

## A Basic Primer on Copyrights on the World Wide Web

David J . Loundy

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## A Basic Primer on Copyrights on the World Wide Web

### Abstract

This article discusses some often-raised copyright questions concerning the assembly and distribution of a World Wide Web page on the Internet

# A Basic Primer on Copyrights on the World Wide Web

David J. Loundy

This article discusses some often-raised copyright questions concerning the assembly and distribution of a World Wide Web page on the Internet. Issues covered include: (a) the source of copyright law, particularly in the United States; (b) ownership of web pages, (c) discussion of the necessity of "obtaining" a copyright, (d) the definition of the copyrightable work, (e) the effect of putting a work on a world-accessible computer network, upon the copyright; (f) concerns at issue when using another's work on your web page, and (g) concerns associated with linking to works stored on another web page.

## Introduction

You need to put together a web page. You are concerned about how the copyright law impacts your efforts. You have solicited opinions from friends, but unfortunately the opinions contradict each other. What do you do now? Read on. Presented here are a series of questions and some of the answers which may help you apply the copyright law to your electronic publishing ventures. The questions presented in this article are frequently asked by people who design and publish electronic materials, either individually or on behalf of other institutions. This is not a complete list of concerns, and the answers are by necessity general and brief, and are presented as general information only. If you have specific copyright questions, please seek out a knowledgeable attorney.

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**David J. Loundy** is an attorney and author working in the areas of intellectual property and computer law. He is vice-chair of the Chicago Bar Association Computer Law Committee, and chair of the Internet Law subcommittee of the Illinois State Bar Association Intellectual Property Section Council. He also serves on the board of editors for *The Cyberspace Lawyer*.

## **Where Do I Find the Relevant Copyright Law?**

Copyright law is found in federal statutes. In the United States, the copyright law is contained in Title 17 of the U.S. Code (and the case law that interprets the statutory law). Other countries have their own copyright laws, many of which are very similar by virtue of the countries subscribing to various international conventions.

Title 17 of the U.S. Code defines when a work is protected by the copyright law (Chapter 1 of the Title), details of copyright ownership (Chapter 2), the duration of a copyright (Chapter 3), parameters defining when a work is subject to the protection of the copyright law and provides remedies for infringement of the copyright on a work (Chapter 5). (Many additional technicalities are contained in Chapters 4, 6, 7, and 8.)

In the U.S., copyright law is authorized by the federal Constitution, which requires a balancing between the rights of creators of intellectual property and the rights of copyright users. The Copyright Act, and the cases interpreting the Act, define this balance. When you create a work, you may act in two roles— that of intellectual property generator, whose work is protected by the copyright law, and intellectual property consumer, whose work may employ the copyrighted materials of others.

## **Who Owns Copyright in the Web Pages I Create?**

The answer to this question depends on who you are. In many cases the creator of a work owns the copyright.<sup>1</sup> However, this will not always be the case.

A common exception is for "works made for hire."<sup>2</sup> These are works which are made by employees in the scope of the employees' employment, as well as some types of commissioned works.<sup>3</sup> For these types of works, the copyright belongs not to the creator, but rather to the employer.<sup>4</sup> Thus, if you are given the job of creating a web page for your university or company, it is usually the institution that owns the copyright, and not you, the web page designer.

Another exception to the rule that the author owns the copyright in the author's creation is for "works of the United States Government," which are not protectable under the Copyright Act.<sup>5</sup> Such a work is defined as one created by "an officer or employee of the United States Government as part of that person's official duties".<sup>6</sup> If you are creating materials for a government agency, or perhaps

even a federally funded university, this exception to the "default" copyright ownership rule may apply to you, and it is best to check with your organization's attorney if there is any concern.

Lastly, it is worth pointing out that sometimes employment contracts will specifically address the questions of copyright in materials created by an employee or contractor. Some employment contracts specifically state that the employee owns the copyright, though some specifically try to reserve the copyright for the institution.

