artists for their work.²⁷⁷ The directive would impose a tax on blank tapes and disks, similar to the tax already imposed by all states except Britain, Ireland, and Luxembourg.²⁷⁸ Although the E.U. is still working to harmonize copyright laws,²⁷⁹ the current trend of the European Court of Justice seems to be against broad copyright protection.²⁸⁰ This means that copyrighted materials may be given less protection in Europe, increasing the likelihood of inconsistency between U.S. and European standards for determining what constitutes infringement and what uses are acceptable.²⁸¹

Conclusion

The Internet has raised substantial new issues relating to copyright. As cases involving copyright infringement have entered the courts, it has become common for parties, particularly defendants, to argue that the nature of the Internet requires the court to apply a different sort of analysis to their case. This approach has not been successful. Instead, courts have done what they can to force new issues into the current framework and, at the same time, let it be known it is Congress's role to change copyright law in response to new technology.

Currently, there has been no modification in the fair use doctrine, either by Congress or the courts. Instead, courts have continued to analyze cases one at a time. The change that the Internet has

178 (1998); *European Commission Paper Seeks Reform in Electronic Commerce*, 10 NO. 7 J. PROPRIETARY RTS. 22, 22 (July 1998).

276. See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 76 (1997) (discussing attempts by some E.U. members to limit access for private or research uses in the Copyright Directive).

277. See Charles Bremner, *New Tax Fear Over Copyright Reforms*, THE TIMES OF LONDON, Feb. 11, 1999, at 13.

278. See *id.*

279. See Hayes, *supra* note 28, at 102.

280. See Frank Romano, *International Conventions and Treaties*, 536 PRACTISING L. INST. 545, 585 (1998) (stating that the court's decisions have "been critical toward copyright and, as such, it has maintained its position against the monopolistic tendencies deemed to be inherent in copyright law").

281. Copyright infringement occurring between countries also raises a myriad of jurisdictional issues. See generally Christian M. Reider & Stacy C. Pappas, *Personal Jurisdiction for Copyright Infringement on the Internet*, 38 SANTA CLARA L.REV. 367 (1998).

brought is not a change in doctrine, but a change in issues. While nearly all cases involve infringement by a provider or site administrator, an increase in cases against individual users can be expected as the technology continues to evolve.

Finally, although the last ten years have seen a substantial change in how society interacts with technology, the current technological revolution is not over, rather, it is just beginning. The technology that shapes these issues is in its infancy. As technology continues to advance, it is likely that it will become more difficult to infringe a copyright over the Internet. Until then, it is likely that those who can do it will—and those who get caught will plead fair use.