## **What Do I Have to Do to Copyright My Work?**

Assuming you have a protectable work, nothing.<sup>7</sup> This is a question which is frequently answered incorrectly by people who are not well versed in modern copyright law. The reason for this is that the law has changed, and many people continue to pass along erroneous information about copyright registration. Since the U.S. altered its copyright law to comply with the Berne Convention for the Protection of Literary and Artistic Works (1971), (an international copyright treaty) a work is protected by the Copyright Act as soon as it is created.<sup>8</sup> No notice or registration is required for protection.

Nonetheless, there are still legal advantages to including a copyright notice on your original work and for registering your copyright with the U.S. Copyright Office.<sup>9</sup> By including a copyright notice on your original work, if your work is infringed, the infringer will not be able to claim to be an "innocent infringer," which could affect any damages to which you may be entitled as a result of the infringement.<sup>10</sup> The type of notice varies slightly based on the type of work,<sup>11</sup> but for literary works notice generally takes the form of the C-in-a-circle symbol,<sup>12</sup> or the word "copyright," followed by the year of first publication, and then the name of the copyright holder.

The legal advantages to registering your work with the Copyright Office include the ability to collect statutory damages and attorney's fees in the event of an infringement, and thus registration may affect the amount of damages that may be available.<sup>13</sup> Also, it is necessary to register your copyright before you can sue someone over an infringement of your work.<sup>14</sup>

## **What Is a Copyrighted Work?**

When you create a web page, it may consist of a number of elements. There may be text (laid out using hypertext markup

language (HTML) tags); there may be graphics (encoded using a variety of formats, most commonly using the GIF format (Graphical Interchange Format)); there may be collections of links to other resources contained on other web pages; and there may be an assortment of other elements, such as sounds, animation, etc.

First, if you fall into certain classes (such as an employee of the U.S. Government, as discussed earlier), none of your work may be protectable, or it may be that you do not own the copyright in the work that you have created. For the purposes of this discussion, let us assume that you have created a work yourself and that there is no question that you own the copyright.

Section 106 of the Copyright Act<sup>15</sup> provides protection not just in "literary works" but also in audiovisual works, pictorial and graphic works, musical works, and more. Furthermore, Section 102 of the Copyright Act<sup>16</sup> provides protection to compilations of different copyrighted elements, even if the elements themselves are not protectable.

What this means is that if you create graphics, you own a copyright in the graphics. If you write text, you own the copyright in the text. If you create a page that is a careful layout of these elements, even if the elements are not copyrightable by themselves, you may own a copyright in the layout. Furthermore, if you utilize elements belonging to others to create a collection, you may own a copyright in the compilation of the elements, even though you do not have a copyright in the elements themselves (for example, a newspaper using freelancers' articles may own a copyright in the paper as a whole, even though the freelancers own the copyrights in the actual individual articles).

Of course, there are always some exceptions. For example, if your graphics or text are too simple or common, they may not be copyrightable. (This is called the doctrine of merger—where the idea is inseparable from the expression of the idea.<sup>17</sup>) Similarly, "facts" are not copyrightable,<sup>18</sup> although compilations of facts may be protectable as a compilation. Also, if your layout or compilation does not show sufficient creativity it may not be copyrightable.<sup>19</sup>

To illustrate the distinction between copyrightable and non-copyrightable works, let us look at two hypothetical web pages. One is a page of links listing the "Top Fifty University Web Pages" ranked in order of their quality. The other is a page linking all of the land-grant universities in alphabetical order. The first page requires creative input—someone must decide which are the best

pages and arrange them in order of their perceived quality. The Internet addresses (known as URLs— Uniform Resource Locators) of the web pages may be unprotectable facts, but the arrangement is a creative expression. In the case of the second page, not only are the URLs of the web pages unprotectable facts, but there is no creativity on the part of the page designer in arranging the list of universities. Which universities are land-grant institutions is also a matter of fact, and is not based on the web page author's creativity; and arranging them alphabetically also does not show the requisite originality.<sup>20</sup> Thus, under the U.S. copyright law, even though the second page may have taken quite a bit of effort to compile, the listing of university web pages is not copyrightable.

### **If I Put Something on the Internet, Doesn't That Mean It Is Now in the Public Domain?**

No. Some information on the Internet is in the public domain. However, there is a difference between "readily available" and "not protected by the copyright law" (which is what it means to say that a work is in the public domain). A work broadcast on television or placed in the library is readily available, as are works on the Internet, yet "available" obviously does not equal "no longer protected by the copyright law."

A work can be in the public domain because the copyright has expired,<sup>21</sup> or because the work could not be copyrighted in the first place. A copyright holder may also explicitly put a work into the public domain, repudiating its copyright. However, just because you make information available for free on the Internet, that does not mean you have given up your copyright in that material.

The tougher question, as yet unresolved by the law, is this: what rights have you given up by putting your work on the Internet? According to U.S. copyright law, the copyright holder has the exclusive right to make or authorize the making of copies of his or her work.<sup>22</sup> According to a series of cases,<sup>23</sup> reading a work into a computer's RAM can constitute an infringing copy. The Internet produces copies at almost every stage of a document's storage, transmission, and access, according to this reasoning. Many of these copies could be considered infringements, but for the concept of an "implied license."

An implied license implies authorization to make certain copies based on the circumstances.<sup>24</sup> For instance, if someone sends you a piece of e-mail which is a copyrighted work owned by the mes-

sage sender, in order to read the message, you must make a copy. Rather than make it an infringement to read your mail, the law should imply permission given by the message sender to the message receiver to make any copies necessary to read the e-mail— after all, the message was sent with that intention. (However, note that there is a problem if the message sent constitutes an infringement in the first place— the message sender cannot convey to the recipient more rights than he or she has in the message when it is sent; thus, there may be some cases where even reading your e-mail may constitute a copyright infringement.)<sup>25</sup>

By placing a web page on-line, you may be implying licenses to use that page in certain customary ways, such as accessing your page, linking to the home page or sub-pages, caching the page<sup>26</sup> on the user's computer or on large machines like those used by America Online, perhaps linking to individual elements on your page, etc. The extent of the "etc." is where the questions exist. Can a user "steal" the graphics from your web page to use on his or her page? Probably not— this would likely exceed any implied license.<sup>27</sup> However, the user might be able to link to the same image without copying it.

### **What Concerns Should I Have When Using Someone Else's Work on My Web Page?**

Just because someone offers to let you include certain information on your web page does not mean that you can legally do so. What seems like a straightforward statement is often one that people do not understand. Before someone can give you the legal authority to use a copyrighted work, they must have that authority to give. Consider two hypothetical archives of graphic elements which are made available for people to use in putting together their own web pages. If someone creates the graphics (and therefore owns the copyright in those graphics) and makes them available with an offer to let anyone use them, then generally there should be no concerns about using those elements (if used according to any terms the copyright holder sets forth— the terms are a copyright license). However, if someone collects the graphics from "various sources," and "makes them available for your use," how do you know that the person making them available is authorized to do so?<sup>28</sup> If you are using elements distributed by another, it is important that you establish the pedigree of the elements that are being available. If the person making them available does not indicate clearly that he or she either created the elements or has obtained



permission from the rightful copyright holder to distribute the elements for the purpose of using them on others' web pages, you should only use elements from that archive at your own risk.

In a similar situation to that of design elements, even if you are presented with documents to place on your web site, you should ensure that you have obtained the necessary permission to do so from the rightful copyright holder. While this may not pose a concern in many environments, it is surprising how often an organization makes available works to which it has only limited rights<sup>29</sup> (e.g. rights to distribute works only in certain regions or by using certain distribution media), or no rights at all. This issue is currently being litigated in the context of newspapers using freelancers' articles on newspapers' on-line services, even though the newspapers have only print-publication rights and not electronic distribution rights in the freelancers' works.<sup>30</sup>

### **What About "Fair Use"?**

An important exception to the law concerning the use of copyrighted works without the copyright holder's permission is the "fair use" section of the Copyright Act<sup>31</sup>. This section is specifically designed to maintain a balance between the rights of copyright holders and copyright users. Unfortunately, it is also a dangerous portion of the law on which to rely because the fair use section is intentionally vague. It is intentionally vague because it serves to permit what would otherwise be a clear violation of the copyright holder's rights based on the equity of a particular situation. In other words, the fair use section states, in essence, that while copying is generally wrong, you may still make copies if it is for a truly worthwhile purpose. If someone asks if his or her use of someone else's protected work is fair use, the only proper response is some form of "maybe." "Maybe" may be an "almost unquestionably," but the only way to answer the question definitely "yes" or "no" is when a court answers the question about your particular use— after you have been sued.

Needless to say, while the fair use section does not provide any certainty, it is still relied on regularly. Application of the fair use provision is often done in two stages. The first stage is to look at the list of uses mentioned in the statute. The statute states that notwithstanding the rights reserved for the copyright holder, making copies "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."<sup>32</sup>

Unfortunately, many people stop reading at this point and decide that their use is on the list, so it must be a fair one.

The statute continues:

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.<sup>33</sup>

All four factors must be examined for every use.

Let us apply the four factors to a hypothetical situation. Pretend you are putting together a web page to advertise a university student group event where a new book is going to be discussed. You scan in the cover art from the book and put it on the web page. Examining the first factor, what is your use? It is to advertise a student group function. While it is for a nonprofit group, it is also not clearly for teaching purposes. Factor one, in this instance, does not clearly aid in the fair use determination.<sup>34</sup> Factor two looks to the type of work that you have copied. If the artwork copied is on a novel being sold to make the author money, the use is less likely to be a fair one. Here, the facts of the example do not allow us to determine whether factor two leans towards or away from a finding of fair use. Factor three is often looked at incorrectly— while the cover artwork may be only a small portion of the entire book, the cover art may be an entire work in itself (just as a newspaper article may be a small part of a newspaper, yet the article may be a separate copyrighted work). Thus, by scanning in the cover, the entire work has been copied. This factor would then weigh against the use being considered fair. Finally, the effect of the use on the potential market for the work may be negligible.<sup>35</sup> A useful question to ask is whether by scanning the book cover, you have displaced any sales of the artwork. In this hypothetical situation, probably not. This factor then favors the use being deemed a fair one. In the end, is the use of the cover art to advertise a meeting a fair one? Maybe. We still cannot be certain.

Because the fair use statute is so difficult to apply—yet some professions, such as teaching, rely on it so heavily—attempts have been made to develop guidelines expanding on the statute's language to aid in the determination as to whether a particular use is a fair use. While these guidelines carry significant weight, they do not have the force of law—they are merely guidelines to aid in a fair use determination in a particular setting.<sup>36</sup> Also, because of the age of these guidelines, they do not take into account use of modern multimedia works or the concept of distance education. For this reason, a number of organizations are working to develop new guidelines that account for new technologies.<sup>37</sup>

## **What Concerns Are Associated With Linking to Someone Else's Work on My Web Page?**

This is a complex question, and one that is ripe for litigation. Fortunately, in practice, the answer is not too difficult. If you examine the proposed linked-site, and cannot find a reason not to link to another's web page, then there is a reasonable chance that you are safe. On the other hand, if you know that there is a serious doubt as to the appropriateness of placing a link to a particular site on your web page, then you should not link to that site.

To better understand this answer, let us take a look at how the World Wide Web works and at types of liability for copyright infringement. When you select a hypertext link on a web page, your web browser sends a request to a remote computer to send the document (or file, image, etc.) located at the address specified in the hypertext link. The request is sent to the computer where that document is stored, regardless of the location of the document providing the link. Thus, if a user connects to Site A and requests a document located at Site A, Site A will send a copy of the document to the user's computer. However, if a user connects to Site A and selects a link to Site B, the user's browser sends a request to Site B for the document—Site A's participation in the copying process is limited to the supplying of an address to facilitate Site B's sending the requested document to the user's computer.

Copyright infringement usually refers to direct infringement—someone makes an unauthorized copy and is therefore liable. In the first example, Site A has provided a link, and Site A has made a copy. In the second example, Site A has provided a link, but it is Site B that has provided the copy. Thus, in this example there can be no direct liability for Site A, because Site A has made no copies.

At this point we must look to see if other types of copyright infringement are present.

Contributory infringement is a type of liability caused by a party's participation in an infringement, even though the party being held liable is not the actual one which infringed the copyright. In other words, contributory infringement holds "accomplices" liable. The classic definition of a contributory infringer is "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."<sup>38</sup> An example of contributory infringement would be if, instead of making photocopies yourself, you asked your secretary to make them for you. You did not make the copies; thus, your secretary would be the direct infringer. However, you would meet the definition of a contributory infringer.

Arguably, this means that, if you link to a site on the internet where you know materials will be copied in violation of the copyright holder's rights, you may be a contributory infringer.<sup>39</sup> Therefore, it would not be prudent to place a link on your web page to "the great pirated software archive." Similarly, if you wish to link to a site which contains a notice that states, "do not link to this page," you should probably refrain from doing so. Web pages can be browsed without causing an infringement, due to the implied license to make the necessary copies to view the web page.<sup>40</sup> However, a notice that states, "link only to my home page, not any sub pages" on someone's web page constitutes an attempt to limit explicitly any implied license so that certain copies are not authorized. While the effectiveness of such a limitation is not universally clear, most people do not wish to be the subject of the test case.

Finally, even if you do not know that the site to which you are linking contains an infringing work, there is still a threat of vicarious copyright infringement. A person can be vicariously liable for infringement when he or she has the "right and ability" to supervise the infringing activity of another, and has an "obvious and direct financial interest in the exploitation of copyrighted materials."<sup>41</sup> The classic case where such liability has been found is in the "dance hall" cases, where a business proprietor has been found liable for the playing of copyrighted music without the payment of royalties to the rightful copyright holder.<sup>42</sup> Even when the proprietor has told the band not to play any unlicensed music, the proprietor has still been held liable. The rationale for this finding is that, as between the innocent copyright holder and the proprietor

who is making money from any infringement, the proprietor should be made to bear the loss as part of his or her business.<sup>43</sup> The proprietor is in the better position to monitor the situation and prevent any infringements, and can build any costs into the price of conducting his or her business.<sup>44</sup>

In juxtaposition to the "dance hall" cases are the "landlord-tenant" cases, in which courts have held that there is no liability where the proprietor only provides space, exercises no supervision, has no knowledge of any copyright violations, receives only a fixed rent and does not receive a financial benefit from any infringements.<sup>45</sup>

Unfortunately, when one attempts to apply these two lines of cases to the World Wide Web, there are no clear answers as to what might constitute vicarious liability. Certainly there are some actions, such as maintaining a site which requires usage fees or which accepts advertising, that may potentially increase your liability as a vicarious infringer, as you would then be profiting based on the number of users who come and encounter any infringements. However, even these actions may constitute the collection of "rent" rather than a direct profit from any infringement.<sup>46</sup>

## Conclusion

Copyright law is a particularly complex area of the law. When applying copyright law to digital technology, the law is fairly clear in some ways, clearly deficient in others, and is just plain silent in many instances. Each one of us is a creator and consumer of intellectual property, and most of us perform both of these functions on a daily basis. With only minimal knowledge, you can take reasonable precautions both to avoid infringing the rights of others, and also to protect your rights in works that you have created. Whether you create works in the form of web pages, journal articles or sculptures, the copyright law may affect your interests, and thus it is in your interest to have a basic understanding of how that law applies.<sup>47</sup>

<sup>1</sup> 17 U.S.C. §201(a).

<sup>2</sup> See definition of "work for hire" in 17 U.S.C. §101.

<sup>3</sup> *Id.*

<sup>4</sup> 17 U.S.C. §201(b).

<sup>5</sup> 17 U.S.C. §105.

<sup>6</sup> 17 U.S.C. §101, definition of "work of the United States Government." Note that this provision applies to works of the federal

government— each state may have different laws about “state” works.

- <sup>7</sup> 17 U.S.C. §102 limits protection to specific types of “works of authorship” (such as literary works, musical works, dramatic works, sound recordings, graphical works, etc.) which meet certain requirements (such as being original works that are “fixed in a tangible means of expression”), and the section specifically excludes from copyright protection works, such as ideas and processes which are protected under patent law.
- <sup>8</sup> 17 U.S.C. §302.
- <sup>9</sup> Registration of a copyrighted work is beyond the scope of this paper, however forms and limited information about the process may be found on the Copyright Office’s web page, located at <http://lcweb.loc.gov/copyright/>.
- <sup>10</sup> 17 U.S.C. §401(d).
- <sup>11</sup> See, 17 U.S.C. §401-402
- <sup>12</sup> Note: NOT a C between parentheses, as this is not a circle as required by the Copyright Act.
- <sup>13</sup> 17 U.S.C. §412.
- <sup>14</sup> 17 U.S.C. §411. This requirement is a compromise between the requirements of the U.S. before joining the Berne Convention, and the Convention’s requirement that no formalities be required to protect a copyright (Convention art. 5.2).
- <sup>15</sup> 17 U.S.C. §106.
- <sup>16</sup> 17 U.S.C. §102.
- <sup>17</sup> See, e.g., *Baker v. Selden*, 101 U.S. 99 (1879) (accounting method requires forms with a specific look, therefore forms dictated by the accounting methods requirement’s are not copyrightable); *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (sweepstakes rules can only be represented in limited ways, and thus similar rules are not an infringement).
- <sup>18</sup> 17 U.S.C. §102.
- <sup>19</sup> See e.g., *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991) (alphabetical arrangement of telephone listings does not show creativity necessary for copyright protection).
- <sup>20</sup> *Id.*
- <sup>21</sup> 17 U.S.C. §301-305 addresses copyright duration, though there are currently efforts being made to lengthen the term of copyright protection. See, “Copyright Term Extension Act of 1995,” S. 483, 104th Cong., 1st Sess. (1995); H.R. 989, 104th Cong., 1st Sess. (1995).
- <sup>22</sup> 17 U.S.C. §106.
- <sup>23</sup> See e.g. *MAI v. Peak*, 991 F.2d 511 (9th Cir. 1993); *Triad Sys. Corp. v. Southeastern Express Co.*, 31 U.S.P.Q.2d 1239 (N.D. Cal. 199) *aff’d*, Nos. 94-15818 & 95-15552, 1995 WL 514132 (9th Cir. Aug.

- 31, (1995); *Advanced Computer Services of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994).
- <sup>24</sup> See, *Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).
- <sup>25</sup> Cf. *Apple Computer, Inc. v. Formula Int'l, Inc.*, 594 F. Supp. 617, at 621-622 (C.D. Cal. 1984).
- <sup>26</sup> Many software packages used to view web pages (web browsers) will store copies of pages or graphics that have been viewed on the user's computer. When the graphics or pages are referred to again, they can then be read from the cache on the user's computer without needing to copy the graphic or page again from the web server, thus reducing time needed to display the web page and reducing the demands on the network.
- <sup>27</sup> Exceeding a license in scope or duration may then constitute an infringement of the copyright. See, *Rano v. Sipa Press*, 987 F.2d 580, 584-86 (9th Cir. 1993); *MAI v. Peak*, 991 F.2d 511, 519 (9th Cir. 1993); *Gilliam v. ABC*, 538 F.2d 14, 20 (2d Cir. 1976).
- <sup>28</sup> 17 U.S.C. §106 reserves to the copyright holder not only the right to make reproductions, but also the right to authorize others to make such reproductions.
- <sup>29</sup> See, e.g., David Loundy, *Authors waging fight in Brave New World*, CHS. DAILY LAW BULL., Mar. 7, 1996 at 6.
- <sup>30</sup> *Tasini v. New York Times*, 93 Civ. 8678(SS) (S.D.N.Y. 1994).
- <sup>31</sup> 17 U.S.C. §107.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.* (Emphasis added)
- <sup>34</sup> However, some additional factors could alter this—if the student group meeting charges admission as a fundraiser, factor one leans more away from fair use. If the students are all literature students who are required to be at the function as a class assignment, it makes the use of the cover art more likely to be fair use. Also, if the web page is world-readable (freely accessible to anyone on the Internet), the use of the work is less fair than if the web page is only available to people at the sponsoring institution who are likely candidates to attend the event.
- <sup>35</sup> However, it is important to note that the statute looks to the potential market. Arguing that the copyright holder has not yet taken advantage of Internet distribution, and therefore there is no impact on that market does not take into account that the copyright holder might wish to take advantage of Internet distribution in the future.
- <sup>36</sup> See, *Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 107-11 (1976).
- <sup>37</sup> Draft guidelines of the Conference on Fair Use Participants ("Confu"), and the eventual guidelines themselves, can be found at the IUPUI Copyright Management Center, located on the

Internet at <http://www.iupui.edu/it/copyinfo/home.html>.

- <sup>36</sup> *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).
- <sup>39</sup> *Cf.*, *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, No. C-95-20091 RMW, (N.D. Cal. 1995); *Sega Enterprises Ltd. v. MAPHIA*, 857 F.Supp. 679, 683 (N.D. Cal. 1994).
- <sup>40</sup> Without this implied license, there would have to be some other provision of the Copyright Act, such as fair use (17 U.S.C. §107), that allows the copies to be made that are necessary to view the web pages, otherwise they would be copies that infringe the copyright holder's exclusive right to make copies (17 U.S.C. §106(1)) The necessity of needing to resort to such licenses in the context of computer software was resolved by the addition of Section 117 to the Copyright Act (as proposed in the Final Report of the National Commission on New Technological Uses of Copyright Works (1979)).
- <sup>41</sup> *Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc.*, 316 F.2d 304, 307 (2d Cir. 1963).
- <sup>42</sup> *See, e.g.*, *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74-5 (W.D. Mo. 1977); *Boz Skaggs Music v. KND Corp.*, 491 F. Supp. 908, 913 (D. Conn. 1980); *Unicity Music, Inc. v. Omni Communs., Inc.*, 844 F. Supp. 504, 509 (E.D. Ark. 1994).
- <sup>43</sup> *Polygram Int'l, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1333 (D. Mass. 1994).
- <sup>44</sup> *Id.*
- <sup>45</sup> *See, e.g.*, *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938).
- <sup>46</sup> One court has found that collecting a fixed-fee without regard to any infringements that may be conducted over a computer system does not result in the financial benefit prong of the vicarious infringement test being met. *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, No. C-95-20091 RMW, (N.D. Cal. 1995).
- <sup>47</sup> For further reading, *see*, Jessica Litman, *The Exclusive Right to Read*, 13 *CARDOZO ARTS & ENT. L. J.* 29 (1994); Niva Elkin-Koren, *Copyright Law and Social Dialog on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 *CARDOZO ARTS & ENT. L. J.* 346 (1994); David Loundy, *Revising the Copyright Law for Electronic Publishing*, 14 *JOHN MARSHALL J. OF COMPUTER & INFORMATION L.* 1 (1995).